

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 November 2- 4, 2012 Drafting Committee Meeting

Full Incorporation

With Prefatory Note and Comments

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NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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October 9, 2012

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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 the 1996 Convention is not necessary for enforcement of foreign custody decrees; ratification 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 draft attempts to eliminate the problems with incorporating by reference from the first three articles into article 4. Instead it indicates for each section whether that section is applicable to all foreign countries, or only convention countries, or only nonconvention countries.

[ARTICLE] 1

GENERAL PROVISIONS

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

SECTION 102. DEFINITIONS. In this [Act]:

(1) “Abandoned” means left without provision for reasonable and necessary care or supervision.

(2) “Authority” means the judicial or administrative entity authorized by a foreign country to order a measure of protection with regard to a child.

~~(3)~~(2) “Child” means an individual who has not attained 18 years of age.

~~(4)~~(3) “Child-custody determination” means a judgment, decree, or other order of a court providing for the legal custody, physical custody, or visitation with respect to a child. The term includes a permanent, temporary, or initial; order and a modification order. The term does not include an order relating to property of the child, child support or other monetary obligation of an individual.

~~(5)~~(4) “Child-custody proceeding” means a proceeding in which legal custody, physical custody, or visitation with respect to a child is an issue. The term includes a proceeding for divorce, separation, neglect, abuse, dependency, guardianship, paternity, termination of parental rights, and protection from domestic violence, in which the issue may appear. The term does not include a proceeding involving juvenile delinquency, contractual emancipation, or enforcement under [Article] 3.

~~(6)~~(5) “Commencement” means the filing of the first pleading in a proceeding.

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

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

(9)(6) “Court” means an entity authorized under the law of a ~~State~~ state or nonconvention country to establish, enforce, or modify a child-custody determination.

(10) “Foreign country” means a country, including a political subdivision thereof, other than the United States.

(11)(7) “Home ~~State~~ state” means the ~~State~~ 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.

(12)(8) “Initial determination” means the first child-custody determination concerning a particular child.

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

(14)(10) “Issuing ~~State~~ state” means the State in which a child-custody determination is made.

(15) “Measure of protection” means a decision on a matter covered by [Article] 4 made by an authority in a foreign country or a court in this state with regard to a child. The term includes a

permanent, temporary, or initial measure and a modification. The term does not include an order relating to [property of the child], or child support,

(16)(11) “Modification” means a child-custody determination or measure of protection that changes, replaces, supersedes, or is otherwise made after a previous determination or measure concerning the same child, whether or not it is made by the court or authority that made the previous determination or measure.

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

(18) “Parental responsibility” means the rights, powers and obligations of a parent, guardian, or other legal representative in relation to the person of the child.

(19)(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, ~~public corporation;~~ or any other legal or commercial entity.

(20)(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.

(21)(14) “Physical custody” means the physical care and supervision of a child.

~~(22)~~(15) “State” means a ~~State~~ 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.

~~[(23)~~(16) “Tribe” means an Indian tribe or band, or Alaskan Native village, which is recognized by federal law or formally acknowledged by a ~~State~~ state.]

~~(24)~~(17) “Warrant” means an order issued by a court authorizing law enforcement officers to take physical custody of a child.

Comment

Related to the convention: Art. 1(2).

The term “authority” is used in connection with cases arising under the convention. Just as it is a “court” that makes a child custody determination under Articles 1-3, so it is an “authority” that orders a “measure” under the convention. The term is broader than “court” in that it includes administrative authorities that, under foreign law may take a measure of protection with regard to a child.

Subsection (15) defines the term “measure of protection,” or “measure.” The term is used most often in Article 4, but does arise in the other articles. The term “custody determination” which is used with regard to United States orders in the first three articles is inappropriate in relationship to a discussion of the 1996 Convention because the convention covers much more than custody determinations. The convention does not itself provide a definition of the term. The term “measure of protection” is defined functionally as a decision regarding a matter covered by Article 4. That means that it is within the scope of Article 4 in Section 401. The second and third sentences of the definition may be redundant given the scope section and therefore could perhaps be eliminated, although many members of the drafting committee wished to include the second sentence of the definition in the text of the definition section. I have bracketed the third sentence which is partially redundant of Section 401 and potentially creates a conflict with that section.

The term “parental responsibility” is taken fairly directly from Article 1(2) of the convention. The term is purposely broad in the convention and therefore questions regarding whether a particular issue is to be interpreted as coming within the concept of parental responsibility ought to be resolved in favor of inclusion. See the Report at ¶18.

SECTION 103. PROCEEDINGS GOVERNED BY OTHER LAW. Except as
provided in [Article] 4, This this ~~[Act]~~ [act] does not govern an adoption proceeding or a

proceeding pertaining to the authorization of emergency medical care for a child.

Comment

The drafting committee has not discussed this issue. Proceedings pertaining to medical care are not governed by Articles 1-3, but a proceeding pertaining to medical care for a child is a measure within the scope of Article 4.

SECTION 104. APPLICATION TO INDIAN TRIBES.

(a) A child-custody proceeding that pertains to an Indian child as defined in the Indian Child Welfare Act, 25 U.S.C. § 1901 et seq., is not subject to this ~~[Act]~~ [act] to the extent that it is governed by the Indian Child Welfare Act.

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

[(c) A child-custody determination made by a tribe under factual circumstances in substantial conformity with the jurisdictional standards of this ~~[Act]~~ [act] must be recognized and enforced under [Article] 3.]

[SECTION 105. INTERNATIONAL APPLICATION OF [ACT]. Except as otherwise provided in Sections 406 and 407, the following rules apply:

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

(2)(b) Except as otherwise provided in ~~subsection (c)~~ paragraph (4), a child-custody determination made in a ~~foreign~~ nonconvention country under factual circumstances in substantial conformity with the jurisdictional standards of this ~~[Act]~~ [Article] 2 must be recognized and enforced under [Article] 3.

(3) A court of this state shall apply [Article] 4 in proceedings concerning convention countries.]

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

Comment

I've bracketed the entire section in this version because we may not need it if each outward-looking section of the act indicates its applicability to either convention countries, nonconvention countries or foreign countries. However, subparagraph (4) should remain here in the general principles since it applies to Article 2-4. Alternatively, subparagraph 4 could be incorporated into Sections 303 and 412. The rest of the commentary on this section assumes that the section continues.

