

**UNIFORM CHILD-CUSTODY JURISDICTION AND
ENFORCEMENT ACT (WITH 2013 AMENDMENTS
PERTAINING TO INTERNATIONAL PROCEEDINGS)***

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

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MEETING IN ITS ONE-HUNDRED-AND-TWENTY-SECOND YEAR
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AMENDMENTS ONLY VERSION

WITH LEGISLATIVE NOTE, PREFATORY NOTE, AND COMMENTS

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NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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February 5, 2016

UNIFORM CHILD-CUSTODY JURISDICTION AND ENFORCEMENT ACT (WITH 2013 AMENDMENTS PERTAINING TO INTERNATIONAL PROCEEDINGS)

The Uniform Child-Custody Jurisdiction and Enforcement Act (with 2013 Amendments Pertaining to International Proceedings) is released for information purposes only. The 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for Protection of Children has not yet been ratified in the United States.

Please contact the Uniform Law Commission for further information before considering enactment of the Uniform Child-Custody Jurisdiction and Enforcement Act.

LEGISLATIVE NOTE *(Amendments Only Version)*

This version of the Uniform Child Custody Jurisdiction and Enforcement Act contains only those amendments that are necessary for a state to adopt in order to implement the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for Protection of Children.

The language of these amendments, particularly in a completely new Article IV, is consistent with the current approach of the Uniform Law Commission's Committee on Style. Therefore those sections in Article IV that are parallel to sections in Article I through III are worded differently than their earlier counterparts. The current style approach of the Uniform Law Commission is somewhat different than that used in 1997 when the UCCJEA was originally promulgated. For example, the word "state" is no longer capitalized. Neither is the word "act". The word "on" is used rather than "upon", etc. These linguistic changes are stylistic only. No substantive change is intended.

Should a state wish to update its version of the UCCJEA to reflect the current style convention of the Uniform Law Commission, a complete draft is available at http://www.uniformlaws.org/shared/docs/hague_convention_on_protection_of_children/UCCJE_A2013_Amended_Final.pdf

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TABLE OF CONTENTS

PREFATORY NOTE.....	1
---------------------	---

**[ARTICLE] 1.
GENERAL PROVISIONS**

SECTION 101. SHORT TITLE.....	6
SECTION 102. DEFINITIONS.....	6
SECTION 105. INTERNATIONAL APPLICATION OF [ACT].....	10

**[ARTICLE] 2.
JURISDICTION**

<u>SECTION 211. FINDINGS AND CONCLUSIONS.....</u>	<u>11</u>
---	-----------

**[ARTICLE] 3.
ENFORCEMENT**

SECTION 301. DEFINITIONS.....	12
SECTION 302. ENFORCEMENT UNDER HAGUE CONVENTIONS.....	12
SECTION 305. REGISTRATION OF CHILD-CUSTODY DETERMINATION.....	12
SECTION 306. ENFORCEMENT OF REGISTERED DETERMINATION.....	15
SECTION 307. SIMULTANEOUS PROCEEDINGS.....	15
SECTION 308. EXPEDITED ENFORCEMENT OF CHILD-CUSTODY DETERMINATION.	16
SECTION 310. HEARING AND ORDER.....	18
SECTION 313. RECOGNITION AND ENFORCEMENT.....	20
SECTION 314. APPEALS.....	20

**[ARTICLE] 4.
PROCEEDINGS UNDER CONVENTION**

<u>SECTION 401. DEFINITION.....</u>	<u>20</u>
<u>SECTION 402. APPLICATION OF ARTICLE.....</u>	<u>23</u>
<u>SECTION 403. EFFECT OF MEASURE OF PROTECTION.....</u>	<u>24</u>
<u>SECTION 404. PRIORITY.....</u>	<u>24</u>
<u>SECTION 405. NOTICE TO PERSON OUTSIDE STATE.....</u>	<u>25</u>
<u>SECTION 406. APPEARANCE AND LIMITED IMMUNITY.....</u>	<u>25</u>
<u>SECTION 407. COMMUNICATION BETWEEN COURT AND AUTHORITY.....</u>	<u>26</u>
<u>SECTION 408. TAKING TESTIMONY IN CONVENTION COUNTRY.....</u>	<u>26</u>
<u>SECTION 409. COOPERATION BETWEEN COURT AND AUTHORITY; <u>PRESERVATION OF RECORDS.....</u></u>	<u>27</u>
<u>SECTION 410. HABITUAL RESIDENCE.....</u>	<u>28</u>

<u>SECTION 411. JURISDICTION TO ORDER OR MODIFY MEASURE OF PROTECTION.</u>	30
<u>SECTION 412. SIMULTANEOUS PROCEEDINGS.</u>	31
<u>SECTION 413. WRONGFUL REMOVAL OR RETENTION OF CHILD: JURISDICTION.</u>	32
<u>SECTION 414. DECLINING JURISDICTION.</u>	35
<u>SECTION 415. REQUEST TO DECLINE JURISDICTION.</u>	37
<u>SECTION 416. TEMPORARY JURISDICTION IN URGENT SITUATION.</u>	38
<u>SECTION 417. NOTICE; OPPORTUNITY TO BE HEARD; JOINDER.</u>	39
<u>SECTION 418. INFORMATION REQUIRED TO BE SUBMITTED TO COURT.</u>	40
<u>SECTION 419. APPEARANCE OF PARTIES AND CHILD.</u>	41
<u>SECTION 420. DURATION OF MEASURE OF PROTECTION.</u>	42
<u>SECTION 421. CONFLICT OF LAWS: IN GENERAL.</u>	43
<u>SECTION 422. CONFLICT OF LAWS REGARDING PARENTAL RESPONSIBILITY.</u>	44
<u>SECTION 423. DUTY TO RECOGNIZE AND ENFORCE MEASURE OF PROTECTION ORDERED IN CONVENTION COUNTRY.</u>	46
<u>SECTION 424. REGISTRATION, RECOGNITION, AND ENFORCEMENT OF MEASURE OF PROTECTION ORDERED IN CONVENTION COUNTRY.</u>	49
<u>SECTION 425. COOPERATION WITH CONVENTION COUNTRY.</u>	50
<u>SECTION 426. SUITABILITY TO EXERCISE [VISITATION].</u>	51

[ARTICLE] 4 5.
MISCELLANEOUS PROVISIONS

<u>SECTION 401 501. UNIFORMITY OF APPLICATION AND CONSTRUCTION.</u>	52
<u>SECTION 502. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT.</u>	52
<u>SECTION 405 503. TRANSITIONAL PROVISION.</u>	52
<u>[SECTION 402 504. SEVERABILITY.]</u>	52
<u>SECTION 403 505. EFFECTIVE DATE.</u>	52

UNIFORM CHILD-CUSTODY JURISDICTION AND ENFORCEMENT ACT (WITH 2013 AMENDMENTS PERTAINING TO INTERNATIONAL PROCEEDINGS)

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), 28 U.S.C.A. §1738A, 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), 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 provided 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. The 1961 Convention was adopted by a number of European countries 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 when made in accordance with the jurisdictional principles of the document. The differences are in the details of how it 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 local authorities. These cooperation problems are addressed in the federal implementing legislation.

