

D R A F T

FOR DISCUSSION ONLY

IMPLEMENTATION OF HAGUE CONVENTION ON PROTECTION OF CHILDREN

**(Revisions to Uniform Child Custody Jurisdiction and
Enforcement Act)**

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

For March 9 - 10, 2012 Drafting Committee Meeting

With Prefatory Note and Comments

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Prefatory Note

I. FROM THE UCCJA TO THE UCCJEA

In 1997 the Uniform Law Commission revisited the problem of the interstate child when it promulgated the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) as a replacement for the Uniform Child Custody Jurisdiction Act (UCCJA). The UCCJA was adopted as law in all 50 states, the District of Columbia, and the Virgin Islands. A number of adoptions, however, significantly departed from the original text. In addition, almost thirty years of litigation since the promulgation of the UCCJA produced substantial inconsistency in interpretation by state courts. As a result, the goals of the UCCJA were rendered unobtainable in many cases.

In 1980, the federal government enacted the Parental Kidnaping Prevention Act (PKPA) to address the interstate custody jurisdiction and enforcement problems that continued to exist after the adoption of the UCCJA. The PKPA mandates that state authorities give full faith and credit to other states' custody determinations, so long as those determinations were made in conformity with the provisions of the PKPA. The PKPA provisions regarding bases for jurisdiction, restrictions on modifications, preclusion of simultaneous proceedings, and notice requirements were similar to those in the UCCJA. There were, however, some significant differences.

As documented in an extensive study by the American Bar Association's Center on Children and the Law, *Obstacles to the Recovery and Return of Parentally Abducted Children* (1993) (Obstacles Study), inconsistency of interpretation of the UCCJA and the technicalities of applying the PKPA, resulted in a loss of uniformity among the states. The Obstacles Study suggested a number of amendments which would eliminate the inconsistent state interpretations and harmonize the UCCJA with the PKPA.

The UCCJEA revisions of the jurisdictional provisions of the UCCJA eliminated the inconsistent state interpretations and can be summarized as follows:

1. Home state priority. Rather than four concurrent bases of jurisdiction, the UCCJEA prioritized home state jurisdiction over all other bases thereby conforming the UCCJEA to the PKPA.
2. Clarification of emergency jurisdiction. This jurisdictional basis was clarified to make it clear that it provided jurisdiction only on a temporary basis and was specifically made applicable to state domestic violence protective order cases.
3. Exclusive continuing jurisdiction for the state that entered the decree. The UCCJEA made it explicit that the state that made the original custody determination retained exclusive continuing jurisdiction over the custody determination so long as that state remained the residence of a parent, the child, or a person acting as a parent.
4. Specification of what custody proceedings are covered. These provisions extended the

coverage of the UCCJEA to all cases, except adoptions, where a child custody determination was made. This eliminated the substantial ambiguity of the UCCJA concerning which proceeding were covered.

5. Role of "Best Interests." The UCCJEA eliminated the term "best interests" in order to clearly distinguish between the jurisdictional standards and the substantive standards relating to custody of and visitation with children.

The UCCJEA also enacted specific provisions on the enforcement of custody determinations for interstate cases. First, there is a simple procedure for registering a custody determination in another state. This allows a party to know in advance whether that state will recognize the party's custody determination. This is extremely important in estimating the risk of the child's non-return when the child is sent on visitation to another state.

Second, the Act provides a swift remedy along the lines of habeas corpus. Time is extremely important in visitation and custody cases. If visitation rights cannot be enforced quickly, they often cannot be enforced at all. This is particularly true if there is a limited time within which visitation can be exercised such as may be the case when one parent has been granted visitation during the winter or spring holiday period. Without speedy consideration and resolution of the enforcement of such visitation rights, the ability to visit may be lost entirely. Similarly, a custodial parent must be able to obtain prompt enforcement when the noncustodial parent refuses to return a child at the end of authorized visitation, particularly when a summer visitation extension will infringe on the school year. A swift enforcement mechanism is desirable for violations of both custody and visitation provisions.

Third, the enforcing court will be able to utilize an extraordinary remedy. If the enforcing court is concerned that the parent, who has physical custody of the child, will flee or harm the child, a warrant to take physical possession of the child is available.

Finally, there is a role for public authorities, such as prosecutors, in the enforcement process. Their involvement will encourage the parties to abide by the terms of the custody determination. If the parties know that public authorities and law enforcement officers are available to help in securing compliance with custody determinations, the parties may be deterred from interfering with the exercise of rights established by court order.

II. THE 1996 HAGUE CONVENTION ON JURISDICTION, APPLICABLE LAW, RECOGNITION, ENFORCEMENT AND CO-OPERATION IN RESPECT OF PARENTAL RESPONSIBILITY AND MEASURES FOR THE PROTECTION OF CHILDREN

At the same time that the Uniform Law Commission was revising the UCCJA, the Hague Conference on Private International law was revising the 1961 Convention on the Protection of Minors. That Convention was adopted by a number of European States and was utilized to recognize custody determinations. However, no common law country ratified the convention.

The Hague Conference decided that a revised convention on jurisdiction and judgments with regard to minors might attract more countries as signatories. This resulted in the 1996 Convention which established international standards for jurisdiction, choice of law, and enforcement of judgments in cases regarding measures taken for the protection of minors.

There are significant differences between the UCCJEA and the 1996 Convention. However, the purposes of the two are very similar. They are both designed to allocate judicial competence to decide cases involving child custody and visitation. Both documents provide for enforcement of custody and visitation determinations of other states or countries. The differences are in the details of how this is to be accomplished.

There is a large part of the 1996 Convention that is devoted to country to country cooperation. There is a small role for a national central authority in carrying out the cooperation provisions of the Convention. Most of the cooperation provisions are ultimately directed to the "competent authority" which would be the appropriate entity under local law for carrying out the particular function referred to in the 1996 Convention. This means that the central authority in the United States will delegate these functions to the local authority. These cooperation problems will be addressed in the federal implementing legislation. Therefore it is not necessary to address the particular cooperation aspects contained in Chapter V of the 1996 Convention in this revision to the UCCJEA.

III. THE INTERNATIONAL CUSTODY CASE

The international child custody case, like the international child support case, has always been the marginal case in the multi-state system. However, with increasing globalization, the international case has been assuming more importance. The international case was dealt with in both the UCCJA and the UCCJEA.

A. THE UCCJA

Section 23 of the UCCJA provided that the general policies of that Act applied to foreign country custody determinations. Foreign custody determinations were to be recognized and enforced if they were made consistently with the UCCJA and there was reasonable notice and opportunity to be heard. There were two types of issues that arose under this section. The first was whether a United States court would defer to a foreign tribunal when that tribunal would have jurisdiction under the UCCJA and the case was filed first in that tribunal. The second issue was whether a state of the United States would recognize, under this section, a custody determination made by a foreign tribunal.

On the first issue, the UCCJA was ambiguous and only required application of the "general policies" of the Act. Frequently courts in the United States would apply the same jurisdictional principles to international cases that they would apply in interstate cases. For example, in *Superior Court v. Plas*, 202 Cal.Rptr. 490 (Cal. Ct. App. 1984), the mother filed for

custody when she had only been in California with her child for four months. The child was born in France and was raised and lived there with his family until shortly before the California hearing. The court determined that California lacked jurisdiction to hear the case and, even if it had jurisdiction, it should have deferred to France as the most convenient forum. However, not all states followed the same practice. For example, the Oregon Court of Appeals in *Horiba v. Horiba*, 950 P.2d 340 (Or. Ct. App. 1997), refused to defer to a pending Japanese proceeding since Japan was not a "state" under the definition of "state" in the UCCJA.

With respect to the second issue, most American states enforced foreign custody orders if made consistently with the jurisdictional standards of the UCCJA and reasonable notice and opportunity to be heard were afforded all participants. However, Missouri, New Mexico and Ohio refused to enact §23 of the UCCJA. Indiana formerly had a provision which seemed to affirmatively require the state to not recognize and enforce a foreign custody order. These provisions undermined the UCCJA principles of recognition and enforcement of custody determinations by countries with appropriate jurisdiction under the UCCJA and created obstacles to the return of children that were illegally abducted.

B. THE UCCJEA

Section 105(a) of the UCCJEA provides that a foreign country will be treated as if it is a state of the United States for the purposes of applying Articles I and II of the UCCJEA. This means that the scope and cooperation principles of Article I as well as the jurisdiction provisions of Article II apply to foreign countries in the same way that they apply to states of United States. Thus communication between a tribunal of the United States and a tribunal in a foreign country is mandatory in cases concerning emergency jurisdiction under Section 204 and simultaneous proceedings under Section 206. Otherwise tribunals in the United States may communicate with tribunals in foreign countries whenever it would be appropriate to communicate with tribunals in the United States under Section 110.

Section 105(b) requires tribunals in the United States to recognize foreign custody determinations if the facts and circumstances of the case indicate that the foreign custody determination was made in substantial conformity with the jurisdictional provisions of the UCCJEA. However, as indicated in Section 105(c) a United States court is given the discretion not to apply the UCCJEA if the child custody law of a foreign country violates fundamental principles of human rights. The language of the section was taken from the Hague Convention on the Civil Aspects of International Child Abduction. The drafting committee of the UCCJEA did not attempt to define what aspects of a foreign custody law would violate fundamental principles of human rights. The committee considered a hypothetical case where the foreign custody law awarded custody of children automatically to the father. When asked to decide whether such a provision violated fundamental principles of human rights, the committee, along with the advisors and observers, could not agree. Therefore the application of that provision was left to the courts to determine on a case by case basis.

Application of Section 105 does not seem to have presented much of a problem for courts since the enactment of the UCCJEA. In particular it does not appear that enforcement has been denied on the basis of a violation of fundamental principles of human rights. The effect of Section 105 is to ensure that all foreign custody determinations that are made in conformity with UCCJEA jurisdictional standards are enforced in the United States. Ratification of 1996 Convention is not necessary for enforcement of foreign custody decrees; ratification it is necessary in order for United States custody determinations to be enforced in other countries.

IV. THIS REVISION

The purpose of this revision to the UCCJEA is to amend the act to incorporate the 1996 Hague Convention on the Protection of Minors. The United States has signed the Convention and the revision of this Act will constitute part of the implementing legislation. The rest of the Convention will be implemented at the federal level.

This version of the revision includes all the sections from section 105 until the end. This is so the committee can determine if there are any additional sections that should be applicable to Article 4, other than those specifically listed in section 403. The rest of this draft focuses entirely on Article 4, the article that partially implements the Convention, although there are some minor additional comments to a couple of the earlier sections.

1 [ARTICLE] 1.

2 GENERAL PROVISIONS

3 SECTION 101. SHORT TITLE. This [Act] may be cited as the Uniform
4 Child-Custody Jurisdiction and Enforcement Act.

5 SECTION 102. DEFINITIONS. In this [Act]:

6 (1) "Abandoned" means left without provision for reasonable and necessary care
7 or supervision.

8 (2) "Child" means an individual who has not attained 18 years of age.

9 (3) "Child-custody determination" means a judgment, decree, or other order of a
10 court providing for the legal custody, physical custody, or visitation with
11 respect to a child. The term includes a permanent, temporary, initial, and modification order.
12 The term does not include an order relating to the property of the child, child support or other
13 monetary obligation of an individual.

14 (4) "Child-custody proceeding" means a proceeding in which legal custody,
15 physical custody, or visitation with respect to a child is an issue. The term includes a proceeding
16 for divorce, separation, neglect, abuse, dependency, guardianship, paternity, termination of
17 parental rights, and protection from domestic violence, in which the issue may appear. The term
18 does not include a proceeding involving juvenile delinquency, contractual emancipation, or
19 enforcement under [articles] 3 and 4.

20 (5) "Commencement" means the filing of the first pleading in a proceeding.

21 (6) "Court" means an entity authorized under the law of a state to establish, enforce, or
22 modify a child-custody determination.

(7) "Home State" means the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child-custody proceeding. In the case of a child less than six months of age, the term means the state in which the child lived from birth with any of the persons mentioned. A period of temporary absence of any of the mentioned persons is part of the period.

(8) "Initial determination" means the first child-custody determination concerning a particular child.

(9) "Issuing court" means the court that makes a child-custody determination for which enforcement is sought under this [Act].

(10) "Issuing state" means the State in which a child-custody determination is made.

(11) "Modification" means a child-custody determination that changes, replaces, supersedes, or is otherwise made after a previous determination concerning the same child, whether or not it is made by the court that made the previous determination.

