To: Battle R. Robinson, Chair UIFSA Standby Committee;
cc Harry l. Tindall, Chair, Joint Editorial Board on Family Law
From: John J. Sampson, UIFSA Reporter
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ACCOMODATING UIFSA TO THE NEW HAGUE MAINTENANCE CONVENTION

I. NEGOTIATING A NEW MAINTENANCE CONVENTION

In response to a recommendation by Battle Robinson, Chair of the standby committee for UIFSA and several other individuals, the executive committee of NCCUSL appointed a drafting committee to examine UIFSA in conjunction with the proposed Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance. Note the international definition of maintenance goes beyond child and spousal support to include, at least theoretically, a wide variety on intrafamily support obligations. Mary Helen Carlson, leader of the U.S. State Department delegation to the Hague Conference on International Private Law, advises that after four years of negotiations, the fifth and final meeting, known as the "diplomatic session," will be held for three weeks in November, 2007.

At least in part, the timing is designed with the United States in mind; this will avoid postponing the diplomatic session to an indefinite time in 2008, which would certainly end all chance of the new maintenance convention being dealt with by the current administration. Ms. Carlson notes that a learning period is required whenever there is a change of administrations, irrespective of party, in order for the new people to give informed consideration of the topic. Further, Ms. Carlson is of the opinion that there is a real chance that the new convention will be signed by President Bush, and perhaps even ratified by the U.S. Senate in 2008.

Given the nature of the negotiations since 2003, it seems virtually certain that the European Commission [EC], which has jurisdiction over maintenance issues, will commit all 25 countries of the European Union [EU] to the new convention. This could happen relatively soon after its promulgation. Thereafter, because the EU countries, plus the Canadian provinces, Australia and New Zealand are the sources of the overwhelming majority of maintenance orders received by U.S. tribunals, the terms of the new

convention will assuredly affect the text of those orders. In short, even if the President does not sign and the U.S. Senate does not promptly (or ever) ratify the new convention, it will have an impact on maintenance orders received in the U.S. In the past, Congress has taken the view that entry into a Hague treaty by the U.S. should be supported by federal law, see the Hague Abduction and Adoption Conventions. If a uniform act is available for Congress to rely on, the possibility of swift action may be enhanced.

II. THE BASIC TERMS OF JURISDICTION UNDER THE NEW MAINTENANCE CONVENTION

Although three weeks of negotiations remain before the final draft will emerges, in fact the latest draft is substantially complete. Prelim. Doc. No. 29, dated June 2007, is attached as a pdf file (print as "letter" because European paper sizes sometimes confuse U.S. printers).

The good news is that the new convention will resolve many issues of consequence for U.S. law. The first hurdle to overcome was the fact that virtually every nation in the world, except the U.S, believes that child support and spousal support are appropriately dealt with by the forum located in the residence of the child or the obligee—known internationally as the "creditor." In addition, the obligee also has the choice of seeking maintenance in the forum of the obligor—the "debtor." This "child-based" jurisdiction is at odds with the well-established jurisdictional view in the U.S. which holds that the obligor must be subject to the personal jurisdiction of the issuing forum in order to be bound by the terms of a maintenance order, *Kulko v. Superior Court*, 436 U.S. 84 (1978). The new maintenance convention provides a satisfactory accommodation for this difference in jurisdictional approaches by including a specific provisions that reconcile the two views to the maximum extent possible, as follows:

Section V. Article 17 Bases for recognition and enforcement

1. A decision made in one Contracting State ("the State of origin") shall be recognized and enforced in other Contracting Sates if

a) the respondent was habitually resident in the State of origin at the time proceedings were instituted;

b) the respondent has submitted to the jurisdiction either expressly or by defending on the merits of the case without objecting to the jurisdiction at the first available opportunity;

c) the creditor was habitually resident in the State of origin at the time proceedings were instituted;

d) the child for whom maintenance was ordered was habitually resident in the State of origin at the time proceedings were instituted, provided that the respondent has lived with the child in that State or has resided in that State and provided support for the child there;

e) except in disputes relating to maintenance obligations in respect of children, there has been agreements to the jurisdiction in writing by the parties; or

f) the decision was made by an authority exercising jurisdiction on a matter of personal status or parental responsibility, unless that jurisdiction was based solely on the nationality of one of the parties.

2. A Contracting State may make a reservation, in accordance with Article 57, in respect of paragraph 1c), e) or f).

3. A Contracting State making a reservation under paragraph 2 shall recognize and enforce a decision if its law would in similar factual circumstances confer or would have conferred jurisdiction on its authorities to make such a decision.

4. A Contracting State shall, if recognition of a decision is not possible as a result of a reservation under paragraph 2, and if the debtor is habitually resident in that State, take all appropriate measures to establish a decision.

The preceding sentence does not apply to direct applications for recognition and enforcement under Article 16 (5) unless a new application is made under Article 10 (1) d).