This version of Article IV distinguishes between convention and nonconvention countries. Nonconvention countries continue to be regarded as if they were states of the United States.

The original comments to this section noted that the term "child custody determination" should be interpreted to cover custody as well analogous decisions made under the 1996 Convention.

Subparagraph (3) directs an attorney to apply article 4 to cases involving convention countries. This seems an appropriate place to put a directional text since attorneys will probably look at this section whenever they have a case with international connections. Distinguishing between convention and nonconvention countries in this section meant that some of the sections in article 1 had to be tweaked to add the phrase "or foreign country." Without the addition of this phrase the sections in article 1 could be interpreted to apply to state, including nonconvention countries, but not to convention countries since there are no comparable provisions in article 4.

Subsection (4) restates the provision currently in the UCCJEA. It applies to "foreign countries" which includes both convention and nonconvention countries. It is functional equivalent of Article 23 (2)(d) which allows a state to refuse to recognize and enforce a measure under the convention if the measure is manifestly contrary to public policy taking into account the best interests of the child. If the child custody law violates fundamental principles of human rights, it is undoubtedly not in the child's best interests. Therefore, it does not appear necessary to have a separate public policy defense in the article 3 enforcement proceedings.

SECTION 106. EFFECT OF CHILD-CUSTODY DETERMINATION. A child-custody determination or measure of protection made by a court of this ~~State~~ state that had

jurisdiction under this ~~[Act]~~ [act] binds ~~all persons who have~~ a person that has been served in accordance with the ~~laws~~ law of this ~~State~~ state, ~~or has been~~ notified in accordance with Section 108 or ~~who have~~ has submitted to the jurisdiction of the court; and ~~who have~~ has been given an opportunity to be heard. ~~As to those persons, the~~ The determination is conclusive as to all decided issues of law and fact except to the extent the determination is modified.

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

SECTION 108. NOTICE TO PERSONS OUTSIDE STATE.

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

(b) Proof of service may be made in the manner prescribed by the law of this ~~State~~ state or by the law of the ~~State~~ state or foreign country 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 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 or measure of protection proceeding, including a modification proceeding, or a petitioner or respondent in a proceeding to enforce or register a child-custody determination or a measure of protection, is not subject to personal jurisdiction in this ~~State~~ 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~~ state on a basis other than physical presence is not immune from service of process in this ~~State~~ state. A party present in this ~~State~~ state who is subject to the jurisdiction of another ~~State~~ state or foreign country is not immune from service of process allowable under the laws of that ~~State~~ state or foreign country.

(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]~~ [act] committed by an individual while present in this ~~State~~ state.

SECTION 110. COMMUNICATION BETWEEN COURTS.

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

~~(a)~~(b) A court of this ~~State~~ state may communicate with a court or an authority in another ~~State~~ state or foreign country concerning a proceeding arising under this ~~[Act]~~ [act].

~~(b)~~(c) The court may allow the parties to participate in the communication. If the parties

are not able to participate in the communication, they must be given the opportunity to present facts and legal arguments before a decision on jurisdiction is made.

~~(e)~~(d) Communication between courts and authorities on schedules, calendars, court records, and similar matters may occur without informing the parties. A record need not be made of the communication.

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

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

SECTION 111. TAKING TESTIMONY IN ANOTHER STATE OR FOREIGN COUNTRY.

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

(b) A court of this ~~State~~ state may permit an individual residing in another ~~State~~ state or foreign country to be deposed or to testify by telephone, audiovisual means, or other electronic

means before a designated court or at another location in that ~~State~~ state or foreign country. A court of this ~~State~~ state shall cooperate with courts or authorities of other ~~States~~ states or foreign countries in designating an appropriate location for the deposition or testimony.

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

**SECTION 112. COOPERATION BETWEEN COURTS AND AUTHORITIES;
PRESERVATION OF RECORDS.**

(a) A court of this ~~State~~ state may request the appropriate court or authority of another ~~State~~ state or foreign country to:

(1) hold an evidentiary hearing;

(2) order a person to produce or give evidence pursuant to procedures of that ~~State~~ state or foreign country;

(3) order that an evaluation be made with respect to the custody of a child involved in a pending proceeding;

(4) forward to the court of this ~~State~~ state a certified copy of the transcript of the record of the hearing, the evidence otherwise presented, and any evaluation prepared in compliance with the request; and

(5) order a party to a child-custody or measure of protection proceeding or any person having physical custody of the child to appear in the proceeding with or without the child.

(b) ~~Upon~~ On request of a court or authority of another ~~State~~ state or foreign country, a court of this ~~State~~ state may hold a hearing or enter an order described in subsection (a).

(c) Travel and other necessary and reasonable expenses incurred under subsections (a) and (b) may be assessed against the parties according to the law of this ~~State~~ state.

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

[ARTICLE] 2

JURISDICTION

Introductory Comment

In this article I have referred, almost exclusively to “child-custody determinations” and “courts.” The reason is that “measures of protection” and “authorities” are discussed in relation to convention countries in Article 4. Therefore when looking outward in this article the reference is always to nonconvention countries and not to convention countries which are covered under Article 4.

SECTION 201. INITIAL CHILD-CUSTODY JURISDICTION.

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

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

(2) a court of another ~~State~~ state or nonconvention country does not have jurisdiction under paragraph (1), or a court of the home ~~State~~ state or nonconvention country of

the child has declined to exercise jurisdiction on the ground that this State state is the more appropriate forum under Section 207 or 208, and:

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

(B) substantial evidence is available in this State state concerning the child’s 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 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 state or nonconvention country 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 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.

Additional Comment

Article 2 deals only with child custody determination and covers both states and nonconvention countries, except in so far as the latter are dealt with under Article 4. It is not necessary to talk about “authorities” or “measures” for this article since it is to be applied to nonconvention countries in exactly the same way as before the revision. Therefore we only need to refer to courts and to child custody determinations.

SECTION 202. EXCLUSIVE, CONTINUING JURISDICTION.

