

## Boston College Law School

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# Brigitte Bodenheimer - Protector of the Children

Sanford N Katz, *Boston College Law School*

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# DEDICATION ADDRESS

## Brigitte Bodenheimer—Protector Of The Children

BY SANFORD N. KATZ\*

*In the Spring of 1982 King Hall founded an annual lecture in memory of our late esteemed faculty member, Brigitte Bodenheimer. The following excerpted remarks by Professor Katz are presented here in recognition of Professor Bodenheimer's contributions to the law and to commemorate the inaugural lecture of the series.*

Word of Professor Bodenheimer's death came to me while I was chairing the 1981 mid-year meeting of the Family Law Section of the American Bar Association. Curiously, on the meeting's agenda was a discussion of the Hague Convention on International Child Abduction. Professor Bodenheimer was a member of the United States delegation to the Hague Conference and had actively participated in the drafting of the Convention, which complemented her earlier work on the Uniform Child Custody Jurisdiction Act.

Professor Bodenheimer's work at the Hague was an outgrowth of her interest in child custody matters and specifically the Uniform Child Custody Jurisdiction Act. The Act, in more or less similar form, has become the law in most American jurisdictions. She was optimistic that it would eventually fulfill its objective, even though it was undergoing interpretation in a number of courts. In her last article on the subject she wrote:

In an area of the law where emotions run as high as they do in custody controversies, it is realized that enormous pressures are brought to bear on courts to give a hearing to the person who is in the state with the child. It is symptomatic of this state of affairs that one court declared that it will "refuse to distort the intent and plain meaning of the Uniform Child Custody Jurisdiction Act to allow this state's assertion of jurisdiction." Once the Act is consistently applied and the public knows what to expect, these

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pressures should be considerably reduced. There is some hope that parental conflict over custody will in the future frequently be resolved by peaceful and non-judicial means. But when the courts must make the decision, it is up to them to hold the line against the tragedies that result from shifting children from state to state in search of a bigger or better "share" of the child.<sup>1</sup>

Although the Hague Convention does not attempt to lay down rules of recognition and enforcement of foreign custody decisions, in Professor Bodenheimer's words, it calls for prompt restoration of the custody situation as it existed before the abduction of the child. More broadly, it is designed to prevent the wrongful removal or retention of children in custody-related disputes and to effect the return of such children.

The importance of the Hague Convention, both domestically and internationally, is in its basic legal significance in promoting comity and in its educational function. By having the President of the United States sign it and the Senate ratify it, we say to the world that this country is not a haven for abductors. And, as Professor Bodenheimer wrote in 1977, before she became a member of the American delegation to the Hague:

[W]e are not going to find a solution to the child kidnapping problem as long as we allow full sway to the uncontrolled discretion of the judge to re-determine what he perceives on a re-examination of the merits to be in the child's best interests. It is true that the first custody judgment might perhaps have gone the other way, but it did settle the question of where the child should live. Nothing is gained and a great deal of harm may come to the child if that decision is subsequently reopened in another forum.<sup>2</sup>

When I reread Professor Bodenheimer's work, written over the past twenty years, I was struck by recurrent themes. She was concerned with respecting the law, strengthening marriage and, when marriage failed, humanizing the divorce process. She recognized the need for providing stability and continuity of care for children of divorce before those words became fashionable. She argued for resolving and concluding disputes effectively and once and for all. Professor Bodenheimer did not seem to advocate divorce on demand or divorce by registration. She thought that marriage was too important to be terminated quickly and without time for reflection. She wrote:

If an attempt is made to formulate a general policy to govern the search

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<sup>1</sup> Bodenheimer, *Interstate Custody: Initial Jurisdiction and Continuing Jurisdiction under the UCCJA*, 14 FAM. L.Q. 203, 227 (1981) (citation omitted).

<sup>2</sup> Bodenheimer, *The International Kidnapping of Children: The United States Approach*, 11 FAM. L.Q. 83, 90-91 (1977) (footnote omitted).

for future divorce grounds, it might have the following ingredients:

1. Individual freedom to live one's life as one pleases, freedom to marry, divorce, re-marry and re-divorce, must be weighed against the burdens, financial and social, which such freedom places upon others, including the children, the other spouse, taxpayers, and society in general.

2. No person in our age should be chained to another in an intolerable marriage. Those who made a serious mistake and those who experience a severe deterioration of their marital relationship, should have a way out, which is fair, dignified, and comparatively simple without being precipitous or hasty. But the law should seek to prevent divorce which is sought for reasons which are trivial, frivolous, or irresponsible.<sup>3</sup>

Today, while traditional fault grounds for divorce are still on the books in most jurisdictions, their use is essentially a thing of the past. Most divorces today are based either on a loose interpretation of the fault ground of cruelty or on no-fault: living apart for a period of time or irreconcilable differences. Consequently, it is not difficult to get a divorce in almost any American jurisdiction if one fulfills the residency requirements. And, as my colleague, Professor Mary Ann Glendon, has observed, it is easier to be released from marriage than to be released from one's job.<sup>4</sup>

About one-third of all young adults can expect to find themselves eventually in re-marriage following a divorce. Professor Bodenheimer seemed to be aware of this trend and wrote about humanizing the divorce process as early as 1961 when she commented on the Utah Counseling Experiment.<sup>5</sup> An advocate for the proper use of mediation and other alternative methods of resolving disputes long before mediation was in vogue, her writings can still be referred to as guidance for the 80's.