5. A decision in favour of a child under the age of 18 which cannot be recognized by virtue only of a reservation under Article 17(1) c), e) or f) shall be accepted as establishing the eligibility of that child for maintenance in the requested State.

6. A decision shall be recognized only if it has effect in the State of origin, and shall be enforced only if it is enforceable in the State of origin.

Article 18 Severability and partial recognition and enforcement

1. If the State addressed is unable to recognize or enforce the whole of the decision it shall recognize or enforce any severable part of the decision which can be so recognized or enforced.

2. Partial recognition or enforcement of a decision can always be applied for.

See Appendix A, Draft Convention June 2007 for the "almost complete" text of the proposed convention.

III. ACCOMMODATING UIFSA 2001 TO THE NEW MAINTENANCE CONVENTION

A. Enforcing a Foreign Maintenance Order

A short-hand explanation of the preceding treaty language is that recognition will be accorded by a U.S. tribunal to a foreign maintenance order if the facts of the case would sustain a finding of a long-arm nexus between the issuing forum and the obligor. This approach is based on the long-arm provision in UIFSA § 201. In order to facilitate international enforcement of maintenance orders, it will be very useful to bench and bar to amend UIFSA to add a provision that tracks the relevant jurisdictional terms of the new convention. Moreover, UIFSA should establish the procedure for the tribunal to reach such a determination, something the new convention is silent about. For example, the statue might state that a foreign maintenance order is presumed to be valid if regular on its face and consistent with the requirements of the treaty unless challenged by the respondent. Allocating the burden of proof of invalidity is the next step.

Interestingly, the countries in the rest of the world will have no difficulty accommodating U.S. orders. When bound by the new Hague Convention on Maintenance, signatory countries have agreed to recognize a maintenance order rendered in a forum in which the child or oblige reside, or one in which the obligee has obtained an order against the obligor. This will include virtually 100% of U.S. orders. There is a theoretical possibility that a obligor could seek an order against himself and bind the obligee by resort to long arm jurisdiction. The upside of that is the obligor is bound to

pay, and the obligee can take whatever action she deems necessary if the order is unsatisfactory.

UIFSA 2001 has been adopted by only 18 states, despite the fact that it is clearly superior to UIFSA 1996, especially with regard to international orders. UIFSA 1996 was promulgated approximately three weeks before Congress mandated efforts to forge maintenance agreements with other nations. UIFSA 2001 explicitly takes the existence of international mobility into account. To develop a new iteration of UIFSA that will accommodate the new international treaty, all of the provisions relating to international maintenance should be gathered in a new Article 7 (the single section in that article may be moved to Article 2 or deleted). By focusing the issue a stand-alone article drafting will be simplified. The next step is to identify the issues for consideration.

Currently the U.S. tribunals receive maintenance orders (primarily child support) from a wide variety of other nations. Some of these orders are from the 19 foreign countries or political subdivisions with whom the U.S has bilateral agreements to treat as if the country is an "individual state," UIFSA § 102(21). Other orders will have been issued in a country that has a reciprocal agreement with the individual state, *e.g.*, apparently Germany has such an agreement with virtually every U.S. state. During Governor Bush's tenure, Texas signed agreements with three Mexican states (incidentally, the first northward bound peso or dollar has yet to arrive).

Further, many orders are received by U.S. tribunals from foreign countries that have neither a bilateral agreement with the United States, nor with a state-to-state agreement with the forum of the tribunal. As a practical matter, IV-D agencies apparently enforce these child support orders from outside the U.S. without making distinctions between the categories above. Undoubtedly this practice is based on the plain fact that the most efficient method of dealing with incoming requests for enforcement of child support orders is to handle them all routinely, rather than attempting to winnow out those few orders that might be jurisdictionally defective. That task is left to the individual respondents in appropriate cases. Under this enforcement system challenges to the issuing forum's jurisdiction to render a child support order are seldom, if ever, made. This notwithstanding the fact that a challenge could be made if the obligor has no nexus with the issuing forum other than that the fact that the other parent or child reside there—

either this just doesn't happen or when raised the trial court's decision does not lead to a reported case.

On the other hand, as a plain fact foreign nations will not enforce maintenance orders unless bound to do so by treaty. This contrasts with the actual current practice of IV-D agencies in the U.S. described above. For this country to obtain similar treatment for its maintenance orders, ratification of the new convention is a necessity. The less than good news is that the new convention does not deal with several specifically international complications—primarily the aftermath of the issuance of an original maintenance order, especially one for child support.

B. Modification of a Foreign Maintenance Order

With the narrow exceptions stated in Article 15 of the new convention, *infra*, it is fully understandable that the new convention basically ignores the issue of modification of an initial order. The reasoning is that modification may be sought by the obligee in the forum where the obligor resides, or where the obligee resides after leaving the original forum. Thus, in all countries except the U.S. virtually every new order is be based on appropriate jurisdiction. Whatever is to happen to the old order, and any arrears thereon, apparently will be left to local law, notwithstanding the results may be inconsistent in different countries.