(a) Except as otherwise provided in Section 204, a court of this ~~State~~ 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~~ 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~~ state and that substantial evidence is no longer available in this ~~State~~ state concerning the child's care, protection, training, and personal relationships; or

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

(b) A court of this ~~State~~ 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~~ state may not modify a child-custody determination made by a court of another ~~State~~ state or nonconvention country unless a court of this ~~State~~ state has jurisdiction to make an initial determination under Section 201(a)(1) or (2) and:

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

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

SECTION 204. TEMPORARY EMERGENCY JURISDICTION. Except as otherwise provided in Section 407, the following rules apply:

(a)(1) A court of this State state has temporary emergency jurisdiction if the child is present in this State 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)(2) If there is no previous child-custody determination that is entitled to be enforced under this ~~[Act]~~ [act] and a child-custody proceeding has not been commenced in a court of a State state or nonconvention country 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 state or nonconvention country 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 state or nonconvention country 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 state becomes the home State state of the child.

(c)(3) If there is a previous child-custody determination that is entitled to be enforced under this ~~[Act]~~ [act], or a child-custody proceeding has been commenced in a court of a State state or nonconvention country having jurisdiction under Sections 201 through 203, any order issued by a court of this State state under this section must specify in the order a period that the

court considers adequate to allow the person seeking an order to obtain an order from the State state or nonconvention country having jurisdiction under Sections 201 through 203. The order issued in this State state remains in effect until an order is obtained from the other State state within the period specified or the period expires or the court recognizes an order obtained from a nonconvention country.

(d)(4) A court of this State state which has been asked to make a child-custody determination under this section, ~~upon~~ on being informed that a child-custody proceeding has been commenced in, or a child-custody determination has been made by, a court of a State state or nonconvention country having jurisdiction under Sections 201 through 203, shall immediately communicate with the other court. A court of this State state which is exercising jurisdiction pursuant to Sections 201 through 203, ~~upon~~ on being informed that a child-custody proceeding has been commenced in, or a child-custody determination has been made by, a court of another State state or nonconvention country under a statute similar to this section shall immediately communicate with the court of that State state or nonconvention country to resolve the emergency, protect the safety of the parties and the child, and determine a period for the duration of the temporary order.

Additional Comment

Subparagraph (3) restates the convention rule that emergency orders from this state remain in effect until the order from the nonconvention country is recognized by this state.

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

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

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

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

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

SECTION 206. SIMULTANEOUS PROCEEDINGS.

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

(b) Except as otherwise provided in Section 204, a court of this State state, before hearing a child-custody proceeding, shall examine the court documents and other information supplied by the parties pursuant to Section 209. If the court determines that a child-custody proceeding has been commenced in a court in another State state or nonconvention country having jurisdiction substantially in accordance with this ~~[Act]~~ [act], the court of this State state shall stay its proceeding and communicate with the court of the other State state or nonconvention country. If

the court of the ~~State~~ state or nonconvention country having jurisdiction substantially in accordance with this ~~[Act]~~ [act] does not determine that the court of this ~~State~~ state is a more appropriate forum, the court of this ~~State~~ state shall dismiss the proceeding.

(c) In a proceeding to modify a child-custody determination, a court of this ~~State~~ state shall determine whether a proceeding to enforce the determination has been commenced in another ~~State~~ state or nonconvention country. If a proceeding to enforce a child-custody determination has been commenced in another ~~State~~ state or nonconvention country, the court may:

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

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

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

SECTION 207. INCONVENIENT FORUM. Except as otherwise provided in Section 406, the following rules apply:

~~(a)~~(1) A court of this ~~State~~ state which has jurisdiction under this ~~[Act]~~ [article] to make a child-custody determination may decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances and that a court of another ~~State~~ state or nonconvention country is a more appropriate forum. The issue of inconvenient forum may be raised upon motion of a party, the court's own motion, or request of another court.

~~(b)~~(2) Before determining whether it is an inconvenient forum, a court of this ~~State~~ state shall consider whether it is appropriate for a court of another ~~State~~ state or nonconvention country

to exercise jurisdiction. For this purpose, the court shall allow the parties to submit information and shall consider all relevant factors, including:

(1)(A) whether domestic violence has occurred and is likely to continue in the future and which State state or nonconvention country could best protect the parties and the child;

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

(3)(C) the distance between the court in this State state and the court in the State state or nonconvention country that would assume jurisdiction;

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

(5)(E) any agreement of the parties as to which State state or nonconvention country should assume jurisdiction;

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

(7)(G) the ability of the court of each State state or nonconvention country to decide the issue expeditiously and the procedures necessary to present the evidence; and

(8)(H) the familiarity of the court of each State state or nonconvention country with the facts and issues in the pending litigation.

(c)(3) If a court of this State state determines that it is an inconvenient forum and that a court of another State state or nonconvention country is a more appropriate forum, it shall stay the proceedings upon condition that a child-custody proceeding be promptly commenced in another designated State state or nonconvention country and may impose any other condition the court considers just and proper.

(d)(4) A court of this State state may decline to exercise its jurisdiction under this [Act]

[act] if a child-custody determination is incidental to an action for divorce or another proceeding while still retaining jurisdiction over the divorce or other proceeding.

Additional Comment

Convenient forum, or transfer of jurisdiction, involving convention countries, is covered in Article 4 in Section 406.

SECTION 208. JURISDICTION DECLINED BY REASON OF CONDUCT.

(a) Except as otherwise provided in Section 204 [or by other law of this State state], if a court of this State state has jurisdiction under this [~~Act~~] [article] because a person seeking to invoke its jurisdiction has engaged in unjustifiable conduct, the court shall decline to exercise its jurisdiction unless:

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

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

(3) no court of any other State state or nonconvention country would have jurisdiction under the criteria specified in Sections 201 through 203.

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

(c) If a court dismisses a petition or stays a proceeding because it declines to exercise its

jurisdiction pursuant to subsection (a), it shall assess against the party seeking to invoke its jurisdiction necessary and reasonable expenses including costs, communication expenses, attorney's fees, investigative fees, expenses for witnesses, travel expenses, and child care during the course of the proceedings, unless the party from ~~whom~~ which fees are sought establishes that the assessment would be clearly inappropriate. The court may not assess fees, costs, or expenses against this ~~State~~ state unless authorized by law other than this ~~[Act]~~ [act].

SECTION 209. INFORMATION TO BE SUBMITTED TO COURT.