(12) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(13) "Person acting as a parent" means a person, other than a parent, who:

(A) has physical custody of the child or has had physical custody for a period of six consecutive months, including any temporary absence, within one year immediately before the commencement of a child-custody proceeding; and

(B) has been awarded legal custody by a court or claims a right to legal custody under the law of this state.

(14) "Physical custody" means the physical care and supervision of a child.

(15) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

[(16) "Tribe" means an Indian tribe or band, or Alaskan Native village, which is recognized by federal law or formally acknowledged by a state.]

(17) "Warrant" means an order issued by a court authorizing law enforcement officers to take physical custody of a child.

* * * *

SECTION 105. INTERNATIONAL APPLICATION OF [ACT]. Except as otherwise provided in [Article 4], the following rules apply:

(1) a court of this State shall treat a foreign country as if it were a state of the United States for the purpose of applying [Articles] 1 and 2.

(2) Except as otherwise provided in paragraph (3), a child-custody determination made in a foreign country under factual circumstances in substantial conformity with the jurisdictional standards of ~~this [Act]~~ [Article] 2 must be recognized and enforced under ~~this [Act].~~ [Article] 3.

(3) A court of this state need not apply this [act] if the child custody law of a foreign country violates fundamental principles of human rights.

Additional Comment

This is the version as suggested by the drafting committee in September. The “except”

1 clause at the beginning of the section, indicates that this section is applicable to cases involving
2 non-Convention countries. Therefore it is unnecessary to amend Article 3 for the purpose of
3 inserting “non-Convention countries” after the term state in the enforcement provisions since
4 non-Convention countries are to be treated as states of the United States except as Article 4 so
5 provides.

6 Article IV concerns cases involving Convention countries and non-Convention countries
7 where the Convention specifically provides for the treatment of non-Convention countries.

8 **SECTION 106. EFFECT OF CHILD-CUSTODY DETERMINATION. A**

9 child-custody determination made by a court of this state that had jurisdiction under this [Act]
10 binds all persons who have been served in accordance with the laws of this state or notified in
11 accordance with Section 108 or who have submitted to the jurisdiction of the court, and who
12 have been given an opportunity to be heard. As to those persons, the determination is conclusive
13 as to all decided issues of law and fact except to the extent the determination is modified.

14 **SECTION 107. PRIORITY.** If a question of existence or exercise of jurisdiction
15 under this [Act] is raised in a child-custody proceeding, the question, upon request of a party,
16 must be given priority on the calendar and handled expeditiously.

17 **SECTION 108. NOTICE TO PERSONS OUTSIDE STATE.**

18 (a) Notice required for the exercise of jurisdiction when a person is outside this state may
19 be given in a manner prescribed by the law of this state for service of process or by the law of
20 the state or foreign country in which the service is made. Notice must be given in a manner
21 reasonably calculated to give actual notice but may be by publication if other means are not
22 effective.

23 (b) Proof of service may be made in the manner prescribed by the law of this state or by
24 the law of the state in which the service is made.

(c) Notice is not required for the exercise of jurisdiction with respect to a person who submits to the jurisdiction of the court.

Additional Comment

When the original UCCJEA was drafted we did not concern ourselves with service of process internationally, although we probably should have. There was no requirement that international service of process comply, when required, with the Hague Convention on Service of Process Abroad or other treaties concerning the service of process, although most courts have added that requirement. Rather the section merely indicated that service was valid if accomplished according to the law of this state or the law of the state where service took place. In those cases where the Service Convention is applicable it is the law of both this state and the foreign country and therefore must be complied with.

SECTION 109. APPEARANCE AND LIMITED IMMUNITY.

(a) A party to a child-custody proceeding, including a modification proceeding, or a petitioner or respondent in a proceeding to enforce or register a child-custody determination, is not subject to personal jurisdiction in this state for another proceeding or purpose solely by reason of having participated, or of having been physically present for the purpose of participating, in the proceeding.

(b) A person who is subject to personal jurisdiction in this state on a basis other than physical presence is not immune from service of process in this state. A party present in this state who is subject to the jurisdiction of another state is not immune from service of process allowable under the laws of that state.

(c) The immunity granted by subsection (a) does not extend to civil litigation based on acts unrelated to the participation in a proceeding under this [Act] committed by an individual while present in this state.

1 **SECTION 110. COMMUNICATION BETWEEN COURTS.**

2 (a) A court of this state may communicate with a court in another state or concerning a
3 proceeding arising under this [Act].

4 (b) The court may allow the parties to participate in the communication. If the parties are
5 not able to participate in the communication, they must be given the opportunity to present facts
6 and legal arguments before a decision on jurisdiction is made.

7 (c) Communication between courts on schedules, calendars, court records, and similar
8 matters may occur without informing the parties. A record need not be made of the
9 communication.

10 (d) Except as otherwise provided in subsection (c), a record must be made of a
11 communication under this section. The parties must be informed promptly of the communication
12 and granted access to the record.

13 (e) For the purposes of this section, "record" means information that is inscribed on a
14 tangible medium or that is stored in an electronic or other medium and is retrievable in
15 perceivable form.

16 **SECTION 111. TAKING TESTIMONY IN ANOTHER STATE.**

17 (a) In addition to other procedures available to a party, a party to a child-custody
18 proceeding may offer testimony of witnesses who are located in another state, including
19 testimony of the parties and the child, by deposition or other means allowable in this state for
20 testimony taken in another state. The court on its own motion may order that the testimony of a
21 person be taken in another state and may prescribe the manner in which and the terms upon
22 which the testimony is taken.

1 (b) A court of this state may permit an individual residing in another state or to be
2 deposed or to testify by telephone, audiovisual means, or other electronic means before a
3 designated court or at another location in that state. A court of this state shall cooperate with
4 courts of other states in designating an appropriate location for the deposition or testimony.

5 (c) Documentary evidence transmitted from another state to a court of this state by
6 technological means that do not produce an original writing may not be excluded from evidence
7 on an objection based on the means of transmission.

8 **SECTION 112. COOPERATION BETWEEN COURTS; PRESERVATION OF**
9 **RECORDS.**

10 (a) A court of this state may request the appropriate court of another state to:

- 11 (1) hold an evidentiary hearing;
- 12 (2) order a person to produce or give evidence pursuant to procedures of that state;
- 13 (3) order that an evaluation be made with respect to the custody of a child
14 involved in a pending proceeding;
- 15 (4) forward to the court of this state a certified copy of the transcript of the record
16 of the hearing, the evidence otherwise presented, and any evaluation prepared in compliance with
17 the request; and
- 18 (5) order a party to a child-custody proceeding or any person having physical
19 custody of the child to appear in the proceeding with or without the child.

20 (b) Upon request of a court of another state, a court of this state may hold a hearing or
21 enter an order described in subsection (a).

22 (c) Travel and other necessary and reasonable expenses incurred under subsections (a)

1 and (b) may be assessed against the parties according to the law of this state .

2 (d) A court of this state shall preserve the pleadings, orders, decrees, records of hearings,
3 evaluations, and other pertinent records with respect to a child-custody proceeding until the child
4 attains 18 years of age. Upon appropriate request by a court or law enforcement official of
5 another state, the court shall forward a certified copy of those records.

6 **[ARTICLE] 2.**

7 **JURISDICTION**

8
9 **SECTION 201. INITIAL CHILD-CUSTODY JURISDICTION.**

10 (a) Except as otherwise provided in Section 204, a court of this state has jurisdiction to
11 make an initial child-custody determination only if:

12 (1) this state is the home state of the child on the date of the commencement of
13 the proceeding, or was the home state of the child within six months before the commencement
14 of the proceeding and the child is absent from this state but a parent or person acting as a parent
15 continues to live in this state;

16 (2) a court of another state or does not have jurisdiction under paragraph (1), or a
17 court of the home state or of the child has declined to exercise jurisdiction on the ground that this
18 state is the more appropriate forum under Section 207 or 208, and:

19 (A) the child and the child's parents, or the child and at least one parent or
20 a person acting as a parent, have a significant connection with this state other than mere physical
21 presence; and

22 (B) substantial evidence is available in this state concerning the child's
23 care, protection, training, and personal relationships;

(3) all courts having jurisdiction under paragraph (1) or (2) have declined to exercise jurisdiction on the ground that a court of this state is the more appropriate forum to determine the custody of the child under Section 207 or 208; or

(4) no court of any other state or would have jurisdiction under the criteria specified in paragraph (1), (2), or (3).

(b) Subsection (a) is the exclusive jurisdictional basis for making a child-custody determination by a court of this state.

(c) Physical presence of, or personal jurisdiction over, a party or a child is not necessary or sufficient to make a child-custody determination.

SECTION 202. EXCLUSIVE, CONTINUING JURISDICTION.

(a) Except as otherwise provided in Section 204, a court of this state which has made a child-custody determination consistent with Section 201 or 203 has exclusive, continuing jurisdiction over the determination until:

(1) a court of this state determines that neither the child, nor the child and one parent, nor the child and a person acting as a parent have a significant connection with this state and that substantial evidence is no longer available in this state concerning the child's care, protection, training, and personal relationships; or

(2) a court of this state or a court of another state determines that the child, the child's parents, and any person acting as a parent do not presently reside in this state .

(b) A court of this state which has made a child-custody determination and does not have exclusive, continuing jurisdiction under this section may modify that determination only if it has jurisdiction to make an initial determination under Section 201.

SECTION 203. JURISDICTION TO MODIFY DETERMINATION. Except as otherwise provided in Section 204, a court of this state may not modify a child-custody determination made by a court of another state unless a court of this state has jurisdiction to make an initial determination under Section 201(a)(1) or (2) and:

(1) the court of the other state determines it no longer has exclusive, continuing jurisdiction under Section 202 or that a court of this state would be a more convenient forum under Section 207; or

(2) a court of this state or a court of the other state determines that the child, the child's parents, and any person acting as a parent do not presently reside in the other state.

SECTION 204. TEMPORARY EMERGENCY JURISDICTION.

(a) A court of this state has temporary emergency jurisdiction if the child is present in this state and the child has been abandoned or it is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse.

(b) If there is no previous child-custody determination that is entitled to be enforced under this [Act] and a child-custody proceeding has not been commenced in a court of a state having jurisdiction under Sections 201 through 203, a child-custody determination made under this section remains in effect until an order is obtained from a court of a state having jurisdiction under Sections 201 through 203. If a child-custody proceeding has not been or is not commenced in a court of a state having jurisdiction under Sections 201 through 203, a child-custody determination made under this section becomes a final determination, if it so provides and this state becomes the home state of the child.

1 (c) If there is a previous child-custody determination that is entitled to be enforced under
2 this [Act], or a child-custody proceeding has been commenced in a court of a state having
3 jurisdiction under Sections 201 through 203, any order issued by a court of this state under this
4 section must specify in the order a period that the court considers adequate to allow the person
5 seeking an order to obtain an order from the state having jurisdiction under Sections 201 through
6 203. The order issued in this state remains in effect until an order is obtained from the other state
7 within the period specified or the period expires.

8 (d) A court of this state which has been asked to make a child-custody determination
9 under this section, upon being informed that a child-custody proceeding has been commenced in,
10 or a child-custody determination has been made by, a court of a state having jurisdiction under
11 Sections 201 through 203, shall immediately communicate with the other court. A court of this
12 state which is exercising jurisdiction pursuant to Sections 201 through 203, upon being informed
13 that a child-custody proceeding has been commenced in, or a child-custody determination has
14 been made by, a court of another state under a statute similar to this section shall immediately
15 communicate with the court of that state to resolve the emergency, protect the safety of the
16 parties and the child, and determine a period for the duration of the temporary order.

17 **Additional Comment**

18 Emergency orders involving foreign countries, whether or not they are Convention
19 countries, are covered under Article 4 in section 408 and are not covered in this section.

20 **SECTION 205. NOTICE; OPPORTUNITY TO BE HEARD; JOINDER.**

21 (a) Before a child-custody determination is made under this [Act], notice and an
22 opportunity to be heard in accordance with the standards of Section 108 must be given to all

1 persons entitled to notice under the law of this state as in child-custody proceedings between
2 residents of this state , any parent whose parental rights have not been previously terminated, and
3 any person having physical custody of the child.

4 (b) This [Act] does not govern the enforceability of a child-custody determination made
5 without notice or an opportunity to be heard.

