

Background on S.1067

Integrating The Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance into State Law

On 4 May 2015, Governor Butch Otter announced he would call a special session of the legislature to convene on 18 May 2015. The special session “will deal solely with the issue of Idaho’s child support system”. The alleged emergency concerning H&W’s child support enforcement system is because the federal government has threatened to cut federal funds for the interstate child support enforcement system and to cut off access to the federal child support enforcement system if the legislature does not pass the Uniform Interstate Family Support Act of 2008 (UIFSA) which was included in Idaho S.1067.

The 2008 UIFSA model legislation incorporates provisions of the 2007 Hague Convention on the International Recovery of Child Support of Family Maintenance (“the Convention” into state law by specific reference. The Convention contains numerous provisions that establish uniform procedures for the processing of international child support cases. The 2008 UIFSA amendments serve as the implementing language for the Convention throughout the states. The 2014 Preventing Sex Trafficking and Strengthening Families Act (H.R. 4980 – 113th Congress) serves as the federal implementing legislation for the Convention.¹

In order for the United States to fully accede to the Convention “it was necessary to modify UIFSA to incorporate provisions of the Convention that impact existing state law”.² The bulk of the 2008 amendments are housed in a new section of UIFSA: Section 7. The new section provides guidelines and procedures for the registration, recognition, enforcement and modification of foreign support orders from countries that are parties to the Convention. Section 7 provides that a support order from a country that has acceded to the Convention must be registered immediately unless a tribunal in the state where the registration is sought determines that the language of the order goes against the policy of the state.³

The Prefatory-Note produced by the Uniform Law Commission drafting committee, includes the following explanatory notes: “... because this multilateral treaty is not self-executing, additional federal or state statutory enactments are necessary to enable the treaty and to make it readily accessible to the bench and bar. Because establishment, enforcement, and modification of family support are basically matters of state law, from the perspective of the Uniform Law Commission the vehicle for the acceptance into force of the new Convention is a revision of UIFSA (2001), hereafter called UIFSA (2008).

¹ National Conference of Commissioners on Uniform State Laws aka Uniform Law Commission (ULC) , *Why States Should Adopt the Uniform Interstate Family Support Act 2008 Amendments*.
[http://www.uniformlaws.org/shared/docs/interstate%20family%20support/UIFSA%20\(2008\)%20Why%20States.pdf](http://www.uniformlaws.org/shared/docs/interstate%20family%20support/UIFSA%20(2008)%20Why%20States.pdf)

² National Conference of Commissioners on Uniform State Laws aka Uniform Law Commission (ULC), *The Uniform Interstate Family Support Act Amendments (2008) – A Summary*.
[http://www.uniformlaws.org/shared/docs/interstate%20family%20support/UIFSA%20\(2008\)%20Summary.pdf](http://www.uniformlaws.org/shared/docs/interstate%20family%20support/UIFSA%20(2008)%20Summary.pdf)

³ Ibid

In time, it is anticipated the new Hague Maintenance Convention will achieve a high level of integration with many other countries".⁴

Yesterday, TVOI News publisher Michael Emery received notice by good authority that the Idaho State legislature will vote to pass the amended S.1067 (Uniform Interstate Family Support Act 2008) during the special session of the legislature to convene on 18 May 2015.

Changes made to S.1067 in the interim period between the end of the legislative session and the 4 May announcement by Governor Otter were posted along with the Governor's press release. These changes are being put forward as solving the objectionable technical issues with the legislation to make it more palatable. The problem is that the main objection to the legislation is that it includes by specific reference the Hague Convention. As long as that reference appears in the bill to be enacted into state law, the objections stand. It is a misrepresentation of the facts to purport that any changes to the UIFSA model legislation made by members of the Idaho State Legislature make any substantive changes to the bill because doing so would be in violation of the mandate given the states in the Action Transmittal AT-14-11 dated October 9, 2014 titled P.L. 113-183 UIFSA 2008 Enactment⁵, the instructions to State Agencies Administering Child Support Plans under Title IV-D of the Social Security Act and Other Interested Individuals, provides the following instructions:

Now that the President signed P.L. 113-183, the following steps must occur before the 2007 Family Maintenance convention can enter into force for the United States.