(a) [Subject to [local law providing for the confidentiality of procedures, addresses, and other identifying information], in] [In] a child-custody, or measure of protection proceeding, each party, in its first pleading or in an attached affidavit, shall give information, if reasonably ascertainable, under oath as to the child's present address or whereabouts, the places where the child has lived during the last five years, and the ~~names and present addresses of the persons~~ name and present address of each person having physical custody with whom the child has lived during that period. The pleading or affidavit must state whether the party:

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

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

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

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

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

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

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

SECTION 210. APPEARANCE OF PARTIES AND CHILD.

(a) In a child-custody or measure of protection proceeding in this ~~State~~ state, the court may order a party to the proceeding ~~who~~ that is in this ~~State~~ state to appear before the court in person with or without the child. The court may order any person ~~who~~ that is in this ~~State~~ state and who has physical custody or control of the child to appear in person with the child.

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

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

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

SECTION 211. FINDINGS AND CONCLUSIONS.

(a) If requested by a party, a court of this state that makes a child-custody determination or orders a measure of protection under this [act] shall include in the determination or measure the court's findings and conclusions on the following:

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

(2) the manner in which notice and opportunity to be heard were given to each person entitled to notice of the proceeding;

(3) the opportunity for the child to be heard or the reasons why the child was not heard; and

(4) the habitual residence of the child.

(b) A child-custody determination or measure of protection made under this [act] may be amended to include the findings and conclusions described in subsection (a).

Comment

Related to Convention: Article 24: This section was proposed by the drafting committee. The drafting committee determined that it should be placed at the end of Article 2. It is meant to help those parents who contemplate foreign enforcement of a United States custody determination or measure of protection, particularly under the 1996 Convention. It is important that a court not only make the conclusions set out in this section, but also the findings of fact underlying those conclusions. This is because Article 24 of the convention requires that the requested state is bound by the findings of fact on which another convention states based its jurisdiction. These findings and conclusions will be extremely helpful to an American parent seeking to enforce abroad a measure taken by a United States court.

Subsection (b) makes it clear that a child custody determination or a measure of protection can be amended to include the findings and conclusions without the risk of the amendments being called a modification.

[ARTICLE] 3

ENFORCEMENT

SECTION 301. DEFINITIONS. In this [article]:

(1) “Petitioner” means a person ~~who~~ that seeks enforcement of an order for return of a child under the Hague Convention on the Civil Aspects of International Child Abduction or ~~enforcement of a child-custody determination,~~ or a measure of protection issued by an authority of a convention country.

(2) “Respondent” means a person against ~~whom~~ which a proceeding has been commenced for enforcement of an order for return of a child under the Hague Convention on the Civil Aspects of International Child Abduction, ~~or enforcement of a child-custody determination,~~ or a measure of protection issued by an authority of a convention country.

Additional Comment

The drafting committee determined that the registration and enforcement provisions of article 3 ought to apply to the registration and enforcement of a measure of protection taken by a convention country. This necessitated some minor tweaks to some of the sections of article 3. In

this section the term petitioner and respondent has been further defined to include those persons seeking enforcement or against whom enforcement is sought of a measure of protection from a convention country.

SECTION 302. ENFORCEMENT UNDER HAGUE CONVENTIONS. Under this [article], a court of this ~~State~~ state may enforce an order for the return of ~~the~~ a child made under the Hague Convention on the Civil Aspects of International Child Abduction or a measure of protection issued by a convention country as if it were a child-custody determination.

SECTION 303. DUTY TO ENFORCE.

(a) A court of this ~~State~~ state shall recognize and enforce a child-custody determination of a court of another ~~State~~ state or nonconvention country if the latter court exercised jurisdiction in substantial conformity with this ~~[Act]~~ [act] or the determination was made under factual circumstances meeting the jurisdictional standards of this ~~[Act]~~ [Article] 2 and the determination has not been modified in accordance with this ~~[Act]~~ [Article] 2.

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

[(c) A court of this state need not apply this [article] if the child custody law of a non convention country violates fundamental principles of human rights.,)] [and] [or] [a court finds, after taking into account the best interests of the child, the child custody law of the nonconvention country is manifestly contrary to the public policy of this state.]

Additional Comment

Subsection (c) is bracketed. It relates to the brackets around Section 105. If 105 is eliminated then a provision like this should be inserted in this section.

SECTION 304. TEMPORARY VISITATION.

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

(1) a visitation schedule made by a court of another State state or [nonconvention] [foreign] country; or

(2) the visitation provisions of a child-custody determination of another State state or [nonconvention] [foreign] country that does not provide for a specific visitation schedule.

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

SECTION 305. REGISTRATION OF CHILD-CUSTODY DETERMINATION AND MEASURE OF PROTECTION.

(a) A child-custody determination issued by a court of another State state or nonconvention country, or a measure of protection issued by a convention country, may be registered in this State state, with or without a simultaneous request for enforcement, by sending to [the appropriate court] in this State state:

(1) a letter or other document requesting registration;

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

(3) except as otherwise provided in Section 209, the name and address of the

person seeking registration and any parent or person acting as a parent who has been awarded custody or visitation in the child-custody determination or measure sought to be registered.

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

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

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

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

(1) a registered determination or measure is enforceable as of the date of the registration in the same manner as a determination or measure issued by a court of this ~~State~~ state;

(2) a hearing to contest the validity of the registered determination or measure must be requested ~~within~~ not later than 20 days after service of notice; and

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

(d) A person seeking to contest the validity of a registered order ~~must~~ shall request a hearing ~~within~~ not later than 20 days after service of the notice. At that hearing, the court shall confirm the registered order unless the person contesting registration establishes that:

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

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

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

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

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

Comment

Section 414 directs a court to use the procedure of article 3 for recognition and enforcement of measures of protection from convention countries. The language of this section has been amended to add “measure of protection” after the term “child-custody determination” to reflect that this section applies to measures of protection. In addition the section has been amended to include reference to nonconvention and convention countries where appropriate, as well as add the term “authority” after “court.”

Other amendments made to this section has been to broaden the jurisdiction terminology from “article 2” to “this act.” The effect of this is that if registration is sought from a nonconvention country it is a defense that the issuing court did not have jurisdiction under article 2. If registration is sought of a measure of protection issued by a convention country, it is a defense that the issuing authority did not have jurisdiction under article 4.

SECTION 306. ENFORCEMENT OF REGISTERED DETERMINATION AND MEASURE.