6 (c) The obligation to join a party and the right to intervene as a party in a child-custody
7 proceeding under this [Act] are governed by the law of this state as in child-custody proceedings
8 between residents of this state.

9 **SECTION 206. SIMULTANEOUS PROCEEDINGS.**

10 (a) Except as otherwise provided in Section 204, a court of this state may not exercise its
11 jurisdiction under this [article] if, at the time of the commencement of the proceeding, a
12 proceeding concerning the custody of the child has been commenced in a court of another state
13 having jurisdiction substantially in conformity with this [Act], unless the proceeding has been
14 terminated or is stayed by the court of the other state because a court of this state is a more
15 convenient forum under Section 207.

16 (b) Except as otherwise provided in Section 204, a court of this state , before hearing a
17 child-custody proceeding, shall examine the court documents and other information supplied by
18 the parties pursuant to Section 209. If the court determines that a child-custody proceeding has
19 been commenced in a court in another state having jurisdiction substantially in accordance with
20 this [Act], the court of this state shall stay its proceeding and communicate with the court of the
21 other state. If the court of the state having jurisdiction substantially in accordance with this [Act]
22 does not determine that the court of this state is a more appropriate forum, the court of this state

1 shall dismiss the proceeding.

2 (c) In a proceeding to modify a child-custody determination, a court of this state shall
3 determine whether a proceeding to enforce the determination has been commenced in another
4 state. If a proceeding to enforce a child-custody determination has been commenced in another
5 state, the court may:

6 (1) stay the proceeding for modification pending the entry of an order of a court of
7 the other state enforcing, staying, denying, or dismissing the proceeding for enforcement;

8 (2) enjoin the parties from continuing with the proceeding for enforcement; or

9 (3) proceed with the modification under conditions it considers appropriate.

10 **SECTION 207. INCONVENIENT FORUM.**

11 (a) A court of this state which has jurisdiction under this [Act] to make a child-custody
12 determination may decline to exercise its jurisdiction at any time if it determines that it is an
13 inconvenient forum under the circumstances and that a court of another state is a more
14 appropriate forum. The issue of inconvenient forum may be raised upon motion of a party, the
15 court's own motion, or request of another court.

16 (b) Before determining whether it is an inconvenient forum, a court of this state shall
17 consider whether it is appropriate for a court of another state to exercise jurisdiction. For this
18 purpose, the court and shall allow the parties to submit information and shall consider all
19 relevant factors, including:

20 (1) whether domestic violence has occurred and is likely to continue in the future
21 and which state could best protect the parties and the child;

22 (2) the length of time the child has resided outside this state;

1 (3) the distance between the court in this state and the court in the state that
2 would assume jurisdiction;

3 (4) the relative financial circumstances of the parties;

4 (5) any agreement of the parties as to which state should assume jurisdiction;

5 (6) the nature and location of the evidence required to resolve the pending
6 litigation, including testimony of the child;

7 (7) the ability of the court of each state to decide the issue expeditiously and the
8 procedures necessary to present the evidence; and

9 (8) the familiarity of the court of each state with the facts and issues in the
10 pending litigation.

11 (c) If a court of this state determines that it is an inconvenient forum and that a court of
12 another state is a more appropriate forum, it shall stay the proceedings upon condition that a
13 child-custody proceeding be promptly commenced in another designated state and may impose
14 any other condition the court considers just and proper.

15 (d) A court of this state may decline to exercise its jurisdiction under this [Act] if a
16 child-custody determination is incidental to an action for divorce or another proceeding while
17 still retaining jurisdiction over the divorce or other proceeding.

18 **Additional Comment**

19 Convenient forum, or transfer of jurisdiction, involving foreign countries is partially
20 covered in Article 4 in Section 407.

21 **SECTION 208. JURISDICTION DECLINED BY REASON OF CONDUCT.**

22 (a) Except as otherwise provided in Section 204 [or by other law of this state], if a court

1 of this state has jurisdiction under this [Act] because a person seeking to invoke its jurisdiction
2 has engaged in unjustifiable conduct, the court shall decline to exercise its jurisdiction unless:

3 (1) the parents and all persons acting as parents have acquiesced in the exercise of
4 jurisdiction;

5 (2) a court of the state otherwise having jurisdiction under Sections 201 through
6 203, determines that this state is a more appropriate forum under Section 207; or

7 (3) no court of any other state would have jurisdiction under the criteria specified
8 in Sections 201 through 203.

9 (b) If a court of this state declines to exercise its jurisdiction pursuant to subsection (a), it
10 may fashion an appropriate remedy to ensure the safety of the child and prevent a repetition of
11 the unjustifiable conduct, including staying the proceeding until a child-custody proceeding is
12 commenced in a court having jurisdiction under Sections 201 through 203.

13 (c) If a court dismisses a petition or stays a proceeding because it declines to exercise its
14 jurisdiction pursuant to subsection (a), it shall assess against the party seeking to invoke its
15 jurisdiction necessary and reasonable expenses including costs, communication expenses,
16 attorney's fees, investigative fees, expenses for witnesses, travel expenses, and child care during
17 the course of the proceedings, unless the party from whom fees are sought establishes that the
18 assessment would be clearly inappropriate. The court may not assess fees, costs, or expenses
19 against this state unless authorized by law other than this [Act].

20 **SECTION 209. INFORMATION TO BE SUBMITTED TO COURT.**

21 (a) [Subject to [local law providing for the confidentiality of procedures, addresses, and
22 other identifying information], in] [In] a child-custody proceeding, each party, in its first pleading

1 or in an attached affidavit, shall give information, if reasonably ascertainable, under oath as to the
2 child's present address or whereabouts, the places where the child has lived during the last five
3 years, and the names and present addresses of the persons with whom the child has lived during
4 that period. The pleading or affidavit must state whether the party:

5 (1) has participated, as a party or witness or in any other capacity, in any other
6 proceeding concerning the custody of or visitation with the child and, if so, identify the court, the
7 case number, and the date of the child-custody determination, if any;

8 (2) knows of any proceeding that could affect the current proceeding, including
9 proceedings for enforcement and proceedings relating to domestic violence, protective orders,
10 termination of parental rights, and adoptions and, if so, identify the court, the case number, and
11 the nature of the proceeding; and

12 (3) knows the names and addresses of any person not a party to the proceeding
13 who has physical custody of the child or claims rights of legal custody or physical custody of, or
14 visitation with, the child and, if so, the names and addresses of those persons.

15 (b) If the information required by subsection (a) is not furnished, the court, upon motion
16 of a party or its own motion, may stay the proceeding until the information is furnished.

17 (c) If the declaration as to any of the items described in subsection (a)(1) through (3) is in
18 the affirmative, the declarant shall give additional information under oath as required by the
19 court. The court may examine the parties under oath as to details of the information furnished
20 and other matters pertinent to the court's jurisdiction and the disposition of the case.

21 (d) Each party has a continuing duty to inform the court of any proceeding in this or any
22 other state that could affect the current proceeding.

1 [(e) If a party alleges in an affidavit or a pleading under oath that the health, safety, or
2 liberty of a party or child would be jeopardized by disclosure of identifying information, the
3 information must be sealed and may not be disclosed to the other party or the public unless the
4 court orders the disclosure to be made after a hearing in which the court takes into consideration
5 the health, safety, or liberty of the party or child and determines that the disclosure is in the
6 interest of justice.]

7 **SECTION 210. APPEARANCE OF PARTIES AND CHILD.**

8 (a) In a child-custody proceeding in this state , the court may order a party to the
9 proceeding who is in this state to appear before the court in person with or without the child. The
10 court may order any person who is in this state and who has physical custody or control of the
11 child to appear in person with the child.

12 (b) If a party to a child-custody proceeding whose presence is desired by the court is
13 outside this state , the court may order that a notice given pursuant to Section 108 include a
14 statement directing the party to appear in person with or without the child and informing the
15 party that failure to appear may result in a decision adverse to the party.

16 (c) The court may enter any orders necessary to ensure the safety of the child and of any
17 person ordered to appear under this section.

18 (d) If a party to a child-custody proceeding who is outside this state is directed to appear
19 under subsection (b) or desires to appear personally before the court with or without the child, the
20 court may require another party to pay reasonable and necessary travel and other expenses of the
21 party so appearing and of the child.

1 **[ARTICLE] 3.**

2 **ENFORCEMENT**

3 **SECTION 301. DEFINITIONS.** In this [article]:

4 (1) "Petitioner" means a person who seeks enforcement of an order for return of a
5 child under the Hague Convention on the Civil Aspects of International Child Abduction or
6 enforcement of a child-custody determination.

7 (2) "Respondent" means a person against whom a proceeding has been
8 commenced for enforcement of an order for return of a child under the Hague Convention on the
9 Civil Aspects of International Child Abduction or enforcement of a child-custody determination.

10 **SECTION 302. ENFORCEMENT UNDER HAGUE CONVENTION.** Under this
11 [article] a court of this state may enforce an order for the return of the child made under the
12 Hague Convention on the Civil Aspects of International Child Abduction as if it were a
13 child-custody determination.

14 **SECTION 303. DUTY TO ENFORCE.**

15 (a) A court of this state shall recognize and enforce a child-custody determination of a
16 court of another state if the latter court exercised jurisdiction in substantial conformity with this
17 [Act] or the determination was made under factual circumstances meeting the jurisdictional
18 standards of this [Act] and the determination has not been modified in accordance with this
19 [Act].

20 (b) A court of this state may utilize any remedy available under other law of this state to
21 enforce a child-custody determination made by a court of another state. The remedies provided in
22 this [article] are cumulative and do not affect the availability of other remedies to enforce a

1 child-custody determination.

2 **SECTION 304. TEMPORARY VISITATION.**

3 (a) A court of this state which does not have jurisdiction to modify a child-custody
4 determination, may issue a temporary order enforcing:

5 (1) a visitation schedule made by a court of another state; or

6 (2) the visitation provisions of a child-custody determination of another state that
7 does not provide for a specific visitation schedule.

8 (b) If a court of this state makes an order under subsection (a)(2), it shall specify in the
9 order a period that it considers adequate to allow the petitioner to obtain an order from a court
10 having jurisdiction under the criteria specified in [Article] 2. The order remains in effect until an
11 order is obtained from the other court or the period expires.

12 **SECTION 305. REGISTRATION OF CHILD-CUSTODY DETERMINATION.**

13 (a) A child-custody determination issued by a court of another state may be registered in
14 this state, with or without a simultaneous request for enforcement, by sending to [the appropriate
15 court] in this state:

16 (1) a letter or other document requesting registration;

17 (2) two copies, including one certified copy, of the determination sought to be
18 registered, and a statement under penalty of perjury that to the best of the knowledge and belief
19 of the person seeking registration the order has not been modified; and

20 (3) except as otherwise provided in Section 209, the name and address of the
21 person seeking registration and any parent or person acting as a parent who has been awarded
22 custody or visitation in the child-custody determination sought to be registered.

1 (b) On receipt of the documents required by subsection (a), the registering court shall:

2 (1) cause the determination to be filed as a foreign judgment, together with one
3 copy of any accompanying documents and information, regardless of their form; and

4 (2) serve notice upon the persons named pursuant to subsection (a)(3) and provide
5 them with an opportunity to contest the registration in accordance with this section.

6 (c) The notice required by subsection (b)(2) must state that:

7 (1) a registered determination is enforceable as of the date of the registration in
8 the same manner as a determination issued by a court of this state;

9 (2) a hearing to contest the validity of the registered determination must be
10 requested within 20 days after service of notice; and

11 (3) failure to contest the registration will result in confirmation of the
12 child-custody determination and preclude further contest of that determination with respect to
13 any matter that could have been asserted.

14 (d) A person seeking to contest the validity of a registered order must request a hearing
15 within 20 days after service of the notice. At that hearing, the court shall confirm the registered
16 order unless the person contesting registration establishes that:

17 (1) the issuing court did not have jurisdiction under [Article] 2;

18 (2) the child-custody determination sought to be registered has been vacated,
19 stayed, or modified by a court having jurisdiction to do so under [Article] 2; or

20 (3) the person contesting registration was entitled to notice, but notice was not
21 given in accordance with the standards of Section 108, in the proceedings before the court that
22 issued the order for which registration is sought.

1 (e) If a timely request for a hearing to contest the validity of the registration is not made,
2 the registration is confirmed as a matter of law and the person requesting registration and all
3 persons served must be notified of the confirmation.

4 (f) Confirmation of a registered order, whether by operation of law or after notice and
5 hearing, precludes further contest of the order with respect to any matter that could have been
6 asserted at the time of registration.