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 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 Section 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 provided 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 meant 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) required 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, in Section 105(c) a United States court was given the discretion not to apply the UCCJEA if the child custody law of a foreign country violated fundamental principles of human rights. The language of the section was taken from the 1980 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 therefore not necessary for enforcement of foreign custody decrees in the United

States; 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. The United States has signed the Convention and the revision of this Act will constitute part of the implementing legislation. The rest of the Convention will be implemented at the federal level.

This version makes minimal substantive changes to Articles 1 and 2, thereby basically keeping those article as originally written. Almost every section which could possibly apply to proceedings under the Convention is placed in Article 4 and rewritten with appropriate terminology, except for the recognition and enforcement provisions of Article 3. While it is possible to set out in Article 4 the Article 3 registration and enforcement sections, it was decided to simply incorporate them by reference.

There are two major documents that should be used in interpreting the provisions of the 1996 Convention. The first is the Report by Professor Paul Lagarde who was the reporter for the Convention. The second is the Practical Handbook on the operation of the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children. The Sixth Meeting of the Hague Conference's Special Commission on the practical operation of the 1980 Hague Child Abduction Convention approved it and thus the Handbook provides a source for authoritative interpretations of the Convention to be used along with the Report. Both documents may be downloaded from the website of Hague Conference at www.hcch.net.

Each comment indicates which Article of the Convention is the source of the particular section and also makes reference to the appropriate section of the Report and the Practical Handbook.

Since this revision of the UCCJEA is designed to implement the 1996 Convention, it follows that the revision will have no effect until the Convention is ratified by the Senate and implementing legislation is passed by Congress. At that time the states will no doubt be required to enact this version of the UCCJEA as part of the implementing process.

Finally this revision to the UCCJEA exists in two versions. One version contains only those amendments to the UCCJEA that are necessary to implements the 1996 Convention. Those sections were then restyled by the Conference's Style Committee. Thus word and punctuation changes in Articles 1, 2 and 3 are the product of the Style Committee and are not intended to have any substantive effect. The second version contains those amendments in addition to a complete stylistic revision of the Act.

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[ARTICLE] 1.

GENERAL PROVISIONS

SECTION 101. SHORT TITLE. This [act] may be cited as the Uniform Child-Custody Jurisdiction and Enforcement Act (with 2013 Amendments Pertaining to International Proceedings).

SECTION 102. DEFINITIONS. In this ~~Act~~ [act]:

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

(2) “Authority” means an entity authorized by a convention country to establish, enforce, or modify a decision to which [Article] 4 applies.

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

~~(3)~~ (4) “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 child support or other monetary obligation of an individual.

~~(4)~~ (5) “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.

~~(5)~~ (6) “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 October 19, 1996.

(8) “Convention country” means a foreign country in which the Convention is in force with respect to the United States.

~~(6)~~ (9) “Court” means an entity authorized by ~~under the law of a State~~ a 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.

~~(7)~~ (11) “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~~ If a child is less than six months of age, the term means the ~~State~~ 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 mentioned is part of the period.

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

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

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

~~(11)~~ (15) “Modification” means a child-custody determination, or a decision to which [Article] 4 applies, that changes, replaces, supersedes, or is otherwise made after a previous

determination or decision concerning the same child, whether or not it is made by the court or authority that made the previous determination or decision.

(16) “Nonconvention country” means a foreign country in which the Convention is not in force with respect to the United States.

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

~~(12)~~ (18) “Person” means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, business or nonprofit entity, public corporation, government or governmental subdivision, agency, or instrumentality, public corporation, or any other legal or commercial entity.

~~(13)~~ (19) “Person acting as a parent” means a person, other than a parent, who that:

(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~~ state.

~~(14)~~ (20) “Physical custody” means the physical care and supervision of a child.

(21) “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.

~~(15)~~ (22) “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.

~~(16)~~ (23) “Tribe” means an Indian tribe or band or Alaskan Native village, which is

recognized by federal law or formally acknowledged by a ~~State~~ state.]

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

Comment

Related to Convention: Article 1(2); Practical Handbook §2.1; Legarde, ¶¶14, 18.

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 makes a decision affecting children that is covered under Article 4 of this act. In article 4 that decision is called a measure of protection and the term is defined there. The term “authority” is broader than “court” in that it includes administrative authorities that, under foreign law, may make decisions regarding a child.

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.

Nothing in these definitions is meant to broaden or restrict the right of a court to appoint an advocate, lawyer, or other representative for the child.

SECTION 103. PROCEEDINGS GOVERNED BY OTHER LAW. This ~~[Act]~~ [act] does not govern an adoption proceeding or, except as otherwise provided in Section 416, a proceeding pertaining to the authorization of emergency medical care for a child.

Additional Comment

Proceedings pertaining to emergency medical care for a child are not governed by Articles 1, 2 or 3, but a proceeding pertaining to emergency medical care for a child is a decision within the scope of Article 4.

SECTION 104. APPLICATION TO INDIAN ~~TRIBES~~. TRIBE.

(a) A child-custody proceeding that pertains to an Indian child as defined in the Indian Child Welfare Act, 25 U.S.C. § Section 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 this [article]~~ and [Article] 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].

(a) A court of this ~~State~~ 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 this [article]~~ and [Article] 2.

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

(c) ~~A court of this state need not apply this [Act] if the child-custody law of a foreign country violates fundamental principles of human rights.~~ [Article] 4 governs a proceeding in a court of this state to which the Convention applies.

Additional Comment

Section 105 is now primarily a provision that explains where the governing rules are located. It distinguishes between convention countries which are covered under Article 4 and nonconvention countries that are covered under Articles 2 and 3. Subsection (a) continues the UCCJEA rule that nonconvention countries are to be treated as states in applying Articles 1 and 2. Registration, recognition and enforcement of child-custody determinations from nonconvention countries are governed by Article 3. Subsection (c) informs courts and lawyers to apply Article 4 to cases involving convention countries.

The former subsection (c) which authorized states to decline to recognize a child custody determination of a foreign country if the child-custody laws violated fundamental principles of human rights has been moved to Article 3 and listed as one of the defenses to registration, recognition and enforcement. Article 4 contains its own public policy defense that is applicable to convention country cases.

[ARTICLE] 2.

JURISDICTION

SECTION 211. FINDINGS AND CONCLUSIONS.

(a) If requested by a party, a court of this state that makes or modifies a child-custody determination or orders or modifies a decision with regard to a child to which [Article] 4 applies shall include in the determination or decision the court's findings and conclusions on the following:

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

(2) the manner in which notice and opportunity to be heard was 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 country of the habitual residence of the child.

(b) A child-custody determination or a decision with regard to a child to which [Article] 4 applies may be supplemented at any time to include the findings and conclusions described in subsection (a) without the supplement being construed as a modification.

Comment

Related to Convention: Article 25; Legarde, ¶131.

This is a new section for Article 2. It is meant to help those parents who contemplate possible foreign enforcement of a child custody determination, or measure of protection, under Article 4, that, when entered, is a solely domestic United States proceeding. 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 25 of the Convention requires that the convention country that is requested to enforce the custody determination, or measure of protection, is bound by the findings of fact upon which another convention country based its jurisdiction. For example, the convention country where enforcement of a child custody determination or measure of protection is sought may not review the facts upon which the convention country that made the original custody determination based its determination of

habitual residence.