(a) A court of this ~~State~~ state may grant any relief normally available under the law of this ~~State~~ state to enforce a registered child-custody determination made by another state or nonconvention country, or a registered measure of protection made by a court of another State

~~state or foreign country~~ an authority of a convention country;

(b) A court of this ~~State~~ state shall recognize and enforce, but may not modify, except in accordance with ~~[Article] 2~~ this [act], a registered child-custody determination of another state or nonconvention country, or measure of protection of a convention country ~~court of another State.~~

Comment

The changes to this section were necessitated by the reference in 414 to use the registration and enforcement proceedings of this article. Therefore some amendments were necessary to ensure that a registered measure of protection was treated the same as a registered custody-determination. This section is concerned with enforcement of registered measure and child-custody determination with the preclusive effect of section 305, while sections 303 and 412 contain a general obligation to recognize and enforce a measure of protection and a child-custody determination.

SECTION 307. SIMULTANEOUS PROCEEDINGS. If a proceeding for enforcement under this [article] of a child-custody determination or a measure of protection is commenced in a court of this ~~State~~ state and the court determines that a proceeding to modify ~~the~~ a determination or measure is pending in a court of another ~~State~~ state, or before an authority in a foreign country, having jurisdiction to modify the determination or measure under ~~[Article] 2~~ this [act], the enforcing court shall immediately communicate with the modifying court or authority. The proceeding for enforcement continues unless the enforcing court, after consultation with the modifying court or authority, stays or dismisses the proceeding.

Comment

This section has been amended to apply the simultaneous proceeding section on the relationship between the modification court and the enforcement court to a measure of protection under the convention. This is not mandated by the convention, nor was it discussed by the drafting committee. However, the same considerations which lead to the original drafting of this section are present with regard to convention countries and well as nonconvention countries. This is an issue the drafting committee should consider at its next meeting.

SECTION 308. EXPEDITED ENFORCEMENT OF CHILD-CUSTODY

DETERMINATION AND MEASURE OF PROTECTION.

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

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

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

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

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

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

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

(6) if the child-custody determination or measure has been registered and

confirmed under Section 305, the date and place of registration.

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

(d) An order issued under subsection (c) must state the time and place of the hearing and advise the respondent that at the hearing the court will order that the petitioner may take immediate physical custody of the child and the 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:

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

(A) the issuing court or authority did not have jurisdiction under ~~[Article] 2~~ this [act];

(B) the child-custody determination or measure for which enforcement is sought has been vacated, stayed, or modified by a court or authority having jurisdiction to do so under ~~[Article] 2~~ this [act]; or

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

(2) the child-custody determination or measure for which enforcement is sought was registered and confirmed under Section 304, but has been vacated, stayed, or modified by a court or authority of a ~~State~~ state or foreign country having jurisdiction to do so under ~~[Article] 2~~ this [act].

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

SECTION 310. HEARING AND ORDER.

(a) Unless the court issues a temporary ~~emergency~~ order pursuant to Section 204 or 407, ~~upon~~ on a finding that a petitioner is entitled to immediate physical custody of the child, the court shall order that the petitioner may take immediate physical custody of the child unless the respondent establishes that:

(1) the child-custody determination or measure of protection has not been registered and confirmed under Section 305 and that:

(A) the issuing court or authority did not have jurisdiction under ~~[Article] 2~~ this [act];

(B) the child-custody determination or measure for which enforcement is sought has been vacated, stayed, or modified by a court or authority of a ~~State~~ state or foreign country having jurisdiction to do so under ~~[Article] 2~~ this [act]; or

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

(2) the child-custody determination or measure for which enforcement is sought was registered and confirmed under Section 305 but has been vacated, stayed, or modified by a court or authority of a ~~State~~ state or foreign country having jurisdiction to do so under ~~[Article] 2~~ this [act].

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

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

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

SECTION 311. WARRANT TO TAKE PHYSICAL CUSTODY OF CHILD.

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

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

statements required by Section 308(b).

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

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

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

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

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

(e) A warrant to take physical custody of a child is enforceable throughout this ~~State~~ state. If the court finds on the basis of the testimony of the petitioner or other witness that a less intrusive remedy is not effective, it may authorize law enforcement officers to enter private property to take physical custody of the child. If required by exigent circumstances of the case, the court may authorize law enforcement officers to make a forcible entry at any hour.

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

SECTION 312. COSTS, FEES, AND EXPENSES.

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

(b) The court may not assess fees, costs, or expenses against a ~~State~~ state or foreign country unless authorized by law other than this ~~[Act]~~ [act].

SECTION 313. RECOGNITION AND ENFORCEMENT. A court of this ~~State~~ state shall accord full faith and credit to an order issued by another ~~State~~ state or foreign country and consistent with this ~~[Act]~~ [act] which enforces a child-custody determination or measure of protection by a court or authority of another ~~State~~ state or foreign country unless the order has been vacated, stayed, or modified by a court or authority having jurisdiction to do so under ~~[Article]~~² this [act].

SECTION 314. APPEALS. An appeal may be taken from a final order in a proceeding under this [article] in accordance with [expedited appellate procedures in other civil cases]. Unless the court enters a temporary emergency order under Section 204 or 407, the enforcing court may not stay an order enforcing a child-custody determination or measure of protection pending appeal.

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

(a) In a case arising under this ~~[Act]~~ [act] or involving the Hague Convention on the Civil Aspects of International Child Abduction, the [prosecutor or other appropriate public official] may take any lawful action, including resort to a proceeding under this [article] or any other available civil proceeding to locate a child, obtain the return of a child, or enforce a child-custody determination or measure of protection if there is:

- (1) an existing child-custody determination or measure;
- (2) a request to do so from a court in a pending child-custody or measure of protection proceeding;

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

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

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

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

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

[ARTICLE] 4

PROCEEDINGS UNDER CONVENTION

Introductory Comment

This Article applies exclusively to cases that fall under 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. It applies to cases between states of the United States and foreign countries in which the Convention is in force. It also applies to cases between states of the United States and foreign countries in which the convention is not in force to the extent that the convention requires special treatment for such countries. The Article has no application to cases between states of the United States.

SECTION 401. SCOPE.