U.S. law regarding modification of child support orders is far more complicated than that contemplated under the new convention. This is doubtless the result of the fact that child-based jurisdiction answers all questions, while the requirement of personal jurisdiction over the obligor may present significant issue of fact. Under UIFSA, however, the initial order is tied to the issuing forum by the doctrine of continuing exclusive jurisdiction [CEJ], unless all parties agree otherwise, or unless all parties and the child move from the issuing forum. At that time, modification jurisdiction shifts to the forum which is the residence of the non-moving party and the controlling order continues in effect until modified. A filing for modification in the residence of the moving party will not be valid unless all parties reside in that same new forum. These rules for U.S. modification of child support orders can result in serious complications unless UIFSA is amended to take international orders into account.

For example, assume that Texas rendered an initial child support order with personal jurisdiction over both parties. When modification becomes an issue, assume one party lives overseas in Germany (whether initially or a subsequent move). Texas retains CEJ to modify. Now assume that the other party and child no longer reside in Texas, and have moved to Oklahoma. The Texas order continues in effect, but according to UIFSA the Texas tribunal has lost jurisdiction to modify. Under a literal reading of the current text of UIFSA, the party now residing in Oklahoma would be required to seek modification in Germany, and vice versa. This should be viewed as an inappropriate result. It seems fairer that transfers of residence within the U.S. should yield a continuing exclusive jurisdiction for U.S. tribunals as long as the non-movant resides in another country. In short, in international cases the issue of the modification of a U.S. order may be regarded as one of venue rather than one of UIFSA continuing exclusive jurisdiction. Amendments to accomplish this may be drafted preparatory to the ratification of the new maintenance convention.

Insofar as modification of a foreign order presented for enforcement in the U.S. is concerned, complications also may arise. Obviously, if the original order is modified by the issuing forum that had established valid jurisdiction over the respondent, the modification is merely a version of CEJ. Suppose, however, that an original order was obtained in France and enforced in Texas. Subsequently the creditor moved to Italy and obtained a new order there. Under European law, the second order is perfectly valid and enforceable. But, what if the debtor had a nexus with France and has none whatsoever with Italy. What is a Texas tribunal to do when enforcement of the new order is sought? Several paths are open, but only one may be chosen in a uniform act. This is especially necessary here, given the fundamental difference between interstate modifications as regulated in the UIFSA and the non-answers given in the new convention regarding international modifications. One suggestion is to specifically recognize modification orders rendered in the international context if the second forum has personal jurisdiction over the obligor with a long-arm nexus legally equal to the nexus required in the initial instance. If this is not the fact in a particular case, continued recognition and enforcement of the initial order should be specifically required. The foreign modification cannot be allowed to effectively terminate the support obligation.

Indeed, before the new convention is ratified by the U.S. Senate, the above questions need answers, as do other foreseeable complications not covered by the new convention. Leaving such decisions to individual judges or appellate courts on a state-by state basis–or worse to the U.S. Congress—defeats the purpose of uniform act.

IV. CONCLUSION

In the U.S. (and Canada and Mexico) the central government does not have jurisdiction over maintenance orders. This fact often does get lost in the welter of "federal mandates" tied to the federal subsidy of child support enforcement administered by state IV-D agencies. Elsewhere in the world the national origin of the order is determinative. That is, a maintenance order by a Berlin tribunal is a German order, not a Berlin order. The exact forum from which the order originates in the foreign country is not an issue, whereas from the UIFSA perspective a Texas order is just that, and is not a U.S. order. To facilitate cross-border enforcement, the international context the convention provides for a central authority to funnel requests to the appropriate enforcing agency. This is the case in the U.S. as well; at present the central authority is the federal Office of Child Support Enforcement, H.H.S. That entity is charged with sending the request for enforcement to the appropriate state forum where the obligor resides or has property. Integrating the U.S. central authority with state CEJ is a drafting challenge.

The world of cross-border payments has grown exponentially since UIFSA first was promulgated in 1992. Exactly to what degree the uniform act should recognize this fact, and perhaps build in accommodation of future developments should be considered by the drafting committee. If the State Department's goal of Senate ratification of the new maintenance convention by late 2008 actually is achieved, it is imperative that the NCCUSL drafting committee prepare a new version of UIFSA for that contingency. Even if the U.S. Senate does not ratify the convention quickly, its adoption by the European Commission will undoubtedly effect the majority of our international cases. Given the IV-D agency practice of routinely attempting to enforce all child support orders from wherever initiated, the U.S. has nothing to lose by adding a substantial number of foreign countries to the list of those which agree to enforce U.S. orders.