Subsection (b) makes it clear that a child custody determination, or a measure of protection, can be amended or supplemented 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 Convention, the Hague Convention on the Civil Aspects of International Child Abduction, or a child-custody determination.

(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 Convention, the Hague Convention on the Civil Aspects of International Child Abduction, or a child-custody determination.

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

SECTION 305. REGISTRATION OF CHILD-CUSTODY DETERMINATION.

(a) A child-custody determination issued by a court of another ~~State~~ state 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 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 sought to be registered.

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

(1) cause the determination 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~~ on the persons named pursuant to subsection ~~(a)(3)~~ (a) 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 is enforceable as of the date of the registration in the same manner as a determination issued by a court of this ~~State~~ state;

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

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

(d) ~~A person seeking to~~ To contest the validity of a registered order, a person must request a hearing ~~within~~ not later than 20 days after service of the notice required by subsection (b)(2). 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~~ the standards of

this [act];

(2) the child-custody determination sought to be registered has been vacated, stayed, or modified by a court having jurisdiction to do so under ~~[Article] 2~~ the standards of 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 that issued the order for which registration is sought;

(4) the child has been placed in foster care, institutional care, or a similar relationship in this state and the court, or authority, that ordered the placement did so without consultation and without transmitting a report giving the reasons for the placement and this state has not consented to the placement; or

(5) the order sought to be registered is from a nonconvention country whose child custody law violates fundamental principles of human rights.

(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.

Additional Comment

Related to Convention: Articles 23, 26; 33(1); Practical Handbook §§10.4-10.6; Legarde, ¶¶121-128.

This section generally is the same as the original Section 305. It is referred to in Article 4 as the method by which a “measure of protection” from a convention country is to be registered, recognized and enforced. That means for Article 4 purposes, the terms in this and

other sections of Article 3 need to be thought of in Article 4 terminology. Thus child-custody determination is the equivalent for this section of measure of protection, court is the equivalent of authority, etc.

The Drafting Committee determined that the defense to registration set out in subsection (d)(4), which is found in Article 33(1) of the Convention, ought to be applicable to nonconvention countries as well as convention countries.

In addition, the provision from Section 105(c) of the original UCCJEA has been moved to subsection (d)(5) of this Section as well as comparable provisions in later sections. It is a rule of nonrecognition and therefore more properly belongs with the defenses to registration, recognition and enforcement than in Section 105. The comment to the original UCCJEA Section 105(c) is applicable here:

The same concept is found in of the Section 20 of the Hague Convention on the Civil Aspects of International Child Abduction (return of the child may be refused if this would not be permitted by the fundamental principles of the requested state relating to the protection of human rights and fundamental freedoms). In applying subsection (c), the court's scrutiny should be on the child custody law of the foreign country and not on other aspects of the other legal system. This Act takes no position on what laws relating to child custody would violate fundamental freedoms. While the provision is a traditional one in international agreements, it is invoked only in the most egregious cases.

Since cases from a convention country have their own public policy defense in Article 4, the terminology was changed here to refer to nonconvention countries only.

SECTION 306. ENFORCEMENT OF REGISTERED DETERMINATION.

(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 a court of another ~~State~~ state.

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

(c) A court of this state may modify a registered child-custody determination of another state only in accordance with this [act].

SECTION 307. SIMULTANEOUS PROCEEDINGS. If a proceeding for enforcement under this [article] is commenced in a court of this ~~State~~ state and the court determines that a proceeding to modify the determination is pending in a court of another ~~State~~

state having jurisdiction to modify the determination under ~~[Article] 2~~ the standards of this [act], the enforcing court shall ~~immediately~~ communicate immediately with the modifying court. The proceeding for enforcement continues unless the enforcing court, after consultation with the modifying court, stays or dismisses the proceeding.

SECTION 308. EXPEDITED ENFORCEMENT OF CHILD-CUSTODY DETERMINATION.

(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 must state:

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

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

(3) whether any proceeding has been commenced that could affect the current proceeding, including 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 has been registered and confirmed under Section 305, the date and place of registration.

(c) ~~Upon~~ On the filing of a petition, under this section, 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 order~~ payment of fees, costs, and expenses under Section 312, and may schedule a hearing to determine whether further relief is appropriate, unless the respondent appears and establishes that:

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

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

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

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

Section 108;

(D) the child has been placed in foster care, institutional care, or a similar relationship in this state, and the court, or authority, that ordered the placement did so without consultation and without transmitting a report giving the reasons for the placement and this state has not consented to the placement; or

(E) the order sought to be enforced is from a nonconvention country whose child custody law violates fundamental principles of human rights; or

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

Additional Comment

Subsection (d)(2)(D) and (E) have been added as defenses to the enforcement of a child custody determination or measure of protection in the same manner as they are added to Sections 305 and 310. The comment to the revised Section 305 is also applicable here.

SECTION 310. HEARING AND ORDER.

(a) Unless the court issues a temporary ~~emergency~~ order ~~pursuant to~~ under Section 204 or 416, ~~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 has not been registered and confirmed under Section 305 and that:

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

(B) the child-custody determination for which enforcement is sought has been vacated, stayed, or modified by a court of a ~~State~~ state having jurisdiction to do so under ~~[Article] 2~~ the standards of 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~~ proceeding before the court that issued the order for which enforcement is sought, but notice was not given in accordance with the standards of Section 108;

(D) the child has been placed in foster care, institutional care, or a similar relationship in this state, the court or authority that ordered the placement did so without consultation and without transmitting a report giving the reasons for the placement, and this state has not consented to the placement; or

(E) the order sought to be enforced is from a nonconvention country whose child custody law violates fundamental principles of human rights; or

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

Additional Comment

The additional comment to the revised Section 305 is equally applicable here.

SECTION 313. RECOGNITION AND ENFORCEMENT. A court of this ~~State~~ state shall accord full faith and credit to an order issued by another ~~State and~~ state which is consistent with this ~~[Act]~~ [act] ~~which and~~ enforces a child-custody determination by a court of another ~~State~~ state unless the order has been vacated, stayed, or modified by a court having jurisdiction to do so under ~~[Article] 2~~ the standards of 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~~ renders a temporary order under Section 204 or 416, the enforcing court may not stay an order enforcing a child-custody determination pending appeal.

[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 a state of the United States and a foreign country in which the Convention is in force between that foreign country and the United States. It also applies to cases between a state of the United States and a foreign country in which the Convention is not in force to the extent that the Convention requires special treatment for nonconvention countries. The Article has no application to cases between states of the United States.

SECTION 401. DEFINITION. In this [article]:

(1) “Measure of protection” means a decision made by an authority or a court regarding protection of a child. The term:

(A) includes a decision concerning:

- (i) the attribution, exercise, termination, delegation, or restriction of parental responsibility;
- (ii) a right of custody, including:
 - (I) a right relating to the care of the child; and
 - (II) determining the place of residence of the child;
- (iii) a right 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;
- (iv) guardianship of the child and any similar relationship;
- (v) the designation and function of a person that has charge of the child, represents the child or assists the child;
- (vi) governmental supervision of a person that has charge of the child; and
- (vii) placement of the child in foster care, institutional care, or a similar relationship; and

(B) does not include a decision concerning:

- (i) establishment or contest of a parent-child relationship;
- (ii) adoption, including preparatory measures, or annulment or revocation of an adoption;
- (iii) the name of the child;
- (iv) emancipation of the child;
- (v) a support or maintenance obligation;
- (vi) a trust or succession;
- (vii) a public benefit, including social security;

(viii) a general governmental decision with regard to education or health;

(ix) a measure resulting from an offense committed by the child;

(x) a right of asylum and immigration; or

(xi) property of the child.