7 **SECTION 306. ENFORCEMENT OF REGISTERED DETERMINATION.**

8 (a) A court of this state may grant any relief normally available under the law of this state
9 to enforce a registered child-custody determination made by a court of another state.

10 (b) A court of this state shall recognize and enforce, but may not modify, except in
11 accordance with [article] 2, a registered child-custody determination of a court of another state.

12 **SECTION 307. SIMULTANEOUS PROCEEDINGS.** If a proceeding for
13 enforcement under this [article] is commenced in a court of this state and the court determines
14 that a proceeding to modify the determination is pending in a court of another state having
15 jurisdiction to modify the determination under [article] 2, the enforcing court shall immediately
16 communicate with the modifying court. The proceeding for enforcement continues unless the
17 enforcing court, after consultation with the modifying court, stays or dismisses the proceeding.

18 **SECTION 308. EXPEDITED ENFORCEMENT OF CHILD-CUSTODY**
19 **DETERMINATION.**

20 (a) A petition under this [article] must be verified. Certified copies of all orders sought to
21 be enforced and of any order confirming registration must be attached to the petition. A copy of a
22 certified copy of an order may be attached instead of the original.

1 (b) A petition for enforcement of a child-custody determination must state:

2 (1) whether the court that issued the determination identified the jurisdictional
3 basis it relied upon in exercising jurisdiction and, if so, what the basis was;

4 (2) whether the determination for which enforcement is sought has been vacated,
5 stayed, or modified by a court whose decision must be enforced under this [Act] and, if so,
6 identify the court, the case number, and the nature of the proceeding;

7 (3) whether any proceeding has been commenced that could affect the current
8 proceeding, including proceedings relating to domestic violence, protective orders, termination of
9 parental rights, and adoptions and, if so, identify the court, the case number, and the nature of the
10 proceeding;

11 (4) the present physical address of the child and the respondent, if known;

12 (5) whether relief in addition to the immediate physical custody of the child and
13 attorney's fees is sought, including a request for assistance from [law enforcement officials] and,
14 if so, the relief sought; and

15 (6) if the child-custody determination has been registered and confirmed under
16 Section 305, the date and place of registration.

17 (c) Upon the filing of a petition, the court shall issue an order directing the respondent to
18 appear in person with or without the child at a hearing and may enter any order necessary to
19 ensure the safety of the parties and the child. The hearing must be held on the next judicial day
20 after service of the order unless that date is impossible. In that event, the court shall hold the
21 hearing on the first judicial day possible. The court may extend the date of hearing at the request
22 of the petitioner.

1 (d) An order issued under subsection (c) must state the time and place of the hearing and
2 advise the respondent that at the hearing the court will order that the petitioner may take
3 immediate physical custody of the child and the payment of fees, costs, and expenses under
4 Section 312, and may schedule a hearing to determine whether further relief is appropriate,
5 unless the respondent appears and establishes that:

6 (1) the child-custody determination has not been registered and confirmed under
7 Section 305 and that:

8 (A) the issuing court did not have jurisdiction under [article] 2;

9 (B) the child-custody determination for which enforcement is sought has
10 been vacated, stayed, or modified by a court having jurisdiction to do so under [article] 2; or

11 (C) the respondent was entitled to notice, but notice was not given in
12 accordance with the standards of Section 108, in the proceedings before the court that issued the
13 order for which enforcement is sought; or

14 (2) the child-custody determination for which enforcement is sought was
15 registered and confirmed under Section 304, but has been vacated, stayed, or modified by a court
16 of a state having jurisdiction to do so under [article] 2.

17 **SECTION 309. SERVICE OF PETITION AND ORDER.** Except as otherwise
18 provided in Section 311, the petition and order must be served, by any method authorized [by the
19 law of this state], upon respondent and any person who has physical custody of the child.

20 **SECTION 310. HEARING AND ORDER.**

21 (a) Unless the court issues a temporary emergency order pursuant to Section 204, upon a
22 finding that a petitioner is entitled to immediate physical custody of the child, the court shall

1 order that the petitioner may take immediate physical custody of the child unless the respondent
2 establishes that:

3 (1) the child-custody determination has not been registered and confirmed under
4 Section 305 and that:

5 (A) the issuing court did not have jurisdiction under [article] 2;

6 (B) the child-custody determination for which enforcement is sought has
7 been vacated, stayed, or modified by a court of a state having jurisdiction to do so under [article]
8 2; or

9 (C) the respondent was entitled to notice, but notice was not given in
10 accordance with the standards of Section 108, in the proceedings before the court that issued the
11 order for which enforcement is sought; or

12 (2) the child-custody determination for which enforcement is sought was
13 registered and confirmed under Section 305 but has been vacated, stayed, or modified by a court
14 of a state having jurisdiction to do so under [article] 2.

15 (b) The court shall award the fees, costs, and expenses authorized under Section 312 and
16 may grant additional relief, including a request for the assistance of [law enforcement officials],
17 and set a further hearing to determine whether additional relief is appropriate.

18 (c) If a party called to testify refuses to answer on the ground that the testimony may be
19 self-incriminating, the court may draw an adverse inference from the refusal.

20 (d) A privilege against disclosure of communications between spouses and a defense of
21 immunity based on the spousal relationship or parent and child may not be invoked in a
22 proceeding under this [article].

1 **SECTION 311. WARRANT TO TAKE PHYSICAL CUSTODY OF CHILD.**

2 (a) Upon the filing of a petition seeking enforcement of a child-custody determination, the
3 petitioner may file a verified application for the issuance of a warrant to take physical custody of
4 the child if the child is immediately likely to suffer serious physical harm or be removed from
5 this state .

6 (b) If the court, upon the testimony of the petitioner or other witness, finds that the child
7 is imminently likely to suffer serious physical harm or be removed from this state , it may issue a
8 warrant to take physical custody of the child. The petition must be heard on the next judicial day
9 after the warrant is executed unless that date is impossible. In that event, the court shall hold the
10 hearing on the first judicial day possible. The application for the warrant must include the
11 statements required by Section 308(b).

12 (c) A warrant to take physical custody of a child must:

13 (1) recite the facts upon which a conclusion of imminent serious physical harm or
14 removal from the jurisdiction is based;

15 (2) direct law enforcement officers to take physical custody of the child
16 immediately; and

17 (3) provide for the placement of the child pending final relief.

18 (d) The respondent must be served with the petition, warrant, and order immediately after
19 the child is taken into physical custody.

20 (e) A warrant to take physical custody of a child is enforceable throughout this state . If
21 the court finds on the basis of the testimony of the petitioner or other witness that a less intrusive
22 remedy is not effective, it may authorize law enforcement officers to enter private property to

1 take physical custody of the child. If required by exigent circumstances of the case, the court may
2 authorize law enforcement officers to make a forcible entry at any hour.

3 (f) The court may impose conditions upon placement of a child to ensure the appearance
4 of the child and the child's custodian.

5 **SECTION 312. COSTS, FEES, AND EXPENSES.**

6 (a) The court shall award the prevailing party, including a state , necessary and reasonable
7 expenses incurred by or on behalf of the party, including costs, communication expenses,
8 attorney's fees, investigative fees, expenses for witnesses, travel expenses, and child care during
9 the course of the proceedings, unless the party from whom fees or expenses are sought
10 establishes that the award would be clearly inappropriate.

11 (b) The court may not assess fees, costs, or expenses against a state unless authorized by
12 law other than this [Act].

13 **SECTION 313. RECOGNITION AND ENFORCEMENT.** A court of this state shall
14 accord full faith and credit to an order issued by another state, and consistent with this [Act]
15 which enforces a child-custody determination by a court of another state unless the order has
16 been vacated, stayed, or modified by a court having jurisdiction to do so under [article] 2.

17 **SECTION 314. APPEALS.** An appeal may be taken from a final order in a proceeding
18 under this [article] in accordance with [expedited appellate procedures in other civil cases].
19 Unless the court enters a temporary emergency order under Section 204, the enforcing court may
20 not stay an order enforcing a child-custody determination pending appeal.

21 **SECTION 315. ROLE OF [PROSECUTOR OR PUBLIC OFFICIAL].**

22 (a) In a case arising under this [Act] or involving the Hague Convention on the Civil

1 Aspects of International Child Abduction, the [prosecutor or other appropriate public official]
2 may take any lawful action, including resort to a proceeding under this [article] or any other
3 available civil proceeding to locate a child, obtain the return of a child, or enforce a child-custody
4 determination if there is:

5 (1) an existing child-custody determination;

6 (2) a request to do so from a court in a pending child-custody proceeding;

7 (3) a reasonable belief that a criminal statute has been violated; or

8 (4) a reasonable belief that the child has been wrongfully removed or retained in
9 violation of the Hague Convention on the Civil Aspects of International Child Abduction.

10 (b) A [prosecutor or appropriate public official] acting under this section acts on behalf of
11 the court and may not represent any party.

12 **SECTION 316. ROLE OF [LAW ENFORCEMENT].** At the request of a [prosecutor
13 or other appropriate public official] acting under Section 315, a [law enforcement officer] may
14 take any lawful action reasonably necessary to locate a child or a party and assist [a prosecutor or
15 appropriate public official] with responsibilities under Section 315.

16 **SECTION 317. COSTS AND EXPENSES.** If the respondent is not the prevailing
17 party, the court may assess against the respondent all direct expenses and costs incurred by the
18 [prosecutor or other appropriate public official] and [law enforcement officers] under Section
19 315 or 316.

1 [ARTICLE] 4.

2 SPECIAL RULES FOR PROCEEDINGS UNDER CONVENTION

3 Introductory Comment

4 This Article applies exclusively to cases that fall under the 1996 Hague Convention on
5 Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in Respect of
6 Parental Responsibility and Measures for the Protection of Children. It applies to cases between
7 states of the United States and foreign countries in which the Convention is in force. It also
8 applies to cases between states of the United States and foreign countries in which the
9 Convention is not in force to the extent that the Convention requires special treatment for such
10 countries. The Article has no application to cases between states of the United States.

11 In accordance with the decision of the drafting committee in September I attempted to use
12 the language of the Convention as much as possible----as well as following the structure of the
13 Convention. Style has made extensive changes in this second draft and I have incorporated most
14 of them. There are some issues concerning the changes proposed by Style. Those issues have
15 been noted in bold and will require discussion by the committee.

16 In this draft all of Article 4 is underlined since Style requires that all “official” drafts have
17 new language underlined.

18 Some of the comments are slightly out of date. I did not have time to change some of the
19 comments to reflect the changes made by the Style Committee prior to the draft being due.

20 SECTION 401. DEFINITIONS. In this [article]:

21 (1) “Authority” means a person who takes a measure of protection with regard to a child.

22 **[Note: Style requires a definition of authority].**

23 (2) “Convention” means the Convention on Jurisdiction, Applicable Law,
24 Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and
25 Measures for the Protection of Minors, concluded at The Hague on 19 October 1996.

26 (3) “Convention country” means a country other than the United States, including a
27 political subdivision thereof, in which the convention is in force with respect to the United States.

28 (4) “Measure of protection” means a decision on a matter that is within the scope of this

1 article taken by an authority with regard to a child. The term includes: [Note: (A) through (D)
2 was moved here from the next section on scope by Style. To be logical all of that section
3 could be moved here since all of it is included in what the convention defines as a “measure
4 of protection.” Or, alternatively, the definitions from 4(A) to 4(D) could be placed back in
5 the scope section.

6 (A) the attribution, exercise, termination, delegation, or restriction of parental
7 responsibility;

8 (B) rights of custody, including rights relating to the care of a child and
9 determining the place of residence of a child;

10 (C) rights of access, [visitation] including the right to take a child for a limited
11 period to a place other than the habitual residence of the child;

12 (D) guardianship of the person of a child, as well as any similar [Note: Style wants
13 this clarified. Any suggestions?] [institution] [relationship];

14 (5) “Nonconvention country” means a country, other than the United States, including a
15 political subdivision thereof, in which the convention is not in force with respect to the United
16 States.

17 (6) “Parental responsibility” means parental authority or an analogous relationship of
18 authority determining the rights, powers, and responsibilities of parents, guardians, or other legal
19 representatives in relation to a child. [The term does not include the appointment of a lawyer
20 representing a child, a guardian ad litem, or a court appointed special advocate.]

