The Down Town Association
60 Pine Street
New York, NY 10005

Co-Sponsor: American Academy of Matrimonial Lawyers – New York Chapter

International Family Law

April 28 - 29, 2017
Wainwright Room

Friday Program

8:00 AM – 9:00 AM	Registration & Breakfast
9:00 AM – 9:10 AM	Introduction Nancy Zalusky Berg, Minneapolis, Minnesota
9:10 AM – 10:25 AM	Common Law, Civil Law & Matrimonial Regimes William Longrigg, London, England Charlotte Butruille-Cardew, Paris, France Sandra Verburgt, The Hague Netherlands
10:25 AM – 11:40 AM	International Prenuptial Agreements Rachael Kelsey, Edinburgh, Scotland Charlotte Butruille-Cardew, Paris, France Oren Weinberg, Toronto, Canada Thomas Sasser, West Palm Beach, Florida Donald Schuck, New York, New York Eric Wrubel, New York, New York
11:40 AM – 12:00 PM	Discussion and Break
12:00 PM – 12:50 PM	International Surrogacy Issues and Comparative Analysis of the use of Genetic Material Throughout the World Michael Stutman, New York, New York Nancy Zalusky Berg, Minneapolis, Minnesota

12:50 PM – 1:00 PM	DISCUSSION
1:00 PM – 2:00 PM	LUNCH AT THE DOWN TOWN ASSOCIATION
2:00 PM – 3:15 PM	ENFORCEMENT, DOMESTICATION AND REGISTRATION OF ORDERS AND THE TREATMENT OF ALIMONY WORLDWIDE CHARLOTTE BUTRUILLE-CARDEW, PARIS, FRANCE LAWRENCE KATZ, MIAMI, FLORIDA NICHOLAS LOBENTHAL, NEW YORK, NEW YORK WILLIAM LONGRIGG, LONDON, ENGLAND THOMAS SASSER, WEST PALM BEACH, FLORIDA
3:15 PM – 3:30 PM	BREAK
3:30 PM – 4:20 PM	HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW: HOW IT WORKS AND WHAT IT DOES DANIEL KLIMOW, U.S. DEPT. OF STATE ROBERT ARENSTEIN, NEW YORK, NEW YORK WILLIAM LONGRIGG, LONDON, ENGLAND
4:20 PM – 4:30 PM	DISCUSSION AND CLOSING REMARKS

The AAML NY Chapter is accredited by the NYS CLE Board as a CLE provider for live presentations for the period October 2, 2014 through October 1, 2017.**The total number of hours of CLE credit approved by the NYS CLE Board for this program is 6.5 hours in Areas of Professional Practice. Credit for partial attendance at a segment will not be given. You must sign in and sign out to get credit**. This is **not** a transitional course for attorneys admitted less than 2 years. Our financial hardship policy is available from Kristen Stevens, Chapter Administrator, at americanacademyny@gmail.com

Saturday Program

8:00 AM – 9:00 AM	Breakfast
9:00 AM – 9:50 AM	UCCJEA or Hague Proceedings Evan Marks, Miami, Florida
9:50 AM – 10:15 AM	Drafting International Travel Documents Patricia Apy, Red Bank, New Jersey
10:15 AM – 10:30 AM	Questions and Break
10:30 AM – 10:55 AM	Effective Prosecution of 1980 Hague Cases (Federal & State) Robert Arenstein, New York, New York
10:55 AM – 11:20 AM	Habitual Residence and Cross Border Comparison Laura Dale, Houston, Texas Rachael Kelsey, Edinburgh, Scotland Ashley Tomlinson, Houston, Texas
11:20 AM – 12:35 PM	A View From And Presentation To The Bench: Hague and International Law Issues and Assessing Flight Risk Justice Linda Christopher, New York, New York Sylvia Goldschmidt, New York, New York Lawrence Katz, Miami, Florida
12:35 PM – 1:00 PM	Closing Comments & Questions

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Common Law, Civil Law and Matrimonial Regimes

William Longrigg, London , England
Charlotte Butriulle-Cardew, Paris, France
Sandra Verburgt, The Hague, Netherlands

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Common Law and Civil Law
WILLIAM LONGRIGG

FRIDAY 28 APRIL 2017

ENGLAND AND WALES: COMMON LAW JURISDICTION

- Civil Law vs Common Law
- Discretion vs Certainty
- Henry II and the Emperor Justinian
- English speaking world and the rest of the world with some fused systems.
- Property regimes
- Trusts

PROPERTY REGIMES

- In what context are the courts operating?
- Matrimonial Property Regimes created on marriage (immediate or deferred).
- Civil law countries consider that England and Wales has "separation of property" regime. Is that accurate?
- *White –v- White* 2001 1ALL ER1, HL.
- Separation of property and maintenance
- Maintenance not normally covered by pre-nups in civil law jurisdictions

PROCEDURE IN ENGLAND

- How does it work in England?
- Procedure on divorce.
- Duty to the court.
- Duty of full and frank disclosure – Form E.
- Very thorough system to include questionnaires.
- First Appointment, Financial Dispute Resolution Hearing (FDR) final hearing.
- Final hearings can last for days or weeks.

DOCUMENTS BEFORE THE COURT

- Case is argued many times on paper.
- Each hearing requires a skeleton argument in addition to the pleadings.
- Now limited to 350 pages per hearing
- Common law jurisdiction make more of a deal of it.

WHICH SYSTEM IS THE FAIREST?

- The formulaic system with limited discretion?
- A system which struggles to acknowledge interests in trusts or property held nominally by third parties?
- A system with lack of forensic thoroughness whether there is no duty to the court on the part of the lawyers or the parties?
- A system which is cumbersome, lengthy and very expensive for the parties?
- Perhaps a combination?

SOME THOUGHTS ON MAINTENANCE

- England and Wales out of step with the rest of the world (including Scotland).
- Germany: generous maintenance is granted in the south and little maintenance is granted in the north.
- Sweden, Finland etc. no maintenance
- Brussels II – rush to court
- Maintenance Regulation (EU regulation no: 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and decisions and co-operation in matters relating to maintenance obligations). Rush to court on maintenance
- EU provisions too complex and inconsistent. Many rely on civil law concepts and sit uneasily with common law jurisdictions.
- Brexit

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Common Law and Civil Law
WILLIAM LONGRIGG

FRIDAY 28 APRIL 2017

The French matrimonial approach

Charlotte Butruille-Cardew,
Partner CBBC Paris

Matrimonial Property Regime (MPR)

- The matrimonial regime of a married couple is set by rules that organize asset administration and entitlement within the marriage, both during the marriage and upon its dissolution. It is often referred to in Common Law countries - where the notion does not exist – as matrimonial property rights.
- European Regulation on Matrimonial Regime (2016/1103) – 23,01,2019 defines it as a "set of rules relating to the economic relations of the spouses between them vis-à-vis third parties".
- The MPR determines the powers of the spouses, either individually, or jointly, to administer their assets and defines the rights of third parties (generally creditors) in relation to the couple's estate. When the marriage terminates, the matrimonial regime of the couple is wound up and each spouse, according to the regime chosen, is allocated a portion of the assets acquired during the marriage.

Primary / secondary regime

- The MPR of a couple is determined either by a contract entered into by the spouses or by virtue of the Law, in the absence of a contract.
- Most common MPR in France : regime of community of assets, separation of property, universal community and participation.
- Those MPR are often referred to in comparative law studies as a **secondary regime**.
- A **primary regime** applies to any married couple residing in France regardless of the matrimonial regime chosen by the spouses: it is a set of mandatory rules which apply automatically to all married couples and organises their *minima* duties and rights in respect of the management of assets and the administration of their estate for the purpose of protecting their family life [art 214 to 226 of the French Civil Code (FCC)].
- **The primary regime** applies automatically to married couples residing in France, regardless of their respective nationality [*Civ. 1re, 20 october 1987, Cressot*].

Concealment of community assets

- ***« Recel de communauté »*** or **Concealment of community assets** [art 1477 of the FCC]
- **The spouse who has attempted to deprive the other spouse of his/her share of the community assets, will be - as a sanction- deprived of his/her own share in the concealed asset to the benefit of the innocent spouse.**
- If the fraud is discovered, the perpetrator of the concealment will receive a smaller portion of the community assets in comparison to what he/she would normally have been entitled to, in application of the community of property regime, whilst the innocent spouse will receive a greater portion.

  → The *« recel de communauté »* is a concrete application of the law of retaliation (*G. Cornu, les Régimes Matrimoniaux: PUF, Thémis, 9e éd. 1997, n°98).*

Protection of the Family home

- French Law strictly prohibits the sale or any legal act that could be related to the matrimonial home.

  « The spouses may not, separately, dispose of the rights whereby the housing of the family is ensured, or of the pieces of furniture with which it is garnished. The one of the two who did not give his or her consent to the transaction may claim the annulment of it: the action for annulment is open to him or her within the year after the day when he or she had knowledge of the transaction, without possibility of its ever being instituted more than one year after the matrimonial regime was dissolved.» [Art 215, 3rd paragraph of the FCC].

  * The place has to be **qualified as the Family home** ;

  * The **furniture** and its **content** too ;

  * A ***de facto* separation of the spouses does not impeed** on the notion of Family home, neither does the free enjoyment of the home ordered by a Judge as an interim measure ;

  * Even if the house is titled in the sole name of the one of the spouses (personal property), the owner will not be able to sell it or rent without the prior consent of the other spouse or a Court Order.

The « Civil Estate Company » (SCI)

- Many spouses create an SCI (“*société civile immobilière*”), literally a real estate company, dedicated to own and manage a real property.

  This civil legal structure is very attractive from a tax and practical point of view.
- The company is an independent legal entity and the partners' divorce is not a cause of action to wind up the company, Indeed, the partners (spouses) will continue its activity despite an ongoing divorce.

Post-divorce issues – sharing tax (« *droit de partage* »)

- Orders relating to the winding up of matrimonial regimes are automatically transmitted to the **Tax administration that raises a tax of 2.5% applicable on the net total amount of the community assets** or on the joint assets in case of a separation of property regime.
- **It is supposed to be a worldwide assets tax,**

Structuring of corporate/civil legal entities

- **CARON case on fictitious companies** – if spouses were tempted by the creation of a company abroad that may own a real property in order to fraud the French tax system, rights of the other spouse or the reserved rights of their heirs (reserved portion) French courts sanction fraudulent company, ignoring the legal entity created.
- This principle lies with the Caron case [*Civ. 1ère, 20 mars 1985, n°82-15033*].

  A man created a company in the US, which owned a real property located in France, in order to avoid the imperative stipulations of the FCC. The "company veil" was voided, and his heirs –that he wanted to disinherit- were deemed heirs with consequent inheritance rights.

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Common Law and Civil Law
SANDRA VERBURGT
DELISSEN MARTENS, THE HAGUE

Friday 28 April 2017

THE NETHERLANDS: CIVIL LAW JURISDICTION

- Dutch Civil Code, based on the "*Code Napoleon*"
- Differences between settlement of Matrimonial Property Rights (property regimes) and Spousal Maintenance
- Codification of both matrimonial regimes and spousal maintenance: no absolute discretion courts. The courts shall apply the law, interpretation open norms by the courts
- Application of conflict laws in cases with an international element

| 1

THE NETHERLANDS: CIVIL LAW JURISDICTION

- The Courts will decide a case, applying:
  - Civil Code (Book 1)
  - Case Law (Supreme Court, Appelate Courts)
  - Guidelines ("*Tremanorms*" which provides for specific rules and formula's to calculate child support and spousal support)
  - Evidence parties
- In international cases: foreign family law if private international law directs so in the specific case

| 2

THE NETHERLANDS: DIVORCE PROCESS

- How does the divorce process look like:
  - Petition for divorce (+ ancillary requests): no waiting term; system of "no fault divorce" since 1973 !!! One ground: marriage should be irretrievably broken down
  - Response other spouse (and possibly ancillary requests)
  - Response petitioner on ancillary requests respondent
  - Hearing, no cross examination, no witness testimony
  - Divorce decision including decisions on ancillary requests (if not to complicated) or in complex cases divorce and maintenance in one decision, then new hearing on winding up matrimonial regime followed by decision

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THE NETHERLANDS: DIVORCE PROCESS

- Right to appeal to Appellate Courts:
  - Devolutive effect: case will be heard in the same way as by District Court: all requests and defences raised before the District Court will be considered, unless parties do not appeal a certain part of the original decision
  - Parties define the extent of the appeal
- Right to appeal to Supreme Court:
  - Application of the law by lower courts (District Court, Appellate Court) correct?
  - Grounds of the lower court's decision sound?
  - Limited scope: no consideration of new facts

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THE NETHERLANDS: DIVORCE PROCESS

- Hearings often very short:
  - 30 minutes for a case which is straight forward decided by a single judge, up to one full day for a complex case decided by a full bench court (3 judges)
- If further information from experts is necessary, new hearings will be scheduled after receipt of the expert's report
- Experts: accountants, Child Protection Board, child psychologists, forensic mediators
- Duty of Dutch Lawyer and party to the court?
- Supreme Court: no oral hearings

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THE NETHERLANDS: PROPERTY REGIME

- Statutory regime: Civil Code (change 01/01/2018)
- Matrimonial contract regimes : some provisions in Civil Code
- Matrimonial contracts: pre and post nuptial contracts. Autonomy parties as long not contrary to bonos mores or public policy
- Courts are fully bound by the contract when deciding the matrimonial settlement upon divorce
- Explication of the substance of the contract if provisions are not clear?

THE NETHERLANDS: MAINTENANCE

- Provisions on spousal support and duration in Civil Code
- Provisions on the entitlement to child support (up to 18) in Civil Code
- Provisions on support for young adults (18-21) in Civil Code
- Calculation of the amount based on guidelines and formula's

SOME FURTHER THOUGHTS

- Why choosing for the Dutch system:
  - Efficient (no extreme lengthly proceedings, judges have read whole case file prior to hearing, no unnecessary repetition)
  - Predictability of the outcome to some extent, since discretion judges is limited by provisions Civil Code and autonomy parties (marital contract, maintenance agreement)
  - Autonomy of the parties is very important in the Netherlands

SOME FURTHER THOUGHTS

- EU law:
  - Brussels II - rush court
  - Maintenance Regulation 4/2009 works pretty well from a civil law perspective; provides autonomy to parties:
    - Uniform application by all EU Member States: predictability
    - Option to chose forum in maintenance agreement (art. 4)
    - Option to chose applicable law in maintenance agreement (art. 15 EMR 4/2009 juncto art. 8 Hague Protocol 2007)
  - Mainly Brits are uncomfortable with EU provisions. Brexit will make them leaving EU within two years, so why should EMR be changed? Ireland would be the only common law jurisdiction in EU (and doesn't complain). Ireland has also adopted the Hague Protocol 2007

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International Prenuptial Agreements

Rachael Kelsey, Edinburgh, Scotland
Charlotte Butriulle-Cardew, Paris, France
Oren Weinberg, Toronto, Canada
Thomas Sasser, West Palm Beach, Florida
Donald Schuck, New York, New York
Eric Wrubel, New York, New York

The French Approach To International Pre/Post Nuptial Agreements

Charlotte Butruille-Cardew,
Partner CBBC

Contrat de mariage – international pre and post nuptial agreements

- French Law has a long established tradition in recognising the validity and enforceability of "**contrat de mariage**" the goal of which is to organise the matrimonial regime of the parties. **The matrimonial property regime (MPR)** of a married couple is set by rules which organise the asset administration and entitlement within the marriage, both during the marriage and if the marriage terminates. It is often referred to in Common Law countries, (where the notion does not exist) as matrimonial property rights.
- At today's date, French Law does not recognise the validly and enforceability of a **French pre-agreement ruling on full ancillary relief** (matrimonial regime and financial compensations on divorce based on the notion of needs), **as those are considered as being contrary to French public policy.**
- In some circumstances however, **French Law may recognise the enforceability of a foreign pre-nuptial agreement covering all theses financial aspects**.

Primary / secondary regime

- The MPR of a couple is determined either by a contract entered into by the spouses (*contrat de mariage* or a foreign pre – post nuptial agreement) or by virtue of the law, in the absence of a contract.
- **Most common MPR in France** : regime of community of assets, separation of property, universal community and participation.
- Those MPR are often referred to in comparative law studies as a **secondary regime**.
- A **primary regime** applies to any married couple residing in France regardless of the matrimonial regime chosen by the spouses: it is a set of mandatory rules which apply automatically to all married couples and organises their *minima* duties and rights in respect of the management of assets and the administration of their estate for the purpose of protecting their family life [art 214 to 226 of the French Civil Code (FCC)].
- It is important to notice that the **primary regime** applies automatically to married couple residing in France, regardless of their respective nationality [*Civ. 1re, 20 october 1987, Cressot*].

Difference bewteen MPR and Financial compensation

- When the marriage terminates, the matrimonial property regime (MPR) of the couple is wound up and each spouse, according to the regime chosen, is allocated a portion of the assets accrued during the marriage.
- This allocation of assets is determined by the matrimonial regime chosen by the spouse and is independent from the cause of the dissolution of their marriage. Therefore if the marriage is dissolved by divorce, the allocation of assets as determined by their matrimonial regime will be combined with the divorcing financial rights of the spouse (*prestation compensatoire*).
- This aspect has to be born in mind when drafting international pre-nuptial agreements because any financial compensation provided by in the agreement and based on the notion of needs /compensation for the breakdown of marriage will be regarded as a compensatory benefit and consequently not part of the matrimonial regime of the parties. Hence the condition of validity and enforceability will be different to those ruling pre-nuptial agreement on matrimonial regime.

Foreign pre-nuptial or post-nuptial agreements and international prenuptial or postnuptial agreements

In the last fifteen years, it has become more and more frequent for future spouses to enter an international marriage contract (prenuptial agreement) before their marriage. The goal of such agreement is to determine their financial rights and duties during the marriage and to organise all the financial consequences of their divorce to the inclusion of Maintenance obligations as understood in the light of the ECJE definition. Clauses as to the applicable law and jurisdiction are also often integrated so that such agreements are valid and recognised in more than one countries.

Traditionally in France

- If the description of the matrimonial property rights of the parties complies with the Hague convention 14 march 1978 on matrimonial property rights and the requirements of French public policy to the inclusion of the primary regime requirements.
- If the applicable law on divorce of the parties is a foreign law which recognizes the validity of an agreement dealing with matrimonial property rights and financial adjustments on divorce, the French Court would apply the agreement in its integrality. Consequently it is possible for the parties to include financial compensations on divorce in pre or post nuptial agreements by submitting them to a Foreign Law which will recognise their validity. For example : German Law,

European instruments

Recently, the new Europeans instruments have reinforced the possibility to enter such prenuptial agreement increasing the freedom of the parties to agree on various aspects of their future separation such as :

- article 4 of the **Council Regulation (EC) n°4/2009 of 18 December 2008 on Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions and Cooperation in Matters Relating to Maintenance Obligation** providing that the parties can choose the court which will have jurisdiction over matters relating to maintenance obligations;
- or articles 7 and 8 of the **Hague Protocol on the Law Applicable to Maintenance Obligations (concluded on 23 November 2007) enable to designate the applicable law to maintenance obligation**.
- article 5 of the **(EU) Regulation n°1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, "Rome III**" equally permits to designate the applicable law to divorce,
- Articles 7 and 22 of the new **EU Regulation n°2016/1103 on matrimonial property rights** will apply to spouses married after the 29th January 2019 also provides for applicable law and jurisdiction choices by the parties.

Principle of fairness

Although by way of combination of applicable law choices and the matrimonial property regime chosen, such international prenuptial agreements could result in an outcome which on divorce will be depriving completely one of the spouses from any financial compensation (either resulting from the matrimonial property rights of the parties or maintenance obligation on divorce – Californian waiver on maintenance), many practitioners advised that such prenuptial agreement should not be advised or entered by client if they do not conduce to a fair and equitable outcome for both spouses in case of divorce.

On a pragmatic level, it is obvious that an unfair agreement will trigger, as opposed to prevent, acrimonious litigation in case of divorce. On a more legal level, numerous countries such as for example in the US the State of California consider that an agreement should comply with the elementary financial rights of the divorcing spouses to be binding or for example in France that such agreement should not be contrary to French international public policy requirements.

In concreto Fairness

The fairness and public policy requirements have been mirrored in the recent instruments mostly for example in relation to the applicable law choice of the Hague protocol 2007 article 8(5) provides "*Unless at the time of the designation the parties were fully informed and aware of the consequences of their designation, the law designated by the parties shall not apply where the application of that law would lead to manifestly unfair or unreasonable consequences for any of the parties*" and again in article 13 "*The application of the law determined under the Protocol may be refused only to the extent that its effects would be manifestly contrary to the public policy of the forum*".

Such approach has been again adopted by the French Supreme court in a ruling dated 8 July 2015 in which the Court refers to the articles 8 and 13 of the Hague Protocol and article 15 of the Council Regulation (EC) 4/2009. In this decision, the Court of Cassation clearly states that the Court of Appeal should have tested whether, *in concreto*, the application of the foreign law chosen by the spouses in their marriage contract was not leading to a violation of the French Public Policy Requirements.

The choice of law which should not be looked at in isolation, but it is rather the combination of this choice of law with all the other provisions of the agreement in order to ensure *in concreto* the the outcome of the agreement is not manifestly unfair,

DOMESTIC CONTRACTS AND THE ONTARIO MATRIMONIAL PROPERTY REGIME – IN TEN MINUTES OR LESS

Oren Weinberg

Boulby Weinberg LLP

The Framework

1. In Ontario, matrimonial property is governed by the *Family Law Act*. Each of the provinces of Canada have family property legislation, some similar to Ontario and some provinces with different regimes. I will speak to the Ontario family property regime.

2. Separating spouses are required to share the growth in value of their assets accrued during the marriage.

3. A spouse must calculate the net value of his or her assets at the date of marriage and deduct that from the value of his or her net assets at the date of separation or, if the marriage ends by death, the day before death – the valuation date. It is a straightforward accounting exercise.

4. The legislation provides for certain exclusions from the calculation such as:

    a. Property other than a matrimonial home acquired by gift or inheritance during the marriage;
    b. Income from gifts or inheritances if the donor expressly stated that it was to be excluded;
    c. Damages for personal injuries, nervous shock, mental distress or loss of care and companionship;
    d. Proceeds of or the right to proceeds of a policy of life insurance; and
    e. Property other than a matrimonial home into which property referred to above can be traced.

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5. The matrimonial home held at the valuation date is given special treatment under the legislation. A spouse who might bring in the asset into the marriage must share the full value as at the date of separation – whether or not the matrimonial home was gifted or purchase with gifted funds. Furthermore, a spouse cannot dispose of or encumber a matrimonial home without the consent of the non-owner spouse or court order.

6. Spouses can have more than one matrimonial home. Any real property that is ordinarily occupied by the parties can be considered a matrimonial home.

7. The legislation defines property expansively and includes any present or future interest, vested or contingent that a person has starting at the date of marriage and ending at the date of separation.

8. Spouses can by agreement contract out of all or part of the legislated equalization regime and they can do so before marriage by co-habitation agreement, during the marriage by marriage contract and on separation, by separation agreement. Collectively these agreements are defined in the *Family Law Act* as domestic contracts.

9. Parties to a cohabitation agreement may contract about their respective rights to ownership and division of property, support obligations, the right to direct the education and moral training of their children (but not the right to custody and access). If they marry, the cohabitation agreement will be deemed a marriage contract governing the parties' rights on separation. Even if a couple is not cohabiting, they may enter a marriage contract in contemplation of their marriage.

10. If parties contract to have the law of another jurisdiction apply to the determination of their property rights on separation, the Ontario court will apply that law as long as the contract itself is valid and enforceable under Ontario law.

<u>Essential Validity and Enforceability</u>

11. The Family Law Act governs the formation and enforceability of domestic contracts. To be enforceable, agreements must be made in writing, signed by the parties, and witnessed.

12. The court retains jurisdiction to override provisions of a domestic contract that it considers not in a child's best interest. It may also override any provisions for the support of a child if it determines the provisions to be unreasonable or not in compliance with Canada or Ontario's child support guidelines.

13. The court will override waivers of support or specific provisions for support if it would result in unconscionable circumstances in light of the parties' circumstances at the time of separation.

14. Provisions that make a right of a party contingent on chastity are not enforceable

15. Provisions of a contract could be set aside if the court is satisfied that the consideration for the provision was the removal of barrier to remarriage within the spouse's faith.

16. A court may set aside a domestic contract or a provision of a domestic contract if:

    a. A party failed to disclose their significant assets, debts and liabilities existing at the date the contract was made,
    b. A party did not understand the nature or consequences of the contract, or
    c. Otherwise in accordance with the common law of contract – ie fraud, duress, mistake, misrepresentation etc.

<u>Contracts Made Outside of Ontario</u>

17. Contracts made outside of Ontario are enforceable in Ontario if the contact is entered into in accordance with Ontario's internal law, that is the contract expressly waives rights to Ontario's family property equalization regime, complies with Ontario's high standard of financial disclosure and, in addition, meets common law contract standards.

18. The court will set aside provisions of contracts made outside of Ontario the same way it would a contract made in Ontario

19. A provision of a marriage contract respecting the right to custody of or access to children is not enforceable.

20. It is becoming increasingly common that parties to a marriage contract or separation agreement reside in more than one jurisdiction. Parties are entering international marriage and separation agreements with a view to enforceability on more than one jurisdiction. It is therefore very important to work with counsel in the requisite jurisdictions to make sure the agreements are, as best as possible, enforceable in each jurisdiction. Ontario's courts have recognized that a couple may have multiple jurisdictions of residence and have taken jurisdiction in cases in which the couple only resided in Ontario for recreational purposes, such as a summer cottage.

Prenuptial Agreements in the United States

By Gary A. Debele and Susan C. Rhode

I. Introduction

Prenuptial agreements, sometimes also referred to as "antenuptial agreements" or "premarital agreements," are agreements between parties contemplating marriage that alter or confirm the legal rights and obligations that would otherwise arise under the laws governing marriages that end either through divorce or death.[1] These agreements are fraught with controversy as to their appropriateness and their enforceability. Prenuptial agreements and the accompanying controversy are not unique to the United States. The purpose of this article is to give the non-American lawyer an overview of this rather complex area of American family law and estate planning, and also to highlight some of the common procedural and substantive requirements and issues currently in play in the United States today.

At one time in American legal history, courts in the United States did not enforce prenuptial agreements that addressed what would happen upon divorce because courts viewed them as agreements that contemplated divorce, and hence encouraged divorce.[2] In an era when most states had fault based divorce, divorce was not allowed simply by mutual consent; thus, these agreements that contemplated divorce were also seen as efforts to generate false evidence of fault grounds, and therefore forbidden—but the agreements could address what was to happen upon death.

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[1] *See* AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 7.01 (2001).

[2] Brooks v. Brooks, 733 P.2d 1044, 1049 (Alaska 1987). *See also* Crouch v. Crouch, 385 S.W.2d 288, 293 (Tenn. Ct. App. 1964)("such [a] contract is promotive of divorce and void on grounds of public policy. Such contract[s] could induce a mercenary husband to to inflict on his wife any wrong he might desire with the knowledge that his pecuniary liability would be limited. In other words a husband could through abuse and ill treatment of his wife force her to bring an action for divorce and thereby buy a divorce for a sum far less than he otherwise would have to pay.").

The nationwide abandonment of traditional fault divorce starting in the 1970's eliminated at least one of the significant barriers to prenuptial agreements. However, the acceptance and enforcement of such premarital contracts between spouses has not been uniformly accepted throughout the United States, nor have the requirements by the state legislatures and courts been consistent or even coherent.

Under American law, prenuptial agreements are not simply garden variety contracts as between persons in a simple business transaction. This is an important aspect of the American law of prenuptial agreements given the unique history of individualism and individuals rights in American legal history and culture. The United States, as a general matter, highly values contractual freedom—so much so that the concept of the right to contract and to have those rights enforced is enshrined in the United States Constitution.[3] However, the intimate relationship of the parties to these agreements, the underlying caring and nurturing union that is presumably being contemplated, the fact that children may be produced of the union, and the significant role the state has in regulating this relationship and protecting the spouses and children have led to rules prohibiting certain issues from being addressed, a unique set of procedural requirements, tests for substantive fairness both at the time of execution and at the time of enforcement—all making these contracts unlike any standard commercial contract.

Unlike other countries that prohibit or refuse to enforce prenuptial contracts, most courts and legislative bodies in the United States now take the general position that prenuptial agreements are enforceable if they meet certain formal procedural requirements and are otherwise valid contracts under general contract principles.[4] However, factors that will also be

[3] U.S. CONST., art. I, § 10.
[4] *See, e.g.*, UNIF. MARITAL PROP. ACT §§ 3, 10, 9A U.L.A. 115, 131 (1998); Hrudka v. Hrudka, 919 P.2d 179, 186 (Ariz. Ct. App. 1995). *See also* Allison A. Marston, Note, *Planning for Love: The Politics of Prenuptial Agreements*,

considered are the length of the marriage, the foreseeability of various developments in the marriage, the existence of children, and the general substantive fairness of the agreement both at the time the contract is executed and when it is to be enforced—and each state's courts and legislature will promulgate these factors in its own unique way.

This article shall attempt to give an overview of American rules regarding prenuptial agreements for foreign practitioners who encounter an American prenuptial agreement. Married American citizens increasingly are living in more than one country or moving from one country to another, and are marrying persons from other countries. Not only do American attorneys now have to advise clients how their foreign-drafted prenuptial agreement will be treated in the United States, but often the foreign practitioner will need to consider how to enforce an American prenuptial agreement in a foreign country or how a foreign prenuptial agreement would be construed in the United States. The purpose of this article is not to provide a definitive and lengthy treatise on these issues, but rather, to give the foreign practitioner a very basic overview of the laws of prenuptial agreements in the United States and to discuss briefly enforcement and construction issues involving agreements drafted in other countries.

The law surrounding prenuptial agreements in the United States is complex and changing rapidly as a result of demographic and cultural trends. What is particularly challenging for the foreign practitioner seeking to understand American laws regarding prenuptial agreements is that there are fifty states within the United States, and each has its own laws and practices with regard to the laws of prenuptial agreements—and sometimes the differences are dramatic. To add to the complexity of fifty states, each with a different set of both statutory and case law addressing prenuptial agreements, there may also be interplay with federal statutes and federal case law.

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49 STAN. L. REV. 887, 898 (1997)(noting that "prenuptial agreements that include divorce provisions are now generally enforceable in all states").

Given that most states have enacted statutes addressing prenuptial agreements, there is also the complex interplay between the common law and statutory law.[5]

Furthermore, states within the United States have their own property regimes, some of which are community property states, while others are common law property states.[6] This affects the presumptions regarding marital and non-marital property and the division of such property on the termination of a marital relationship. Even the United States Constitution is implicated in the laws of prenuptial agreements, especially with regard to the right of persons to enter contracts, notions of equal protection and enforcement, and also notions of procedural and substantive due process. While these agreements are largely governed by state law, in the United States even that proposition has its complexities.

As with any family law matter within the Untied States, the use of prenuptial agreements is also dramatically affected by the significant discretion that is given to family court judges when addressing family law matters. Given this discretion and the wide latitude in interpretation of such agreements, the individual views of the trial judge on these issues have significant importance. While it is enormously difficult to advise a client with any certainty as to the enforceability of a prenuptial agreement over the long term duration of a marriage, much of this is the result of the various approaches to the agreements taken by state courts, the whole concept of substantive fairness of the agreement, and whether such fairness will be contemplated at the time of execution of agreement or the time of enforcement. It is especially difficult to find certainty in this complex area of the law in a rapidly changing international and interconnected world.

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[5] *See* P. André Katz & Amanda Clayman, *When Your Elderly Clients Marry: Prenuptial Agreements and Other Considerations*, 16 J. AM. ACAD. MATRIM. LAW. 445, 462 n.2 (2000)(listing state statutes).
[6] Hanoch Dagan, *The Craft of Property*, 91 CAL. L. REV. 1517, 1541 (2003).

II. Unique Aspects of American Demographics

One legal commentator writing in the area of prenuptial agreements noted that such agreements used to be a rather rare occurrence in a family law attorney's practice. Today in the United States these agreements are much more common.[7] One of the significant demographic trends driving this increase in prenuptial agreements is that at the present time, people from a variety of age groups and economic backgrounds are now seeking such agreements. Parties to these contracts may be relatively young and about to enter their first marriage, but one or both may be positioned to inherit wealth or a family business in the near future and family members may wish to keep the assets in the family. Either one or both of the parties may have been married before, and they have pre-existing children they want to provide for, or their divorce was such a horrific experience they want to resolve property division and spousal maintenance before a divorce occurs. Given that people now live longer, it is more common for both men and women to marry several times in a lifetime and to have accumulated significant income and assets that need protecting. Such older persons are candidates for the protections of such agreements. These agreements present special challenges to the drafters, not the least of which are concerns as to the capacity of such persons to enter into these complex agreements.[8] All of these trends are affected by current demographics.

In the past, the classic scenario giving rise to a prenuptial agreement was a situation where a wealthy man married a younger, less wealthy woman. He sought to limit his financial exposure in the event of death or divorce. No longer are such agreements sought out primarily

[7] Willard H. Dasilva, *Prenuptial Agreements: The Balance Between Love and Money*, 24 FAM. ADVOC. 4 (Winter 2004).

[8] *Id.*. For a discussion of unique drafting challenges for elderly and possibly incapacitated clients, see Stephen W. Schlissel & Jennifer Rosenkrantz, *Prenuptial Agreements for the Golden Years*, 24 FAM. ADVOC. 28 (Winter 2002).

by elderly men about to be married. More and more professional woman have built businesses or receive executive salaries which they too seek to protect in the event the marriage ends through death or divorce. Men and women are also amassing assets and income at even young ages, driving down the ages of persons seeking prenuptial agreements.

Another consideration, especially with younger couples contemplating one of the parties leaving the workforce and parenting children fulltime, is the issue of providing for children. Although it is a general rule in the United States that prenuptial agreements cannot reduce the duty of parents to support children nor bind the court to custody determinations, such agreements can be used to expand children's rights by establishing more generous or special benefits or a higher standard of living. Among the provisions that might be addressed are ongoing child support at a level above that mandated by statutory guidelines so as to maintain a standard living for the children enjoyed during the marriage, and provisions for private schooling or various extracurricular activities. As long as the agreement provides support beyond the state guidelines, it should not run afoul of public policies prohibiting such agreements from limiting child support.

While these trends may not be unique to the United States, they do definitely reflect demographic trends within this country. With a divorce rate hovering at approximately 50%, with ongoing concern in state legislatures to make marriage a more stable and enduring institution, and with increasingly complex family situations in and out of marriage, people increasingly are focusing on the utility of prenuptial agreements to address a wide variety of needs and situation.

III. Substantive Law of Prenuptial Agreements: Overview

While all fifty states recognize prenuptial agreements in one form or another, it is important to know in which state the agreement was written and where it will likely be enforced. Each of the states has its own law on the scope and enforcement of prenuptial agreements. There is a Uniform Prenuptial Agreement Act (UPAA), which approximately 26 states have adopted but, each of these states has included its own modifications to the UPAA.[9] The remaining states have adopted their own statutes or apply common law.

Despite the varying requirements from state to state, recurring requisites throughout the fifty states include: the agreement must be in writing, and it must meet certain technical requirements; the agreement must be signed before the marriage, and a marriage must occur; the agreement cannot cover topics that are against public policy; the agreement must meet standards for substantive fairness. Furthermore, there must be the opportunity for legal counsel, and there must be financial disclosure.

To create certainty about what law will apply, agreements usually include a provision directing what state's law will apply to enforcement of the agreement and what happens if the parties move from one state to another. These choice-of-law provisions are typically enforced although some states do not consistently defer to these provisions.

A. Technical Requirements

Prenuptial agreements must be in writing. While there have been some exceptions to this requirement using contract principals, the general and prudent rule is that the agreement should be in writing. The UPAA requires no other formalities beyond the agreement being in writing

[9] UNIF. PREMARITAL AGREEMENT ACT, 9C U.L.A. 48 (2001).

and signed by both parties.[10] Other jurisdictions require substantially greater formality. For example, Minnesota requires that each party's signature be witnessed by two individuals and that the party be sworn and acknowledge his or her signature before a notary public.[11]

B. Legal Counsel

Generally parties to a prenuptial agreement must have the opportunity to consult with legal counsel. The absence of counsel does not render a prenuptial agreement unenforceable, so long as the individual had an opportunity to consult with independent legal counsel.[12] The absence of counsel may be one factor in the future viability of the agreement but generally this aspect alone will not be dispositive.[13]

C. Financial Disclosure

All states require some degree of financial knowledge or the opportunity to obtain the knowledge. The level of disclosure varies from state to state. Some states permit parties to waive the disclosure. In some instances knowledge is imputed to a party even though no disclosure is made.[14] Other states impose an affirmative duty to disclose. A material, fraudulent nondisclosure or failure to disclose a material fact may void all or part of the agreement.[15] If, however, the nondisclosure did not prejudice a party, the agreement still may be enforced.[16]

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[10] *Id*. at § 6.
[11] *See* MINN. STAT. ANN. § 519.11 (2004).
[12] Lutz v. Schneider, 563 N.W.2d 90 (N.D. 1997).
[13] *See* In re Marriage of Bonds, 5 P.3d 815 (Cal. 2000). *See generally* Nancy R. Schembri, Note, *Prenuptial Agreements and the Significance of Independent Counsel*, 17 ST. JOHN'S J. LEGAL COMMENT 313 (2003).
[14] *See* Barnhill v. Barnhill, 386 So.2d 749 (Ala. Civ. App.), *cert. denied,* 386 So.2d 752 (1980); Pajak v. Pajak, 385 S.E.2d 384 (W Va. 1989).
[15] *See* Posner v. Posner, 257 So. 2d 530 (Fla. 1972); Corbett v. Corbett, 628 S.E.2d 588 (Ga. 2006)
[16] Hill v. Hill, 356 N.W.2d 49 (Minn. Ct. App. 1984); Schutterle v. Schutterle, 260 N.W.2d 341 (S.D. 1977).

D. Timing of Execution

All states require that the agreement be signed before the marriage. In many states there is a requirement that the agreement be signed at least 24 hours or the day before the wedding. The closer to the marriage the agreement is signed, the more likely it is to be challenged.[17]

E. Requirement of Marriage

For the agreement to be enforceable, there must be a marriage subsequent to execution of the agreement. This requirement can be challenged where there is an annulment, a void marriage or a delay in the marriage after execution of the agreement. The UPAA provides for the enforcement of a prenuptial agreement even where the marriage is void, but only in instances where the parties have been married for a long time and one of the parties has relied on the agreement during the marriage.

F. Public Policy Limits

Attempts to regulate certain areas of marriage may be unenforceable because they are against public policy. For example, any limits on support of children may be void as against public policy and affecting the rights of individual who were not parties to the agreement.[18] Provisions regarding child custody are also typically not enforceable.[19]

Some states do not permit prenuptial agreements to cover the payment or waiver of spousal support.[20] Other states do not permit a waiver of attorneys fees.[21]

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[17] *See* Tiryakian v. Tiryakian, 370 S.E.2d 852 (N.C. Ct. App.1988); Fletcher v. Fletcher, 628 N.E.2d 1343 (Ohio 1994);Bakos v. Bakos, 950 So. 2d 1257 (Fla. 2d DCA 2007)

[18] *See* Edwardson v. Edwardson, 798 S.W.2d 941 (Ky. 1990); Rogers v. Yourshaw, 448 S.E.2d 884 (Va. Ct. App. 1994).

[19] Alves v. Alves, 262 A.2d 111 (D. C. 1970).

[20] In re Marriage of Van Brocklin, 468 N.W.2d 40 (Iowa Ct. App. 1991).

G. Fairness and Enforcement Standards

Most states have some level of fairness that they impose on prenuptial agreements before they will be enforced. What degree of fairness is required and when the fairness will be tested varies from jurisdiction to jurisdiction. Some jurisdictions use an either or test; if the agreement is substantively unfair but there has been financial disclosure, then it is enforced[22], or if the agreement is substantively fair but there was no disclosure, it will still be enforced.[23]

The UPAA favors enforceability, so that not only must the agreement be unconscionable when executed but there must have been no disclosure or waiver of disclosure or other imputed knowledge of the other party's assets and income.[24] The only exception to this sweeping rule is in the case of a waiver or limit on spousal support that leaves a party eligible for public welfare. In that case only the court can award sufficient support to avoid the payment of welfare.

Other states have policies that are not as favorable to enforcement as the UPAA standards.[25] Some states will set aside an agreement if it is unconscionable at the time of execution no matter if there has been full disclosure. Other states have an even broader protection, by examining the fairness of the agreement at the time it is executed and when it is enforced.[26]

What constitutes substantive fairness upon execution often depends on the circumstances surrounding the agreement. These considerations are sometimes referred to as the Button factors

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[21] In re Marriage of Burke, 980 P.2d 265 (Wash. Ct. App.1999); Kessler v. Kessler, 818 N.Y.S. 2d 571 (2 Dep't 2006)
[22] Marsocci v. Marsocci, 911 A2d 690 (RI 2006).
[23] *See generally* Peggy L. Podell, *Before Your Client Says "I Do"—Premarital Agreements Will Hold Up Better With Full Financial Disclosure*, A.B.A. J. 80 (Aug. 1999).
[24] UNIF. PREMARITAL AGREEMENT ACT, *supra* note 12, at § 6.
[25] *See e.g.* Lentz v. Lentz, 721 N.W. 2d 861 (Mich. App. 2006)
[26] *See* Rider v. Rider, 669 N.E.2d 160 (Ind. 1996); *McKee Johnson*, 444 N.W.2d 259.(Minn 1989) *overruled on other grounds* In re Estate of Kinney, 733 N.W.2d 118 (Minn. 2007)

after the case Button v. Button,[27] and include: the objectives of the parties, the economic circumstances of the parties, the property owned by each party prior to the marriage, the existence of other family relationships and obligations, each party's income and earning capacity, the anticipated contributions of each party to the marriage, the age, physical and emotional health of the parties, the anticipated education and professional goals of each party including expectations that one party will contribute as a homemaker and parent.

The standards for substantive fairness at enforcement are usually more limited and focus on changed circumstances which could not have been foreseen and which make the agreement oppressive or unconscionable.[28] Such circumstances may be the unexpected birth of a child, a disability, financial reversals, etc.

While the standards for substantive fairness may be vague, it is clear that a prenuptial agreement is not unenforceable merely because it provides for less than the law would provide.[29] In fact providing for a different outcome than the law would provide is most often the intent of the agreement. An agreement is not void because of this result.

H. Other Drafting Considerations

Prenuptial agreements frequently cover the parties' rights and obligations not only upon divorce but also upon death; therefore, drafters of prenuptial agreements must be knowledgeable of the law for each area in the agreement's jurisdiction. Also if obligations are imposed by prior marriages or existing estate plans, these matters must also be considered.

[27] 388 N.W.2d 546 (Wis. 1986).
[28] Booth v. Booth, 486 N.W.2d 116 (Mich. Ct. App. 1992);; *Cf.* Lane v. Lane, 202 S.W. 2d 577 (Ky 2006).
[29] *McKee Johnson*, 444 N.W.2d 259.(Minn 1989) *overruled on other grounds* In re Estate of Kinney, 733 N.W.2d 118 (Minn. 2007).

Because of the increasing specialization of attorneys in the U.S., it is often necessary to have both a family law attorney and a trusts and estates attorney involved in the drafting to ensure that all of the necessary waivers and necessary language are included. For example, in some instances special waiver language must be used to effectively waive a spouse's right to elect to take against a will.

The execution of the agreement does not end the attorney's job. Frequently implementation must occur after the marriage, such as transfer of real estate, updated estate planning and creation of accounts. Also, it may be necessary to execute a separate waiver of a surviving spouse's rights to pension benefits if the plan requires.[30]

IV. Trends in Litigation and Enforcement

The trend favors the enforcement of prenuptial agreements. Generally enforcement of prenuptial agreements upon death is favored more so than upon divorce.[31] Enforcement policies in general must balance the competing public policies favoring the freedom to contract and encouraging divorce settlements versus the protection of parties in potentially vulnerable situations where overreaching can more easily occur. Because of the inherent trust the parties' relationship engenders, a far greater potential for abuse of that trust exists than there would be in a business context.

[30] *See* Hagwood v. Newton, 282 F.3d 285 (4th Cir. 2002).
[31] *See* Susan Wolfson, *Premarital Waiver of Alimony*, 38 FAM. L.Q. 141, 142 (2004).

A. Creation of the Agreement

Consider how the agreement was created and whether the circumstances created a cooperative and voluntary process or whether there was duress or coercion in the process. Some general questions to ask are:

- Was there sufficient time to consider the agreement so that no one was unduly pressured? This may not require that the actual agreement was presented at a very early time if the terms of the agreement were being discussed.[32]
- Did both parties have time to hire an attorney? Was there money to pay for an attorney? Was the attorney for one spouse chosen by the other spouse?
- Were there meaningful negotiations or was the agreement presented as an ultimatum to the other party? If the guests are arriving and one party is suddenly insisting on the other signing the agreement or the wedding will not go on, this can be considered duress.[33] Also if a party is pregnant and the marriage is conditioned on the prenuptial agreement, this may constitute duress.[34]

Attorneys can take additional precautions in the drafting and presentation of the prenuptial agreement to assist in supporting its validity. Each attorney should keep a careful record of the negotiations and drafts of the agreement to demonstrate if needed later that

[32] *See* Williams v. Williams, 720 S.W.2d 246 (Tex. Ct. App. 1986).
[33] *See* Zimmie v. Zimmie, 464 N.E.2d 142, 146-47 (Ohio 1984); In re Estate of Kinney, 2006 WL 1806386 (Minn. Ct. App. 2006) (unreported)
[34] *See* Ex Parte Williams, 617 So.2d 1033 (Ala. 1992). *Cf.* Hamilton v. Hamilton, 591 A.2d 720 (Pa. Super. Ct. 1991); Biliouris v. Biliouris, 852 N.E. 2d 687 (Mass. App. Ct. 2006)

meaningful discussions occurred and revisions were undertaken as requested. Document the circumstances existing at the time the agreement is signed. If extraordinary circumstances exist, such as an illness, pregnancy, or other concerns, be sure those aspects are noted. It may be prudent to videotape the signing to demonstrate the demeanor of both parties and their willingness to sign the agreement.[35] This strategy actually provides for a type of testimony at the time of execution in the event the agreement is later challenged. Finally, make a full financial disclosure as early as possible so any questions can be answered.

B. Terms of the Agreement

When drafting, keep in mind some of the future challenges that may be made to the agreement and draft to avoid or at least address those challenges. State the circumstances of the agreement clearly, including any special circumstances such as if one party plans to leave his or her career to care for children or a spouse. Anticipate changes that may occur in the future and draft to ensure that the agreement remains fair in the face of those changes. For example, what may be fair consideration after five years may not be fair after twenty-five years—plan for longevity. Anticipate disability and how that might change the fairness of the agreement.

If any questions exist about the value of assets, be sure to address the various aspects of valuation. If an asset's value is expected to change or if a party expects to receive an inheritance, be sure these circumstances are disclosed. Check for ambiguities especially with complex definitions of what property and income are to be covered by the agreement. If applicable, state how assets and income are anticipated to be spent during the marriage.

[35] *See, e.g.*, Kathleen Hogan, *The Candid Camera: Videotaping Execution of the Agreement*, 24 FAM. ADVOC. 25 (Winter 2002).

Prenuptial agreements typically cover property rights of a spouse upon divorce or the death of the other spouse. In addressing these rights, agreements often define rights in "marital" and "nonmarital" property. The definitions of these two concepts vary from state to state but generally, nonmarital property is property acquired before the marriage, by gift to one party but not both, or by inheritance. The definition may also include income and appreciation on nonmarital property. Marital property is typically property acquired during the marriage from earnings and gifts to both parties.[36]

The financial disclosure should be attached to the agreement and should be as complete as possible. In the alternative the agreement should state that the disclosure was made and list the documents actually provided to the future spouse. The agreement should recite the parties' legal rights and that each party has been informed of all of these rights and acknowledges receiving the information. The agreement should contain a method for alteration of its terms. Typically the changes must be in writing and meet the technical requirements of the original execution.

C. Challenges to the Agreement

The agreement must meet standard contract criteria as well as the special requisites for prenuptial agreements. Some considerations are whether the agreement meets contract standards, including whether there was a meeting of the minds. Also, the parties must understand the agreement. This does not require absolute understanding but only the opportunity. The

[36] *See* Victoria M. Ho & Kristine K. Rieger, *How to Analyze Marital v. Nonmarital Property in Divorce Proceedings*, 70 FLA. B.J. 84 (Oct. 1996).

unilateral failure to read the agreement or to read the agreement carefully is usually not a reason to set aside an agreement.[37]

The agreement must not have been obtained through fraud, duress or coercion. One question is whether the agreement was executed when the parties were older and their estates established or was it created when they were young and could not foresee the future?

Attorneys should carefully confirm that the agreement meets the technical requirements for the jurisdiction. If you are challenging the agreement, recheck the signatures, witnesses, etc. Attorneys should verify that the agreement meets the fairness requirements for the jurisdiction, as discussed above.[38] Query whether the agreement provides for changes and potential foreseen circumstances. Check for ambiguities in the language of the agreement that might make its enforcement unclear.

Make sure that the financial disclosures are accurate, and check for changes in value or income since execution of the agreement. Look at other financial disclosures at the time of the prenuptial agreement to see if those disclosures are consistent with those in the agreement. If an inaccurate financial disclosure occurred, question whether it was material or whether it in some way prejudiced the other party. If the failure to make an accurate disclosure would have no effect on whether the party signed the agreement, then the failure may not be fatal to the agreement. Evaluate whether any substantial and unforeseen changes in circumstances (such as an unforeseen increase or decrease in the parties' wealth) happened during the marriage. Evaluate also whether assets were combined so that they cannot be separated.

Question if the parties followed or ignored the agreement during the marriage. If the agreement has not been followed—for example if assets have not been kept separate—the

[37] Laird v. Laird, 597 P.2d 463 (Wyo. 1973).
[38] *See supra* text at notes 25-30.

argument can be made that the parties have waived some or all of the protections of the agreement. If a party has not lived up to an obligation in the agreement, such as the requirement to establish life insurance or a trust or pay certain bills, an argument can be made that the agreement was breached. Such a breach must typically be material to void the agreement.

The burden of proof in challenging the agreement varies by jurisdiction. In some jurisdictions there may be different standards depending on whether "nonmarital" or "marital" property is the subject of the agreement. Typically the proponent of the agreement has the burden of proof although this may be changed by statute.

Upon death (if applicable), query whether one party has adequately waived rights, such as a clear waiver of the right to elect against the will. General waivers may not be sufficient to constitute a waiver of specific rights.

An issue may arise as to what state's law will apply. Typically this will be the state in which the agreement was executed or the choice-of-law provision in the agreement itself. Ask whether compelling reasons exist why the agreement should be enforced under another state's law. For example, question whether the agreement violates some public policy of the enforcing state.

V. **International Issues**

The primary issues facing the foreign practitioner attempting to enforce a foreign-drafted prenuptial agreement in the United States, or a United States practitioner dealing with a party who is not a resident of the United States, involve conflicts of law issues and enforcement concerns when more than one jurisdiction is involved, and one of them is a foreign country.

Under the American law of conflicts, the general rule is that the validity and the enforceability of the contract is determined by the law of the state where the contract was entered into. or the state whose laws the agreement specified will apply in a choice of law provision. According to one commentator, this doctrine is equally applicable to prenuptial agreements.[39] In fact, one court has held that as a general rule, unless an explicit contrary intent is shown, a prenuptial agreement made in a foreign country is enforceable in the United States according to the law of the foreign country where it was executed.[40]

These general rules, however, are not without exception. The Restatement (Second) of Conflicts of Laws provides the following general statement of law that captures the majoring view of how state courts in the United States addresses this conflicts of law issue in the area of prenuptial agreements:

> a court shall apply the law of the state chosen by the parties in most cases, unless the state has no substantial relation to the contract or unless the law of that state offends a fundamental policy of a state having a greater interest in the particular issue. [41]

In situations where the parties did not express an intention as to the law to be applied, the majority approach, which tracks with the Restatement, is that the laws and polices of the state having the most significant relationship to the transaction of the parties should be applied.[42]

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[39] Laura W. Morgan, *Enforcement of Islamic Antenuptial Agreements*, 15 DIV. LITIG. 41 (Mar. 2003).
[40] *See, e.g.*, Fernadez v. Fernadez, 15 Cal. Rptr. 374 (Cal. Ct. App. 1961); Shaudry v. Shaudry, 388 A.2d 10001 (N.J. Super. Ct. App. Div.); Sapir v. Stein-Sapir, 382 N.Y.S. 2d 799 (1976). *See also* LAURA W. MORGAN & BRETT R. TURNER, ATTACKING AND DEFENDING MARITAL AGREEMENTS § 15.02 at 448-449 (2001).
[41] Restatements are statements of law prepared by the American Law Institute (ALI). The ALI is a group of judges, academics, and practitioners who serve by appointment. The Restatements, which cover a variety of areas of substantive law, are usually proposed model codes that either capture the primary trends in American law or advocate what the ALI believes the law should be. While the ALI's promulgations do not carry the force of law of a statute or court decision, they do attempt to suggest best practices or a majority view of the law. Some courts have explicitly adopted positions taken by the ALI. In a legal system such as we have in the United States with its multiple jurisdictions, such summaries or restatements can be quite helpful in discussing disparate trends in the law.
[42] RESTATEMENT (SECOND) OF CONFLICT OF LAWS, §§ 187,188 (1971 and Supp. 1988).