(2) “United States” means the states of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, and any territory or insular possession subject to the jurisdiction of the United States.

Comment

Related to Convention: Articles 3, 4; Practical Handbook §§3.14-3.52; Legarde, ¶¶18-36.

This section defines the term “measure of protection,” or “measure.” The term “custody determination” which is used with regard to United States orders, or orders from nonconvention countries, in the first three articles of this act is inappropriate in relation 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 “measure of protection.” Therefore term is here defined functionally as is done in the Convention by noting what is and what is not a measure of protection that is covered by the Convention.

The list in Article 3 of the Convention, 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” appear in the 1980 Hague Convention on the Civil Aspects of International Child Abduction. They are meant to have the same definition in applying this Convention as they have in applying the 1980 Convention. Thus, for example, a *ne exeat* right would be treated as a right of custody under 1996 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 413 which concerns wrongful removal and wrongful retention, and are broad enough to include most of the contemporary variations on word choice for custody. Thus “parenting time”, “joint custody”, “managing conservator” and “shared custody” 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, they become a right of custody under the 1980 Convention, as well as the 1996 Convention.

SECTION 402. APPLICATION OF ARTICLE.

(a) Except as otherwise provided in Sections 416, 421, and 422, this [article] applies only in a proceeding in a court of this state:

(1) which involves recognition and enforcement of a measure of protection ordered by an authority in a convention country; or

(2) in which:

(A) a party to the proceeding has a significant connection to a convention country; or

(B) a child who is the subject of the proceeding has a significant connection to a convention country.

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

Comment

This section operates as a sign-posting for cases with international connections. If a case involves either a child or a party with a significant connection to a convention country this article should be consulted to determine whether it has any applicability to a particular case. In most cases the determinative issue will be that of the habitual residence of the child. If the child is habitually resident in another convention country then, not only does Article 4 generally not apply, the entire UCCJEA is inapplicable because the other convention country will have jurisdiction to determine the measure of protection. However, there will be cases where even if jurisdiction to take a measure of protection is not in the United States, a proceeding under Article 4 could take place. For example, a parent in the United States may file an Article 4 proceeding in which the parent seeks to have the court request a transfer of jurisdiction under Section 415. Conversely, if the habitual residence of the child is in the United States, a parent who has a significant connection to a convention country may wish to file an Article 4 proceeding seeking to have the court transfer the case to that convention country under Section 414. In addition the foreign parent may wish to have information considered for a decision on whether the foreign parent should be allowed access to, or visitation with, the child. The procedure under Article 4 would require the court to consider the information sent by the foreign convention authorities under Section 426.

This article is applicable to all cases where a measure of protection from a convention country is sought to be registered, recognized and enforced.

The term “proceeding in a court of this state” means that this article will apply only to court proceedings, and not to measures that are issued under the Convention that will be determined by administrative agencies and other governmental personnel.

SECTION 403. EFFECT OF MEASURE OF PROTECTION.

(a) A measure of protection ordered by a court of this state that had jurisdiction under this [article] binds a person that:

(1) has:

(A) been served in accordance with law of this state other than this [act];

(B) been notified in accordance with Section 405; or

(C) submitted to the jurisdiction of the court; and

(2) has been given an opportunity to be heard.

(b) A measure of protection that binds a person under subsection (a) is conclusive as to all decided issues of law and fact.

Comment

Except for the provisions on registration, recognition and enforcement, all the sections from Articles 1 and 2 that are applicable to an Article 4 proceeding are set out in full in Article 4. There are appropriate language changes, i.e., changing “child custody determination” to “measure of protection” and “court” to “authority” where required. These language changes do not change the substantive understanding of any section. Therefore these sections should be interpreted in Article 4 as they are interpreted under Articles 1 through 3.

This section is the equivalent of Section 106.

SECTION 404. PRIORITY. If a question of the existence or exercise of jurisdiction under this [article] is raised in a proceeding, on request of a party, the court shall give the question priority on the calendar and determine it expeditiously.

Comment

This section is the equivalent of Section 107.

SECTION 405. NOTICE TO PERSON OUTSIDE STATE.

(a) Notice to a person outside this state required for the exercise of jurisdiction by a court of this state may be given in a manner for service of process prescribed by law of this state other than this [act] or the convention 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) In a proceeding under this [article], proof of service may be made in the manner prescribed by law of this state other than this [act] or the convention country in which service is made.

(c) Notice is not required for the exercise of jurisdiction under this [article] with respect to a person that submits to the jurisdiction of a court of this state.

Comment

The section is the equivalent of Section 108.

SECTION 406. APPEARANCE AND LIMITED IMMUNITY.

(a) A party to a proceeding under this [article], including a modification proceeding, or a petitioner or respondent to a proceeding to enforce or register a measure of protection is not subject to personal jurisdiction in this state for another proceeding or purpose solely by reason of having participated, or having been physically present for the purpose of participating, in the proceeding.

(b) A party subject to personal jurisdiction in this state on a basis other than physical presence is not immune under subsection (a) from service of process in this state. A party present in this state which is subject to the jurisdiction of another state or convention country is not immune under subsection (a) from service of process allowable under the law of that state or

convention country.

(c) Immunity under subsection (a) does not extend to civil litigation based on an act committed by a party while present in this state which is unrelated to the party's participation in a proceeding under this [article].

Comment

This section is the equivalent of Section 109.

SECTION 407. COMMUNICATION BETWEEN COURT AND AUTHORITY.

(a) In a proceeding under this [article], the court may communicate with an authority concerning the proceeding.

(b) The court may allow the parties to participate in a communication under this section. If a party is not able to participate in the communication, the party must be given the opportunity to present facts and legal arguments before a decision on jurisdiction is made.

(c) Except as otherwise provided in subsection (d), a record must be made of a communication under this section. The court promptly shall inform the parties of the communication and grant them access to the record.

(d) Communication between the court and an authority on a schedule, calendar, court record, or similar matter may occur without informing the parties under subsection (a). A record need not be made of the communication.

Comment

This section is the equivalent of Section 110.

SECTION 408. TAKING TESTIMONY IN CONVENTION COUNTRY.

(a) In addition to other procedures available to a party, a party to a proceeding under this [article] may offer testimony of an individual located in a convention country, including

testimony of a party or a child, by deposition or other means allowable in this state for testimony taken in another state or foreign country. The court may order that testimony be taken in a convention country and may prescribe the manner in which and the terms on which the testimony is taken.

(b) In a proceeding under this [article], the court may permit an individual residing in a convention country to be deposed or to testify by telephone, audiovisual means, or other electronic means before a designated person. The court shall cooperate with the authority of the convention country in designating an appropriate location for the deposition or testimony.

(c) In a proceeding under this [article], documentary evidence transmitted from a convention country to the court 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.

