

DRAFT

FOR DISCUSSION ONLY

MEMORANDUM

**ACCOMMODATING THE UCCJEA AND THE 1996
HAGUE CONVENTION**

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ON UNIFORM STATE LAWS

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I

FROM THE UCCJA TO THE UCCJEA¹

[Note: If you are familiar with the UCCJA and the UCCJEA, please feel free to skip this part of the memorandum]

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.²

In 1980, the federal government enacted the Parental Kidnaping Prevention Act³ (PKPA) to address the interstate custody jurisdiction and enforcement problems that continued to exist after the adoption of the UCCJA. The PKPA mandates that state authorities give full faith and credit to other states' custody determinations, so long as those determinations were made in conformity with the provisions of the PKPA. The

¹ Most of the material in this section comes from the Prefatory Note to the Uniform Child Custody Jurisdiction and Enforcement Act. The Act with comments has been sent to all members of the drafting committee, as well as all advisors and observers. For a version of the UCCJEA with unofficial annotations by the reporter for that Act, see Robert G. Spector, *The Uniform Child Custody Jurisdiction and Enforcement Act (with Prefatory Note, Comments and Unofficial Annotations)*, 32 Fam.L.Q. 301 (1998).

² One of the main reasons why the goals of the UCCJA were not accomplished is because the goals are incompatible. The UCCJA embodied two main goals: First to prevent parental kidnaping of children by attempting to provide clear rules of jurisdiction and enforcement. Second to provide that the forum which decided the custody determination would be the forum that could make the most informed decision. These goals proved to be mutually incompatible. As a result courts rendered decisions that were doctrinally inconsistent as they provided for the primacy of one goal or another depending on the result they wished to accomplish in an individual case. Ann B. Goldstein, *The Tragedy of the Interstate Child: A Critical Reexamination of the Uniform Child Custody Jurisdiction Act and the Parental Prevention Act*, 25 U.C. Davis L. Rev. 845 (1992)(exhaustively and authoritatively documenting how the inconsistency of the UCCJA goals produced inconsistent court decisions).

The inconsistency of the UCCJA reflects the dichotomy in substantive custody law between certainty of result and individual decision making in the "best interest" of the child. Since many of the participants in the UCCJEA Drafting Committee's deliberations were family law practitioners, this dichotomy loomed large throughout the Committee's discussions. Ultimately that Drafting Committee concluded that no coherent act could be drafted which attempted to maintain the primacy of both goals. Therefore, while trying not to lose sight of the promise of individual decision making, the focus of the UCCJEA is that it is more important to determine which state has jurisdiction to make a determination than to find the "best" state court to make the determination.

³ 28 U.S.C. §1738A.

PKPA provisions regarding bases for jurisdiction, restrictions on modifications, preclusion of simultaneous proceedings, and notice requirements were similar to those in the UCCJA. There were, however, some significant differences.

As documented in an extensive study by the American Bar Association's Center on Children and the Law, *Obstacles to the Recovery and Return of Parentally Abducted Children* (1993) (*Obstacles Study*), inconsistency of interpretation of the UCCJA and the technicalities of applying the PKPA, resulted in a loss of uniformity among the states. The *Obstacles Study* suggested a number of amendments which would eliminate the inconsistent state interpretations and harmonize the UCCJA with the PKPA.⁴

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,⁵ where a child custody

⁴ In 1994 NCCUSL's Scope and Program Committee adopted a recommendation of the NCCUSL Family Law Study Committee that the UCCJA be revised to eliminate any conflict between it and the PKPA. In the same year the Council of the American Bar Association's Family Law Section unanimously passed the following resolution at its spring 1994 meeting in Charleston:

RESOLUTION

WHEREAS the Uniform Child Custody Jurisdiction Act (UCCJA) is in effect in all 50 of the United States, and the Federal Parental Kidnapping Prevention Act (PKPA), 28 U.S.C.A. §1738A, governs the full faith and credit due a child custody determination by a court of a U.S. state or territory, and

WHEREAS numerous scholars have noted that certain provisions of the PKPA and the UCCJA are inconsistent with each other,

THEREFORE BE IT RESOLVED the Council of the Family Law Section of the American Bar Association urges the National Conference of Commissioners on Uniform State Laws (NCCUSL) to study whether revisions to the UCCJA should be drafted and promulgated in a revised version of the uniform act.

⁵ Although many members of the Drafting Committee preferred to cover adoption proceedings in the UCCJEA, it proved to be impossible. NCCUSL promulgated the Uniform Adoption Act in 1994. The jurisdictional provisions of that Act, §3-101, are substantially different from those of the UCCJEA. Since

determination was made. This eliminated the substantial ambiguity of the UCCJA concerning which proceeding was covered.

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

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

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

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

Finally, there is a role for public authorities, such as prosecutors, in the enforcement process. Their involvement will encourage the parties to abide by the terms of the custody determination. If the parties know that public authorities and law enforcement officers are available to help in securing compliance with custody

NCCUSL could not promulgate two separate acts containing contrary provisions, the decision was made to exclude adoptions from the UCCJEA.

This decision has long been a cause of concern. See Patricia M. Hoff, *The ABC's of the UCCJEA: Interstate Custody Practice Under the New Act*, 32 Fam. L. Q. 267 (1998). The Uniform Adoption Act was adopted by only one state and is now a Model Act, rather than a Uniform Act. If a state adopted the UCCJEA and did not have other law to cover jurisdiction in adoption cases, it had no provisions with regard to interstate jurisdiction in adoption cases. Many states added "adoptions" to the definition of "custody proceeding" in Section 102(4) of the UCCJEA.

If there is any change that can be made to the original structure of the UCCJEA, it should be to include adoptions under the definition of custody proceeding.

determinations, the parties may be deterred from interfering with the exercise of rights established by court order.

II

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

At the same time that the Uniform Law Commission was revising the UCCJA, the Hague Conference on Private International law was revising the 1961 Convention on the Protection of Minors. That Convention was adopted by a number of European States and was utilized to recognize custody determinations.⁶ 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.⁷

There are significant differences between the UCCJEA and the 1996 Convention. However, the purposes of the two are very similar.⁸ 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. The differences are in the details of how this is to be accomplished. However,

⁶ For the background on the 1996 Convention and an analysis of its terms see Linda Silberman, *The 1996 Hague Convention on the Protection of Children: Should the United States Join?*, 34 *Fam. L. Q.* 239 (2000).

⁷ The Convention came into force on January 1, 2002 with the ratification by the Czech Republic, the Slovak Republic and Monaco. The Convention has been ratified or acceded to by 30 countries. See http://www.hcch.net/index_en.php?act=conventions.status&cid=70. Those 30 countries include most of the European Union, with the exception of six countries---all of whom are expected to ratify the Convention this year. The Convention has also been ratified by a number of non-EU states, including Australia, Uruguay and Armenia.

In addition to custody problems the Convention also deals with matters regarding the property of children. The Convention in Article 55 allows states to take a reservation with regard to property located in its territory and to refuse to recognize judgments taken in other states with respect to its property. It is anticipated that the United States will take this reservation thus eliminating the property issues from discussion of this drafting committee.

⁸ See Robert G. Spector, *The New Uniform Law with Regard to Jurisdiction Rules in Child Custody Cases in the United States with Some Comparisons to the 1996 Hague Convention on the Protection of Minors*, in Eihorn and Seihl ed., *Essays In Memory of Peter Nygh*, at p. 357, T.A.C. Asser Press (2004). This article has already be distributed to members of the drafting committee, the observers and advisors.

the differences are significant and will present difficulties in accommodating the Convention into United States law through the UCCJEA.