When applying these general principals of conflicts law to a prenuptial agreement that is being challenged, the application of the law will usually depend on the nature of the matter in dispute. For example, if the issue involves whether the document was properly executed, and is hence enforceable, a majority of states would apply the Restatement approach and apply the laws of the state where the document was executed or, if the agreement has one, the law of the state chosen by the parties in the choice of law provision. If the issue is one of substantive fairness at the time of enforcement, a court maybe more reluctant to simply defer to the state or country where the agreement was drafted or the state whose laws were chosen in a choice of law provision. With this type of issue, public policy considerations may be more significant.

When faced with a foreign drafted prenuptial agreement in the United States, under the doctrines recited above the first question to be answered before even reaching the issue of whether such an agreement can be enforced is whether the document purported to be a prenuptial agreement actually constitutes such a contract. Here it will be critical to examine the contents of the agreement, what is the ultimate purpose of the agreement, and whether statutory or case law requirements exist in the country where the document was drafted that will provide some guidance to a court in the United States trying to determine whether the agreement is in fact a valid prenuptial agreement under those laws. If it is an American prenuptial agreement that is being considered in a foreign country, assuming the same type of analysis would apply in the foreign country, it will then be critical for the court in the foreign attorney to determine whether the parties complied with the laws of the state where the document was drafted. Assuming that a valid agreement actually exists, the court must then reach the question of whether such an agreement has provisions that violate the public policy of the governing state.

Certainly another issue affecting the international enforcement and interpretation of prenuptial agreements can be implicated if a foreign country has passed on the validity and interpretation of such an agreement and then a court determination is sought as to enforcement in the United States. Two general bodies of law affect whether a "foreign judgment" must be enforced in another state or jurisdiction. The United States Constitution and most state constitutions have a full faith and credit clause that requires that the courts of each state honor other state's public acts, records, and judicial proceedings. The federal Full Faith and Credit Clause applies to all states of the United States, as well as federal, territorial, and District of Columbia courts.[43]

Since the Full Faith and Credit Clause would not apply to foreign countries' judgments and judicial determinations, one is left with the doctrine of comity. Comity is the principal under which a court in one country either declines to exercise jurisdiction under certain circumstances in deference to the laws and interests of another foreign country, or agrees to apply another country's judicial or other legal decisions because of confidence that the procedures used to arrive at the decisions or action were fair and appropriate given the circumstances.[44] One commentator, in describing the doctrine of comity, notes that nothing in the United States Constitution or any state constitutions requires a state within the United States to enforce or apply the judgments, decisions, or laws of a foreign country, and absent a federal treaty so requiring, the states can do as they please in_ foreign contracts are agreements; each state ultimately decides for itself how far it will go in applying a foreign country's laws and procedures to a contract or other agreement.[45]

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[43] U.S. CONST. art. IV, § 1.

[44] BLACK'S LAWS DICTIONARY 261-62 (7th ed. 1999). Black's Laws Dictionary 261-62 (7th ed. 1999), defines "comity" as "a willingness to grand a privilege, not as a matter or right, but out of deference and good will.

Among the factors an American court will consider in applying another country's laws in a dispute involving a prenuptial agreement are whether the laws and procedures are compatible with domestic American concepts of due process. These include fair notice, an appropriate jurisdictional basis, and a fair hearing. [46] Given that this doctrine of comity applies to orders and judgments of a court, if you are in a situation where you want an American court to invoke the doctrine of comity to a dispute involving a prenuptial agreement, it may be necessary to obtain a decision from a court in the foreign county as to the validity or enforceability of the agreement under that country's laws, and then seek to have that decision enforced in an American court. One caveat that bears repeating, however, is that especially in the area of family law, the judges have much discretion. You should make sure to know something about your court and how it views prenuptial agreements before invoking the doctrine of comity.

Conclusion

Because more and more persons contemplating marriage may be marrying persons from other countries or residing in more than one country, the drafting and enforcement of prenuptial agreements more and more frequently raises complex international legal issues. As a result, it will be more important for practitioners and courts to have some understanding of the substantive laws of each country or state involved, as well as the doctrines used to resolve international jurisdiction and choice of law disputes. Hopefully this article will assist courts and practitioners when the United States is involved in some way in a prenuptial agreement.

[4] 3 DAVID D. SIEGEL, CONFLICTS IN A NUTSHELL § 109 B (1982).

UNIFORM PREMARITAL AND MARITAL AGREEMENTS ACT

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

ANNUAL CONFERENCE
MEETING IN ITS ONE-HUNDRED-AND-TWENTY-FIRST YEAR
NASHVILLE, TENNESSEE
JULY 13 - JULY 19, 2012

WITH PREFATORY NOTE AND COMMENTS

January 2, 2013

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UNIFORM PREMARITAL AND MARITAL AGREEMENTS ACT

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UNIFORM PREMARITAL AND MARITAL AGREEMENTS ACT

Prefatory Note

The purpose of this act is to bring clarity and consistency across a range of agreements between spouses and those who are about to become spouses. The focus is on agreements that purport to modify or waive rights that would otherwise arise at the time of the dissolution of the marriage or the death of one of the spouses.

Forty years ago, state courts generally refused to enforce premarital agreements that altered the parties' right at divorce, on the basis that such agreements were attempts to alter the terms of a status (marriage) or because they had the effect of encouraging divorce (at least for the party who would have to pay less in alimony or give up less in the division of property). Over the course of the 1970s and 1980s, nearly every state changed its law, and currently every state allows at least some divorce-focused premarital agreements to be enforced, though the standards for regulating those agreements vary greatly from state to state. The law relating to premarital agreements affecting the parties' rights at the death of a spouse had historically been less hostile than the treatment of such agreements affecting the right of the parties at divorce. The ability of a wife to waive her dower rights goes back to the 16th century English Statute of Uses. 27 Hen. VIII, c. 10, § 6 (1535). Other countries have also moved towards greater legal recognition of premarital agreements and marital agreements, though there remains a great diversity of approaches internationally. *See* Jens M. Scherpe (ed.), *Marital Agreements and Private Autonomy in Comparative Perspective* (Hart Publishing, 2012); *see also* Katharina Boele-Woelki, Jo Miles and Jens M. Scherpe (eds.), *The Future of Family Property in Europe* (Intersentia, 2011).

The Uniform Premarital Agreement Act was promulgated in 1983. Since then it has been adopted by 26 jurisdictions, with roughly half of those jurisdictions making significant amendments, either at the time of enactment or at a later date. *See* Amberlynn Curry, Comment, "The Uniform Premarital Agreement Act and Its Variations throughout the States," 23 *Journal of the American Academy of Matrimonial Lawyers* 355 (2010). Over the years, commentators have offered a variety of criticisms of that Act, many arguing that it was weighted too strongly in favor of enforcement, and was insufficiently protective of vulnerable parties. *E.g.*, Barbara Ann Atwood, "Ten Years Later: Lingering Concerns About the Uniform Premarital Agreement Act," 19 *Journal of Legislation* 127 (1993); Gail Frommer Brod, "Premarital Agreements and Gender Justice," 9 *Yale Journal of Law & Feminism* 229 (1994); J. Thomas Oldham, "With All My Worldly Goods I Thee Endow, or Maybe Not: A Reevaluation of the Uniform Premarital Agreement Act After Three Decades," 19 *Duke Journal of Gender and the Law* 83 (2011). Whatever its faults, the Uniform Premarital Agreement Act has brought some consistency to the legal treatment of premarital agreements, especially as concerns rights at dissolution of marriage.

The situation regarding marital agreements has been far less settled and consistent. Some states have neither case law nor legislation, while the remaining states have created a wide range of approaches. Additionally, other legal standards relating to the waiver of rights at the death of the other spouse, by either premarital agreements or marital agreements, seem to impose somewhat different requirements. *See, e.g., Uniform Probate Code*, Section 2-213; *Restatement*

(Third) of Property, Section 9.4 (2003); *Model Marital Property Act*, Section 10 (1983); and *Internal Revenue Code*, Sections 401 and 417 (stating when a surviving spouse's waiver of rights to a qualified plan would be valid).

The general approach of this act is that parties should be free, within broad limits, to choose the financial terms of their marriage. The limits are those of due process in formation, on the one hand, and certain minimal standards of substantive fairness, on the other. Because a significant minority of states authorizes some form of fairness review based on the parties' circumstances at the time the agreement is to be enforced, a bracketed provision in Section 9(f) offers the option of refusing enforcement based on a finding of substantial hardship at the time of enforcement. And because a few states put the burden of proof on the party seeking enforcement of marital (and, more rarely, premarital) agreements, a Legislative Note after Section 9 suggests alternative language to reflect that burden of proof.

This act chooses to treat premarital agreements and marital agreements under the same set of principles and requirements. A number of states currently treat premarital agreements and marital agreements under different legal standards, with higher burdens on those who wish to enforce marital agreements. *See, e.g.*, Sean Hannon Williams, "Postnuptial Agreements," 2007 *Wisconsin Law Review* 827, 838-845; Brian H. Bix, "The *ALI Principles* and Agreements: Seeking a Balance Between Status and Contract," in *Reconceiving the Family: Critical Reflections on the American Law Institute's Principles of the Law of Family Dissolution* (Robin Fretwell Wilson, ed., Cambridge University Press, 2006), pp. 372-391, at pp. 382-387; Barbara A. Atwood, "Marital Contracts and the Meaning of Marriage," 54 *Arizona Law Review* 11 (2012). However, this act follows the American Law Institute, in its *Principles of the Law of Family Dissolution* (2002), in treating the two types of agreements under the same set of standards. While this act, like the American Law Institute's *Principles* before it, recognizes that different sorts of risks may predominate in the different transaction types – risks of unfairness based on bounded rationality and changed circumstances for premarital agreements, and risks of duress and undue influence for marital agreements (*Principles of the Law of Family Dissolution*, Section 7.01, comment *e*, at pp. 953-954) – this act shares the American Law Institute's view that the resources available through this act and common law principles are sufficient to deal with the likely problems related to either type of transaction.

UNIFORM PREMARITAL AND MARITAL AGREEMENTS ACT

SECTION 1. SHORT TITLE. This [act] may be cited as the Uniform Premarital and Marital Agreements Act.

SECTION 2. DEFINITIONS. In this [act]:

(1) "Amendment" means a modification or revocation of a premarital agreement or marital agreement.

(2) "Marital agreement" means an agreement between spouses who intend to remain married which affirms, modifies, or waives a marital right or obligation during the marriage or at separation, marital dissolution, death of one of the spouses, or the occurrence or nonoccurrence of any other event. The term includes an amendment, signed after the spouses marry, of a premarital agreement or marital agreement.

(3) "Marital dissolution" means the ending of a marriage by court decree. The term includes a divorce, dissolution, and annulment.

(4) "Marital right or obligation" means any of the following rights or obligations arising between spouses because of their marital status:

(A) spousal support;

(B) a right to property, including characterization, management, and ownership;

(C) responsibility for a liability;

(D) a right to property and responsibility for liabilities at separation, marital dissolution, or death of a spouse; or

(E) award and allocation of attorney's fees and costs.

(5) "Premarital agreement" means an agreement between individuals who intend to marry which affirms, modifies, or waives a marital right or obligation during the marriage or at

separation, marital dissolution, death of one of the spouses, or the occurrence or nonoccurrence of any other event. The term includes an amendment, signed before the individuals marry, of a premarital agreement.

(6) "Property" means anything that may be the subject of ownership, whether real or personal, tangible or intangible, legal or equitable, or any interest therein.

(7) "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.

(8) "Sign" means with present intent to authenticate or adopt a record:

(A) to execute or adopt a tangible symbol; or

(B) to attach to or logically associate with the record an electronic symbol, sound, or process.

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

Legislative Note: *If your state recognizes nonmarital relationships, such as civil unions and domestic partnerships, consider whether these definitions need to be amended.*

Comment

The definition of "amendment" includes "amendments" of agreements, narrowly understood, and also revocations.

The definitions of "premarital agreement" and "marital agreement" are part of the effort to clarify that this act is not intended to cover cohabitation agreements, separation agreements, or conventional day-to-day commercial transactions between spouses. Marital agreements and separation agreements (sometimes called "marital settlement agreements") are usually distinguished based on whether the couple at the time of the agreement intends for their marriage to continue, on the one hand, or whether a court-decreed separation, permanent physical separation or dissolution of the marriage is imminent or planned, on the other. To avoid deception of the other party or the court regarding intentions, one jurisdiction refuses to enforce a marital agreement if it is quickly followed by an action for legal separation or dissolution of the marriage. *See Minnesota Statutes* § 519.11, subd. 1a(d)(marital agreement presumed to be

unenforceable if separation or dissolution sought within two years; in such a case, enforcement is allowed only if the spouse seeking enforcement proves that the agreement was fair and equitable).

While most premarital agreements and marital agreements will be stand-alone documents, a fragment of a writing that deals primarily with other topics could also constitute a premarital agreement or marital agreement for the purpose of this act.

With premarital agreements, the nature and timing of the agreement (between parties who are about to marry) reduces the danger that the act's language will accidentally include types of transactions that are not thought of as premarital agreements and should not be treated as premarital agreements (but see the discussion of *Mahr* agreements, below). There is a greater concern with marital agreements, since (a) spouses enter many otherwise enforceable financial transactions, most of which are not problematic and should not be made subject to special procedural or substantive constraints; and (b) there are significant questions about how to deal with agreements whose primary intention may not be to waive one spouse's rights at dissolution of the marriage or the other spouse's death, but where the agreement nonetheless has that effect. In the terms of another uniform act, the purpose of the definition of "marital agreement" is to exclude from coverage "acts and events that have significance apart from their effect" upon rights at dissolution of the marriage or at the death of one of the spouses. *See Uniform Probate Code*, Section 2-512 ("Events of Independent Significance"). Such transactions might include the creation of joint and several liability through real estate mortgages, motor vehicle financing agreements, joint lines of credit, overdraft protection, loan guaranties, joint income tax returns, creation of joint property ownership with a right of survivorship, joint property with payment-on-death provisions or transfer-on-death provisions, durable power of attorney or medical power of attorney, buy-sell agreements, agreements regarding the valuation of property, the placing of marital property into an irrevocable trust for a child, etc.

The shorter definition of "premarital agreement" used by the Uniform Premarital Agreement Act (in its Section 1(1): "an agreement between prospective spouses made in contemplation of marriage and to be effective upon marriage") had the disadvantage of encompassing agreements that were entered by couples about to marry but that were not intended to affect the parties' existing legal rights and obligations upon divorce or death, e.g., Islamic marriage contracts, with their deferred *Mahr* payment provisions. See Nathan B. Oman, "Bargaining in the Shadow of God's Law: Islamic *Mahr* Contracts and the Perils of Legal Specialization," 45 *Wake Forest Law Review* 579 (2010); Brian H. Bix, "*Mahr* Agreements: Contracting in the Shadow of Family Law (and Religious Law) – A Comment on Oman," 1 *Wake Forest Law Review Online* 61 (2011), available at *http://wakeforestlawreview.com/*.

The definition of "property" is adapted from the *Uniform Trust Code*, Section 103(12).

This act does not define "separation agreement," leaving this to the understanding, rules, and practices of the states, noting that the practices do vary from state to state (*e.g.*, that in many states separation agreements require judicial approval while in other states they can be valid without judicial approval).

A premarital agreement or marital agreement may include terms not in violation of public policy of this state, including terms relating to: (1) rights of either or both spouses to interests in a trust, inheritance, devise, gift, and expectancy created by a third party; (2) appointment of fiduciary, guardian, conservator, personal representative, or agent for person or property; (3) a tax matter; (4) the method for resolving a dispute arising under the agreement; (5) choice of law governing validity, enforceability, interpretation, and construction of the agreement; or (6) formalities required to amend the agreement in addition to those required by this act.

SECTION 3. SCOPE.

(a) This [act] applies to a premarital agreement or marital agreement signed on or after [the effective date of this [act]].

(b) This [act] does not affect any right, obligation, or liability arising under a premarital agreement or marital agreement signed before [the effective date of this [act]].

(c) This [act] does not apply to:

(1) an agreement between spouses which affirms, modifies, or waives a marital right or obligation and requires court approval to become effective; or

(2) an agreement between spouses who intend to obtain a marital dissolution or court-decreed separation which resolves their marital rights or obligations and is signed when a proceeding for marital dissolution or court-decreed separation is anticipated or pending.

(d) This [act] does not affect adversely the rights of a bona fide purchaser for value to the extent that this [act] applies to a waiver of a marital right or obligation in a transfer or conveyance of property by a spouse to a third party.

Comment

This section distinguishes marital agreements, which are subject to this act, both from agreements that parties might enter at a time when they intend to obtain a divorce or legal separation or to live permanently apart, and also from the conventional transfers of property in which state law requires one or both spouses waive rights that would otherwise accrue at the death of the other spouse.

Subsection (c) is meant to exclude “separation agreements” and “marital settlement agreements” from the scope of the act. These tend to have their own established standards for

enforcement. The reference to "a waiver of a marital right or obligation" in Subsection (d) would include the release of dower, curtesy, or homestead rights that often accompanies the conveyance of real property. In general, the enforceability of agreements in Subsections (b), (c) and (d) is left to other law in the state.

This section is not meant to restrict third-party beneficiary standing where it would otherwise apply.

SECTION 4. GOVERNING LAW. The validity, enforceability, interpretation, and construction of a premarital agreement or marital agreement are determined:

(1) by the law of the jurisdiction designated in the agreement if the jurisdiction has a significant relationship to the agreement or either party and the designated law is not contrary to a fundamental public policy of this state; or

(2) absent an effective designation described in paragraph (1), by the law of this state, including the choice-of-law rules of this state.

Comment

This section is adapted from the *Uniform Trust Code*, Section 107. It is consistent with *Uniform Premarital Agreement Act*, Section 3(a)(7), but is broader in scope. The section reflects traditional conflict of laws and choice of law principles relating to the enforcement of contracts. *See Restatement (Second) of Conflict of Laws*, Sections 186-188 (1971). Section 187(2)(a) of that *Restatement* expressly states that the parties' choice of law is not to be enforced if "the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice…." Section 187(2)(b) of the same *Restatement* holds that the parties' choice of law is not to be enforced if "application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue …." The limitation of choice of law provisions to jurisdictions having some connection with the parties or the transaction tracks a similar restriction in the *Uniform Commercial Code*, which restricts choice of law provisions to states with a reasonable relation to the transaction (this was Section 1-105 under the UCC before the 2001 revisions; and Section 1-301 in the (2001) Revised UCC Article 1).

"Significant relation" and "fundamental public policy" are to be understood under existing state principles relating to conflict of laws, and "contrary to … fundamental public policy" means something more than that the law of the other jurisdiction differs from that of the forum state. *See, e.g.*, *International Hotels Corporation v. Golden*, 15 N.Y.2d 9, 14, 254 N.Y.S.2d 527, 530, 203 N.E.2d 210, 212-13 (1964); *Capital One Bank v. Fort*, 255 P.3d 508, 510-513 (Or. App. 2011) (court refused to apply law under choice of law provision because

contrary to "fundamental public policy" of forum state); Russell J. Weintraub, *Commentary on the Conflict of Laws* 118-125 (6th ed., Foundation Press, 2010).

For examples of choice of law and conflict of law principles operating in this area, see, *e.g.*, *Bradley v. Bradley*, 164 P.3d 537, 540-544 (Wyo. 2007) (premarital agreement had choice of law provision selecting Minnesota law; amendment to agreement held invalid because it did not comply with Minnesota law for modifying agreements); *Gamache v. Smurro*, 904 A.2d 91, 95-96 (Vt. 2006) (applying California law to prenuptial agreement signed in California); *Black v. Powers*, 628 S.E.2d 546, 553-556 (Va. App. 2006) (Virginia couple drafted agreement in Virginia, but signed it during short stay in the Virgin Islands before their wedding there; the agreement was held to be covered by Virgin Islands law because there was no clear party intention that Virginia law apply and because Virgin Island law was not contrary to the forum state's public policy); *cf. Davis v. Miller*, 7 P.3d 1223, 1229-1230 (Kan. 2000) (parties can use choice of law provision to choose the state version of the Uniform Premarital Agreement Act to apply to a marital agreement, even though that Act would otherwise not apply).

SECTION 5. PRINCIPLES OF LAW AND EQUITY. Unless displaced by a provision of this [act], principles of law and equity supplement this [act].

Comment

This section is similar to Section 106 of the *Uniform Trust Code* and Section 1-103(b) of the *Uniform Commercial Code*, and incorporates the case-law that has developed to interpret and apply those provisions. Because this act contains broad, amorphous defenses to enforcement like "voluntariness" and "unconscionability" (Section 9), there is a significant risk that parties, and even some courts, might assume that other conventional doctrinal contract law defenses are not available because preempted. This section is intended to make clear that common law contract doctrines and principles of equity continue to apply where this act does not displace them. Thus, it is open to parties, e.g., to resist enforcement of premarital agreements and marital agreements based on legal incompetency, misrepresentation, duress, undue influence, unconscionability, abandonment, waiver, etc. For example, a premarital agreement presented to one of the parties for the first time hours before a marriage (where financial commitments have been made and guests have arrived from far away) clearly raises issues of duress, and might be voidable on that ground. *Cf.* In re *Marriage of Balcof*, 141 Cal.App.4th 1509, 1519-1527, 47 Cal.Rptr.3d 183, 190-196 (2006) (marital agreement held unenforceable on the basis of undue influence and duress); *Bakos v. Bakos*, 950 So.2d 1257, 1259 (Fla. App. 2007) (affirming trial court conclusion that premarital agreement was voidable for undue influence).

The application of doctrines like duress varies greatly from jurisdiction to jurisdiction: *e.g.*, on whether duress can be shown even in the absence of an illegal act, e.g. *Farm Credit Services of Michigan's Heartland v. Weldon*, 591 N.W.2d 438, 447 (Mich. App. 1998) (illegal act required for claim of duress under Michigan law), and whether the standard of duress should be applied differently in the context of domestic agreements compared to commercial agreements. This act is not intended to change state law and principles relating to these matters.

Rules of construction, including rules of severability of provisions, are also to be taken from state rules and principles. *Cf. Rivera v. Rivera*, 243 P.3d 1148, 1155 (N.M. App. 2010), *cert. denied*, 243 P.3d 1146 (N.M. 2010) (premarital agreement that improperly waived the right to alimony and that contained no severability clause deemed invalid in its entirety); *Sanford v. Sanford*, 694 N.W.2d 283, 291-294 (S.D. 2005) (applying state principles of severability to conclude that invalid alimony waiver in premarital agreement severable from valid provisions relating to property division); *Bratton v. Bratton*, 136 S.W.3d 595, 602 (Tenn. 2004) (property division provision in marital agreement not severable from provision waiving alimony). Additionally, state rules and principles will govern the ability of parties to include elevated formalities for the revocation or amendment of their agreements.

SECTION 6. FORMATION REQUIREMENTS. A premarital agreement or marital agreement must be in a record and signed by both parties. The agreement is enforceable without consideration.

Comment

This section is adapted from *Uniform Premarital Agreement Act*, Section 2. Almost all jurisdictions currently require premarital agreements to be in writing. A small number of courts have indicated that an oral premarital agreement might be enforced based on partial performance, *e.g.*, In re *Marriage of Benson*, 7 Cal. Rptr. 3d 905 (App. 2003), *rev'd*, 36 Cal.4th 1096, 116 P.3d 1152 (Cal. 2005) (ultimately holding that the partial performance exception to statute of frauds did not apply to transmutation agreement), and at least one jurisdiction has held that a premarital agreement could be amended or rescinded by actions alone. *Marriage of Baxter*, 911 P.2d 343, 345-346 (Or. App. 1996), review denied, 918 P.2d 847 (Or. 1996). One court, in an unpublished opinion, enforced an oral agreement that a written premarital agreement would become void upon the birth of a child to the couple. *Ehlert v. Ehlert*, No. 354292, 1997 WL 53346 (Conn. Super. 1997). While this act affirms the traditional rule that formation, amendment, and revocation of premarital agreements and marital agreements need to be done through signed written documents, states may obviously construe their own equitable doctrines (application through Section 5) to warrant enforcement or modification without a writing in exceptional cases.

It is the consensus view of jurisdictions and commentators that premarital agreements are or should be enforceable without (additional) consideration (the agreement to marry or the act of marrying is often treated as sufficient consideration). Additionally, most modern approaches to premarital agreements have by-passed the consideration requirement entirely: e.g., *Uniform Premarital Agreement Act*, Section 2; American Law Institute, *Principles of the Law of Family Dissolution*, Section 7.01(4) (2002); *Restatement (Third) of Property*, Section 9.4(a) (2003).

In some states, courts have raised concerns relating to the consideration for marital agreements. The view of this act is that marital agreements, otherwise valid, should not be made unenforceable on the basis of lack of consideration. As the American Law Institute wrote on the distinction (not requiring additional consideration for enforcing premarital agreements, but

requiring it for marital agreements): "This distinction is not persuasive in the context of a legal regime of no-fault divorce in which either spouse is legally entitled to end the marriage at any time." *Principles of the Law of Family Dissolution*, Section 7.01, Comment *c*, at 947-948 (2002). The consideration doctrine is sometimes used as an indirect way to ensure minimal fairness in the agreement, and the seriousness of the parties. *See, e.g.*, Lon L. Fuller, "Consideration and Form," 41 *Columbia Law Review* 799 (1941). Those concerns for marital agreements are met in this act directly by other provisions. On the conclusion that consideration should not be required for marital agreements, see also *Restatement (Third) of Property*, Section 9.4(a) (2003), and *Model Marital Property Act*, Section 10 (1983).

SECTION 7. WHEN AGREEMENT EFFECTIVE. A premarital agreement is effective on marriage. A marital agreement is effective on signing by both parties.

Comment

This section is adapted from *Uniform Premarital Agreement Act*, Section 4. The effective date of an agreement (premarital agreement at marriage, marital agreement at signing) does not foreclose the parties from agreeing that certain provisions within the agreement will not go into force until a later time, or will go out of force at that later time. For example, a premarital agreement may grant a spouse additional rights should the marriage last a specified number of years.

Parties sometimes enter agreements that are part cohabitation agreement and part premarital agreement. This act deals only with the provisions triggered by marriage, without undermining whatever enforceability the cohabitation agreement has during the period of cohabitation.

SECTION 8. VOID MARRIAGE. If a marriage is determined to be void, a premarital agreement or marital agreement is enforceable to the extent necessary to avoid an inequitable result.

Comment

This section is adapted from *Uniform Premarital Agreement Act*, Section 7. For example, if John and Joan went through a marriage ceremony, preceded by a premarital agreement, but, unknown to Joan, John was still legally married to Martha, the marriage between John and Joan would be void, and whether their premarital agreement should be enforced would be left to the discretion of the court, taking into account whether enforcement in whole or in part would be required to avoid an inequitable result.

This section is intended to apply primarily to cases where a marriage is void due to the pre-existing marriage of one of the partners. Situations where one partner is seeking a civil annulment (see Section 2(3)) relating to some claims of misrepresentation or mutual mistake

would usually be better left to the main enforcement provisions of Sections 9 and 10.

SECTION 9. ENFORCEMENT.

(a) A premarital agreement or marital agreement is unenforceable if a party against whom enforcement is sought proves:

(1) the party's consent to the agreement was involuntary or the result of duress;

(2) the party did not have access to independent legal representation under subsection (b);

(3) unless the party had independent legal representation at the time the agreement was signed, the agreement did not include a notice of waiver of rights under subsection (c) or an explanation in plain language of the marital rights or obligations being modified or waived by the agreement; or

(4) before signing the agreement, the party did not receive adequate financial disclosure under subsection (d).

(b) A party has access to independent legal representation if:

(1) before signing a premarital or marital agreement, the party has a reasonable time to:

(A) decide whether to retain a lawyer to provide independent legal representation; and

(B) locate a lawyer to provide independent legal representation, obtain the lawyer's advice, and consider the advice provided; and

(2) the other party is represented by a lawyer and the party has the financial ability to retain a lawyer or the other party agrees to pay the reasonable fees and expenses of independent legal representation.

(c) A notice of waiver of rights under this section requires language, conspicuously displayed, substantially similar to the following, as applicable to the premarital agreement or marital agreement:

"If you sign this agreement, you may be:

Giving up your right to be supported by the person you are marrying or to whom you are married.

Giving up your right to ownership or control of money and property.

Agreeing to pay bills and debts of the person you are marrying or to whom you are married.

Giving up your right to money and property if your marriage ends or the person to whom you are married dies.

Giving up your right to have your legal fees paid."

(d) A party has adequate financial disclosure under this section if the party:

(1) receives a reasonably accurate description and good-faith estimate of value of the property, liabilities, and income of the other party;

(2) expressly waives, in a separate signed record, the right to financial disclosure beyond the disclosure provided; or

(3) has adequate knowledge or a reasonable basis for having adequate knowledge of the information described in paragraph (1).

(e) If a premarital agreement or marital agreement modifies or eliminates spousal support and the modification or elimination causes a party to the agreement to be eligible for support under a program of public assistance at the time of separation or marital dissolution, a court, on request of that party, may require the other party to provide support to the extent necessary to

avoid that eligibility.

(f) A court may refuse to enforce a term of a premarital agreement or marital agreement if, in the context of the agreement taken as a whole[:]

[(1)] the term was unconscionable at the time of signing[; or

(2) enforcement of the term would result in substantial hardship for a party because of a material change in circumstances arising after the agreement was signed].

(g) The court shall decide a question of unconscionability [or substantial hardship] under subsection (f) as a matter of law.

Legislative Note: *Section 9(a) places the burden of proof on the party challenging a premarital agreement or a marital agreement. Amendments are required if your state wants to (1) differentiate between the two categories of agreements and place the burden of proof on a party seeking to enforce a marital agreement, or (2) place the burden of proof on a party seeking to enforce either a premarital agreement or marital agreement.*

If your state wants to permit review for "substantial hardship" caused by a premarital agreement or marital agreement at the time of enforcement, Section 9(f), including the bracketed language, should be enacted.

Comment

This section is adapted from *Uniform Premarital Agreement Act*, Section 6. While this section gives a number of defenses to the enforcement of premarital agreements and marital agreements, other defenses grounded in the principles of law and equity also are available. See Section 5.

The use of the phrase "involuntary or the result of duress" in Subsection (a)(1) is not meant to change the law. There is significant and quite divergent caselaw that has developed under the "voluntariness" standard of the Uniform Premarital Agreement Act and related law – *e.g.*, *compare Marriage of Bernard*, 204 P.3d 907, 910-913 (Wash. 2009) (finding agreement "involuntary" when significantly revised version of premarital agreement was presented three days before the wedding) *and Peters-Riemers v. Riemers*, 644 N.W.2d 197, 205-207 (N.D. 2002) (agreement presented three days before wedding found to be "involuntary"; court also emphasized absence of independent counsel and adequate financial disclosure) *with Brown v. Brown*, No. 2050748, 19 So.3d 920 (Table) (Ala. App. 2007) (agreement presented day before wedding; court held assent to be "voluntary"), *aff'd sub. nom* Ex parte *Brown*, 26 So.3d 1222, 1225-1228 (Ala. 2009) *and Binek v. Binek*, 673 N.W.2d 594, 597-598 (N.D. 2004) (agreement sufficiently "voluntary" to be enforceable despite being presented two days before the wedding); *see also Mamot v. Mamot*, 813 N.W.2d 440, 447 (Neb. 2012) (summarizing five-factor test many

courts use to evaluate "voluntariness" under the UPAA); *see generally* Judith T. Younger, "Lovers' Contracts in the Courts: Forsaking the Minimal Decencies," 13 *William & Mary Journal of Women and the Law* 349, 359-400 (2007) (summarizing the divergent interpretations of "voluntary" and related concepts under the UPAA); Oldham, "With All My Worldly Goods," *supra*, at 88-99 (same). This act is not intended either to endorse or override any of those decisions. One factor that courts should certainly consider: the presence of domestic violence would be of obvious relevance to any conclusion about whether a party's consent to an agreement was "involuntary or the result of duress."

The requirement of "access to independent counsel" in Subsections (a)(2) and (b) represents the view that representation by independent counsel is crucial for a party waiving important legal rights. The act stops short of requiring representation for an agreement to be enforceable, *cf. California Family Code* § 1612(c) (restrictions on spousal support allowed only if the party waiving rights consulted with independent counsel); *California Probate Code* § 143(a) (waiver of rights at death of other spouse unenforceable unless the party waiving was represented by independent counsel); *Ware v. Ware*, 687 S.E.2d 382, 387-391 (W. Va. 2009) (*access* to independent counsel required, and *presumption of validity* for premarital agreement available only where party challenging the agreement actually consulted with independent counsel). When a party has an obligation to make funds available for the other party to retain a lawyer, under Subsection (b)(2), this refers to the cost of a lawyer competent in this area of law, not necessarily the funds needed to retain as good or as many lawyers as the first party may have.

The notice of waiver of rights of Subsections (a)(3) and (c) is adapted from the *Restatement (Third) of Property*, Section 9.4(c)(3) (2003), and it is also similar in purpose to *California Family Code* §1615(c)(3). It creates a safe harbor when dealing with unrepresented parties by use of the applicable designated warning language of Subsection (c), or language substantially similar, but also allows enforcement where there has been an explanation in plain language of the rights and duties being modified or waived by the agreement.

The requirement of reasonable financial disclosure of Subsection (a)(4) and (d) pertains only to assets of which the party knows or reasonably should know. There will be occasions where the valuation of an asset can only be approximate, or may be entirely unknown, and this can and should be noted as part of a reasonable disclosure. Disclosure will qualify as "reasonably accurate" even if a value is approximate or difficult to determine, and even if there are minor inaccuracies. As the Connecticut Supreme Court stated, after reviewing cases from many jurisdictions on the comparable standard of "fair and reasonable disclosure," "[t]he overwhelming majority of jurisdictions that apply this standard do not require financial disclosure to be exact or precise. … [The standard] requires each contracting party to provide the other with a general approximation of their income, assets and liabilities…." *Friezo v. Friezo*, 914 A.2d 533, 549, 550 (Conn. 2007). Under Subsection (d)(1), an estimate of value of property, liabilities, and income made in good faith would satisfy this act even if it were later found to be inaccurate.

Some commentators have urged that a waiver of the right of financial disclosure (or the right of financial disclosure beyond what has already been disclosed) be valid only if the waiver were signed after receiving legal advice. The argument is that it is too easy to persuade an

unrepresented party to sign or initial a waiver provision, and that the party waiving that right would then likely be ignorant of the magnitude of what was being given up. Even when notified in the abstract of the rights being given up, it would make a great deal of difference if the party thinks that what was being given up was a claim to a portion of $80,000, when in fact what was being given up was a claim to a portion of $80,000,000. However, this act follows the current consensus among the states in not requiring legal representation for a waiver. One reason for not requiring legal advice is that this might effectively require legal representation for all premarital agreements and marital agreements. Under a requirement of legal representation, parties entering agreements might reasonably worry that even if there were significant disclosure, it would always be open to the other party at the time of enforcement to challenge the agreement on the basis that the disclosure was not sufficient, and that any waiver of disclosure beyond the amount given was invalid because of a lack of legal representation. In general, there was a concern that a requirement of legal representation would create an invitation to strategic behavior and unnecessary litigation.

"Conspicuously displayed" in Subsection (c) follows the language and standard of Uniform Commercial Code § 1-201(10), and incorporates the case-law regarding what counts as "conspicuous."

Reference in Subsection (d)(3) to "adequate knowledge" includes at least approximate knowledge of the value of the property, liabilities, and income in question.

Subsection (e) as adapted from the *Uniform Premarital Agreement Act*, Section 6(b). Other jurisdictions have in the past chosen even more significant protections for vulnerable parties. *See, e.g., N.M. Stat.* § 40-3A-4(B) (premarital agreement may not affect spouse's right to support); *Matter of Estate of Spurgeon*, 572 N.W.2d 595, 599 (Iowa 1998) (widow's spousal allowance could be awarded, even in the face of express provision in premarital agreement waiving that right); In re *Estate of Thompson*, No. 11-0940, 812 N.W.2d 726 (Table), 2012 WL 469985 (Iowa App. 2012) (same); *Hall v. Hall*, 4 So.3d 254, 256-257 (La. App. 2009), writ denied, 9 So.3d 166 (La. 2009) (waiver of interim support in premarital agreement unenforceable as contrary to public policy). This act attempts to give vulnerable parties significant procedural and substantive protections (protections far beyond what was given in the original *Uniform Premarital Agreement Act*), while maintaining an appropriate balance between such protection and freedom of contract.

The reference in Subsection (f) to the unconscionability of (or substantial hardship caused by) a term is meant to allow a court to strike particular provisions of the agreement while enforcing the remainder of the agreement – consistent with the normal principles of severability in that state (see Section 5 and its commentary). However, this language is not meant to prevent a court from concluding that the agreement was unconscionable as a whole, and to refuse enforcement to the entire agreement.

Subsection (f) includes a bracketed provision for states that wish to include a "second look," considering the fairness of enforcing an agreement relative to the time of enforcement. The suggested standard is one of whether "enforcement of the term would result in substantial hardship for a party because of a material change in circumstances arising after the agreement

was signed." This language broadly reflects the standard applied in a number of states. *E.g.*, *Connecticut Code* § 46b-36g(2) (whether premarital agreement was "unconscionable . . . when enforcement is sought"); *New Jersey Statutes* § 37:2-38(b) (whether premarital agreements was "unconscionable at the time enforcement is sought"); *North Dakota Code* § 14-03.1-07 ("enforcement of a premarital agreement would be clearly unconscionable"); *Ansin v. Craven-Ansin*, 929 N.E.2d 955, 964 (Mass. 2010) ("the terms of the [marital] agreement are fair and reasonable … at the time of divorce"); *Bedrick v. Bedrick*, 17 A.3d 17, 27 (Conn. 2011) ("the terms of the [marital] agreement are . . . not unconscionable at the time of dissolution"). However, it should be noted that even in such "second look" states, case law invalidating premarital agreements and marital agreements at the time of enforcement almost universally concerns rights at divorce. There is little case law invalidating waivers of rights arising at the death of the other spouse grounded on the unfairness at the time of enforcement.

Among the states that allow challenges based on the circumstances at the time of enforcement, the terminology and the application vary greatly from state to state. Courts characterize the inquiry differently, referring variously to "fairness," "hardship," "undue burden," "substantial injustice" (the term used by the American Law Institute's *Principles of the Law of Family Dissolution* § 7.05 (2002)), or just "unconscionability" at the time of enforcement. In determining whether to enforce the agreement or not under this sort of review, courts generally look to a variety of factors, including the duration of the marriage, the purpose of the agreement, the current income and earning capacity of the parties, the parties' current obligations to children of the marriage and children from prior marriages, the age and health of the parties, the parties' standard of living during the marriage, each party's financial and home-making contributions during the marriage, and the disparity between what the parties would receive under the agreement and what they would likely have received under state law in the absence of an agreement. *See* Brett R. Turner & Laura W. Morgan, *Attacking and Defending Marital Agreements* (2nd ed., ABA Section of Family Law, 2012), p. 417. The American Law Institute argued that courts generally were (and should be) more receptive to claims when the marriage had lasted a long time, children had been born to or adopted by the couple, or there had been "a change of circumstances that has a substantial impact on the parties … [and that] the parties probably did not anticipate either the change, or its impact" at the time the agreement was signed. American Law Institute, *Principles of the Law of Family Dissolution* § 7.05(2) (2002). One court listed the type of circumstances under which enforcement might be refused as including: "an extreme health problem requiring considerable care and expense; change in employability of the spouse; additional burdens placed upon a spouse by way of responsibility to children of the parties; marked changes in the cost of providing the necessary maintenance of the spouse; and changed circumstance of the standards of living occasioned by the marriage, where a return to the prior living standard would work a hardship upon a spouse." *Gross v. Gross*, 464 N.E.2d 500, 509-510 n.11 (Ohio 1984).

Subsection (g) characterizes questions of unconscionability (or substantial hardship) as questions of law for the court. This follows the treatment of unconscionability in conventional commercial contracts. *See UCC* § 2-302(1) & Comment 3; *Restatement (Second) of Contracts* § 208, comment f (1981). This subsection is not intended to establish or modify the standards of review under which such conclusions are considered on appeal under state law.

Waiver or modification of claims relating to a spouse's pension is subject to the constraints of applicable state and federal law, including ERISA (Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq*.). *See, e.g., Robins v. Geisel*, 666 F.Supp.2d 463, 467-468 (D. N.J. 2009) (wife's premarital agreement waiving her right to any of her husband's separate property did not qualify as a waiver of her spousal rights as beneficiary under ERISA); *Strong v. Dubin*, 901 N.Y.S.2d 214, 217-220 (N.Y. App. Div. 2010) (waiver in premarital agreement conforms with ERISA waiver requirement and is enforceable).

In contrast to the approach of the act, some jurisdictions put the burden of proof on the party seeking enforcement of an agreement. *See, e.g., Randolph v. Randolph*, 937 S.W.2d 815, 820-821 (Tenn. 1996) (party seeking to enforce premarital agreement had burden of showing, in general, that other party entered agreement "knowledgeably": in particular, that a full and fair disclosure of assets was given or that it was not necessary due to the other party's independent knowledge); *Stancil v. Stancil*, No. E2011-00099-COA-R3-CV, 2012 WL 112600 (Tenn. Ct. App., Jan. 13, 2012) (same); In re *Estate of Cassidy*, 356 S.W.3d 339, 345 (Mo. App. 2011) (parties seeking to enforce waivers of rights at the death of the other spouse have the burden of proving that procedural and substantive requirements were met). The Legislative Note directs a state to amend Subsection (a) appropriately if the state wants to place the burden of proof on the party seeking enforcement of a marital agreement, a premarital agreement, or both. In those jurisdictions, Subsection (a) should provide that the agreement is unenforceable unless the party seeking to enforce the agreement proves each of the required elements.

Many jurisdictions impose greater scrutiny or higher procedural safeguards for marital agreements as compared to premarital agreements. *See, e.g., Ansin v. Craven-Ansin*, 929 N.E.2d 955, 961-964 (Mass. 2010); *Bedrick v. Bedrick*, 17 A.3d 17, 23-25 (Conn. 2011). Those jurisdictions view agreements in the midst of marriage as being especially at risk of coercion (the analogue of a "hold up" in a commercial arrangement) or overreaching. Additionally, these conclusions are sometimes based on the view that parties already married are in a fiduciary relationship in a way that parties about to marry, and considering a premarital agreement, are not. Linda J. Ravdin, *Premarital Agreements: Drafting and Negotiation* (American Bar Association, 2011), pp. 16-18. Also, some jurisdictions have distinguished "reconciliation agreements" entered during marriage with other marital agreements, giving more favorable treatment to reconciliation agreements. *See, e.g., Bratton v. Bratton*, 136 S.W.3d 595, 599-600 (Tenn. 2004) (summarizing the prior law in Tennessee under which reconciliation agreements were enforceable but other marital agreements were void). Many other jurisdictions and The American Law Institute (in its *Principles of the Law of Family Dissolution*, Section 7.01(3) & Comment *b* (2002)) treat marital agreements under the same standards as premarital agreements. This is the approach adopted by this act.

SECTION 10. UNENFORCEABLE TERMS.

(a) In this section, "custodial responsibility" means physical or legal custody, parenting time, access, visitation, or other custodial right or duty with respect to a child.

(b) A term in a premarital agreement or marital agreement is not enforceable to the extent

that it:

(1) adversely affects a child's right to support;

(2) limits or restricts a remedy available to a victim of domestic violence under law of this state other than this [act];

(3) purports to modify the grounds for a court-decreed separation or marital dissolution available under law of this state other than this [act]; or

(4) penalizes a party for initiating a legal proceeding leading to a court-decreed separation or marital dissolution.

(c) A term in a premarital agreement or marital agreement which defines the rights or duties of the parties regarding custodial responsibility is not binding on the court.

Legislative Note: *A state may vary the terminology of "custodial responsibility" to reflect the terminology used in the law of this state other than this act.*

Comment

This section lists provisions that are not binding on a court (this contrasts with the agreements mentioned in Section 3, where the point was to distinguish agreements whose regulation fell outside this act). They include some provisions (*e.g.*, regarding the parents' preferences regarding custodial responsibility) that, even though not binding on a court, a court might consider by way of guidance.

There is a long-standing consensus that premarital agreements may not bind a court on matters relating to children: agreements cannot determine custody or visitation, and cannot limit the amount of child support (though an agreed *increase* of child support may be enforceable). *E.g.*, In re *Marriage of Best*, 901 N.E.2d 967, 970 (Ill. App. 2009) ("Premarital agreements limiting child support are … improper"), appeal denied, 910 N.E.2d 1126 (Ill. 2009); *cf. Pursley v. Pursley*, 144 S.W.3d 820, 823-826 (Ky. 2004) (agreement by parties in a separation agreement to child support well in excess of guideline amounts is enforceable; it is not unconscionable or contrary to public policy). The basic point is that parents and prospective parents do not have the power to waive the rights of third parties (their current or future children), and do not have the power to remove the jurisdiction or duty of the courts to protect the best interests of minor children. Subsection (b)(1) applies also to step-children, to whatever extent the state imposes child-support obligation on step-parents.

There is a general consensus in the caselaw that courts will not enforce premarital agreement provisions relating to topics beyond the parties' financial obligations *inter se*. And

while some courts have refused to enforce provisions in premarital agreements and marital agreements that regulate (or attach financial penalties to) conduct during the marriage, *e.g.*, *Diosdado v. Diosdado*, 118 Cal. Rptr.2d 494, 496-497 (Cal. App. 2002) (refusing to enforce provision in agreement imposing financial penalty for infidelity); In re *Marriage of Mehren & Dargan*, 118 Cal.App.4th 1167, 13 Cal.Rptr.3d 522 (Cal. App. 2004) (refusing to enforce provision that penalized husband's drug use by transfer of property); *see also* Brett R. Turner and Laura W. Morgan, *Attacking and Defending Marital Agreements* 379 (2nd ed., ABA Section on Family Law, 2012) ("It has been generally held that antenuptial agreements attempting to set the terms of behavior during the marriage are not enforceable" (footnote omitted)), this act does not expressly deal with such provisions, in part because a few courts have chosen to enforce premarital agreements relating to one type of marital conduct: parties' cooperating in obtaining religious divorces or agreeing to appear before a religious arbitration board. *E.g.*, *Avitzur v. Avitzur*, 446 N.E.2d 136, 138-139 (N.Y. 1983) (holding enforceable religious premarital agreement term requiring parties to appear before religious tribunal and accept its decision regarding a religious divorce). Also, while there appear to be scattered cases in the distinctly different context of separation agreements where a court has enforced the parties' agreement to avoid fault grounds for divorce, e.g., *Massar v. Massar*, 652 A.2d 219, 221-223 (N.J. App. Div. 1994); *cf. Eason v. Eason*, 682 S.E.2d 804, 806-808 (S.C. 2009) (agreement not to use adultery as defense to alimony claim enforceable); see generally Linda J. Ravdin, *Premarital Agreements: Drafting and Negotiation* (ABA, 2011), p. 111 ("In some fault states, courts may enforce a provision [in a premarital agreement] that waives fault"), there appears to be no case law enforcing an agreement to avoid *no-fault* grounds. This act follows the position of the American Law Institute (*Principles of the Law of Family Dissolution*, Section 7.08(1) (2002)), that agreements affecting divorce grounds in any way should not be enforceable.

It is common to include escalator clauses and sunset provision in premarital agreements and marital agreements, making parties' property rights vary with the length of the marriage. *Cf. Peterson v. Sykes-Peterson*, 37 A.3d 173, 177-178 (Conn. App. 2012), cert. denied, 42 A.3d 390 (Conn. 2012) (rejecting argument that sunset provision in premarital agreement is unenforceable because contrary to public policy). Subsection (b)(4), which makes provisions unenforceable that penalize one party's initiating an action that leads to the dissolution of a marriage, does not cover such escalator clauses. Additionally, nothing in this provision is intended to affect the rights of parties who enter valid covenant marriages in states that make that alternative form of marriage available.

Section 10 does not purport to list all the types of provisions that are unenforceable. Other provisions which are contrary to public policy would also be unenforceable. See Section 5.

SECTION 11. LIMITATION OF ACTION. A statute of limitations applicable to an action asserting a claim for relief under a premarital agreement or marital agreement is tolled during the marriage of the parties to the agreement, but equitable defenses limiting the time for enforcement, including laches and estoppel, are available to either party.

Comment

This Section is adapted from *Uniform Premarital Agreement Act*, Section 8. As the Comment to that Section stated: "In order to avoid the potentially disruptive effect of compelling litigation between the spouses in order to escape the running of an applicable statute of limitations, Section 8 tolls any applicable statute during the marriage of the parties …. However, a party is not completely free to sit on his or her rights because the section does preserve certain equitable defenses."

SECTION 12. 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 13. 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 14. REPEALS; CONFORMING AMENDMENTS.

(a) [Uniform Premarital Agreement Act] is repealed.

(b) [Uniform Probate Code Section 2-213 (Waiver of Right to Elect and of Other Rights)] is repealed.

(c) [. . ..]

SECTION 15. EFFECTIVE DATE. This [act] takes effect ….

The Down Town Association
60 Pine Street
New York, NY 10005

International Surrogacy Issues and Comparative Analysis of the use of Genetic Material Throughout the World

Michael Stutman, New York, new York
Nancy Zalusky Berg, Minneapolis, Minnesota

ARTICLE: TO BE OR NOT TO BE (A PARENT)? - NOT PRECISELY THE QUESTION: THE FROZEN EMBRYO DISPUTE, 18 Cardozo J.L. & Gender 355

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LexisNexis Summary

... Recent surveys indicate that there are approximately three hundred fertility clinics in the United States currently providing services to thousands of couples every year. ... Part I of this Article reviews the effects of fertility treatments on the family structure and the increasing importance of agreements to establish the legal parenthood of children born through these treatments. ... Coerced parenthood has already been considered in different circumstances: the question of a woman's right to an abortion against her partner's wishes; parenthood as a result of rape; theft of genetic material, such as sperm and ova or making use of a person's genetic material without their knowledge; insufficient or ineffective contraceptive methods, and careless medical treatment leading to the birth of an unplanned child. ... However, according to the conclusions of this Article and following those few states which already exempt the subordinate spouse from all his parental obligations, other legislators should follow suit. ... Implementing this suggested compromise will result in partners who object to becoming parents being completely exempted from all rights and obligations regarding the child, in return for the objecting partner's release of the **frozen embryos** for the other partner's use.

Text

[*355]

Introduction

Although disputes over **frozen embryos** are uncommon, they nevertheless attract considerable media attention with regard to their legal and ethical aspects. These legal and ethical questions force a reassessment of complex matters such as the status of the **frozen embryo** and whether it is a proto-person, [1] property or perhaps something in between that requires special treatment. [2] What is the just way to balance between the right to become a parent and the right not to become one contains substantial issues of critical importance. [3] Recent surveys indicate that there are approximately three hundred fertility clinics in the United States currently providing services to thousands of couples every year. [4] As a result, there are about 400,000 **frozen embryos** in existence, and this number is growing by tens of thousands every year. [5] Since the rate of divorce in the United States is between **[*356]** 40% and 50%, [6] it is fairly easy to imagine that many of these **frozen embryos** may become subjects of disputes.