In Professor Bodenheimer's writings about child custody, she was again in the vanguard of progressive thought. Long before most, she wrote about the needs of children for continuity of care and the security of loving parents. She, like I, had doubts about the widespread use of joint custody awards. She lived to see the beginnings of a legislative movement to establish joint custody as a viable alternative to single custody with rights of visitation. But Professor Bodenheimer was careful to set standards that make both practical and psychological sense. I regret that these important thoughts on joint custody are buried in a footnote

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<sup>3</sup> Bodenheimer, *Reflections on the Future of Grounds for Divorce*, 8 J. FAM. L. 179, 192 (1968).

<sup>4</sup> M. GLENDON, *THE NEW FAMILY AND THE NEW PROPERTY* 4-5, 152 (1981).

<sup>5</sup> Bodenheimer, *The Utah Marriage Counseling Experiment: An Account of Changes in Divorce Law and Procedure*, 7 UTAH L. REV. 443 (1961).

in Professor Bodenheimer's article on the international kidnapping of children. She wrote:

Joint parenthood under two roofs is presently being tried in some cases in the United States. The children alternate between their parents' homes, or the parents take turns living with the children who remain in the matrimonial residence. Such sophisticated arrangements require a maximum of joint planning and long-continuing, amicable working relationships between former spouses living in geographic proximity. Some ex-spouses may succeed with such a scheme, but it does not seem to be a realistic possibility for the average divorced couple who do not meet the prerequisites of sustained joint effort and continued geographic proximity. In the United States the latter condition is seldom fulfilled over long periods of time due to the high mobility of the population. Enforced continuation of residence within the state or vicinity does not seem to be an acceptable answer.<sup>6</sup>

I am sorry to see legislative action in the area of child custody law reform taking the approach of establishing presumptions in favor of joint custody as a few states have done. My view is that if both parties agree on joint custody and the agreement is examined by a judge and found appropriate, then the court should incorporate the agreement in the divorce decree. To impose an arrangement on a couple seems to fly in the face of common sense. In other words, I find it difficult to imagine a good outcome of a litigated case that would involve a joint custodial arrangement. I believe Professor Bodenheimer would have agreed.

Professor Bodenheimer's greatest contribution to the law and to the profession is, of course, her work on the Uniform Child Custody Jurisdiction Act. To her, the Act represented the best effort to minimize the times a child's life should be upset. She thought that once a custody award was made, it should stick. Modifications should be infrequent. Decrees should be honored in sister states. By respecting custodial decrees, children's lives have the possibility of stability. "[C]hildren, like delicate plants," she wrote, "should not be uprooted from their surroundings if at all avoidable."<sup>7</sup>

The goals of the UCCJA are quite simple. As Professor Bodenheimer put it, the Act is designed to plug three major loopholes of prior custody law: eliminate jurisdiction based on the physical presence of the child; prohibit modifications of custody decrees of other states, with very limited exceptions; and require summary enforcement

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<sup>6</sup> Bodenheimer, *The International Kidnapping of Children: The United States Approach*, 11 FAM. L.Q. 83, 84 n.5 (1977) (citations omitted).

<sup>7</sup> Bodenheimer, *The Rights of Children and the Crisis in Custody Litigation: Modification of Custody In and Out of State*, 46 U. COL. L. REV. 495, 498 (1975) (footnote omitted).

of out-of-state custody decrees. Of course, the UCCJA is not a panacea. Courts have interpreted provisions of the Act, sometimes without regard to its basic philosophy. Some courts have given way to parochial pressures. But the fact that there has been litigation over certain provisions should not be interpreted as a failure. Lawyers can litigate over the meaning of any word.

The UCCJA, in turn, was the impetus for other reform efforts. On December 28, 1980, President Carter signed H.R. 8406 which included the Parental Kidnaping Prevention Act of 1980. That Act contains, among other things, a section dealing with the application of the full faith and credit clause to child custody decrees of a state exercising jurisdiction consistent with the provisions of the laws which are derived from the UCCJA. The UCCJA, along with the Federal Parental Kidnaping Prevention Act, should discourage child snatching, a horror described by Professor Bodenheimer in her last few articles.

I have come full circle. I began my presentation with a discussion of the Hague Convention on International Child Abduction, Professor Bodenheimer's last major effort. That Convention, the UCCJA, and the Federal Parental Kidnaping Prevention Act are all parts of a grand design, crafted in a very major way by Brigitte Bodenheimer. Few scholars leave legacies that have such enormous practical significance. Many scholars work a good part of their productive lives on a major book which years later collects dust and is forgotten but for a footnote from time to time. Professor Bodenheimer produced no such magnum opus. She toiled in the vineyards, working inch by inch to improve the lot of children of divorce. Her methods were her writings and her personal activities with legislators, other government officials and bar associations. She was firm, but she was also a woman of grace and charm.

In *Kings*, the question is asked, "Is it well with the child?"<sup>8</sup> We can respond in this way: "Yes, it is better for the child because Brigitte Bodenheimer lived."

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<sup>8</sup> 2 *Kings* 4:26.