21 **Comment**

22 Related to the Convention: Art. 1(2). The definition of “authority” uses the term person

1 which brings forward the definition of person from Section 102. I have used that term pretty
2 much throughout the draft because the decision making body, whether for custody or otherwise,
3 can be something other than an individual.

4 I have included definitions for Convention, non-Convention country, and Convention
5 country. The first because it is necessary to determine what we are discussing in this article. The
6 latter two because it helps distinguish between the two in the sections on urgency jurisdiction and
7 transfer of jurisdiction. I could just as easily use contracting and non-contracting state depending
8 on the wishes of the committee.

9 I have used the term “measure of protection,” or “measure” throughout much of this draft.
10 The Style committee prefers the full term rather than the abbreviation of “measure.” The term
11 “custody determination” which is used in the first three articles is inappropriate in this article
12 because the Convention covers much more than custody determinations. In accordance with the
13 decision of the drafting committee to use convention language as much as possible, I have used
14 this term to describe those matters that are covered in the this article. That meant the term
15 measure needed a definition, which the Convention does not provide. The best way to define it
16 seemed to be functionally as a decision regarding a matter that is within the scope of this article. I
17 have used the term “authority” in the definition rather than “court” since it is possible that we will
18 have to recognize and enforce a measure of protection from another country that is not taken by a
19 court. The Style committee wanted a definition of “authority” which I have provided.

20
21 The term “parental responsibility” is taken fairly directly from Article 1(2) of the
22 Convention. The brackets refer to the question of whether the appointment of a representative of
23 the child is a measure that is covered by the Convention. Article 3 of the Convention refers to
24 “the designation and function of any person having charge of, representing, or assisting the child.”
25 It would seem as though the “designation” of the child’s representative is the same as the
26 appointment of the child’s representative. If the drafting committee agrees then brackets and the
27 material within the brackets should be deleted.

28 **SECTION 402. SCOPE.**

29 (a) This [article] applies only to a proceeding in a court of this state involving a measure
30 of protection under this article. A measure of protection may involve:

31 (1) the measures included in Section 401 (4);

32 (2) the designation and function of a person having charge of, representing, or
33 assisting a child;

34 (3) governmental supervision of a [individual] [person] having charge of a child;

(4) placement of a child in foster care, institutional care, or a similar [institution]
[relationship]. [Note: Originally this section included (A) through (D) of the definition of
parental responsibility. Style moved them to the definition section. I added (a)(1) to the
Scope section. The issue is whether this section appears to be truncated without the matters
that have been moved, or whether all of it should be moved to the definition section.]

(b) This [article] does not apply to:

(1) establishment or contest of a parent-child relationship;

(2) adoption, including preparatory measures, and the annulment or revocation of
an adoption;

(3) the name of a child;

(4) emancipation of a child;

(5) support or maintenance obligations with regard to a child;

(6) trusts or succession;

(7) [social security] [welfare] [Note: Style wants a term other than social
security];

(8) general governmental decisions regarding education or health;

(9) a penal offense committed by a child; [or]

(10) rights of asylum or immigration; [or]

[(11) property of a child].

Comment

Related to the Convention: Arts. 3,4. This section on the scope of this article was requested by the Drafting Committee and follows the terms of the Convention. I have used the term “proceeding in a court of this state” to describe the scope of the article. This confirms the

1 decision that this article will apply to courts and not to measures that are governed by the
2 Convention that will have to be determined by administrative agencies and other governmental
3 personnel.

4 The scope of this article is a measure that is taken in relation to one of the subject matters
5 covered in Article 3 of the Convention. As noted in the Explanatory Report, the list in article 3,
6 and therefore in subsection (a) of this section, is opened-ended which is indicated by using the
7 term “may include.” Unlike subsection (a), subsection (b) concerning exclusions is a closed list.

8 In (a)(2) I have used the term “person” since a governmental agency may be in charge of a
9 child. However, in (a)(3) I have used the term “individual” since it probably is a human being that
10 will have charge of a child that is being supervised by the government.

11 **SECTION 403. APPLICABILITY OF OTHER SECTIONS.** Sections 106, 107, 108,
12 109, 110, 111, 112, 205, 206(c), 209, 210, 307, 309, and 312, through 317 also apply to this
13 [article].

14 **Comment**

15 In accordance with the decision of the drafting committee, this article includes a section
16 indicating which provisions of Articles 1-3 of the UCCJEA are also applicable to this article. The
17 question is where to place this section. Should it be at the beginning? Or should it be later on in
18 the article? The Style committee did not object to its current placement.

19 **SECTION 404. HABITUAL RESIDENCE.**

20 (a) The habitual residence of a child is the country in which the child has been physically
21 present for a time sufficient for acclimatization and in which the child has a degree of settled
22 purpose. from the perspective of the child. [Note: Style wants this phrase removed. However,
23 it is an essential part of how the analysis of habitual residence is made under this approach
24 to the issue.]

25 (b) A court of this state shall consider the following in determining the habitual residence
26 of a child:

27 (1) the age of the child;

1 (2) the length of time the child has been in the country;

2 (3) whether the presence of the child in the country is timelimited or open ended;

3 (4) the social interactions of the child, including education, family relationships,
4 peer relationships, and language; and

5 (5) if appropriate, the intent of the parents of the child.

6 **Comment**

7 In accordance with the decision of the drafting committee, this is not a definition but rather
8 a provision designed to give guidance to a court in making the determination of the habitual
9 residence of the child. As determined by the Drafting Committee, the provision is also child
10 centered, in that it focuses on the child and not on the child's parents. The intention of the child's
11 parents is listed as the last of the factors to be considered. No determination is made as to when it
12 would be appropriate to consider the parents' intent, however, it will obviously be more important
13 with extremely young children.

14 It should be noted that the 1996 Convention uses the term in a different context than the
15 1980 Abduction Convention. In the 1980 Convention the determination that a child is habitually
16 resident in the requesting country is necessary in order for the remedy of that Convention to be
17 applicable and is part of the larger inquiry as to whether there has been a wrongful removal or
18 retention of a child. The role of habitual residence in the 1996 Convention is to assess which
19 country's authorities have jurisdiction to take measures of protection and whether their decisions
20 should be recognized by other contracting countries. Therefore the precedent that has developed
21 under the 1980 Convention is not necessarily applicable to the determination of habitual residence
22 under this article.

23 **SECTION 405. JURISDICTION.** Except as otherwise provided in Sections 408 and
24 409, a court of this state may make or modify a measure of protection only if:

25 (1) this state is the habitual residence of the child on the date of the commencement of the
26 proceeding and remains so throughout the proceeding;

27 (2) the child is present in this state and:

28 (A) the habitual residence of the child cannot be determined;

29 (B) the child is a refugee; or

1 (C) the child is internationally displaced due to disturbances in the country of the
2 habitual residence of the child; or

3 (3) an authority of a convention country with jurisdiction under paragraph (1) or (2) has
4 decided to transfer jurisdiction to the court because the court is in a better position to assess the
5 best interests of the child and decides that it is in the best interests of the child to assume
6 jurisdiction.

7 **Comment**

8 Related to Convention: Arts. 5,6,8, and 9. This section relates primarily to articles 5 and 6
9 of the Convention. The phrase, “remains so throughout the proceeding” reflects the Convention
10 position that jurisdiction changes when habitual residence changes, even if it is in the middle of a
11 proceeding. A state can also have jurisdiction, apart from habitual residence, if the child is
12 present in this state and has no habitual residence. However, the Practical Handbook indicates
13 that this determination should be avoided if at all possible. Jurisdiction is also proper if the child
14 is present in the state and is a refugee or is internationally displaced. Finally, this state has
15 jurisdiction if the Convention country that would otherwise have jurisdiction has decided to
16 transfer jurisdiction to this state and this state has accepted the transfer.

17 **SECTION 406. JURISDICTION IN CASES OF WRONGFUL REMOVAL OR** 18 **RETENTION OF A CHILD.**

19 (a) In this section removal or retention of a child is wrongful:

20 (1) if it is in breach of rights of custody attributed to a person, either jointly or
21 alone, under the law of the country of the child’s habitual residence immediately before the
22 removal or retention; and

23 (2) at the time of removal or retention the right of custody was exercised, either
24 solely or jointly, or would have been exercised but for the removal or retention.

25 (b) In this section, a right of custody may arise by operation of law, a judicial or
26 administrative decision, or an agreement having legal effect under the law of the country of the

1 child's habitual residence immediately before a removal or retention.

2 (c) A court of this state which has jurisdiction under Section 405 continues to have
3 jurisdiction after a removal or retention of a child that is wrongful until the child acquires a new
4 habitual residence, and:

5 (1) each person with rights of custody has acquiesced in the removal or retention;

6 or

7 (2) the child resides in the country of the new habitual residence for one year from
8 the time that every person with rights of custody knew or should have known of the whereabouts
9 of the child, no petition for the return of the child is pending before an authority of the country of
10 the new habitual residence or in a court of this state, and the child is settled in the new
11 environment.

12 (d) Except as otherwise provided in Section 408, a court of this state does not have
13 jurisdiction over a child whose habitual residence in this state is the result of a wrongful removal
14 or retention unless:

15 (1) each person with rights of custody has acquiesced in the removal or retention;

16 or

17 (2) the child resides in this state for one year after the time that every person with
18 rights of custody knew or should have known of the whereabouts of the child, no petition for the
19 return of the child is pending in a court of this state or before an authority of the country of the
20 former habitual residence of the child, and the child is settled in the new environment.

21 **Comment**

22 Relation to Convention, Art 7. The definition of wrongful removal or retention in this

1 section does not specifically set out “institution or other body” as the term is used in the
2 Convention, That is because the definition of the term “person” in section102 includes “institution
3 or other body” and therefore the terms would be redundant in this section.

4 Note that the definition of “rights of custody” is also not defined in this section since it
5 takes the definition that is set out in section 402 [now 401(4)(b)] of this article, The term “rights
6 of custody” does not include access or visitation rights as defined in the same section.

7 This section presents both sides of Article 7. It confirms that a court of this state does not
8 lose its jurisdiction after a wrongful abduction unless the requirements of Article 7 are met. It
9 also provides that a court of this state does not obtain jurisdiction if the child’s habitual residence
10 in this state is the result of a wrongful abduction unless the requirements of the article are met.

11 The reference to a petition for the return of the child pending in the court of this state or
12 the new habitual residence is in line with the interpretation of the Permanent Bureau. See
13 Preliminary Document No. 4, Practical Handbook on the Operation of the 1996 Convention,
14 available at <http://www.hcch.net/upload/wop/abduct2011pd04e.pdf>. It should be noted that a
15 custody determination made by the court of the state from which the child has been wrongfully
16 removed or retained while that state still has jurisdiction under this section must be recognized
17 and enforced under the section on recognition and enforcement.

18 **SECTION 407. TRANSFER OF JURISDICTION.**

19 (a) If a court of this state which has jurisdiction under Section 405(1) or (2) determines
20 that an authority in another convention country is in a better position to assess the best interests of
21 the child, the court may:

22 (1) directly request the authority in the other convention country to assume
23 jurisdiction; or

24 (2) stay the proceedings to allow the parties to request that the authority in the
25 other convention country assume jurisdiction.

26 (b) A court of this state may communicate with the authority in the other convention
27 country concerning the request to transfer jurisdiction.

28 (c) [Before determining whether jurisdiction should be transferred, a court of this state

1 shall allow the parties to submit information and shall consider all relevant factors, including:

2 (1) whether domestic violence has occurred and is likely to continue in the future
3 and which convention country could best protect the parties and the child;

4 (2) the length of time the child has resided outside this state;

5 (3) the distance between the court and the authority in the convention country
6 which would assume jurisdiction;

7 (4) the relative financial circumstances of the parties;

8 (5) any agreement of the parties concerning which convention country should
9 assume jurisdiction;

10 (6) the nature and location of the evidence required to resolve the pending
11 litigation, including testimony of the child;

12 (7) the ability of the authorities of each convention country to decide the issue
13 expeditiously and the procedures necessary to present the evidence; and

14 (8) the familiarity of the authorities of each convention country with the facts and
15 issues in the pending litigation.]

16 [(d)] Jurisdiction under this section may be transferred only to an authority in a convention
17 country that:

18 (1) is the nationality of the child;

19 (2) has jurisdiction over the divorce or annulment of the parents of the child; or

20 (3) has a substantial connection to the child.