A survey of the few rulings handed down in the United States and the rest of the world [7] show a common approach whereby the struggle over **frozen embryos** is seen as a binary conflict - all or nothing - between the right to be a parent and the denial of this right. Under the binary frameworks currently employed, one side's victory often ends up being the other side's defeat. Currently, certain countries prohibit individuals from creating more embryos than they will use. The state of Louisiana has imposed a complete ban on the destruction of embryos. Certain schools of thought have suggested imposing a set limit on the number of embryos that an individual can create, [8] but a statutory limit on embryo creation would pose constitutional issues in the United States. [9] A general principle behind these rulings is that no individual should become a genetic--and therefore legal--parent against his or her will, [10] unless it is the other partner's last opportunity to become a parent. [11]

Many disputes over **frozen embryos** result from the spouses' failure to agree in advance about what to do with the embryos in the event of divorce, death, or loss of legal competency. Additionally, disputes may result from a simple change of **[*357]** heart on behalf of one of the partners. Such a change could be caused by an intention to separate, a desire not to become a parent, or a success with prior fertility treatments. [12] In this Article's view, there are several possibilities for pre-arranged contractual arrangements regarding the **frozen embryos** in the event the couple decides to end its marriage, or in any other circumstance where the couple does not agree.

Part I of this Article reviews the effects of fertility treatments on the family structure and the increasing importance of agreements to establish the legal parenthood of children born through these treatments. The more the centrality and importance of these aspects is understood, the better equipped we will be to comprehend the validity and importance of legal implementation with regard to the initial undertaking of becoming a legal parent, but to also establish agreed legal parentage after the child's birth. Part II reviews the importance and effects of establishing legal parentage, since the current legal approach sees it as a quarrel over acquiring or rejecting parenthood at almost any price. It would be preferable to neutralize this argument and offer a reasoned compromise to reconcile these two opposing approaches. Later, it reviews the various forms of "coerced parenthood," which is a recurring problem that must be resolved. Part III discusses the legal and ethical aspects of the disposition agreement. This agreement documents and preserves the original intentions of the sides to the dispute with respect to the different situations that may arise, including a future dispute between the parties to the agreement. Part IV presents the advantages of such contracts, especially the role of the agreement in establishing legal parenthood of children born through different fertility treatments and the possibility of resolving future conflicts a priori by agreement.

choice between full and non-legal parenthood. In this Article's view, only this additional solution can stop this existing approach towards this subject as binary and as all-or-nothing. The establishment of legal parenthood today is based upon mutual agreement, and it is possible to suggest practical alternatives offering an intermediate status between the two extremes of full legal and non-legal parenthood. The spouse who objects to continued fertility treatments and refuses to accept parenthood will be legally defined as having no parent status. The legal precedents relevant to this suggestion are presented, especially those with respect to an anonymous sperm donor and to someone deceased whom, without his **[*358]** agreement, became a father after his demise. Similarly, this Article considers a number of modern legislative proposals and laws in the United States that support this approach. Finally, the Article concludes with the advantages and disadvantages of the proposal and examines the possibility of writing such a clause that offers this compromise a mandatory obligation along with the general framework required for drafting disposition agreements.

I. Fertility Treatments, the Structure of the Modern Family, and the Growing Acceptance of Intentional Parenthood

The last few decades have seen dramatic changes affecting the institutions of family and parenthood. While, in the past, the classic family was defined sociologically as a pair of heterosexual parents living together under one roof along with their children, sociological changes have led to a rapid and great transformation in the definitions of family, marital relations, parenthood and the relationship between parents and children. [13] Thus, today, the bio-normative and traditional marriage has lost much of its strength, and emphasis has been placed on the individual's autonomy and wishes to separate marital relations from sexuality and fertility. The societal changes that have occurred are especially relevant in light of advanced medical technology, which in many cases involves a third party from outside the marriage in planning parenthood. This situation leads to serious legal and ethical dilemmas reminiscent of the case judged by King Solomon [14] with regard to the establishment of legal parenthood. [15] Such a situation could only aggravate the possible disputes between the different parties involved in the fertility process. It is therefore urgent and essential to construct a legal framework that will resolve these possible problems in advance and establish not just a local arrangement but also a general coherent solution.

Indeed, different scholars, together with the courts, have repeatedly turned to the legislatures for their help in resolving these complex issues. [16] Various national **[*359]** committees have met to discuss the legal and ethical problems of fertility treatments, including the dilemma of how to define parenthood. [17] However, out of fear of destroying the traditional family structure and concern for the welfare and rights of children, legislators have failed to adequately address the issue. [18]

If the contradictory trends in family law and establishment of legal parenthood, as discussed below, did not present enough problems, modern medical innovations make legal parenthood even more difficult to define. [19] Through these scientific innovations, infertile parents are able to conceive children using alternative techniques, such as through purchasing ova and sperm. Such a revolution has been termed the ""Wild West' of American medicine." [20] Although fertility treatments have enabled sterile couples to reproduce, [21] many scholars still justifiably claim that their use caused a radical split in the traditional family structure. These treatments reexamine the most basic social assumptions with regard to the institution of family and parenthood. [22] This reexamination is seen as a positive step, since in these cases the socio-legal situation enables and empowers establishment of legal parenthood by agreement. The specific case of fertility treatments can be expanded to cover more general situations and serves as an anchor for a general comprehensive discussion about the essence of determining legal parenthood by agreement, and how it can be used in an optimal manner to establish legal parenthood through mutual agreement.

This Article will illustrate the way in which current law with respect to parents and children allows "freedom of contract" only in the most limited of situations--an almost total rejection of the establishment of legal parenthood by agreement. However, a closer examination will reveal a growth in contractual **[*360]** solutions for marital relations, including legal parenthood. [23] Various experts in the United States, [24] together with their colleagues in Canada, the United Kingdom and other countries, [25] have pointed out the need to recognize legal parenthood through agreement. This is especially pressing in the case of non-traditional families such as two partners of the same sex [26] or families belonging to minorities in different countries, where it is customary for a number of individuals, rather than a pair of heterosexual parents, to raise children. [27]

A single example of how one can use a person's agreement to become a parent and allow the process of using his gamete in order to establish its legal parenthood may be found in one of the famous legal rulings handed down in the United States with regard to "planned orphanhood." [28] A woman was inseminated **[*361]** with the semen of her deceased boyfriend, and the court decided that since the deceased had expressed his wish to be a father and left instructions regarding what to do with his sperm after his death, his wishes should be honored in a contract with the fertility clinic to which he had entrusted his semen, despite opposition of his heirs. [29] In a similar manner, a number of academic studies express the importance of agreement in establishing legal parenthood in the situation where the male partner dies. [30] On the other hand, it is worth noting that there is a common counter holding amongst the research literature which claims to use contract in this sensitive and problematic context, like the surrogacy agreement, is inappropriate. [31]

II. Importance and Consequences of Establishing Legal Parenthood

The importance of determining legal parenthood, which is considered to be one of the most controversial issues in contemporary family law [32] and which therefore requires massive reform and regulation, [33] is critical for both the child and its parents. [34] A decree of legal parenthood benefits the child psychologically and **[*362]** emotionally as well as economically, in that it implicates the child's rights to alimony and inheritance. [35] It also determines who will enjoy the full rights and duties of legal parenthood. These rights include:

(1) naming the child

(2) custody and visitation

(3) determining place of residence

(4) the right to appoint a guardian

(5) the right to receive information about the child and to refuse others access to this information

(6) the right to represent, demand, or relinquish the child's rights

(7) the right to choose how to educate the child

(8) the right to choose medical treatment that the parent deems appropriate

(9) rights to the child's salary

(10) tax exemptions from the Federal Income Tax, and the right to various social benefits from the Social Security System. [36]

Parental duties include concern for the child's welfare, such as providing food and economic support, education, appropriate and timely medical treatment, supervision, and in the case of a failure to supervise, responsibility for the damage. [37] Thus, a determination of legal parenthood creates a framework for resolving disagreements about guardianship, visitation rights and many other aspects of the child's welfare. [38]

newborn children to ensure their needs are met, inter alia, by enforcing child support payments. [40] Scholars differ in their opinions as to whether [*363] this effort has been successful, [41] and some have felt that these efforts had not succeeded [42] and have even tried to introduce reforms. [43] Couples' current inability to determine legal parenthood by agreement prior to the birth of the child can lead to violent conflicts after the child is born. [44] The complexity and drawn-out nature of the ensuing proceedings does great harm to all parties in this legal struggle, especially the child. [45] Therefore, reform is urgently needed. [46]

A. The Problem of "Coerced Parenthood" in its Various Forms

The most common case involving coerced parenthood is the claim of paternity fraud by one of the partners through a false claim of sterility or a claim to using contraceptives. Usually, the recalcitrant partner claims that he does not want to be forced to be a parent because he wants to avoid an unwanted genetic parenthood and because he wants to avoid legal parenthood with the obligations listed above. [47] These claims are also true even when one of the partners originally agreed to be a parent, but for various reasons reneged on his or her original agreement to participate in fertility treatments, even though a **frozen embryo** may have already been created. [48] Coerced parenthood has already been considered in different circumstances: the question of a woman's right to an abortion against her partner's wishes; [49] parenthood as a result of rape; [50] theft of genetic material, such [*364] as sperm and ova or making use of a person's genetic material without their knowledge; [51] insufficient or ineffective contraceptive methods, and careless medical treatment leading to the birth of an unplanned child. [52]

One can still find, however, additional claims of coerced parenthood in a modern form, such as through statutory rape laws. If it were not sufficient that those minors suffered a most traumatic experience, they are forced to pay alimony for the child born of the statutory rape. [53] Other modern coerced parenthood claims can be found in the contexts of theft or loss of genetic material either by accident or intentionally by a fertility clinic or physician, [54] or in the case of a man who believes that he is the biological father of a child and later discovers that he is not. [55]

[*365] The basic approach in American courts and in the rest of the world is that one should not view coerced parenthood as detrimental to the legal rights of the father. However, a new approach is gradually being introduced under which a person has the legal right to refuse to be a parent, just as he has a legal right choose to be one. [56] However, Professor Glenn Cohen believes that this legal right is not monolithic and made from only one piece but is the source of additional potential rights, where the recognition of one right does not necessarily negate the recognition of others. [57]

III. Problematic Validation of the Disposition Agreements

Essentially, disposition agreements are agreements (a) between the spouses and (b) between the couple and the fertility clinic. These agreements supposedly reflect the intended use and disposition of **frozen embryos** in the event of divorce, separation, estrangement, or illness, incapacity, or death of one or both intended parents. For example, when a couple is contemplating the idea of going through fertility treatments and using the practice of IVF, they can agree in advance what will be done with their superfluous **frozen embryos** when a quarrel may arise between them. Some jurisdictions insist on disposition agreements as a prerequisite to receiving fertility clinic services.

[*366] The courts and legislatures, which have not stayed up to date with the problems involved in the donation of genetic material, have trouble keeping up with scientific advancement. A handful of countries, including England, have legislated with respect to this matter, [58] but no similar federal legislation exists in the United States. This creates a problem with uniformity, as there are substantial differences between the legal approaches in different states. [59] First, only a small number of states have enacted legislation pertaining to disposition agreements. [60] A minority of states imposes an obligation to sign disposition agreements prior to fertility treatments. [61] In those states, the relevant questions relate to the agreements' necessity, their jurisdiction and their enforcement. [62]

The case law is similarly sparse. Besides the general tendency to avoid forcing parenthood on an unwilling parent, there is no general agreement with regard to the recognition and enforcement of disposition agreements and contracts. [63] However, there was a recent ruling in the British court system that [*367] sparked a discussion of fertility treatments in the European Court of Human Rights ("ECHR"). [64] The crux of the discussion, both in the majority and minority opinions, was the question of how to reach the proper balance between the right to be a parent and the right not to be a parent. [65] Scholars have criticized the ruling on the grounds that the analytic approach was restricted to discourse about human rights and that little attention was paid to a thorough analysis of the aspects of contractual law in this case. From their point of view and as this research shows, mutual agreement in the form of a contract is an alternate and possibly more effective way to protect human rights. [66]

A. Advantages of Disposition Agreements

A number of key legal rulings have been handed down in the United States in which agreements signed prior to fertility treatments were recognized as binding contracts. [67] About ten years ago, professional medical organizations demanded the introduction of consent forms to be signed prior to fertility treatments. [68] Most of the clinics in the United States, as early as 1990, required the couple to sign these types of disposition agreements before undergoing treatment. According to this contract, there would be a clear answer as to the fate of **frozen embryos** in case of death, divorce, loss of legal standing of one of the parties, loss of contact with the couple or the end of the storage period. [69]

Many legal scholars consider the questions surrounding fertility treatments to be the main issues in establishing legal parenthood by agreement. [70] Other scholars [*368] who do not necessarily support full freedom of contract nevertheless support the use of contracts as the optimal solution to resolve disputes in this complicated issue, since a written contract is an established, formalized legal basis for memorializing the parties' intent and overruling other implied promises or manifestations. [71]

Disposition agreements regarding **frozen embryos** are a plausible solution. Indeed, with regard to IVF treatments, there are different reasons that support the validity and efficiency of the use of contracts. First, they strengthen individuals' freedom to reproduce. [72] These agreements provide clarity, certainty, efficiency and flexibility in the event of a dispute, and set down the wishes of each of the sides. Contracts may indeed minimize future conflicts, [73] providing tools to balance and to render justice in the event of a dispute. The contract, and not the state, lists the parties who own the genetic material and those who are the most qualified to determine the fate of the **frozen embryos**, [74] and ensures that the agreements and private arrangements are honored. [75]

When a dispute is centered on a highly intimate and emotional decision - such as the decision of whether or not to become a parent - the parties' intentions and wishes are of the utmost importance. As such, it is preferable to honor the parties' understandings rather than forcing them to accept a legal ruling. A policy of enforcing disposition agreements will encourage the parties to think about their intentions and to negotiate more carefully prior to signing such agreements. [76] By honoring disposition agreements, courts will be able to effectuate the parties' intentions without interfering too heavily with the couple's domestic life and intimate interests. [77] Further, courts will be able to limit the unethical and unfair use [*369] of the **frozen embryos** and allow flexibility in drafting each contract in accordance with the parties' circumstances. [78]

IV. A Suggested Compromise Between the Right to Be And Not to Be A Parent

A. Establishing Legal Parentage by Agreement [79]

This Article supports the possibility of determining parenthood by agreement as the main and legitimate way to compel parental responsibility by agreement in the case of in vitro fertilization and as a general way of determining legal parenthood. The degree of responsibility is based on the parties' initial agreement. Parenthood can no longer be

The practical application of this principle can be found in our study, which suggests to an arguing couple that the one who opposes continuing the fertilization would have to accept the status of non-parenthood and in this way arrive at an agreement that fertilization can continue without prejudicing the one opposed to the idea of forced parenthood. The couple must agree at the outset of fertilization to the provisions of the agreement, similar to the disposition agreements that refer to the fate of the fertilized egg should the sides come to a disagreement. Because it is possible to agree which partner would acquire legal parenthood and her status, it is essential to promote the idea of intentional parenthood and to establish this Article's argument that supports determining legal parenthood in light of historic and modern comparative law.

In the ancient world, legal motherhood was restricted to the woman who had given birth to the child, whereas legal fatherhood was ascribed to her husband even if he was not the biological father of the child. 81 The reason was simply a lack of understanding of genetics. Today, we possess not only the ability to prove fatherhood, but also the desire to maintain the traditional bionormative structure of marriage and parenthood while directing sexuality and fertility into recognized marriage. Regardless, the best interests and rights of the child were never involved in the formation and strengthening of recognized marriage. Religion and law thus created a legal fiction that granted legitimacy to the child and thus provided that a **[*370]** child born in wedlock was the son of his mother's husband. This axiom was and remains so strong that in some of the American states it cannot be overturned, even by using proven scientific tests and even when the child was the biological son of a previous husband born after the mother had remarried.

In other words, the legal presumption of legitimacy is based upon the intention and agreement of the male who marries a woman and serves as a legal father in all circumstances to her children. This applies even if they are not his biological children and even if they were born during their marriage as a result of an adulterous relationship. Under religious and civil laws, there is a general assumption - unless the couples have not stated otherwise - 82 that the major aim of marriage, both from the public and private points of view, is primarily procreation. On the one hand, the children of these parents will enjoy different rights, specifically material support and inheritance, but on the other hand, they will be able to bequeath their property to their parents if they pre-decease them.

Nevertheless the development of modern science, our improved understanding of the mechanism of genetics, and the ability to prove parenthood biologically, religion, conservatism, and the societal presumption of legitimacy have negated the possibility of overruling the legitimacy presumption by scientific means. This is due to the traditional convention that legal parentage is established by legal fiction and not by scientific evidence. Therefore, many courts prefer using the traditional assumption instead of using the scientific means in their process of determining the paternity of the child. This may mean that general agreements regarding legal parenthood can overcome scientific conclusions with respect to biological parenthood. 83

One significant way of acquiring legal parenthood is through the existence of intimate relations, conception and the birth of a child - inside and outside the marital unit. The other main way of acquiring legal parenthood is through adoption, which in essence establishes legal parenthood by agreement. Intention and agreement fuel the adoption process, which concludes with the granting of legal parental status. However, the marital status and the bionormative family are still apparent in that the legal system duplicates them and permits only couples with a family structure approved by law to acquire the status of legal parenthood. Thus, even today, single parents or same-sex couples are not allowed to adopt, except in **[*371]** difficult cases where there are no available married couples that live as a traditional family. 84

The growth of legal parenthood by agreement is readily apparent through open adoption. Since the 1970s, both in England and in the United States, this form of adoption has grown steadily. 85 Its main feature is an agreement between two couples who agree to maintain a relationship between the adoptive parents, the biological parents and the adopted child. In this case, the parties' intentions and agreement are paramount in the establishment of legal parenthood. 86 Of the accepted ways of acquiring the status of legal parenthood--adopting child or bringing him into exist following sexual intercourse--, the social value of defending the status of traditional marriage and bionormative parenthood is paramount, and therefore, the status of parenthood is granted to those individuals who bore or adopted a child within the marital unit. Again, this reflects the tendency of the law to adhere to legal fiction instead of assimilate the existing reality of the new era.

Secularization and modern liberalism led to a "divorce revolution" in the 1970s that arguably weakened the institution of marriage, but strengthened the recognition of freedom of contract between couples to regulate different aspects of their marital life. The result was the development of privatization in the family and the appearance of new family structures that differed from the traditional bionormative parental structure. At the same time, individuals who were not necessarily married couples or biological parents wanted to realize their rights to become parents. Although unmarried fathers historically could not enjoy parental rights, they have challenged the legality of existing arrangements over the past fifty years and have won a number of important cases where the decision to give up the child for adoption was determined to no longer be solely the mother's prerogative. 87

The various precedents with respect to unmarried fathers serve as important markers of the possibility of a functional distinction between full legal parenthood with all of its obligations and rights and partial legal parenthood with only the obligations of parenthood or even no parenthood status at all. In light of a number of consistent legal rulings by the United States Supreme Court, one may conclude **[*372]** that a genetic foundation is sufficient for determining legal parenthood with respect to a number of different obligations. It is not, however, a sufficient condition for the enjoyment of various rights. In that case, a person wanting to be a legal father must fulfill all parental obligations and prove himself by "grasping the opportunity." 88 If he does not do so, he is likely to lose his parental rights and status completely. 89 There is thus important precedent regarding the possibility of discussing the significance of legal parenthood and reaching the conclusion that we are not necessarily dealing with a "package" of obligations and rights to be treated as a unit - all or nothing - but rather with a functional legal status primarily dependent upon its context. Both the best interests of the child together with the protection of his or her rights and various social interests enable us to distinguish between two distinct statuses of legal parenthood--full legal parenthood and non-legal parenthood.

Furthermore, these precedents show that in the case of a married person, the husband is only required to agree to serve as a legal parent for his wife's offspring to acquire legal parenthood, whereas an unmarried male in order to acquire this right has to demonstrate through active measures his wish to enjoy more than partial legal parenthood. This Article argues that psychological parenthood is primarily based upon intention and agreement, sometimes openly expressed and in other cases implied, of the parent to personally accept legal parenthood. 90 Indeed, in many countries, there is a possibility of acquiring legal parenthood when a person voluntarily accepts it. Where the situation can be recorded or the relationship made subject to administrative supervision or as a different solution, the relationship may be recognized through a court ruling.

B. Varieties of Parenthood Status

More than twenty years ago, Professor Katharine T. Bartlett postulated that legal parenthood is considered an exclusive status in that at any given instant the law recognizes only one male and one female as a child's legal parents. This means that any other person is completely alien to the child, unless it can be demonstrated that a legal parent is unsuitable or has abandoned the child. 91 Legal **[*373]** parents are the sole recipients of the rights and obligations that compose the status of parenthood. The legal parents' autonomy is comprehensive and is recognized with regard to the state, to any third party, and to the child. This applies when the law grants parenthood status not only through marriage and/or biological connections, but also when the parenthood is functional. Even if one of the parents ceases to be a legal parent, the second parent automatically assumes full responsibility and rights, as derived from the principle of concern for the best interests of the child. 92

However, this Article argues that legal parenthood should be granted to the individual who intended and agreed to serve as the legal parent of the child. If the individual intended and desired to serve as a legal parent in all circumstances, he or she should be granted full parental status. But if in an early agreement the individual's decision was to serve as a partial legal parent, he or she should enjoy only partial parental rights in proportion to his or her degree of participation in the obligations of parenthood. An exact definition of the extent of the parenthood with respect to obligations and the rights derived from it should be set down at the beginning through an agreement between the parties, and this should be done under judicial or administrative supervision.

today in different countries around the world. It is necessary to create a gender-neutral incentive that is not dependent upon sexual convention or marital status, and under which only the one who will look after all the child's needs would enjoy full rights as a legal parent. An individual who chooses to partially fulfill parental responsibilities would only enjoy partial parental rights in accordance with his or her investment in the child. An individual who refuses to carry out any parental obligations would receive non-parenthood status and not enjoy any rights, provided that such an arrangement would not impair the rights and best interests of the child. 93

The above framework is similar to the legal solution applicable to any parent who does not want or is unable to fulfill his parental obligations towards a child: the parent's legal parenthood is annulled. The child is removed from the parent's custody and given to alternative parents who will look after the child's needs. In **[*374]** the context of embryo disputes, a distinction should be made between three different levels of legal parenthood. Only a parent who intends to fulfills all of his or her obligations toward the child and treat the child with the love and affection that is so necessary for its best interests and the protection of its rights should receive full legal parenthood. This approach is designed to strengthen and not to weaken these central doctrines of the best interests of the child and preserving his rights. 94

C. Granting Non-Parenthood Status to the Spouse who Objects to Becoming a Parent

This Article attempts to find a compromise suggestion to resolve disputes regarding **frozen embryos**. The first step towards a solution is for courts to honor disposition agreements that will include the couple's agreement as to what is to be done with their combined genetic materials under different circumstances, including divorce or the death of one of the parties. Dispositions should be given full legal backing and should be enforced whenever necessary. Even so, this compromise suggestion should be accompanied by legislation that would limit the inflexibility and the extent of the disputes that accompany such disagreements by providing the solution of granting non-legal parenthood to the subordinate spouse. It should be reemphasized that fixing the different aspects of legal parenthood by agreement in accordance with the conclusions of this Article is a necessary precondition to the feasibility and success of these two propositions--honoring and enforcing disposition agreements include the option of granting non-legal parenthood to the subordinate spouse.

As previously indicated, the usual confrontation between two parties is either over full or non-parenthood. However, according to the conclusions of this Article and following those few states which already exempt the subordinate spouse from all his parental obligations, other legislators should follow suit. Implementing this suggested compromise will result in partners who object to becoming parents being completely exempted from all rights and obligations regarding the child, in return for the objecting partner's release of the **frozen embryos** for the other partner's use. In other words, the partner who objects will receive non-parenthood status--similar to a donor of gamete, ovum or semen--in return for his intention or agreement to donate his genetic matter to another, without accepting legal parenthood status with its accompanying rights and obligations. Similarly, in several American states there are a number of legislative initiatives to grant non-parent status to deceased parents whose genetic material was used posthumously and without their consent to create an embryo. In such a case, the genetic parent would not become the legal parent.

[*375] Such a solution contributes to bridging the gulf between opposing opinions with regard to the existing legal situation, under which there is no compromise between full parenthood and the complete denial of both biological and legal parenthood. In other words, if the legal struggle over the **frozen embryos** is seen today as binary, leaving only one of two existing possibilities, there is a third normative alternative which might bridge between the two possibilities accepted today.

D. Legal Precedents for the Suggested Compromise

1. Sperm Donation and Granting Non-Parenthood Status to an Anonymous Donor

During the 1930s and 1940s, the practice of anonymous sperm donation slowly became socially and legally accepted, particularly in the United States, for various sociological reasons. 95 In a series of legal rulings, the practice of anonymous sperm donation gathered momentum. 96 Sperm donation is based on an agreement between the two males involved in the procedure. The sperm donor agrees to donate his genetic material and to accept the status of non-parenthood, in that he will not be obliged to carry out any duties with respect to the child and will therefore not acquire any parental rights. On the other hand, since the husband agrees to his wife's insemination and enters into an agreement or implied agreement in which he undertakes all parental obligations towards the child to be born, he receives full parental status with all its rights. In light of these rulings, the state legislatures created laws in the spirit of this new contractual approach to family law, which began in 1964 with Georgia, and was followed by Oklahoma in 1967 and Kansas in 1968. 97

However, a wider legislative recognition was only apparent in the 1970s. In 1973, the United States adopted a number of uniform laws, and in 1988, the legislature enacted laws stating that a sperm donor has neither parental status nor **[*376]** any obligations or rights derived from that status. 98 By 2006, the law had been adopted in full by approximately half of the American states, and adopted in part by a majority of states. 99

A designation of non-parenthood is the result of initial agreement, intention and wish not to become the child's legal parent and not to undertake any parental obligations. An individual who assumes the status of non-parenthood is not entitled to any rights whatsoever with respect to the child. In the context of sperm donation, this "transfer" of parenthood obligations is necessary so that the law can recognize a husband's consent to artificial insemination as a marker of his agreement to accept the legal fatherhood of the child. Following his initial agreement, intention and wish to accept parental obligations, he will become the legal parent of the child together with all the rights entailed. 100 In other words, the parties define legal parenthood by agreeing to the transfer of fatherhood status from the biological parent who donated the semen to the non-biological parent. The mother's husband then assumes parental responsibility and becomes the child's legal father. 101

2. Granting Non-Parenthood Status to the Deceased Parent who did not Give Permission to Bear a Child After his Death

The identical result - granting non-parenthood status to a person who did not intend to be a parent - can be found in section 707 of the Uniform Parentage Act ("UPA"), which provides that a person will not become a parent absent his or her express agreement. Section 707 is undoubtedly one of the major innovations of the UPA. It states that as long as the party did not expressly agree to become a parent after his death, no use should be made of his or her genetic material. 102 If someone uses the party's genetic material in contradiction of these rules and a child is born, **[*377]** the deceased will be considered a non-parent with no parental status. According to the UPA,

If an individual who consented in a record to be a parent by assisted reproduction dies before placement of eggs, sperm, or embryos, the deceased individual is not a parent of the resulting child unless the deceased spouse consented in a record that if assisted reproduction were to occur after death, the deceased individual would be a parent of the child. 103

The note and explanation to section 707 underscores the importance of establishing legal parentage by agreement, stating: "In this instance, intention, rather than biology, is the controlling factor . . ." 104 Indeed, this remark regarding the importance of agreement in fixing legal parenthood has been used in legislative proposals in other American states, reflecting the fact that the general convention is the importance of agreement prior to fertility treatments. 105

E. A Survey of Legislative Suggestions Consistent With Our Proposal

This Article argues that an express agreement is essential to establishing legal parenthood. Legal parenthood should never be given to an individual who has not expressed an interest in being a legal parent. Rather, such individuals should be assigned non-parenthood status. The minority opinion in Kass v. Kass proposed a similar argument to this Article's thesis. In Kass, the New York Court of Appeals held that the informed consents regarding the disposition of the **frozen embryos** signed by the parties unequivocally manifested their mutual intention that the **frozen embryos** were to be donated for research to the IVF program. 106 The court stated in its dissenting opinion: "While

Today, however, this proposal of granting non-legal parenthood to the subordinate spouse is acquiring momentum and is widely accepted in the legislation of a number of states in varied contexts. This is also true for divorce. If the couple divorced prior to fertility treatments, then the previous partner is not the legal father of the newborn unless he accepted parenthood in a signed agreement. 108 Furthermore, there is a new approach in sub-paragraph (b) of section 706 of the UPA. If the recalcitrant partner originally agreed, he can recant later but only if the fertility treatments have not yet begun. Section 706(b) reads: "The consent of a woman or a man to assisted reproduction may be withdrawn by that individual in a record at any time before placement of eggs, sperm, or embryos. An individual who withdraws consent under this section is not a parent of the resulting child." 109 As pointed out in the explanatory note, the first draft of the paragraph was drafted specifically for married couples, 110 but in a later amendment in 2002, the status of the partners was deleted to enable greater freedom of contract. 111 Therefore, the partner can withdraw his or her agreement not only in the event of divorce, but also in the case of two individuals who are unmarried and one of the parties wants to withdraw because of a change of heart. However, this is possible only if the fertility treatments have not yet begun. The common logic of the UPA sections 706 and 707 is that a person should not become a legal parent unless he or she agrees to become one. This applies both when an individual never agreed to become a parent and if he or she agreed but subsequently withdrew the agreement by sending a written notice to the fertility clinic. 112

Again, the principle of intention in establishing legal parentage may override and annul the genetic foundation. In other words, it is vitally important to carry out and record a detailed process of negotiation with regard to all the different aspects **[*379]** involved when a couple signs an agreement to become parents. Where no contract or other agreement between a couple exists with respect to the problems that may arise regarding a **frozen embryo** in the case of death, divorce, or separation, state law will apply.

The UPA, which is similar to this Article's proposal, was adopted by a number of states, including Washington, Colorado, and Texas, and it has been contemplated by the New Mexico legislature. 113 Whereas the Washington legislature allowed an option to withdraw from the original consent in the case of a married couple and a plain written notification is enough, the legislation in Texas required that the written notice be retained by a licensed physician. 114 In New Mexico, the legislature also adopted such an agreement and option of withdrawal from it between unmarried partners. 115 The notice is to be sent to the second partner, if the insemination of the **frozen embryos** did not take place within a year of the original agreement. However, complete annulment of legal parenthood in the case of a recalcitrant parent was only legislated in New Mexico, but not in Washington, Colorado, or Texas. 116 According to this Article and similar to New Mexico's approach, to satisfy the different approaches and to prevent complaints of any kind, the notice should be sent to both the clinic and the second partner to make sure that the withdrawal from the initial agreement is understandable to all sides of the process.

This Article suggests that if one of the partners of the **frozen embryo** did not agree to continue with their use to procreate, the recalcitrant partner will not be a legal parent but will receive non-parenthood status. This suggested compromise is in accordance with up to date legislation proposals from paragraph 501(3)(e) of the Model Act: "In the event that a transfer occurs after receipt of notice in a record of that individual's intent to avoid gestation as set forth in paragraph 3(c) of this Section, that intended parent will not be the parent of a resulting child." 117 Similarly, there are also different scholars in the research literature who support **[*380]** this study's compromise proposal considering it to be important and efficient within the context of this discussion. 118

V. Advantages and Disadvantages of The Article's Compromise

A. Advantages

The possibility of recognizing legitimate legal parenthood of a man based on his intentions and wishes is present in the legal literature and research of the past few decades. The main object of this research is to explore the possibility of determining agreed parenthood in a way that encompasses its various levels - full parental, partial parental and non-parental. It would be difficult for the state to resolve such a dispute surrounding the **frozen embryos** by forcing one of the partners to submit to the other. 119 The use of judicial force to uphold the partner who wants to become a parent, and who wishes to overcome the will of the other partner, raises the problem of coerced parenthood together with the different legal aspects involved. On the other hand, supporting the recalcitrant partner will prevent the willing partner from becoming a parent. Therefore, one of the important advantages of this proposal is the possibility of satisfying both the will of the partner who wants to become a parent and also the will of the recalcitrant partner. 120

Thus, on the one hand, our solution does not force anyone to be a parent against his or her will. We prohibit the use of people's genetic material against their wishes and without their permission and cooperation. On the other hand, we will be able to fulfill the desires of the individuals who do wish to become parents but are constrained by unwilling partners.

Our suggested compromise is also relevant for conservative states, such as Louisiana, which does not permit the destruction of **frozen embryos**, thus forcing the embryos to be given to a couple who wants to adopt. 121 From a more general point of view, courts in the United States have preferred the rights of the partner who objects to being a parent against their will, unless the other partner who wants **[*381]** to become a parent will have no further opportunity to become a parent. This normative suggestion is consistent with the direction of the existing law today, and it may aid the partner to get the recalcitrant partner's consent to the continuation of the fertility procedure by their former partner.

Incidentally, the courts' tendency to prefer the rights of the partner who objects to being a parent takes precedence over a contract which includes an agreement to continue with the fertility procedure, even against the will of one of the partners. 122 However, this Article agrees to the possibility in principle to allow the annulment of the contract and not to carry out its various obligations only when the circumstances bring about a change of mind on the part of one of the partners. 123 Similar to the courts and legal scholars, this Article recognizes the right of a partner not to be forced into being a legal parent in light of court rulings that dealt with abortion and the cancellation of different laws on the subject of contraception. 124

The best interests of the child and its future rights support its right to be born in spite of the special circumstances relevant to the birth. This is true in light of the inherent difficulty that exists in determining these rights before the child is born. For when a child appears before a judge, it is difficult to determine its best interests and which of the parents would be the better guardian. It becomes even more difficult when the child is not yet born and the discussion relates to a **frozen embryo**. One may even doubt if we are discussing the rights and welfare of an existing child when it is an embryo, as it is extremely difficult to discuss the rights and welfare of sperm, ova or **frozen embryo**. 125

Let us not forget that up until recently in the eyes of Christianity and Islam, and accordingly in the legal codes of many countries, a child born out of wedlock was considered illegitimate and was legally an orphan without a father and initially without a mother. 126 However, in modern times, even a child born to its biological and legal father could be adopted, allowing its father to escape his parental obligations. Whatever the disadvantages, the child is still in a better position than if he or she had never even b born.

The courts are of the opinion that the existence of a biological child automatically involves the existence of a psychological connection, which leads to one of two options: either the wish to invest time, love, affection and resources in the child, or alternatively, to refuse to acknowledge the child and to live with a **[*382]** feeling of loss. 127 Indeed, in Professor Ellen Waldman's opinion, the existing judicial approach stems from the psychological and social fear of being involved with the child only due to the biological connection. This problem is aggravated by the existing legal situation where any attempt to regulate the status of two parents who have brought a child into the

However, the claim that a person who was forced to be a biological parent, despite not being liable for any legal parental obligation, and as a result unjustifiably suffers severe emotional damage, should be rejected. [129] An examination of the legal practice today reveals that this issue involves a social rather than genetic structure. Professor Waldman discusses two examples: the possibility of a male being able to evade his parental obligations for various reasons and the releasing of a gamete donor from his different parental obligations towards the child. [130] This understanding is reinforced by empirical findings whereby the quality and extent of the relationship between a father and his child is primarily a product of the quality of the relationship between the male and the child's mother. [131]

Similarly, different empirical data teaches that in the case of the anonymous donation of semen, the emotional connection does not exist between the anonymous donor and the child to be born from his semen. In fact, the vast majority of anonymous donors, including donation of a gamete, do not want to know if they have had children, how many, where they are living and what is their situation. [132]

However, a number of precedents are in favor of recognizing contractual obligations between the parties, including annulling the fatherhood of a donor even if his identity is known. [133] There are also precedents that limit the rights of known donors with regard to the child even on the basis of implied agreement. [134] In fact, **[*383]** Quebec's legal system has generated a precedent-setting piece of legislation. Canadian provincial law permits the parties to sign an agreement known as the "parental project." [135] It allows the exemption of the male from parental obligations on the basis of agreement, even if the child was born of sexual relations. [136] However, if he wants to be recognized as the father, he may lay his claim in the first year of the child's life. It reads:

If the genetic material is provided by way of sexual intercourse, a bond of filiation may be established, in the year following the birth, between the contributor and the child. During that period, the spouse of the woman who gave birth to the child may not invoke possession of status consistent with the act of birth in order to oppose the application for establishment of the filiation. [137]

In Professor Glenn Cohen's opinion, regarding the basic claim in cases where it has been claimed that biological parenthood will necessarily lead to psychological parenthood, it would be very difficult to reach such a firm conclusion. [138] Furthermore, in his opinion, one may understand the wish not to be a gestational or legal parent against a person's will, but to be a biological parent without any legal obligations can only cause emotional damage. [139]

Similarly, the examples of coerced parenthood show that the male has no right to be a biological parent against his will whether the reason is the best interests of the child [140] or that of society in general, and therefore one cannot claim **[*384]** that the Constitution allows him this negative right. [141] Furthermore, on the basis of this research that the Constitution does not defend this right, a person may draw up a contract to defend his right not to be a biological parent against his will, just as there is a legal possibility to draw up such contracts with respect to other legal rights. [142]

B. Disadvantages

This Article's suggestion is certainly not perfect and has its disadvantages. In spite of this, since these cases are evenly balanced and because it would very difficult to rule in a way that would be acceptable to everyone, the suggested compromise is the best solution under the circumstances.

One disadvantage is that the case differs from a gamete donation where the donor is interested in donating genetic material and receiving non-parenthood status. In our case, we are discussing a couple who apparently enjoyed long-term intimate sexual relations prior to their decision to undertake fertility treatment. Furthermore, prior to the formation of the **frozen embryos**, the couple underwent a long and far from simple medical procedure at great psychological, economic and emotional cost. Therefore, it is possible that even the offer of non-parenthood status would not completely convince the recalcitrant partner to allow the other partner to become a parent. The recalcitrant partner may even have developed a deep psychological and emotional need to become a parent, which might become complicated where there is a conflict with the other partner. It is not certain that the offer of non-parenthood would convince him to agree to become a biological but not legal parent, and therefore he or she may still reject our compromise. [143]

Furthermore, unlike the gamete donor who is usually not interested in knowing whether and how many children were born from his genetic material, it is difficult to conceive that the recalcitrant partner would succeed in emotionally separating himself from his past, his family and his possible child. After much effort invested in becoming a parent, where the former partner succeeded despite not knowing his biological child, he is still not considered his legal parent with all the relevant rights. Could such a person not feel responsibility for the child and oppose any such possibility? For even if he is not the father from a legal point of view, he may well suffer emotionally because he is still the biological father who may be emotionally connected. [144] Even if in a number of cases the recalcitrant partners agreed to the status of non-parenthood and allowed the fertility process to continue, it would not necessarily recognize such a suggestion as sufficient to ease their firm objection to becoming biological but not legal parents.

[*385] Moreover, children born of anonymous gamete donations, such as children who grew up in adopted families, feel a deep emotional need to uncover their genealogical roots. [145] If this is an area in which it is difficult to maintain full anonymity today, especially in an age of information and Internet explosion, it will be difficult to hide from the child that he was born of the genetic material from a previous partner who opposed his birth. Additionally, if the child uncovered the genetic truth about his or her biological parent, he may well recognize him or her as a real parent. [146] In Professor Susan B. Apel's opinion, accepting this Article's suggestion may well lead to one of two undesirable legal results. First, the contractual approach should only be used in a very limited number of cases where children are born of **frozen embryos** and there is a dispute between the partners over the ova. This contradicts the UPA's approach to erase the problematic distinctions between legitimate and illegitimate children. [147] Secondly, there needs to be an awareness that a slippery slope exists that may lead to other methods of establishing parenthood by agreement. This could be used to help potential parents opt-out of their parental obligations instead of adding additional parents who wish to opt-in. [148]

However, there are certain limitations that should be placed on the contractual approach in order to ensure its success besides special awareness that will solve these potential problems. First, this Article does not define one group of children who live with a legal mother and a biological father who has no legal status. This option already exists in the case of single-parent families - a phenomenon which has increased in recent years. Furthermore, in the existing legal situation and that which we suggest, children born after their father's death will also live with a mother and without a father. Even if we were only discussing a single group of children, we could expect that their numbers will increase after people begin to understand our conclusions. This is similar to all the fertility treatments that have suffered - and some still suffer - from significant legal, ethical, and social growing pains.

Secondly, there is no reason to fear the slippery slope, since this proposal should be accompanied by appropriate legislation. Without changes to legislation, the existing legal situation is where a biological parent will continue to be a legal parent, unless the court or the appropriate administrative supervisor releases them from their obligations toward the child. This is due to the acute legal will and need to preserve the best interests and the rights of the child.

[*386]

C. Towards a Mandatory Disposition Agreement? [149]

This Article takes the position that there is a social and legal drive to make necessary preparations in advance to forestall confrontations about **frozen embryos** at a later stage. Therefore, based on the understanding that legal parenthood should be determined by agreement, this section presents additional suggestions beyond the requirement that legislators enact necessary statutes regarding the compromises discussed earlier.

parental obligations and rights with regard to the child to be born. Accordingly, there is a need for legislation obligating a couple who wishes to start fertility treatments to ensure the treatments are preceded by a contract regarding the disposal of **frozen embryos** under different circumstances, especially when there is a change of circumstances.

The advantages of a contract requirement far outweigh the various disadvantages, especially because most couples understand what is best for them better than a court would. Assume, with suitable reservations, that most agreements and contracts will not lead to legal disputes and that their main advantage is to set out the intentions and wishes of the various sides with respect to both the medical and legal aspects. The possibility of abrogating their early agreement while preferring their later wishes may affect the expectations and assumptions of couples who wish to abide by their first agreement. Furthermore, in many cases, one of the parties relied on the agreement and weakened his position, a change that could have had serious consequences.

This preference for the latter situation may lead to a careless entry into the contractual sphere. The result may be that there is no real motivation to enter into a contract and to define what the parties want under different circumstances to minimize possible disputes while the legal system has no interest in seriously considering early agreements. The rejection of an earlier agreement may have a deterrent effect on the couples and prevent them from drawing up contracts if it is known that such agreements, even though they are supported by a written contract, **[*387]** may not hold up in court in the event of a change in circumstances. [151] Indeed, some modern legislative proposals now require a contract that includes, among other requirements, dispositions with regard to the disposal of **frozen embryos** in the event of various changes in circumstances. Additionally, there are a number of legal rulings in harmony with this position. [152]

Modern contract law teaches us that one cannot enforce any contract exactly as set down in the event of a change of heart or a change in circumstances. For example, when dealing with intimate matters within the household, including fertility, pregnancy, birth, and childrearing, legal intervention and enforcement may well have serious social and personal effects. [153] It is therefore logical to allow some deviation from the original agreement when there is reasonable doubt that enforcing the contract will cause damage to the public. In extreme circumstances, where one of the sides wishes to withdraw from his original agreement, it should be permitted. This should only occur if the fertility treatments have not yet commenced and no **frozen embryo** has been implanted in the mother's womb. [154]

To limit the problem of the change of circumstances or change of heart, this Article suggests a number of improvements to the main proposal. First, it should be ensured that the contract between the parties and the fertility clinic is not a standard contract, proposed and drafted in favor of the clinic which cannot be changed by the couple and does not express their needs and intentions. Second, the couple should be required to receive medical and psychological guidance prior to the signing of such a contract. Third, the couple should be careful to discuss and sign these contracts, signed by the couple and the clinic, separately from the agreements for treatment so that it should be completely clear that it is a separate **[*388]** and independent legal document. Fourth, one should retain the protocols that document the handing over of all medical and psychological data to the couple together with the decision-making apparatus and the signed contract. There is also a need to expand the current regulatory mechanisms with regard to adoption and surrogate to these disposition agreements. [155]

Finally, there is another possible contractual solution [156] that will resolve the deadlock between handing over the **frozen embryos** to a partner who wants to become a parent and the demands of a partner who objects to the procedure and orders the destruction of the **frozen embryos**. Any contract signed by the couple prior to the fertility treatments must include a provision that if the couple is unable to reach an agreement, they will either donate the **frozen embryos** to research or to a sterile couple. [157] As suggested by Section 502(1) of the Model Act, the couple that gives up the **frozen embryo** will receive non-parenthood status, and at the first opportunity, the couple receiving the **frozen embryo** will replace it. [158]

Conclusion

This Article supports the possibility of determining parenthood by agreement as the main and legitimate way to compel parental responsibility by agreement in the case of in vitro fertilization and as a general way of determining legal **[*389]** parenthood. When we can internalize the concept that legal parenthood is determined by agreement, we can then say that the degree of parenthood is based on what each receives in the initial agreement. We can no longer refer to parenthood as a monolithic and permanent status but as a variety of statuses - full parental, partial parental and non-parental.

The practical application of this principle can be found in the study in which we suggested to the arguing couple that the one who opposes continuing the fertilization would have to accept the status of non-parenthood. In this way, the couple could arrive at an agreement that fertilization may continue without prejudicing the one opposed to the idea of forced parenthood. In this Article's view, the legislatures should make the signing of a disposition agreement a mandatory precondition to fertility treatments. The disposition agreement should include an explicit clause that would offer the couple our suggested compromise. The couple would have to agree, at the outset of fertilization, to the provisions of the agreement, which would provide for the fate of the fertilized egg should the sides fail to agree, and would make it possible to determine which of the parties would acquire legal parenthood in the various unforeseen situations that could arise.

Footnotes

1 Proto-person is a term used to define the unique status of the **frozen embryo**. Right now it cannot be treated as a human, but since it has the potential to grow and become human, it cannot be destroyed and therefore should be treated in a proper manner.

2 This dilemma is revealed in Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992), which discusses the three aforementioned status options. See also Susan L. Crockin, Commentary, "What Is an Embryo?": A Legal Perspective, 36 Conn. L. Rev. 1177, 1181-82 (2004) (suggesting an approach that recognizes the normative property foundations as preferable to the right to be a parent); Jessica Berg, Owning Persons: The Application of Property Theory to Embryos and Fetuses, 40 Wake Forest L. Rev. 159, 215-19 (2005).

3 The question as to whether there is a right to procreate through fertility treatments and consideration that such a right is limited in practice has been discussed in detail in academic circles. See, e.g., Radhika Rao, Equal Liberty: Assisted Reproductive Technology and Reproductive Equality, 76 Geo. Wash. L. Rev. 1457, 1462-68, 1474-88 (2008). See also Sonia M. Suter, Conflicting Interests in Reproductive Autonomy and Their Impact on New Technologies: The State's Interest: The

right to procreate, in addition to the fact that we cannot yet discuss the different social aspects in a pluralistic manner).

4 See Tarun Jain, Socioeconomic and Racial Disparities Among Infertility Patients Seeking Care, 85 Fertility & Sterility 876, 876 (2006). The number of fertility clinics is steadily growing. See id.

5 See Susan B. Apel, Cryopreserved Embryos: A Response to "Forced Parenthood" and the Role of Intent, 39 Fam. L.Q. 663, 664 (2005).

6 See Ellen A. Waldman, Disputing over Embryos: Of Contracts and Consents, 32 Ariz. St. L.J. 897, 906 n.43 (2000) (citing Scott Stanley, What Really is the Divorce Rate?, Divorce Support, http://divorcesupport.about.com/library/weekly/aa061699.htm).

7 See Dalia Dorner, Human Reproduction: Reflections on the Nachmani Case, 35 Tex. **Int'l** L.J. 1 (2000) (a famous ruling given in Israel with regard to the Nahmani couple); Janie Chen, Note, The Right to Her Embryos: An Analysis of Nahmani v. Nahmani and its Impact on Israeli In Vitro Fertilization Law, 7 Cardozo J. **Int'l** & Comp. L. 325 (1999).

8 See Helen M. Alvare, The Case for Regulating Collaborative Reproduction: A Children's Rights Perspective, 40 Harv. J. On Legis. 1, 61 (2003).

9 The problem inherent in constraining someone from his full right to procreate, at least by sexual means, is a well-known constitutional issue. In general, the State has to show good reason for intervening in someone's "negative procreation right." See I. Glenn Cohen, The Constitution and the Rights Not to Procreate, 60 Stan. L. Rev. 1135 (2008), for an in depth analysis of the constitutional issues.

10 See, e.g., Harv. L. Rev. Ass'n, Family Law - Contract--Supreme Court of New Jersey Holds That Preembryo Disposition Agreements Are Not Binding When One Party Later Objects, 115 Harv. L. Rev. 701 (2001); Helene S. Shapo, Frozen Pre-Embryos and the Right to Change One's Mind, 12 Duke J. Comp. & **Int'l** L. 75, 76 (2002) (stating that the rulings in five United States cases before 2002 favored the party opposing implementation); see infra notes 64-65 and accompanying text (discussing similar holdings in European courts). For a discussion of the importance of establishing legal parentage on the basis of genetic parenthood, and its advantages and disadvantages, see Yehezkel Margalit, The Rise, Fall and Rise Again of the Genetic Foundation for Legal Parentage Determination, 3 Journal of Health Law and Bioethics (2010) (Heb.). For the different philosophical aspects of becoming a parent or blocking the right to be a parent and the different social structure of the genetic parent and the legal parent, especially from the point of view of responsibilities in England, see Jonathan Ives, Becoming a Father/Refusing Fatherhood: How Paternal Responsibilities and Rights are Generated (2007), http://etheses.bham.ac.uk/254/1/Ives07PhD.pdf (fatherhood is essentially a social relationship constructed within a narrative of responsibility and that there is a distinction between being a "father" and being a "progenitor," both of which give rise to different kinds of responsibilities and rights).

11 No U.S. case squarely addresses this in its holding. The closest was J.B. v. M.B., 751 A.2d 613 (N.J.Super. Ct. App. 2000). See Cohen, supra note 9, at 1192-96 (suggesting that when infertility is probable, courts should favor the pro-implementation party).

12 See generally Yehezkel Margalit, Surrogacy - From Problematic Practice to Giving the Gift of Life (on file with author) (discussing the more efficient modern contract law approach leading to changed circumstances and change of heart which justify the increased use of contractual arrangements with regard to fertility treatment).

13 See generally Marsha Garrison, An Evaluation of Two Models of Parental Obligation, 86 Cal. L. Rev. 41, 72-74 (1998) (explaining the different philosophical approaches to the family unit); Jeffrey Blustein, Parents and Children: The Ethics of the Family 22-98 (1982); Jacob J. Ross, The Virtues of The Family 124-35 (1994).

14 In determining a case between two women both claiming to be the birth-mother of a live child, King Solomon suggested that the child be cut in two in the hopes that the real mother would show pity on her child and forego her claim to save the child's life. See 1 Kings 3:16-28 (story of King Solomon).

15 See generally Deborah H. Wald, The Parentage Puzzle: The Interplay Between Genetics, Procreative Intent, and Parental Conduct in Determining Legal Parentage, 15 Am. U. J. Gender Soc. Pol'y & L. 379, 383 (2007) (claiming that the different fertility treatments are the pioneers of change in family law and therefore serve as an ideal opening point for the discussion of legal parenthood); Jonathan B. Pitt, Fragmenting Procreation, 108 Yale L.J. 1893 (1999).

16 See, e.g., Surrogate Parenting Assoc., Inc. v. Commonwealth ex rel. Armstrong, 704 S.W.2d 209, 211 (Ky. 1986) (suggesting that the extension or limitation of laws dealing with the canceling of parental rights and adoption in relation to agreements dealing with surrogacy is not a question for the judge but rather for the legislator) (dictum); Angela Campbell, Conceiving Parents Through Law, 21 **Int'l** J.L. Pol'y & Fam. 242, 243 (2007) (noting the lack of academic literature in Canada dealing with these dilemmas in spite of the many cases facing judges and legislators); see also Tracy Cashman, Comment, When is a Biological Father Really a Dad?, 24 Pepp. L. Rev. 959, 964-66 (1997) (discussing the vitality of establishing legal parentage for the child's sake).

17 See, e.g., Canadian Royal Comm'n on New Reprod. Techs., Proceed with Care: The Final Rep. of the Royal Commission on New Reproductive Technologies (1993); U.S. Congress, Office of Tech. Assessment, OTA-BA-358, Infertility: Medical and Social Choices (1988).

18 For articles discussing the relevant ethical problems ascribed to these treatments, see generally Encyclopedia of Bioethics (Stephen G. Post et al. eds., 3d ed. 2004).

19 See generally Harv. L. Rev. Ass'n., Developments in the Law of Marriage and Family: Changing Realities of Parenthood: The Law's Response to the Evolving American Family and Emerging Reproductive Technologies, 116 Harv. L. Rev. 2052 (2003).

20 See Marsha Garrison, Conflicting Interests in Reproductive Autonomy and Their Impact on New Technologies: Issues of Access to Advanced Reproductive Technologies: Regulating Reproduction, 76 Geo. Wash. L. Rev. 1623, 1623 (2008).

21 See generally John A. Robertson, Assisted Reproductive Technology and the Family, 47 Hastings L.J. 911, 927-33 (1996) (supporting the Individual's right to bear children in almost anyway possible and discussing the effects of fertility treatment on the structure of the family).