There is a large part of the 1996 Convention that is devoted to State to State cooperation. There is a small role for a national central authority in carrying out the cooperation provisions of the Convention. Most of the cooperation provisions are ultimately directed to the “competent authority” which would be the appropriate entity under local law for carrying out the particular function referred to in the 1996 Convention. This means that the central authority in the United States will delegate these functions to the local authority. These cooperation problems are going to be addressed in the federal implementing legislation. Therefore it is not necessary to address the particular cooperation aspects contained in Chapter V of the 1996 Convention in this revision to the UCCJEA,⁹ although some reference to these provisions may be appropriate.

III THE INTERNATIONAL CUSTODY CASE¹⁰

The international child custody case, like the international child support case¹¹, 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 UCCJA¹² provided that the general policies of that Act applied to foreign country custody determinations. Foreign custody determinations were to be

⁹ This revision of the UCCJEA is designed solely to implement the 1996 Convention. Therefore, although there may be a number of amendments to the UCCJEA which would be desirable after almost fifteen years of practice under the Act, the amendments are to be limited to those necessary to implement the 1996 Convention. However, part of that implementation could be to incorporate the Uniform Child Abduction Prevention Act into the UCCJEA. The Child Abduction Prevention Act can be found at http://www.law.upenn.edu/bll/archives/ulc/ucapa/2006_finalact.htm. That is an issue for the drafting committee.

¹⁰ See generally Robert G. Spector, International Child Custody Jurisdiction and the Uniform Child Custody Jurisdiction and Enforcement Act, 33 N.Y.U. Journal of Internat.. Law and Policy 251 (2000)

¹¹ For a discussion of international child support orders see John J. Sampson, The Uniform Interstate Family Support Act: Introductory Comment to Article VII, 43 Fam. L. Q. 75,140 (2009).

¹² The text of the Section 23 is as follows:

The general policies of this act extend to the international area. The provisions of this act relating to the recognition and enforcement of custody decrees of other states apply to custody decrees and

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

On the first issue, the UCCJA was ambiguous and only required application of the “general policies” of the Act. Frequently courts in the United States would apply the same jurisdictional principles to international cases that they would apply in interstate cases. For example, in *Superior Court v. Plas*,¹³ 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.¹⁴ However, not all states followed the same practice. For example, the Oregon Court of Appeals in *Horiba v. Horiba*,¹⁵ refused to defer to a pending Japanese proceeding since Japan was not a “state” under the definition of “state” in the UCCJA.¹⁶

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.¹⁷ However, Missouri, New Mexico and Ohio refused to enact §23 of the UCCJA. Indiana formerly had a provision which seemed to affirmatively require the state to not recognize and enforce a foreign custody order.¹⁸ These provisions undermined the UCCJA

decrees involving legal institutions similar in nature to custody institutions rendered by appropriate authorities of other nations if reasonable notice and opportunity to be heard were given to all affected persons

¹³ 202 Cal.Rptr. 490 (Cal. Ct. App. 1984).

¹⁴ See also *Goldstein v. Fisher*, 510 A.2d 184 (Conn. 1986)(court lacked jurisdiction to decide custody of child who had been born in Germany and who only resided in the state for four months); *Baumgartner v. Baumgartner*, 691 So.2d 488 (Fla. Dist. Ct. App. 1997)(Florida enters domestic violence order and defers to pending proceeding in Germany); *Ivaldi v. Ivaldi*, 685 A.2d 1319 (N.J. 1996)(simultaneous proceedings provisions apply to New Jersey/Morocco custody dispute); *Dincer v. Dincer*, 701 A.2d (Pa. 1997)(trial court should have deferred to Belgium as the “home state” of the child).

¹⁵ 950 P.2d 340 (Or. Ct. App. 1997).

¹⁶ See also *Lotte V. v. Leo V.*, 491 N.Y.S.2d 58 (Fam.Ct. 1985)(New York entertains custody case despite pending proceedings in Switzerland).

¹⁷ See e.g. *Bliss v. Bliss*, 733 A.2d 954(D.C. 1999)(enforcing Russian custody order).

¹⁸ See Ind. Code Ann. §31-1-11.6-25 (1996) repealed by P.L.1-1997, §157. The Drafting Committee for the UCCJEA discussed several situations where attorneys in the United States,

principles of recognition and enforcement of custody determinations by countries with appropriate jurisdiction under the UCCJA and created obstacles to the return of children that were illegally abducted.

B. THE UCCJEA

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

Section 105(b) requires tribunals in the United States to recognize foreign custody determinations if the facts and circumstances of the case indicate that the foreign custody determination was made in substantial conformity with the jurisdictional provisions of the UCCJEA. However, as indicated in Section 105(c) a United States court is given the discretion not to apply the UCCJEA if the child custody law of a foreign country violates fundamental principles of human rights. The language of the section was taken from the Hague Convention on the Civil Aspects of International Child Abduction.¹⁹ 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.²⁰ In particular it does not appear that

representing clients seeking to avoid the enforcement of foreign custody decrees, counseled them to move to Indiana.

¹⁹ The 1980 Convention can be found at http://www.hcch.net/index_en.php?act=conventions.text&cid=24 and has already been distributed to members of the drafting committee, observers and advisors.

²⁰ For a selection of recent cases see *In re Marriage of Akula*, 935 N.E.2d 1070 (Ill Ct. App. 2010)(deferring to a finding by an Indian court that all parties lived in India in determining that Illinois lost exclusive continuing jurisdiction); *Stern v. Roux*, 2010 WL 1050302, (Ariz. Ct. App. 2009)(unpublished; text in Westlaw)(finding that a British Columbia court decided a custody determination in substantial

enforcement has been denied on the basis of a violation of fundamental principles of human rights.²¹ The effect of Section 105 is to ensure that all foreign custody determinations that are made in conformity with UCCJEA jurisdictional standards are enforced in the United States. Ratification of 1996 Convention is not necessary for enforcement of foreign custody decrees; ratification is necessary in order for United States custody determinations to be enforced in other countries.

IV ISSUES FACING THE DRAFTING COMMITTEE

This section makes the assumption that all issues arising under the 1996 Convention will fall under the jurisdiction of state courts and not federal courts. That issue is one that will have to be addressed in the federal implementing legislation. Currently under the “domestic relations exception” to federal jurisdiction domestic relations issues are left to state courts even if the federal court would otherwise have jurisdiction based on the diverse citizenship of the litigants.²² This means that in cases involving the 1980 Hague Abduction Convention, a federal court decides only the issue as to whether the child should be returned under that Convention. However, should one of the defenses be established and the child not returned, further issues concerning jurisdiction and the substantive custody determination must be left to state courts.

A. DISTINGUISHING BETWEEN CONVENTION AND NON-CONVENTION COUNTRIES

Currently the UCCJEA applies to all foreign countries by treating them as if they are states of the United States. With the ratification of the 1996 Convention, it will be necessary to construct a different regime for our treaty partners that conforms to the

conformity with the UCCJEA even though they use habitual residence as a connecting factor and not home state); *In re Marriage of Nurie*, 98 Cal.Rptr.3d 200 (Cal. Ct. App. 2009)(discussing whether California retained exclusive continuing jurisdiction after the father spent three years in Pakistan); *Marriage of Richardson*, 102 Cal.Rptr.3d 391 (Cal. Ct. App. 2009)(California may not adjudicate custody of a child whose home state is Japan) *Sanjuan v. Sanjuan*, 892 N.Y.S.2d 146 (N.Y. App. Div. 2009)(New York may not determine the custody of a child whose home state is the Philippines).