21 [(e)] A court of this state may request or invite the parties to request the appropriate
22 authority of the convention country of the habitual residence of a child to transfer jurisdiction to

1 the court if the court believes it can better assess the best interests of the child if this state:

2 (1) is the state of nationality of the child;

3 (2) is the state where a divorce or annulment proceeding concerning the parents of
4 the child is pending; or

5 (3) has a substantial connection to the child and the court believes it can better
6 assess the best interests of the child.

7 [f] A court of this state may communicate with the authority of the convention
8 country of the habitual residence of the child with regard to a request under subsection (e). A
9 court of this state may not assume jurisdiction following a request under subsection (e) until the
10 authority decides to transfer jurisdiction to the court.

11 **Comment**

12 Relation to Convention, Arts 8,9. This section has been moved forward to follow the
13 pattern of the Convention rather than the pattern found in Article 2. It has also been rewritten to
14 incorporate as far as possible the language of the Convention.

15 Subsection (c) is in brackets. It is language that is contained in Article 207. The issue is
16 whether this section should provide guidance to a court in determining whether it is appropriate to
17 transfer jurisdiction in the same way that 207 provides guidance in terms of whether a court
18 should find that it is an inconvenient forum. If so then the brackets should be removed. The
19 Convention does not provide a procedure for determining when a court decides that another state
20 should receive jurisdiction. Therefore it would not be inconsistent with the Convention to add
21 such a provision.

22 That part of article 8 of the Convention that requires a court to determine whether it is in
23 the best interests of the child for it to receive jurisdiction is covered in section 405(3).

24 The transfer of the case under this Section does not effect a permanent transfer of
25 jurisdiction. If the country of the habitual residence of the child transfers the case to another
26 country, modification procedures would take place in the country of the child's habitual residence
27 since there is no continuing jurisdiction under the convention.

1 **SECTION 408. TEMPORARY EMERGENCY JURISDICTION.**

2 (a) In an emergency, a court of this state has temporary jurisdiction to take [Note: Style
3 suggests the word “order” in this section rather than “make” which is the term of the
4 convention] a measure of protection if necessary to protect the child and the child is present in
5 this state [because the child has been abandoned or it is necessary in an emergency to protect the
6 child because the child, or a sibling or parent of the child, is subjected to or threatened with
7 mistreatment or abuse].

8 (b) A measure of protection taken under subsection (a) regarding a child habitually
9 resident in a convention country expires when an authority of the country with jurisdiction over
10 the child takes a measure of protection with respect to the child.

11 (c) An measure of protection taken under subsection (a) regarding a child habitually
12 resident in a nonconvention country expires when the court of this state recognizes a measure
13 taken by the authority of the nonconvention country.

14 [(d)] A court of this state which has been asked to take a measure of protection under this
15 section, on being informed that a proceeding to take a measure of protection concerning the child
16 has been commenced in, or a measure of protection has been taken by, an authority of a foreign
17 country having jurisdiction in accordance with this [article], a court of this state in a proceeding
18 under this section shall communicate immediately with that authority. A court of this state which
19 is exercising jurisdiction in accordance with this [article] on being informed that a proceeding to
20 take a measure of protection has been commenced in or a measure of protection has been made by
21 an authority of a foreign country under a provision similar to this section shall communicate
22 immediately with the authority of that country to resolve the emergency and protect the safety of

1 the parties and the child.]

2 **Comment**

3 Related to Convention: Art. 11. This section tracks article 11 of the Convention. The first
4 set of brackets in subsection (a) concerns the issue of whether we should define emergency as it is
5 defined in section 204, or whether we should let the term simply be construed by courts. Courts
6 will probably note the parallel and define the term in this section as they have defined it under
7 section 204.

8 The expiration of the emergency order is as set out in Article 11. If the child's habitual
9 residence is in a Convention country the order expires when the Convention country takes
10 whatever measure is required by the situation. If the child's habitual residence is in a
11 nonconvention country the emergency order expires when it is recognized by a court of this state.
12 I think we need not concern ourselves with the language of Article 10(C) of "each contracting
13 state" and "in the contracting state in question" since we are writing for this state and no other
14 state. The implication of the language of the Convention seems to require that the non-contracting
15 state actually take a measure of protection since there must be something to be recognized in this
16 state in order for the temporary order to come to an end.

17 The second set of brackets is subsection (d) and the issue involves whether to bring
18 forward the communication provisions of 204 forward into this section. The Convention does not
19 require any form of communication under the urgency section. However, the Practical Handbook
20 notes that even though communication is not required, it will practically always be good practice
21 for the authorities to communicate with each other.

22 **SECTION 409. TEMPORARY PROVISIONAL JURISDICTION.**

23 (a) Except as otherwise provided in Section 406, a court of this state has jurisdiction to
24 take a provisional measure for the protection of a child if the child is present in this state. A
25 provisional measure must be compatible with a measure previously taken by an authority in
26 another country having jurisdiction, The provisional measure is limited to this state.

27 [(b)] A court of this state shall inform an appropriate authority in a foreign country with
28 jurisdiction of the existence of a provisional order.]

29 (c) An measure of protection issued under subsection (a) regarding a child habitually
30 resident in a convention country expires when an authority of the convention country with

1 jurisdiction takes a measure of protection with respect to the child.

2 (d) An measure of protection issued under subsection (a) regarding a child habitually
3 resident in a nonconvention country expires when the court of this state recognizes a measure of
4 protection taken by the authority of the nonconvention country.

5 **Comment**

6 Related to Convention, Art. 12. The drafting committee decided to retain the section on
7 provisional jurisdiction. For this draft I have renamed it as a ground of jurisdiction and used the
8 term temporary, which may be redundant given the term “provisional.” The Convention provides
9 a number of protections against its misuse. First, it is subject to Section 406, which deals with
10 wrongful abductions. It cannot be used to subvert the provisions of that section. Second, the
11 measures cannot be contrary to measures taken previously by the country of the child’s habitual
12 residence. Third, measures taken under this Article lapse using the same procedure as with
13 measures taken in an emergency.

14 The brackets raise the question of whether we should include a provision requiring a court
15 of this state to notify the court that would otherwise have jurisdiction of the existence of the
16 provisional order, or whether this should simply be left to the parties.

17 **SECTION 410. [LIS PENDENS] [SIMULTANEOUS PROCEEDINGS.]**

18 (a) Except as otherwise provided in Section 408 or 409, a court of this state may not
19 exercise its jurisdiction under Sections 405, 406 or 407 [Note: Apparently Style thinks the
20 reference to the section numbers are acceptable here, although they wanted them eliminated
21 elsewhere. I have followed the suggestion of the Style Committee as to whether to include
22 the section numbers or not] if the court determines that at the time of the commencement of the
23 proceeding a proceeding has commenced before an authority of a convention country having
24 jurisdiction concerning the same measures of protection and the proceeding has not concluded,
25 unless the authority declines its jurisdiction in favor of a court of this state.

26 (b) if a court of this state which has jurisdiction under Section 405, 406, or 407 and has

determined that a proceeding has been commenced later in a convention country having jurisdiction 407 concerning the same measure of protection, the court may decline jurisdiction.

[(c) Except as otherwise provided in Section 408 or 409, if a court of this state determines that a proceeding has been commenced before an authority of a convention country having jurisdiction concerning the same measure of protection and has not concluded, the court shall stay its proceeding and communicate with the authority. [Note: Style wants to know, under this section, how the judge is to do this and what will the judge communicate.] If the authority of the does not decline jurisdiction the court shall dismiss the proceeding.]

Comment

Related to the Convention, Art 13. Article 13 provides a lis pendens for situations where there is potentially conflicting jurisdiction. Its use was primarily thought to apply between the country of the child's habitual residence and the country where a divorce between the child's parents is pending. However, it has application to all potential jurisdictional conflicts that might arise under Articles 5-10 of the Convention. Therefore, it would apply when the child's habitual residence changes during the middle of a case.

This could be labeled as lis pendens, or we could use the label from Section 206 and call it simultaneous proceedings. Note that under subsection (a) there is a provision for a court of this state to continue the case if the court that first had jurisdiction declines in favor of this state. This declination of jurisdiction is on the basis of forum non conveniens and does not involve the transfer jurisdiction of Article 8-9 of the Convention. I have added a subsection (b) that authorizes a court of this state to decline jurisdiction in favor of the second to file country. There is a question as to whether we should further add to this section the procedure from Section 207 concerning the factors a court should consider, i.e. the bracketed language of Section 407(c).

The brackets around subsection (c) raise the question of to what extent any of the procedure of Section 206 should be brought forward to this Section, in particular, requiring a court of this state to communicate with the other authority.

SECTION 411. CONTINUATION OF ORDERS. Except as otherwise provided in Sections 408 and 409, the following rules apply:

(1) A measure of protection taken by a court of this state with jurisdiction under Section

1 405, 406, or 407 continues in effect according to its terms until modified by an authority of a
2 convention country with jurisdiction.

3 (2) A measure of protection taken by an authority of a convention country with jurisdiction
4 continues in effect according to its terms until modified by a court of this state with jurisdiction.

5 **Comment**

6 Related to Convention, Art 14. This is a familiar principle and is found in both UIFSA
7 and the UCCJEA. An order made with appropriate jurisdiction continues to be enforceable even
8 after the jurisdictional basis of the order disappears. The order is enforceable until modified by a
9 court with appropriate jurisdiction under this article, or until a situation arises whereby another
10 order can be recognized under the recognition sections. This would occur when the original order
11 is modified by either a court with jurisdiction under this article or by an authority of the
12 nonconvention state of the child's habitual residence. Article 23(2)(e) specifically sets out a rule
13 allowing for non-recognition of an order from a contracting state if it is incompatible with a later
14 order from the nonconvention state of the child's habitual residence.

15 **SECTION 412. APPLICABLE LAW RULES.**

16 (a) In this section "law" means the law in state or foreign country other than its conflict of
17 law rules.

18 (b) Except as otherwise provided in this section in a proceeding under this [article], a court
19 of this state shall apply the law of this state.

20 (c) In exceptional circumstances to protect a child, a court of this state may apply, or take
21 into consideration the law of another country which has a substantial relationship to the [situation]
22 [facts]. [Note: Style wants another word other than situation, which is the term used in the
23 conveniton.]

24 (d) If this state becomes the habitual residence of a child, the law of this state governs the
25 application in this state of a measure of protection taken in the convention country of the previous
26 habitual residence of child.

(f) The law of the habitual residence of a child governs the exercise of parental responsibility.

(e) A court of this state may refuse to apply the law designated by this section if it is manifestly contrary to the public policy of this state [[only] after taking into account the best interests of the child.]] **[Note: Style wishes this phrase eliminated and placed in a comment. However, it is an integral part of the convention and is there to limit the public policy defense.].**

Comment

Related to Convention, Arts 15, 17, 20, 21(1), 22. These articles introduce into United States cases arising under the Convention a new element: the question of the applicable law. In the United States, as well as most other common law countries, allocation of competency between jurisdictions in child custody and visitation cases is handled by rules of jurisdiction and recognition of judgments. Choice of law is not used. A court that has jurisdiction over a custody determination applies its own substantive law of custody, visitation, dependency, neglect, etc. Given that choice of law is a new element for the United States, I thought the best way to approach this problem may be simply to set out the choice of law rules using the Convention language as much as possible.

The normal rule, contained in subparagraph (b), is that a court that has jurisdiction under the Convention will apply its own law, which, given that the jurisdiction is likely to be the place of the child's habitual residence, will result in the application of the law of the child's habitual residence. However, the court in order to protect the child may, in exceptional cases, apply the law of another country which has a substantial connection to the fact pattern.

The provision providing for the application of the law of another jurisdiction is likely to be little used in the United States. Since there will be no jurisdiction for the divorce court in the United States, the only concurrent jurisdiction will be urgency jurisdiction, or, possibly, presence jurisdiction. It is extremely unlikely that a court asked to decide a case in an emergency will have time to consider the law of another jurisdiction. Thus, practically all cases will be heard by the court of the child's habitual residence which will apply its own law. However, it is possible that there may be a case, albeit rare, where even though a court has jurisdiction as the place of the child's new habitual residence, the child, over the course of time, has had more connection with another country and therefore, although unlikely, the court of the child's new habitual residence may wish to apply the law of the child's previous habitual residence.