22 See Marsha Garrison, Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage, 113 Harv. L. Rev. 835, 842 (2002); Marsha Garrison, The Technological Family: What's New and What's Not, 33 Fam. L.Q. 691, 692-701 (1999) (opining that legal parenthood of such children should be established in the same way as that of normative children); but see Radhika Rao, Assisted Reproductive Technology and the Threat to the Traditional Family, 47 Hastings L.J. 951 (1996).

23 See E. Gary Spitko, Reclaiming the "Creatures of the State": Contracting for Child Custody Decisionmaking in the Best Interests of the Family, 57 Wash & Lee L. Rev. 1139 (2000) (calling for freedom of contract in arbitration contracts with regard to child custody and visitation rights); see also Vivian Bodey, Enforcement of Interspousal Contracts: Out with the "Old Ball & Chain" and in with Marital Equality and Freedom, 37 Sw. U. L. Rev. 239 (2008); Jana B. Singer, The Privatization of Family Law, 1992 Wis. L. Rev. 1443 (1992). See generally Yehezkel Margalit, Determining Legal Parentage by Agreement (2011) (Ph.D Dissertation, Bar-Ilan University) (noting the increase in use of establishing legal parentage by agreement); but see Lynn D. Wardle, Deconstructing Family: A Critique of the American Law Institute 's "Domestic Partners" Proposal, 2001 BYU L. Rev. 1189 (2001).

24 Both the United States' and the United Kingdom's courts have already ruled some decades ago to allow freedom of contract where there are no dispute between the parents. See generally Robert H. Mnookin & Lewis Kornhausert, Bargaining in the Shadow of the Law: The Case of Divorce, 88 Yale L.J. 950, 955 n.22-23 (1979) (stating propositions similar to the increasing recognition of freedom of contract with regard to divorce); see also Robert H. Mnookin, The Limits on Private Ordering, 18 U. Mich. J.L. Reform 1015, 1034-35 (1985); John A. Robertson, Children of Choice: Freedom and the New Reproductive Technologies 129-30 (1994) (suggesting that there is some anticipation of legal parenthood on the basis of agreement, which is the only way to promote the fertility clinic industry); Alexa E. King, Solomon Revisited: Assigning Parenthood in the Context of Collaborative Reproduction, 5 UCLA Women's L.J. 329, 361 (1995); Katharine K. Baker, Bargaining or Biology? The History and Future of Paternity Law and Parental Status, 14 Cornell J.L. & Pub. Pol'y 1, 22 (2004).

25 See Gillian Douglas, Marriage, Cohabitation and Parenthood - From Contract to Status, in Cross Currents: Family Law And Policy In The US And England 211, 232-33 (John Eekelaar et al. eds., 2000) (advocating for the increased use of agreement in the establishment of legal parentage in different countries); Campbell, supra note 16, at 260-65.

26 Recently, it was estimated that in 2005, there were 776,943 single sex couples. See US Census Snapshot, The Williams Institute (Dec. 2007), http://www.law.ucla.edu/williamsinstitute/ publications/USCensusSnapshot.pdf (These statistics were extracted using different sources such as place of residence or ethnical origin.). See also Martha M. Ertman, Mapping the New Frontiers of Private Ordering: Afterword,49 Ariz. L. Rev. 695, 700 (2007) (providing information on lesbian marriages as well as other related articles); Margaret S. Osborne, Legalizing Families: Solutions to Adjudicate Parentage for Lesbian Co-Parents, 49 Vill. L. Rev. 363, 370-74 (2004) (stating that lesbian parenthood, like open adoption, may be arranged by a mutually agreed contract in one of two ways: co-parenting agreements and visitation agreements).

27 The need to establish legal parentage through agreement is subordinate to the best interests of the child. The problem is more serious in the case of minorities and poverty-stricken families, such as Afro-American and Native American families. See generally Jane C. Murphy, Reforming Parentage Laws: Protecting Children by Preserving Parenthood, 14 Wm. & Mary Bill of Rts. J. 969, 985-6 (2006); Melissa Murray, The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers, 94 Va. L. Rev. 385, 424-27 (2008); Laura T. Kessler, Community Parenting, 24 Wash. U. J.L. & Pol'y 47 (2007); Laura T. Kessler, Transgressive Caregiving, 33 Fla. St. U.L. Rev. 1 (2005) (discussing a common model of community parenting in the light of feministic criticism).

28 See Ruth Landau, Planned Orphanhood: Posthumous Conception, 49 Soc. Sci. and Med. 185 (1999); Hecht v. Super. Ct., 59 Cal. Rptr. 2d 222, 227 (Cal. Ct. App. 1996).

7 (2002). But see In re Estate of Kievernagel, 83 Cal. Rptr. 3d 311 (Cal. Ct. App. 2008) (honoring the deceased's will not to become a parent). It should be mentioned that there are some additional federal cases on posthumous conception, which are largely about Social Security Benefits.

30 See Anne Reichman Schiff, Arising from the Dead: Challenges of Posthumous Procreation, 75 N.C. L. Rev. 901 (1997); see also Raymond C. O'Brien, The Momentum of Posthumous Conception: A Model Act, 25 J. Contemp. Health L. & Pol'y 332, 371-75 (2009); Amanda Horner, I Consented to Do What?: Posthumous Children and the Consent to Parent After-Death, 33 S. Ill. U. L. J. 157 (2008); Ruth Zafran, Dying to be a Father: Legal Paternity in Cases of Posthumous Conception, 8 Hous. J. Health L. & Pol'y 47, 74-76 (2007); Gail A. Katz, Protecting Intent in Reproductive Technology, 11 Harv. J. L. & Tech. 683 (1998).

31 See Hollinger J. Heifetz, From Coitus to Commerce: Legal and Social Consequences of Noncoital Reproduction, 18 U. Mich. J.L. Reform 865 (1985) (discussing major researches which object to establishing legal parentage by agreement); see also Janet L. Dolgin, Solomon's Dilemma: Exploring Parental Rights: The "Intent" of Reproduction: Reproductive Technologies and the Parent-Child Bond, 26 Conn. L. Rev. 1261 (1994) (regarding the limits and lack of coherency in the current application of establishing legal parentage by agreement); June Carbone, Redefining the Family in Terms of Community, 31 Hous. L. Rev. 359, 392-3 (1994) (regarding parental relations as an automatic status which cannot be evaded); William J. Wagner, The Contractual Reallocation of Procreative Resources and Parental Rights: The Natural Endowment Critique, 41 Case W. Res. 1 (1990); Garrison, supra note 22, at 859-66.

32 See June Carbone, The Legal Definition of Parenthood: Uncertainty at the Core of Family Identity, 65 La. L. Rev. 1295, 1295, 1297 (2005). Similarly, Professor David D. Meyer explains that the recognition of rights by people other than the biological parents of the child depends upon the establishment of legal parentage and this is the Achilles' heel of modern family law. See David D. Meyer, The Constitutional Rights of Non-Custodial Parents, 34 Hofstra L. Rev. 1461, 1461 (2006).

33 See Katharine K. Baker, Bionormativity and the Construction of Parenthood, 42 Ga. L. Rev. 649, 651 (2008); David D. Meyer, Parenthood in a Time of Transition: Tensions Between Legal, Biological, and Social Conceptions of Parenthood, 54 Am. J. Comp. L. 125, 144 (2006) (regarding the claim that the establishment of legal parentage has passed the point of no-return and that society has to determine what is legal parenthood since the law cannot do better).

34 See Carter Dillard, Valuing Having Children, 12 J.L. & Fam. Stud. 151 (2010) (surveying the different legal claims in favor of the right of procreation and the need to limit its application because of the child to be born's best interests); see also Carter Dillard, Child Welfare and Future Persons, 43 Ga. L. Rev. 367 (2009).

35 See Melanie B. Jacobs, Micah Has One Mommy and One Legal Stranger: Adjudicating Maternity for Nonbiological Lesbian Coparents, 50 Buff. L. Rev. 341, 346-47 nn.19-24 (2002) (surveying different economic rights which a child may enjoy after the ruling about legal parenthood); Cynthia R. Mabry, Who is the Baby's Daddy (And Why is it Important for the Child to Know)?, 34 U. Balt. L. Rev. 211, 228-30 (2004) (surveying the importance of establishing legal parentage for psychological and emotional reasons).

36 See Katharine T. Bartlett, Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of The Nuclear Family Has Failed, 70 Va. L. Rev. 879, 883, 885 nn.20-34 (1984) (regarding a list of these rights and the precedents which support them).

37 See id. at 885-86; see also Brenda M. Hoggett, Parents and Children: The Law of Parental Responsibility (1993) (discussing the parental obligations in England). For a consideration of the obligations and rights in comparative law both in England and the United States, see Cynthia R. Mabry, "Who is my Real Father?" - The Delicate Task of Identifying a Father and Parenting Children Created From an in Vitro Mix-Up, 18 Nat'l Black L.J. 1, 18-25 (2004).

38 See Sharon S. v. Super. Ct., 73 P.3d 554, 568 (Cal. 2003).

39 There is also much divergence in the approach each state takes. See, e.g., Michael H. v. Gerald D., 491 U.S. 110, 124 (1989).

40 See generally Linda D. Elrod, Child Support Reassessed: Federalization of Enforcement Nears Completion, 1997 U. Ill. L. Rev. 695 (1997); Sanford N. Katz, A Historical Perspective on Child-Support Laws in the United States, in The Parental Child-Support Obligation 17, 19-20 (Judith Cassetty ed., 1983); Lowell H. Lima & Robert C. Harris, The Child Support Enforcement Program in the United States, in Child Support: From Debt Collection to Social Policy 20 (Alfred J. Kahn & Sheila B. Kamerman eds., 1988).

41 See Paul K. Legler, The Coming Revolution in Child Support Policy: Implications of the 1996 Welfare, 30 Fam. L. Q. 519 (1996).

42 See generally Melanie B. Jacobs, My Two Dads: Disaggregating Biological and Social Paternity, 38 Ariz. St. L.J. 809, 846 (2006); Annette R. Appell, Virtual Mothers and the Meaning of Parenthood, 34 U. Mich. J.L. Reform 683, 687, 774-5 (2001).

44 See generally Sarah McGinnis, You Are Not the Father: How State Paternity Laws Protect (and Fail to Protect) the Best Interests of Children, 16 Am. U.J. Gender Soc. Pol'y & L. 311, 333 (2008).

45 See generally Courtney G. Joslin, Protecting Children(?): Marriage, Gender, and Assisted Reproductive Technology, 83 S. Cal. L. Rev. 1177 (2010).

46 See Jeffrey A. Parness, Old-Fashioned Pregnancy, Newly-Fashioned Paternity, 53 Syracuse L. Rev. 57 (2003) (discussing the faults of the current American law concerning parental rights and calling for comprehensive reform); see also Ruth-Arlene W. Howe, Parenthood in the United States, in Cross Currents: Family Law and Policy in the US and England 187, 189 (John Eekelaar et al. eds., 2000) (surveying the situation in the U.S. with regard to legal parenthood and specifically an attempt to widen the legal parenthood without jeopardizing the rights of parent and child).

47 See supra note 37 and accompany text.

48 See Ruth Colker, Pregnant Men Revisited or Sperm Is Cheap, Eggs Are Not, 47 Hastings L.J. 1063 (1996); see also Tracey S. Pachman, Disputes Over Frozen Preembryos & the "Right Not to be a Parent," 12 Colum. J. Gender & L. 128 (2003).

49 There are legal precedents which rule that a woman has the right to abort, at the very least in the first three months of her pregnancy; this is her right and neither her husband nor her parents have any right to veto her decision. See Roe v. Wade, 410 U.S. 93, 113 (1973); Planned Parenthood of Southeastern Penn. v. Casey, 505 U.S. 833 (1992); Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52 (1976); Gonzales v. Carhart, 550 U.S. 124 (2007) (regarding the legality of the existing arrangements of abortions, the Supreme Court of the United States ruled that there are no legal problems with the existing situation); see also Priscilla J. Smith, Responsibility for Life: How Abortion Serves Women's Interests in Motherhood, 17 J.L. & Pol'y 97 (2008) (discussing the importance of the right to an abortion which empowers a woman's interest in motherhood and in carrying out her responsibilities towards her living children).

50 See Judith J. Thomson, A Defense of Abortion, 1 Philosophy and Public Affairs 47, 65 (1971) (discussing the right of a woman who was raped to an abortion in order to avoid forced parenthood). With regards to the rights of the rapist there are a number of rulings and a number of laws which repudiate all of his rights with regard to a child born as a result of intimate relations against the mother's wishes, in spite of the genetic relationship between the rapist and his child. See Gary Spitko, The Constitutional Function of Biological Paternity: Evidence of the Biological Mother's Consent to the Biological Father's Co-parenting of Her Child, 48 Ariz. L. Rev. 97, 115-17 (2006) (discussing the correlation between the mother's agreement to intimate relations as a basis for a right to be the father and the problem of statutory rape in this connection).

51 See Gerald H. Paske, Sperm-Napping and the Right not to Have a Child, 65 Australasian Journal of Phil. 98, 99-100 (1987) (regarding a hypothetical case discussed in bio-ethical philosophical literature with regard to the theft of sperm from an unconscious man and the demand not to force parenthood upon him); but see S.F. v. State ex rel. T.M., 695 So.2d 1186 (Ala. 1996) (regarding a case where sperm was stolen from an unconscious man who was forced to accept parenthood). See also Onora O'Neill, Begetting, Bearing, and Rearing, in Having Children: Philosophical and Legal Reflections on Parenthood 26, 27-28 (Onora O'Neill & W. Ruddick eds., 1979) (regarding a similar appeal not to force a person to be a parent after the theft of genetic material by a couple); Rebecca S. Snyder, Reproductive Technology and Stolen Ova: Who is the Mother?, 16 Law & Ineq. J. 289 (1998) (regarding the theft of ova and forced parenthood).

52 There are a number of cases where the court recognized parents' rights to sue a clinic, pharmacist or doctor who sterilized or prescribed contraceptives in a careless manner resulting in an unplanned birth of a child. See, e.g., Zehr v. Haugen, 871 P.2d 1006 (Or. 1994) (regarding a case of a sterility procedure carried out carelessly); Troppi v. Scarf, 187 N.W.2d 511 (Mich. Ct. App. 1971) (regarding a case brought against a careless pharmacist); but see Smith v. Gore, 728 S.W.2d 738 (Tenn. 1987) (holding in favor of the doctor when a couple brought suit against the doctor who was careless in a sterility procedure).

53 See Cnty. of San Luis Obispo v. Nathaniel J., 57 Cal. Rptr. 2d 843 (Cal. Ct. App. 1996); Jevning v. Cichos, 499 N.W.2d 515 (Minn. Ct. App. 1993); State ex rel. Hermesmann v. Seyer, 847 P.2d 1273 (Kan. 1993); Mercer Cnty. Dept. of Soc. Services ex rel. Imogene T. v. Alf M., 589 N.Y.S.2d 288 (N.Y. Fam. Ct. 1992); see also Dana Johnson, Comment, Child Support Obligations That Result from Male Sexual Victimization: An Examination of the Requirement of Support, 25 N. Ill. U. L. Rev. 515 (2005); Ellen London, A Critique of the Strict Liability Standard for Determining Child Support in Cases of Male Victims of Sexual Assault and Statutory Rape, 152 U. Pa. L. Rev. 1957 (2004); Ruth Jones, Inequality from Gender-Neutral Laws: Why Must Male Victims of Statutory Rape Pay Child Support for Children Resulting from Their Victimization?, 36 Ga. L. Rev. 411 (2002); Tina M. Allen, Comment, Gender-Neutral Statutory Rape Laws: Legal Fictions Disguised as Remedies to Male Child Exploitation, 80 U. Det. Mercy L. Rev. 111, 123-24 (2002); Angela D. Lucchese, Note, Pena V. Mattox: The Parental Rights of a Statutory Rapist, 36 Brandeis J. Fam. L. 285 (1998) (discussing the rights of a person who committed statutory rape).

54 See Jennifer L. Foote, What's Best for Babies Switched at Birth? The Role of the Court, Rights of Nonbiological Parents, and Mandatory Mediation of the Custodial Agreements, 21 Whittier L. Rev. 315, 320-28 (1999) (discussing the existing case law and the paucity of relevant legislation in the United States); Marjorie M. Shultz, Taking Account of Arts in Determining Parenthood: a Troubling Dispute in California, 19 Wash. U. J.L. & Pol'y 77 (2005); Judith D. Fischer, Walling Claims In or Out: Misappropriation of Human Gametic Material and the Tort of Conversion, 8 Tex. J. Women & L. 143 (1999). For key cases which accept or reject the process of determining fatherhood, see Doran v. Doran, 820 A.2d 1279 (Pa. Super. Ct. 2003); Kohler v. Bleem, 654 A.2d 569 (Pa. Super. Ct. 1995); but see Sekol v. Delguntro, 763 A.2d 405 (Pa. Super. Ct. 2000); In re Paternity of Cheryl, 746 N.E.2d 488 (Mass. 2001). For a discussion of the problems of the contemporary processes that

fatherhood, see Paula Roberts, Truth and Consequences: Part I. Disestablishing the Paternity of Non-Marital Children, 37 Fam. L.Q. 35 (2003); Steven N. Peskind, Who's Your Daddy?: An Analysis of Illinois' Law of Parentage and the Meaning of Parenthood, 35 Loy. U. Chi. L.J. 811, 817-23 (2004).

55 See Shawn Seliber, Taxation Without Duplication: Misattributed Paternity and the Putative Father's Claim for Restitution of Child Support, 14 Wash. & Lee J. Civil Rts. & Soc. Just. 97 (2007) (discussing the economic aspect where the parent discovered that he was not the biological father); Andrew S. Epstein, The Parent Trap: Should a Man be Allowed to Recoup Child Support Payments if he Discovers he is not the Biological Father of the Child?, 42 Brandeis L.J. 655 (2004); see also Linda L. Berger, Lies Between Mommy and Daddy: The Case for Recognizing Spousal Emotional Distress Claims Based on Domestic Deceit that Interferes with Parent-Child Relationships, 33 Loy. L.A. L. Rev. 449, 501-07 (2000) (discussing the demand for legislative recognition of possible emotional damage to a parent caused by domestic deceit).

56 But see Child Support Enforcement Agency v. Doe, 109 Haw. 240 (2005) (discussing a father's argument on appeal that a state law compelling him to pay child support for his natural child was unconstitutional; the court rejected his appeal). For an approach that is in favor of forcing the father to pay child support, even when the mother has deceived him in spite of the unfairness of this sort of ruling, see John G. Hall, Child Support Supported: Policy Trumps Equity in Martin v. Pierce Despite Fraud and a Controversial Amendment to the Paternity Code, 61 Ark. L. Rev. 571 (2008).

57 See Cohen, supra note 9, at 1135, 1139.

58 See Human Fertilisation and Embryology Act 2008 22 (Eng.); Leanne Bell, Is the Human Fertilisation and Embryology Act 2008 Compatible with the Universal Declaration of Human Rights (UDHR)?, 1 Web JCLI (2009), http://webjcli.ncl.ac.uk/2009/issue1/bell1.html. For a survey of the situation in different countries, see, e.g., Kellie LaGatta, The **Frozen Embryo** Debate Heats Up: A Call for Federal Regulation and Legislation,4 Fl. Coastal L.J. 99, 110-11 (2002); Nicole L. Cucci, Constitutional Implications of In Vitro Fertilization Procedures, 72 St. John's L. Rev. 417, 431-33 (1998).

59 See Donna M. Sheinbach, Examining Disputes over Ownership Rights to **Frozen Embryos**: Will Prior Consent Documents Survive if Challenged by State Law and/or Constitutional Principles?, 48 Cath. U.L. Rev. 989, 993 n.23 (1999).

60 Only two states had legislation with regard to this issue until about ten years ago. See Naomi R. Cahn, Parenthood, Genes, and Gametes: The Family Law and Trusts and Estates Perspectives, 32 U. Mem. L. Rev. 563, 572 n.35 (2002) (quoting the ABA Report). See generally Kathryn V. Lorio, Successions and Donations: A Symposium: From Cradle to Tomb: Estate Planning Considerations of the New Procreation, 57 La. L. Rev. 27, 41-43 (1996) (discussing the treatment of **frozen embryos** in Australia; Australia's law permits the implantation of **frozen embryos** in a surrogate mother and prohibits the destruction of **frozen embryos**); Jennifer M. Stolier, Disputing **Frozen Embryos**: Using **International** Perspectives to Formulate Uniform U.S. Policy, 9 Tul. J. **Int'l** & Comp. L. 459, 471-79 (2001).

61 See Fla. Stat. § 742.17 (2008). The most prominent country with this view is England. See Human Fertilisation and Embryology Act 1990, c. 37 (Eng.),http://www.opsi.gov.uk/Acts/ acts1990/ukpga_19900037_en_2 (hereinafter HEFA 1990). In California, there is a requirement to sign a form of agreement prior to any fertility treatment, but there is no clear ruling with regard to the content of the form including what to do with the **frozen embryos**. SeeCal. Penal Code § 367(g) (2001). For an up-to-date survey of the situation in the United States in 2008, see Melissa Boatman, Bringing up Baby: Maryland Must Adopt an Equitable Framework for Resolving **Frozen Embryo** Disputes after Divorce, 37 U. Balt. L. Rev. 285, 299-301 (2008).

62 See Erik W. Johnson, **Frozen Embryos**: Determining Disposition Through Contract, 55 Rutgers L. Rev. 793, 809-12 (2003).

63 See Bohn v. Ann Arbor Reprod. Med. Assoc., No. 213550, 1999 WL 33327194 (Mich. App. Ct. Dec. 17, 1999); Ellen Waldman, The Parent Trap: Uncovering the Myth of "Coerced Parenthood" in **Frozen Embryo** Disputes, 53 Am. U.L. Rev. 1021, 1025 n.10 (2004). For a description and discussion of various rulings, see John A. Robertson, Prior Agreements for Disposition of **Frozen Embryos**, 51 Ohio St. L.J. 407, 411-14 (1990); see also Olivia Lin, Rehabilitating Bioethics: Recontextualizing In Vitro Fertilization Outside Contractual Autonomy, 54 Duke L.J. 485, 490-98 (2004) (discussing the contractual aspects discussed in court rulings in the United States). According to this commentator, the court in at least one case ignored the parents' wishes and chose to continue the pregnancy. See Shapo, supra note 10, at 102 n.206.

64 See Evans v. United Kingdom, App. No. 6339/05 (Eur. Ct. H.R. Apr. 10, 2007). Prior to this case there was another discussion before the same European court in Evans, App. No. 6339/05 (Eur Ct. H.R. Mar. 7, 2006).

65 Id.

66 Orna Ben-Naftali & Iris Canor, European Convention for the Protection of Human Rights and Fundamental Freedoms--Assisted Reproductive Technologies--Reproductive Freedom--**Frozen Embryos**--Right to Life--Right to Respect for Private Life--Gender Equality-- Margin of Appreciation, 102 Am. J. **Int'l** L. 128, 131-34 (2008).

Theresa M. Erickson & Megan T. Erickson, What Happens to Embryos When a Marriage Dissolves? Embryo Disposition and Divorce, 35 Wm. Mitchell L. Rev. 469, 487 (2009) (discussing In re Marriage of Dahl and Angle, 194 P.3d 834 (Or. Ct. App. 2008)). While many of these rulings are love letters to contracting, none of them actually enforces an agreement as against a current partner's expressed desire not to be a genetic parent at the time of enforcement.

68 See American Society for Reproductive Medicine (ASRM), Practice Committee Report: Elements to be Considered in Obtaining Informed Consent for ART (June 1997).

69 Waldman, supra note 6, at 917 n.127 (quoting The New York State Task Force).

70 Christi D. Ahnen, Disputes over **Frozen Embryos**: Who Wins, Who Loses, and How Do We Decide? - An Analysis of Davis v. Davis, York v. Jones, and State Statutes Affecting Reproductive Choices, 24 Creighton L. Rev. 1299, 1344-50 (1991); John A. Robertson, In the Beginning: The Legal Status of Early Embryos, 76 Va. L. Rev. 437, 465-69 (1990); John A. Robertson, Resolving Disputes over **Frozen Embryos**, 19 Hastings Center Rep. 7, 10-11 (1989); Mario J. Trespalacios, **Frozen Embryos**: Towards an Equitable Solution, 46 U. Miami L. Rev. 803, 826 (1992); Mark C. Haut, Note, Divorce and the Disposition of **Frozen Embryos**, 28 Hofstra L. Rev. 493, 517-25 (1999). See also Waldman, supra note 63; Rachel Polinger-Hyman, Erecting Women: Contracting Parentenhood from Marriage to Divorce, 2 Hous. J. Health L. & Pol'y 241, 283 (2002); Cahn, supra note 60; Colker, supra note 48; Johnson, supra note 62; Erickson & Erickson, supra note 67 (without a written contract the parties will have to resign their various constitutional rights which were influenced by civil law).

71 See Paula Walter, His, Hers, or Theirs--Custody, Control, and Contracts: Allocating Decisional Authority Over **Frozen Embryos**, 29 Seton Hall L. Rev. 937, 963-64 (1999); Tanya Feliciano, Davis v. Davis: What About Future Disputes?, 26 Conn. L. Rev. 305, 346 (1993); Trespalacios, supra note 70, at 828-31.

72 For the infrastructure of contract law and the foundations, which are most effective in strengthening the autonomy of the individual and his right to reproduce and are even more effective than discourse about human rights, see Ben-Naftali & Canor, supra note 66.

73 See Cohen, supra note 9, at 1169; Carl H. Coleman, Procreative Liberty and Contemporaneous Choice: An Inalienable Rights Approach to **Frozen Embryo** Disputes, 84 Minn. L. Rev. 55, 56 (1999). The following agree but think that there should be room for a change of heart: Cahn, supra note 60, at 568-9; Haut, supra note 70, at 523; Colker, supra note 48, at 1079; Johnson, supra note 62, at 819.

74 See Lori B. Andrews, The Legal Status of the Embryo, 32 Loy. L. Rev. 357, 358-59 (1986).

75 See Cahn, supra note 60, at 601. The enforcement of these contracts will grant stability and security in this field, elements which are lacking. See Ellis, supra note 29, at 1225.

76 See Kass v. Kass, 696 N.E.2d 174, 180 (N.Y. 1998); Angela K. Upchurch, The Deep Freeze: A Critical Examination of the Resolution of **Frozen Embryo** Disputes Through the Adversarial Process, 33 Fla. St. U.L. Rev. 395, 417 (2005); Trespalacios, supra note 70, at 834.

77 See, e.g., Helene S. Shapo, Matters of Life and Death: Inheritance Consequences of Reproductive Technologies, 25 Hofstra L. Rev. 1091, 1182-88 (1997); Sara D. Petersen, Dealing with Cryopreserved Embryos upon Divorce: A Contractual Approach Aimed at Preserving Party Expectations, 50 UCLA L. Rev. 1065, 1093 (2003); Walter, supra note 71, at 964.

78 See, e.g., Melissa Boatman, Bringing up Baby: Maryland Must Adopt an Equitable Framework for Resolving **Frozen Embryo** Disputes after Divorce, 37 U. Balt. L. Rev. 285, 288-89 (2008).

79 See, e.g., Jesse M. Nix, "You Only Donated Sperm": Using Intent to Uphold Paternity Agreements, 11 J. L. & Fam. Stud. 487, 494 (2009); Katherine M. Swift, Parenting Agreements, The Potential Power of Contract, and the Limits of Family Law, 34 Fla. St. U.L. Rev. 913 (2007); John L. Hill, What Does it Mean to be a "Parent?" The Claims of Biology as the Basis for Parental Rights, 66 N.Y.U. L. Rev. 353 (1991); Marjorie M. Shultz, Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality, 1990 Wis. L. Rev. 297 (1990); Andrea E. Stumpf, Redefining Mother: A Legal Matrix for New Reproductive Technologies, 96 Yale L.J. 187 (1986).

80 See Margalit, supra note 23.

81 See id. at 162-68.

82 See Mary A. Totz, What's Good for the Goose is Good for the Gander: Toward Recognition of Men's Reproductive Rights, 15 N. Ill. U. L. Rev. 141, 156-57 (1994) (regarding the general agreement and the claim that a parent should not be forced to carry out his or her parental duties); Fischer, supra note 54, at 155-56 n.97.

83 It is worth noting that this conclusion doesn't work when you are the biological parent and married to the mother since you cannot disclaim by contract ex ante your legal parenthood. Indeed, some of the sperm donor paternity cases involving known sperm donors have not even let them step out of legal parenthood when the recipient mother is unmarried. The usual reason given, which may be quite problematic, has to do with the idea that the right to support belongs to the child and cannot be waived by the behavior of either parent.

84 See generally Leah C. Battaglioli, Modified Best Interest Standard: How States against Same-Sex Unions Should Adjudicate Child Custody and Visitation Disputes between Same-Sex Couples, 54 Cath. U.L. Rev. 1235, 1240-41 (2005).

85 Cf. Baker, supra note 33, at 686-87.

86 See Annette R. Appell, The Endurance of Biological Connection: Heteronormativity, Same-Sex Parenting and the Lessons of Adoption, 22 BYU J. Pub. L. 289, 319-25 (2008) (explaining that the existence of a contract which regulates the distribution of parental obligations and rights is appropriate for this very special arrangement); Ertman, supra note 26, at 700 (the open adoption, like the contract for joint parentage in the case of lesbian couples, can be regulated using legal parenthood by mutual agreement, in accordance with the intentions of the parties).

87 See generally Caban v. Mohammed, 441 U.S. 380, 397 (1979); Lehr v. Robertson, 463 U.S. 248, 260 n.16 (1983); Quilloin v. Walcott, 434 U.S. 246 (1978). See Anthony Miller, The Case for the Genetic Parent: Stanley, Quilloin, Caban, Lehr, and Michael H. Revisited, 53 Loy. L. Rev. 395 (2007).

88 See Lehr, 463 U.S. at 248, 262.

89 See Heart of Adoptions, Inc. v. J.A., 963 So. 2d 189 (Fla. 2007) (for an important precedent given recently which supports the rights of unmarried biological fathers to receive actual notice of the adoption of their child and for a list of the obligations of such a father who wants to become the legal father of his child); see also Laura Oren, Unmarried Fathers and Adoption: "Perfecting" or "Abandoning" an Opportunity Interest, 36 Cap. U.L. Rev. 253, 256-65 (2007); Laura Oren, The Paradox of Unmarried Fathers and the Constitution: Biology "Plus' Defines Relationships; Biology Alone Safeguards the Public Fisc, 11 Wm. & Mary J. of Women & L. 47 (2004).

90 See Baker, supra note 24, at 31-38 (discussing psychological parenthood as a contract and its implications and a survey of legal rulings which support the building and acquiring of such legal psychological parenthood within different contractual doctrines).

91 See generally Bartlett, supra note 36, at 887-93 (the accepted concept of exclusive parenthood is based upon two central themes: nature and instrumentalism). See also Nancy D. Polikof, This Child does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families, 78 Geo. L.J. 459, 468-73 (1990) (this approach contradicts the principle of the best interests of the child and maintains the fiction of the homogenous family at the expense of children living in other family structures); Johnson v. Calvert, 851 P.2d 776 (Cal. 1993) (the California court's rejection of the ACLU's suggestion that there be more than two legal parents in cases involving surrogacy).

92 See Joseph Goldstein et al., Beyond the Best Interests of the Child 35-39 (1979).

93 See Margalit, supra note 12 (defending intentional parenthood as the right metric regarding the surrogacy case law).

94 See Shoshana L. Gillers, A Labor Theory of Legal Parenthood, 110 Yale L.J. 691, 718 (2001).

95 See Gaia Bernstein, The Socio-Legal Acceptance of New Technologies: A Close Look at Artificial Insemination, 77 Wash. L. Rev. 1035, 1060-71 (2002) (describin the gradual social acceptance of artificial insemination over three centuries); Yehezkel Margalit, Artificial Insemination from Donor (AID) - From Status to Contract and Back Again to Status? (on file with author).

96 See, e.g., Anonymous v. Anonymous, 246 N.Y.S.2d 835 (N.Y. Sup. Ct. 1964) (holding that husband had duty to support children conceived by artificial insemination when husband consented to wife's pregnancy in a written agreement); Gursky v. Gursky, 242 N.Y.S.2d 406 (N.Y. Sup. Ct. 1963) (holding that, while the child of a consensual artificial insemination is not the husband's legal issue, the husband has a legal, contractual obligation to provide support for that child); People ex

consented to the artificial insemination of his wife has the same parental rights as a foster parent or as if he had semi-adopted the child).

97 See Harry S. Chandler, Note, A Legislative Approach to Artificial Insemination, 53 Cornell L.Q. 497, 498 (1968); see also Walter Wadlington, Artificial Insemination: The Dangers of a Poorly Kept Secret, 64 Nw. U. L. Rev. 777, 794-96 (1969-1970).

98 See Unif. Parentage Act § 5 (repealed 2000), 9B U.L.A. 407 (2001); Unif. Putative & Unknown Fathers Act 1(2)(ii) (repealed 2000), 9B U.L.A. 160 (2001); Unif. Status of Children of Assisted Conception Act 4(a) (repealed 2000), 9B U.L.A. 265 (2001) (hereinafter USCACA).

99 See Brent J. Jensen, Comment, Artificial Insemination and the Law, 1982 BYU L. Rev. 935, 952-6 (1982) (surveying how different states have approached the issue up to 1982). See also Marla J. Hollandsworth, Gay Men Creating Families Through Surro-Gay Arrangements: A Paradigm for Reproductive Freedom, 3 Am. U. J. Gender & Law 183, 207-15 (1995) (for a later survey, covering until the year 1995); Cahn, supra note 60, at 570 n.25 (for a contemporary survey of the situation in the U.S.).

100 See HEFA 1990, supra note 61, at para. 28, 30 (In England, HEFA 1990 changed the legal practice where a child born of the semen of a donor was illegitimate and ruled that in light of the agreement with regard to legal parenthood, fatherhood may be transferred from the biological father to the sociological father and the child would no longer be illegitimate). See also Joan Mahoney, Great Britain's National Health Service and Assisted Reproduction, 35 Wm. Mitchell L. Rev. 403, 406-7 (2009).

101 It is worth noting that many states recognize the older version of the UPA rule where the sperm donor is absolved of responsbility only if the sperm donor recipient is married and the recipient got the sperm inseminated through a doctor. Besides that, there is case law suggesting that the use of a known sperm donor even where the recipient is married will block any agreement stipulating that the donor is not the legal parent. Thus the landscape of the law currently is more complex than described.

102 Unif. Parentage Act § 707 (2000) (amended 2002).

103 Id. The intention is to prevent the appearance of different problems regarding inheritance with regard to the rights of somebody born after the demise of the testator. It was adopted by Texas and Utah alone. See Paula Roberts, Biology and Beyond: The Case for Passage of the New Uniform Parentage Act, 35 Fam. L.Q. 41, 77 (2001); Apel, supra note 5; see generally Charles P. Kindregan, Jr. & Maureen McBrien, Posthumous Reproduction, 39 Fam.L.Q. 579 (2005); Susan N. Gary, Posthumously Conceived Heirs: Where the Law Stands and What to Do About It Now, 19 Prob. & Prop. 32 (2005); see generally Ronald Chester, Posthumously Conceived Heirs Under a Revised Uniform Probate Code, 38 Real Prop. Prob. & Tr. J. 727 (2004); Melissa B. Vegter, The "ART" of Inheritance: A Proposal for Legislation Requiring Proof of Parental Intent before Posthumously Conceived Children Can Inherit from a Deceased Parent's Estate, 38 Val. U.L. Rev. 267, 296-310 (2003) (for academic analyses).

104 See, e.g., Unif. Parentage Act § 706 cmt. (2002).

105 See, e.g., the legislative proposal of the State of Pennsylvania stating that a child born through assisted reproduction accomplished after consent has been voided by the filing and service of a divorce complaint, under § 5934 or withdrawn under § 5933, will have a legal mother and a genetic father, but not a legal father. In this instance, intention, rather than biology, is the controlling factor, http://jsg.legis.state.pa.us/resources/documents/ftp/publicatio ns/2008-23Assisted%20Reproductive%20 Technologies%20Act%20-%20May%202008.pdf. See also The Proposed Pennsylvania Assisted Reproductive Technologies Act, Report of the Subcommittee on Assisted Reproductive Technologies, http://jsg.legis.state.pa.us/resources/documents/ftp/publicatio ns/2008-23Assisted%20Reproductive%20 Technologies%20Act%20-%20May%202008.pdf.

106 Kass v. Kass, 235 A.D.2d 150 (N.Y. App. Div. 1997), aff'd, 696 N.E.2d 174 (1998).

107 Kass, 235 A.D.2d at 179. See also, Apel, supra note 5, at 665 (regarding the recurring theme in these judgments, in which, in the case of divorce, the court approves of this approach).

108 See Unif. Parentage Act § 706(a) (2002).

109 Unif. Parentage Act § 706(b) (2002).

The original language stated: "The consent of a former spouse to assisted reproduction may be withdrawn by that individual in a record at any time before placement of eggs, sperm, or embryos," Unif. Parentage Act § 706(b) (2000).

111 Today the couple need not necessarily be married but any person may supply semen or agree to inseminate a woman, even if she is not his legal wife, and he will become the legal parent if he agrees. Under the former title, "Husband's Paternity of Child of Assisted Reproduction," the words "Husband's paternity" have been erased and replaced by the more general term "Paternity." The new title is "Paternity of Child of Assisted Reproduction." Incidentally, the novelty of the new paragraph has not yet been appreciated. Some states refers only to the inseminated woman's husband as donor and does not discuss an anonymous donor. On the other hand, a number of states have legislated the subject outside of the context of marriage - Delaware, North Dakota and Wyoming. See Jonathan Penn, Note, A Different Kind of Life Estate: The Laws, Rights, and Liabilities Associated with Donated Embryos, 21 Regent U. L. Rev. 207, 210 (2008).

112 It should be mentioned here that there are some contrary state law cases, such as Ferguson in Pennsylvania, emphasizing the child's rights to child support as the main reason for rejecting the agreed agreement. Ferguson v. McKiernan, 596 Pa. 78 (2007).

113 See ABA Model Act Governing Assisted Reprod. Tech. § 606 (2008), available at http://www.abanet.org/family/committees/artmodelact.pdf (hereinafter Model Act). The states of Texas, Washington and Colorado adopted the wording of the Act without any changes. The paragraph reads: "If a marriage is dissolved before [placement] of eggs, sperm, or embryos, the former spouse is not a parent of the resulting child unless the former spouse consented in a record that if assisted reproduction were to occur after a [dissolution of marriage], the former spouse would be a parent of the child." Id. § 606(2).

114 See Tex. Fam. Code Ann. § 160.706(a)-(b) (West 2007).

115 S. B. 183, 49th Leg., 2d Sess. (N.M. 2010).

116 Wash. Rev. Code § 26.26.725 (West 2008) ("The consent of the former spouse or former domestic partner to assisted reproduction may be withdrawn by that individual in a record at any time before placement of eggs, sperm, or embryos."); Colo. Rev. Stat. § 19-4-106(7)(b) (2008) ("The consent of a former spouse to assisted reproduction may be withdrawn by that individual in a record [kept by a licensed physician] at any time before the placement of eggs, sperm, or embryos."); see also Mark P. Strasser, You Take the Embryos But I Get the House (and the Business): Recent Trends in Awards Involving Embryos upon Divorce, 57 Buff. L. Rev. 1159, 1189 n.139 (2009).

117 Model Act, supra note 113, § 501(3)(e).

118 See, e.g., Waldman, supra note 63, at 1059-60; Cahn, supra note 60, at 597-99; Lee M. Silver & Susan R. Silver, Confused Heritage and the Absurdity of Genetic "Ownership," 11 Harv. J. L. & Tech. 593, 615-16 (1998) (supporting this approach where it is the parent's last opportunity to bear a child and the other parent is unwilling to accept parental obligations).

119 See, e.g., Patricia A. Martin & Martin L. Lagod, The Human Preembryo, the Progenitors, and the State: Toward a Dynamic Theory of Status, Rights, and Research Policy, 5 High Tech. L.J. 257, 262 (1990).

120 See generally Yehezkel Margalit, Towards Determining Legal Parentage by Agreement in Israel," 42 Mishpatim 6 (2012) (forthcoming on file with author) (Heb.) (discussing the dilemma of whether to extend this proposal to coital intercourse).

121 See generally Jessica L. Lambert, Developing a Legal Framework for Resolving Disputes Between "Adoptive Parents" of **Frozen Embryos**: A Comparison to Resolutions of Divorce Disputes Between Progenitors, 49 B.C. L. Rev. 529, 541-42 (2008) (discussing the legal situation in Louisiana); see also National Conference of State Legislatures, Embryo and Gamete Disposition Laws, (updated July 2007), http://www.ncsl.org/default.aspx?tabid=14379 (discussing the legal situation in other states).

122 For a list of the rulings in the United States and other countries, see Cohen, supra note 9, at 1137 n.2.

123 See generally Margalit, supra note 12.

124 See Roe v. Wade, 410 U.S. 113 (1973); Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992); Griswold v. Connecticut, 381 U.S. 479 (1965).

For this issue of the Non-Identity problem, see Cohen, supra note 9, at 1131 n.48; I. Glenn Cohen, Beyond Best Interests, 96 Minn. L. Rev. (forthcoming 2011).

126 See generally Harry D. Krause, Illegitimacy: Law and Social Policy (1971).

127 See generally Waldman, supra note 63, at 1027.

128 Cf. Garrison, supra note 22.

129 For this claim from a socio-biological view point, see Richard Dawkins, The Selfish Gene 2, 102-3, 248-49 (2d ed. 1989); June Carbone & Naomi Cahn, Which Ties Bind? Redefining the Parent-Child Relationship in an Age of Genetic Certainty, 11 Wm. & Mary Bill Rts. J. 1011, 1025-39 (2003).

130 See generally Waldman, supra note 63, at 1041-48.

131 See generally supra note 95 and accompany text.

132 See generally Waldman, supra note 63, at 1048-49; see also Cohen, supra note 9, at 1142-45 (discussing data and concluding that one cannot learn anything about his or her true feelings of the fathers who are disestablishing the paternity and who may have suffered deeply from their decision).

133 Cf. McIntyre v. Crouch, 780 P.2d 239 (Or. Ct. App. 1989); In Interest of B.C., 775 P.2d 27 (Colo. 1989); In re Sullivan, 157 S.W.3d 911 (Tex. App. 2005); In re H.C.S, 219 S.W.3d 33 (Tex. App. 2006); In re K.M.H., 169 P.3d 1025 (Kan. 2007); C.O. v. W.S., 639 N.E.2d 523 (Ohio Com. Pl. 1994).

134 See Marriage of Leckie and Voorhies, 875 P.2d 521 (Or. Ct. App. 1994); Ferguson v. McKiernan, 940 A.2d 1236 (Pa. 2007). For a discussion of the revolutionary consequences of this ruling, see David T. Rohwedder, Ferguson v. McKiernan: Can a Sperm Donor Be Held Liable for Child Support After the Recipient Has Contractually Waived that Right?, 32 Am. J. Trial Advoc. 229 (2008).

135 A parental project involving assisted procreation exists from the moment a person alone decides, or spouses by mutual consent decide, to have a child, to resort to the genetic material of a person who is not party to the parental project. See Quebec Civ. Code, S.Q., Art. 538 (2002), http://www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telec harge.php?type=2&file=/CCQ/CCQ_A.html; see also Nancy D. Polikoff, A Mother Should Not Have to Adopt Her Own Child: Parentage Laws for Children of Lesbian Couples in the Twenty-first Century,5 Stan. J. C.R. & C.L. 201, 227-32 (2009).

136 See Quebec Civ. Code, supra note 135 (intending to recognize the parenthood of single sex couples and allow them to be legitimate parents to their children); see also Fiona Kelly, Reforming Parenthood: The Assignment of Legal Parentage Within Planned Lesbian Families, 40 Ottawa L. Rev. 185, 193-34 (2008 - 2009).

137 See Quebec Civ. Code, supra note 135 (ruling that both a couple and an individual can agree to the annulment of the legal parenthood of the male, if the agreement is in accordance with the legal conditions). For a discussion on the last Quebec's Amendments, see Campbell, supra note 16, at 254-55; Robert Leckey, "Where the Parents are of the Same Sex': Quebec's Reforms to Filiation, 23 **Int'l** J.L. Pol'y & Fam. 62, 65-69 (2009); Polikoff, supra note 135, at 26-29.

138 See Cohen, supra note 9, at 1148-67.

139 See generally Restatement (Second) of Torts §§46 cmt. b, 436A (1965); Cohen, supra note 9, at 1158-61.

140 For the various court rulings which support the prohibition of disestablishing the paternity on the basis of the best interests of the child, see Cohen, supra note 9, at 1128-29. However, one may ask to what extent is this relevant in the case of **frozen embryos**. For the rejection of the claim of the best interests of the child in this specific unusual case, see id. at 1130-31. On the other hand, the legislation in Louisiana sees the **frozen embryos** as a potential person and therefore does apply the doctrine of the best interests of the child. See La. Rev. Stat. Ann.§§9:129, 131 (2006); Fotini A. Skouvakis, Defining the Undefined: Using a Best Interests Approach to Decide the Fate of Cryopreserved Preembryos in Pennsylvania, 109 Penn. St. L. Rev. 885, 904-5 (2005).

142 Cohen, supra note 9, at 1185-96.

143 See Waldman, supra note 63, at 1052; see also Apel, supra note 5, at 675-80.

144 Cf. Cohen, supra note 9, at 1145 (for a summary of this claim).

145 See Jessica R. Caterina, Glorious Bastards: The Legal And Civil Birthright Of Adoptees To Access Their Medical Records In Search Of Genetic Identity, 61 Syracuse L. Rev. 145 (2010).

146 See Cohen, supra note 9, at 1136-37.

147 See Nat'l Conference of Comm'rs of Unif. State Laws, 312/915-0195, Unif. Parentage Act: Prefatory Note (1973); see also Carol A. Donovan, The Uniform Parentage Act and Nonmarital Motherhood-by-Choice, 11 N.Y.U. Rev. L. & Soc. Change 193 (1982-1983).

148 Apel, supra note 5, at 677-80.

149 See Diane K. Yang, What's Mine is Mine, But What's Yours Should Also be Mine: An Analysis of State Statutes That Mandate the Implantation of Frozen Preembryos, 10 J.L. & Pol'y 587, 616-26 (2002) (discussing the problems involved in establishing pre-mandatory conditions where the procreation rights of one of the parties is at stake); Bridget M. Fuselier, The Trouble With Putting All of Your Eggs in One Basket: Using a Property Rights Model to Resolve Disputes Over Cryopreserved Pre-Embryos, 14 Tex. J. C.L. & C.R. 143 (2009) (discussing the importance of preliminary agreements for the couple and for the fertility clinic).

150 See Cohen, supra note 9 (arguing that making the contract mandatory defeats the sorting function of the contract).

151 See, e.g., Jeremy A. Blumenthal, Law and the Emotions: The Problems of Affective Forecasting, 80 Ind. L.J. 155, 215-16 (2005); John A. Robertson, Symposium, Precommitment Issues in Bioethics, 81 Tex. L. Rev. 1849, 1870-7 (2003); Sara D. Petersen, Dealing with Cryopreserved Embryos upon Divorce: A Contractual Approach Aimed at Preserving Party Expectations, 50 UCLA L. Rev. 1065, 1080 (2003).

152 See, e.g., Model Act, supra note 113,§§201(2)(j), 501(1)(a)-(b) in the Model Act which lays out respectively:

A statement of the need for intended parents to agree in advance who shall acquire the right to possession and control of the embryos or gametes in the event of marriage dissolution, death of one or both of them, or subsequent disagreement over disposition in compliance with the provisions of Section 501 of this Act.

Id. § 201(2)(j).

Binding agreements executed prior to embryo creation must be entered into a record by intended parents as to: (a) Intended use and disposition of embryos; (b) The use and disposition of preserved embryos in the event of divorce of intended parents, if married, illness, incapacity, or death of one or both intended parents, or other change of circumstances such as separation or estrangement ... .

Id. § 501(1)(a)-(b). Accord Calm, supra note 60, at 595 n.151 (quoting Model Assisted Reprod. Technologies § 1.05, Subs. 1(c)(4)).

153 But see George J. Annas, The Shadowlands -- Secrets, Lies and Assisted Reproduction, 339 New Eng. J. Med. 935 (1998).

154 See Coleman, supra note 73. See also Cohen, supra note 9, at 1185-87, for the possibility of using a damages measure instead.

155 See, e.g., Waldman, supra note 6, at 925-30 (discussing the conclusion that an adhesion contract which only allows the destruction of the **frozen embryos** o their adoption is extremely problematic); Wendel v. Wendel, No. D-191962 (Ohio C.P. Dom. Rel. Ct. July 21, 1989), mentioned and discussed in Robertson, supra note 63, at 411-14 .

See Alexia M. Brunet, Cryopreserved Embryos as Americas Prospective Adoptees: Are Couples Truly Adopting or Merely Transferring Property Rights?, 16 Wm. & Mary J. Women & L. 133 (2009) (specifying the appropriate contract law for this situation and situations where adoption laws should be utilized).

157 See June Carbone & Naomi Cahn, Symposium, Families, Fundamentalism, & the First Amendment: Embryo Fundamentalism, 18 Wm. & Mary Bill Rts. J. 1015, 1015, 1023-24 (2010) (discussing the need for federal supervision of the procedures for adopting and donating **frozen embryos** after the change of the policy from the Bush administration with regard to research into stem cells by President Obama in 2009).

158 According to Model Act, supra note 113, § 502(1):

Intended parents may choose to donate their unused embryos for any of the following purposes subject only to any limitations set forth in a record prior to donation as permitted and imposed pursuant to the provisions of Section 204 hereof, which choices shall be reflected in their agreement(s): (1)Donation to another patient(s), either known or anonymous. Donation to known individuals may only be done for the purpose of the recipient attempting to create a child and become that child's parent.

See, e.g., Lambert, supra note 121; Jennifer Baker, A War of Words: How Fundamentalist Rhetoric Threatens Reproductive Autonomy, 43 U.S.F. L. Rev. 671 (2009) (criticizing the organization Snowflake and the treatment of **frozen embryo** using adoption vocabulary and not donation vocabulary and the possible serious effects on the abortion question); Michelle L. Anderson, Are You my Mommy? A Call for Regulation of Embryo Donation, 35 Cap. U.L. Rev. 589 (2006) (requesting that legislators should legislate with regard to the donation and adoption of **frozen embryos** to prevent injustice); Charles P. Kindregan, Jr. & Maureen McBrien, Embryo Donation: Unresolved Legal Issues in the Transfer of Surplus Cryopreserved Embryos, 49 Vill. L. Rev. 169 (2004); Katheryn D. Katz, Snowflake Adoptions and Orphan Embryos: The Legal Implications of Embryo Donation, 18 Wis. Women's L.J. 179 (2003); Paul C. Redman & Lauren Fielder Redman, Seeking a Better Solution for the Disposition of **Frozen Embryos**: Is Embryo Adoption the Answer?, 35 Tulsa L.J. 583, 587-89 (2000).

K.L.W. v. Genesis Fertility Centre, 2016 BCSC 1621 (CanLII)

Date: 2016-08-31
Docket: S166962
Citation: K.L.W. v. Genesis Fertility Centre, 2016 BCSC 1621 (CanLII), <http://canlii.ca/t/gvnsx>, retrieved on 2017-04-19

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *K.L.W. v. Genesis Fertility Centre,* 2016 BCSC 1621

Date: 20160831
Docket: S166962
Registry: Vancouver

Between:

K.L.W.

Petitioner

And

Genesis Fertility Centre

Respondent

Before: The Honourable Mr. Justice Pearlman

Reasons for Judgment

(Redacted Version)

Counsel for the Petitioner: Lawrence A. Kahn, Q.C. & J. Aucoin

The Respondent: No one appeared

Place and Date of Hearing:	Vancouver, B.C. August 17, 2016
Place and Date of Judgment:	Vancouver, B.C. August 31, 2016

INTRODUCTION

[1] The petitioner, K.L.W., applies for the following relief:

1. A declaration that the human reproductive material of [A.B.], deceased, (the "Reproductive Material") is the sole legal property of the petitioner.
2. The Reproductive Material shall be released by Genesis Fertility Centre to the petitioner, K.L.W., for her use absolutely, to create embryos for the reproductive use of the petitioner, and for no other purpose.
3. This file shall be sealed.

[2] [A.B.], the petitioner's husband, died intestate at [content redacted].

[3] Throughout his life, [A.B.] struggled with [content redacted]. The petitioner and [A.B.] shared an intense desire to have a family. However, [A.B.] suffered from a succession of severe medical conditions related to [content redacted] that disrupted and postponed their plans to conceive a child. The petitioner and [A.B.] agreed that she would use the Reproductive Material to conceive a child, regardless of whether [A.B.] died as a result of his [content redacted].