²¹But see *Charara v. Yatim*, 937 N.E.2d 490 (Mass. Ct. App. 2010)(under the UCCJA, refusing to enforce a Lebanese custody determination because, among other reasons, the mother would not be allowed to obtain custody under Lebanese law.); *El Chaar v. Chehab*, 2010 WL 5395090 (Mass. Ct. App. 2010)(declining to enforce under the UCCJA another Lebanese custody determination because it was based on the mother removing the child from Lebanon instead of considering all the factors that a Massachusetts court would consider in determining the best interests of the child)

²²*Barber v. Barber*, 62 U.S. 583 (1858); *Ex parte Burrus*, 136 U.S. 586 (1890); *Ankenbrandt v. Richards*, 504 U.S. 689 (1992).

approach of the Convention. The issue then becomes how do we treat non-Convention foreign countries. There are several possibilities:

(a) *Apply provisions of Section 105:* Non-Convention foreign countries could continue to be treated under the provisions of Section 105. In other words Articles I and II of the UCCJEA would apply to them, as is the current practice. The custody determinations of non-Convention countries would be recognized if, under the facts and circumstances of the case, the decision rests on jurisdictional principles substantially in conformity with the UCCJEA, unless the foreign state's child custody law violates fundamental principles of human rights. This has the advantage of continuing an approach with which courts and attorneys are familiar. However, if another country's child custody determinations are going to be recognized unilaterally by the United States, there is no incentive for foreign countries to join the Convention and thereby be obligated to recognize our custody determinations.

(b) *Not mention non-Convention States or refer to comity:* This would have the effect of allowing each state of the United States to develop its own rules, outside of the UCCJEA, with regard to jurisdiction, choice of law, enforcement of judgments and judicial cooperation through the application of their law of comity.²³ This has the effect of encouraging countries to join the Convention and thereby have some certainty as to how their child custody determinations will be treated in the United States. However, it will undermine the goal of uniformity of result among states of the United States with regard to how foreign country judgments are to be treated. For example, assume a situation where a child has been wrongfully abducted to the United States, but a defense to the return of the child has been established under the Abduction Convention. If the child has been taken in violation of a custody determination of another country that is a party to the 1996 Convention, a court of the United States may still be obligated to recognize that judgment.²⁴ On the other hand if the child is wrongfully taken from a country that has become a member of the Abduction Convention, but is not a party to the 1996 Convention, it would be up to the individual state of the United States whether to recognize the foreign country child custody determination, thereby producing an incentive for child abductors to abduct the child to certain states of the United States.

(c). *Apply some provisions of the UCCJEA* Most of the sections that could be made applicable are in the judicial cooperation provisions in Article I. For example, §110 of the UCCJEA (judicial communications) could provide that a judge may communicate

²³ This was done explicitly under §104(a), UIFSA (2008),: "Remedies provided by this [act] are cumulative and do not affect the availability of remedies under other law or the recognition of a support order on the basis of comity."

²⁴ See the discussion in Gloria F. DeHart, *The Relationship Between the 1980 Child Abduction Convention and the 1996 Protection Convention*, 33 N.Y.U. J. Int'l L. & Pol. 83, 94 (2000).

with a court “outside of this state”²⁵ which would authorize courts to communicate with courts from Convention and non-Convention States. Without such a provision some courts in some states may decide that there is no authority that allows them to communicate with courts from non-Convention States.

It is also possible that some provisions of articles II and III could be made applicable to non-Convention States. Examples could include Section 207 on forum non conveniens and Section 208 on declining jurisdiction due to reprehensible conduct. In Article III it might be desirable to apply the enforcement remedies to custody determinations of non-Convention countries that the individual state chooses to recognize.

B. INCORPORATION OR A SEPARATE ARTICLE

Since the UCCJEA is being revised only for the purpose of implementing the Convention, the drafting goal is to integrate the Convention into state law. In many places there are differences between the Convention and the UCCJEA as originally promulgated. In order to avoid conflict between the two it is necessary to substantially amend the text of the UCCJEA to accommodate Convention cases, or to create an independent article of the UCCJEA solely for Convention cases.

It is possible to incorporate particular Convention provisions into each article. For example, in the section on definitions, there could be a definition of “measure” which would be the Convention equivalent of “custody determination” applicable to Convention cases. Other examples could include Section 201 addressing jurisdiction in Convention cases and 202 could address the lack of exclusive, continuing jurisdiction in the Convention case.

The other possibility, and the one selected by the UIFSA drafting committee, is to do both. This would mean applying some of the original UCCJEA provisions to Convention cases where it can be done easily. There could also be a separate article, as in UIFSA, applicable only to Convention cases. This article would include those rules of the Convention which differ from normal practice under the UCCJEA. It would direct state courts in (to use the language of the UIFSA reporter) the “do’s and don’ts” specifically applicable to cases falling under the Convention. This latter approach is probably more desirable, especially given one of the original decisions made by the

²⁵ This was also the solution under UIFSA (2008), whereby a number of the provisions of UIFSA were made applicable to all countries, regardless as to whether the country is a member of the 2007 Hague Maintenance Convention. This produced a definition, section §102(18), which defined “out of this state” as meaning “a location in another state or a country other than the United States, whether or not the country is a foreign country. (Foreign country had previously been defined as including members of the 2007 Hague Maintenance Convention, among other things).

UCCJEA Drafting Committee which is to keep parallel the UCCJEA and UIFSA as much as possible given the different bases of jurisdiction.

C. SPECIFIC ISSUES TO BE ADDRESSED IN PROVISIONS APPLICABLE TO CONVENTION CASES

This section of the memorandum discusses (and sometimes simply mentions) those sections of the Convention that will need to be addressed specifically in the UCCJEA, particularly if we place Convention cases in a separate article.

1. The Problem of Habitual Residence:

Similar to the Abduction Convention, and unlike the Maintenance Convention, the term “habitual residence” is central to the operation of the 96 Convention. Jurisdiction to take a measure for the protection of the minor is based on the habitual residence of the minor. Jurisdiction changes to a new state upon a change of habitual residence.²⁶ The difficulty is that the term is not defined in the 96 Convention and, actually, is not defined in any convention promulgated by the Hague Conference on Private International Law. European attorneys are used to giving the term a slightly different meaning depending on the context where the term appears. In the United States, however, the term appears only in the case law implementing the Abduction Convention.

The issue is whether we should define the term in the UCCJEA provisions implementing the 96 Convention. There are three possible approaches that could be taken:

(a) Not define the term at all. It is very likely that in the absence of a definition, courts and attorneys will turn to the case law under the Abduction Convention. This would not be a problem if the case law under the Abduction Convention was not in such disarray. There are currently three different approaches to habitual residence that are used, depending on the particular circuit.

The test used in the Third and Sixth Circuit was first set out in *Feder v. Evans-Feder*²⁷, and is called the “settled purpose” test and explained by the Third Circuit as follows:

²⁶ This is true even if the change of habitual residence occurs in the middle of a court proceeding. Therefore courts will have to give special care to deciding motions on relocation, especially pre-decree. Granting a motion to allow one parent and the child to move to a new country will probably ultimately result in a change in the child’s habitual residence with a corresponding loss of jurisdiction by the original court.

²⁷ *Feder v. Evans-Feder*, 63 F.3d 217 (3rd Cir.1995); *Robert v. Tesson*, 507 F.3d 981 (6th Cir. 2007).

[A] child's habitual residence is the place where he or she has been physically present for an amount of time sufficient for acclimatization and which has a "degree of settled purpose" from the child's perspective.... [A] determination of whether any particular place satisfies this standard must focus on the child and consists of an analysis of the child's circumstances in that place and the parents' present, shared intentions regarding their child's presence there.²⁸

Recently the Sixth Circuit reexamined the issue of habitual residence and affirmed the "settled purpose" approach. It held that habitual residence is the place where the child has been physically present for an amount of time sufficient to be acclimatized so that the child has a degree of settled purpose from the child's point of view.²⁹ Some of the lower federal courts in circuits that have not ruled on this issue have also agreed with the "settled purpose" approach to habitual residence.³⁰

The Ninth Circuit, however, interpreted the concept of settled purpose to mean that both parents must have a settled intent that their children remain in the new country in order for habitual residence to shift.³¹ Therefore even though the children had been in California for fifteen months, the United States did not become the children's new habitual residence because the parents had not agreed that the children would abandon their old habitual residence in Israel and live permanently in the United States. The court appeared to be concerned that it would be impossible to apply the settled-purpose language of *Feder* to cases involving young children.