Comment

This section is the equivalent of Section 111.

SECTION 409. COOPERATION BETWEEN COURT AND AUTHORITY; PRESERVATION OF RECORDS.

(a) In a proceeding under this [article], the court may request the appropriate authority to:

- (1) hold an evidentiary hearing;
- (2) order a person to produce or give evidence under procedures of the convention country;
- (3) order that an evaluation be made of the child involved in the proceeding;
- (4) forward to the court a certified copy of the transcript of the record of the hearing, the evidence presented, and any evaluation prepared in compliance with the request; and
- (5) order a party to a measure of protection proceeding or any person having

physical custody of the child to appear in the proceeding with or without the child.

(b) In a proceeding under this [article], on request of an authority the court may hold a hearing or render an order described in subsection (a).

(c) The court may assess travel and other necessary and reasonable expenses incurred under subsections (a) and (b) against a party according to law of this state other than this [act].

(d) In a proceeding under this [article], the court shall preserve the pleadings, orders, decrees, records of hearings, evaluations, and other pertinent records with respect to a measure of protection until the child attains 18 years of age. On request by an authority or law-enforcement official of a convention country, the court shall forward a certified copy of those records.

Comment

This section is the equivalent of Section 112.

SECTION 410. HABITUAL RESIDENCE. In a proceeding under this [article], in determining the country of the habitual residence of a child, the court shall consider all relevant factors, which may include:

- (1) whether the child has a home state in the United States;
- (2) the extent of the child's ties to a particular country, including the child's social interactions, 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;
- (5) the circumstances under which the child is in a country; and
- (6) the intent of each person with parental responsibility for the child in determining the habitual residence of the child.

Comment

Practical Handbook §§4.5-4.7, 13.84-13-96.

The term “habitual residence” is used in all conventions promulgated by the Hague Conference on Private International Law and is never defined. Lawyers operating in the civil law systems of continental Europe are accustomed to giving the term slightly different meanings depending on the context where the term is used. In the United States the term appears only in cases interpreting the 1980 Hague Convention on the Civil Aspects of International Child Abduction. The Practical Handbook cautions that:

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.

On the other hand the English Supreme Court has determined that the term should generally be interpreted the same way regardless if the case concerns the Abduction Convention or the Protection of Children Convention. The English Supreme Court decided that the term “habitual residence” is a fact based determination allowing the court to find the place which reflects some degree of integration by the child in a social and family environment in the country concerned. This in turn depends on a number of factors, including the reasons for the family’s stay in the country in question. *Re A (Jurisdiction: Return of Child)* [2013] UKSC 60 [2014] 1 FLR 111.

This section reflects the same interpretation. It is less of a definition, but rather a provision designed to give guidance to a court in making the determination of the habitual residence of the child. The factors are child focused, rather than being focused on the parents. If thought of in terms of the current split between the federal circuits concerning the interpretation of the term “habitual residence” in the Abduction Convention, this section leans heavily toward the approach of the Sixth Circuit in *Robert v. Tesson*, 507 F.3d 981 (6th Cir. 2007) rather than the Ninth Circuit’s reliance on parental intent in *Mozes v. Mozes*, 239 F.3d 1067 (9th Cir. 2001). Therefore 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.

The term “home state” in subsection (1) is meant to have the same definition in this article as it has in Articles 1 and 2.

SECTION 411. JURISDICTION TO ORDER OR MODIFY MEASURE OF PROTECTION.

(a) Except as otherwise provided in Section 416, a court of this state has jurisdiction to order or modify a measure of protection only if:

(1) the court has jurisdiction under Section 201 and the United States is the country of the habitual residence of the child;

(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 with jurisdiction substantially in accord with paragraph (1) or (2) requests the court to assume jurisdiction and the court agrees.

(b) If requested by a party, the court in a proceeding under this [act], shall make findings and conclusions of the jurisdictional facts.

Comment

Related to Convention: Articles 5, 6, 8, 9; Practical Handbook §§4.1-4.19; 5.1-5.8; Legarde, ¶¶38-45.

In order for a measure taken in this country to be enforceable in another convention country, the court taking the measure must have jurisdiction under a basis approved by the Convention. The primary basis for jurisdiction in the Convention is the habitual residence of the child. The Convention is concerned with country to country relationships; therefore the term “habitual residence” means that the child must be a habitual resident of the United States. In addition to the child being a habitual resident of the United States the court must also have jurisdiction under Section 201.

A state can also have jurisdiction, apart from habitual residence, if the child is present in this state and has no habitual residence. This is a determination that probably should be avoided if possible. But such a determination may be proper when for example: (1) a child moves

frequently between two or more countries, (2) where a child is unaccompanied or abandoned and it is difficult to find evidence to establish the child's habitual residence or (3) where a child's previous habitual residence has been lost and there is insufficient evidence to support the acquisition of a new habitual residence.

Jurisdiction is also proper if the child is present in the country and is a refugee or is internationally displaced. Whether a child is a refugee or is internationally displaced is to be decided under federal law. Finally, this state has jurisdiction if the convention country that would otherwise have jurisdiction has decided to ask a court of this state to assume jurisdiction under Section 415 and the court has agreed.

It should be noted that jurisdiction follows habitual residence. Therefore this section applies when the child's habitual residence changes during the proceedings. When habitual residence changes from one convention country to another convention country, the first court loses jurisdiction and the second court gains jurisdiction. Section 412 provides a *lis pendens* to resolve those cases.

However this rule does not apply when the change of habitual residence is to a non-convention country. The Convention then ceases to apply and either state may attempt to exercise jurisdiction on any basis provided by local law. A measure determined by a court after that child's habitual residence changes to a nonconvention country is not entitled to be enforced under the Convention.

SECTION 412. SIMULTANEOUS PROCEEDINGS.

(a) Except as otherwise provided in Section 416, a court of this state may not exercise jurisdiction under Section 411, 413, or 414 if the court determines that when the proceeding commenced, a request for a similar measure of protection has been made before an authority having jurisdiction and is still under consideration, unless the authority declines to exercise its jurisdiction in favor of the court.

(b) If a court of this state that has jurisdiction under Section 411, 413, or 414 determines that a proceeding has been commenced later in a convention country having jurisdiction concerning a similar measure of protection, the court may decline to exercise jurisdiction.

Comment

Related to Convention: Article 13; Practical Handbook §§4.13-4.35; Legarde, ¶¶68-83.

Article 13 of the Convention provides a *lis pendens* for situations where there is more

than one country which could potentially claim jurisdiction. It was originally designed to apply between the country of the child's habitual residence and the country where a divorce between the child's parents is pending, which under the Convention has concurrent jurisdiction, when authorized by the convention country in question. The United States does not allow the divorce court to have concurrent jurisdiction with the court of the home state.

However, Article 13 of the Convention has application to all potential jurisdictional conflicts that might arise under Articles 5 through 10 of the Convention. Therefore, it would apply in those situations when the child's habitual residence changes during the middle of a case. Article 13 applies for as long as proceedings involving similar measures in the other first contracting country are still under consideration. This provides a form of continuing jurisdiction in the country that originally had jurisdiction when habitual residence changes in midst of a case.

In order for this section to apply, the requests before both contracting countries must be the same or similar in substance.