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

(1) the attribution, exercise, termination, delegation, or restriction of parental responsibility;

(2) rights of custody, including:

(A) rights relating to the care of the person of the child and,

(B) determining the place of residence of the child;

(3) rights of access or visitation, including the right to take the child for a limited period to a place other than the habitual residence of the child;

(4) guardianship of the person of the child, and any similar relationship;

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

(6) governmental supervision of an individual having charge of the person of the child; and

(7) placement of the child in foster care, institutional care, or a similar relationship.

(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) public benefits, including social security;
- (8) general governmental decisions regarding education or health;
- (9) measures resulting from an offense committed by a child; [or]
- (10) decisions on rights of asylum and immigration]; or
- (11) property of a child].

(c) If a provision of this [article] is inconsistent with [Articles] 1 through 3, this [article] controls.

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. The term “proceeding in a court of this state” means that this article will apply to courts and not to measures that are governed by the convention that will have to be determined by administrative agencies and other governmental personnel. The federal implementing legislation will have to address those applications. This section also makes it clear that it applies only to proceedings that are governed by the Convention. The language follows the comparable section in UIFSA (2008)

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

The terms “rights of custody” and “rights of access are taken from the 1980 Hague Convention on the Civil Aspects of International Child Abduction. They should be given the same definition in applying this convention as they are given in applying the 1980 convention. Thus, for example, a ne exeat right would be treated as a right of custody under this convention just as it would under the 1980 convention. See *Abbott v. Abbott*, 130 S.Ct. 1983 (2010). The terms are particularly important in the application of section 407 and are broad enough to include most of the contemporary variations on word choice for custody. Thus parenting time, joint custody, and managing conservator are all terms used in various states to indicate who is entitled to make decisions concerning the child. If those decisions include rights relating to the care of the

child, and, in particular, the right to choose the child's residence it becomes a right of custody under this convention.

Subsection (c) is taken from UIFSA 2008 Section 702 and resolves any possibility of a conflict between earlier section of this Act and this article.

~~**SECTION 402. APPLICABILITY OF OTHER SECTIONS OF ACT.** [Except for sections 102, 105 through 112, 205, 206(c), 209, 210, 307, 309, and 312, through 317, [Articles] 1 through 3 do not apply to this [article].]~~

Comment

For this draft I have stricken this section. Given that all of the outward looking section of the act delineate whether they are applicable to states, states and nonconvention countries, or states and foreign countries, it is probably not necessary to have a section which sets out which other sections are applicable to this article

SECTION 402. HABITUAL RESIDENCE. A court of this state shall consider the following in determining the habitual residence of a child:

- (1) the length of time the child has been in a country, including whether this state is the home state of the child;
- (2) the social interactions of the child, including education, family relationships, peer relationships, and language;
- (3) the age and maturity of the child;
- (4) whether the presence of the child in a country is time limited or open ended; and
- (5) the intent of the parents of the child.

Comment

In accordance with the decision of the drafting committee, this is not a definition but rather a provision designed to give guidance to a court in making the determination of the habitual residence of the child. As determined by the Drafting Committee, the provision is also child centered, in that it focuses on the child and not on the child's parents. The intention of the child's

parents is listed as the last of the factors to be considered. No determination is made as to when it would be appropriate to consider the parents' intent, however, it will obviously be more important with extremely young children.

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

SECTION 403. MEASURE OF PROTECTION: JURISDICTION. Except as otherwise provided in Section 407, a court of this state may order or modify a measure of protection only if:

(1) the court has jurisdiction under Section 201 and the child is a habitual resident of the United States at the commencement of the proceeding;

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

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

(B) the child is a refugee; or

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

(3) an authority of a convention country with jurisdiction substantially in accord with paragraph (1) or (2) has decided to transfer jurisdiction to the court and the court decides that it is in the best interests of the child to assume jurisdiction.

Comment

Related to Convention: Arts. 5,6,8, and 9. This section relates primarily to articles 5 and 6

of the Convention. A state can also have jurisdiction, apart from habitual residence, if the child is present in this state and has no habitual residence. However, the Practical Handbook indicates that this determination should be avoided if at all possible. Jurisdiction is also proper if the child is present in the state and is a refugee or is internationally displaced. Finally, this state has jurisdiction if the convention country that would otherwise have jurisdiction has decided to transfer jurisdiction to this state and this state has accepted the transfer.

SECTION 404. SIMULTANEOUS PROCEEDINGS.

(a) Except as otherwise provided in Section 407, a court of this state may not exercise its jurisdiction under Section 403, 405 or 406 if the court determines that at the time the proceeding commenced, a proceeding was pending before an authority of a convention country having jurisdiction concerning a similar measure of protection and the measure is under consideration unless the authority declines to exercise its jurisdiction in favor of the court.

(b) If a court of this state which has jurisdiction under Section 403, 405, or 406 determines that a proceeding has been commenced later in a convention country having jurisdiction concerning a similar measure of protection, the court may decline jurisdiction.

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.

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.

SECTION 405. JURISDICTION IN CASE OF WRONGFUL REMOVAL OR RETENTION OF CHILD.

(a) A removal or retention of a child is wrongful if:

(1) it is in breach of a right of custody attributed to a person, either jointly or solely, under the law of the country of the child's habitual residence immediately before the removal or retention; and

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

(b) In this section, a right of custody may arise by operation of law, a judicial or administrative decision, or an agreement having legal effect under the law of the country of the child's habitual residence immediately before a removal or retention.

(c) A court of this state which has jurisdiction under Section 404 continues to have jurisdiction after a wrongful removal or retention of a child until the child acquires a new habitual residence, and:

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

or

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

(d) Except as otherwise provided in Section 407, a court of this state does not have jurisdiction over a child whose habitual residence in this state is the result of a wrongful removal or retention unless:

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

or

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

Comment

Relation to Convention, Art 7. The definition of wrongful removal or retention in this section does not specifically set out “institution or other body” as the term is used in the Convention, That is because the definition of the term “person” in section 102 includes “institution or other body” and therefore the terms would be redundant in this section.

The term “rights of custody” is also not defined in this section since it takes the definition that is set out in section 401 on scope. The term “rights of custody” does not include access or visitation or access rights as defined in the same section. This section is designed to prevent jurisdiction from transferring following a wrongful removal or retention as set out in the 1980 convention. Therefore, the terms of “rights of custody,” exercise of custody,” acclimated’, etc will take on the same meaning here that they have in the 1980 convention.