²⁸*Feder*, 63 F.3d at 224. See also *Armiliato v. Zaric-Armilato*, 169 F.Supp.2d 230 (S.D. N.Y. 2001)(court uses the "settled purpose" doctrine and decides that although the child traveled extensively with her parents, she was born in Italy, spoke Italian and always returned to Italy after their travels and therefore Italy was the child's habitual residence); *People ex rel. Ron v. Levi*, 719 N.Y.S.2d 365 (N.Y. App. Div. (2001).

²⁹*Robert v. Tesson*, 507 F.3d 981 (6th Cir. 2007). The First Circuit in *Nicolson v. Pappalardo*, 605 F.3d 100 (1st Cir. 2010) appears to agree although the issue of a change of habitual residence was not present in the case. Under this approach to habitual residence if the child never becomes acclimatized to the new state a change of habitual residence does not occur. See e.g., *Paz v. Paz*, 169 F.Supp.2d 254 (S.D.N.Y. 2001)(child whose country of residence had changed at least nine times in three years may remain with her mother in the United States because the New Zealand father failed to show that the child had become acclimatized to New Zealand during the time she was there and therefore was not taken from the country of the child's habitual residence).

³⁰See e.g., *Lockhart v. Smith*, 2006 WL 3091295 (D. Me. 2006) (unpublished; text in Westlaw)(two children who relocated with their mother to Canada while their father spent eighteen months in prison were found to be habitual residents of Canada, regardless of the father's intent).

³¹*Mozes v. Mozes*, 239 F.3d 1067 (9th Cir. 2001).

This conflict was recognized in by the Second Circuit in *Gitter v. Gitter*.³² The court in that case fashioned an amalgam of the two tests. The court held that normally the child's habitual residence ought to be determined by the shared intent of the parents. However, since in some cases, the child will have resided for a considerable period of time in one country without the parents coming to an agreement on where the child should reside, the court should also determine whether the child has become acclimatized to the new country regardless of the parent's intentions.

These three approaches continue to divide the Circuit Courts of Appeal. Perhaps the most extreme example occurred in *Ruiz v. Tenario*.³³ In that case the Eighth Circuit determined that a three year stay in Mexico was insufficient to change the habitual residence of the children to Mexico from the United States because the court could not find a settled intent on the part of the parents to abandon their habitual residence in the United States. The mother had made comments to the effect that she was only moving to Mexico if their marriage worked out and therefore even three years was not sufficient to establish an intent to abandon their old habitual residence. It seems clear that if the court applied the "settled purpose" test that habitual residence would have shifted to Mexico.³⁴

If, in the absence of a definition, courts import into the UCCJEA the Abduction Convention case law on habitual residence, there will be substantial disuniformity at the outset of the revised UCCJEA. This, of course, undermines one of the major goals of the UCCJEA, which is to make it clear that there is one court, and only one court, where jurisdiction is appropriate in any particular child custody case.

(b) Choose one of the definitions of habitual residence currently in use. The approach of the Third and Sixth Circuit most closely resembles the approach most used by our prospective treaty partners. Such a choice might convince some of the other circuits to

³²396 F.3d 124 (2nd Cir. 2005).

³³392 F.3d 1247 (11th Cir. 2004).

³⁴ For other cases see *Koch v. Koch*, 450 F.3d 703 (7th Cir. 2006)(adopting the Mozes test of parental intent); *Ozgul v. Ozgul*, 2010 WL 3981238 (D. Colo. 2010)(unpublished; text in Westlaw)(suggesting that the Tenth Circuit was leaning toward adopting the Mozes test.).

However, in at least one case a federal district court paid lip service to Mozes but then stood the case on its head. In *Haro v. Woltz*, 2010 WL 3279381 (E.D. Wis. 2010)(unpublished; text in Westlaw), the court determined that the evidence was conflicting concerning whether the child was to stay with the father in Wisconsin for one year before returned to Mexico, or whether the child was to stay in Wisconsin for an indefinite period. The court, believing the father, determined that the habitual residence had shifted since there was no shared intent that the child should stay only one year. Mozes required that before the child's habitual residence can shift there must be a shared parental intent that it do so. In this case the court apparently determined that the year the child spent in Wisconsin was sufficient to shift habitual residence absent a shared parental intent that it not do so.

abandon the “intent of the parents” test for habitual residence in favor of the “settled purpose” test.

(c) Define habitual residence the same way as home state and home state jurisdiction are defined: This has the advantage of importing into the article on Convention cases the jurisdictional scheme to determine original jurisdiction in inter-state cases. It is one that is familiar to American courts and lawyers and would represent a continuation of current law.

On the other hand, such a specific definition of habitual residence raises the possibility of conflicting custody determinations between the United States and other Convention States. Consider the situation where, pre-decree, one parent and the child move to another country. A custody proceeding is filed in the left-behind parent’s country before the expiration of the six-month extended home state provision of Section 201(a)(1). If the home state definition is to be used as the definition of habitual residence, it is possible that the country where the child has been removed to will find that habitual residence has shifted, while the United States would find that it has not shifted. This raises the possibility of conflicting custody decrees, something that the UCCJEA has striven hard to avoid. However, given the amorphous nature of the term habitual residence, it is possible that any approach to the problem will result in conflicting custody determinations. Such conflicts may be less likely if the term remains undefined or, if the “settled purpose” approach to habitual residence is adopted.

2. Definitions

The terms used in the Convention differ from those used in the UCCJEA. The drafting committee needs to decide if all of the Convention terms should have a separate definition, either in the main definition section, or in a special definition section applicable only to Convention cases. Example of terms where a definition is probably necessary include the terms “measure” and “parental responsibility.” In defining the terms in a special section, the issue is whether to use Convention language or to try and adapt the Convention language to normal ULC drafting language. This issue will appear almost immediately with the definition of “measure.” For example, the term under the Convention includes guardianships and “curatorships.” The former term is very familiar to United States attorneys and judges; the latter is not. The Convention is also applicable to “kafala” a term that is used only in Islamic law. The term probably needs to be included in the definition of “measure,” however, in some circles the Act is likely to receive some criticism for incorporating Islamic law principles into local law.³⁵

³⁵ For one example see *Awad v. Ziriax*, --- F.Supp.2d ----, 2010 WL 4814077 (W.D. Okla. 2010) granting a preliminary injunction against Oklahoma State Question 755 which would have amended the Oklahoma Constitution to prohibit the use of Islamic law in Oklahoma courts. This could potentially affect

There are other terms that may not need a separate definition. For example, the term under the convention is “urgency.” The comparable UCCJEA term is “emergency.” The terms are similar enough so that, perhaps, a separate definition of “urgency” is not needed. On the other hand, the UIFSA (2008) definitions of “obligee” and “obligor” were re-defined to include the 2007 Maintenance Convention terms of “creditor” and “debtor” even though almost everyone would understand that those terms are the functional equivalent of “obligee” and “obligor.”

There are other situations where the term is defined using different words but essentially says the same thing. For example, the term “child” is defined in the UCCJEA as “an individual who has not attained 18 years of age.” The Convention definition is that a person is a child “from the moment of their birth until they reach the age of 18 years.” The two are functionally equivalent and therefore, perhaps, there is no need to redefine children for purposes of Convention cases.

Perhaps the best approach is to translate the language of the Convention into familiar United States statutory terms where that can readily be done. If, however, the terms cannot be so translated, perhaps the Convention language should be used in order to prevent confusion from attorneys attempting to find some difference between UCCJEA language and the Convention language.

3. Article 6: Refugee Children and Children Whose Habitual Residence Cannot be Established

The provisions of this Article could be incorporated into the UCCJEA in three or four ways: First, the Article could be subsumed into the urgency or emergency jurisdiction proceedings. Refugee children can be thought of as abandoned which triggers the emergency jurisdiction provisions of section 204 of the UCCJEA. When the child obtains an habitual residence that state would then have jurisdiction.