[4] Unfortunately, [A.B.] passed away without giving his written consent to the petitioner's use of the Reproductive Material for the purpose of creating an embryo, as required by s. 8(1) of the *Assisted Human Reproduction Act*, S.C. 204, c. 2 ("*AHRA*") and ss. 3(1) and 4(1) of the *Assisted Human Reproduction (Section 8 Consent) Regulations*, SOR/2007-137 (the "*Regulations*").

[5] While Genesis Fertility Centre ("Genesis") has continued to store the reproductive material, it will not release that material to the petitioner without [A.B.]'s written consent.

[6] Genesis, although named and served as a respondent, did not participate in these proceedings. Accordingly, the petition is unopposed.

ISSUES

[7] This application raises the following issues:

(a) Is the Reproductive Material property?

(b) If so, did property in the Reproductive Material pass to the petitioner as the sole beneficiary of [A.B.]'s intestate estate?

(c) In the circumstances of this case, may the Court order the release of the Reproductive Material to the petitioner, notwithstanding the lack of the donor's written consent to the petitioner's use of the Reproductive Material for the purpose of creating an embryo?

FACTS

[8] From the affidavit materials filed in support of the petition, I make the following findings of fact.

[9] The petitioner is a [content redacted].

[10] The parties met in [content redacted], began to live together in [content redacted] and were married on [content redacted].

[11] At the age of 10 months, [A.B.] was diagnosed with [content redacted]. Throughout his childhood, and as an adult, [A.B.] suffered [content redacted]. Despite numerous hospitalizations due to [content redacted], [A.B.] was able to graduate from high school in 1996 and win a [content redacted] to a community college. However, as a result of his [content redacted], [A.B.] had to forego his [content redacted]. Between 1996 and 2002, he spent approximately half of his time in [content redacted] Hospital.

[12] From the beginning of their relationship, the petitioner was aware of [A.B.]'s medical problems. Throughout their relationship, she was a devoted and caring partner to [A.B.]

[13] In September 2000, the parties moved to [content redacted] to enable the petitioner to complete her Bachelor of Arts degree in Psychology.

[14] By 2002, with the benefit of an effective pain control regime, [A.B.] enrolled in a community college [content redacted] program. He also worked as a sales associate at a [content redacted] store in the summer of 2003.

[15] In [content redacted], the petitioner obtained her Bachelor of Arts degree in psychology.

[16] In 2004, [A.B.] secured employment in [content redacted], while the petitioner returned to the University [content redacted] to study [content redacted].

[17] In 2004, [A.B.]'s treating physicians first advised the parties that [A.B.] might require a [content redacted]. [A.B.] continued to work at the [content redacted] and graduated in March 2005 from the community college with a diploma in business administration and a certificate of [content redacted].

[18] [content redacted]

[19] [content redacted]

[20] By September [content redacted], [A.B.] was no longer able to work due to his medical complications.

[21] [content redacted]

[22] From an early stage in their relationship, the parties discussed having children together.

[23] Both the petitioner and [A.B.] understood that because [content redacted], they would likely require in-vitro fertilization in order to conceive a child. They decided to postpone having children until they completed their post-secondary education and until [A.B.]'s health stabilized.

[24] While they waited for the [content redacted], the parties began to take steps to ensure that they could have a child, even if [A.B.] died.

[25] The [content redacted] clinic referred the parties to Dr. [content redacted], a fertility specialist. K.L.W. and [A.B.] wanted to make all of the arrangements and complete the fertility procedures, so they could have a child even if [A.B.] died [content redacted], or following surgery.

[26] [content redacted]

[27] [content redacted]

[28] While [A.B.] was still in the hospital and receiving treatment for ongoing complications, he and the petitioner met with the fertility specialist, Dr. [content redacted], who advised that [A.B.] would have to wait until he was able to reduce his medications and his health was more stable before proceeding with the parties' plan to have children.

[29] In early 2008, the parties returned to British Columbia where the petitioner began her final practicum for her Bachelor of [content redacted] degree and [A.B.] obtained employment at a [content redacted].

[30] In June 2008, [A.B.] was hospitalized again in Vancouver for [content redacted].

[31] In August 2008, K.L.W. completed her Bachelor of [content redacted] and obtained employment as a [content redacted] in a community [content redacted].

[32] By 2009, [A.B.]'s health stabilized, enabling him to reduce his medications. The parties decided to renew their efforts to have a child. They met with Dr. [content redacted], a director of Genesis in Vancouver, British Columbia. [A.B.] also met with an urologist at Vancouver General Hospital to discuss undergoing an MESA/TESA procedure for the extraction of his sperm. [content redacted].

[33] On January 29, 2009, [A.B.] had a further semen analysis, and signed a consent form authorizing Genesis to release the results of that analysis to the petitioner.

[34] [content redacted]

[35] Nonetheless, in October 2009, [A.B.] underwent the MESA/TESA procedure under sedation at UBC Hospital. His sperm was extracted, frozen, and stored at Genesis.

[36] [content redacted]

[37] Between March and August 2010, [A.B.] was hospitalized for treatment of complications with his pain medications. From [content redacted], [A.B.] was hospitalized on multiple occasions for [content redacted] infections.

[38] In late January 2011, the parties received advice that [A.B.] would not be discharged from the hospital until he [content redacted].

[39] [content redacted]. However he suffered a post-operative infection, resulting in further surgery on [content redacted]. By [content redacted], [A.B.]'s kidneys ceased to function and sadly, on [content redacted], [A.B.] died as a result of multi-organ failure.

[40] Shortly before [A.B.] passed away, the petitioner promised him that she would have their baby.

[41] Before [A.B.]'s death, no one advised the petitioner or [A.B.] that his written consent was required for the petitioner to make use of his stored sperm for reproductive purposes in the event of his death.

[42] During the time [A.B.] and the petitioner consulted with Genesis, the respondent had no consent form for recording a donor's written consent to his spouse's reproductive use, following his death, of his stored sperm.

[43] The petitioner only learned of the requirement for [A.B.]'s written consent to her use of his human reproductive material as a result of a telephone conversation with Dr. [content redacted] shortly after her husband's death. Dr. [content redacted] advised that Genesis was able to store [A.B.]'s sperm. However, he also informed the petitioner that under Canadian law, she would not be able to use the sperm to conceive a child in Canada when [A.B.] had not stipulated his consent in a will.

[44] By a note dated March 6, 2012, Dr. [content redacted] confirmed that Genesis was not able to use the stored sperm for reproductive purposes in Canada in circumstances where [A.B.] had died without providing his written consent in a will.

[45] I pause here to note that rather than requiring any kind of testamentary grant or consent, s. 8(1) of the *AHRA* requires a donor to provide his written consent, in accordance with the *Regulations*, to the use of the human reproductive material, (in this case by his spouse), for the purpose of creating an embryo. Later in these reasons I will return to the *Regulations*.

[46] Genesis has also informed the petitioner that in the event she wishes to destroy the stored sperm, she must consent in writing to its disposal. By the terms of Genesis' consent for disposal form, the signatory transfers all property in the stored sperm to Genesis for the purpose of disposing of the sperm and waives "all rights, claims or causes of action related to the property in storage and disposal of these Specimens".

[47] Since [A.B.]'s death, the petitioner has paid more than $1,000 to Genesis in storage fees for [A.B.]'s sperm. The Genesis invoices, addressed to the petitioner, refer to the "storage fee for your sperm."

[48] During [A.B.]'s lifetime, he and the petitioner advised P.M., his [content redacted] social worker; A.T., a registered nurse at the [content redacted] clinic; his aunt; his brother-in-law; and his family physician, Dr. R., of their plan to conceive a child and have a family, even if [A.B.] passed away.

[49] P.M. has sworn an affidavit providing a detailed account of various discussions he had with both the petitioner and [A.B.] regarding their plan to have a baby, and how [A.B.]'s [content redacted], subsequent complications and [content redacted] delayed their plan. P.M. has also deposed that on February 2, 2011, [A.B.] told him that he wanted the petitioner to have their baby so that she would have a child in her life should he pass away.

[50] On or about April 4, 2007, while [A.B.] was awaiting the [content redacted] in [content redacted], he and the petitioner met with A.T., a nurse who specializes in [content redacted] reproductive issues. The petitioner and [A.B.] discussed their plan to have a family, and to conceive a child, even if [A.B.] died. A.T. counselled them on the potential obstacles; including the very real risk that [A.B.] might not live to see their child grow up. The petitioner and [A.B.] both confirmed that they wanted to proceed with their plan to have a child.

[51] Dr. R. provided two letters, attached as exhibits to K.L.W.'s affidavit in support of the petition. In his first letter dated June 23, 2011, Dr. R. confirmed that he and [A.B.] had discussed in great detail his patient's plan to have a family with the petitioner, and that on several occasions they discussed the details of the procedure for sperm extraction and storage.

[52] On June 30, 2016, Dr. R. provided a second letter, in which he stated:

> This is an undated letter about [J's] wishes.
>
> As his family doctor [until] the time of his unfortunate death in 2011, I want to reiterate the fact that [J] and I had numerous discussions about his plans to have sperm collected and preserved for possible future fertility treatment. His wishes also were for his wife, [K], to proceed with the plans of trying to conceive with his preserved sperm, in the event that he may pass away due to the complications of his disease. I also need to note that both him and his wife [were] very sure about [their] wishes for a possible future pregnancy.

[53] [A.B.] died without a will and leaving a spouse but no surviving descendants. Under s. 20 of the *Wills Estates and Succession Act*, S.B.C. 2009, c. 13, ("*WESA*") his estate must be distributed to the petitioner:

> **20** If a person dies without a will leaving a spouse but no surviving descendant, the intestate estate must be distributed to the spouse.

[54] At the time of his death, [A.B.] had no significant assets. The parties' joint savings account passed to the petitioner by survivorship, as did the vehicle they jointly owned. In these circumstances, the petitioner was not required to apply for a Grant of Administration.

[55] The petitioner is the sole beneficiary of [A.B.]'s estate. No other person claims any interest in [A.B.]'s Reproductive Material.

[56] I find that during their marriage, the petitioner and [A.B.] made a carefully considered plan to try to conceive a child using the Reproductive Material. The petitioner and [A.B.] agreed that even in the event of [A.B.]'s death, the petitioner would use the Reproductive Material for the purpose of conceiving a child through in-vitro fertilization. [A.B.] expressed his consent to his spouse's use of the stored sperm not only to the petitioner, but also to his [content redacted] social worker, to the nurse who counselled the parties on [content redacted] reproductive issues, and to his family physician.

[57] Further, in their consultations with Dr. [content redacted], the parties both expressed their wish to have a child together through in-vitro fertilization, using the sperm retrieved from [A.B.] and stored at Genesis.

[58] Unfortunately, no one informed [A.B.] of the requirement for his written consent to the petitioner's use of the Reproductive Material.

[59] In light of [A.B.]'s enduring wish, throughout their relationship, to conceive a child with the petitioner, I have no doubt that had the requirement for written consent been brought to his attention, [A.B.] would have promptly given his consent in writing to the petitioner's use, following his death, of the Reproductive Material.

DISCUSSION AND ANALYSIS

(a) Is the Reproductive Material Property?

[60] In particular contexts, courts in various jurisdictions have held that human sperm or ovums stored for reproductive purposes are property: *C.C. v. A.W.*, 2005 ABQB 219 (CanLII); *J.C.M. v. A.N.A.*, 2012 BCSC 584 (CanLII); *Lam v. University of British Columbia*, 2015 BCCA 2 (CanLII); *Yearworth v. North Bristol NHS* Trust, [2009] EWCA Civ 37; *Kate Jane Bazley v. Wesley Monash IVF Pty. Ltd.*, [2010] QSC 118 (Queensland SCTD); *Jocelyn Edwards: Re the Estate of the late Mark Edwards*, [2011] NSWSC 478.

[61] In *C.C. v. A.W.*, the parties disputed access to twins born to C.C. through a donation of sperm from A.W. Each party also claimed the four fertilized embryos that remained in a Toronto clinic. A.W. refused to consent to the release of the remaining embryos to C.C. for her use in another attempt to become pregnant.

[62] At paras. 20 and 21, the court found that A.W. had provided his sperm as an unqualified gift to C.C. to assist her to conceive children. The remaining fertilized embryos remained C.C.'s property. They were chattels she could use as she saw fit.

[63] In *J.C.M. v. A.M.A.*, the parties, during the course of their spousal relationship, each gave birth to one child using artificial insemination from sperm provided by a single donor. When the parties separated, they entered into a separation agreement that divided all joint property of their relationship. Through inadvertence, the separation agreement did not divide the 13 remaining sperm straws stored at Genesis. Madam Justice Russell concluded that the remaining sperm straws should be treated as property for the purpose of dividing them upon the dissolution of the parties' spousal relationship. In reaching that conclusion, Russell J. relied primarily upon *C.C.* and the decision of the England and Wales Court of Appeal in *Yearworth v. North Bristol NHS Trust*, [2009] EWCA Civ 37.

[64] In *Yearworth*, the Court held that stored sperm was property for the purposes of an action for negligent damage to property. The appellants were all diagnosed with cancer. They received treatment at a hospital operated by North Bristol NHS Trust and accepted advice that before undergoing chemotherapy, they could produce semen samples that the respondent would store for their future use. Before any of the appellants attempted to use the sperm, the hospital's freezing system failed and the sperm perished.

[65] The Court of Appeal began its analysis at para. 28:

> 28. A decision whether something is capable of being owned cannot be reached in a vacuum. It must be reached in context; and in this section of our judgment the context is whether an action in tort may be brought for loss of the sperm consequent upon breach of the Trust's duty to take reasonable care of it. The concept of ownership is no more than a convenient global description of different collections of rights held by persons over physical and other things. In his classic essay on "Ownership" (Oxford Essays in Jurisprudence, OUP, 1961, Chapter V) Professor Honore identified 11 standard incidents of ownership but stressed that not all of them had to be present for ownership to arise. He suggested that the second incident was "the right to use" and he added, at p.l 16, that:
>
> > "The right (liberty) to use at one's discretion has rightly been recognised as a cardinal feature of ownership and the fact that... certain limitations on use also fall within the standard incidents of ownership does not detract from its importance..."
>
> We have no doubt that, in deciding whether sperm is capable of being owned for the purpose which we have identified, part of our enquiry must be into the existence or otherwise of a nexus between the incident of ownership most strongly demonstrated by the facts of the case (surely here, the right, albeit limited, of the men to use the sperm) and the nature of the damage

> consequent upon the breach of the duty of care (here, their inability to use it notwithstanding that this was the specific purpose for which it was generated).

[66] In *Yearworth*, the Court recognized that historically, the common law did not allow any property interest in the human body, or body parts, living or dead. The Australian High Court in *Doodeward v. Spence*, (1908) 6 C.L.R. 406 created an exception to this rule when it recognized the right of ownership in a two-headed fetus preserved for commercial display as a curiosity. For the majority, Chief Justice Griffith held:

> [W]hen a person has by the lawful exercise of work or skills so dealt with a human body or part of the body in his lawful possession that it has acquired some attributes differentiating it from a mere corpse awaiting burial, he acquires a right to retain possession of it ...

[67] The Court in *Yearworth* held at para. 45(a) that developments in medical science "now require a re-analysis of the common law's treatment of and approach to the issue of ownership of parts or products of a living human body, whether for present purposes (viz. an action for negligence) or otherwise."

[68] At para. 45 (d), the Court stated that it was not content to see the common law in this area founded upon the principle in *Doodeward*, "which was devised as an exception to a principle, itself of exceptional character, relating to the ownership of the human corpse. Such ancestry does not commend it as a solid foundation."

[69] At para. 45(f), the Court held that for the purposes of their negligence claims, the appellants had ownership of the sperm which they had generated and ejaculated for the sole purpose of its later use for their benefit. Although their rights to use the sperm were limited by legislation, no person other than the appellants had any right in relation to the sperm.

[70] In *Yearworth*, at para. 45(b), the Court of Appeal emphasized the claim concerned products of a living human body intended for use by the persons whose bodies had generated them. The Court was not asked to consider whether there was any significant difference between such claims and claims in respect of donated products intended for use by others brought by the donors or by the donees of such products.

[71] In *J.C.M.*, Russell J., referring to *Yearworth*, commented at para. 63 that the need for the common law to keep up with medical science is compelling. At para. 69, she found that in the context of the dispute before her, the sperm was the property of the parties. Madam Justice Russell observed that the sperm had been treated as property by everyone involved in the transaction, including the donor, Genesis and the parties.

[72] Equally, in the case at bar, [A.B.], Genesis and the petitioner all treated the Reproductive Material as property.

[73] In *Lam v. University of British Columbia*, the Court of Appeal upheld the trial judge's finding that frozen human sperm is property for the purposes of the *Warehouse Receipt Act*, R.S.B.C. 1996, c. 481 ("*WRA*"). The facts of *Lam* are similar to *Yearworth*. The respondent, Mr. Lam, was the representative plaintiff in a class proceeding against the University of British Columbia. Members of the class had cancer. Before undergoing radiation treatment, they stored their frozen sperm in the appellant's freezer. As the result of a power failure, the stored sperm was damaged or destroyed.

[74] In *Lam*, Chiasson J.A., at para. 51, considered the Court in *Yearworth* had taken the correct approach to the development of the common law in holding that developments in medical science

required a re-examination of the issue of ownership of parts or products of a living human body. However, in concurring reasons for judgment, Bennett J.A., writing for herself and Frankel J.A., emphasized at para. 110 that in *Yearworth*, the Court was determining whether human sperm was property in a very narrow context, and was not determining whether sperm in other contexts, such as probate or matrimonial law, could be considered property.

[75] At paras. 113 and 114, Bennett J.A. stated:

> [113] The nature and scope of property interests that a person can have in human sperm need not be decided on the facts of this case. This case, unlike for example, *J.C.M. v. A.N.A.*, 2012 BCSC 584 (CanLII), does not deal with competing property interests in human sperm. This case considers whether Mr. Lam, a cancer patient, has ownership of the sperm he produced, such that he can contract for its storage to enable his personal use of the sperm at a later date. If so, the sperm is property, as something must be property if it is capable of being owned. There may also exist things that are property that cannot be owned, but that is not something that needs to be decided in the context of this case.
>
> [114] Not all of Professor Honoré's 11 incidents of ownership need to be present for ownership to arise (*Yearworth* at para. 28). Ownership of body parts must be contextual, and often limited by legislation because of public policy reasons. No one would argue that if a cancer patient cut her hair and stored it for the purpose of later making a wig after treatment that she did not "own" her hair in that context. On the other hand, legislation prevents the selling of sperm and organs such as kidneys, but does not prevent their donation. The prohibition on sale does not necessarily mean the legislation is inconsistent with ownership. It has provided limits to ownership in some contexts.

[76] In concluding that each of the sperm donors had sufficient ownership of their stored sperm for it to be "property" and thus "goods" within the meaning of the *WRA*, Bennett J.A. applied the same analytical framework as the Court had adopted in *Yearworth*. The donors had ejaculated the sperm; contracted to store the sperm for their own future use; paid a fee for storage; and could consent to the sperm being tested. Further, they could terminate the storage agreement; could consent to the release of the sperm to their physician to be used by their spouse; and could exclude all others from using the sperm. Although legislation or the storage agreement precluded the donors from disposing of the sperm by leaving it to someone in their will or from selling the sperm, they nonetheless had sufficient rights in relation to their own sperm for it to be defined as property.

[77] In *Bazley v. Wesley Monash IVF Pty. Ltd.*, the applicant's husband was diagnosed with liver cancer. Before his death, he provided a semen sample before undergoing chemotherapy. The respondent continued to store the semen samples following Mr. Bazley's death. When the applicant requested that the respondent continue to store the sperm, a spokesperson for the respondent informed her that in the absence of specific reproductive and assisted technology legislation in Queensland, the respondent operated under national guidelines for the use of assisted reproductive technology. The guidelines provided that clinics must not store or use gametes from deceased persons unless there was a clearly expressed written directive from the donor consenting to the use of the gametes. Mr. Bazley had died without providing such a direction. The respondent informed the applicant that in the absence of such a directive, it was prevented by the guidelines from continuing to store Mr. Bazley's sperm or using it to procure a pregnancy.

[78] The applicant applied to the Queensland Supreme Court for an order requiring the respondent to continue to hold and maintain stored semen belonging to her deceased husband, and restraining the respondent from destroying the semen until further order.

[79] Mr. Bazley had left a will by which he appointed the applicant and his accountant as executors and trustees, and made the applicant the principal beneficiary of his estate. However, his

will contained no directive concerning the posthumous use of his sperm.

[80] The court characterized the question for determination as whether sperm extracted and stored could be described as "property" and thus form part of Mr. Bazley's estate. In the course of reviewing the authorities, the Court referred to the conclusion of the Court of Appeal in *Yearworth* that developments in medical science required a re-analysis of the common law's treatment of the ownership of parts or products of a living human body. In *Bazley* at para. 27, White J. also found helpful the Court of Appeal's conclusion in *Yearworth* that since the appellants had ownership of their sperm for the purposes of claims in negligence, they had sufficient rights to the sperm to give rise to a gratuitous bailment of the sperm by them to the storage facility.

[81] After reviewing the factors the Court of Appeal took into account in *Yearworth* in finding the appellants had ownership of stored sperm for the purposes of their claims in negligence, White J. concluded in *Bazley* at para. 33:

> [33] The conclusion, both in law and in common sense, must be that the straws of semen currently stored with the respondent are property, the ownership of which vested in the deceased while alive and in his personal representatives after his death. The relationship between the respondent and the deceased was one of bailor and bailee for reward because, so long as the fee was paid, and contact maintained, the respondent agreed to store the straws. The arrangement could also come to an end when the respondent died without leaving a written directive about the semen, but plainly the bailor, or his personal representatives, maintained ownership of the straws of semen and could request the return of his property. …

[82] In *Jocelyn Edwards; Re the Estate of the late Mark Edwards*, [2011] NSWSC 478, the applicant sought a declaration that she, as the administrator of the estate of her late husband, was entitled to possession of sperm extracted from his body shortly after his death.

[83] *Edwards*, is distinguishable from the case at bar in so far as that case involved a claim by a spouse to possession of sperm posthumously extracted from her deceased husband.

[84] The court was not asked to recognize any property entitlement in the stored sperm beyond the applicant's entitlement to possession.

[85] Hulme J., applying *Doodeward*, held at paras. 82 and 83 that because the removal of the sperm was lawfully performed pursuant to orders of the court in a process involving the application of work and skill, it was property. The medical personnel who removed and then preserved and stored the sperm, did so as agents for Ms. Edwards.

[86] Ms. Edwards' counsel argued that she was entitled to possession, not on the basis that the semen was part of the assets of the estate, but rather on the ground that as "incidental to her duty as administrator in relation to the disposal of the deceased's body", she had a "right to possession of any part thereof". However the Court, referring to *Doodeward*, held Ms. Edwards' duty entitled her to do no more than give the deceased's body a "decent internment".

[87] Instead of basing his decision on Ms. Edwards' rights as an administrator, Hulme J. concluded that Ms. Edwards was the only person in whom an entitlement to property in the deceased's sperm would lie. The deceased was her husband; the sperm was removed on her behalf and for her purposes; no one else had any interest in the sperm specimens.

[88] One of the discretionary considerations the court took into account was whether there was any consent, either express or inferred, given by the patient. The court accepted Ms. Edwards' evidence of the desire she and her husband shared to have a child together, but refrained from expressing any

view as to the strength of the inference that Mr. Edwards was in favour of the claimant having their child even after his death.

[89] Here, I have found that [A.B.] expressed his consent both to the petitioner and to various care providers, to the use by the petitioner of the stored sperm for reproductive purposes after his death.

[90] Hulme J. recognized that Ms. Edwards would not be permitted to use the sperm to obtain assisted reproductive treatment in New South Wales. The assisted reproductive treatment legislation of that State prohibited fertility clinics from providing treatment to a woman using a gamete unless the deceased donor had consented to the use of his gametes after his death. The New South Wales legislation required a donor to give a treatment provider "written notice setting out [his] wishes in relation to the gamete", which Mr. Edwards had not done.

[91] While Ms. Edwards would not be able to undergo in-vitro fertilization in New South Wales, it was possible that she would be able to obtain assisted reproductive treatment elsewhere.

[92] In *Edwards* at para. 149, the court noted that there was no suggestion that anyone other than Ms. Edwards claimed any entitlement to possession of the sperm. The clinic holding the sperm had not asserted any interest. Only two outcomes were possible: either Ms. Edwards would take possession of the sperm or it would be destroyed. The court granted the declaration that Ms. Edwards was entitled to possession of the sperm recovered from the body of her late husband.

[93] Here, [A.B.] generated the sperm that was surgically retrieved from him, frozen and stored at Genesis.

[94] The sole purpose for extracting and storing the sperm was to preserve it for later use by [A.B.] and the petitioner to attempt to conceive a child. While [A.B.] was alive, Genesis stored the frozen sperm on his behalf and treated it as [A.B.]'s property. Only [A.B.] could consent to the use of the stored sperm for reproductive purposes permitted under the *AHRA*.

[95] While [A.B.] could not sell the stored sperm, only he could authorize its reproductive use by his spouse following his death, or donate it for the reproductive use of a third party.

[96] I find that [A.B.] had rights of use and ownership in the Reproductive Material sufficient to make it property.

(b) Did property in the Reproductive Material pass to the petitioner as the sole beneficiary of [A.B.]'s intestate estate?

[97] For ease of reference, I reproduce s. 20 of *WESA* here:

> 20 If a person dies without a will leaving the spouse but no surviving descendent, the intestate estate must be distributed to the spouse.

[98] Section 1 of *WESA* contains the following definitions:

> **"estate"** means the property of a deceased person
>
> **"personal property"** means every kind of property other than land
>
> **"property"** means land and personal property.

[99] Under s. 29 of the *Interpretation Act*, R.S.B.C. 1996 c. 238 "property" includes any right, title, interest, estate or claim to or in property.

[100] Here, though its use was restricted by legislation, the Reproductive Material was personal property of [A.B.]

[101] Since [A.B.]'s death, Genesis has stored the Reproductive Material for the petitioner and she has paid the annual storage fees. In the event that the petitioner were to decide to discard the stored sperm, Genesis would require her written consent to its disposal.

[102] No one other than the petitioner claims any right to the Reproductive Material.

[103] [A.B.] intended that the petitioner would use the stored sperm for reproductive purposes following his death.

[104] The claimant has paid the storage fees in order to store, preserve and maintain the stored sperm for her own reproductive use.

[105] In these circumstances, I find that following [A.B.]'s death, property in the Reproductive Material vested in the petitioner as [A.B.]'s spouse and sole beneficiary of his intestate estate.

(c) In the circumstances of this case, may the Court order the release of the Reproductive Material to the petitioner, notwithstanding the lack of the donor's written consent to the petitioner's use of the Reproductive Material for the purpose of creating an embryo?

[106] Section 8(1) of the *AHRA* provides:

> 8(1) No person shall make use of human reproductive material for the purpose of creating an embryo unless the donor of the material has given written consent, in accordance with the regulations, to its use for that purpose.

[107] Under section 3, ***donor*** means

> **(a)** in relation to human reproductive material, the individual from whose body it was obtained, whether for consideration or not; and
>
> **(b)** in relation to *in vitrio* embryo a donor is defined in the regulations.
>
> ***human reproductive material*** means a sperm, ovum or other human cell or human gene, and includes any part of any of them.

[108] Part 1 of the *Assisted Reproduction (Section 8 Consent) Regulations* contains the following provisions relevant to this application:

> 1(3) For the purposes of these Regulations, the written consent of a donor must be signed by the donor and attested by a witness.
>
> ...
>
> **Consent Given Under Subsection 8(1)**
>
> 3 Before a person makes use of human reproductive material for the purpose of creating an embryo, the person shall have a document signed by the donor of the material stating that, before consenting to the use of the material, the donor was informed in writing that

> (a) subject to paragraph (b), the human reproductive material will be used in accordance with the donor's consent to create an embryo for one or more of the following purposes, namely,
>
> (i) the donor's own reproductive use,
>
> (ii) following the donor's death, the reproductive use of the person who is, at the time of the donor's death, the donor's spouse or common-law partner,
>
> ...
>
> (g) if the human reproductive material is used to create *in vitro* embryos for the reproductive use of the person who, at the time of the donor's death, is the donor's spouse or common-law partner and there are *in vitro* embryos in excess of the spouse or common-law partner's reproductive needs, the excess *in vitro* embryos will be used in accordance with the spouse or common-law partner's consent and, if the use is providing instruction in assisted reproduction procedures, improving assisted reproduction procedures or other research, the consent of the donor in accordance with section 4;
>
> 4 (1) Before a person makes use of human reproductive material for the purpose of creating an embryo, the person shall have the written consent of the donor of the material stating that the material may be used for one or more of the following purposes:
>
> (a) the donor's own reproductive use;
>
> (b) following the donor's death, the reproductive use of the person who is, at the time of the donor's death, the donor's spouse or common-law partner;
>
> ...
>
> (2) A donor's consent stating that the donor's human reproductive material may be used for a purpose mentioned in paragraph (1)(b) or (c) shall also state whether any in vitro embryos that are not required for that purpose may be used for providing instruction in assisted reproduction procedures, improving assisted reproduction procedures or other research.

[109] The *Regulations* clearly specify the content and scope of the written consent required from a donor under s.8 of *AHRA*.

[110] In *Reference re Assisted Human Reproduction Act*, 2010 SCC 61 (CanLII), [2010] 3 S.C.R. 457, the majority of the Court upheld the constitutional validity of s. 8 as valid criminal law. As McLachlin C.J. stated at paras. 89 and 90:

> [89] Section 8 prohibits the use of reproductive material for the artificial creation of embryos, unless the donor has consented in accordance with the regulations: *Assisted Human Reproduction (Section 8 Consent) Regulations*, SOR/2007-137 (June 14, 2007). It is backed by penalties, specified in s. 60 of the Act.
>
> [90] Section 8 is grounded in valid criminal law purposes. As the Baird Report put it, "gamete donors . . . have a unique moral interest in the use of their genetic material" (p. 639). This morality interest stems from the danger that reproductive material may be used against a donor's will to create a human being, as well as from the possibility that an embryo, donated with the intent of creating a human being, could be used for different purposes, such as research. At the heart of s. 8 lies the fundamental importance that we ascribe to human autonomy. The combination of the embryo's moral status and the individual's interest in his or her own genetic material justify the incursion of the criminal law into the field of consent. There is a consensus in society that the consensual use of reproductive material implicates fundamental notions of morality. This confirms that s. 8 is valid criminal law.

[111] Here, the moral interest of [A.B.], shared by the petitioner, was to use the Reproductive Material to attempt to conceive a child with his spouse, a purpose permitted under *AHRA*. The

danger that human reproductive material might be used for a commercial purpose or for prohibited experimentation does not arise in this case.

[112] During the Hansard debate on the *Assisted Human Reproduction Act* (Bill C-13) (2nd Sess. 37th Parl.), the Minister of Health, the Honourable Anne McLellan identified free and informed consent and the prohibition of commercial trade in reproductive capacity as fundamental objectives of the *AHRA*.

[113] The Minister said this:

> Bill C-56, an act respecting assisted human reproduction, is important because it would provide a legislative framework to protect the health and safety of Canadians and their offspring. It would, at the same time, offer new hope for infertile people, as well as those suffering from illness and disease.
>
> it is important because it will fill a void. At present, Canada has no law to prohibit or regulate activities relating to assisted human reproduction. And it is equally important, because these issues are not easy ones. Nor should they be, as they go to the very heart of our values as a society, with regard to the way we build our families...
>
> The bill before us today speaks to one of the most fundamental human desires, having a family. The truth is that approximately one in eight Canadian couples faces the challenges of infertility. Bill C-56 seeks to provide a measure of comfort and protection through various means.
>
> There is another overarching purpose to this legislation. It is to make clear to Canadians and to the world our position on this complicated and fast changing issue. This legislation would clearly prohibit the cloning of human life. We will not let people profit from the creation of a baby or favour one type of child over another just because we have the technical capacity to do so.
>
> The legislation opens with a statutory declaration, six principles that would guide the interpretation of the proposed law. These principles assert that: the health and well-being of children born through AHR techniques must be paramount: human health, safety and dignity in the use of assisted human reproductive techniques and related research much be protected; AHR technologies affect all Canadians but women most particularly: the principle of free and informed consent is fundamental to the application of AHR technologies: there should be no trade in the reproductive capacity of women or men, or any commercial exploitation of children or adults involved in AHR: and human individuality and diversity as well as the integrity of the human genome must be safeguarded. [Emphasis added]

[114] By s. 2 of the *AHRA*, the Parliament of Canada recognizes and declares that:

> (d) the principle of free and informed consent must be promoted and applied as a fundamental condition of the use of human reproductive technologies.

[115] Unfortunately, [A.B.] was never informed of the requirement for his written consent to the petitioner's use of the Reproductive Material. As a consequence, he died without having the opportunity to provide that consent in writing.

[116] Counsel for the petitioner referred to two recent English authorities where donors of gametes had passed away without having fully complied with statutory requirements for their consent.

[117] In *Warren v. Care Fertility (North Hampton) Ltd. and another*, [2014] EWHC 602 (Fam), the claimant's husband was diagnosed with a brain tumour. Before undergoing treatment, he had a quantity of his sperm frozen at a fertility clinic. The husband gave his written consent, as required under the applicable regulations, to the storage and use of his gametes after death and named the claimant as the person to use his gametes in any treatment. However he died without having given

his written consent to the storage of the gametes for a period in excess of 10 years. Under the regulations that consent was required for the extended storage of the gametes.

[118] The Human Fertilization and Embryology Authority ("HFEA"), which regulates the storage and use of gametes and embryos in England, concluded that the requirement for written consent to extended storage had not been met.

[119] When the claimant applied for an extension of storage, the court allowed her claim on the ground that the clinic had failed to fulfil its statutory obligation to the husband to provide him with relevant information concerning the options available to him for the storage of his sperm. As a consequence of that failure, the husband was deprived of the opportunity to meet the requirements of the regulations for extended storage of his sperm. The court considered that allowing the gametes to perish would be contrary to the husband's intentions and would be grossly and conspicuously unfair to the claimant.

[120] In *Warren* at para. 136, the Court held that Parliament intended to enable a deceased man's sperm to be used by the named person, in this case his widow, provided that was the deceased's wish recorded in writing. The husband's wish was known although it was only partially recorded in compliance with the regulations.

[121] The Court sought to interpret the statutory provisions in a purposive way that was compatible with the applicant's right under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms to decide to seek to become a parent by her deceased husband. In *Warren*, where the clinic failed to inform the husband of his options and the requirement for written consent for storage beyond 10 years, the court concluded that it was right and proper to make the declaration sought by the claimant, authorizing the extended storage of the deceased's gametes.

[122] Counsel for the petitioner also drew to this court's attention the recent decision of the English Court of Appeal in *R (On the application of I.M. and another) v. Human Fertilization and Embryology Authority*, [2016] EWCA Civ 611. In *R*, the applicants' daughter, A, had consented to treatment for egg removal and storage, and to the use of her eggs after her death.

[123] The applicants applied to HFEA to export A's eggs from the facility where they were stored in England to a fertility centre in the United States. In order to give effect to their late daughter's wishes, the applicants intended to use her eggs to create an embryo with anonymous donor sperm, and to implant an embryo in A's mother, the second applicant. Any child born would be brought up as the appellants' grandchild.

[124] Under the *Human Fertilization and Embryology Act 1990* ["*HFE Act*"], a fertility clinic could only provide services using a person's gametes with that person's effective consent. To that end, the *HFE Act* provides that, before treatment, a person must be given "such relevant information as is proper", and offered counselling.

[125] While A had consented to treatment for egg removal and storage and to the use of her eggs after her death, she had not completed any form providing detailed, precise use of her eggs.

[126] Under the United Kingdom legislation, HFEA could waive the requirement for consent to be in writing and signed by the person giving it when approving the export of the gametes. However, HFEA concluded there was insufficient evidence that A had consented to the proposed use of her gametes after her death and refused approval.

[127] The applicants applied for judicial review of the ground that the HFEA decision was irrational and took into account matters which ought not to have been considered. After a High Court Judge refused to set aside the decision, the applicants appealed.

[128] The applicant mother had given evidence of conversations she had with A regarding A's desire to have her mother act as a surrogate and for the applicants to raise her children. On its review of the application, HFEA concluded it had inadequate evidence of both consent and the offer of information concerning the export of the gametes, their admixture with donor sperm, the use of a surrogate and the use of the gametes in treating A's mother, rather than A.

[129] The Court of Appeal concluded that the reasons of HFEA were irrational. Where A had consented to the use of her eggs after her death, HFEA should have considered whether it was inherently probable that A would have refused her consent to an anonymous sperm donor if that was the only way her wishes could be implemented.

[130] These cases are of only limited assistance. In each case, the result flowed largely from the court's analysis of the applicable statutory framework. However, it is noteworthy that in *Warren*, as in the case at bar, the donor, through no fault of his own, was deprived of the opportunity to fulfil the statutory requirements for written consent.

[131] The circumstances of this case are extraordinary. [A.B.] freely and repeatedly expressed his consent to the petitioner's use, following his death, of the Reproductive Material. He communicated his agreement to the petitioner's use of his stored sperm to the petitioner, to his social worker, to a nurse at the [content redacted] hospital where his [content redacted] was performed, to his family doctor, and to Genesis.

[132] [A.B.] fully understood that the Reproductive Material would be used in accordance with his wishes to create an embryo, and would be used, following his death, by the petitioner to attempt to conceive a child.

[133] One of the guiding principles of the *AHRA* is the promotion and application of free and informed consent as a fundamental condition for the use of human reproductive technologies. Another guiding principle, set out in s. 2(b), is that the benefits of the technology for individuals, families and society can be most effectively secured by appropriate measures for the protection and promotion of human health, safety and dignity. Here, [A.B.] and the petitioner sought to use the technology in order to have a child of their own. They took appropriate steps to ensure that the [content redacted] would not be passed to any child they conceived through in-vitro fertilization. They consulted with medical specialists about the safe use of the technology.

[134] To deny the petitioner the use of the Reproductive Material intended by [A.B.] would be both unfair and an affront to her dignity.

[135] [A.B.] expressed his consent to the petitioner's use of the Reproductive Material after he had the benefit of professional counselling from his [content redacted] social worker, a nurse trained in [content redacted] fertility issues and his family doctor.

[136] I conclude that in the circumstances of this case, [A.B.]'s consent, although not in writing, specifically contemplated the petitioner's reproductive use of his stored sperm after his death, and was sufficient to satisfy the fundamental objective of the *AHRA* that the donor's consent must be both free and informed. Accordingly, the Court may order the release of the Reproductive Material to the petitioner to enable her use of that material for the purpose of creating an embryo.

RELIEF

[137] This Court declares that the Reproductive Material of [A.B.] stored at Genesis is the sole property of the petitioner.

[138] The Reproductive Material shall be released by Genesis Fertility Centre to the petitioner, K.L.W., for her use to create embryos for the reproductive use of the petitioner, and for no other purpose.

[139] The sealing order made in this proceeding on August 5, 2016 by the Honourable Justice Griffin remains in force and effect.

"PEARLMAN J."

Federal Law Gazette, Part I, No. 69, issued in Bonn, 19th December 1990, page 2746

Act
for Protection of Embryos
(The Embryo Protection Act)

Gesetz
zum Schutz von Embryonen
(Embryonenschutzgesetz – ESchG)

Of 13th December 1990

The following Act has been adopted by the Bundestag:

Section 1
Improper use of reproduction technology

(1) Anyone will be punished with up to three years imprisonment or a fine, who

1. transfers into a woman an unfertilised egg cell produced by another woman,
2. attempts to fertilise artificially an egg cell for any purpose other than bringing about a pregnancy of the woman from whom the egg cell originated,
3. attempts, within one treatment cycle, to transfer more than three embryos into an woman,
4. attempts, by gamete intrafallopian transfer, to fertilise more than three egg cells within one treatment cycle,
5. attempts to fertilise more egg cells from a woman than may be transferred to her within one treatment cycle,
6. removes an embryo from a woman before completion of implantation in the uterus, in order to transfer it to another woman or to use it for another purpose not serving its preservation, or
7. attempts to carry out an artificial fertilisation of a woman who is prepared to give up her child permanently after birth (surrogate mother) or to transfer a human embryo into her.

(2) Likewise anyone will be punished who

1. brings about artificially the penetration of a human egg cell by a human sperm cell, or
2. transfers a human sperm cell into a human egg cell artificially,

without intending to bring about a pregnancy in the woman from whom the egg cell originated.

(3)

1. In the case of paragraph 1, number 1, 2 and 6, the woman from whom the egg cell or embryo originated, and likewise the woman into whom the egg cell or embryo will be transferred, and

2. in the case of paragraph 1, number 7, the surrogate mother and likewise the person who wishes to take long-term care of the child,

will not be punished.

(4) In the case of paragraph 1, number 6, and paragraph 2, any attempt is punishable.

Section 2

Improper use of human embryos

(1) Anyone who disposes of, or hands over or acquires or uses for a purpose not serving its preservation, a human embryo produced outside the body, or removed from a woman before the completion of implantation in the uterus, will be punished with imprisonment up to three years or a fine.

(2) Likewise anyone will be punished who causes a human embryo to develop further outside the body for any purpose other than the bringing about of a pregnancy.

(3) Any attempt is punishable.

Section 3

Forbidden sex selection

Anyone who attempts to fertilise artificially a human egg cell with a sperm cell, that is selected for the sex chromosome contained in it, will be punished with up to one years's imprisonment or a fine. This does not apply when the selection of an sperm cell is made by a doctor in order to preserve the child from falling ill with Duchenne-type muscular dystrophy or a similarly severe sex-linked genetic illness, and the illness threatening the child is recognised as being of appropriate severity by the body responsible according to Land legislation.

Section 4

Unauthorised fertilisation, unauthorised embryo transfer and artificial fertilisation after death

(1) Anyone will be punished with up to three years imprisonment or a fine, who

1. attempts artificially to fertilise an egg cell without the woman, whose egg cell is to be fertilised, and the man, whose sperm cell will be used for fertilisation, having given consent,

2. attempts to transfer an embryo into an woman without her consent, or

3. knowingly fertilises artificially an egg cell with the sperm of a man after his death.

(2) In the case of paragraph 1 number 3, the woman by whom the artificial fertilisation was taken on will not be punished.

Section 5

Artificial alteration of human germ line cells

(1) Anyone who artificially alters the genetic information of a human germ line cell will be punished with imprisonment up to five years or a fine.

(2) Likewise anyone will be punished who uses a human germ cell with artificially altered genetic information for fertilisation.

(3) Any attempt is punishable.

(4) Paragraph 1 does not apply to

1. an artificial alteration of the genetic information of a germ cell situated outside the body, if any use of it for fertilisation has been ruled out,

2. an artificial alteration of the genetic information of a different body's germ line cell, that has been removed from a dead embryo, from a human being or from a deceased person, if it has ruled out that

   a) they will be transferred to an embryo, fetus or human being or

   b) a germ cell will originate from them,

   and likewise

3. inoculation, radiation, chemotherapeutic or other treatment by which an alteration of the genetic information of germ line cells is not intended.

Section 6

Cloning

(1) Anyone who causes artificially a human embryo to develop with the same genetic information as another embryo, fetus, human being or deceased person will be punished with imprisonment up to five years or a fine.

(2) Likewise anyone will be punished who transfers into a woman an embryo designated in paragraph 1.

(3) Any attempt is punishable.

Section 7

Formation of chimaerae and hybrids

(1) Anyone who attempts

1. to unite embryos with different genetic material to a cell conglomerate using at least one human embryo,

2. to join a human embryo with a cell that contains genetic information different from the embryo cells and induces them further to develop, or

3. by fertilisation of a human egg cell with the sperm of an animal or by fertilisation of an animal's egg cell with the sperm of a man to generate an embryo capable of development,

will be punished with imprisonment up to five years or a fine.

(2) Likewise anyone will be punished who attempts

1. to transfer an embryo arising out of a procedure defined in paragraph 1 to

   a) a woman or

   b) an animal

   or

2. to transfer an human embryo into an animal.

Section 8

Definition

(1) For the purpose of this Act, an embryo already means the human egg cell, fertilised and capable of developing, from the time of fusion of the nuclei, and further, each totipotent cell removed from an embryo that is assumed to be able to divide and to develop into an individual under the appropriate conditions for that.

(2) In the first twenty four hours after nuclear fusion, the fertilised human egg cell is held to capable of development except when it is established before expiry of this time period that it will not develop beyond the one cell stage.

(3) Germ line cells, for the purpose of this Act, are all cells that lead of the egg and sperm cells to the resultant human being and, further, the egg cell from capture or penetration of the sperm cell until the ending of fertilisation by fusion of the nuclei.

Section 9

Medical proviso

Only a physician may carry out

1. artificial fertilisation,

2. transfer of a human embryo into an women,

3. preservation of a human embryo or human egg cell which has already been penetrated by, or has artificially captured, a human sperm cell.

Section 10

Voluntary participation

No one is obliged to carry out the measures described in section 9 above or to take part in them.

Section 11

Offences against the medical proviso

(1) Anyone who, without being a physician,

1. carries out an artificial fertilisation contrary to section 9 number 1 or

2. transfers a human embryo into a woman contrary to section 9 number 2,

will be punished with up to one year's imprisonment or a fine.

(2) In the case of section 9 number 1, a woman who has carried out on her an artificial insemination, and the man whose sperm is used for artificial insemination will not be punished.

Section 12

Administrative fines

(1) An administrative offence shall be deemed to have been committed by a person who, without being a physician, in violation of section 9 number 3, preserves a human embryo or a human egg cell as described therein.

(2) The committing of an administrative offence may be punished with a fine not exceeding five thousand deutsche marks.

Section 13

Entry into force

The present Act shall enter into force on 1st January 1991.

The laws by the Bundesrat according the constitution are respected.

The above Act is herewith signed and will be promulgated in the Federal Law Gazette.

Bonn, 13th December 1990

The Federal President
Weizsäcker

The Federal Chancellor
Dr. Helmut Kohl

The Federal Minister of Justice
Engelhard

The Federal Minister for Youth, Family and Health
Ursula Lehr

The Federal Minister for Research and Technology
Riesenhuber

PARLIAMENTARY COUNSEL OFFICE
TE TARI TOHUTOHU PĀREMATA

New Zealand Legislation

Human Assisted Reproductive Technology Act 2004

Reprint as at 1 March 2017

Human Assisted Reproductive Technology Act 2004

Public Act 2004 No 92
Date of assent 21 November 2004
Commencement see section 2

Note

Changes authorised by subpart 2 of Part 2 of the Legislation Act 2012 have been made in this official reprint.

Note 4 at the end of this reprint provides a list of the amendments incorporated.

This Act is administered by the Ministry of Justice.

Contents

Part 3
Information about donors of donated embryos or donated cells and donor offspring

Application

1 Title

This Act is the Human Assisted Reproductive Technology Act 2004.

2 Commencement

(1) Part 1, subpart 1 of Part 2, the provisions of section 67 (other than subsection (2)(c)(ii) to (v)), sections 68 to 75, the provisions of section 76(1), sections 77, 79 to 85, and 87, and Schedules 1 and 2 come into force on the day after the date on which this Act receives the Royal assent.

(2) The rest of this Act comes into force on the expiry of 9 months after the date on which it receives the Royal assent.

Part 1
Preliminary provisions

3 Purposes

This Act has the following purposes:

(a) to secure the benefits of assisted reproductive procedures, established procedures, and human reproductive research for individuals and for society in general by taking appropriate measures for the protection and promotion of the health, safety, dignity, and rights of all individuals, but particularly those of women and children, in the use of these procedures and research:

(b) to prohibit unacceptable assisted reproductive procedures and unacceptable human reproductive research:

(c) to prohibit certain commercial transactions relating to human reproduction:

(d) to provide a robust and flexible framework for regulating and guiding the performance of assisted reproductive procedures and the conduct of human reproductive research:

(e) to prohibit the performance of assisted reproductive procedures (other than established procedures) or the conduct of human reproductive research without the continuing approval of the ethics committee:

(f) to establish a comprehensive information-keeping regime to ensure that people born from donated embryos or donated cells can find out about their genetic origins.

4 Principles

All persons exercising powers or performing functions under this Act must be guided by each of the following principles that is relevant to the particular power or function:

(a) the health and well-being of children born as a result of the performance of an assisted reproductive procedure or an established procedure should be an important consideration in all decisions about that procedure:

(b) the human health, safety, and dignity of present and future generations should be preserved and promoted:

(c) while all persons are affected by assisted reproductive procedures and established procedures, women, more than men, are directly and significantly affected by their application, and the health and well-being of women must be

protected in the use of these procedures:

(d) no assisted reproductive procedure should be performed on an individual and no human reproductive research should be conducted on an individual unless the individual has made an informed choice and given informed consent:

(c) donor offspring should be made aware of their genetic origins and be able to access information about those origins:

(f) the needs, values, and beliefs of Māori should be considered and treated with respect:

(g) the different ethical, spiritual, and cultural perspectives in society should be considered and treated with respect.

5 Interpretation

In this Act, unless the context otherwise requires,—

advisory committee means the committee established under section 32

approval, in relation to the ethics committee, means an approval given by the ethics committee under section 19

assisted reproductive procedure or **procedure**—

(a) means a procedure performed for the purpose of assisting human reproduction that involves—

(i) the creation of an *in vitro* human embryo; or

(ii) the storage, manipulation, or use of an *in vitro* human gamete or an *in vitro* human embryo; or

(iii) the use of cells derived from an *in vitro* human embryo; or

(iv) the implantation into a human being of human gametes or human embryos; but

(b) does not include an established procedure

authorised person—

(a) means a person authorised in writing by the Director-General of Health to enter and inspect premises for the purposes of this Act; and

(b) includes the Director-General of Health

cloned embryo means a human embryo that is a genetic copy (whether identical or not) of a living or dead human being, a still-born child, a human embryo, or a human foetus

Customs officer has the same meaning as in section 2(1) of the Customs and Excise Act 1996

donated cell means the whole or part of an *in vitro* human gamete or other *in vitro* human cell that is donated for reproductive purposes

donated embryo means an *in vitro* human embryo that is donated for reproductive purposes

donor means a person from whose cells a donated embryo is formed or from whose body a donated cell is derived; and,—

(a) in relation to a donor offspring, means the donor or donors of a donated embryo or a donated cell from which the donor offspring was formed; and

(b) in relation to an embryo that is a donated embryo or is formed from a donated cell, means the donor or donors of that donated embryo or donated cell; and

(c) in relation to a provider, means the donor or donors of a donated embryo or a donated cell used or available for use in a service performed or arranged by the provider

donor offspring,—

(a) in relation to a donor, means a person formed from a donated embryo, or a donated cell, that is derived wholly or partly from the donor's body; and

(b) in relation to a provider, means a person formed from a donated embryo or a donated cell used in a service performed or arranged by the provider

embryo includes a zygote and a cell or a group of cells that has the capacity to develop into an individual; but does not include stem cells derived from an embryo

established procedure means any procedure, treatment, or application declared to be an established procedure under section 6

ethics committee means the committee designated under section 27

gamete means—

(a) an egg or a sperm, whether mature or not; or

(b) any other cell (whether naturally occurring or artificially formed or modified) that—

(i) contains only 1 copy of all or most chromosomes; and

(ii) is capable of being used for reproductive purposes

guardian, in relation to a donor offspring, means the donor offspring's guardian within the meaning of the Guardianship Act 1968

human reproductive research means research that uses or creates a human gamete, a human embryo, or a hybrid embryo

hybrid embryo means an embryo that is formed—

(a) by fusing a human gamete with a non-human gamete; or

(b) by fusing or compacting a cell of a human embryo with the cell of a non-human embryo; or

(c) by fusing or compacting a cell or cells of a human embryo with the cell or cells of another human embryo; or

(d) by transferring the nucleus of a human cell into a non-human egg or a non-human embryo; or

(e) by transferring the nucleus of a non-human cell into a human egg or a human embryo

identifying information, in relation to any person, means that person's name, address, or contact details; and includes any information that is likely to enable another person to ascertain that person's name, address, or contact details

implant includes insert into and inject into

in vitro, in relation to an embryo, a foetus, gamete, or cell means an embryo, a foetus, gamete, or cell that is outside a living organism

Minister means the Minister of Health

person responsible, in relation to an activity approved by the ethics committee, means the person for the time being approved under section 20

provider—

(a) means a person who, in the course of a business (whether or not carried on with a view to making a profit), performs, or arranges the performance of, services in which donated embryos or donated cells are used; and

(b) includes a successor provider

Registrar-General means the person for the time being appointed to that office under section 79(1) of the Births, Deaths, Marriages, and Relationships Registration Act 1995

still-born child has the meaning given to it by section 2 of the Births, Deaths, Marriages, and Relationships Registration Act 1995

successor provider means the successor, receiver, or liquidator of any provider or successor provider

surrogacy arrangement means an arrangement under which a woman agrees to become pregnant for the purpose of surrendering custody of a child born as a result of the pregnancy

valuable consideration includes an inducement, discount, or priority in the provision of a service.