Note that under subsection (a) there is a provision for a court of this state to continue the case if the authority of the convention country 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 provisions of Articles 8 and 9 of the Convention. Subsection (b) authorizes a court of this state to decline jurisdiction in favor of the second to file country, if that would be appropriate under the circumstances.

Although there is nothing in the Convention concerning communication, it will usually be good practice for communication to take place between the two convention countries involved (either via Central Authorities or through direct judicial communications) to ensure that no gap in the protection of the child results.

SECTION 413. WRONGFUL REMOVAL OR RETENTION OF CHILD; JURISDICTION.

(a) This section applies to a right of custody that arises:

(1) by operation of law;

(2) under an agreement having legal effect under the law of the country of the
habitual residence of the child immediately before removal or retention of the child; or

(3) from a judicial or administrative decision.

(b) Removal or retention of a child is wrongful if:

(1) it is in breach of a right of custody of a person, either jointly or solely, under

the law of the country of the habitual residence of the child 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.

(c) A court that has jurisdiction under Section 411(a)(1) 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 and;

(A) 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

(B) the child is settled in the new environment.

(d) Except as otherwise provided in Section 416, a court of this state does not have jurisdiction under this [article] over a child whose habitual residence in this state is the result of a wrongful removal or retention unless:

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

(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, and

(A) 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

(B) the child is settled in the new environment; or

(3) the court assumes jurisdiction under Section 415.

Comment

Related to Convention: Article 7; Practical Handbook §§4.20-4.25; 13.1-13.14; Legarde, ¶¶ 46-51.

This section is designed to prevent jurisdiction from transferring following a wrongful removal or retention as set out in the 1980 Abduction Convention by formalizing the relationship between that Convention and the 1996 Protection Convention. Therefore, as set out below, the terms of this section should be interpreted identically to the terms of the Abduction Convention.

The definition of wrongful removal or retention in this section does not specifically include the term “institution or other body.” That is because the definition of the term “person” in Section 102 includes “institution or other body” and therefore the term would be redundant in this section.

The term “rights of custody” is also not defined in this section since it is defined in Section 401. The language of Section 401 should be interpreted to track the interpretation given to the terms under the Abduction Convention. The term “rights of custody” therefore does not include access or visitation rights as defined in Section 401. Other terms such as, “exercise of custody”, “acclimatized”, and “environment” etc will also take on the same meaning here that they have in the cases interpreting the 1980 Convention. Since there is a considerable judicial gloss on those terms, the drafting committee determined that none of the language should be modernized.

This section presents both sides of Article 7 of the Convention. It confirms that a court of this state does not lose its jurisdiction after a wrongful abduction or retention 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 or retention unless the requirements of the Article 7 are met. The only jurisdiction that can be exercised by a court of this state when a child has become a habitual resident of the United States and has its home state in this state as a result of a wrongful abduction is urgency jurisdiction under section 416.

The reference to a petition for the return of the child pending in the court of this state or the country of the new habitual residence is in line with the interpretation of Article 7 set out in the Practical Handbook. Therefore, it should be noted that a custody determination made by the court of the convention country from which the child has been wrongfully removed or retained, while that country still has jurisdiction under this section, must be recognized and enforced under the sections on recognition and enforcement. Therefore a return order issued by a convention country from which the child has been abducted must be enforced by the convention country to which the child been wrongfully abducted even if the child’s habitual residence has changed.

SECTION 414. DECLINING JURISDICTION.

(a) If a court of this state that has jurisdiction under Section 411(a)(1) or (2) determines that an authority in a convention country is in a better position to assess the best interest of a child, the court may:

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

(2) stay the proceeding to allow a party to request that the authority assume jurisdiction.

(b) If under subsection (a), the authority agrees to assume jurisdiction, the court may decline jurisdiction.

(c) The court may communicate under Section 407 with the authority concerning a request under subsection (a) that it assume jurisdiction.

(d) Before determining under subsection (a) whether the authority is in a better position to determine the best interest of a child, the court shall allow each party to submit information and shall consider all relevant factors, including:

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

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

(3) the distance between the court and the authority that would assume jurisdiction;

(4) the financial circumstances of the parties;

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

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

(7) the ability of the court and the authority to obtain evidence and decide the case expeditiously;

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

(9) the familiarity of the court and the authority with the facts and issues in the proceeding; and

(10) whether a defense to the return of the child was sustained under the 1980 Hague Convention on the Civil Aspects of International Child Abduction.

(e) A request under subsection (a) may be made only to an authority:

(1) in a convention country of which the child is a national;

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

(3) in a convention country that has a significant connection to the child.

(f) An order declining to exercise jurisdiction under this section is not permanent.

Comment

Related to Convention: Articles 8, 9; Practical Handbook §§5.1-5.22; Legarde, ¶¶ 53-60.

Article 8 and 9 of the Convention are set out in Sections 414 and 415 of this Article. This section refers to declining jurisdiction. Section 415 refers to “assuming jurisdiction.” The term “transferring jurisdiction” was not used since it does not fit comfortably into a common law tradition, even though the convention terminology is “transferring jurisdiction.”

The provisions of this section and the next section only apply to convention countries.

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 Section 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 what factors a court should consider when it decides that another state should transfer or receive jurisdiction. Therefore it is not inconsistent with the Convention to

add this provision.

The Convention also does not provide for the parties to be heard before a request to decline jurisdiction is granted. This then becomes a matter of local law and it would be appropriate to apply the provisions of Section 207 to allow the parties to submit information to the court before a decision on declining jurisdiction is made.

That part of Article 8 of the Convention that requires an authority to determine whether it is in the best interests of the child for it to receive jurisdiction is covered in Section 411(a)(3).

Subsection (f) provides that a transfer under this section does not effect a permanent transfer of jurisdiction. If the convention 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 415. REQUEST TO DECLINE JURISDICTION.

(a) 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 decline to exercise jurisdiction over a measure of protection in favor of the court if:

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

(2) a [divorce] or annulment-of-marriage proceeding of the parents of the child is pending in this state; or

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

(b) The court may communicate under Section 407 with the authority concerning a request under subsection (a).

(c) The court may assume jurisdiction following a request under subsection (a) only if the authority declines to exercise jurisdiction in favor of the court.

(d) An assumption of jurisdiction under this section is not permanent.

Comment

Related to Convention: Articles 8, 9; Practical Handbook §§5.1-5.22; Legarde, ¶¶ 53-60.

It is not necessary to have a separate jurisdictional basis for the court under subsection

(a). So long as the court would have subject matter jurisdiction to entertain a petition under the law of this state, it can decide whether to request a transfer of jurisdiction from the convention country of the child's habitual residence.

As in the case of the previous section an assumption of jurisdiction in this state following a declination by the country of the habitual residence of the child is not permanent. Future actions would have to be filed in the convention country of the child's habitual residence.

SECTION 416. TEMPORARY JURISDICTION IN URGENT SITUATION.

(a) A court has jurisdiction under this [article] to order a temporary measure of protection for a child present in this state in an urgent situation, including when:

(1) the child has been abandoned;

(2) the child may be removed immediately from this state; or

(3) 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 the court orders an end to the measure or an authority with jurisdiction has taken measures required by the situation.

(c) A measure of protection ordered under subsection (a) regarding a child habitually resident in a nonconvention country expires when the court orders an end to the measure or a measure ordered by the nonconvention country is registered under Section 305.