Second, the committee could draft a “presence jurisdiction” provision. See Article 12. It would also provide that when a child acquires a habitual residence that state has jurisdiction.

Third the problem of refugee children could be addressed in a separate section, as does the Convention.

state ratifications, in which case states would be required to apply whatever federal implementing statute is ultimately passed.

A fourth possibility is for the federal legislation to determine jurisdictional rules with regard to refugee children under the theory that issues concerning refugees should be decided as an aspect of a national immigration policy.

4. Article 7. Relation Between the 1996 Convention and the 1980 Abduction Convention.

Article 7 deals with the problem of a shift in habitual residence that may occur during a wrongful abduction. The definitions of this article are taken from the Abduction Convention and will need to be kept as written. The article provides that even though the child's habitual residence has shifted, the abducted-from country retains jurisdiction unless there has been acquiescence, or one year has passed after the left-behind parent should have known about the location of the child, the child is settled in the new environment, and no request for return is still pending.

The ambiguity in this article stems from the fact that a request for return could be thought of as pending in the left-behind country or the abducted-to country. If the latter, then jurisdiction will shift following a wrongful abduction after one year and the rest of the conditions are met. If the former, or both, then a continuing proceeding in the abducted-from country could keep the abducted-to country from acquiring jurisdiction, except for urgency. This would provide a form of continuing jurisdiction in wrongful abduction cases. Whether this interpretation of the article would be recognized by any other Contracting State is questionable.³⁶

The use of the term "pending" in this Article is troubling. That term caused considerable confusion under the UCCJA and its use was abandoned in the UCCJEA.³⁷ The drafting committee will need to consider whether a separate definition of "pending" should be included in order to prevent the re-emergence of the old UCCJA case law.

5. Articles 8 and 9: Form Non Conveniens

The first question concerning these Articles is whether there should be a separate section for Convention cases, or whether Convention cases can be covered in Section 207 of the UCCJEA. It may be appropriate to have a separate Convention section because of limitations contained in the articles:

³⁶A form of continuing jurisdiction to defeat a change of jurisdiction accompanying a change of habitual residence may also be possible through an interpretation of Article 13 on simultaneous proceedings and is discussed under that article.

³⁷Under the UCCJA, some courts held that a case is not "pending" until process is served. *Brown v. Brown*, 493 So.2d 961 (Miss. 1986). The majority approach was that a custody proceeding began with the filing of the first pleading. E.g. *Elder v. Park*, 717 P.2d 1132 (N.M. 1986).

(a) These articles operate only between Convention States. If we wish to use forum non conveniens with regard to non-Convention States, we will have to so indicate in section 207.

(b) Article 8 (2) contains a limitation concerning the countries to which the article applies, although the listed countries are probably the only ones which would qualify as a more convenient forum.

(c) There are no factors under the Convention for the court to consider in making the determination as to whether another country would be “better placed.” A Convention section on convenient forum, could indicate that the court shall consider the factors listed in section 207. It is probably permissible to add the factors. The drafting committee could consider that the Convention provisions provide the minimum necessary to carry out the purposes of the Convention. An individual state could add factors necessary to adapt the Convention to local law. An example under the 1980 Abduction Convention is the burden of proof necessary to establish a defense to the return of the child. The United States implementing legislation requires that the burden of proof to establish a defense under Article XIII(b) and Article XX of the Abduction Convention is clear and convincing evidence,³⁸ although the Abduction Convention itself does not mention burdens of proof.

(d) There are slight differences in procedure that should be noted. The Convention suggests that there will communication between the tribunals, either directly or through the central authority. Section 207 does not mention communication, however communication between judges in the United States occurs very frequently in cases under Section 207. The drafting committee could incorporate the provisions of section 110 of the UCCJEA by reference in a separate Convention section on convenient forum.

(e) At least one key aspect of the procedure is the same. Article 8(1) allows the court to suspend consideration of the case and invite the parties to proceed in another jurisdiction. This is very similar to Section 207(c) of the UCCJEA.

6. Article 10: Divorce Jurisdiction

This article presents potential problems for the United States. It provides that a court can have jurisdiction consistently with the Convention if it has jurisdiction over the parties’ divorce, one of the parties is habitually resident in the state, the parties agree that the divorce court may decide custody, and it is in the best interest of the child that it

³⁸ International Child Abductions Remedies Act, 42 USC §11603(e)(2)(A).

do so. The effect of this provision requires a recognition of the custody determination made by the divorce court under the recognition provisions of the Convention.

Consider a case in which all parties reside in Country A. After the couple separate, the child and one parent continue to reside in Country A. The other parent moves to Country B, establishes habitual residence, and files for divorce. The parties agree that Country B shall determine, not only whether a divorce should be granted, but also the issues of custody and visitation. This would satisfy the provisions of the Convention and would require recognition of the custody determination by other Contracting States.

However, this fact pattern raises issues that, to the best of my knowledge, have not been decided in the United States. In the United States, the UCCJA, the PKPA, and the UCCJEA all proceed under the theory that personal jurisdiction is neither necessary nor sufficient to make a child custody determination. Although there has been some commentary to the contrary,³⁹ this issue now seems to be generally conceded.⁴⁰

The UCCJEA, like the PKPA and the UCCJA, takes the position that a significant relationship between the parent, the child, and the state, plus the notice and hearing provisions of the UCCJEA, are all that is necessary to satisfy due process. These three acts are based on Justice Frankfurter's concurrence in *May v. Anderson*⁴¹ which allowed states to recognize custody determinations made by other states even though the Full Faith and Credit Clause of the Constitution did not require recognition. As pointed out by Professor Bodenheimer, the reporter for the UCCJA, no "workable

³⁹ Rhonda Wasserman, *Parents, Partners and Personal Jurisdiction*, 1995 U.Ill.L.Rev. 813,

⁴⁰ See *Fitzgerald v. Wilson*, 46 Cal. Rptr. 2d 558, 564 (Cal. Ct. App. 1995) ("[T]he UCCJA does not require personal jurisdiction over a nonresident parent before the court may determine child custody issues. Indeed, such a requirement would thwart the purpose of the act, which is to provide a forum to resolve custody issues."); *Balestrieri v. Maliska*, 622 So.2d 561 (Fla.Ct.App. 1993)(collecting cases); *Herma Hill Kay*, *Adoption in the Conflict of Laws: The UAA not the UCCJA is the Answer*, 84 Cal.,L.Rev. 703, 755 n.245 (1996)("The point seems to have been resolved for purposes of the UCCJA").

Alabama seems to be the only state which, in addition to the jurisdictional requirements of section 201 of the UCCJEA, also requires personal jurisdiction over both parties. See the discussion in *Ex parte, Diefenbach*, --- So.3d ---, 2010 WL 5030126 (Ala. Civ. App. 2010).

The last attempt that I know about to seek review of this issue before the United States Supreme Court was *Warfield v. Warfield*. 661 So.2d 924 (Fla.Ct.App. 1995), cert.den.117 S.Ct. 59 (1996) The father resided in Florida and the mother and child lived in Mexico. Even though the wife and child were Mexico residents, the trial court held it had jurisdiction over the parties' child custody dispute under the UCCJA, where the parents had agreed in writing that the child would reside with the husband and attend school in Florida. The appellate court affirmed and the Supreme Court denied certiorari.

⁴¹ 345 U.S. 528 (1953).

interstate custody law could be built around [Justice] Burton's plurality opinion.... [requiring personal jurisdiction.]" 42

The effect of not requiring personal jurisdiction is that courts in the United States have determined that the status jurisdiction set out in the UCCJEA is akin to a limitation on subject matter jurisdiction. As such, it cannot be waived by the parties, nor can it be conferred on the court by consent.⁴³

Under the fact pattern presented above, there is no substantial relationship between the child and the parents in State B. The issue is whether the parties' agreement to submit their child custody determination to the State B court is sufficient satisfy due process concerns when a United States court is asked to recognize and enforce the State B custody determination. The failure to object to jurisdiction in a bilateral divorce has been found to be sufficient to prevent a second state from denying full faith and credit to the divorce.⁴⁴ Although this principle has not been applied to custody determinations,⁴⁵ it seems reasonable to assume that consenting to jurisdiction by not raising an objection to jurisdiction is sufficient as a constitutional matter, although not normally permitted by statute in custody litigation.