Section 5 **Registrar-General**: amended, on 24 January 2009, by section 47 of the Births, Deaths, Marriages, and Relationships Registration Amendment Act 2008 (2008 No 48).

Section 5 **still-born child**: amended, on 24 January 2009, by section 47 of the Births, Deaths, Marriages, and Relationships Registration Amendment Act 2008 (2008 No 48).

6 Procedures or treatments may be declared to be established procedures

(1) The Governor-General may, by Order in Council made on the recommendation of the Minister given after advice tendered by the advisory committee, declare any of the following to be an established procedure for the purposes of the definition of assisted reproductive procedure in section 5:

(a) a medical, scientific, or technical procedure:

(b) a medical treatment:

(c) an application of a medical, scientific, or technical procedure:

(d) an application of a medical treatment.

(2) In tendering advice to the Minister, under subsection (1), about a procedure or treatment, the advisory committee must provide the Minister with a report that sets out the following:

(a) information about the procedure or treatment:

(b) an assessment, drawn from published and peer reviewed research, of the known risks and benefits to health of the procedure or treatment:

(c) advice as to whether, in its expert opinion, the known risks to health of the procedure or treatment fall within a level of risk that is acceptable in New Zealand:

(d) an ethical analysis of the procedure or treatment:

(e) advice as to whether, in its expert opinion, the Minister should recommend that the procedure or treatment be declared an established procedure.

(3) Promptly after providing the Minister with a report under subsection (2), the chairperson of the advisory committee must ensure that the report is published on the Internet.

7 Act binds the Crown

This Act binds the Crown.

Part 2
Prohibited and regulated activities

Subpart 1—Prohibited actions

8 Prohibited actions

(1) Every person commits an offence who takes an action described in Schedule 1.

(2) Every person commits an offence who, knowing that an *in vitro* gamete, an *in vitro* embryo or an *in vitro* foetus, or an *in vitro* being has been formed by an action described in Schedule 1, imports into, or exports from, New Zealand that *in vitro* gamete, *in vitro* embryo, *in vitro* foetus, or *in vitro* being.

(3) Every person commits an offence who, knowing that a gamete, an embryo or foetus, or a being has been formed by an action described in Schedule 1, possesses, without reasonable excuse, that gamete, embryo, foetus, or being.

(4) A person who commits an offence against this section is liable on conviction to imprisonment for a term not exceeding 5 years or a fine not exceeding $200,000, or both.

Section 8(4): amended, on 1 July 2013, by section 413 of the Criminal Procedure Act 2011 (2011 No 81).

9 Duty to stop development of *in vitro* human or hybrid embryos

(1) This section applies to an *in vitro* human embryo or an *in vitro* hybrid embryo that has been artificially formed (whether in New Zealand or elsewhere).

(2) Every person commits an offence who, knowing that the embryo has been developing after the specified day, intentionally—

(a) imports the embryo into New Zealand or exports the embryo from New Zealand; or

(b) does anything,—

(i) in the case of a human embryo, to cause the further development of the embryo outside the body of a human being; or

(ii) in the case of a hybrid embryo, to cause the further development of the embryo; or

(c) possesses the embryo with a view to using it in human reproductive research or for reproductive purposes; or

(d) uses the embryo in human reproductive research or for reproductive purposes.

(3)

Every provider and every person responsible for an activity approved by the ethics committee commits an offence who fails to take all practicable steps to ensure that subsection (2) is not contravened.

(4) For the purposes of this section, **specified day** means,—

(a) in relation to a human embryo, the 14th day after its formation (exclusive of any day during which the development of the embryo is suspended); and

(b) in relation to a hybrid embryo, the 14th day after its formation (exclusive of any day during which the development of the embryo is suspended) or the day on which the primitive streak appears, whichever is the earlier.

(5) Every person who commits an offence against subsection (2) is liable on conviction to imprisonment for a term not exceeding 2 years or to a fine not exceeding $100,000, or both.

(6) Every person who commits an offence against subsection (3) is liable on conviction to a fine not exceeding $50,000.

Section 9(5): amended, on 1 July 2013, by section 413 of the Criminal Procedure Act 2011 (2011 No 81).
Section 9(6): amended, on 1 July 2013, by section 413 of the Criminal Procedure Act 2011 (2011 No 81).

10 Restriction and prohibition on further storage of human *in vitro* embryos and human *in vitro* gametes stored for applicable period (10 years and extensions)

(1) This section restricts then prohibits storage, manipulation, and use of a human *in vitro* gamete or a human *in vitro* embryo (being an embryo whose development has been suspended) that has been stored for the applicable period.

(2) For a 6-month period starting with the expiry of the applicable period, any person may store for disposal or dispose of, but no person may in any other way store, manipulate, or use, the gamete or embryo.

(3) After that 6-month period, no person may for any purpose store, manipulate, or use the gamete or embryo.

(4) **Applicable period**, in this section and sections 10A to 10D, and in relation to the gamete or embryo, means—

(a) a period of 10 years starting when storage of the gamete or embryo began; or

(b) if the ethics committee has, under section 10A, approved in respect of the gamete or embryo 1 or more extensions, means that 10-year period and all of those extensions.

(5) In calculating, for the purposes only of this section, the period for which a human *in vitro* gamete or a human *in vitro* embryo has been stored, any storage of that gamete or embryo before 22 November 2004 must be disregarded.

(6) In calculating, for the purposes only of this section, the period for which a human *in vitro* embryo has been stored, that period must be treated as including any storage on or after 22 November 2004 of the only stored, or the (or any one of the) longest stored, human *in vitro* gamete or gametes (if any) used in that embryo's creation.

(7) In calculating, for the purposes only of this section, whether a gamete or embryo has been stored for the applicable period, storage of that gamete or embryo, or of a gamete used in creating that embryo, must be included even if it occurred outside New Zealand.

(8) This section is not limited by, and does not limit, provisions of subpart 2 of this Part that apply to storage—

(a) of an *in vitro* human gamete or an *in vitro* human embryo; and

(b) that is, or is part of, any assisted reproductive procedure or human reproductive research.

(9) Every person commits an offence who contravenes this section and is liable on conviction to a fine not exceeding $20,000.

Section 10: substituted (with effect on 22 November 2004), on 16 October 2010, by section 5 of the Human Assisted Reproductive Technology (Storage) Amendment Act 2010 (2010 No 117).
Section 10(9): amended, on 1 July 2013, by section 413 of the Criminal Procedure Act 2011 (2011 No 81).

10A Ethics committee may approve extensions

(1) The ethics committee may from time to time, before the applicable period expires and on a written application for the purpose, approve in respect of the gamete or embryo 1 or more extensions to the applicable period.

(2) An approval given under this section in respect of storage of the only stored, or the (or any one of the) longest stored, gamete or gametes used in the creation of an embryo also applies to any storage of that embryo.

(3) Sections 29 and 30 apply (without limitation) to, and to the giving, changing, or cancelling in accordance with sections 10B to 10D of, an approval under this section.

Section 10A: inserted, on 16 October 2010, by section 6 of the Human Assisted Reproductive Technology (Storage) Amendment Act 2010 (2010 No 117).

10B Giving of approval under section 10A

(1) The ethics committee may give an approval under section 10A (in this section and sections 10C and 10D called an **approval**) only if—

(a) the giving of approvals under section 10A is covered in relevant guidelines issued by the advisory committee; and

(b) the ethics committee is satisfied that the approval is consistent with relevant guidelines issued and relevant advice given by the advisory committee.

(2) If relevant new information becomes available, the ethics committee may, for any reason that it considers appropriate, reconsider an application—

(a) for an approval; and

(b) that it has previously declined.

(3) The ethics committee may give an approval subject to any conditions it thinks fit to impose.

Section 10B: inserted, on 16 October 2010, by section 6 of the Human Assisted Reproductive Technology (Storage) Amendment Act 2010 (2010 No 117).

10C Changing of approval under section 10A

(1) The ethics committee may change an approval only if—

(a) the changing of approvals under section 10A is covered in relevant guidelines issued by the advisory committee; and

(b) the ethics committee is satisfied that the changing of the approval is consistent with relevant guidelines issued and relevant advice given by the advisory committee.

(2) The ethics committee may change an approval in 1 or more of the following respects:

(a) by varying a condition previously imposed on the approval:

(b) by revoking a condition previously imposed on the approval:

(c) by imposing 1 or more new conditions on the approval.

(3) The ethics committee may change the approval on its own initiative only if it is satisfied that the change is necessary—

(a) to ensure consistency with this Act or relevant guidelines issued or relevant advice given by the advisory committee before or after the date on which the approval was given; or

(b) to correct an error or omission made by the ethics committee.

(4) The ethics committee may not change the approval on its own initiative unless it has first—

(a) informed the person storing the gamete or embryo under the approval concerned why it is considering the change; and

(b) given that person a reasonable time to make written submissions and be heard on the question, either personally or by that person's representative; and

(c) considered any submissions made in that time.

(5) The ethics committee may change the approval at the request of the person storing the gamete or embryo under the approval if it is satisfied that the change is consistent with relevant guidelines issued or relevant advice given by the advisory committee before or after the date on which the approval was given.

Section 10C: inserted, on 16 October 2010, by section 6 of the Human Assisted Reproductive Technology (Storage) Amendment Act 2010 (2010 No 117).

10D Cancellation of approval under section 10A

(1) The ethics committee may cancel an approval only if—

(a) the cancellation of approvals under section 10A is covered in relevant guidelines issued by the advisory committee; and

(b) the ethics committee is satisfied that the cancellation is consistent with relevant guidelines issued and relevant advice given by the advisory committee.

(2) The ethics committee may cancel an approval, in whole or in part, if it is satisfied—

The Law Itself is not above Human Beings: Comments on China's First Case on Frozen Embryos

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Text

Abstract: The increasing use of assisted reproductive technology has created new ethical and legal issues in China, similar to many other parts of the world. With insufficient legal constraints and a growing use of assisted reproductive technology, the Jiangsu Court of China delivered the ***first*** *ruling concerning the legal characteristics and inheritance issues of* ***frozen embryos****. The ruling recognizes the deceased couple's parents' joint custody and right to dispose of the remaining* ***frozen embryos*** *after the death of the donor couple. This article presents the current legal regulations regarding assisted reproductive technology in China, with a specific focus on the judgment of the Jiangsu Court. This article compares the legal and ethical considerations of the Chinese court with those of rulings in other jurisdictions and identifies the issues that require further clarification.*

MATRIMONIAL LAW

I. Introduction

The **first** Chinese human baby conceived through in vitro fertilization (IVF) technology (Martin and Lagod, 1990) was born in Beijing In 1988 (Jiang, 2014). Since then, the number of babies conceived through assisted reproductive treatment (ART) (Noah, 2003), especially IVF, has increased rapidly in China. According to statistics from **China's** Ministry of Health (CMOH), there were approximately 10,000 IVF babies born in China from 1988 to 2004. However, in 2012, over 100,000 IVF babies were born in one well-known reproductive and genetic hospital in Hu Nan Province. It has been estimated that the annual number of new-born IVF babies has exceeded 300,000 in China despite a lack of solid official statistics (Shen, 2014). The rising ART market demand has also resulted in the increase in the number of ART organizations. By the end of 2011, there were 178 reproductive centres and 13 sperm banks approved by CMOH. These facilities are located in 30 provinces, autonomous

regions, and municipalities, except Tibet. It is believed that the total number of various ART organizations had reached 358 at the end of 2012 (Qiao and Feng, 2014).

Chinese law lags behind the rapid expansion of the ART market. Currently, CMOH has issued only two regulations that manage and control ART operations. These regulations, entitled *Measures on the Administration of Assisted Human Reproductive Technology* [1] and *Measures on the Administration of Human Sperm Banks* were enacted in 2001. [2] In May 2001, CMOH also published relevant technical specifications, basic standards, and ethical principles for ART. [3] In 2003, the methods and standards were amended, and the amendments included incorporation of the *Ethical Principles for Human Assisted Reproduction and Sperm Banks* into new regulations called *Technical Standards and Ethical Principles*. [4] According to these regulations, reproductive programs and sperm banks in China must be affiliated with authorized hospitals. The application of ART should be for medical purposes and comply with the national one-child family planning policy (Attane, 2002), ethical principles, and the provisions of relevant laws. Medical institutions and medical personnel are prohibited from selling gametes, zygotes, and **embryos** and implementing gestational surrogacy technology and gender selection in any form.

Moreover, the *Technical Standards and Ethical Principles* specify the institutional, personnel, and procedural requirements for ART. These standards further establish seven ethical principles to practice ART and use sperm banks, including (i) the principle in favour of the patient. Infertile couples should be fully informed regarding all the risks and options, and they can determine how to dispose of the human gametes and **embryos** obtained during ART surgery. (ii) The principle of informed consent requires that ART surgery cannot be implemented without written informed consent voluntarily signed by the couples. (iii) The principle of protection of offspring indicates that medical personnel must inform the couple that their IVF babies enjoy the same legal rights as naturally born babies. (iv) The principle of social welfare involves several proscriptions. The 2003 amendments ban the use of IVF by unmarried women or couples with cousin marriage or certain infectious diseases; they also prohibit gestational surrogacy and the marketing of sperm, eggs, and **embryos**. Non-medical gender choice and reproductive cloning technology are also banned. (v) The principle of confidentiality means that the mutual blind principle should be followed when donated sperm or eggs are used in the ART process. (vi) The principle to prevent commercialization expects that medical institutions will not abuse ART for commercial purposes. (vii) The principle of ethical oversight suggests that every ART organization should establish medical ethics committees and accept their guidance and supervision. [5]

However, the above regulations and guidance are limited to regulating ART organizations. There is no legislation that addresses the legal status of human **embryos**. Only recently, a Chinese court in east **China's** Jiangsu Province has had to rule on this issue. The final judgement of the Wuxi Intermediate People's Court in the Jiangsu province on 17 September 2014 clarified for the **first** time the issues over ownership, inheritance, and the disposition of **frozen** human **embryos** when death precludes the parties from using the **embryos** to conceive. [6] The landmark **case** not only clarifies several ambiguous legal issues that involve **embryos** but also shows

several specific cultural, ethical, and practical considerations that are different from courts in other jurisdictions that have addressed similar disputes.

This article provides a comprehensive analysis of this significant **case**. The article **first** presents the rulings of the Chinese court in detail. Next, it compares the key points of the Chinese court with those of similar rulings in other jurisdictions and analyses the similarities and differences. The article then explores the political, ethical, and cultural considerations behind the final ruling of the Chinese court. Finally, several ripple effects and unresolved questions regarding **frozen embryos** in China are discussed, and the article concludes that legislative enactments to regulate the ownership and legal rights of **frozen embryos** at the national level are necessary in China.

The controversies of the **case** were rooted in a family tragedy involving the death of a young couple named Shen Jie and Liu Xi. The young couple were married on 13 October 2011. In August 2012, the couple came to Nanjing City Gulou Hospital ('Gulou Hospital') to attempt IVF and **embryo** transfer surgery because of primary infertility and the repeated failure of artificial insemination at other hospitals. Finally, Gulou Hospital successfully obtained 15 oocytes, of which 13 were fertilized and divided. To prevent 'ovarian hyperstimulation syndrome', Gulou Hospital **froze** four fertilized **embryos** instead of immediately transplanting them in the wife. During the treatment, the wife signed an informed consent of assisted reproductive chromosomal diagnosis. In this document, the wife confirmed that she understood all the relevant issues of chromosome examination, agreed to all inspections, bore all possible risks, and agreed that the hospital could dispose of any remaining samples according to relevant state laws and regulations. On 3 September 2012, the couple signed an informed consent of the whereabouts of the gametes and **embryos**, which established that 15 oocytes were obtained through surgery conducted by the Reproductive Center of Gulou Hospital, among which none were transplanted, four were **frozen**, and six were under observation. The couple agreed to discard the remaining gametes ('eggs and sperm') and agreed to **freeze** the blastocysts if the **embryos** under observation developed into blastocysts. On the same day, the couple signed another informed consent of **freezing**, thawing and transplanting **embryos** and blastocysts, in which Gulou Hospital clarified that the current period for the hospital to store the **frozen embryos** was 1 year and the couple made their **first** instalment payment for the initial 3 months of storage. The couple must pay the cost of additional storage of the **frozen embryos**; otherwise, the **frozen embryos** would not be stored. The couple agreed to keep the **frozen embryos** for a year and abandon them after that period.

On 20 March 2013, a car accident took the lives of the couple. The four inseminated **embryos** were still preserved at Gulou Hospital at that time. The death of the couple was a tragedy to their families. Both the husband's and the wife's parents claimed that they should inherit and dispose of the four **frozen embryos** left by the deceased couple. Because the two families could not reach an agreement, the husband's parents filed a **case** in court. During the litigation, the trial court added Gulou Hospital as a third party because the **embryos** were preserved at the hospital.

The parents of both families argued that they were entitled to inherit and dispose of the **frozen embryos** according to the law and general customs. However, Gulou Hospital refused to give the **frozen embryos** to any of them and argued that the **embryos** should be disposed of by the hospital according to the letters of informed consent signed by the deceased couple.

The claims of the parents of both families to inherit the four **frozen embryos** were denied in the **first** instance by the Yixing Court. The trial court considered that the **embryos** produced by IVF **embryo** fertilization surgery have the potential to develop into life. As a 'special thing' containing future life features, the **embryos** could not be transferred or voluntarily inherited as common personal property. The trial court further stated that even the rights of the couple regarding their own **embryos** are restricted. Anyone who uses the **embryo** must comply with the population and family planning law, and not act contrary to social ethics and morality. The **embryos** could be used only for birth, not for sale. In this **case**, the purpose of reproduction through IVF surgery became impossible because the couple was deceased. The limited rights of the **frozen embryo** left by the couple could not be inherited.

The parents of the couple challenged the ruling and appealed to the Wuxi Intermediate People's Court of Jiangsu Province. The appeals court revised the judgement of **first** instance and held that the four parents of the deceased couple shared custody rights and disposal of the **frozen embryos**. After confirming that the key issue in this **case** was to determine who should keep and dispose of the **frozen embryos**, the appeals court ruled based on several factors. The court **first** asserted that the couple's consent documents did not control the dispute over the **frozen embryos**. Although the couple had signed the letters of informed consent with the hospital to keep the **frozen embryos** for a year and abandon them after that period, the signed consent agreements could not be performed because of an unforeseen and undesirable reason - the accidental death of the couple. Therefore, the hospital could not unilaterally dispose of the **frozen embryos** according to the consent documents.

Considering that there is no statute to define the legal status of **frozen embryos**, the judge of the Wuxi Intermediate People's Court concluded that the ownership of the **frozen embryos** in this **case** should be determined by referring to three factors. The **first** factor is ethics. The court believed that as potential lives, the inseminated **embryos** produced by IVF surgery contained not only the DNA and other genetic features of the late couple but also the genetic information of both families. Therefore, the parents of the late couple have a close bioethical association with the four **frozen embryos**. The second factor is emotion. In the ruling, the judge stated that the most tragic situation in life is when parents must bury their child; in this **case**, the parents in their old age must bury their only child. The accidental death of Shen Jie and Liu Xi kept their older parents from enjoying family love and joy. Most people cannot appreciate the sadness of parents who have lost their only child. The **frozen embryos** left by the late couple are the only carrier of the family blood, which bears personal interests of grief sustenance, solace, and comfort. Awarding the **embryos** to be kept and disposed of by the parents of the late couple is consistent with human relations and may moderately reduce their pain from the loss of their

child. The third factor is the protection of special interests. The court considered that the **embryo** transitionally exists between a person and a thing. As carriers of potential lives, **embryos** should enjoy a higher moral status than common things and receive special respect and protection. Following the death of the couple, their parents have the greatest concern for the fate of the **embryos** and should be the beneficiaries because their interests are more closely aligned with the **embryos**. It is fair and reasonable to decide that the four **frozen embryos** should be placed in the custody of the dead couple's parents. The court further emphasized that the use of the **frozen embryos** must comply with the law, must not be contrary to public order and morals and must not harm others.

Regarding the argument raised by Gulou Hospital that the relevant regulations of CMOH prohibit surrogacy and provide that an **embryo** cannot be traded or given, the court determined that these regulations did not deny rights over **embryos**. The court further stated that the administrative regulations issued by CMOH are used to manage and regulate the functions of medical institutions and personnel that engage in ART-related operations. Gulou Hospital could not impede the legitimate rights created by private law on the basis of administrative regulations.

III. Evaluation and implications of the Chinese ruling

The assisted reproductive technology monitoring committee has revealed there have been five million 'test tube babies' born all over the world from 1978 to 2012 (Gallagher, 2012). The development and broad use of assisted reproductive and genetic screening technologies have produced intense ethical, legal, and policy debates (Shapiro, 1998). The types of legal disputes over **embryos** include the proper registration and monitoring of IVF clinics, the guidelines of sperm banks, the ownership and disposition of **frozen embryos**, and the child's rights to access information regarding his genetic background, method of conception, the legality of the surrogacy, etc. (Banerjee, 2006; Brezina and Zhao, 2012). The legal status of **frozen embryos** is the fundamental question that must be addressed in all of these disputes. Different jurisdictions have different views on the issue depending on different ethical and practical considerations.

In USA, the **case** law and statutes in several states advance three theories regarding the legal status of a **frozen embryo** - property, human life, and property deserving special respect. The **embryo** as property theory classifies **embryos** as a form of property, such as gametes, sperm, human tissue, and other biological materials (Gitter, 2004). Under this theory, the court analyses the **embryos** as personal property and applies traditional contract or property law as if the **embryos** were matrimonial asset The critical issues pertaining to the resolution of the **embryo** dispute are the interpretation and enforceability of the consent agreements used in ART clinics and considerations of marital property law. For example, the Eastern District of Virginia in *York v. Jones* concluded that a clinic that had refused to release an **embryo** to its progenitors was unlawfully converting the couple's property. [7] By contrast, the **embryo** as human life theory defines a fertilized **embryo** as a human being. Under this theory, disputes over **frozen embryos** mimic custody disputes between the parents of born children in which the courts use a 'best interests of the child' analysis

based on family law principles to decide which parent prevails (Woodhouse, 1993). The state of Louisiana is the only jurisdiction to adopt this theory and has a statute that deems **frozen embryos** to be persons unless they fail to develop within 36 hours of IVF. In addition, the statute directs courts confronted with a dispute regarding the

frozen embryo, relied on the ethical standards established by The American Fertility Society, and concluded that an **embryo**'s unique potential capability of becoming human life upon implantation and gestation distinguished it from pure property and deserved 'special respect'. The Tennessee Supreme Court clarified that the unique hybrid character of **frozen embryos** implied that the progenitors have decisionmaking authority concerning the disposition of the pre-**embryos** within the scope of policy established by law, and the creation of the **embryo** triggers the progenitors' constitutional interests in procreation. Finally, the court maintained that without the benefit of a prior consent agreement that indicated the parties' intentions at the time they agreed to IVF participation, the court should take a 'balanced approach' to 'weigh the interests of each party to the dispute . . . in order to resolve the dispute in a fair and responsible manner'. Based on the specific factual analysis of the **case**, the court concluded that the interests of the party desiring to avoid genetic parenthood were more significant than the burden imposed on the procreational autonomy of the other donor. The hybrid special respect status allows the courts to remove the dispute from the realm of property law and, at the same time, avoids legal presumptions of family law and the best interest of the child test. Thus, special respect status has become the most accepted theory that addresses **embryo** disputes, although courts in practice hold different explanations regarding the 'special aspect' of human **embryos** based on the different facts of the **cases** (Trainor, 2001-4). Several states, such as Florida, [10] New Hampshire, [11] and others, use a contract approach and examine the language of the fertility clinic contracts. In a typical **case**, *Kass v. Kass*, [12] a New York court maintained that the existence of the parties' consent document controlled the dispute over their **frozen embryos**. This approach was also adopted by courts in *Cahill v. Cahill* [13] and *Litowitz v. Litowitz*. [14] The Massachusetts Supreme Court, however, refused to enforce an agreement that would compel one donor to become a parent against his or her will because forced procreation is not an area amenable to judicial enforcement as a matter of public policy. [15] Courts in other states have chosen to employ a balancing test to determine which party should keep the pre-**embryos**. [16]

In Europe, there is similarly no consensus among the member states that involve the legal status of **frozen embryos**. In the key **case**, *Evans v. the United Kingdom*, the European Court of Human Rights (ECtHR) reviewed the legal position of **frozen embryos** in member states of the Council of Europe, USA, the State of Israel, and relevant international texts. The ECtHR concluded that 'there is no consensus as to the point at which consent to the use of genetic material provided as part of IVF treatment may be withdrawn by one of the parties'. The ECtHR also determined that the UK's law was within a national jurisdiction's margin of appreciation when

determining the balance to be struck between the rights of both parties under the European Convention. [17] In a most recent **case**, *PARRILLO v. Italy*, the European Center for Law and Justice (ECLJ) stated that

> [A] study of the legislation governing scientific research on human **embryos** in Europe (citing www.EurostemcellLOrg) shows that, out of thirteen European States (Italy, Ireland, the United Kingdom, Portugal, Spain, Germany, the Czech Republic, Switzerland, France, Greece, Lithuania, Finland and Sweden), three provide for a general ban on the use of **embryos** for scientific research (Italy, Ireland and Germany). In the remaining States, the legislation allows such a practice, particularly regarding surplus **embryos** (that is, those which are created as a result of in vitro fertilisation and are ultimately not used), subject to certain conditions (for example, that the couple concerned give their consent or that the research is carried out during a given life span of the **embryos**). [18]

Several EU countries, such as Italy, recognize the in vitro **embryo** as a subject, and the principle of primacy of the human being applies (Enright, 2006). However, most EU countries consider that preimplantation the pre-**embryo** is not a person, although it should have its own legal rights and should be treated with respect (Mlall, 1993; Schenker, 1997). In the *Evans* **case**, the British courts upheld British law that required the continuing consent of the woman's partner for her to use the **frozen embryos**; otherwise, the **embryos** must be destroyed. [19] The *Evans* decisions suggest that a mutual consent requirement must be adhered to as male and female rights as regards the dispute are absolutely equivalent, the theory of which is consistent with the contract approach adopted by some states in USA as mentioned above. Contrasting to the **case** law in most other jurisdictions, the Israeli Supreme Court decided in *Nachmani v. Nachmani* [20] that the ex-wife's right to have a child trumped her ex-husband's right to not have one, particularly because she had no more eggs and, therefore, had no other means of having a genetic child of her own (Chen, 1997). The unique respect of the party for whom the stored **embryo** represented their last chance at genetic parenthood may be a result of the cultural and religious influences in Israel.

Unlike the facts of these **cases**, the Chinese **case** involves inheritance of **frozen embryos** when both parties have died and left no instructions with the clinic or in a will. This type of dispute is rare because most **cases** in this area concern divorcing couples who want different dispositions. Presumably, the remaining **frozen embryo** would be inherited by the heirs under the '**embryo** as property theory', whereas custody of the **frozen embryo** could be awarded to relatives following the best interest of the child policy under the '**embryos** as human beings theory'. By contrast, the '**embryo** deserves special respect theory' requires a court to analyse the specific facts of a **case** and makes a legal determination complicated. In an early **case**, *Hecht v. Superior Court*, [21] the appeals court of California decided that spermatozoa, like **embryos**, are gametic materia, and a 'unique type of property', so the gamete source should decide their use with will. Similarly, a recent **case** before a Dallas probate court addressed the disposition of 11 **frozen embryos** after the parents were

murdered. The Master in Chancery appointed by the Probate Court recommended that the **embryos** be maintained by the clinic until the 2-year-old heir is 18 years, at which time he would acquire all rights to their disposition. The Master in Chancery recommended that if the probate court did not affirmatively rule that the **embryos** are property, it should follow the *Davis v. Davis* decision that they have a quasiproperty status 'in the nature of an ownership interest', which is subject to probate orders for the settlement or distribution of an estate. [22]

Compared with approaches adopted by USA and EU states, the two levels of Chinese courts agree on the nature of the **frozen embryos**. Both the court of **first** instance and the court of appeals determined that the **frozen embryos** were 'special things with the development of potential life and future life character'. That definition obviously conforms to the *Davis* interpretation of special respect. However, as Angela K. Upchurch stated, 'the characterization of **embryos** as "property deserving special respect" does not provide a clear legal framework for the court' (Upchurch, 2005). With the same definition of the legal status of **frozen embryos**, the two levels of Chinese courts disagreed regarding whether the parents of the deceased couple could have custody and dispose of the **frozen embryos** because of a different understanding that involves the aspects of 'special respect'. The trial court determined that the **frozen embryos** are special because they could be used only for the wife to become pregnant. By contrast, the court of appeals considered that **frozen embryos** could play a role as the object of family affections and emotions and those parents of the deceased couple could reproduce their future generations with the shift of time and national policy concerning surrogacy. The appeals court changed the claims of the parents of the deceased couple from inheritance to custody and disposition because it determined that the term 'inheritance' implies that **frozen embryos** are property. Furthermore, the appeals court advanced a closest relationship analysis to conclude that the parents of the deceased couple could have custody and dispose of the four **frozen embryos** because they have the closest relationship with the **frozen embryos**.

Different rulings or theories regarding **frozen embryos** in different jurisdictions are, to a great extent, caused by the different ethical and social recognition of the values involved with **frozen embryos**. The final ruling in the Chinese court is also a response to the cultural and emotional demands of Chinese society. **First**, the traditional and cultural function of the Chinese family is to reproduce children. Traditional Confucian theory expects most Chinese people to marry, create a family, and produce offspring. An old Chinese saying establishes: 'There are three things that are not dutiful to your parents, and not bearing offspring is the worst' (Dawson, 2002). Offspring is not only th child of a couple but also a continuation of the family. The change in the size of a large family to a small family in modern China does not cause the family to transform completely from prioritizing the parent child axis to the husband wife axis (Li, 2011). The final ruling provides hope for the families of the late couple to reproduce their offspring in the future. Second, the final ruling is also derived from sympathy towards the parents who lost their only child. Subject to **China's** one-child policy that took effect in 1980, both of the two sets of the parents of the deceased couple in this **case** have only one child. With the death of the only son and only daughter, both of the two families become

deceased couple.

IV. Unresolved issues and ripple effects

The final ruling of the appeals court is concise and vague and leaves several questions unresolved. **First**, there is the insufficiency of the closest relationship theory advanced by the appeals court. The court indicated that the parents of the late couple were the only people who cared about the **embryos** and had the closest relationship to them; therefore, the parents should have the right to monitor the **embryos** and determine their future. Because the plaintiffs - the parents of the husband - and the defendants - the parents of the wife - finally made an alliance against the hospital, their claims became the same, and they were awarded joint disposition of the **frozen embryos** by the court. However, if the parties had different claims over the **embryos**, such as if one party wanted custody of the **embryos** but the other party wanted to discard them, the closest relationship theory becomes useless. Additionally, the closest relationship theory is insufficient to resolve disputes between divorced couples who disagree regarding whether to implant or dispose of the remaining **embryos**. The complexity of the decision regarding whether to implant or discard the remaining **frozen embryos** lies in the difficulty of weighing individual rights. Moreover, the appeals court changed the cause of action from 'inheritance' to 'custody and disposition' and avoided clearly specifying the **frozen embryos** as inheritable. Whether a couple can make a will to dispose of **frozen embryos** is also questionable. Additionally, whether donors can determine how to dispose of **frozen embryos** in an agreement between themselves or with the ART clinics is uncertain if **embryos** are viewed more as persons rather than property (Yang, 2014).

Surrogacy is another disputable issue in this **case**. Some commentators were concerned that the ruling would open a Pandora's Box and encourage illegal surrogacy as the only way for the parents of the deceased couple to conserve their grandchildren. However, the four parents of the deceased couple said in an interview that they knew surrogacy was illegal but wanted to have a hospital in which to keep their 'potential grandchildren' until the rules were relaxed (Wei, 2014). Actually, the possibility of surrogacy was the major reason why the trial court denied the claims of the parents of the deceased couple on public policy grounds. The final ruling in favour of the parents of the deceased couple also emphasized that the **frozen embryos** should be disposed of within the regulations, law, and policy, which implies that the parents of the deceased couple could not use the **frozen embryos** in surrogacy. However, the court did not address the legality of surrogacy in China. On the one hand, the regulations issued by CHMO prohibit only medical institutions from surrogacy; they have no effect on surrogacy that occurs privately or in non-medical institutions. On the other hand, a Pandora's Box of surrogacy was opened long ago. The surrogacy black market fell under public scrutiny in 2011 when a wealthy couple paid nearly 1 million Yuan as a fine for violating the family planning policy to have

eight babies simultaneously using IVF and two surrogates (Davison, 2012). Chinese media reports have estimated that 25,000 surrogate children have been born in China in the past 30 years. There are more than 100 surrogacy agencies that advertise online to provide 'womb-renting' services for approximately $138,000 (Wilson, 2012). The underground surrogacy market is growing annually because the demand for babies has increased. It may be time for China to establish clear legal guidance regarding the conditions and requirements of surrogacy (Banerjee, 2006).

V. Conclusion

A 2011 epidemiology study concluded that 15 20% of the women of reproductive age in China suffer from infertility (Qiao and Feng, 2014). Scientific advancements in reproductive technology allow couples to combat problems with conception through various surrogacy arrangements. It can be anticipated that disputes over **embryos** will increase. The **case** studied in this article is the **first** of its type with a final ruling in China to address the legal status and related interests of parties that concern **embryos**. The **case** confirmed the legal status of **frozen embryos** as objects that require special respect. However, difficult questions, such as whether the closest relationship theory would be applied to all types of **embryo**-related disputes and the legality of surrogacy, are avoided. In addition, because China is a civil law jurisdiction, **cases** cannot act as precedents. There is no clear legal guidance for donors, medical institutions, and related people to clarify their legal rights and obligations that involve **embryos**. All of these difficulties show that it is time for China to consider national legislation that regulates the use of **embryos**.

References

Attane, I. (2002) '**China's** family planning policy: an overview of its past and future', *Studies in Family Planning* 33(1), 103-13.

Banerjee, A. (2006) 'An insight into the ethical issues related to in vitro fertilization', *The Internet Journal of Health* 6(1), 221.

Brezina, R.P. and Zhao, Y. (2012) 'The ethical, legal, and social issues impacted by modern assisted reproductive technologies', *Obstetrics and Gynecology International* 2012, 686253.

Chen, J. (1997) 'The right to her **embryos**: an analysis of Nachamani v Nachamani and its impact on israeli in virtro fertilisation law', *Cardozo Journal of International & Comparative Law* 7, 325.

Davison, N. (2012) '**China's** surrogate mothers see business boom in year of the dragon', *The Guardian* (8 February 2012).

Dawson, M.M. (2002) *The Ethics of Confucius*, Hawaii: University Press of the Pacific.

Enright, M. (2006) 'Justice, convention and anecdote: evans and the rights to become a mother', *Irish Journal of Family Law* 4, 11.

Gallagher, J. (2012) 'Five millionth "test tube baby"', *BBC News*(1 July 2012) http://www.bbc.com/news/health-18649582 (accessed 2 February 2014).

Gitter, D.M. (2004) 'Ownership of human tissue: a proposal for federal recognition of human research participants' property rights in their biological material', Washington & Lee Law Rev 61, 257.

Li, Y. (2011) 'Report on investigations of family formation and family relations in five cities' in Ru Xin Xueyi and Li PeilinLu (eds), *The China Society Yearbook*, 175 1. Beijing: Brill.

Lijing, J. (2015) 'IVF the Chinese way: Zhang Lizhu and post-Mao Human in vitro fertilization', *Research East Asian Science, Technology and Society* 9, 23 45.

Liu, Q. and Wang, Y. (2014) 'Analysis on the pension problems in loss-of-single-child family: a perspective of public policy', *Studies in Asian Social Science* 1(2), 16.

Martin, A.P. and Lagod, M.L. (1990) 'The human preembryo, the progenitors and the state: toward a dynamic theory of status, rights, and research policy', *High Technolo Law Journal* 5(2), 257.

Miall, E.C. (1993) 'The regulation of reproduction: the relevance of public opinion for legislative policy formation', *International Journal of Law, Policy and the Family* 7(1), 18 39.

Noah, L. (2003) 'Assisted reproductive technologies and the pitfalls of unregulated biomedical innovation', *Florida Law Review* 55(2), 603 65.

Qiao, J. and Feng, L.H. (2014) 'Assisted reproductive technology in China: compliance and non-compliance', *Translational Pediatrics* 3(2), 91 7.

Shapiro, R. (1998) 'Who owns your **frozen embryo**? Promises and pitfalls of emerging reproductive options', *Human Rights Magazine Spring*, 12.

Shen, L. (2014) 'The number and quality of tube babies' [Shi Guan Yin Er de Shu Liang he Zi Liang]. *Science Frontline* [Ke Xue Qian Yan] 5, 15.

Trainor, E.A. (2001-4) 'Annotation, right of husband, wife, or other party to custody of **frozen embryo**, pre-**embryo**, or pre-zygote in event of divorce, death, or other circumstances', American Law Reports, 5th, 87, 261-62.

Upchurch, K.A. (2005). 'Deep **freeze**: a critical examination of the resolution of **frozen embryo** disputes through the adversarial process', *The Florida State Universioty Law Review* 33, 395 435.

Wei, X. (2014) 'Big legal question behind little **frozen embryos**' [Xiao Xiao Leng Dong Pei Tai Bei Hou de Da Fa Lv Wen Ti] Chinese Trial [*Zhong Guo Shen Pan*] 8, 11.

Wilson, K. (2012) 'Surrogacy: a moral minefield'. *Asia Weekly* (12 August 2012), 1.

Woodhouse, B.B. (1993) 'Hatching the egg: a child-centered perspective on parents' rights', Cardozo Law Review 14, 1747-846.

Yang, L. (2014) 'The inheritance question and the legal nature of the human **frozen embryos**' [Ren De Leng Dong Pei Tai de Fa Lv Shu Xing Ji Qi Ji Chen Wen Ti] Peoples' Judiciary Practice [*Ren Min Si Fa Ying Yong*] 13, 15.

International Journal of Law Policy and the Family

Footnotes

1 The measures on the Administration of Assisted Human Reproductive Technology, CMOH Decree No. 14, was issued by CMOH on 20 February 2001.

2 The measures on the Administration of Human Sperm Banks, CMOH Decree No. 15, was issued by CMOH on 20 February 2001 and came into effect on 1 August 2001.

3 The 'Technical Standards for Assisted Human Reproduction', 'Technical Standards for Human Sperm Banks', 'Basic Standards for Human Sperm Banks' and 'Ethical Principles in Conducting Assisted Human Reproduction' were issued by CMOH on 20 February 2001.

4 The Notice of the CMOH to Revise the relevant technical specifications, basic standards and ethical principles relating to ART and human sperm banks were issued by CMOH on 27 June 2003.

5 The technical standards and ethical principles (revised) were issued by CMOH on 27 June 2003.

6 *Shen Xinnan and Shao Yumei v. Liu Jinfa and Hu Xinxiang*, Civil Ruling of Intermediate People's Court of Wuxi, Jiangsu Province, (2014) Xi Min Zhong Zi No. 01235.

7 *York v. Jones*, 717 F. Supp. 421 (E.D. Va. 1989).

8 La. Rev. Stat. Ann. § 9:123-131.

9 *Davis v. Davis*, 842 S.W.2d 588, 604 (Tenn. 1992)

10 Fla. Stat. ch. 742.17 (1997).

11 N.H. Rev. Stat. Ann. § 168-B:21.

12 *Kass v. Kass*, 696 N.E.2d 174 (N.Y. 1998).

[14] *Litowitz v. Litowitz*, 146 Wash. 2d 514, 48 P.3d 261 (2002).

[15] *A.Z. v. B.Z.*, 431 Mass. 150, 725 N.E.2d 1051 (2000).

[16] *Reber v. Reiss*, 42 A.3d 1131 (Pa.Super.2012).

[17] *Evans v. United Kingdom*, Application No. 6330/05, Judgement of 10 April 2007 (Grand Chamber).

[18] *PARRILLO v. Italy* (no 46470/11) (pending).

[19] *Natallie Evans v. Amicus Healthcare Ltd. and others (Secretary of State for Health intervening)*, [2004] EWCA (Civ.) 727. [2004] FLR 766.

[20] *Nachmani v. Nachmani* (50(4) PD 661 (Isr)).

[21] *Hecht v. Superior Court*, 1993.

[22] Report and Recommendations of Master In Chancery, In the Estate of Yenenesh Abayneh Desta, Deceased, No. PR 12-2856-1 (Probate Court No. 1 Dallas County, Texas, at 16).

The Down Town Association
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Enforcement, Domestication and Registration of Orders and the Treatment of Alimony Worldwide

Charlotte Butruille-Cardew, Paris, France
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Enforcement of Orders – Recognition – Domestication France – US

Charlotte Butruille-Cardew,
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Applicable Statutory Laws in France European and International

- **Regulation Brussels *II bis* 2201/2003** on divorce of 27 Nov. 2003,
- **Regulation *Rome III* 1259/2010** on applicable Law to divorce of 20 Dec.2010
- **Regulation 4/2009** on maintenance obligations of 18 Dec. 2008,
- **The Protocol of the Hague** on Law applicable to maintenance obligations, concluded on 29 Nov. 2007,
- **International Convention 14 March 1978** on matrimonial regime, soon **Regulation 2016/1103 on Matrimonial regime**

Litispendens

French Judges consider that an international litispendence defence can only succeed if the following are true (Civ.1è, 26 Nov. 1974, *Soc. Miniera di Fragne*):

- ❖ A claim has previously been brought before an American Court,
- ❖ The parties, the causes and the subjects of the claim are identical,
- ❖ The first-seized Court has jurisdiction over the case,
- ❖ The foreign Court's decision may be recognized in France.

Important decisions from the Court of Justice of the European union on the existence of an international litispendence situation:

- **CJEU, 9 November 2010, n°C-296/10, *Purrucker***

  No international litispendence when one only asks for temporary measures to the first-seized Court.

- **CJEU, 6 October 2015, n°C-489/15**:
  - A situation of international litispendence is characterized when a judicial separation petition and a divorce petition are brought before two different judges,
  - Such situation disappears if the first-seized Court dismisses the case,

Enforcement

To be recognised in France, a foreign Order must comply with the following conditions (Civ.1ère, 20 February 2007,*Cornelissen*, n°0514.082):

- The foreign Court had jurisdiction over the case (i.e strong links) and no French exclusive jurisdiction,
- The foreign Order conforms to French public policy requirements,
- Absence of fraud.

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The Treatment of Alimony Worldwide
WILLIAM LONGRIGG

FRIDAY APRIL 28 2017

COMMON LAW JURISDICTIONS AND CIVIL LAW JURISDICTIONS

- What is maintenance and what is capital/property?
- Property Regimes
- Pre-marital agreements/pre-nuptial agreements/marital agreements/marriage contracts do not normally deal with maintenance. There are exceptions.
- Interim period payments and final periodical payments. This can be relevant in countries where divorce takes a long time.

FRANCE

- Prestation compensatoire.
- Compensatory payments ordered after divorce in only 17% of cases.
- Joint lives maintenance?

GERMANY

- Spousal maintenance more common in the south of Germany than in the north. Different attitudes towards family life prevail.
- 2008 new statute seeking to limit spousal maintenance.
- Marriages lasting more than 20 years the financially weaker party has a claim.
- The parent with the care of the child must start working when the child is 3 years old.
- Levels of spousal maintenance are relatively low.

SCOTLAND

- Essentially spousal maintenance does not exist.
- Rachael Kelsey to report
- Scotland, like South Africa and some other jurisdictions, is a hybrid civil law and common law jurisdiction.

SWEDEN

- Spousal maintenance virtually does not exist.
- The State takes over if necessary.
- Sweden has the highest employment rate in the EU.
- Pre-acquired assets taken into account in the default matrimonial property regime. Marital agreements are the norm.

SWITZERLAND

- Spousal maintenance is quite common.
- Matters to consider are similar to those in England and Wales.
- A mother is expected to work when the child is 10 (part time) and full time once the child is 16.
- Maintenance is awarded in a high percentage of cases – more than 50%.

ITALY

- The fault of the breakdown of the marriage has some bearing on whether maintenance is awarded.
- Spousal maintenance is quite common but the award tends to be low.
- Interim maintenance is very common because divorces take a long time.

FINLAND

- Not so different from Sweden.

GREECE

- Conduct of the payee may affect the quantum of spousal maintenance or whether it is paid at all.
- Interim maintenance is common.
- Disclosure is an issue.

CANADA

- Historically this has been quite generous.
- Spousal support advisory guidelines created in an effort to bring consistency and predictability. Not compulsory. Tends to be used for quantum rather than entitlement. Is based on the sharing of income rather than on budgets setting out need.

THE NETHERLANDS

- [Sandra to advise on this].

AUSTRALIA

- In most Australian states it is not common for spousal maintenance orders to be made.
- Even as long ago as 1986, long-term spousal maintenance was only being ordered or agreed in about 6% of cases.
- Binding financial agreements can and often do exclude spousal maintenance.
- Joint lives spousal maintenance very rare.

ENGLAND AND WALES

- Obligation on the court to look for a clean break where possible.
- Spousal maintenance very common.
- A new broom, Mostyn J? Moving towards term maintenance rather than joint lives being the default position.
- "Divorce capital of the world".
- Is 'compensation' dead?
- High levels of support routinely ordered
- Schedule I Children Act 1989
- Part III Matrimonial and Family Proceedings Act 1984

International Academy of Family Lawyers
International Family Law Conference
The Down Town Association
New York, New York

Enforcement, Domestication and Registration of orders and the treatment of Alimony Worldwide

WILLIAM LONGRIGG

FRIDAY APRIL 28 2017

New York UCCJEA

N.Y. Dom. Rel. Law § 75 et seq.

§ 77-a. Enforcement under Hague Convention

Under this act, a court of this state may enforce an order for the return of the child made under the Hague Convention on the Civil Aspects of International Child Abduction as if it were a child custody determination.

§ 77-b. Duty to enforce

1. A court of this state shall recognize and enforce a child custody determination of a court of another state if the latter court exercised jurisdiction in substantial conformity with this article or the determination was made under factual circumstances meeting the jurisdictional standards of this article and the determination has not been modified in accordance with this article; provided, however, that recognition and enforcement of the determination would not violate subdivision one-c of section two hundred forty of this chapter or section one thousand eighty-five of the family court act.
2. A court of this state may utilize any remedy available under other law of this state to enforce a child custody determination made by a court of another state. The remedies provided in this title are cumulative and do not affect the availability of other remedies to enforce a child custody determination.

§ 77-d. Registration of child custody determination

1. A child custody determination issued by a court of another state may be registered in this state, with or without a simultaneous request for enforcement, by sending to the appropriate court in this state;
(a) a letter or other document requesting registration;
(b) 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
(c) except as otherwise provided in section seventy-six-h of this article, 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.
2. On receipt of the documents required by subdivision one of this section, the registering court shall:
(a) 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
(b) serve notice upon the persons named pursuant to subdivision one of this section and provide them with an opportunity to contest the registration in accordance with this section.

3. The notice required by paragraph (b) of subdivision two of this section must state that:
(a) 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;
(b) a hearing to contest the validity of the registered determination must be requested within twenty days after service of notice; and
(c) 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.
4. A person seeking to contest the validity of a registered order must request a hearing within twenty days after service of the notice. At that hearing, the court shall confirm the registered order unless the person contesting registration establishes that:
(a) the issuing court did not have jurisdiction under title two of this article;
(b) the child custody determination sought to be registered has been vacated, stayed, or modified by a court having jurisdiction to do so under title two of this article; or
(c) the person contesting registration was entitled to notice, but notice was not given in accordance with the standards of section seventy-five-g of this article, in the proceedings before
the court that issued the order for which registration is sought.
5. 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.
6. 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.

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Hague Conference on Private International Law: How it Works and What it Does

Robert Arenstein, New York, New York
Daniel Klimow, U.S. Department of State
William Longrigg, London, England

Role of the Department of State
Private International Law Conventions
Office of Legal Affairs, Overseas Citizens Services
April 21, 2017

The Hague Service Convention

- Main Channel of Transmission
  - Competent Authority, Judicial officer (or attorney in U.S), transmits the document to the foreign central authority using the model form found on the Hague Conference Website: www.hcch.net

Main Channel Cont'd

- The Central Authority will serve the documents in one of three ways
  1) Personal service
  2) Method provided by the requested state
  3) Method requested by the applicant

Alternative Channels

- The Convention allows for service through alternative channels of transmission
- E.g., consular or diplomatic channels, postal channels, as otherwise provided in local law

Overview of Hague Evidence Convention

- The Convention seeks to overcome differences between **civil law** and **common law** systems with respect to the taking of evidence.

Overview of Hague Evidence Convention Cont'd

- Many civil law countries consider the Evidence Convention **mandatory**, which means it may be the sole mechanism for lawfully obtaining evidence in that country.
- **Not mandatory** in the United States
  - *Societe Nationale Industrielle Aerospatiale v. US Dist. Ct.*, 482 U.S. 522 (1987)

Hague Evidence Convention

- **Chapter I:**
  - Judicial authority of State A sends a Letter of Request to Central Authority of State B
  - Evidence is obtained by State B, under its laws and procedures

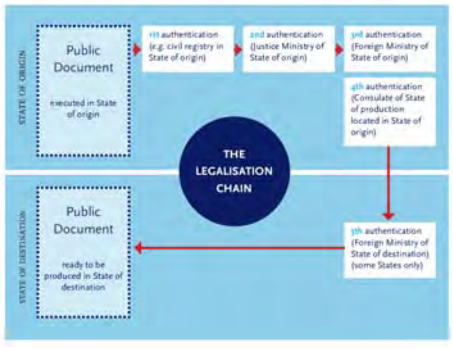
Taking Evidence Under Chapter II

- **Article 15**: U.S. consular officer may take evidence from a willing U.S. citizen witness.
- **Article 16**: U.S. consular officer may obtain evidence from a willing non-U.S. citizen witness; prior permission of host state required.
- **Article 17**: A Commissioner may obtain evidence from a willing witness in host state; prior permission required.

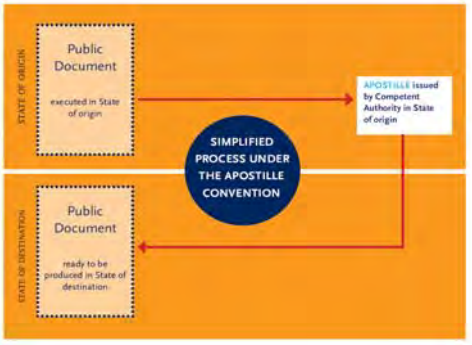
Chapter III General Clauses

- **Article 23**
  - Allows countries to decline to execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents.
  - The United States does not have an Article 23 reservation.

Before the Hague Legalization (Apostille) Convention



After the Hague Legalization (Apostille) Convention



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Effective Prosecution of 1980 Hague Cases (Federal & State)

Robert Arenstein, New York, New York

INTRODUCTION

- Almost 30 years since Hague Convention came into effect in the U.S.
- Hague Convention currently has 96 contracting states
- Indispensable tool for resolving international jurisdictional disputes concerning child custody
- Still a novel area of law for many attorneys and especially Judges
- Must educate the courts on the provisions and proper application of the Hague Convention

ROLE OF THE CENTRAL AUTHORITY

- Each country designates a Central Authority to oversee the implementation of the Hague Convention
- A left-behind parent typically contacts the Central Authority in their home country and fills out a Request for Return form
- The Request for Return is then forwarded to the U.S. Central Authority
- The U.S. Central Authority is Office of Children's Issues, Bureau of Consular Affiars, U.S. Department of State, located at 2100 Pennsylvania Avenue NW, SA-29, 4th floor, Washington, DC 20037.
- A case management officer will be assigned to oversee the case in the United States; Can assist in locating an attorney to represent either party,; Can send letters seeking a voluntary return and letters to Judges advising them of the relevant provisions of the Hague Convention.

PURPOSE OF THE CONVENTION

- International Child Abduction Remedies Act (ICARA), 22 U.S.C. § 9001, et al, is the Federal Legislation implementing the Hague Convention
- Intended as civil remedies, not criminal.
- Designed to "protect children internationally from the harmful effects of their wrongful removal and retention and to establish procedures to ensure their prompt return to the State of their habitual residence." – Convention, preamble
- Designed to "preserve the status quo" and "deter parents from crossing international boundaries in search of a more sympathetic court." - *Blondin v. Dubois (Blondin II),* 189 F.3d 240, 246 (2d Cir. 1999).