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

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

SECTION 406. TRANSFER OF JURISDICTION.

(a) If a court of this state has jurisdiction under Section 404(1) or (2) and determines that an authority in another convention country is in a better position to assess the best interests of the child, the court may:

(1) request that the authority assume jurisdiction over all or part of the case; or

(2) stay the case to allow the parties to request that the authority exercise jurisdiction.

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

(c) Before determining whether jurisdiction should be transferred under subsection (a), a court of this state shall allow the parties to submit information and shall consider all relevant factors, including:

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

(2) the length of time the child has resided outside the United States;

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

(4) the financial circumstances of the parties;

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

(6) the nature and location of evidence required to resolve the issues in the case, including testimony of the child;

(7) the ability of the authorities of each convention country to present evidence and

decide the case expeditiously;

(8) the procedures available in each convention country necessary to present evidence; and

(9) the familiarity of the authorities of each convention country with the facts and issues in the proceeding.

(d) Jurisdiction may be transferred under this section only to an authority in a convention country:

(1) of which the child is a national;

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

or

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

(e) A court of this state may request or invite the parties to request the appropriate authority of the convention country of the habitual residence of a child to transfer jurisdiction to the court if the court believes it can better assess the best interests of the child if:

(1) the child is a national of the United States;

(2) a divorce or annulment proceeding concerning the parents of the child is pending in this state; or

(3) this state has a substantial connection to the child.

(f) A court of this state may communicate with the authority of the convention country of the habitual residence of the child with regard to a request under subsection (e).

(g) A court of this state may not assume jurisdiction following a request under subsection (e) until the authority of the convention country of the habitual residence of the child decides to

transfer jurisdiction to the court.

Comment

Relation to Convention, Arts 8,9.

Subsection (c) is material that is contained in Section 207. This section should provide guidance to a court in determining whether it is appropriate to transfer jurisdiction in the same way that 207 provides guidance in terms of whether a court should find that it is an inconvenient forum. The factors of this section can also be used to determine whether another convention country has a significant connection to the child. The convention does not provide a procedure for determining when a court decides that another state should transfer or receive jurisdiction. Therefore it would not be inconsistent with the Convention to add such a provision.

That part of article 8 of the Convention that requires a court to determine whether it is in the best interests of the child for it to receive jurisdiction is covered in section 404(3).

It should be noted that subsection (e) follows the convention in that it allows a court of this state to request the appropriate authority of the child's habitual residence to consider transferring the case to a court of this state. It does not authorize a court of this state to request transfer from an authority who is exercising jurisdiction on a basis other than habitual residence.

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

SECTION 407. MEASURE OF PROTECTION: TEMPORARY JURISDICTION.

(a) In an urgent situation a court of this state has temporary jurisdiction to order a measure of protection if necessary to protect a child present in this state, including when the child has been abandoned or if it is necessary 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) A measure of protection ordered under subsection (a) regarding a child habitually resident in a convention country expires when an authority of the country with jurisdiction over the child orders a measure of protection with respect to the child.

(c) An measure of protection ordered under subsection (a) regarding a child habitually resident in a nonconvention country expires when the court recognizes a measure ordered by the authority of the nonconvention country.

Comment

Related to Convention: Art. 11. This section tracks article 11 of the Convention. The scope of this section is wider than the scope of section 204. The term “urgent” covers more situations than the comparable term “emergency” as found in section 204. According to the Practical Handbook this means that this section can be used to fill in the gaps of the 1980 Hague Convention on the Civil Aspects of International Child Abduction. Thus if a court of a country that is requested to return the child under the 1980 convention might decide to return the child only if the child is protected from the left behind parent on return. Or, it might decide to return the child only if the left behind parent provides certain undertaking with regard to financial commitments to child and the other parent. These orders are described as “urgent” and since they are properly taken under this section are entitled to enforcement in the country of the habitual residence of the child until modified. See the Practical Handbook, ¶6.11. Although United States courts have authority to issue provisional order under the International Child Abductions Remedies Act, 42 U.S.C. §11604, there is no basis for enforcement of these orders abroad except by this convention.

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

SECTION 408. DURATION OF MEASURE. Except as otherwise provided in Section 407 the following rules apply:

(1) A measure of protection ordered by a court of this state with jurisdiction under Section 403, 405, or 406 remains in force even if a change of circumstances has eliminated the jurisdictional basis of the measure, until terminated, modified, or replaced by a measure of an

authority of a convention country with jurisdiction or of the nonconvention country of the habitual residence of the child.

(2) A measure of protection ordered by an authority of a convention country with jurisdiction remains in force even if a change of circumstances has eliminated the jurisdictional basis of the measure, until terminated, modified, or replaced by a measure of a court of this state with jurisdiction under this [act], an authority of a convention country with jurisdiction, or the nonconvention country of the habitual residence of the child.

Comment

Related to Convention, Art 14, 23(2)(e). This is a familiar principle and is found in both UIFSA and the UCCJEA. An order made with appropriate jurisdiction continues to be enforceable even after the jurisdictional basis of the order disappears. The order is enforceable until modified by a court with appropriate jurisdiction under this article, or until a situation arises whereby another order can be recognized under the recognition sections. This would occur when the original order is modified by either a court with jurisdiction under this article or by an authority of the nonconvention state of the child's habitual residence.

This section implements Article 23(2)(e) which specifically sets out a rule allowing for non-recognition of an order from a convention country if it is incompatible with a later order from the nonconvention country of the child's habitual residence.

SECTION 409. CONFLICT OF LAWS.

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

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

(c) To protect a child, a court of this state may apply or take into consideration the law of another country which has a substantial relationship to the case.

(d) If this state becomes the habitual residence of a child, the law of this state governs the

application in this state of a measure of protection taken in a convention country of the former habitual residence of child.

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

(f) A court of this state may refuse to apply the law designated by this section only if the court finds, after taking into account the best interests of the child, the law is manifestly contrary to the public policy of this state.

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.

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 very 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. This provision 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.