- **All states must enact UIFSA 2008 verbatim** by the effective date noted in P.L. 113-183. Where UIFSA 2008 has bracketed language, states may use terminology appropriate under state law. In addition, P.L. 113-183 requires states to make minor revisions to the state plan which OCSE will address in forthcoming guidance.
- The President must sign the instrument of ratification.
- Once these activities are completed, the United States will be able to deposit its instrument of ratification with the Ministry of Foreign Affairs of the Kingdom of the Netherlands, which is the depository for the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance.

The federal mandate to the states that they include by specific reference in state law, the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, concluded at The Hague on November 23, 2007, is a violation of the U.S. Constitution – Article 1, Section 10: ***No state shall enter into any treaty, alliance, or confederation.*** S.1067 makes the state of Idaho a party to and as a consequence, subject to The Hague Convention and private international law jurisdiction.

⁴ National Conference of Commissioners on Uniform State Laws, Drafting Committee, Annual Conference in Big Sky Montana, July 18-25, 2008, Uniform Interstate Family Support Act (Last Amended or Revised in 2008), Final Act with Revised Prefatory Note and Comments.

http://www.uniformlaws.org/shared/docs/interstate%20family%20support/UIFSA_2008_Final_Amended%202015_Revised%20Prefatory%20Note%20and%20Comments.pdf

⁵ Department of Health & Human Services, Office of Child Support Enforcement, P.L. 113-183 UIFSA 2008 Enactment, Action Transmittal AT-14-11, published October 9, 2014.

<http://www.acf.hhs.gov/programs/css/resource/pl-113-183-uifsa-2008-enactment>

In the prefatory-notes of the ULC drafting committee on final adoption of UIFSA, they wrote the following:

“...the federal preemption of the issue via the treaty clause will be sufficient to make the Convention “the law of the land”. See Article VI. cl. 2. However, because this multilateral treaty is not self-executing, additional federal or state statutory enactments are necessary to enable the treaty and make it readily accessible to bench and bar.... In time, it is anticipated the new Hague Maintenance Convention will achieve a high level of integration with many other countries.”⁶

By definition, if the treaty is not self-executing because it requires changes to state law concerning jurisdictional matters *inter alia* then Article VI, cl. 2 is not sufficient and since the recognition of the Hague Convention in state law to make the Convention accessible to bar and bench violates Article 1, Section 10, UIFSA 2008 is unconstitutional and the federal mandate to make UIFSA 2008 a state law is unconstitutional.

The Open Door

The last sentence in the previous quoted paragraph, “*In time, it is anticipated the new Hague Maintenance Convention will achieve a high level of integration with many other countries*” is a window into the thinking of the ULC which is an expansion of international law and a further incursion into state law through the mechanism of ascension to this treaty and as a precedent to other as yet unnamed international conventions. This concern gains legitimacy from the number and nature of “open doors” in the language of the Convention itself – specifically (but not limited to) as follows:

- Article 7 with reference to Article 6(2) b), c), g), h), i), and j) **when no application under Article 10 is pending.**
- Article 8(2) Central Authorities may not impose any charge on an applicant for the provision of their services under the Convention **save for exceptional costs arising from a request for a specific measure under Article 7.**
- Article 10 – Bases for recognition and enforcement, **habitual residence.**
- Article 53 – In the interpretation of this Convention, regard shall be had to its international character and to the need to promote uniformity in its application.
- Article 54 – The **Secretary General of The Hague Conference** on Private International Law shall at regular intervals convene a **Special Commission in order to review the practical operation of the Convention and to encourage the development of good practices...**
- Article 55 – The forms annexed to this Convention **may be amended by a decision of a Special Commission** convened by the **Secretary General of the Hague Conference on Private International Law.**

⁶ Uniform Interstate Family Support Act, 2008 Amendments to the Uniform Interstate Family Support Act, Drafted by the National Conference of Commissioners on Uniform State Laws, July 18-25 Conference. http://www.uniformlaws.org/shared/docs/interstate%20family%20support/UIFSA_2008_Final_Amended%202015_Revised%20Prefatory%20Note%20and%20Comments.pdf

The preamble of the Hague Convention⁷ includes the following statement:

“Seeking to take advantage of advances in technologies and to create a flexible system which can continue to evolve as needs change and further advances in technology create new opportunities,

Recalling that, in accordance with Articles 3 and 27 of the *United Nations Convention on the Rights of the Child of 20 November 1989*,”

When the U.S. Senate issued the Advice and Consent, it was with the following Amendment⁸:

“To provide an understanding that the preamble to the Treaty does not create any obligation of the United States under the Convention on the Rights of the Child as a matter of United States or international law.”