1 Subsection (c) draws a distinction between the existence of the measures and the method
2 of application of the measure in a particular country when the child's habitual residence changes
3 as required by Article 15(3). In other words, the distinction is the equivalent of the distinction
4 between the law governing the validity of a contract and the performance of a contract. The
5 substantive law governing, for example, visitation, is that of the forum. However, the conditions
6 for carrying out the visitation arrangements are that of the child's habitual residence. This is
7 particularly apt, according to the explanatory report in those situations where the original
8 determination was made by the child's habitual residence and then child's habitual residence
9 changes. The explanatory report acknowledges that there is not a clear line between the
10 establishment of a measure and the means of carrying out the measure and suggests that the line
11 will have to be drawn on a case-by-case basis.

12 Subsection (d) distinguishes between the existence of parental responsibility and the
13 exercise of parental responsibility. The applicable law governing the exercise of parental
14 responsibility is that of the habitual residence of the child.

15 In subsection (e) there are brackets around the word "only." The drafting committee needs
16 to decide whether the word should or should not be retained.

17 **SECTION 413. SPECIAL RULES TO ESTABLISH PARENTAL**
18 **RESPONSIBILITY.**

19 (a) Except as otherwise provided in subsection (b), in this section "law" means the law in
20 force in a country other than its conflict of law rules.

21 (b) If the law made applicable by this section is the law of a nonconvention country and if
22 the choice of law rules of the nonconvention country would apply the law of another
23 nonconvention country, the law of the other nonconvention country is applicable. If the other
24 nonconvention country would not apply its own law, the law applicable is as provided in
25 subsection (c).

26 (c) In a proceeding under this [article], the following rules apply:

27 (1) Attribution or extinction of parental responsibility of a child by operation of
28 law, without the intervention of a judicial or administrative authority, is governed by the law of

1 the country of the habitual residence of the child.

2 (2) Attribution or extinction of parental responsibility of a child by agreement or a
3 unilateral act, without the intervention of a judicial or administrative authority, is governed by the
4 law of the country of the habitual residence of the child at the time the agreement or unilateral act
5 takes effect.

6 (3) Attribution of parental responsibility of a child under the law of the country of
7 the habitual residence of the child continues even if the child acquires a new habitual residence.

8 (4) If a child acquires a new habitual residence, the law of the new habitual
9 residence determines the attribution of parental responsibility of the child by operation of law to
10 an individual who at the time of the acquisition of the new habitual residence did not have
11 parental responsibility.

12 (d) Parental responsibility established under subsection (c) may be terminated or modified
13 by a measure of protection taken in accordance with this [article].

14 (e). A court of this state may refuse to apply the law designated by this section if it is
15 manifestly contrary to the public policy of this state [[only] after taking into account the best
16 interests of the child.]] **[Note: Again Style wishes this phrase eliminated and placed in a**
17 **comment.]**

18 **Comment**

19 Related to convention, Arts 16, 18, 21(2), 22. The specific rules referred to in this section
20 are for situations where a country may have rules which provide for rights of custody, or parental
21 responsibility, by operation of law, unilateral act, or agreement. Unlike anything else in the
22 convention, the rules do not concern decisions, but rather relationships created by local rules of
23 law. The Convention provides that these issues be determined by the law of the habitual
24 residence of the child.

1 Subsection (c)(3) provides that the parental responsibility that comes about by operation of
2 law, agreement or unilateral act continues even if the habitual residence of the child changes.

3
4 Subsection (c)(4) deals with the reverse situation. It provides that if parents who do not
5 have parental responsibility under the law of the child's original habitual residence move to a state
6 where parental responsibility by operation of law is applicable, the law of the new habitual
7 residence applies.

8 Subsection (d) restates Article 18 that the parental responsibility established by this section
9 may be modified by a measure under this article.

10 Subsection (b) deals with the renvoi problem, i.e. whether the reference to the law of a
11 particular State is to that State's local law or whether the reference includes the conflict of law
12 rules of the referred to State. Article 21 (2) contains an exception to the normal rule of referring
13 only to local law for fact patterns that fall under Article 16. If the application of that article
14 designates the law of a nonconvention country and if the choice-of-law rules of that state would
15 dictate applying the law of another nonconvention country then the law of the second
16 nonconvention country applies. If the second nonconvention country would not apply its own law
17 then the Convention requires that the applicable law be that set forth in the section.

18 **SECTION 414. FINDINGS AND CONCLUSIONS.** A court of this state that makes a
19 child-custody determination or which takes a measure of protection under this [act], if requested
20 by a party, shall include in the custody determination or measure the following information:

21 (1) the basis for the exercise of jurisdiction by the court;

22 (2) the manner in which notice and opportunity to be heard were given to the persons
23 entitled to notice of the proceeding; **[Style wants us to describe or define how notice is to be**
24 **given.]**

25 (3) the opportunity for the child to be heard; and

26 (4) the habitual residence of the child.

27 **Comment**

28 This section was suggested at the last drafting committee meeting. It is meant to help
29 those parents who contemplate foreign enforcement of a United States custody determination or
30 measure of protection. These findings will help a foreign court determine whether the measure

1 issued by a United States court will be entitled to recognition and enforcement under the
2 Convention. The issue is where to place this section. It could go almost anyplace in Article 4, or
3 it could even fit into Article 2. However, Style had no objection to its current placement.

4 **SECTION 415. DUTY TO RECOGNIZE MEASURE OF PROTECTION TAKEN**
5 **IN A CONVENTION COUNTRY.**

6 (a) A measure of protection taken by a convention country with jurisdiction [under this
7 article] that has not been modified by a convention country with jurisdiction [under this article]
8 shall be recognized by a court of this state.

9 (b) The recognition required by subsection (a) applies to a measure taken by an authority
10 in a convention country that had jurisdiction over the divorce or annulment of the marriage of the
11 parents of a child if:

12 (1) one of the parents was habitually resident in the convention country;

13 (2) one of the parents had parental responsibility of the child at the time the
14 proceeding for divorce or annulment was commenced; and

15 (3) the jurisdiction of the authority of the convention country which decided the
16 divorce or annulment was agreed to by the parents and any other person with parental
17 responsibility.

18 **Comment**

19 Related to the Convention, Art. 10, 23(1). This section sets out in subsection (a) the basic
20 rule of recognition. It requires recognition of child custody determinations made in another
21 contracting country if the measure was decided in accordance with the jurisdictional provisions of
22 this article. The operative language from Section 303 has been rewritten but the duty to recognize
23 is not lessened in this article.

24 If the language of Section 303 were brought forward the section would read as follows:

25 (a) A court of this state shall recognize and enforce a measure of protection taken
26 by a convention country if that convention country exercised jurisdiction in

1 [substantial] conformity with this [article] or the measure of protection was taken
2 under factual circumstances meeting the jurisdictional standards of this [article]
3 and the determination has not been modified in accordance with this [article].

4 Subsection (b) is a special case. The Convention allows an authority having jurisdiction of
5 the parent's divorce or annulment to also exercise jurisdiction over the child so long as one of the
6 parents is habitually resident in the country, one parent has parental responsibility and the parties,
7 as well as anyone else with parental responsibility, agree. This jurisdictional basis is not required
8 under the Convention and will not be a part of United States law. However, the Convention does
9 require recognition of custody determinations made in accordance with its jurisdictional standard.
10 Therefore even though the United States does not have this jurisdictional basis to determine
11 custody, the Convention does require recognition of measures taken by the country that has
12 jurisdiction over the divorce or annulment of the parents of the child.

13 The jurisdiction authorized under Article 10 for the authority of the divorce or annulment
14 ceases when the divorce or annulment proceedings end. There is no continuing jurisdiction under
15 the Convention. Therefore proceeding to modify the determination made by the divorce authority
16 are governed by Section 405.

17 The Convention requires recognition as a matter of law without the intervention of a court
18 or other tribunal. Recognition "by operation of law" means that it is not necessary to commence
19 proceedings for the measure to be recognized in the requested Convention state and for it to
20 produce its effects there. An example set out by the Permanent Bureau in the Practical Handbook,
21 and slightly modified, is as follows:

22 A family are habitually resident in Contracting State A. Following the breakdown
23 of the parents' relationship, the court in Contracting State A, with the agreement of
24 the father, grants the mother sole custody of the child. A year later, the mother
25 lawfully moves with the child to Contracting State B. She wishes to enroll the
26 children in school. Her sole custody of the child which will allow enrollment in
27 school will be recognized by operation of law in Contracting State B without her
28 taking any further action. She will not have to apply to the judicial or
29 administrative authorities in Contracting State B for recognition of the custody
30 order.

31 I have eliminated the language "by operation of law." The example raised above does not
32 fall within the ambit of court decisions. Since this Act is directed to courts, it seems to follow that
33 it will deal with cases where recognition may be contested. Therefore the operation of law
34 language would not apply and the registration procedure is as set out in Article 3.

35 **SECTION 416. REGISTRATION OF CONVENTION MEASURE.**

36 **Drafting note:** The drafting committee decided that the procedure for registration and
37 enforcement of convention country measures should duplicate as much as possible the procedure

1 for registration and enforcement for state and nonconvention country orders and be set out in full
2 in Article 4. Therefore I have duplicated, with appropriate amendments, the provisions of Article
3 3. **However, Style has directed me to break section 416 and 420 into two or three sections**
4 **which I have not yet done.**

5 (a) A measure of protection issued by an authority of a convention country may be
6 registered in this state, with or without a simultaneous request for enforcement, by sending to [the
7 appropriate court] in this state:

8 (1) a letter or other document requesting registration;

9 (2) two copies in the original language and two copies in English, including one
10 certified copy, of the measure sought to be registered, and a statement under penalty of perjury
11 that to the best of the knowledge and belief of the person seeking registration the measure has not
12 been modified; and

13 (3) except as otherwise provided in Section 209, the name and address of the
14 person seeking registration and any person that is affected by the measure sought to be registered.

15 (b) On receipt of the documents required by subsection (a), the registering court shall:

16 (1) cause the measure of protection to be filed as a foreign judgment, together with
17 one copy in the original language and one copy in English of any accompanying documents and
18 information, regardless of their form; and

19 (2) serve notice on the person named under subsection (a)(3) and provide the
20 person with an opportunity to contest the registration in accordance with this section.

21 (c) The notice required by subsection (b)(2) must state that:

22 (1) a registered measure of protection is enforceable as of the date of the
23 registration in the same manner as a measure issued by a court of this state;

1 (2) a hearing to contest the validity of the registered measure of protection must be
2 requested not later than 20 days, or 60 days if the party does not live in the United States, after
3 service of notice; and

4 (3) failure to contest the registration will result in confirmation of the measure of
5 protection and preclude further contest of that measure with respect to any matter that could have
6 been asserted.

7 (d) A person seeking to contest the validity of a registered measure of protection must
8 request a hearing within 20 days, or 60 days if the person does not live in the United States, after
9 service of the notice. At the hearing, the court shall confirm the registered measure unless the
10 person contesting registration establishes that:

11 (1) the issuing authority did not have jurisdiction;

12 (2) the measure sought to be registered has been vacated, stayed, or modified by an
13 authority having jurisdiction to do so;

14 (3) except for an emergency measure of protection, the person contesting
15 registration was not given an opportunity to be heard;

16 (4) except for an emergency measure of protection, the measure was taken without
17 an opportunity for the child to be heard [in violation of fundamental principles of this state];

18 **[Note: Style wishes to eliminate the material in brackets. However, it is in the convention.]**

19 (5) the measure is incompatible with a later measure taken by the nonconvention
20 country of the habitual residence of the child and the later measure is required to be recognized
21 under [Article] 3;

22 (6) the measure is manifestly contrary to the public policy of this state; [[only] after

1 taking into account the best interests of the child]; or [Note: Again Style wants the entire phrase
2 eliminated. However, it is in the convention].

3 (7) the procedure in Section 421(a) has not been followed.

4 (e) A court of this state may not review the merits of a measure of protection taken by an
5 authority of a convention country and is bound by the findings of fact of the issuing authority.

6 (f) If a timely request is not made for a hearing to contest the validity of a registration
7 under this section, the registration is confirmed as a matter of law and the court shall notify all
8 persons requesting registration and all persons served of the confirmation.

9 (g) Confirmation of a registered measure of protection, whether by operation of law or
10 after notice and hearing, precludes further contest of the measure with respect to any matter that
11 could have been asserted at the time of registration.