Subsection (c) draws a distinction between the existence of the measures and the method of application of the measure in a particular country when the child's habitual residence changes as required by Article 15(3). In other words, the distinction is the equivalent of the distinction

between the law governing the validity of a contract and the performance of a contract. The substantive law governing, for example, visitation, is that of the forum. However, the conditions for carrying out the visitation arrangements are that of the child's new habitual residence. This is particularly apt, according to the explanatory report in those situations where the original determination was made by the child's habitual residence and then child's habitual residence changes. The explanatory report acknowledges that there is not a clear line between the establishment of a measure and the means of carrying out the measure and suggests that the line will have to be drawn on a case-by-case basis.

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

SECTION 410. CONFLICT OF LAWS RULES REGARDING PARENTAL RESPONSIBILITY.

(a) Except as otherwise provided in subsection (c), in this section "law" means the law in force in a state or foreign country other than its conflict of laws rules.

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

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

(1) Attribution or extinction of parental responsibility of a child by operation of law, without the intervention of an authority, is governed by the law of the country of the habitual residence of the child.

(2) Attribution or extinction of parental responsibility of a child by agreement or a unilateral act, without the intervention of an authority, is governed by the law of the country of the

habitual residence of the child at the time the agreement or unilateral act takes effect.

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

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

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

(f) A court of this state may refuse to apply the law designated by this section only if the court finds, after taking into account the best interests of the child, the law is manifestly contrary to the public policy of this state.

Comment

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

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

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

Subsection (d) restates Article 18 that the parental responsibility established by this section

may be modified by a measure under this article.

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

SECTION 411. DUTY TO RECOGNIZE MEASURE OF PROTECTION

ORDERED IN A CONVENTION COUNTRY.

(a) A court of this state shall recognize and enforce a measure of protection ordered by a an authority in convention country if:

(1) the convention country exercised jurisdiction in substantial conformity with this [article] or the measure of protection was ordered under factual circumstances meeting the jurisdictional standards of this [article]; and

(2) the determination has not been modified in accordance with this [article].

(b) Even if a child is not habitually resident in the country, the recognition required by subsection (a) applies to a measure of protection ordered by an authority in a convention country that had jurisdiction over the divorce or annulment of the marriage of the parents of the child if:

(1) the law of the convention country so provides;

(2) one of the parents was habitually resident in the country;

(3) at least one of the parents had parental responsibility of the child at the time the proceedings for divorce or annulment was commenced; and

(4) the jurisdiction of the authority that decided the divorce or annulment was

agreed to by the parents or any other person with parental responsibility.

[(c) A court of this state need not apply this section if the measure of protection law of a convention country violates fundamental principles of human rights.,] [and] [or] [the court finds, after taking into account the best interests of the child, the measure of protection law is manifestly contrary to the public policy of this state.]

Comment

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

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

The jurisdiction authorized under Article 10 for the authority having jurisdiction of the divorce or annulment ceases when the divorce or annulment proceedings end. There is no continuing jurisdiction under the convention. Therefore proceeding to modify the determination made by the divorce authority are governed by Section 403.

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

A family are habitually resident in Contracting State A. Following the breakdown of the parents' relationship, the court in Contracting State A, with the agreement of the father, grants the mother sole custody of the child. A year later, the mother lawfully moves with the child to Contracting State B. She wishes to enroll the children in school. Her sole custody of the child which will allow enrollment in

school will be recognized by operation of law in Contracting State B without her taking any further action. She will not have to apply to the judicial or administrative authorities in Contracting State B for recognition of the custody order.

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

Subsection (c) relates to Section 105. If Section 105 is eliminated then we should insert a provision here that would provide a defense to recognition of measures of protection when the law underlying the measure of protection violates fundamental principles of human rights.

SECTION 412. REGISTRATION AND ENFORCEMENT OF CONVENTION

MEASURE.

(a) A measure of protection that is entitled to be recognized and enforced under this [article] is recognized and enforced under Sections 305 through 317.

(b) A court of this state is bound by the findings of fact on which the authority of the convention country based its jurisdiction.

(c) A court of this state may use any remedy available under law of this state other than this act to enforce a measure of protection made by an authority of a convention country. The remedies provided in this [act] are cumulative and do not affect the availability of other remedies to enforce a measure.

Comment

Related to Convention: Arts. 23, 24, 25, 26, 28. This section requires that the standards and procedure for recognition and enforcement of measures of protection from convention countries will be subject to the requirements as recognition of child-custody determinations from other states and nonconvention countries. Under the convention this is possible because the defenses to recognition set out in Article 23(2) of the convention are permissive defenses and not mandatory defenses. Three of the defenses are already recognized by Article 3. They are lack of appropriate jurisdiction, failure to give notice, and incompatibility with a later measure that is

entitled to be recognized. See also Section 409. A fourth defense is contained in Section 105(d) in that the measure violates fundamental principles of human rights. The remaining two defenses are that the child was not give an opportunity to be heard in violation of fundamental rules of procedure of the forum and that this state was not consulted before a child is placed in this state for a foreign child placing authority. These defenses are waived in this enactment.

SECTION 413. COOPERATION WITH CONVENTION COUNTRY. Before placing a child in foster care, institutional care, or a similar situation in a convention country, a court of this state shall:

- (1) consult with the appropriate authority in the country; and
- (2) obtain consent to the placement by the appropriate authority in the country.

SECTION 414. SUITABILITY TO EXERCISE VISITATION. A parent who is a party to a case in this state who is seeking to obtain or maintain visitation and 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 request a court to stay the case pending receipt of information regarding suitability. The court shall consider the information in making a decision on visitation.

Comment

Related to the Convention, Arts 33, 35.

[ARTICLE] 45

MISCELLANEOUS PROVISIONS

SECTION 401501. UNIFORMITY OF APPLICATION AND CONSTRUCTION.

In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

SECTION 502. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND

NATIONAL COMMERCE ACT. This [act] modifies, limits, and supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001, et seq., but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

SECTION ~~405~~ 503. TRANSITIONAL PROVISION. A motion or other request for relief made in a child-custody proceeding or to enforce a child-custody determination which was commenced before the effective date of this [act] is governed by the law in effect at the time the motion or other request was made.

[**SECTION ~~402~~ 504. SEVERABILITY.** If any provision of this [act] or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this [act] which can be given effect without the invalid provision or application, and to this end the provisions of this [act] are severable.]

***Legislative Note:** Include this section only if this state lacks a general severability statute or a decision by the highest court of this state stating a general rule of severability.*

SECTION ~~403~~ 505. EFFECTIVE DATE. This [Act] takes effect