The UIFSA model language for state ascension to The Hague Convention refers to the Convention as concluded at The Hague on November 23rd, 2007. There is no qualification for the Amendment in the Senate Advice and Consent nor does the Amendment for the United States include the States specifically as would be expected given the requirement for individual state ascension to the treaty. This leaves an open door for elements of the United Nations Convention on the Rights of the Child through state law despite the lack of ratification of the UN Convention by the Senate.

Extortion through Cooperative Federalism

In a paper written by Eric Fish, Senior Director of Legal Services of the Federal of State Medical Boards titled, *Enforcing International Obligations through Cooperative Federalism*⁹, on page 46 he discusses the conditions required to force the states to accept federal mandates under the system of “cooperative federalism”. Extortive mandates are considered constitutional only if they meet the following tests:

- 1) The exercise of the spending power must be in pursuit of the general welfare
- 2) Congress must exercise the spending power unambiguously, allowing states to exercise their choice independently but with full cognizance of the repercussions of the choice
- 3) The conditions must be related to the federal interest in particular national projects and programs
- 4) The terms of conditional spending must not run afoul of other constitutional provisions

Spending power includes the power to withhold promised funds which is the threat to the states if they do not pass the UIFSA 2008 legislation. The mandate for the states to pass the UIFSA does not serve the

⁷ Hague Conference on Private International Law, *Convention on the International Recovery of Child Support and Other Forms of Family Maintenance concluded 23 November 2007*.

http://www.hcch.net/index_en.php?act=conventions.text&cid=131

⁸ Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, adopted at The Hague on November 23, 2007, *Senate Consideration of Treaty Document 110-21*, <https://www.congress.gov/treaty-document/110th-congress/21/amendments>

⁹ Journal of the American Academy of Matrimonial Lawyers, Vol. 24, p. 33, 2011, Eric M. Fish, *The Uniform Interstate Family Support Act (UIFSA) 2008: Enforcing International Obligations Through Cooperative Federalism*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1911980

general welfare of the American public and the extortion demand of the federal government holds hostage the most vulnerable of Americans – the children.

The United States and the states have an interstate compact to coordinate and enforce child support obligations across state borders. That system was in the national interest. UIFSA expands that system to the international level making it an international system. That makes UIFSA an international project not a national project. Since it also runs afoul of Article 1, Section 10 of the Constitution, the federal mandate for the states to pass the UIFSA 2008 into state law is unconstitutional. Failure to defend states' rights would be malfeasance and dereliction of duty by the state's Attorney General.

Security

There is plenty of legal analysis to be found concerning the UIFSA 2008, but there is a dearth of systems analysis and the impact of this Convention as it pertains to security issues concerning data, the protection of children and families, and the control of process when a foreign entity “owns” the system.

The Civil Justice Programme of the European Union is sponsoring the development of the data exchange system to facilitate the cross-border case management. The name of the system is iSupport¹⁰ and “the objective is to develop, within a two-year period, an electronic case management and secure system to facilitate the cross-border recovery of maintenance obligations under the EU 2009 Maintenance Regulation and the 2007 Hague Child Support Convention.

From a systems point of view, there would be no difference between a child support enforcement case between Idaho and California and a child support enforcement case between California and Mexico. This begs the question; does the HHS intend to replace the national system of child support enforcement case management with the international system (iSupport) child support enforcement case management system? There would be nothing to prevent them from doing that and by so doing, they would be transferring the extortion option for use of the system and the funds they control – to either the European Commission or to the Secretary General of the Hague Conference.