EXPEDITED PROCEEDINGS AND RULES OF EVIDENCE

- The goal is to promote a determination on the merits of a Hague Convention proceeding within six weeks. - Hague Convention, art. 11.
- § 9005 of ICARA relaxes the rules of evidence and provides that the authentication of documents is not necessary to be admissible into evidence.
- Article 14 of the Convention permits courts to take judicial notice of foreign law or decisions "without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable." Hague Convention, art. 14
- Article 16 of the Convention stays courts from deciding on the merits of custody

Federal or State Courts?

- ICARA gives both federal and state courts jurisdiction over Hague Convention cases. Since the Federal courts do not normally hear custody cases, a federal judge may be better able to look solely at the legal issue of jurisdiction, as required by the Convention, without becoming clouded by any underlying custody arguments or issues.
- State courts may be more familiar with addressing allegations of domestic violence.
- There are various methods to try and remove the case from a particular court. A case brought in the State Court may be removed to the Federal Court under the Federal Removal Statute.

PRIMA FACIE CASE

- Burden of proof is preponderance of the evidence – ICARA, 22 U.S.C. § 9003(e)(1)(A)
- Must demonstrate that a child under the age of sixteen (16) was (1) removed from the child's state of habitual residence; (2) in breach of a right of custody attributable to the Petitioner; and (3) which the Petitioner had been exercising at the time of the wrongful removal.

HABITUAL RESIDENCE

- First must prove that the child[ren] was removed from or retained away from their country of "habitual residence"
- Habitual residence was purposely left undefined by the drafters of the Convention in order to leave room for judicial interpretation and flexibility and in order to prevent mechanical application of the term.
- The drafters of the Convention conceived of habitual residence as a question of pure fact, differentiating it from strictly technical terms such as domicile .
- The Ninth Circuit explained that "'Habitual residence' is the central-often outcome determinative-concept on which the entire system is founded." - *Mozes v. Mozes,* 239 F.3d 1067, 1072 (9th Cir. 2001).
- In the United States, there are two main branches of case law, divided among the various Circuit Courts, addressing the issue of habitual residence.

MAJORITY OF CIRCUITS

- The majority of the Circuit Courts focus on the question of whether the parents had a shared intention to establish a habitual residence for the child[ren].
- The Ninth Circuit Court found that a child's habitual residence must be based on a "settled mutual intent" by the parents to abandon their previous residence and an "actual change in geography" and a period of time "sufficient for acclimatization." The Ninth Circuit approach has been largely adopted by the First, Second, Fourth, Fifth, Seventh and Eleventh circuits. *Mozes v. Mozes,* 239 F.3d 1067, 1076-78 (9th Cir. 2001).
- In *Gitter v. Gitter*, the Second Circuit stated that "focusing on intentions gives contour to the objective, factual circumstances surrounding the child's presence in a given location. This approach allows an observer to determine whether the child's presence at a given location is intended to be temporary, rather than permanent." Thus, where parents differ as to where the habitual residence of a child is, "[i]t then becomes the court's task to determine *the intentions of the parties as of the last time that their intentions were shared.*" *Gitter v. Gitter,* 396 F.3d 124 (2d Cir. 2005).

MINORITY OF CIRCUITS

- Other circuits follow the lead of the Sixth Circuit and focus on the past experiences of the child[ren], not future intentions, in determinating where their habitual residence. *Friedrich v. Friedrich (Friedrich I),* 983 F.2d 1396 (6th Cir. 1993).
- The Third and Eighth Circuits adopted versions of this "child-centered" test. *Feder v. Evans-Feder,* 63 F.3d 217, 222 (3d Cir. 1995); *Barzilay v. Barzilay*, 600 F.3d 912, 918 (8th Cir. 2010).
- The Seventh Circuit acknowledged that all circuits "consider *both* parental intent *and* the child's acclimatization, differing only in their emphasis." *Redmond v. Redmond,* 724 F.3d 729, 745-46 (7th Cir. 2013).

RIGHTS OF CUSTODY

- Petitioner must demonstrate that s/he had rights of custody pursuant to the laws of the child's habitual residence.
- Rights of custody "may arise in particular by operation of law or by reason of judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State." Convention, Art. 3.
- A parent does not have to have actual physical custody. The right to make decisions regarding the child's well-being, including the right to determine the place of residence of the child[ren], are considered rights of custody. Convention, Art 5.
- The U.S. Supreme Court in *Abbott v. Abbott,* 560 U.S. 1 (2010), found that ne exeat rights (requirement that both parents give consent before a child is permitted to leave the country) constituted a right of custody.

AFFIRMATIVE DEFENSES

- Articles 12, 13 and 20 of the Hague Convention provide the defenses available to the Respondent in a Hague case, including that: (1) the Petitioner had no right of custody or was not exercising those rights at the time of the removal or retention; (2) the Petitioner consented or acquiesced to the removal or retention; (3) there is grave risk that a return would expose the child[ren] to harm or an intolerable situation; the child[ren] is of appropriate age and degree of maturity and objects to the return; (4) the child[ren] is settled in the new environment; (5) and/or a return would not be permitted by "the fundamental principles of the requested state relating to the protection of human rights and fundamental freedoms."
- The Respondent's burden of proof is to prove either by clear and convincing evidence that the Grave Risk (Article 13(b)) or Humran Rights (Article 20) exceptions apply or by a preponderance of the evidence that any other exceptions apply. ICARA, 22 U.S.C. § 9003(e)(2).
- All the affirmative defenses are to be construed narrowly lest they "frustrate the core purpose of the Hague Convention…" *In re Kim,* 404 F.Supp.2d 495, 512 (S.D.N.Y. 2005)

WELL-SETTLED DEFENSE

- Courts MAY refuse to return a child if the Petitioner waited more than one year after the removal or retention to file the Petition and the child is settled in the new environment.
- This exception provides an additional defense to an abducting parent ONLY in cases where the proceedings were not started within one year.
- The United States Supreme Court held in *Lozano v. Montoya Alvarez* that the principle of equitable tolling was not appropriate to Hague Abduction cases because the Convention is a treaty rather than a statute and because Article 12 was not a limitations period. *Lozano v. Montoya Alvarez, 134 S. Ct. 1224, 1235-36 (2014).*
- To determine whether the child is now well-settled in the new environment, the U.S. Department of State has stated that "nothing less than substantial evidence of the child's significant connections to the new country is intended to suffice to meet the respondent's burden of proof." The U.S. State Dept. Text & Legal Analysis, 51 Fed. Reg. 10,494, 10509 ("Text & Legal Analysis")
- The question is whether "there could come a point at which a child would become so settled in a new environment that repatriation might not be in its best interest." *Blondin v. Dubois*, 238 F.3d 153, 164 (2d Cir. 2001) (*Blondin IV*).
- Courts have explored a variety of factors including: (1) the age of the child, (2) the stability of their environment, (3) their school experience, (4) any extracurricular activities, (5) the respondent's financial stability, (6) the child's relationships with friends and relatives, and (7) the immigration status of the child. *Broca v. Giron*, 530 F. App'x 46, 47 (2d Cir. 2013)

CONSENT AND ACQUIESCENCE

- Article 13(a) of the Convention provides for the non-return of the child in a situation where a parent "was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced after the removal or retention."
- courts should "liberally find 'exercise' whenever a parent…keeps, or seeks to keep, any sort of regular contact with his or her child" and a person "cannot fail to 'exercise' those custody rights under the Hague Convention short of acts that constitute clear and unequivocal abandonment of the child." Friedrich v. Friedrich, 78 F.3d 1060, 1065-66 (6th Cir. 1996)
- Consent is given prior to the removal or retention while acquiescence is provided afterwards and typically requires more formality.
- Courts frequently warn that "[e]ach of the words and actions of a parent during the separation are not to be scrutinized for a possible waiver of custody rights" and "isolated statements to third parties are not sufficient to establish consent or acquiescence." *Friedrich v. Friedrich*, 78 F.3d 1060, 1070 (6th Cir. 1996); *Moreno v. Martin*, 2008 WL 4716958, at *15 (S.D. Fla. 2008).

GRAVE RISK OF HARM

- Under Article 13(b) of the Convention, the Court is not obligated to return the child if Respondent establishes that "there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation."
- While the "grave risk" defense must be proven by clear and convincing evidence, "subsidiary facts…need only be proven by a preponderance of the evidence" and can be aggregated to create clear and convincing evidence of a grave risk of harm. *Danaipour v. McLarey*, 183 F. Supp. 2d 311, 315 (D. Mass. 2002).
- The Article 13(b) exception should be "interpreted narrowly, lest it swallow the rule." *Souratgar v. Fair,* 720 F.3d 96, 103 (2d. Cir. 2013).
- The exception "is not license for a court in the abducted-to country to speculate on where the child would be happiest." *Gaudin v. Remis*, 415 F.3d 1028, 1035 (9th Cir.2005) (*quoting Friedrich v. Friedrich*, 78 F.3d 1060, 1068 (6th Cir. 1996)).
- It is also not a license for the Court to engage in a best-interests-of-the-child analysis. Text and Legal Analysis, 51 Fed. Reg. 10,494, 10,509 (Mar. 26, 1986).
- In cases of credible sexual abuse, death threats, serious neglect or serious physical or psychological abuse, Courts have found grave risk of harm.

CHILD OBJECTS TO THE RETURN

- There is an additional provision of Article 13 (unlettered) which allows for the judicial or administrative authority to consider the child[ren]'s wishes not to return to his or her country of habitual residence, depending upon the child[ren]'s age and degree of maturity.
- The drafters of the Hague Convention purposefully declined to set a minimum age that a child must attain before a court may find him or her sufficiently mature and may refuse repatriation based solely on the child's objection.
- The State Department cautions, however, that "[a] child's objection to being returned may be accorded little if any weight if the court believes that the child's preference is the product of the abductor parent's undue influence over the child." The U.S. State Dept. Text & Legal Analysis, 51 Fed. Reg. 10,494, 10510

STAYS PENDING APPEAL

- The United States Supreme Court, in *Chafin v. Chafin,* addressed the issue of whether an appeal was moot once a return order had been carried out. For example, if a return order was reversed on appeal, courts might find it difficult to enforce an order directing a party in another country to return the child to the United States.
- In *Chafin*, the Supreme Court ruled unanimously that the child's return does not moot an appeal, because the parties continue to have a concrete interest in the outcome of the litigation. The Court found that there was a possibility that the foreign jurisdiction would enforce a return order or that the original left-behind parent would voluntarily return to the United States.
- The *Chafin* case should make it more difficult to attain stays once a return order has been issued by the trial court. As the Supreme Court illustrated, to determine an appeal moot once a child was returned would increase the number of stays granted pending appeal, which would "conflict with the Convention's mandate of prompt return to a child's country of habitual residence," and likely also generate more appeals in Convention cases, in order to delay the child's return as long as possible.
- *Chafin v. Chafin,* 133 S.Ct. 1017 (2013)

ATTORNEY'S FEES

- ICARA provides that upon a successful return order the court "shall order the respondent to pay necessary expenses incurred by or on behalf of petitioner, including court costs, legal fees, foster home or other care during the course of the proceedings in this action, and transportation costs related to the return of the child, unless the respondent establishes that such order would be clearly inappropriate." 22 U.S.C. §9007(b)(3).
- Article 26 of the Convention provides that upon a successful order the court "may, where appropriate, direct the person who removed or retained the child… to pay necessary expenses incurred by or on behalf of the applicant, including travel expenses, any costs incurred or payments made for locating the child, the costs of legal representation of the applicant, and those of returning the child.

CONCLUSION

- Each new case has the chance to highlight a particular and unique set of facts against the backdrop of the Convention's language and purpose. This in turn helps to clarify the law in the United States.
- As more countries accede to the Convention and become treaty partners, it will continue to become more important that attorneys and judges learn how to apply the Convention in order to achieve its stated goals.
- Courts should not take these cases as an opportunity to adjudicate merits of an underlying custody case. Rather they should have faith that the judicial systems in the child's habitual residence will be able to make those ultimate decisions. Otherwise, the Convention will merely provide license for abducting parents to engage in forum shopping.
- It is necessary to recognize that the act of abducting a child can have a devastating effect on a child and it is the responsibility of the courts to ensure that these abductions are not countenanced except in those most extreme cases.
- The Supreme Court in the case of *Abbott v. Abbott*, 560 U.S. 1 (2010), wrote that "[s]ome child psychologists believe that the trauma children suffer from these abductions is one of the worst forms of child abuse."

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Habitual Residence and Cross Border Comparison

Laura Dale, Houston, Texas
Rachael Kelsey, Edinburgh, Scotland
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HABITUAL RESIDENCE:
A Comparative Analysis of Habitual Residence Standards Under The Hague Convention

Presented by:
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Laura Dale & Associates, P.C.
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Cambridge University

I. INTRODUCTION

The Hague Convention on the Civil Aspects of International Child Abduction is designed to secure the prompt return of abducted children to their countries of habitual residence. But what is habitual residence? The drafters of the Convention deliberately chose to leave the term undefined as a matter of practicality. Yet, as a result, habitual residence has developed into a nebulous legal concept yielding inconsistencies, domestically and internationally.[1] The inconsistency has become increasingly problematic, especially given the primacy of habitual residence in Hague Convention cases.

Habitual residence is a threshold and often "outcome determinative" element in Hague Convention cases.[2] If a child has not been abducted from his or her habitual residence, the removal is not wrongful; therefore, a parent is not entitled to any relief under the Convention.[3] It then comes as no surprise that the United States circuit courts have struggled at length the concept of habitual residence. The circuits unanimously agree that, despite a definition, habitual residence requires consistent application. The circuit courts, however, have been unable to reach an agreement as to what the correct single inquiry or analytical framework should be. Likewise, there is a lack of consensus amongst the international community.

This paper explores the longstanding debate over habitual residence and attempts to extract some discernable pattern(s) between the circuit courts. We examine the theoretical foundations and practical implications of each such pattern with the hope that it may provide some guidance for practitioners.

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[1] *Redmond v. Redmond*, 724 F.3d, 745-46 (7th Cir. 2013); RHONA SCHUZ, THE HAGUE CHILD ABDUCTION CONVENTION: A CRITICAL ANALYSIS 188-194 (2013).

[2] *Mozes v. Mozes*, 239 F.3d 1067, 1071-73 (9th Cir. 2011).

[3] *Redmond v. Redmond*, 724 F.3d 729 (7th Cir. 2013).

II. THE DISCREPANCY AND ITS SOURCES

The international community and our circuit courts have been unable to agree on what conditions are necessary to create habitual residence. When a child has resided in one country its entire life, there is very rarely a dispute as to habitual residence. The difficulty arises when a family moves to one or more new countries during the child's life.

In exploring this issue, our courts have fallen into three "camps," each adopting a different focus in their habitual residence inquiry. These three groups will be discussed in more detail below, but can be generally described as follows:

(1) courts that prioritize the parental intent;
(2) courts that prioritize the child's perspective; and
(3) courts that have adopted a hybrid, totality of the circumstances test.

There are various factors that have spurred divergence amongst the courts and that have also made it difficult to overcome the lack of consensus.

a. *The Aims of The Hague Convention.*

Perhaps the most important reason for the spectrum of approaches taken by courts is that the Convention has multiple interrelated, yet distinct, objectives. These objectives can pull in different directions and be difficult to reconcile. On one hand, the Convention places at the head of its objectives the restoration of the child's status quo. This aim yields a more objective approach that focuses on the child's perspective. On the other hand, the Convention also aims to prevent one parent from unilaterally removing a child to a different country in search of a friendlier forum for a custody suit. This goal favors a subjective approach that focuses on the parents' intent. As explored at greater length below, it can be difficult at times to reconcile these two objectives in the context of a habitual residence inquiry.

b. Maintaining Flexibility

Courts must not only keep in mind the Convention's sometimes conflicting objectives, but also the inevitable myriad of fact patterns that come into play in a habitual residence inquiry. All circuit courts have stressed that a formulaic, "one-size-fits-all' habitual residence test is clearly inappropriate in light of the multitude of different fact patterns that can occur in a child abduction case. The determination has been described on multiple occasions as "highly fact-specific" and which "necessarily varies with the circumstances of each case."[4]

[4] *Whiting v. Krassner*, 391 F.3d (3d Cir. 2004).

c. Lack of Supreme Court Authority

The previous two factors have not only shaped our jurisprudence, but also that of our sister signatories. The result is a lack of consensus between treaty partners. The lack of international consensus and the inherent flexibility of the test, coupled with complicated fact patterns, make habitual residence cases unlikely candidates for certiorari to the United States Supreme Court. Many people (including some of the nation's most preeminent constitutional scholars) have asked our Supreme Court to resolve the circuit split on habitual residence. However, the Supreme Court will likely remain extremely reticent to decide a question that is still being considered by the Hague Conference. Moreover, the Supreme Court also favors "clean" cases that are straightforward and broadly applicable. Abduction cases often involve messy fact patterns that vary dramatically from case to case.

III. THE HABITUAL RESIDENCE MODELS

a. Parental Intent Model

Parental intent is the prevailing model in the United States. There currently exist two variants of this model, but both have in common an emphasis on the shared intent of the child's parents, instead of the child's perspective. Numerous parental intent courts have noted, "the difficult cases arise when the [parents] do not agree on where [habitual residence] has been fixed."[5] The two variants differ as to what constitutes share parental intent and how much weight parental intent should be given over the child's perspective. The first variant – the *Mozes* variant – places a strong emphasis on shared parental intent, but still allows for a finding of habitual based on the child's perspective. The *Berezowsky* variant, on the other hand, gives much greater weight to a rigid, narrow definition of shared parental intent.

1. The Mozes Varient – 1st, 2nd, 4th, 9th and 11th Circuits

The most common variant is *Mozes*, which originates from the Ninth Circuit's opinion in *Mozes v. Mozes*.[6] The *Mozes* variant starts it analysis with a two-tier test:

(1) Intent to Abandon – There must be a settled intention to abandon the child's prior habitual residence (as judged from the perspective of the "person or persons entitled to fix the place of the child's residence");
(2) Acclimatization – There must also be an "actual change in geography" and the passage of an appreciable period of time…that is sufficient for acclimatization."[7]

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[5] *Ruiz v. Tenorio*, 392. F3d. 1247, 1253 (11th Cir. 2004); *Mozes*, 239 F.3d at 1076.

[6] 239 F.3d 1067 (9th Cir. 2001). *See also Gitter v. Gitter*, 396 F.3d 124, 134 (2d Cir. 2005); *Nicolson v. Pappalardo*, 605 F.3d 100, 104 (1st Cir. 2010); *Maxwell v. Maxwell*, 588 F.3d 245, 251 (4th Cir. 2009); *Mozes v. Mozes*, 239 F.3d 1067, 1075 (9th Cir. 2001); *Ruiz v. Tenorio*, 392 F.3d 1247, 1252-53 (11th Cir. 2004) (adopting the *Mozes* habitual residence framework).

When the two elements conflict, the *Mozes* variant gives near dispositive weight to the first tier – parental intent. In order to establish a new habitual residence, there must be shared parental intent *and* acclimatization. However, if there is evidence of a child's acclimatization, but no evidence of shared parental intent, the *Mozes* framework makes it extremely difficult to establish habitual residence.

In its lengthy analysis, the Ninth Circuit in *Mozes* established a spectrum of fact patterns that courts may encounter when considering the near-dispositive element of parental intent.

(1) On one side are those cases in which the court finds that "the family as a unit has manifested a settled purpose to change habitual residence."[8] There may be settled purposes even when one parent may have qualms about the move.[9] This occurs when both parents and the child relocated together "under circumstances suggesting they intend to make their home in the new country."[10] When a court finds a family made these coordinated efforts to abandon one residence in favor of another, one parent's alleged reservations are rarely sufficient to negate a finding of "shared and settled purpose."[11]
(2) On the other side of the spectrum are those cases in which the child's relocation was "clearly intended to be for a specific, delimited period."[12] In such cases, one parent's unilateral decision to make the move permanent will rarely result in a change of habitual residence.[13]
(3) In between are cases where there was only consent for the child to stay in a new country for "some period of ambiguous duration."[14] Even when there is a "lack of perfect consensus" between the parents, the circumstances of the child's stay are sometimes such that a court can infer shared parental intent to change the child's habitual residence.[15] Similarly, the circumstances of the child's stay may indicate that there is no "settled mutual intent from which abandonment can be

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[7] *Id*. at 1078.

[8] *Id.* at 1076.

[9] *Id*.

[10] *Id*. at 1077.

[11] *Id*.

[12] *Id*.

[13] *Id*.

[14] *Id*.

[15] *Id*.

inferred."[16] In such cases, the findings of the district court are entitled to great deference.[17]

The *Mozes* variant essentially "creates a presumption that shared parental intent (or lack thereof) regarding a change of residence generally trumps evidence of acclimatization."[18] If there is no shared parental intent, then *Mozes* warns that courts should "be slow to infer from [a child's acclimatization] that an earlier habitual residence has been abandoned."[19] As noted above, the emphasis on parental intent is driven by the fact that the "Convention is designed to prevent child abduction by reducing the incentive of would-be abductors" to engage in forum shopping.[20]

Yet, the spectrum of parental intent outlined in *Mozes* suggests that parental intent is a somewhat flexible concept. *Mozes* explicitly allows a finding of shared parental intent, despite a perfect consensus between the parents. Moreover, the *Mozes* variant does not require an unequivocal declaration of shared intent by the parents at the time of relocation, but allows courts to reach this inference from the totality of the circumstances: "One need not have this settled intention at the moment of departure; it could coalesce during the course of a stay abroad originally intended to be temporary. Nor need the intention be expressly declared, if it is manifest from one's actions; indeed, one's actions may belie any declaration that no abandonment was intended."[21] This is consistent with the commonly recurring observation by courts that the habitual residence test cannot be so rigid as to exclude parents from relief under the Convention.[22]

The *Mozes* variant may create a presumption that relies on parental intent; yet in keeping with the need for flexibility, *Mozes* does not foreclose the possibility that a child's acclimatization may by itself be sufficient to establish a new habitual residence. "A child's life may become so firmly embedded in the new country as to make it habitually residence even though there may be lingering parental intentions to the contrary."[23]

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[16] *Id*.

[17] *Id*.

[18] *Karkkainen v. Kovalchuk*, 445 F.3d 280 (3d Cir. 2006)

[19] *Mozes*, 239 F.3d at 1078-79.

[20] *Id*. at 1079.

[21] *Id.* at 1075.

[22] *Id. at 1080-81*.

[23] *Id*. at 1078.

However, as stated above, *Mozes* warns that, without shared parental intent, courts should be slow to find that a child's contacts with a new country are sufficient to establish habitual residence. *Mozes* and its progeny adopt the view that "the greater the ease with which habitual residence can be shifted without the consent of both parents, the greater the incentive to try" and "[t]he question whether a child is in some sense 'settled' in its new environment is so vague as to allow findings of habitual residence based on virtually any indication that the child has generally adjusted to life there."[24]

The Ninth Circuit concluded its analysis by cautioning that its parental intent framework should not become a rigid or bright line test. The courts that adhere to the *Mozes* variant have adopted the Ninth Circuits warning:

> Recognizing the importance of parental intent, some courts have gone of in the other direction, announcing a bright line rule that 'where both parents have equal rights of custody no unilateral action by one of them can change the habitual residence of the children, save by agreement or acquiescence over time of the other parent…While this rule certainly furthers the policy of discouraging abductions, it has been criticized as needing to be 'carefully qualified if it is not to lead to absurd results. The point is well taken: Habitual residence is intended to be a description of a factual state of affairs, and a child *can* lose its habitual attachment to a place even without a parent's consent. Even if when there is no settled intent on the part of the parent to abandon the child's prior habitual residence if 'the objective facts point unequivocally to a person's ordinary or habitual residence being in a particular place.[25]

The second variant – the *Berezowsky* variant – seemingly ignores this admonition by adopting a narrow and rigid definition of parental intent and giving even less weight to acclimatization.

2. The Berezowsky Variant – 5th Circuit

In *Berezowsky v. Ojeda*, the Fifth Circuit reiterated that it had previously adopted the *Mozes* framework and emphasized that the "primary consideration in the habitual residence determination [is] shared parental intent."[26] This statement is not of itself particularly new or controversial; however, coupled with the court's rigid definition of shared parental intent and its refusal to even discuss the child's acclimatization,[27] the

[24] *Id*. at 1079.

[25] *Id*. at 1080-81.

[26] *Berezowsky v. Ojeda*, 765 F.3d 456 (5th 2014).

[27] *Id*. at 476 fn.10. ("Some courts have held that even absent a shared parental intent, a child may acquire a habitual residence by becoming sufficiently acclimated to a new environment. See, e.g.,

Fifth Circuit's approach constitutes a significant departure from *Mozes*. The result is a rigid and inflexible habitual residence test that would exclude many cases from the scope of the Convention.

As seen under the *Mozes* variant, numerous courts have emphasized that shared parental intent can be inferred from the totality of the circumstances, even when there is a "lack of perfect consensus" between the parents.[28] Yet, under the *Berezowsky* variant, shared parental intent cannot be inferred, but instead requires a "meeting of the minds."[29] The majority concluded in *Berezowsky* that there could have been no meeting of the minds because the parents had been estranged since before the child's birth. In her dissent in *Berezowsky*, Judge Haynes noted that the majority's insistence that "parents must testify that they sat down together and explicitly agreed to a child's habitual residence" marks a sharp departure from the long-established *Mozes* framework.[30]

Berezowsky also seems to suggest that acclimatization should be given even less weight than under the *Mozes* variant. In its opinion, the majority explicitly cited *Mozes* and its progeny as authority that allows a child to acquire habitual residence by becoming "sufficiently acclimated;" in response, the majority noted that the Fifth Circuit has "instead emphasized shared intentions."[31] The majority declined to even consider whether a three-year-old child had become sufficiently acclimated during his 13-month stay in Mexico, where he had also spent long periods of time prior to relocation.

Contrary to the *Mozes* variant, *Berezowsky* also seems to suggest that a district court's findings regarding habitual residence are not entitled to the deference normally afforded to a court's factual findings. To date, there has been no other court in any of the other circuits that has adopted the *Berezowsky* variant.

b. Child-Centric Model

Like the Parental Intent Model, there are two existing variants of the Child-Centric Model. These two variants share an emphasis on the child's perspective, instead of the parents' intentions. Yet, the weight given to the child's perspective varies. One variant considers only objective facts of the child's acclimatization and ignores entirely subjective parental intent; the other emphasizes the child's perspective, but parental intent remains relevant.

Gitter, 396 F.3d at 134; *Mozes*, 239 F.3d at 1081. The approach taken by our circuit has instead emphasized shared intentions. See Larbie, 690 F.3d at 311").

[28] *Mozes*, 239 F.3d at 1077.

[29] *Berezowsky*, 765 F.3d at 469.

[30] *Id*. at 477 fn.2.

[31] *Id*. at 467 fn. 10.

1. *The Friedrich Variant* – 6th Circuit

The Sixth Circuit stands alone in its interpretation of habitual residence. In one of the earliest examinations by an American circuit court of The Hague Convention, the Sixth Circuit held in *Friedrich v. Friedrich,* that "to determine habitual residence, the court must focus on the child, not the parents."[32] In exploring the mother's claims that she never intended for the child to habitually reside in Germany, the Sixth Circuit held that her intentions were *irrelevant*.[33]

Six years after the Ninth Circuit introduced the prevailing *Mozes* model, the Sixth Circuit reaffirmed its view of habitual residence in *Robert v. Tesson*.[34] In *Robert*, the Sixth Circuit reiterated that a court "should consider *only* the child's experience in determining habitual residence."[35] The court dismissed the "subjective intent of the parents" as "not only inconsistent with the precedent" but also making "seemingly easy cases hard and reaching results that are questionable at best."[36]

The *Roberts* court explained that it considered any focus on parental intent to "run counter" to the goal of preventing children from being "taken out of the family and social environment in which its life has developed."[37] In reaching this conclusion, the Sixth Circuit is able to give effect to both of the Convention's objectives of restoring the status quo and preventing abduction. However, the rigidity of the test ignores the import that parental intent may have in assessing the totality of the circumstances.

Two other courts have attempted to achieve this balance, by focusing on the child's perspective but still considering parental intent.

2. *The Feder Variant* – 3rd and 8th

Two years after *Friedrich*, the Third Circuit adopted a child-centric model under which objective evidence of the child's acclimatization is paramount. Under *Feder*, however, parental intent is still relevant. The Third Circuit explained that:

> 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

[32] 983 F.2d 1396, 1401 (6th Cir. 1993)

[33] *Id*.

[34] 507 F.3d 981 (6th Cir. 2007).

[35] *Id*.

[36] *Id*.

[37] *Id.*

> determination of whether any particular place satisfies this standard must focus on the child and consist of an analysis of the child's circumstances in that place and parents' present, shared intentions.[38]

The Eighth Circuit has since followed suit.[39] Together, these two courts have compiled an ever-growing list of objective factors that may help a court determine whether a child has acclimatized (e.g. enrollment in school, involvement in extracurricular activities, family relations, etc.). However, parental intent remains relevant in any habitual residence analysis. Moreover, under the *Feder* framework, there is an inverse correlation between the age of the children and the weight given to parental intent. The younger the child, the more weight is given to parental intent.[40] Because a young child lacks the capacity to form his or her own intentions or meaningful ties to an environment, parental intent is by default given nearly dispositive weight in deciding the issue of habitual residence.[41]

By allowing courts to adjust the weight given to different factors, the *Feder* variant gives courts the flexibility that is necessary in such fact-intensive cases. This flexibility can at times yields a framework that is nearly identical (or at least consistent with) the parental intent test under *Mozes*.[42] The flexible approaches embraced by the *Feder* and *Mozes* variants have led some scholars and jurists to note that there is a growing and inevitable convergence of the child-centric and parental intent models. The fact that these tests can sometimes seem indistinguishable has prompted one court to question the parental intent vs. child-centric paradigm. The Seventh Circuit seems to be moving toward a new hybrid test that is free of presumptions favoring one factor over the other.

c. Totality of the Circumstances Model

In *Redmond v. Redmond*, the Seventh Circuit surveyed the circuit split between the two schools – *Mozes*/parental intent and *Feder*/child-centric. The court concluded that the "differences are not as great as they may seem."[43] And the opinion may signal the

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[38] *Feder v. Feder-Evans*, 63 F.3d 217, 224 (3d Cir. 1995).

[39] *Silverman v. Silverman*, 338 F.3d 886, 898-99 (8th Cir. 2003); *Barzilay v. Barzilay*, 600 F.3d 912, 918 (8th Cir. 2010).

[40] *Whiting v. Krassner*, 391 F.3d 540, 548 (3d Cir. 2004).

[41] *Id*. (citing *Delvoye v. Lee*, 329 F.3d 332, 333 (3d Cir. 2003). The Sixth Circuit has acknowledged this caveat in the child-centric approach, but has declined to address whether it will incorporate this caveat to it otherwise purely child-based model. *Roberts v. Tesson*, 507 F.3d 981 (6th Cir. 2007).

[42] In *Whiting v. Krassner*, the Third Circuit recognized that its sliding scale test could, in certain cases, be reconciled and consistent with *Mozes*. 540 F.3d at 548.

[43] *Redmond v. Redmond*, 724 F.3d 729, 746 (7th Cir. 2013).

beginning of a new balanced model that doesn't start with the presumption that the parental intent should be given more weight than the child's, or vice versa.

As explained in *Redmond*, the Seventh Circuit never firmly committed to either camp. Instead, the Seventh Circuit "loosely" adopted the *Mozes* framework for its stated commitment to maintaining a flexible habitual residence test, not for its presumption favoring parental intent.[44] The court opined that the parental intent presumption in *Mozes* is, in fact, far from ideal. Shared parental intent may be the proper starting point in cases involving very young children for whom the concept of acclimatization has little meaning. On the other hand, the court observed, an emphasis on shared parental intent does not work when the parents are estranged essentially from the outset.[45] In other words, the Seventh Circuit concluded that it is "unwise to set in stone the relative weights of the parental intent and the child's acclimatization."[46] Instead, the habitual residence inquiry must remain "essentially fact-bound, practical, and unencumbered with rigid rules, formulas or presumptions."[47]

At first glance, a totality of the circumstances test seems a very rational approach because it is so fluid that it has the potential to deal effectively with every possible child abduction fact pattern. However, its greatest virtue is also is greatest vice. The lack of structure will provide little predictability for parties and it may become even more difficult to discern any consistent patterns. It may also facilitate result oriented opinions by judges left unbound by any clear precedent. The Seventh Circuit does seem to suggest, however, that it is possible to develop general guiding principles within this flexible framework that will provide sufficient guidance and binding precedent (e.g. parental intent is given greater weight when the child is young).

IV. A FOREIGN PERSPECTIVE

As discussed above, our courts are not the only ones that are struggling with the concept of habitual residence. There is an international debate that in many ways resembles and influences our own domestic debates over the proper habitual residence framework. In particular, the United Kingdom's jurisprudence has been of great significance in our habitual residence case law. Many of our seminal habitual residence cases – such as *Mozes, Redmond*, *Friedrich* to name a few – rely on two English opinions known as *Re Bates* and *Shah*.

In *Re Bates*, the English court expressed that courts should "resist the temptation to develop detailed and restrictive rules as to habitual residence, which might make it as technical a term of art as common law domicile. The facts and circumstances of each

[44] *Id*. at 746.

[45] *Id*.

[46] *Id*.

[47] *Id*.

case should continue to be assessed without resort to presumptions or presuppositions."[48] On the other hand, in *Shah*, another English court defined habitual residence as being "habitually and normally resident" in a location, coupled with a "settled purpose" to reside there.[49] It was this reference to "settled purpose" that gave rise to the shared parental intent standard adopted in *Mozes*.[50]

The United Kingdom Supreme Court, however, has since disavowed the "settled purpose" formulation. In 2014, the U.K. Supreme Court held in *Re LC* that "settled purpose" is "not readily applicable to a child, who usually has little choice about where he lives and no settled purpose, other than survival, than living there." [51] The rejection of "settled purpose" seems to signal a shift by the U.K. courts to a child-centric approach.

In fact, *Re LC* seems to establish a child-based model that far exceeds the scope of our domestic jurisprudence. First, the new U.K. habitual residence framework sets a low threshold for proving acclimatization. In his judgment in *Re LC*, Lord Wilson confirmed that courts need only look for "*some* integration on the part of the child in a social and family environment in the suggested state of habitual residence."[52] And perhaps the most novel, and radical, development is that *Re LC* encourages courts to give greater weight to the child's state of mind. Whereas our acclimatization case law still rests on "objective facts" (e.g. existence of social and familial ties), *Re LC* rejects the long-standing preference for objective proof over evidence of "state of mind."[53] The emphasis on the child's subjective state of mind may establish precedent for courts in the United Kingdom to give greater weight to children's preferences. This would be in keeping with other recent calls by the judiciary for children to "be heard far more frequently" in Convention cases.[54]

We have yet to see how *Re LC* will be applied by the lower courts and what it practical consequences will be.

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[48] *Re Bates* (1989), No. CA 122/89 (High Ct. of Justice, Fam. Div. Eng.).

[49] *Mozes*, 239 F.3d at 1073-74. Oddly, *Shah* is not an abduction case, but merely involved another law that used the same term. Therefore, reliance on *Shah*'s "settled intent" makes less sense in cases in which the issue is the habitual residence of minor children.

[50] *Id.*

[51] [2014] UKSC 1.

[52] *Id.*

[53] *Id.*

[54] [2011] EWCA Civ 272.

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Drafting International Travel Documents

Patricia Apy, Red Bank, New Jersey

Preventing International Child Abduction

Tips on the use and drafting of protective orders

WHY DO YOU WANT A PROTECTIVE ORDER?

- To prevent all travel from the United States pending further order of the Court.
- To provide reasonable restrictions and arrangements for international travel , and to discourage wrongful removal and retentions in breach of those arrangements.

I . PREVENTING REMOVAL OF A CHILD FROM THE UNITED STATES

1. Understanding US Borders

Unlike many (if not most countries) passport and immigration control occurs in the United States only as a person is entering the country not leaving it. Passport and immigration control while leaving the United States has, until very recently, been a function carried out by Airlines and other common carriers.

The **Convention for the Unification of certain rules relating to international carriage by air**, commonly known as the **Warsaw Convention**, provides the legal authority for the requirement to produce travel documents (including passports) at the time of issuance of ticket and boarding of aircraft to leave the United States, and creates and regulates liability for international carriage of persons, luggage, or goods performed by the airline.

Air Carrier Liability

- Liability under the terms of the Convention is limited to determining whether a child will be permitted to ENTER the country of destination , and shifting the burden of travel expense if an airline is forced to return a passenger. The standard of care for such an analysis therefore is "reckless " not a negligence standard.
- As a result, a protective order intending to prevent all travel outside of the United States should be written to make it as clear as possible what the limitations are intended for international travel (the simpler the better) . Once an order is entered , should a parent believe that airline reservations have been made, or a wrongful removal or retention is in progress , a copy of the Order should be submitted to the following :
- Corporate Counsel Office for the Individual Airline if known (always include the national airline)
- Airline Office at the Individual Airport
- Port Authority Police

NATIONALITY, PASSPORTS & TRAVEL DOCUMENTS

IF a child is NEVER supposed to travel internationally (whether as a component of a temporary order or a final decree) the protective order must include precise language in order capable of informing third parties regarding passports.

- Identify nationality of both parents (full names and birth dates) Identify names and nationality of children (whether or not passports for those countries have been issued.
- If the case is pending the Court order should specify that all passports (expired and current) for the minor child are relinquished to the Court of competent jurisdiction , or returned to the issuing authority for destruction.
- The Order should confirm that the child is registered in the United States Department of State Children's Passport Issuance Alert Program (CPIAP) which can be done online, and does not require a Court order.

Research Countries Involved

The United States has several travel documents in addition to passports ;

- US Passport Cards: Land and Sea travel within North America (Canada, Mexico, the Caribbean and Bermuda)
- Nexus Card: Border Crossing for US and Canadian citizens and permanent residents. Can be used for air travel (dedicated kiosks) . Can be used to enter the US from Mexico , but not Mexico from the US.
- FAST Card: Crossing between US and Canada , as well as to US from Mexico for US and Canadian Citizens
- Sentri Card: Passport free entry into US from Mexico and Canada.
- Enhanced Drivers Licenses WHIT compliant : VT, WAS, MI, NY and BC, Manitoba, Ontario (by land only)

Foreign Passports and ID Cards

- A US court cannot order a Sovereign nation to do anything. However, it CAN order the litigants to do things.
- Order should specify the surrender of all existing and expired passports .
- Foreign national litigants should be required to write to the Foreign Embassy requesting that no foreign passports be issued or renewed with copies sent to Central Authority (if Hague Country) or Ministry of Foreign Affaires
- All ID Cards should be surrendered (Discovery should produce notice of whether the child is listed as a resident of the foreign country)

International Child Abduction Prevention and Recovery Act

22 USC 9111 et seq.

Reference the Act to Prevent Abduction

- As required by Title III of the International Child Abduction Prevention and Return Act 6 U.S.C. 241, the Department of Homeland Security, U.S. Customs and Border Protection (CBP), in coordination with the U.S. Department of State and other federal agencies, has established a program that seeks to prevent the departure of a child from the United States when presented with an order from a court of competent jurisdiction which prohibits the child's removal from the United States.
- Requires an Order specifying that the Child is NOT to leave the United States, not appropriate for protective orders contemplating permitted international travel.
- Recommend a Separate Order by Court dedicated to simply addressing travel restriction

Include Reference to Hague Abduction Convention

- Include either Factual stipulations OR Findings of Fact and Conclusions of Law significant in an analysis under the Hague Convention on the Civil Aspects of International Child Abduction
- Habitual Residence (set forth factual basis)
- Confirm rights and exercise of custody
- Absence shall be considered Temporary
- Child not exposed to "grave risk of harm" or "intolerable situation"

Criminal Statutes

Requirements in Protective Orders to engage Law Enforcement

International Parental Kidnapping Prevention and Crime Act 18 USC Sec. 1204

- **(a)**Whoever removes a child from the United States, or attempts to do so, or retains a child (who has been in the United States) outside the United States with intent to obstruct the lawful exercise of parental rights shall be fined under this title or imprisoned not more than 3 years, or both.
- Investigated by the Federal Bureau of Investigation
- Prosecuted by the United States Attorney
- Requires the existence of an Order setting forth both rights of custody AND terms of parental access with specificity .
- Requires language in the Order that provides NOTICE that violation of the order will constitute violation of statute.

Protective Orders where travel is contemplated

- Identify terms and conditions of International travel
- Identify who holds , renews or replaces travel documents
- Identify any limitation on use of travel documents (NOTE dual nationality)
- Determine if presumptive permission will be given , or individual permissions required for each trip
- Provide limitations on countries to which travel cannot take place : (State Department Travel warnings, CDC warnings regarding health/disease , Non-Hague Countries
- Set forth jurisdictional determinations, court of competent jurisdiction , and custodial definitions and determinations.

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Attorneys for Plaintiff

	:	**SUPERIOR COURT OF NEW JERSEY**
	:	**CHANCERY DIVISION-FAMILY PART**
	:	**_____ COUNTY**
Plaintiff,	:	
	:	DOCKET NO.
vs.	:	
	:	CIVIL ACTION
	:	
,	:	**CONSENT ORDER**
	:	**SHARED PARENTING**
Defendant.	:	
	:	

THIS MATTER having been opened to the Court by both the Plaintiff, through her counsel Patricia E. Apy, Esq. of the firm Paras, Apy & Reiss, P.C., and the Defendant ; and the parties having amicably resolved between themselves all issues regarding the terms and conditions of shared parenting of their minor children , including, but not limited to, their parenting time schedule; and the parties having now submitted this joint application to which both parties have given independent judgment and have had the opportunity to consult counsel; and the parties having set forth the following stipulations; and the Court making such finding and further that good and sufficient cause exists for the entry of this Order;

IT IS on this _____ day of _____, 2016

ORDERED as follows:

UCCJEA DECLARATION

1. The parties were married on XXXXXXXX in a civil ceremony in New York City, New York, United States of America. The parties were married in a religious ceremony on

XXXXXXXXX in XXXXXXXXX New Jersey, United States of America. The marriage was registered in France.

2. The parties are the parents of XXXXXXXXX, a natural born citizen of the United States, having dual French citizenship; born XXXXXXX, in XXXXXXXX, New Jersey, United States of America. [The child] has been a resident of the County of XXXXXX, State of New Jersey, United States of America since XXXXXX. [The Child] has a United States passport # XXXXXXXX which expires on XXXXXX. There are have been no travel documents applied for or issued by the French Republic regarding [the child] .
3. The parties are the parents of XXXXXX, a natural born citizen of the United States, having dual French citizenship, born XXXXXXX in XXXXXXX New Jersey, United States of America. {The Child} has been a resident of the County of XXXX, State of New Jersey, United States of America since XXXXXX. [The child] has a United States passport, XXXXXXXX which expires on DATE . There have been no travel documents applied for or issued by the French Republic regarding [the child]
4. The Plaintiff is a life-long citizen of the United States of America and a resident of the State of New Jersey.
5. The Defendant , is a life-long citizen of the French Republic. The Defendant became a naturalized citizen of the United States on [DATE]. The Defendant is the holder of United States passport ##### which expires on DATE; and French passport ###### which expires on DATE. The Defendant is a resident of the State of New Jersey.
6. The parties stipulate and affirm that both of their children have been residents of the State of New Jersey since their birth. As such their "home state" pursuant to (UCCJEA citation) N.J.S.A. 2A:34-65, et. seq. is and remains New Jersey, United States of America. Subject matter jurisdiction for this case and over these children rests

exclusively in the United States of America, State of New Jersey, County of XXXXX under the applicable provisions of Federal, State, and International Law, including, but not limited to, the pertinent provisions of International Parental Kidnapping Crime Act, (IPKCA) 18 USC§1204 (1993), the International Child Abduction Prevention and Recovery Act (hereinafter ICAPRA) (22 USC§9111 et. seq.) and the International Child Abduction Remedies Act (hereinafter ICARA) ; 22 USC 9001 , et. seq.

7. Any absence of [the children] from the State of New Jersey, United States of America, including prior holiday trips to France, have been considered "temporary absences" within the meaning of NJSA 2A: 34-65, (UCCJEA citation) and do not cause the United States of America to lose its status as either the "home state" nor the "habitual residence" of the minor child within the meaning of Article 3 of the Hague Convention of Civil Aspects of International Child Abduction, 25 October 1980, 51 Fed. Reg. 10498 (1980) found in ICARA at 22 USC 9003. The parties recognize that French Republic is a signator to the 1980 Hague Convention on the Civil Aspects of International Child Abduction. The Defendant specifically acknowledges that the Defendant has not and the Defendant is expressly waiving any right the Defendant may have had under French law to seek orders addressing the custody and support of the minor children in France based upon the Defendant or the children's identity as French nationals.
8. As part of their settlement, the parties wish to enter into a Custody and Parenting Time Agreement to be filed in the State of New Jersey, United States of America, capable of recognition and enforcement in both the United States and the French Republic. They intend that this Consent Order for Shared Parenting be appended to an eventual Judgment of Divorce in the above captioned matter. This Agreement is therefore to be treated as an initial child custody determination, and the State of New Jersey shall

continue to exercise continuing and exclusive jurisdiction for the consideration of any requests by either parent to modify these provisions.

9. Pursuant to United States and New Jersey law, specifically N.J.S.A. 9:2-4 (custody removal and relocation) and N.J.S.A. 2C:13-4 (Interference with Custody) as well as N.J.S.A. 2A:34-76 (UCCJEA enforcement of Hague determinations) in aid of the application of Article 15 of the Hague Convention or the Civil Aspects of International Child Abduction, 25 October 1980, should either party purposefully internationally retain or refuse to return either or both of the minor children from the United States, State New Jersey, such retention is and may continue to be considered "wrongful" in accordance with the applicable provisions of the law of the child's habitual residence, New Jersey, United States of America.

AGREEMENT

A. Custody

1. The parties shall continue to serve as joint legal custodians of the minor children, The boys shall be considered primarily reside with their Mother at _____ and with their Father at _____as their parent of alternate residence. Shared parenting includes the shared right and obligation of both parents to jointly agree in writing to any proposed change of the habitual residence of their [children] , in advance. Neither parent may unilaterally change the primary residence of the children, their home state or their habitual residence, absent further order of the New Jersey Court.

2. The parties have carefully weighed and considered the shared parenting of their sons and intend that this agreement constitutes their final resolution of those issues. They are hopeful that their parenting will be flexible and cooperative. To that end, attached to this order (Appendix "A"), is a Parenting time schedule intended to serve as a

default. Modifications to this order may be made by the parties only with express written consent of both parents exchanged in advance or by an order of this Court upon notice given.

Passports

3. Neither party may apply for or renew any existing passports for the minor children, current or expired, issued by any country, including but not limited to the United States of America or the French Republic absent the express written consent of both parties.

4. The parties affirmatively represent that the children do not now have French passports, and no administrative registration of the children has been sought by either parent outside of the United States. Further, they represent that other than the registration of the parties' marriage in France, neither parent has applied for French passports on behalf of the children or otherwise registered them as French citizens.

5. The United States passports of [the children] shall be registered with the United States Department of State Passport Control Office to insure that both parents are required to receive notice and obtain consent for the renewal and reissuance of any United States passports. A copy of this order, including the additional international requests for assistance regarding passport issuance shall be forwarded to the Office of Children's Issues for their file. A copy of this Order shall also be served on the Department of Homeland Security under the Prevent Departure Program, 6 USC 241 to effectuate the agreement of the parties to prohibit the ***unauthorized*** removal of their children from the United States. Pending further order of this Court, the passports of the minor children shall remain in the possession of the Plaintiff , subject to use by the Defendant consistent with the terms of this Order, or further order of this Court.

Travel to France/Switzerland

6. Nevertheless, both parties acknowledge that their [children] are both United States and French nationals and will continue to benefit from both countries and culture. The parties agree that their sons will continue to travel regularly to France , and may do so with either parent. As long as the travelling parent complies with the agreements for international travel, the presumption shall be that travel to France with [the Defendant] twice a year is permitted. In the event of a disagreement, either parent may make an application to this Court and present evidence rebutting that presumption.

International Travel

7. Neither parent, nor any agent acting on either parent's behalf, shall remove the minor children from the United States of America absent the express written consent of the other parent, or an order from the New Jersey Superior Court, XXXXXXXX County, Family Part, obtained in advance. The parties agree that in the event they wish to enjoy their uninterrupted parenting time (vacations) outside of the United States of America, that the travelling parent will provide written notice (email return receipt) , an itinerary of destinations, flight times, flight numbers, hotel and stay details, and dates of travel at least 30 days prior to the intended travel. The parties agree that the non-travelling parent will respond within one week of receipt of same and provide their response to the travel request. In the event no response is given to a request timely made, the travelling parent may book airline travel and provide confirmed travel documentation to the non-travelling parent. In that event, any charges which occur as the result of the non-travelling parent's later objection will be charged to the non-travelling parent. In the event that the travelling parent books travel

notwithstanding a timely objection from the non-travelling parent, charges or cancellations to the travel will be the responsibility of the travelling parent.

8. The parties agree that they will not travel with their children to countries of the world that have been identified by INTERPOL, the Center for Disease Control, the United States Department of State or French government as posing a threat to their citizens. Travel of the children , to countries that are not Treaty partners to the Hague Convention on the Civil Aspect of International Child Abduction (22 USC sec 9001 et seq.) with the United States or about which the United States Department of State has reported to be non-compliant in their Treaty obligations (22 USC sec. 9111 et seq.) , will not be entertained unless both parties expressly agree in writing in advance to permit such travel.

Interstate Travel

9. Both parties agree that they may travel with their children , throughout the mid-Atlantic region (New York, Connecticut, Delaware, Maryland, Washington, D.C., Virginia) during their scheduled parenting time, upon notice to the other parent. To the extent possible, mail and text notice should be made at least 48 hours in advance, if practical. No such notice is required by either party for travel to Manhattan or Washington DC. Any travel outside of the mid-Atlantic region requires notice to the other parent, accompanied by airline or other travel information, itinerary and contact details as soon as possible, but in no event less than 48 hours in advance.

10. **B**oth parties are aware that any violation of any custody and/or visitation order issued by this Court (which would include but not be limited to, the unauthorized request for travel documents on behalf of the minor children) could constitute the wrongful removal or retention of the minor child(ren) from this jurisdiction, and provides the basis of a violation of the federal law prohibiting international parental kidnapping

under the International Parental Kidnapping Crime Act (IPKCA), 18 U.S.C. 1204(a), as well as prohibitions contained in additional Federal law as well as under New Jersey law NJSA 2A:13-4.

11. For purposes of any notice required under the Order, consistent with N.J.S.A. 2A:34-60 (UCCJEA notice provisions) , ***actual*** notice is sufficient, and may be given by delivering, mailing or emailing any court documents to the last known address or by Overnight Mail service, email or facsimile upon a counsel of record, or pro se litigant, and shall be sufficient service for the continued prosecution of this matter between the

12. ural development of their children's love and respect for each of their parents.

WAIVER OF FRENCH PROCESS

13. At the same time as the execution of this Agreement the Defendant is executing an Appearance in Lieu of Answer , to be filed in the Superior Court of New Jersey-Family Part , County of XXXXXXXX, United States of America under Docket No. XXXX. With the filing of his appearance, Plaintiff agrees to withdraw her previously filed Request to Enter Default. As such the Defendant preserves his right to be heard on all remaining issues of dispute related to the dissolution of the marriage. The Defendant specifically acknowledges that the Defendant has not and with the filing of his Appearance in Lieu of Answer, the Defendant is expressly waiving any right the Defendant may have had under French law to seek orders addressing the dissolution of the marriage, the distribution of property or the application of the matrimonial regime by the French courts , which the Defendant may have had based upon the Defendant 's identity as a French national. The parties agree that the remaining financial issues, and any disputes regarding them will be negotiated and resolved in the within action, by the Court of competent jurisdiction which will remain

the Superior Court of New Jersey County of XXXXXXXXX, United States of America.

_____

J.S.C.

We hereby consent to the form and entry of the within Order.

_____ _____

PATRICIA E. APY, ESQ. XXXXXXXXXXXXX

Attorney I.D. #020641986
Paras, Apy & Reiss, P.C.
Attorneys for the Plaintiff

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SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
FAMILY PART
COUNTY

Plaintiff

-v-

Defendant

DOCKET NO.