Comment

Related to Convention: Article 11; Practical Handbook §§6.1-6.12; Legarde, ¶¶68-73.

This section tracks Article 11 of the Convention. As in Section 204, the child must be present in this state for this section to be applicable. But, 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. Subsection (a)(1)-(3) are examples of what can constitute an urgent situation. It is not meant to exhaust the situations where urgent jurisdiction can be taken.

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 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 the child and the other parent. These orders are described in the Practical Handbook as “urgent” and, since they are properly taken under this section, are therefore 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 orders 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 of the Convention. If the child’s habitual residence is in a convention country the order expires when that convention country takes whatever measure is required by the situation, which may be none at all if the convention country of the child’s habitual residence decides there is no emergency. 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 under Section 305. 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 417. NOTICE; OPPORTUNITY TO BE HEARD; JOINDER.

(a) Before a court orders a measure of protection under this [article], notice and an opportunity to be heard must be given to:

(1) a parent whose parental rights have not been terminated;

(2) a person having physical custody of the child; and

(3) any other person entitled to notice under the law of this state in a child-custody proceeding between residents of this state;

(b) The obligation to join a party and the right to intervene as a party in a proceeding under this [article] are governed by the law of this state in a child-custody proceeding between residents of this state.

Comment

This section is the equivalent of Section 205.

SECTION 418. INFORMATION REQUIRED TO BE SUBMITTED TO COURT.

(a) [Subject to [local law providing for the confidentiality of procedures, addresses, and other identifying information], in] [In] a measure-of-protection proceeding, each party, in its first pleading or 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 name and present address of each person with which 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 another proceeding concerning a measure of protection for the child and, if so, identify the court or authority, the case number, and the date of the proceeding;

(2) knows of any proceeding that could affect the current proceeding, including a proceeding for enforcement and a proceeding relating to domestic violence, a protective order, a termination of parental rights, or an adoption and, if so, identify the court or authority, the case number, and the date of the proceeding; and

(3) knows the name and address of any person not a party to the proceeding having physical custody of the child or claiming a right of legal or physical custody of, or visitation with, the child and, if so, the name and address of the person.

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

(c) If a pleading or affidavit states any information under subsection (a) affirmatively, the party shall give additional information under oath as required by the court. The court may examine the party under oath as to details of the information furnished and any other matter pertinent to the court's jurisdiction and the disposition of the case.

(d) A party to a measure-of-protection proceeding has a continuing duty to inform the court of any proceeding that could affect the measure-of-protection 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 under subsection (a), the information must be sealed and may not be disclosed to the other party or the public unless the court orders the disclosure 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.]

***Legislative Note:** The pleading requirements from Article 2 of the UCCJEA are generally carried over into this Article. However, the information is made subject to local law on the protection of names and other identifying information in certain cases. A number of states have enacted laws relating to the protection of victims in domestic violence and child abuse cases which provide for the confidentiality of victims' names, addresses, and other information. These procedures must be followed if the child-custody proceeding of the state requires their applicability.*

Comment

This section is the equivalent of Section 209.

SECTION 419. APPEARANCE OF PARTIES AND CHILD.

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

(b) If a party to a measure-of-protection proceeding under this [article] whose presence is desired by the court is outside this state, the court may order that a notice given pursuant to Section 405 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 render an order necessary to ensure the safety of the child and a person ordered to appear under this section.

(d) If a party to a measure-of-protection proceeding that is 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 or other expenses of the party appearing and of the child.

Comment

This section is the equivalent of Section 210.

SECTION 420. DURATION OF MEASURE OF PROTECTION. Except as otherwise provided in Section 416(b) and (c), the following rules apply:

(1) A measure of protection ordered by a court of this state with jurisdiction under Section 411, 413, or 414 remains in force, even if a change of circumstances has eliminated the jurisdictional basis of the measure, until the measure is terminated, modified, or replaced by a court of this state or an authority with jurisdiction.

(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 the measure is terminated, modified, or replaced by a court of this state or an authority with jurisdiction.

Comment

Related to Convention: Articles 14, 23(2)(e); Practical Handbook §§8.1-8.5; Legarde, ¶¶81-83.

This is a familiar principle and is found in both Uniform Interstate Family Support Act and this Act. 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 an authority, or court, with appropriate jurisdiction under this article.

It should be noted that even though the order remains in force, the Convention in Article 23(e) provides a defense to its registration, recognition and enforcement if the order is inconsistent with a later order of the nonconvention country of the child's habitual residence.

SECTION 421. CONFLICT OF LAWS: IN GENERAL.

(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 and Section 422, a court of this state shall apply the law of this state in a proceeding under this [article].

(c) In an exceptional circumstance to protect a child, a court of this state in a proceeding under this [article] may apply or take into consideration the law of another country that has a significant connection to the child.

(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 the convention country of the former habitual residence of the child.

(e) Except as otherwise provided in Section 422(c), in a proceeding under this [article], the law of the habitual residence of a child governs the exercise of parental responsibility. If the habitual residence of the child changes, the law of the new habitual residence applies.

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

Comment

Related to Convention: Articles: 15, 17, 20, 21(1), 22; Practical Handbook §§9.1-9.8; 9.16-9.18; 9.25; Legarde, ¶¶86-97; 109-110; 115-118.

Sections 421 and 422 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 default rule, contained in subparagraph (b), is that a court that has jurisdiction under the Convention will apply its own law, which, given that jurisdiction is very likely to be located in the place of the child's habitual residence, will result in the application of the law of the child's habitual residence in practically all cases.

However, the court in order to protect the child may, in exceptional cases, apply the law of another country which has a significant connection to the fact pattern. This provision is likely to be little used in the United States. Since there will be no concurrent jurisdiction for the divorce court in the United States, the only concurrent jurisdiction will be urgency jurisdiction. It is extremely unlikely that a court asked to decide a case in an urgent situation will have time to consider the law of another jurisdiction. 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 a more substantial relationship with another country and therefore the court of the child's new habitual residence may wish to apply the law of the child's previous habitual residence. Under this section when a court looks to the law of another country it looks only that the internal law of that country and not its choice of law rules.

Subsection (d) draws a distinction between the existence of measures of protection and the method of application of a measure in a particular country when the child's habitual residence changes. 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 child's habitual residence then 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 (e) 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 and not the place where the parent acted. If the habitual residence of the child changes the law of the new habitual residence governs the exercise of parental responsibility.

SECTION 422. CONFLICT OF LAWS REGARDING PARENTAL RESPONSIBILITY.

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

(b) If the law made applicable by this section is the law of a nonconvention country and the law on conflict of laws 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 determined under subsection (c).

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

(1) Attribution or termination of parental responsibility 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 termination of parental responsibility 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 act takes effect.

(3) Attribution of parental responsibility 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 the child acquires a new habitual residence, the law of the new habitual residence determines the attribution of parental responsibility 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].

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

Comment

Related to Convention: Articles 16, 18, 21(2), 22; Practical Handbook §§9.9-9.15; Legarde, ¶¶98-108.

The specific rules referred to in this section are for those countries where local rules provides 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 or measures, 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 convention country where parental responsibility by operation of law is applicable, the law of the new habitual residence applies.