Regardless of these concerns, we are obligated to have a provision recognizing custody determinations under circumstances where the court of a Contracting State based its jurisdiction on Article 10. Perhaps the paucity of cases in the United States indicates that the issue is unlikely to arise.

7. Article 11: Urgency Jurisdiction

The urgency jurisdiction provisions of Article 11 of the Convention are similar in purpose to the emergency jurisdiction provision of Section 204 of the UCCJEA.

⁴² Bridgette Bodenheimer, *The Uniform Child Custody Jurisdiction Act: A Legislative Remedy for Children Caught in the Conflict of Laws*, 22 Vand.L.Rev. 1207,1233 (1969).

See also Brigitte M. Bodenheimer & Janet Neeley-Kvarme, *Jurisdiction Over Child Custody and Adoption After Shaffer and Kulko*, 12 U.C.Davis, 229, 252 (1979):

A close examination of the Supreme Court cases in light of the nature of custody adjudication and the state of preexisting law should dispel any doubt that cases concerning the custodial relationship between parent and child and the termination of that relationship are status adjudications within the meaning of the Shaffer exception. Child custody determinations are governed by particularized jurisdictional rules that are "child-centered" and not "defendant-centered."

⁴³ *Walsh-Stender v. Walsh*, 307 S.W.3d 127, (Ky. Ct. App. 2009); *Harshberger v. Harshberger*, 724 N.W.2d 148, (N.D. 2006); *Rosen v. Rosen*, 664 S.E.2d 743, (W. Va. 2008). But see *Hightower v. Myers*, 304 S.W.3d 727 (Mo. 2010).

⁴⁴ *Sherrer v. Sherrer*, 334 U.S. 343 (1948).

⁴⁵ See *Joliff v. Joliff*, 1992 OK 39, 829 P.2d 81 (litigating custody does not prevent a litigant from raising on appeal the lack of UCCJ[E]A jurisdiction even though the issue was not raised in the trial court.)

However, there are some differences that will probably necessitate a separate section for emergency cases under the Convention.

(a) The first difference is that Section 204 contains language defining what constitutes an emergency.⁴⁶ It occurs when a child is abandoned or when the child, or a parent or sibling of the child, is threatened with mistreatment or abuse. The question is whether in a section dealing with emergencies under the Convention, we should add further language similar to that currently in Section 204. This is another issue where the Convention provides the basic rules. However, it should be possible to flesh out the Convention language so long as the draft does not detract from the Convention's purpose.

(b) The second difference between the Convention and Section 204 is the communication provisions. Section 204 requires that there be communication between the court that issues the temporary emergency order and the court that would otherwise have jurisdiction. There are no communication provisions in this part of the Convention.⁴⁷ Again the issue for the drafting committee is whether to add communication requirements similar to Section 204 for United States courts. This would require United States courts, when confronted with an emergency case to communicate with the court of the other State even though there would be no corresponding duty on the court of the other country to communicate with a United States court. There is also the reverse situation where a court in another State issues an emergency order. There is no requirement that the court in the other State contact the United States court that would, apart from the emergency, have jurisdiction.

⁴⁶The explanatory report takes the position that an urgent situation occurs when there is the likelihood of irreparable harm to the child. Paul Legarde, Explanatory Report of the 1996 Convention at ¶69. The Explanatory Report is available at <http://hcch.e-vision.nl/upload/exp134.pdf>

⁴⁷ According to the Explanatory Report, the Special Commissions rejected a reporting requirement by the court that had taken the urgent measure for fear of "overburdening" the Convention and adding a possible additional ground for non-recognition under Article 23. Legarde at ¶72. However, there is nothing in the report to indicate that a State could not assume a communication requirement unilaterally.

In addition, one could read the principle of Article 36 into the urgency jurisdiction provisions. That Article requires that:

In the case where the child is exposed to a serious danger, the competent authorities of the Contracting State where measures for the protection of the child have been taken or are under consideration, if they are informed that the child's habitual residence has changed to, or that the child is present in another State, shall inform the authorities of that other State about the dangers involved and the measures taken or under consideration.

It would seem that if a State is contemplating taking an emergency measure, it is likely that the child is being exposed to a serious danger. In which case it can be argued that the Convention does require communication between the court entertaining the emergency and the State that would otherwise have jurisdiction or where the child is located.

There is also no provision in the Convention that requires litigants to inform the different courts concerning the two proceedings. That, of course, raises the question of whether the pleading requirements of Section 209 of the UCCJEA should be made applicable to Convention cases. Otherwise there would be no requirement on a person who obtained an emergency order from a court of another country to inform the court in the United States as to the existence of the other proceeding. If a court in the United States is to communicate with a court in another State concerning an emergency order entered in that State there should be some burden on the litigants to inform the court concerning other proceeding that will affect the child.

(c) The third difference between Section 204 and the Convention concerns the duration of the order. Under Section 204 the purpose of the communication between the courts is to set the duration for the temporary emergency order. Under the Convention the emergency order lapses by operation of law when the State that would have jurisdiction, apart from the emergency, has taken the appropriate measures required by the situation. One can imagine situations where the State that would otherwise have jurisdiction takes measures which it believes have addressed the situation. However, the State that issued the emergency order determines that the measures do not adequately address the situation. The Convention provides no method for resolving that problem.

(d) The Convention also provides a specific rule in Article 11 (3) for situations where the State that would otherwise have jurisdiction is a non-Contracting State. In this situation, the emergency order lapses only when the measures taken by the non-Contracting State are recognized by a Contracting State. Therefore, for example, if it is a United States court that has issued an emergency order, the measures taken by a non-Contracting State that would be the child's habitual residence would not become effective until they were recognized by the United States, or, depending on the fact pattern, recognized by another Contracting State.

Regardless of the decisions reached by the drafting committee on these issues non-Contracting states must be specifically mentioned in the section dealing with emergencies, as well as other sections where non-Contracting States are specifically referred to in the Convention.

8. Article 12: Presence Jurisdiction for Provisional Orders

The issue with regard to the presence jurisdiction in Article 12 is whether it is possible to avoid this jurisdictional basis altogether. The discussion at the Special and Diplomatic Commissions on this article focused on the problems that occur when the child is habitually resident in country A and owns property in country B. Country B may require certain measures to be taken with regard to the property that are not, strictly

speaking, emergencies, but which need to be done fairly quickly. Since the United States will take the reservation allowed by Article 55 with regard to property, this aspect of the presence jurisdiction is not necessary.

On the other hand, Article 12 is not limited to property and applies to situations where the child is present in the territory and some measure of a provisional nature needs to be taken with regard to the child. It is difficult to conceive of many situations where, absent an emergency, such jurisdiction would be necessary. The fact pattern mentioned by the Reporter,⁴⁸ and discussed by the Diplomatic Commission, concerned a child present in a country for a limited period of time as an exchange student. The concern was what should occur when the family receiving the exchange student suddenly could not care for the child. This section would, according to the reporter, facilitate placing the exchange student with another family or shelter, but under the protection of the local social authorities. However, it could very well be argued that this situation constitutes an emergency and could be handled under those provisions.

If this concept is retained, the Convention provides a number of protections against its misuse. First, it is subject to Article 7, which deals with wrongful abductions. It cannot be used to subvert the provisions of that article. Second, the measures cannot be contrary to measures taken previously by the State of the child's habitual residence. Third, measures taken under this Article lapse using the same procedure as with measures taken in an emergency, with the same difficulties.