12 **Comment**

13 Related to the Convention, Arts 23(2), 24, 25, 26, 28, 54. This article is an adaptation of
14 the registration procedure under Section 305 to convention cases. The Convention provides that
15 any interested person may request a determination by the appropriate authority of another
16 Convention country on whether a measure taken in a contracting country can be recognized. The
17 example discussed in the report is a situation where a mother in Country A has been granted
18 custody with a proviso that she may not change the child's habitual residence without the
19 permission of the father. The father is willing to allow the mother to change the child's habitual
20 residence to Country B, but not to Country C. He might wish a pre-determination in Country B
21 that it would continue to recognize the father's ability to restrict the mother's efforts to change the
22 child's habitual residence from Country B. The report also suggests that this principle would
23 work to allow an interested person to obtain a pre-declaration on non-recognition. This section
24 provides the procedure to request such a determination through a registration procedure very
25 similar to that already in place. Indeed its use for this purpose was contemplated by the original
26 UCCJEA drafting committee.

27 The jurisdictional problems associated with obtaining a pre-determination of a recognition
28 of a measure taken by a Convention country when the respondent has no connection with the state
29 where the measure is sought to be registered were noted in the last drafting committee and have
30 not yet been resolved.

1 The brackets in subsection (a) are in Section 305. It allows each state of the United States
2 to insert the appropriate name for its court.

3 Of necessity some changes had to be made from the original version of Section 305. The
4 first of these is in (a)(2) which deals with the translation problem. In accordance with Article 54
5 of the Convention this subsection requires that the documents be sent in the original language as
6 well as a translation into English. This issue was not addressed in the original UCCJEA even
7 though that Act is applicable internationally. Section 305 requires two copies. I doubled that to
8 four, including two in the original language and two in English.

9 The amount of time necessary to contest a registered order has been extended to 60 days
10 for persons not living in the United States. See UIFSA §707.

11 There is an important issue that needs to be considered at this point. The Convention does
12 not require that the establishment of any of the defenses listed in Article 23(2) result in non-
13 recognition. It only provides that a country may refuse to recognize a decision from another
14 Convention country if any of the defenses are established. The issue for the drafting committee is
15 whether any of these defenses should be mandatory. For purposes of discussion I have drafted the
16 defenses in this and other articles as mandatory, i.e. once the respondent proves one of the
17 defenses the order cannot be recognized. For purposes of nonconvention countries the defenses
18 set out in (d)(1), (2), and (3) are mandatory since decisions of nonconvention countries are
19 covered under Article 3 and, under that article, the first three defenses are mandatory. In the
20 Convention these are permissive defenses. The drafting committee needs to consider whether all
21 the defenses should be mandatory, permissive, or whether some should be mandatory and others
22 permissive.

23 Otherwise, subsection (d) adds to the defenses to registering an order, those defenses listed
24 in Article 23(b) that were not contained in the UCCJEA. These include subsection (4) for those
25 cases where the child did not have any input into the proceedings and the failure to solicit the
26 child's views violates the fundamental procedural policy of this state. I suspect this would rarely
27 occur in the United States, however, outgoing cases will have to be carefully documented to
28 insure United States orders are enforced abroad. Added also are sections that the order is
29 incompatible with a later order issued by the nonconvention country of the child's habitual
30 residence as well as a public policy defense which replicates that found under the applicable law
31 sections.

32 The defense found in subsection (7) is one we may well want to consider. That refers to
33 section 421(a), Article 33 of the Convention, which requires that if a court of another Convention
34 country is considering placing a child in this state it must first consult with the appropriate
35 authority in this state and obtain this state's consent. While we must comply with article 33 for
36 outgoing cases, we are not obliged to have this defense to incoming cases.

37 Subsection (e) implements Article 25 and 27 which require that the enforcing court is

bound by the findings of fact of the issuing court and cannot review the merits of the original order.

SECTION 417. ENFORCEMENT OF REGISTERED MEASURE OF PROTECTION.

(a) A court of this state may grant any relief available under the law of this state to enforce a registered measure of protection taken by an authority of a convention country.

(b) A court of this state shall recognize and enforce a registered measure of protection of a convention country. The court may modify a registered measure of protection of a convention country only in accordance with this [article].

SECTION 418. [EXPEDITED] [PETITION FOR] ENFORCEMENT OF CONVENTION COUNTRY MEASURE OF PROTECTION. [Note: Style objects to the use of the term “expedited” in the title since the term is not used in the text. However, the term is used in the title of section 308 without being used in the text. Style also wants this section broken up and some of the language that is used in earlier articles eliminated. However, these sections duplicate the enforcement mechanism of Article 3 as requested by the committee. I suggest the language in the second set of bracket which may help remove any confusion.]

(a) A petition for enforcement of a measure of protection from a convention country filed under this [article] must be verified. Certified copies of a measure sought to be enforced and of any order confirming registration must be attached to the petition. One copy of the measure must be in the original language and one copy must be in English. A copy of a certified copy of the measure may be attached instead of the original.

(b) A petition for enforcement of a measure of protection from a convention country must state:

(1) whether the authority that issued the measure identified the basis on which it

1 relied in exercising jurisdiction;

2 (2) whether the measure has been vacated, stayed, or modified by an authority
3 whose decision must be enforced under this [article] and, if so, identify the authority, the case
4 number, and the nature of the proceeding;

5 (3) whether a proceeding has been commenced that could affect the current
6 proceeding, including a proceedings relating to domestic violence, a protective order, termination
7 of parental rights, and adoption and, identify the authority, the case number, and the nature of the
8 proceeding;

9 (4) the present physical address of the child and the respondent, if known;

10 (5) whether relief in addition to the immediate physical custody of the child and
11 attorney's fees is sought, including a request for assistance from [law enforcement officials] and,
12 if so, the relief sought; and

13 (6) if the measure has been registered and confirmed under Section 416, the date
14 and place of registration.

15 (c) A court of this state may not review the merits of a measure of protection taken by an
16 authority of a convention country and is bound by the findings of fact of the issuing authority.

17 (d) On the filing of a petition, the court shall issue an order directing the respondent to
18 appear in person at a hearing with or without the child and may issue any order necessary to
19 ensure the safety of the parties and the child. The court shall hold the hearing on the first judicial
20 day available after service of the order. The court may extend the date of hearing at the request of
21 the petitioner. **[Note: Style wants to know what only at the request of the petitioner. This is in**
22 **Article 3 and since it is an enforcement proceeding, the respondent should not be able to**

delay enforcement in an international case any more than in a domestic case. Note also that the language of this section used to read that the hearing was to be held on the “next judicial day after service of the order unless that day is impossible....” The rewrite by Style gives more discretion to the court as to when to hold the hearing.]

(e) An order issued under subsection (d) must state the time and place of the hearing and advise the respondent that at the hearing the court may grant the petitioner immediate physical custody of the child, may order payment of fees, costs, and expenses under Section 312, and may schedule a hearing to determine whether further relief is appropriate, unless the respondent appears and establishes that the measure has not been registered and confirmed under Section 416 and that:

(1) the issuing authority did not have jurisdiction;

(2) the measure sought to be enforced has been vacated, stayed, or modified by an authority having jurisdiction to do so;

(3) except with respect to a temporary emergency measure of protection, the person contesting registration was not given an opportunity to be heard [in violation of fundamental principles of this state]; [Note: Same Style issue as mentioned earlier]

(4) except with respect to a temporary emergency measure of protection the measure was taken without an opportunity for the child to be heard; [in violation of fundamental principles of this state;] [Note: Again the same Style issue].

(5) the measure of protection is incompatible with a later measure taken by the nonconvention country of the habitual residence of the child and the measure is required to be recognized under [Article] 3;

1 (6) the measure of protection is contrary to the public policy of this state [[only]
2 after taking into account the best interests of the child;] or [Note: Again the same Style issue].

3 (7) the procedure in Section 421(a) has not been followed.

4 **Comment**

5 Related to Convention, Arts 23(b), 26. This is section 308 modified slightly to fit
6 Convention cases. The modification adds grounds for non-recognition and enforcement under
7 article 23(b).
8

9 **SECTION 419. SERVICE OF PETITION FOR ENFORCEMENT AND ORDER.**

10 Except as otherwise provided in Section 311, a petition for enforcement of a measure of
11 protection from a convention country and order must be served. Service may be by any method
12 authorized [insert citation to the law of this state], on the respondent and any person who has
13 physical custody of the child.

14 **SECTION 420. HEARING AND ORDER.**

15 (a) Unless the court issues a temporary emergency order pursuant to Section 408, on a
16 finding that a petitioner is entitled to immediate physical custody of the child, the court shall grant
17 the petitioner immediate physical custody of the child unless the respondent establishes that the
18 measure has not been registered and confirmed under Section 416 and that:

19 (1) the issuing authority did not have jurisdiction;

20 (2) the measure sought to be enforced has been vacated, stayed, or modified by an
21 authority having jurisdiction to do so;

22 (3) except with respect to a temporary emergency measure of protection, the person
23 contesting registration was not given an opportunity to be heard [in violation of fundamental
24 principles of this state]; [Note: Same Style issue as mentioned earlier]

1 (4) except with respect to a temporary emergency measure of protection the
2 measure was taken without an opportunity for the child to be heard; [in violation of fundamental
3 principles of this state;] [Note: Again the same Style issue].

4 (5) the measure of protection is incompatible with a later measure taken by the
5 nonconvention country of the habitual residence of the child and the measure is required to be
6 recognized under [Article] 3;

7 (6) the measure of protection is contrary to the public policy of this state [[only]
8 after taking into account the best interests of the child;] or [Note: Again the same Style issue].

9 (7) the procedure in Section 421(a) has not been followed.

10 (8) the measure for which enforcement is sought was registered and confirmed
11 under Section 416 but has been vacated, stayed, or modified by an authority ~~court~~ having
12 jurisdiction to do so under this [article].

13 (b) A court of this state may not review the merits of a measure of protection taken by an
14 authority of a convention country and is bound by the findings of fact of the issuing authority.

15 (c) The court of this state shall award the fees, costs, and expenses authorized under
16 Section 312 and may grant additional relief, including a request for the assistance of [law
17 enforcement officials], and set a further hearing to determine whether additional relief is
18 appropriate.

19 [(d) If a party called to testify refuses to answer on the ground that the testimony may be
20 self-incriminating, the court may draw an adverse inference from the refusal.

21 (e) A privilege against disclosure of communications spouses and a defense of immunity
22 based on the spousal relationship or parent and child relationship may not be invoked in a

proceeding under this [article].]

Comment

This is section 310 of article 3, modified to take account of the additional defenses to enforcement set out in Article 23(2) of the Convention. There is a question as to whether subsections (d) and (e) should included here. They are in Article 3 and were included there because they are in UIFSA and there was an attempt to include in the UCCJEA as many of the provisions of UIFSA as possible.

Subsections (d) and (e) are in brackets. Style would like them broken out into separate sections. These subsections are together in one section in the comparable version in Article 3. The reasons these sections were included there is that they are in UIFSA. One of the factors in drafting the original UCCJEA was to duplicate UIFSA as much as possible so that attorneys would find comparable provisions in each act.

SECTION 421. COOPERATION WITH CONVENTION COUNTRY.

(a) Before placing a child in foster care, institutional care, or a similar situation in a convention country, a court of this state must:

(1) consult with the appropriate authority in the country; and

(2) obtain consent to the placement by the appropriate authority in the country.

(b) If a parent who is seeking to obtain or maintain visitation and who has asked an authority of the convention country that is the residence of the parent to make a finding on the suitability of the parent to exercise visitation, may petition a court of this state to stay a proceeding pending receipt of information regarding suitability. The court state shall consider the finding before making a decision on visitation.

Comment

Related to the Convention, Arts 33, 35.

1 [ARTICLE] 45.

2 MISCELLANEOUS PROVISIONS

3 SECTION 4501. APPLICATION AND CONSTRUCTION. In applying and
4 construing this Uniform Act, consideration must be given to the need to promote uniformity of the
5 law with respect to its subject matter among states that enact it.

6 SECTION 4502. SEVERABILITY CLAUSE. If any provision of this [Act] or its
7 application to any person or circumstance is held invalid, the invalidity does not affect other
8 provisions or applications of this [Act] which can be given effect without the invalid provision or
9 application, and to this end the provisions of this [Act] are severable.

10 SECTION 4503. EFFECTIVE DATE. This [Act] takes effect

11 SECTION 4504. REPEALS. The following acts and parts of acts are hereby
12 repealed:....

13 SECTION 4505. TRANSITIONAL PROVISION. A motion or other request for relief
14 made in a child-custody proceeding or to enforce a child-custody determination which was
15 commenced before the effective date of this [Act] is governed by the law in effect at the time the
16 motion or other request was made.