Subsection (d) restates Article 18 of the Convention that the parental responsibility established by this section may be modified by a measure taken 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 country. Article 21(2) of the Convention contains an exception to the normal rule of referring only to local law for fact patterns that fall under Article 16 of the Convention. If the application of subsection (c) of this section would result in the application of the law of a nonconvention country and if the choice-of-law rules of that country 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 423. DUTY TO RECOGNIZE AND ENFORCE MEASURE OF PROTECTION ORDERED IN CONVENTION COUNTRY.

(a) Except as otherwise provided in subsection (e), a court of this state shall recognize and enforce a measure of protection ordered by an authority if:

(1) the authority's 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 measure has not been modified in accordance with this [article].

(b) Except as otherwise provided in subsection (e), if a child's habitual residence is not in the convention country, the recognition required by subsection (a) applies to a measure of protection ordered by an authority 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 provides;

(2) the habitual residence of one parent is in the country;

(3) at least one parent had parental responsibility when the proceeding for [divorce] or annulment commenced; and

(4) the jurisdiction of the authority was agreed to by the parents or any other person with parental responsibility.

(c) A court of this state may decline to recognize a measure of protection ordered by an authority only if:

(1) the authority's country was not the habitual residence of the child and the authority did not otherwise have jurisdiction under the standards of Section 411(a)(2), 413, or 414;

(2) except in an urgent situation, the issuing authority did not allow the respondent an opportunity to be heard;

(3) the measure is incompatible with a later measure taken by an authority of a convention country with jurisdiction or by an authority of a nonconvention country of the child's habitual residence;

(4) after taking into account the best interest of the child, the court finds the measure is manifestly contrary to the public policy of this state;

(5) except in an urgent situation, the issuing authority did not provide the child an opportunity to be heard if the failure to be heard is in violation of fundamental principles of procedure of this state; or

(6) the child has been placed in foster care, institutional care, or a similar relationship in this state, the authority that ordered the placement did so without consultation and without transmitting a report giving the reasons for the placement, and this state has not consented to the placement.

Comment

Related to Convention: Articles 10, 23; Practical Handbook §§10.1-10.19; Legarde, ¶¶61-63; 119-135.

This section contains in subsection (a) the basic rule of recognition. It requires recognition of a measure of protection made in another convention country if the measure was taken in accordance with the jurisdictional provisions of this article. The recognition language taken 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 in Article 10 allows an authority having jurisdiction of the parent's divorce or annulment to also exercise jurisdiction over the child of the parties 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 is not 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 decide a measure of protection such as custody, the Convention does require recognition of a measure 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. Therefore proceeding to modify the determination made by the divorce authority are governed by Section 411.

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 country and for it to produce an effect there. An example set out 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.

The language "by operation of law," is not included in this section. The example raised above does not fall within the ambit of court decisions. Since this act is directed to courts, it will be operational in cases where recognition will be contested. Therefore the operation of law language would not apply and the registration procedure is as set out in Article 3.

The defenses to recognition are set out in this section as they are in Article 23(2) of the Convention. The list of the reasons for nonrecognition are exclusive. No additional bases for rejecting recognition are permitted. The Convention, and therefore this section, permits nonrecognition for the reasons set out but does not require nonrecognition.

Subsection (c)(3) allows for nonrecognition of a measure if it is incompatible with a later measure taken by the nonconvention country of the child's habitual residence. However, before this subsection is applicable, it must be determined that the measure taken by the nonconvention country of the child's habitual residence is entitled to be recognized and enforced in this state.

Subsection (c)(5) does not require amendment of state statutes or rules concerning the role of the child's preference in procedures affecting the child. So long as the child's preference plays a role in the proceedings, either through an attorney for the child, a guardian ad litem, a custodial evaluator, or an interview by the court, this provision is satisfied. Even if the child is never consulted, the lack of input from the child must violate a fundamental rule of procedure of this state to be unenforceable. The provision also does not apply when the measure taken is an urgent one.

The public policy defense is worded differently here than Article 3. Article 3 applies to nonconvention countries and the wording of this defense in this section is the one mandated by the convention.

SECTION 424. REGISTRATION, RECOGNITION, AND ENFORCEMENT OF MEASURE OF PROTECTION ORDERED IN CONVENTION COUNTRY.

(a) A measure of protection ordered by an authority may be registered in this state under Section 305.

(b) A measure of protection ordered by an authority may be recognized and enforced

under Sections 308 through 312.

(c) Registration, recognition, and enforcement of a measure of protection ordered by an authority may be declined only under Section 423(c).

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

(e) A court of this state may use any remedy available to the court to enforce a measure of protection ordered by an authority. The remedies in this [act] are cumulative and do not affect the availability of other remedies to enforce a measure of protection.

Comment

Related to Convention: Articles 23, 24, 25, 26, 28; Practical Handbook §§10.1-10.19; Legarde, ¶¶61-63; 119-135.

It is possible that the entire registration and enforcement process could be set out section by section in this article. The drafting committee determined that a reference to the Article 3 procedure was more appropriate. Therefore a measure from a convention country is registered under the procedure of Section 305 and is recognized and enforced in accordance with the procedure of Sections 308-312. The defenses to registration and enforcement are contained in Section 423.

By its reference to Section 305, this section continues the policy of that section that a measure does not have to be registered for enforcement. It can simply be registered with a view toward later enforcement. This complies with Article 24 of the Convention which requires convention countries to have a simple and rapid procedure to determine whether a measure taken in another convention country is entitled to recognition and enforcement.

Subsection (d) implements Article 25 of the Convention. In determining whether a measure of another convention country is entitled to registration, recognition and enforcement a court of this state may not review findings of fact made by the authority of the convention country that ordered the measure sought to be enforced.

Enforcement procedure are governed by the law of the law of the state, or convention country, where the measure is to be enforced.

SECTION 425. 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 of the country;
- (2) transmit a report to the authority giving reasons for the placement; and
- (3) obtain consent to the placement by the authority.

Comment

Related to Convention: Article 33; Practical Handbook §§11.13-11.17; Legarde, ¶¶143.

A court in this state that is considering placing a child in another convention country must first consult with the appropriate authority of the other convention country. It must transmit to the other convention country a report on the child, together with the reasons for the proposed placement. The decision to place the child in the other convention country must not be made unless the appropriate authority of that convention country has consented to the placement.

SECTION 426. SUITABILITY TO EXERCISE [VISITATION].

(a) If the parent has asked an authority in a convention country with which the parent has a significant connection to make a finding on the suitability of the parent to exercise [visitation], the parent may request the court to stay a proceeding in which the parent is seeking to obtain or maintain visitation.

(b) If the authority under subsection (a) made a finding on the suitability of the parent to exercise [visitation], the court shall consider the finding in making a decision on [visitation].

Comment

Related to Convention: Article 35; Practical Handbook §11.23; Legarde, ¶¶146-149.

Although it is not required that the proceedings be stayed to allow the parent time to obtain the information contemplated by this section, the Explanatory Report indicates that it is strongly urged. A court which does stay the proceeding pending arrival of the information may take temporary measures regarding the child.

[ARTICLE] 4 5.

MISCELLANEOUS PROVISIONS

SECTION ~~401~~ 501. 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, or supersedes the 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