9. Article 12: Lis Pendens or Simultaneous Proceedings

This article concerns the situation where there has been a shift in jurisdiction under Article 5-10 of the Convention.⁴⁹ For example, the child's habitual residence at the beginning of the case is in Country A but shifts to Country B during the pendency of the case. Under the Convention, jurisdiction changes immediately to Country B. However, Country B is prohibited from exercising its jurisdiction so long as Country A is still considering the case. This section goes a long way to alleviating the problem caused by changes in the child's habitual residence during the course of the proceedings.

⁴⁸ Legarde, Explanatory Report at ¶74.

⁴⁹ The primary reason why this article was included in the Convention is that the article is also applicable to the concurrent jurisdiction problem between the divorce court and the court of the child's habitual residence. However, since the United States does not have, and is not required to have, concurrent jurisdiction in the court where the parties are being divorced, this aspect of the problem is not applicable to us.

Country A can, under this Article, unilaterally decline jurisdiction. This declination operates independently of the transfer of jurisdiction provisions of Articles 8 and 9. There appears to be only two questions concerning the operation of this Article:

(a) There are no provisions which would require either of the two courts to communicate with each other. The UCCJEA in Section 206, which covers simultaneous proceedings, does require that the second court communicate with the first court.

(b) The second issue is whether it is possible under this section to avoid the exercise of jurisdiction by Country B through the device of Country A issuing a series temporary orders providing for custody with a review of the orders in, for example, one year increments. The argument would be that, under the Convention, the measure in question was originally requested from a court with appropriate jurisdiction and is still under consideration. The Drafting Committee may wish to address this issue, since if this argument is successful it could, potentially, constitute a species of continuing jurisdiction which is not recognized by the Convention.

10. Chapter III, Articles 15 – 22: Choice of Law

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

These articles will probably require some explanation and that explanation will probably have to be set out in comments, perhaps extensive, for practitioners that will not be used to dealing with choice of law rules in cases involving children. Brief explanations as to how these choice of law rules are meant to operate are set out below:

(a) Article 15: The normal rule, contained in Article 15(1), is that a court that has jurisdiction under the Convention will apply its own law, which, given that the jurisdiction is likely to be the place of the child's habitual residence, will result in the application of the law of the child's habitual residence. However, under Article 15(2) the court may "exceptionally" apply the law of another state which has a "substantial connection" to the

fact pattern. According to the report,⁵⁰ this is to be applied restrictively. This “exceptionally” provision is likely to be little used in the United States. Since there will be no jurisdiction for the divorce court in the United States, the only concurrent jurisdiction will be urgency jurisdiction, or, possibly, presence jurisdiction. It is extremely unlikely that a court asked to decide a case concerning an emergency will have time to consider the law of another jurisdiction. Thus, practically all cases will be heard by the court of the child’s habitual residence which will apply its own law. However, it is possible that there may be a case, albeit rare, where even though a court has jurisdiction as the place of the child’s new habitual residence, the child, over the course of time, has had more connection with another country and therefore, although unlikely, the court of the child’s new habitual residence may wish to apply the law of the child’s previous habitual residence.

There is no methodology set out for a court to use when determining whether the law of another State should be applicable. The forum will use its own conflict of law rules to determine which situations might fall under the “exceptionally” provision.

Article 15(3) draws a distinction between the existence of the measures and the method of application of the measure in a particular state when the child’s habitual residence changes. In other words, the distinction is the equivalent of the distinction between the law governing the validity of a contract and the performance of a contract. The substantive law governing, for example, visitation, is that of forum. However, the conditions for carrying out the visitation arrangements are that of the child’s habitual residence. This is particularly apt, according to the reporter, in those situations where the original determination was made by the child’s habitual residence and then child’s habitual residence changes. The Explanatory Report acknowledges that there is not a clear line between the establishment of a measure and the means of carrying out the measure and suggests that the line will have to be drawn on a case-by-case basis.⁵¹

(b) Article 16 discusses choice of law for situations where a state may have rules which provide for custody, or parental responsibility, by operation of law. Unlike anything else in the Convention, the rules do not concern measures but rather relationships created by local rules of law. Its purpose in the Convention is to deal with what was, at the time, a peculiar Scandinavian problem whereby unmarried parents of children have essentially joint custody as a matter of law without the need for parentage or other proceedings. The growth of unmarried couples as parents since 1996 makes the issue much more widespread than simply a Scandinavian problem. The Convention provides that this issue is to be determined by the habitual residence of the child.

⁵⁰ Legarde, Explanatory Report at ¶89.

⁵¹ Legarde, Explanatory Report at ¶ 90.

Article 16 (2) provides that in those countries where the attribution or extinction of parental responsibility can be accomplished by an agreement or by a unilateral act, the governing rule is that of the habitual residence of the child at the time of the agreement or unilateral act.

Under Article 16(3) the parental responsibility that comes about by operation of law, agreement or unilateral act continues even if the habitual residence of the child changes.

Article 16(4) deals with the reverse situation. Assume an unmarried couple from the United States moves to Norway with their child. In the United States the father of the child is usually not recognized as the father, absent some determination of parentage, such as a hospital acknowledgment. However, in Norway the father would be recognized as such by operation of law. In this case the choice of law rule to be applied is that of the child's new habitual residence: Norway. If the parents and the child move back to the United States the parental responsibility of the child would have to be recognized by the United States under Article 16(1).

Article 18 provides that the parental responsibility set out in Article 16 may be terminated by an appropriate measure taken by a State that has jurisdiction under the Convention.

(c) Article 17 distinguishes between the existence of custodial rights and the exercise of those rights. The applicable law is that of the habitual residence of the child. For example, if an American couple temporarily in Sweden with their child chooses corporal punishment, their ability to do so is governed by United States law, assuming the child remains habitually resident in the United States. However, if the child's habitual residence changes to Sweden, Swedish law governs and the corporal punishment would not be an authorized exercise of custodial rights.

(d) Article 19 provides a special rule for third parties who enter into transactions with someone they believe to be a representative of the child. The discussion during the Special and Diplomatic Commissions indicated that this special rule would arise almost exclusively in cases involving children's property. Given that the United States will take a reservation as to property, it might not be necessary to have this rule at all.

(e) Article 20 provides that the choice of law rules of this chapter are to be followed even if the law designated by these rules is the law of a non-Contracting state.

(f) Article 21 deals with the renvoi problem, i.e. whether the reference to the law of a particular State is to that State's local law or whether the reference includes the conflict of law rules of the referred to State. Article 21 provides that the law referred to in

Chapter III is the internal law that a country would apply to a totally domestic case. The reference does not include the country's choice-of-law rules. Article 21 (2) contains a confusing exception for fact patterns that fall under Article 16. If the application of that article designates the law of a non-Contracting State and if the choice-of-law rules of that State would dictate applying the law of another non-Contracting State then the law of the second non-Contracting State applies.

(g) Article 22 contains the typical public policy defense to the application of the another state's law.

11. Article 23: Recognition of Judgments

(a) Article 23 (1) supplies the basic rule of recognition, or indirect jurisdiction. It requires recognition of measures taken by Contracting States, which have jurisdiction to take such measures under the Convention, except as provided for in subsection (2) of the article. The translation of this article into the UCCJEA will need to have an additional section providing for recognition of measures taken by the divorce court with jurisdiction under Article 10 of the Convention since there will be no comparable jurisdiction provision for United States courts.

(a) The grounds for non-recognition Article 23(2) are fairly standard and can probably be set forth in the language of the article.⁵² Non-recognition is not mandated for situations falling into paragraph (2); it simply allows a state not to recognize the measure.

Some of the grounds for non-recognition require some comment. Subparagraph (2)(b) provides that a measure need not be recognized if the child did not have an opportunity to be heard and this would violate the fundamental principles of the State requested to recognize the judgment. The effect of this is not clear. The Report⁵³ states that, it is not necessary for the child to be heard in every case. It appears only to be necessary that the state which took the measure has procedures which would allow the court, in its discretion, to take the child's preference into account.