In the Senate Executive Report¹¹ that accompanies the Advice and Consent of the senate for the Hague Convention, the following is an exchange between Senator Ben Cardin and Vicki Turetsky, commissioner in the Office of Child Support Enforcement at the Department of HHS: (emphasis added)

Senator Cardin. I have one last question for either or both you, and that is: **How much is this needed in the United States?** Do you have any documentation as to the level of child support that goes uncollected and may very well be collected if the Convention is widely ratified? Or is this your gut? **I mean, do we have any documentation of what may be involved here?**

Ms. Turetsky. Senator, **we don't have a hard projection of dollars. We estimate that about 1 percent of our caseload is international**, in the sense that one parent lives in a different country. **What we do have**

¹⁰ Hague Conference on Private International Law, iSupport Section, http://www.hcch.net/index_en.php?act=text.display&tid=192

¹¹ Senate Executive Report 111-2, Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance (Treaty Doc. 110-21), Mr. Kerry, from the Committee on Foreign Relations, submitted the Report, quote from page 25 (adobe). <https://www.congress.gov/111/crpt/erpt2/CRPT-111erpt2.pdf>

is **anecdotal information** from parents who have written to us, who say, you know, “I’m living here. I have a support order. My—the parent of my child lives in another country. I don’t know what to do. I understand there’s no agreement with that country. What can I do? **And so, we know that there are a number of families that are going to be affected by a fully ratified treaty.** We don’t know how that caseload will grow over time.

But, we’re—you know we’re sensible of the fact that we’re, you know an increasingly global world, and that parents do move around. And in our caseload, where parents are living apart, the likelihood of one parent living in one country and another parent living in our country is likely to grow over time. **So we’re really planning for the future here.**

So the justification for this treaty boils down to benefitting a few families based on anecdotal evidence. The international cases – the 1% are already handled so they wouldn’t benefit from the treaty over and above the service they are already receiving.

By any reasonable standard, Ms. Turetsky’s explanation of the necessity for participation in this treaty doesn’t meet even the barest minimum of standards for justification for a change this large. The only plausible explanation is that the international system will replace the national system thereby saving the expense of maintenance of the national system. We can’t know because there has been no analysis of this computer system that is available for public review. One obvious problem is that if they do replace the national system with the international system, the “international community” would have significant leverage over domestic policy through control of the system and control of the child support funds – including potentially domestic funds that would flow through it in precisely the same way that the federal government is using extortion holding children whose parents receive child support payments through the national child support enforcement system hostage to force acceptance of UIFSA 2008.

Indian Tribes and the Relationships to the States

The legislation that included the mandate for the states to pass UIFSA 2008 into state law was H.R. 4980 Preventing Sex Trafficking and Strengthening Families Act passed into law by the 113th Congress. Title III, Section 302 Child Support Enforcement Programs for Indian Tribes. The existing law is changed as follows:

An Indian tribe or tribal organization operating a program under section 455(f) shall be considered a State for purposes of authority to conduct an experimental, pilot, or demonstration project under subsection (a) to assist in promoting the objectives of part D of title IV and receiving payments under the second sentence of that subsection. The Secretary may waive compliance with any requirements of section 455(f) or regulations promulgated under that section to the extent and for the period the Secretary finds necessary for an Indian tribe or tribal organization to carry out such project...

In a previous paragraph, it appears that Tribes are being given access to the Federal Parent Locator Service which includes asset searches. If there is any restriction on tribal access to asset information on non-tribal members, it’s not showing here – and in fact, access would be a simple rule within the system itself.

With tribes being considered as states for the purpose of UIFSA 2008 legislation which includes by specific reference the Hague Convention, presumably the Tribes will become parties to the Hague Convention on the same level as states but without the regulatory framework and data security prohibitions inherent in state and federal law. With consideration for Article 7 (request for information when an application is not pending) of the Hague Convention which is an open door to asset searches, this leaves open the possibility of an “information for sale” business opportunity for the Tribes on matters unrelated to a child support case and not involving members of a tribe.

Conclusion

In summary, the UIFSA 2008 is unconstitutional and the method being employed to push it down the throats of the states is unconstitutional. There has been too much obfuscation and too many questions with too few answers. The legislature – and in particular, the legislators who are also members of the bar need to remember the oaths they took when they were sworn. Both of the oaths include affirmation to protect and defend the Constitution. On that basis along, they should all vote NO on S.1067 that integrates the Hague Convention into state law.

Vicky Davis

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