(b) Article 23 (d) is a somewhat different way of phrasing the public policy defense. Unlike the Maintenance Convention, but like the Adoption Convention, the public policy defense must focus the analysis on the best interests of the child.

(c) Article 23 (e) allows non-recognition in the situation where the measure taken in a Contracting state for which recognition is sought is incompatible with a decision made in a non-Contracting State which is the State of the child's habitual residence and the

⁵²For a comparable situation see UIFSA §708 (2008).

⁵³Legarde, Explanatory Report at ¶125.

decision of the non-Contracting State is entitled to be recognized by the forum under local law apart from the Convention.

(d) Article 23 (f) allows non-recognition if the procedure of Article 33 has not been complied with. That article requires that if a child is to be placed in a foster home, or the equivalent, in another Contracting state, that State must be consulted prior to the placement of the child. The article also requires the placing authority to provide a report on the child and the reasons for the placement of the child in the other Contracting State. The placement can take place only if it is agreed to by the State where the child is to be placed.

12. Article 24: Pre-recognition of judgments

This article provides that any interested person may request a determination by the court of another Contracting State on whether a measure taken in a Contracting State can be recognized. The example discussed in the report is a situation where a mother in Country A has been granted custody with a proviso that she may not change the child's habitual residence without the permission of the father. The father is willing to allow the mother to change the child's habitual residence to Country B, but not to Country C. He might wish a pre-determination in Country B that it would continue to recognize the father's ability to restrict the mother's efforts to change the child's habitual residence from Country B. The report also suggests that this principle would work to allow an interested person to obtain a pre-declaration on non-recognition.⁵⁴

This procedure was contemplated by the original UCCJEA drafting committee.⁵⁵ This is reflected by the language in Section 305 that a custody determination may be registered without any request for enforcement of the custody determination. The registration process must be treated as an adversary process since most state courts do not give advisory opinions. In the hypothetical listed above the father would have to register the custody determination of Country A in the state of the United States where the mother planned to move. However, the mother has not yet moved there and this raises a thorny issue of whether the custody determination can be registered not only in the state where the respondent resides, but also in any state where the respondent might end up. The Drafting Committee for the UCCJEA was convinced that most family law practitioners would not normally attempt to register a custody determination in a state unless they believed they would have to enforce the determination in that state at a later time, even though Section 305 provides for registration without enforcement. Therefore registration would undoubtedly be limited to states that had a relationship to the respondent. As a result the text of the UCCJEA does not mention, and the Drafting

⁵⁴ Legarde, Explanatory Report at ¶129.

⁵⁵ See UCCJEA section 305 and the accompanying comment.

Committee was able to avoid, the thorny issue of the jurisdictional predicate necessary for registration.

The jurisdictional problem is the issue of what relationship is necessary between the state where registration is sought and the petitioner, respondent and child. In the case of support obligations, it is clear that the registering court must have personal jurisdiction over the non-registering party.⁵⁶ Whether personal jurisdiction is necessary to register a custody determination that did not require personal jurisdiction in the first place is an unanswered question. In the hypothetical listed above neither the mother, the father, nor the child would have a relationship to the state where registration is sought. Nor would the court have personal jurisdiction over the mother. The mother may have a defense to registration under the Convention and the UCCJEA. Recognition of a custody determination has the effect of cutting off those defenses. Whether due process concerns would permit a court to issue a predetermination of the recognition of a custody order, and the elimination of those defenses by a state with no relationship to the non-registering party is an issue the drafting committee will have to resolve. The issue has not arisen in the years that the UCCJEA has been in force and may be more hypothetical than real.

The registration process under the UCCJEA will have to be amended slightly in order to accommodate all the reasons for non-recognition mentioned in Article 23. In addition we will have to specify that, in accordance with Article 54 all “communications,” i.e., documents, submitted to a court must contain an original language copy and a translation into English. We might also include additional requirements to ensure the accuracy of the translation.

13. Article 26(2): Expedited Recognition Procedure

The provision of Article 26(2) concerning the requirement of each state to have a simple rapid procedure for the recognition of judgments from Contracting States is satisfied by the registration procedure and by the expedited enforcement procedure of Section 308 of the UCCJEA. Like Section 305 it will have to be amended slightly to take account of all of the defenses to recognition and enforcement under the Convention.

14. Article 28: Enforcement

Article 28 provides that enforcement provisions are governed by the law of the enforcing state, taking into consideration the best interests of the child. As noted by Professor Silberman, this provision was added because of wide divergence in the

⁵⁶See John J. Sampson, Uniform Interstate Family Support Act with Unofficial Annotations, 27 Fam.L.Q. 93, 157 n.141 (1993). The entire problem was avoided under UIFSA by not allowing registration of an out-of-state order unless it was also to be enforced. See UIFSA §601.

protective measures that may be applied in different countries and the difficulty of giving effect to measures when there is no equivalent in domestic law. "There is a danger that the requested State might use this provision to superimpose a best interests test at the enforcement state, thus undermining the objective of a jurisdiction and judgments convention....⁵⁷ This matter can probably be addressed via the comments to the section.

15. Other Issues

(a) Address Impoundment: The address impoundment provision of Article 37 is insufficient by today's standards. We will need to continue the provisions currently found in Section 209 of the UCCJEA.

(b) Problems of Visitation and Access: For the Special and Diplomatic Commissions one of the most important parts of the 1996 Convention is Article 35 concerning organizing access, or visitation, rights for noncustodial parents. Subparagraph (2) allows the authorities of a State where a parent is located to gather information and make a finding on the suitability of that parent to exercise visitation and the conditions, if any, that should attach to the exercise of visitation. This information is to be transmitted to the authorities of a State exercising jurisdiction under Articles 5-10 of the Convention, normally the State of the child's habitual residence. The authorities of the latter State must admit and consider the information submitted before making a decision on visitation. Subparagraph (3) authorizes the court that is deciding a visitation issue to stay the proceeding pending the receipt of a request made under subparagraph (2), although the state of the child's habitual residence may take provisional measures under subparagraph (4) pending the receipt of the information.

The question for the drafting committee is how all this is to be accomplished. The provisions of subparagraph (2) seem very inappropriate for the judiciary. The judiciary is not normally an information gathering institution. The role of gathering information and making a recommendation concerning visitation and the conditions attached to visitation is best thought of as an administrative problem, perhaps appropriately done by the state's child protective services. If that is the case then this issue should be left to the federal implementing legislation which will have to cover the cooperation principles of the Convention.

On the other hand subparagraphs (3) and (4) are addressed to the State's competent authority that is making a determination concerning visitation. That will be the court. Therefore the provisions of these subsections will probably need to be included somewhere in a revised UCCEA.

⁵⁷ Silberman, 34 Fam. L. Q. at 264.

(c) *The Certificate*: Article 40 authorizes, but does not require, that the State where a measure was taken may deliver to the person having parental responsibility, or to the person entrusted with protection of the child's person or property, a certificate indicating the capacity in which that person is entitled to act and the powers conferred upon that person. The certificate has importance with regard to issues affecting the property of the child so that third parties know the authority of the person they are dealing with concerning the child's property. However, it could also have importance in other contexts, such as consenting to health care decisions for the child.

The issue for the drafting committee is whether the content and form of the certificate should be set forth in a revised UCCJEA, or, whether the certificate should be left to be determined by federal law. If the former, then there probably should be a designation in a revised UCCJEA of each State's central authority. It is possible that the Drafting Committee may wish to go further and indicate what functions can be exercised by the Central Authority of an individual State. The purpose of setting out the function of the Central Authority in the Act would be to inform courts and lawyers concerning the role of central authorities. Of course, the actual delegation of authority to a local central authority would have to be done at the federal level.

D. CONCLUSION

To the extent the issues raised in this memorandum can be addressed prior to the first full meeting, it will greatly facilitate the drafting process. There will, no doubt, be other issues that arise in the course of drafting which can be dealt with at that time.