CIVIL ACTION

EX PARTE ORDER TO SHOW CAUSE WITH TEMPORARY RESTRAINTS
(Oral Argument Requested)

o0o

THIS MATTER being presented to the Court on the application of Paras, Apy & Reiss, P.C., attorneys for the Plaintiff _____ (Patricia E. Apy, Esquire. appearing) and no notice having been given to the Defendant _____ due to the demonstrated risk that further immediate and irreparable harm will result should such notice be given prior to hearing, and the Court making such finding, and further, that good cause exists for the entry of this order;

IT IS on this _____ day of _____, 2015, hereby **ORDERED** that on the _____ day of _____, 2015, at 9:00 a.m. in the forenoon or as soon thereafter as counsel may be heard, Defendant _____, LOCATION United States of America, why an Order should not be entered which ORDERS the following:

1. Naming the parties joint legal custodians of the minor child, [NAME DOB] with the

plaintiff named temporary primary residential parent;

2. Restraining the removal of the minor child from the State of New Jersey, United States of America, absent further order of this court;

3. Requiring the surrender of any and all passports which may have been issued for the minor child and to the parties to the Superior Court, pending further order.

4. Requiring the surrender of any passport(s) of the maternal grandparents for any time period they wish to exercise access with the minor child.

5. Converting the temporary restraints and custodial restraints into permanent restraints.

6. For such other relief that the Court may deem equitable and just.

IT IS FURTHER ORDERED that pending the return date of the Order to Show Cause the Court makes the following findings:

1. The parties were married on _____ in a religious ceremony in New York City, New York, United States of America.

2. The parties are the parents of CHILD , a citizen of the United States, DOB in New York City, New York, United States of America. [The Child]does not have a United States passport. She has been a resident of the State of New Jersey, County of _____, United States of America since her birth. It is believed that [The Child] is considered a national of [COUNTRY] by operation of law. To the best of the Plaintiff's knowledge, [The Child] does not have a [The Country] passport.

3. The Defendant is a citizen of [Country]. After coming to the United States on an H1B work visa in [ ] , she received her green card on [ ] . She has been resident in the United States of America since [ ] . She has been a resident of the State of

New Jersey, County of ----------, United States of America since at least _____. Defendant holds a [ ] passport**.**

4. The [maternal/ paternal] grandmother, NAME DOB, has been visiting in the marital home since _____. She is a [Country] citizen and holds a [Country] passport.

5. The minor child has been resident with her parents in the [City] [County] New Jersey, since her birth. As such her "home state" for the determination of the initial child custody determination pursuant to [UCCJEA citation] N.J.S.A. 2A:34-65, et. seq. is and remains New Jersey, United States of America. Subject matter jurisdiction for this case and over this child rests exclusively in the United States of America, State of New Jersey, County of [ ] under the applicable provisions of Federal, State, and International Law, including the pertinent provisions of International Parental Kidnapping Crime Act, (IPKCA) 18 USC§1204 (1993) .

6. Any absence of [CHILD] from the State of New Jersey, United States of America shall be considered a "temporary absence" within the meaning USC 1738B(b)(B), and shall not cause the United States of America to lose its status as the "habitual residence" of the minor child within the meaning of Article 3 of the Hague Convention on the Civil Aspects of International Child Abduction . 22 USC 9001 et seq.

7. Pursuant to United States and New Jersey law, specifically N.J.S.A. 9:2-4 [Custody and Removal] and N.J.S.A. 2C:13-4 [Criminal Interference with Custody] as well as N.J.S.A. 2A:34-76 [UCCJEA Hague Enforcement] in aid of the application of Article 15 of the Hague Convention or the Civil Aspects of International Child Abduction, 25 October 1980, codified at 22 USC 9001 et. seq., neither parent may

unilaterally modify the place of residence of the minor child. Should either party purposefully retain or refuse to return the minor child to the United States, State New Jersey, such retention is and may continue to be considered "wrongful" in accordance with the applicable provisions of the law of the child's habitual residence, New Jersey, United States of America.

8. The United States Department of State, Bureau of Consular Affairs has indicated that:

[HERE include provisions of the ICAPRA 22 USC 9111 et seq. Country Report and other information related to enhanced obstacles to recovery]

9. The recent report from the Office of Children's Issues at the Department of State confirms that [Country] has no bilateral procedures for the resolution of abductions, and adheres to no protocol.

10. The Plaintiff has alleged that the Defendant's behavior indicates that [Defendant] may constitute a risk of wrongful removal of the parties' minor child to her native [Country] .

11. The Defendant maintains strong ties to [Country] , where Defendant was born, raised and lived until being transferred to the United States on business in [ ] . [**HERE INCLUDE SPECIFIC FINDINGS RE BEHAVIOR SUPPORTING ABDUCTION RISK]**

12. The Defendant has insisted that the Plaintiff produce and give the Defendant their daughter's birth certificate, which could be used to obtain a [Country] passport.

13. Although the precise travel itinerary is unknown, the Defendant has represented that the maternal/paternal grandmother is imminently scheduled to travel on or about DATE back to [Country] . She and her husband have demanded that the plaintiff "admit" while on Skype that Plaintiff wants a divorce and have indicated that [the

Defendant] granddaughter and maternal/paternal grandparents should be considered "inseparable".

14. The Defendant's behavior and her ties to the [Country] as outlined above, constitute objective evidence coupled with the virtually total obstacle to the ability to recover an abducted child as constituting risk factors for international child abduction as set forth in the analysis, "A Judge's Guide to Risk Factors for Family Abduction and Child Recovery" **(See Certification in Support of Order to Show Cause, Exhibit "A")** and "Risk Factors and Preventative Interventions for Custody Violations and Parental Abduction" **(See Certification in Support of Order to Show Cause, Exhibit "B")** matrix. These documents identify those factors and behaviors which, once identified by the court, are predictive of the risk of wrongful removal and retention of children.

AS SUCH pending the return date **IT IS FURTHER ORDERED:**

15. The Parties shall temporarily serve as joint legal custodians, and Plaintiff shall serve as temporary physical custodian of the minor child, { NAME} , [DOB] , who shall not be removed by either parent from the State of New Jersey, absent Order of the Court.

16. The court hereby orders that both parties' passports, the maternal/paternal grandmother's passport and any passports for the minor child which may be in existence, including but not limited a [Country] passport which may have been obtained for the child, be immediately relinquished to this Court pending final resolution in this matter or order of the Court.

17. A copy of this order will be immediately served upon the Consulate of the [Country] in New York, respectfully requesting that they provide immediate confirmation of the existence of a [Country] passport for the minor child [NAME] , [DOB] and

notification to this Court, as well as the Office of Children's Issues at the United States Department of State in the event an application for the Issuance of a [Country] Passport (replacement or renewals) is requested for the minor child or for the Defendant during the pendency of this court's restraint of her passport.

18. Both parties are prohibited from applying for or renewing/replacing any United States or [Country] passports on behalf of the child or the parties during the pendency of this court's restraint of the passport.

19. As a condition of contact with the minor child, the maternal grandmother shall surrender any [Country] or other passports and/or visas she may have to this Court for any time period during which she intends to exercise access.

20. The United States United States Department of State has already entered the minor child into the Children's Passport Issuance Alert Program. **(See Certification in Support of Order to Show Cause, Exhibit "D")** to insure that both parents are required to receive notice and consent for the renewal, issuance or reissuance of a United States passport for their daughter. A copy of this order, including the additional international requests for assistance regarding passport issuance will be forwarded to the United States Department of State, Office of Children's Issues for their existing file.

21. A copy of this Order shall be served on the Department of Homeland Security , pursuant to 22 USC 9111 et seq. and 6 USC 241 confirming that the minor child is PREVENTED from travelling outside of the United States of America .

22. The Plaintiff retains the right to seek such reimbursement for all expenses incurred in this matter, including all counsel fees and costs.

23. **IT IS FURTHER ORDERED** that this Order to Show Cause and accompanying pleadings shall be served upon the Plaintiff within two (2) days of this Order.

24. **IT IS FURTHER ORDERED** that both parties are aware that any violation of any custody and/or visitation order issued by this Court could constitute the wrongful removal of the minor child from this jurisdiction, and provides the basis of a violation of the federal law prohibiting international parental kidnapping under the International Parental Kidnapping Crime Act (IPKCA), 18 U.S.C. 1204(a), as well as prohibitions contained in N.J.S.A. 2C:13-4.[State Interference with Custody Statute)

25. **IT IS FURTHER ORDERED** that for purposes of any notice required under the Order, consistent with N.J.S.A. 2A:34-60, (UCCJEA notice provisions) actual notice may be given by delivering or mailing any court documents to the last known address or by Federal Express, email or facsimile upon a counsel of record, and shall be sufficient service for the continued prosecution of this matter between the parties.

26. **IT IS FURTHER ORDERED** that the Defendant shall file and serve upon Plaintiff's counsel any responsive pleadings at least three (3) days prior to the return date.

_____

J.S.C.

The Down Town Association
60 Pine Street
New York, NY 10005

UCCJEA or Hague Proceedings

Evan Marks, Miami, Florida

Hague or UCCJEA Proceedings

Evan Marks, Esq.

April 29, 2017

UNIFORM CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT

- The UCCJEA has been adopted by 49 states (Massachusetts still uses the older UCCJA) and is the United States' statutory mechanism for determining custody, timesharing, or visitation rights with regard to minor children.

UCCJEA - PURPOSE

- "Avoid jurisdictional competition and conflict"
- "Promote cooperation with the courts of other States"
- "Discourage the use of the interstate system for continuing controversies"
- "Deter abductions of children"
- "Avoid relitigation of custody decisions"
- "Facilitate the enforcement of custody decrees"

UCCJEA – HOME STATE

- The UCCJEA determines what state has jurisdiction over custody, timesharing, visitation based upon where the child's "home state" is.
- "Home state" is defined by whether the "state is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six (6) months before the commencement of the proceeding." §61.514(1) Fla. Stat.

UCCJEA – DECLINING JURISDICTION

A state may decline jurisdiction, regardless of whether the state is in fact the home state of the child if either of the two (2) following circumstances exist:

- Inconvenient forum; or
- Another state already has jurisdiction.

HAGUE: CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

- "to secure the prompt return of children wrongfully removed to or retained in any Contracting State"

and

- "to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States."

HAGUE – REQUIRED ELEMENTS

- Child removed to or retained in a country that is not their habitual residence;
- The petitioning parent has custodial rights that the removal/retention violates; and
- The petitioning parent was or would have exercised custodial rights.

HAGUE - DEFENSES

- More than one (1) year has passed since removal & child is now well-settled in new country;
- Consent/acquiescence by petitioning parent;
- Grave risk of harm to child if returned; or
- Child is mature and old enough to object to return.

HAGUE OR UCCJEA

The Hague exists as a mechanism to return children who have been wrongfully removed from a country by one parent.

The UCCJEA exists specifically to establish a right of access to a child within the United States.

The UCCJEA can be used as proof of a parent's rights to a child in a Hague proceeding.

Additionally, the UCCJEA, can be used to enforce an order of return from a foreign jurisdiction (state or country).

UCCJEA or Hague Proceedings

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Evan R. Marks is a board certified marital and family law attorney licensed in the State of Florida. He practices family law with his wife, Carolyn West, and two associates, at the Law firm of Marks & West, P.A., with offices in downtown Miami Florida. The Firm has a comprehensive practice in all aspects of marital and family law, with extensive experience in complex family law litigation and appeals, paternity, custody and international parental kidnapping matters, pre-and post-marital agreements, and alternative dispute resolution, including the collaborative law process.

Having received his Bachelor's and Law degrees from the University of Miami, Mr. Marks has been a Member of the Florida Bar since 1981 and Board Certified by the Florida Bar as a specialist in Marital and Family Law since 1995. He is a Fellow in the International Academy of Family Lawyers. He is AV rated by Martindale-Hubbell. Mr. Marks is the current President of the Collaborative Family Law Institute (CFLI), in addition to being a former President of the Family Law Section of the Florida Bar (2004), former Member of the Florida Commission on Responsible Fatherhood (1996-2002), former President of the First Family Law Inn of Court (2000-01), and former President of the North Dade Bar Association (1995-96).

Mr. Marks is a frequent author and lecturer on family law topics and professional ethics. He has taught at the Florida Conference of Circuit Court Judges and in June 2009 he served on the Faculty at the Florida Advanced Judicial Studies College. He is the proud father of four children, Lynx, Benjamin, Danny and Whitney.

Ronald H. Kauffman is the founder of Ronald H. Kauffman, P.A. He is board certified in marital and family law. He currently serves on the Executive Council of the Florida Bar Family Law Section, and is a member of both the California and Florida Bars. Ron is currently serving as President of the First Family Law American Inns of Court, and formerly served as Vice-Chair of the *Florida Bar Journal*. His most recent article "To Catch a Time-sharing Deviation" was published in *The Florida Bar Journal*, and is cited as a reference in the Florida Benchbook on Child Support. Outside the courtroom, Ron, and his wife Lisa, have three children: Jake, Matt and Scott.

Note: The UCCJEA statutory examples and case law provided are Florida specific, however, the UCCJEA is a nationally uniform statute (with the exception of Massachusetts). The statutes quoted are therefore applicable to forty-nine (49) states regardless of the exact citation being specifically for Florida. The case law included is intended to be illustrative of how American courts have interpreted the UCCJEA.

Table of Contents

I. Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA)

A. Introduction

The UCCJEA, is a uniform act drafted by the ULC, and adopted by all U.S. states except Massachusetts; which still follows the older UCCJA.[1] The ULC promulgated the UCCJEA to harmonize custody, visitation, timesharing and parental responsibility because different states have different approaches to these issues. Florida adopted the UCCJEA in Chapter 61, §§ 61.501-61.542 of the *Florida Statutes*.

The UCCJEA and the UIFSA share common features and concepts, and in places, the two acts have nearly identical provisions. However, they deal with different family law issues (custody and support) which can strongly impact how the two Acts are implemented.

B. Purpose

"The general purposes of the UCCJEA are to avoid jurisdictional competition and conflict with other courts in child custody matters; promote cooperation with other courts; insure that a custody decree is rendered in the state which enjoys the superior position to decide what is in the best interest of the child; deter controversies and avoid relitigation of custody issues; facilitate enforcement of custody decrees; and promote uniformity of the laws governing custody issues." Arjona v. Torres, 941 So. 2d 451 (Fla. 3d DCA 2006).

C. Parental Kidnapping Prevention Act (PKPA)

Congress enacted 28 U.S.C. § 1738A, titled: The Full Faith and Credit Given to Child Custody Determinations, and is commonly referred to as the PKPA. It is a federal law as opposed to a uniform multi-state law like the UIFSA and UCCJEA. The PKPA was enacted to address the then national epidemic of kidnapping by parents hoping to find sympathetic courts in other states willing to change unfavorable custody orders. "The act does not create a private right of action in federal court to determine the validity of two conflicting custody decrees." Thompson v. Thompson, 484 U.S. 174 (1988).

The PKPA is not a criminal anti-kidnapping statute. The PKPA is similar to its full faith and credit counterpart, the FFCCSOA for support orders, and requires states to afford full faith and credit to valid child custody and visitation determinations entered by a sister State's courts. The PKPA addresses the modification of interstate orders by preventing interstate competition and conflicts about custody disputes among the various jurisdictions of the American Union. "Under the Supremacy Clause of the Constitution, the PKPA supersedes any and all inconsistent state laws." Yurgel v. Yurgel, 572 So. 2d 1327, 1329 (Fla. 1990).

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[1] **As of October 1, 2016, Massachusetts Senate Bill S.2392, which enacts the UCCJEA, is currently before the committee on Ways and Means which is recommending passage with an amendment.**

The PKPA imposes a duty on the States to enforce any custody determination or visitation determination entered by a court of a sister State if the determination is consistent with the provisions of the PKPA. 28 U.S.C. §§1738A(a).

Briefly put, a custody or visitation order is consistent with the PKPA if the child's home is or recently has been in the State entering the order, if the child has no home state and it would be in the child's best interest for that State to assume jurisdiction, or if the child is present in the State and has been abandoned or abused. 28 U.S.C. § 1738A(c)(1)-(2).

The "home state," under the PKPA, means the State in which, immediately preceding the time involved, the child lived with his parents, a parent, or a person acting as parent, for at least six (6) consecutive months, and in the case of a child less than six (6) months old, the State in which the child lived from birth with any of such persons. Periods of temporary absence of any of such persons are counted as part of the six-month or other period. 28 U.S.C. § 1738A(b)(4).

The PKPA prioritizes "home state" jurisdiction by denying full faith and credit to a child custody determination made by a State that exercises initial jurisdiction as a "significant connection state" when there is a "home state."

Once a State exercises jurisdiction consistently with the provisions of the PKPA, no other State may exercise concurrent jurisdiction over the custody dispute, even if it would have been empowered to take jurisdiction in the first instance, and all States must accord full faith and credit to the first State's ensuing custody decree. Thompson, 484 U.S. 174. Only when the rendering court no longer has jurisdiction under the PKPA, or declines to exercise jurisdiction, may a court of another state modify a custody order. 28 U.S.C. § 1738A(f)(2).

The PKPA also remedies the problem of simultaneous proceedings in separate states by prohibiting a state from exercising jurisdiction over a custody or visitation dispute which was brought while a child custody or visitation proceeding is pending in another state or an order has been entered. 28 U.S.C. § 1738A(g).

With the nearly national replacement of the UCCJEA over the older UCCJA the need to rely on the PKPA is diminishing. However, because the PKPA supersedes inconsistent state laws, the PKPA may be an effective tool in areas not specifically covered under the UCCJEA, in Massachusetts where the UCCJA controls, and in states where public policy may prohibit enforcing foreign custody or visitation determinations.

D. Subject Matter Jurisdiction

An important aspect of the UCCJEA is that it only covers child custody determinations, meaning it specifically excludes child support, the subject matter of the UIFSA and other areas. This makes the UCCJEA and the UIFSA mutually exclusive of each other.

Under the UCCJEA, a "child custody determination" means a judgment, decree, or other order of a court providing for the legal custody, physical custody, residential care, or visitation with respect to a child. The term includes permanent, temporary, initial, and/or modification orders. The definition does not include an order relating to child support or other monetary obligation of an individual. § 61.503(3), Fla. Stat. (2016). Nor does it include proceedings involving juvenile delinquency, contractual emancipation, or enforcement under § 61.503(4), Fla. Stat. (2016).

Moreover, the UCCJEA, as its name suggests, is limited to children. An emanciapted, special needs child, over the age of 18, is not a child for purposes of the UCCJEA. *See* § 61.503(2), Fla. Stat. (2016) and Gamache v. Gamache, 14 So. 3d 1236, 1237–38 (Fla. 2d DCA 2009).

E. Personal Jurisdiction

The UCCJEA is very different than the UIFSA in the area of personal jurisdiction. Whereas personal jurisdiction is required to impose a financial obligation under the UIFSA, "[t]he UCCJEA does not require personal jurisdiction over a party to make a child custody determination." Brulte v. Brulte, 967 So. 2d 1087, 1088 (Fla. 1st DCA 2007).

Home State

Jurisdiction under the UCCJEA is based on the location of the child and the types of connections the child has with the state. Under the UCCJEA, "'[h]ome state' means the state in which a child lived with a parent or a person acting as a parent for at least 6 consecutive months *immediately before the commencement of a child custody proceeding*. In the case of a child younger than 6 months of age, the term means the state in which the child lived from birth with any of the persons mentioned. A period of temporary absence of any of the mentioned persons is part of the period." § 61.503(7), Fla. Stat. (2016), emphasis added.

"The words 'immediately before the commencement of a child custody proceeding' in the definition of 'home state' should not be read so as to essentially eliminate and render meaningless the provision allowing for the assertion of jurisdiction if the state qualified as the child's home *at any time* within the six months preceding the filing of the custody proceeding." Sarpel v. Eflanli, 65 So. 3d 1080, 1084 (Fla. 4th DCA 2011).

NEW: Home State in Paternity Actions: "[T]he fact that the child was born out of wedlock has no bearing on the child's home state... While the UCCJEA does not specifically define 'parent,' the definition of 'person acting as a parent' includes a person other than a 'parent' who '*claims a right to a child-custody determination under the laws of this state*.' Baker v. Tunney, 201 So. 3d 1235, (Fla. 5th DCA 2016), citing §61.503(13)(a)-(b), Fla. Stat. 2015.

F. Initial Custody Determinations

(1) Florida courts have jurisdiction to make initial custody determinations only if Florida is the home state of the minor child, if the home state has declined jurisdiction and the child has significant connections, or if there is no home states and the child is in Florida. These are further explained as follows:

(a) Home State: "This state is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six (6) months before the commencement of the proceeding and the child is absent from this state but a parent or person acting as a parent continues to live in this state." § 61.514(1), Fla. Stat. (2016).

"There are two ways for Florida to qualify as a child's 'home state.' Under the first, the children must have been living in Florida for six consecutive months on ... the date of filing of the [parent's] petition. ... The second alternative permits Florida to exercise jurisdiction if, at any time during the six months preceding the filing of the petition for [timesharing], Florida qualified as the child's 'home state.' ... Courts have struggled with the apparent conflict between the jurisdiction provision providing for the exercise of jurisdiction if, at any time during the six (6) months preceding the filing of the custody proceeding, the state is the child's home state and the definition of 'home state,' which seems to require the consecutive six months to be the six (6) months immediately preceding the filing of the custody proceeding... [T]he inclusion of the words 'immediately before the commencement of a child custody proceeding' in the definition of 'home state' should not be read to eliminate and render meaningless the provision allowing for the assertion of jurisdiction if the state qualified as the child's home at any time within the six months preceding the filing of the custody proceeding." Sarpel v. Eflanli, 65 So. 3d 1080, 1083-1084 (Fla. 4th DCA 2011).

(b) Significant Connections: If a court of another state does not have home state jurisdiction or the child's home state's court has declined jurisdiction on the grounds that this state is the more appropriate forum under §§ 61.520 (inconvenient forum) or 61.521, (jurisdiction declined because of conduct of the party) Fla. Stat. (2016) then the Florida court will examine whether significant connections, defined as follows:

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

(ii) Substantial evidence is available in this state concerning the child's care, protection, training, and personal relationships." § 61.514(1)(b)(1-2), Fla. Stat. 2016.

(d) Default Jurisdiction: If no court has home state jurisdiction over the child and they are in Florida at the commencement of the action then Florida may have default jurisdiction.

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

(4) Binding Only with Personal Service

While a state is empowered to make a custody determination without personal jurisdiction over every individual, its binding effect can only be imposed on those who have been served or notified.

"If a person is validly served or given notice in accordance with [service statute], and if the court has jurisdiction, the court's child custody determination 'is conclusive as to all decided issues of law and fact except to the extent the determination is modified.'" In re. S.M., (Fla. 2d DCA 2004).

G. Exclusive Continuing Jurisdiction (ECJ)

(1) The UCCJEA, like the UIFSA, uses the same concept that only one tribunal should have exclusive jurisdiction to modify. Where the UIFSA uses the term "continuing, exclusive jurisdiction," the UCCJEA uses the term "exclusive, continuing jurisdiction." § 61.515, Fla. Stat. (2016):

"[A] court of this state which has made a child custody determination consistent with §§ 61.514 or 61.516 has exclusive, continuing jurisdiction over the determination until:

(a) A court of this state determines that the child, the child's parents, and any person acting as a parent do not have a significant connection with this state and that substantial evidence is no longer available in this state concerning the child's care, protection, training, and personal relationships; or

(b) A court of this state or a court of another state determines that the child, the child's parent, and any person acting as a parent do not presently reside in this state." §61.515(1)(a-b), Fla. Stat. 2016.

(c) The only way a court can modify a child custody order or judgment if it lacks ECJ is if that state would be qualified to make an initial determination as established above.

(2) The Florida Supreme Court has ruled that "[a] custody proceeding, properly begun in Florida remains under Florida's jurisdiction until Florida determines otherwise, unless virtually all contacts with the state clearly have been lost." Yurgel v. Yurgel, 572 So. 2d 1327, 1332 (Fla. 1990).

(3) A foreign country is treated as a "state" for purposes of applying the UCCJEA. Sarpel v. Eflanli, 65 So. 3d 1080 (Fla. 4th DCA 2011).

H. Temporary Emergency Jurisdiction

(1) The UCCJEA, in § 61.517, Fla. Stat. (2016) provides for temporary emergency jurisdiction in certain cases, namely due to abandonment, "an emergency to protect the child," or until the child's home state can issue an order determining custody. The statute is below in full.

(a) Abandonment, Threat of Abuse or Mistreatment: "A court of this state has temporary emergency jurisdiction if the child is present in this state and the child has been abandoned or it is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse." § 61.517(1), Fla. Stat. (2016)

(b) Duration: If there is no previous child custody determination that is entitled to be enforced under this part, and a child custody proceeding has not been commenced in a court of a state having jurisdiction under §§ 61.514-61.516, Fla. Stat. (2016) a child custody determination made under this section remains in effect until an order is obtained from a court of a state having jurisdiction under §§ 61.514-61.516. If a child custody proceeding has not been or is not commenced in a court of a state having jurisdiction under §§ 61.514-61.516, a child custody determination made under this section becomes a final determination if it so provides and this state becomes the home state of the child."

(2) Duty to Communicate: A court being asked to make a temporary emergency child custody determination has a statutory duty to immediately communicate with the court of the child's home state or where there is or has been an action filed relating to the custody of the child. *See* § 61.517(4), Fla. Stat. (2016). Communication between the courts is useful "'to resolve the emergency, protect the safety of the parties and the child, and determine a period for the duration of the

temporary order.'" Edgar v. Firuta, 100 So. 3d 255, 259 (Fla. 3d DCA 2012).

(3) Temporary emergency jurisdiction does not confer jurisdiction to make an initial custody determination. § 61.514, Fla. Stat. (2016) and In re D.N.H.W., 955 So. 2d 1236 (Fla. 2d DCA 2007).

I. Registration

(1) A mechanism exists to modify or enforce a child custody order issued in another state. Traditionally, the moving party would ask the second state to domesticate the order. The UCCJEA, like the UIFSA, established a "registration" process. Registration under the UIFSA and UCCJEA are the same, except for the type of information needed to be set forth as seen in § 61.528, Fla. Stat. (2016):

"A child custody determination issued by a court of another state may be registered in this state, with or without a simultaneous request for enforcement, by sending to the circuit court of the county where the petitioner or respondent resides or where a simultaneous request for enforcement is sought:

(a) A letter or other document requesting registration;

(b) 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

(c) Except as otherwise provided in § 61.522, 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." § 61.528(1)-1(c), Fla. Stat. (2016).

(2) Under the UCCJEA, registration is expressly for enforcement. However, it should also be considered the correct procedure regarding modifications.

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

(b) A court of this state shall recognize and enforce but may not modify, except in accordance with §§ 61.514-61.523, a registered child custody determination of another state." § 61.529(1-2), Fla. Stat. (2016).

(3) There is no requirement "that a proceeding be a 'child custody proceeding' under the UCCJEA before the trial court can have jurisdiction to domesticate a foreign custody order." McIndoo v. Atkinson, 159 So. 3d 227, 230 (Fla. 4th DCA 2015).

J. Modification

The Exclusive Continuing Jurisdiction (ECJ) means the issuing state has the exclusive jurisdiction to modify as long as one of the parents or the child continues to reside in the order issuing state. However, many situations arise in which not all family members reside in the same state. The UCCJEA provides for jurisdiction to modify an order in another state.

"'Modification' means a child custody determination that changes, replaces, supersedes, or is otherwise made after a previous determination concerning the same child, regardless of whether it is made by the court that made the previous determination." § 61.503, Fla. Stat. (2016).

Pursuant to the § 61.516, Fla. Stat. (2016) "a court may not modify a child custody determination made by a court of another state unless a court of this state has jurisdiction to make an initial determination under § 61.514(1)(a) or (b) and:

(1) The court of the other state determines it no longer has exclusive, continuing jurisdiction under § 61.515 or that a court of this state would be a more convenient forum under § 61.520; or

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

§ 61.516(1) is not satisfied unless the court of the issuing state determines that it no longer has ECJ, or that another state would be a more convenient forum. The inquiry is solely of the issuing state unless another state determines that the neither the child or the child's parents presently reside in the issuing state. *See* London v. London, 32 So. 3d 107 (Fla. 2d DCA 2009). McGhee v. Biggs, 974 So. 2d 524, 525 (Fla. 4th DCA 2008).

K. Enforcement

(1) With respect to enforcing an existing order when custody or visitation issues are involved, the focus of the court is getting the child into the appropriate physical possession. The emphasis under the UCCJEA is full faith and credit, and to prevent a person who is in wrongful possession of a child from getting an inconsistent order in another state. In appropriate circumstances, enforcing courts have authority to enter emergency orders. § 61.526, Fla. Stat. (2016) provides:

(a) "A court of this state shall recognize and enforce a child custody determination of a court of another state if the latter court exercised jurisdiction in substantial conformity with this part or the determination was made under factual circumstances meeting the jurisdictional standards of this part and the determination has not been modified in accordance with this part.

(b) A court of this state may use any remedy available under other laws of this state to enforce a child custody determination made by a court of another state. The remedies provided by §§ 61.524-61.540 are cumulative and do not affect the availability of other remedies to enforce a child custody determination."

(2) Enforcement and Public Policy

Currently, there is an express conflict in Florida when a foreign judgment violates Florida public policy. In Ledoux-Nottingham v. Downs, 163 So. 3d 560, 562 (Fla. 5th DCA 2015), the Mother argued a Colorado order was unenforceable as against public policy because grandparent visitation may not be ordered by a Florida court. The Fifth District certified conflict with the Fourth District Court of Appeal's decision in M.S. v. D.C., Jr., 763 So. 2d 1051 (Fla. 4th DCA 1999) (holding that the Full Faith and Credit Clause does not trump Florida's overriding public policy of a guaranteed fundamental right of privacy in child-rearing autonomy).

(3) Expedited Enforcement

When custody or visitation issues are involved, the UCCJEA places emphasis on returning the child to the appropriate parent. Accordingly, the UCCJEA provides for expedited enforcement proceedings and the power to issue warrants to take physical custody of the child.

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

An order issued under § 61.531(3) must state the time and place of the hearing and advise the respondent that at the hearing the court will order that the petitioner may take immediate physical custody of the child and the payment of fees, costs, and expenses under § 61.535 and may schedule a hearing to determine whether further relief is appropriate." § 61.531(3-4), Fla. Stat. (2016).

"Unless the court enters a temporary emergency order under § 61.517, upon 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" the there are fundamental flaws with the custody order. § 61.533(1), Fla. Stat. (2016).

"Upon the filing of a petition seeking enforcement of a child custody determination, the petitioner may file a verified application for the issuance of a warrant to take physical custody of the child if the child is likely to imminently suffer serious physical harm or removal from this state." § 61.534(1), Fla. Stat. (2016).

(4) Communication between Courts

"If a proceeding for enforcement under §§ 61.524-61.540 is commenced in a court of this state, and the court determines that a proceeding to modify the determination is pending in a court of another state having jurisdiction to modify the determination under §§ 61.514-61.523. the enforcing court shall immediately communicate with the modifying court. The proceeding for enforcement continues unless the enforcing court, after consultation with the modifying court, stays or dismisses the proceeding." § 61.530, Fla. Stat. (2016).

Further explained, a "Florida trial court must communicate to provide the [other] court the opportunity to determine if Florida is the more convenient forum." London v. London, 32 So. 3d 107, 111 (Fla. 2d DCA 2009).

L. Procedure and Evidence

(1) Inconvenient or Improper Forums

Even if it is determined that the court is an appropriate forum, and there is no compelling basis to refuse to assert jurisdiction, the court may still decline jurisdiction under the UCCJEA. The detailed factors, set forth below from § 61.520, Fla. Stat. (2016), underscore the goal of the UCCJEA: that cases be resolved in the forum with the best ability to obtain the information necessary while also considering the relative impact on the participants.

(a) "A court of this state which has jurisdiction under this part to make a child custody determination may decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances and that a court of another state is a more appropriate forum. The issue of inconvenient forum may be

raised upon motion of a party, the court's own motion, or request of another court.

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

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

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

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

(4) The relative financial circumstances of the parties;

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

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

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

(8) The familiarity of the court of each state with the facts and issues in the pending litigation." § 61.520(1)-(2)(a)-(h), Fla. Stat. (2016)

In K.I. v. Dep't of Children & Families the court found that "the fact that the child had been living in Virginia for approximately ten years and would be a witness in the father's criminal proceeding in Virginia, the alleged child abuse occurred in Virginia, the relative willing to care for the child resided in Virginia, and the Virginia court already issued a preliminary protective order for the child" all constituted sufficient grounds to support the trial court's order to decline jurisdiction as an inconvenient forum. K.I. v. Dep't of Children & Families, 70 So. 3d 749, 753 (Fla. 4th DCA 2011)

(2) Immunity from Civil Process

There is a connection between support and child timesharing issues, however, the UCCJEA provides a procedural shield so that a participant in

a court action under that act is immune from most other civil process, including a child support action.

A "circuit court has subject matter jurisdiction to address the issues of custody and visitation, that the court may make a 'child custody determination' under the UCCJEA. Under § 61.510(1), [a parent] has the right to participate in the proceedings concerning those issues without waiving [their] objection to personal jurisdiction over financial issues". Hollowell v. Tamburro, 991 So. 2d 1022, 1025 (Fla. 4th DCA 2008), referencing Fox v. Webb, 495 So. 2d 879 (Fla. 5th DCA 1986).

The admission of paternity in pleadings relating to custody or timesharing does not waive an objection to personal jurisdiction for financial issues. Therefore, jurisdiction over a "custody determination" under the UCCJEA does not confer "personal jurisdiction over a non-resident to alter support payments created by another state's decree." Fox v. Webb, 495 So. 2d 879, 880 (Fla. 5th DCA 1986).

(3) Attorneys' Fees and Costs

The UCCJEA provides for prevailing party attorneys' fees and costs. Travel and other necessary and reasonable expenses incurred under subsections (1) and (2) may be assessed against the parties according to the laws of this state if the court has personal jurisdiction over the party against whom these expenses are being assessed. *See §* 61.535, Fla. Stat. (2016).

Generally, "[i]f a court dismisses a petition, or stays a proceeding, because it declines to exercise its jurisdiction [by reason of conduct], it shall assess against the party seeking to invoke its jurisdiction necessary and reasonable expenses, including costs, communication expenses, attorney's fees, investigative fees, expenses for witnesses, travel expenses, and expenses for child care during the course of the proceedings, unless the party from whom fees are sought establishes that the assessment would be clearly inappropriate. The court may not assess fees, costs, or expenses against this state unless authorized by law other than this part." § 61.521(3), Fla. Stat. (2016).

"The court shall award the fees, costs, and expenses authorized under § 61.535 and may grant additional relief, including a request for the assistance of law enforcement officers, and set a further hearing to determine whether additional relief is appropriate." § 61.533(2), Fla. Stat. (2016).

"So long as the court has personal jurisdiction over the party against whom the expenses are being assessed, the court shall award the

prevailing party, including a state, necessary and reasonable expenses incurred by or on behalf of the party, including costs, communication expenses, attorney's fees, investigative fees, expenses for witnesses, travel expenses, and expenses for child care during the course of the proceedings, unless the party from whom fees or expenses are sought establishes that the award would be clearly inappropriate." § 61.535(1-2), Fla. Stat. (2016).

Both §§ 61.16, and 61.535, can apply, and both sections provide a different standard in determining entitlement to attorney's fees. "[T]he trial court should determine the governing provision for the award of attorney's fees and make the necessary findings as to the reasonableness of the hours expended and the hourly rate, 'taking into consideration all the circumstances surrounding the litigation. Nagl v. Navarro, 187 So. 3d 359, 361-362 (Fla. 4th DCA 2016), citing Rosen v. Rosen, 696 So. 2d 697, 699 (Fla. 1997).

(4) Unjustifiable Conduct

The UCCJEA imposes the requirement that the person seeking the relief not have engaged in "unjustifiable conduct," and courts in Florida under § 61.521, Fla. Stat. (2016), can decline jurisdiction because of conduct.

(1) "Except as otherwise provided in § 61.517 or by other law of this state, if a court of this state has jurisdiction under this part because a person seeking to invoke its jurisdiction has engaged in unjustifiable conduct, the court shall decline to exercise its jurisdiction unless:

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

(b) A court of the state otherwise having jurisdiction under §§ 61.514-61.516 determines that this state is a more appropriate forum under § 61.520; or

(c) No court of any other state would have jurisdiction under the criteria specified in §§ 61.514-61.516."

Moreover, the party engaging in unjustifiable conduct is subject to sanctions and other remedies

(1) "If a court dismisses a petition or stays a proceeding because it declines to exercise its jurisdiction under § 61.521(1), it shall assess against the party seeking to invoke its jurisdiction necessary and reasonable expenses, including costs, communication expenses, attorney's fees, investigative fees, expenses for witnesses, travel expenses, and child care during the course of the

proceedings, unless the party from whom fees are sought establishes that the assessment would be clearly inappropriate. The court may not assess fees, costs, or expenses against this state unless authorized by law other than this part." § 61.521(3), Fla. Stat. (2016).

(5) The Affidavit

Although subject to confidentiality laws § 61.522 requires certain information to be submitted to the court, and imposes a "continuing duty to inform the court of any proceeding in this or any other state which could affect the current proceedings." § 61.522(1-4), Fla. Stat. (2016).

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

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

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

(c) Knows the names and addresses of any person not a party to the proceeding who has physical custody of the child or claims rights of legal custody or physical custody of, or visitation with, the child and, if so, the names and addresses of those persons." § 61.522(1)(a-c), Fla. Stat. (2016).

(2) Failure to File Affidavit

If the information is not furnished, the court may stay the proceeding until the information is furnished. "However, failing to file the [statutory section] affidavit is not in itself fatal to

jurisdiction." Strommen v. Strommen, 927 So. 2d 176, 182 (Fla. 2d DCA 2006).

M. International Custody

(1) The UCCJEA provides a general legal framework for recognition and enforcement of foreign custody and visitation decrees originating from foreign jurisdictions.

(a) "A foreign country is treated as a 'state' for purposes of applying the UCCJEA." Sarpel v. Eflanli, 65 So. 3d 1080, 1083 (Fla. 4th DCA 2011).

(b) The UCCJEA, like the Hague Convention discussed below, can also be used to seek the return of a child from Florida to a foreign country. § 61.506, Fla. Stat. (2016) provides:

(1) "A court of this state shall treat a foreign country as if it were a state of the United States for purposes of applying §§ 61.501-61.523.

(2) Except as otherwise provided in subsection (3), a child custody determination made in a foreign country under factual circumstances in substantial conformity with the jurisdictional standards of this part must be recognized and enforced under §§ 61.524-61.540.

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

(2) UCCJEA and The Hague

The UCCJEA specifies that a decree made by a party to the Hague Convention on the Civil Aspects of International Child Abduction will be enforced. The United States is a party to Hague Convention on the Civil Aspects of International Child Abduction. Accordingly, "a court of this state may enforce an order for the return of a child made under the Hague Convention as if it were a child custody determination." § 61.525, Fla. Stat. (2016).

(3) Public Policy Exception

"[W]hen the foreign law itself fails to recognize a fundamental public policy tenet, such as considering the best interests of the child, the courts of this state may decline to recognize the judgment. However, whether the

foreign court has properly applied its law is a question for the foreign jurisdiction." Dyce v. Christie, 17 So. 3d 892 (Fla. 4th DCA 2009).

II. Hague Convention on the Civil Aspects of International Child Abduction

A. Introduction

The Hague Conference is an international organization of member states whose purpose is to "work for the progressive unification of private international law." The Hague Conference accomplishes this through "Conventions," multi-lateral treaties negotiated and adopted by member states. There have been over forty (40) Conventions adopted. The two Conventions discussed in this outline concern: International Child Abduction and the International Recovery of Child Support.

B. Purpose

"The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction is a multilateral treaty which seeks to protect children from the harmful effects of abduction and retention across international boundaries by providing a procedure to bring about their prompt return. Child Abduction Section, (April 7, 2017) https://www.hcch.net/en/instruments/conventions/specialised-sections/child-abduction. For a list of those countries who are considered the parties (or Partners) see: https://travel.state.gov/content/childabduction/en/country/hague-party-countries.html

A court that receives a petition under the Convention may not resolve the question of who, as between the parents, is best suited to have custody of the child. With a few narrow exceptions, the court must return the abducted child to its country of habitual residence so that the courts of that country can determine custody. Mozes v. Mozes, 239 F. 3d 1067 (9th Cir. 2001).

Because the court receiving a Hague petition does not resolve issues of parenting, it has been said that "[t]he Convention's central operating feature is the "return remedy." Sanchez v. Suasti, 140 So. 3d 658, 660 (Fla. 3d DCA 2014), citing Abbott v. Abbott, 560 U.S. 1, 9 (2010).

The Convention acts as a forum selection mechanism, operating on "the principle that the child's country of 'habitual residence' is 'best placed to decide upon questions of custody and access." Villegas Duran v. Arribada Beaumont, 534 F. 3d 142, 146 (2d Cir.2008).

C. International Child Abduction Remedies Act (ICARA)

The United States Congress implemented the treaty by enacting the International Child Abduction Remedies Act, often referred to as ICARA. *See* 42 U.S.C. § 11601 et seq.

ICARA vests concurrent jurisdiction over claims brought under the Convention in the United States District Courts and in the courts of the states. 42 U.S.C. § 11603(a).

"Congress has found that the international abduction or wrongful retention of children is harmful to their well-being and that persons should not be permitted to obtain custody of children by virtue of their wrongful removal or retention." Strout v. Campbell, 864 So. 2d 1275, 1277 (Fla. 5th DCA 2004).

D. Wrongful Removal or Retention

(1) Prima Facie Case

The case of Sanchez v. Suasti, 140 So. 3d 658, 660 (Fla. 3d DCA 2014) sets forth the factors necessary to establish a prima facie case under the Convention. A petitioner must establish three (3) elements:

(a) A child under the age of sixteen (16) "has been retained in a country outside the child's country of habitual residence." Id., citing Larbie v. Larbie, 690 F. 3d 295, 307 (5th Cir. 2012)

(i) "The Convention shall cease to apply when the child attains the age of 16 years." Hague Convention, Art. 4.

(b) "[T]he wrongful removal must be a violation of the petitioner's 'rights of custody,' which 'include rights relating to the care of the person of the child and, in particular, *the right to determine the child's place of residence*." Id.

(c) "[T]he rights of custody 'were actually being exercised or would have been exercised but for the removal.'" Id., citing Wigley v. Hares, 82 So. 3d 932, 936 (Fla. 4th DCA 2011), citing Hague Convention, art. 3.

(2) Remedy

"If a child under the age of sixteen has been wrongfully removed or retained within the meaning of the Hague Convention, the child must be promptly returned to the child's country of habitual residence, unless certain exceptions apply." Sanchez v. Suasti, 140 So. 3d 658, 660 (Fla. 3d DCA 2014).

The Convention is intended to "restore the pre-abduction status quo and to deter parents from crossing borders in search of a more sympathetic court." Wigley v. Hares, 82 So. 3d 932 (Fla. 4th DCA 2011).

(3) Habitual Residence

Ironically, the Convention does not define the key term "habitual residence." Little case law exists on the Convention in general. Determining whether the country from which the child was abducted was a child's habitual residence is a fact-specific inquiry. Mozes v. Mozes, 239 F. 3d 1067, 1073 (9th Cir. 2001).

Under the Convention, "a child's habitual residence is the place where the he or she has been physically which has a 'degree of settled purpose' from the child's perspective." Robert v. Tesson, 507 F. 3d 981 (6th Cir. 2007).

"The British courts have provided the most complete analysis. In Re Bates, No. CA 122.89, High Court of Justice, Family Div'n Ct. Royal Court of Justice, United Kingdom (1989), the High Court of Justice concluded that there is no real distinction between ordinary residence and habitual residence. Id. At 10. The court also added a word of caution:

'It is greatly to be hoped that the courts will resist the temptation to develop detailed and restrictive rules as to habitual residence, which might make it as technical a term of art as common law domicile. The facts and circumstances of each case should continue to be assessed without resort to presumptions or pre-suppositions.' Id. (Quoting Dicey & Morris, The Conflicts of Law 166 (11th ed.)).

We agree that habitual residence must not be confused with domicile. To determine the habitual residence, the court must focus on the child, not the parents, and examine past experience, not future intentions... A person can have only one habitual residence. On its face, habitual residence pertains to customary residence prior to the removal. The court must look back in time, not forward." Friedrich v. Friedrich, 983 F. 2d 1396 (6th Cir. 1993).

Of note: Valenzuela v. Michel, 736 F. 3d 1173 (9th Cir. 2013) explores the concept of "shuttle custody" wherein the parents have different habitual residencies and the child alternately lives in one or the other at any given point in time. This creates the existence of dual alternating habitual residences for the child. The court, therefore, has interpreted retention of the child in one of the two (2) countries in which they are habitually reside to not be wrongful. This creates a danger for multinational parents without a formal custody arrangment.

"First, in order to acquire a new habitual residence, there must be a 'settled intention to abandon the one left behind.' This is a question of fact to which this court grants deference to the district court. Second, there must be (A) an 'actual "change in geography,'" combined with (B) the 'passage of "an appreciable period of time."' This period of time must be

'sufficient for acclimatization.' ... In making this determination, we heed the statutory requirement that … the party seeking return of the children - establish by a preponderance of the evidence that the children have been wrongfully retained." Holder v. Holder 392 F. 3d 1009, 1015 (9th Cir. 2004), citing Mozes v. Mozes, F. 3d 1067, 1071-1073 (9th Cir. 2001).

(4) Parental Agreements to Habitual Residence

Determination of habitual residence is a fact intensive inquiry particularly sensitive to the perspective and circumstances of the child. To allow parents simply to stipulate to any habitual residence they choose would render these factual considerations irrelevant. "The Convention seeks to prevent the establishment of 'artificial jurisdictional links' as a means to remove the child from the 'family and social environment in which its life has developed.' It is difficult to imagine a jurisdictional link more artificial than an agreement between parents stating that their child habitually resides in a country where it has never lived." Barzilay v. Barzilay, 600 F. 3d 912 (8th Cir. 2010).

(5) Acclimatization

A child's newer residence can be found to be the child's habitual residence. "The question in these cases is not simply whether the child's life in the new country shows some minimal 'degree of settled purpose,' but whether we can say with confidence that the child's relative attachments to the two countries [changing] to the point where requiring return to the original forum would now be tantamount to taking the child 'out of the family and social environment in which its life has developed,'" a process known as acclimatization. Mozes v. Mozes, 239 F. 3d 1067 (9th Cir. 2001), citing Shah v. Barnet London Borough Council and other appeals, 1 All E.R. 226, 235 (Eng.H.L.).

Courts should be "slow to infer from contacts with a new country that an earlier habitual residence has been abandoned, both because the inquiry is fraught with difficulty, and because readily inferring abandonment would circumvent the purpose of the Convention." Murphy v. Sloan, 764 F. 3d 1144, 1152-53 (9th Cir. 2014).

(6) Rights of Custody Actually Being Exercised

Article 5(a) of the Convention, defines "rights of custody." Rights of custody include "rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence."

(a) Ne exeat rights

Some countries provide parents a "*ne exeat*" right. The ne exeat right is a right to obtain consent from one parent, before a relocating parent can take a child out of the country. The right to consent to, or require a court hearing regarding, a relocation of the child out of the jurisdiction, together with visitation rights, creates a "right of custody" under the Convention. See Abbott v. Abbott, 560 U.S. 1 (2010).

(b) Visitation Rights

"The Hague Convention draws a distinction between a parent's 'rights of custody' and 'rights of access.' A parent's 'right of access' is defined as 'the right to take a child for a limited period of time to a place other than the child's habitual residence.' The remedy for the violation of a parent's right of access does not include the right to force the return of the child. Instead, a court may, for example, 'force the custodial parent to pay the travel costs of visitation, or make other provisions for the noncustodial parent to visit his or her child.'" Sanchez v. Suasti, 140 So. 3d 658, 661 (Fla. 3d DCA 2014), citing Hague Convention, art. 5.

(c) Actual Exercise of Custody

Under the Convention, whether a parent was exercising lawful custody rights over a child at the time of removal must be determined under the law of the child's habitual residence. See Hague Convention, art. 3.

The Friedrich Rule

"The only acceptable solution is to liberally find 'actual exercise of custody' whenever a parent with de jure custody rights keeps, or seeks to keep, any sort of regular contact with his or her child. We see three (3) reasons for this broad definition of 'exercise.' First, American courts are not well suited to determine the consequences of parental behavior under the law of a foreign country. Second, an American decision about the adequacy of one parent's exercise of custody rights is dangerously close to forbidden territory: the merits of the custody dispute. And third, the confusing dynamics of quarrels and informal separations make it difficult to assess adequately the acts and motivations of a parent." Friedrich v. Friedrich, 983 F. 2d 1396 (6th Cir. 1993).

E. Affirmative Defenses

Because the purpose of the Convention is to return the child – not settle the potential custody determination that may underlie the abduction – there are a limited number of defenses that may be raised in a child-return case.

(1) Article 12 Defenses

Article 12 of the Convention provides for defenses relating to a statute of limitations:

(a) One-Year Rule

Child-return cases must be filed within one year from the wrongful removal or retention. See Hague Convention, Art. 12.

The United States Supreme Court in Lozano v. Montoyo Alvarez, 134 S. Ct. 1224, 1234-1235 (2014), held that the one-year period is not subject to equitable tolling.

In the case of wrongful removal, the time begins to run from the date of the wrongful conduct or else retention becomes wrongful "when the Petitioner became aware of the Respondent's true intention not to return." In Re Ahumada Cabrera, 323 F. Supp. 2d 1303 (S.D. Fla. 2004). See also Zuker v. Andrews, 2 F. Supp. 2d 134, 140 (D. Mass. 1998), citing Slagenweit v. Slagenweit, 841 F. Supp. 264, 270 (N.D.la 1993) (holding "the noncustodial parent ... clearly communicate[d] [the] desire to regain custody and assert[ed] [the] parental right to have [the child] live with [him or her]" and the other parent refused as sufficient to begin the tolling of the one (1) year period.)

(b) Well Settled Environment

The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

The rationale behind Article 12's "now settled" defense is that when ("a child has become settled and adjusted in [his new environment, a] forced return might only serve to cause him or her further distress and accentuate the harm caused by the wrongful relocation."). In re B. Del C.S.B., 559 F.3d 999, 1003 (9th Cir.2008).

The Ninth Circuit cited a list of factors to consider when making the "settled environment" analysis: (1) the child's age; (2) the stability and duration of the child's residence in the new environment; (3) whether the child attends school or day care consistently; (4) whether the child has friends and relatives in the new area; (5) the child's participation in community or extracurricular school activities, such as team sports, youth groups, or school clubs; and (6) the respondent's employment and financial stability. In some circumstances, we will also consider the immigration status of the child and the respondent. In general, this consideration will be relevant only if there is an immediate, concrete threat of deportation. Although all of these factors, when applicable, may be considered in the "settled" analysis, ordinarily the most important is the length and stability of the child's residence in the new environment.

In addition, some courts have taken the position that the immigration status is a factor in the "settled environment" analysis, even if immediate deportation is not at hand. In re Koc v. Koc, 181 F. Supp. 2d 136, 154 (E.D.N.Y. 2001).

In addition to the factors set forth above, a court may consider the active measures undertaken to conceal the child's whereabouts, as well as the prospect that the abducting parent could be prosecuted for violations of law based on the concealment. Lops v. Lops, 140 F. 3d 927, 946 (11th Cir.1998).

At least one court has required that the abducting parent provide evidence that the child had developed the connections to the community which a normal child of his or her age would. Wigley v. Hares, 82 So. 3d 932, 942 (Fla. 4th DCA 2011).

(2) Article 13 Defenses

Article 13 of the Convention provides additional defenses to return. [T]he judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that:

(a) Not Actually Exercising Custody Rights

The person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention.

(b) Consent or Acquiescence

The parent remaining in the country of habitual residence consented to or subsequently acquiesced to the removal or retention. However, "'as a general rule courts should be careful not to translate negotiation into acquiescence.'" Antunez-Fernandes v. Connors-Fernandes, 259 F. Supp. 2d 800, 814 (N.D. Iowa 2003), citing Hague Convention on International Children Abduction: A Brief Overview and Case Law Analysis, 28 Fam. L.Q. 9, 26 (1994).

(c) Grave Risk

Return of the child can be avoid if there is a grave risk that the child's return would expose the them to physical or psychological harm or otherwise "place them in an intolerable situation." Further defined as "aris[ing] in 'situations in which the child faces a real risk of being hurt, physcially or psychologically, as a result of repatriation.'" The "exception for grave risk should be 'narrowly drawn.'" Asvesta v. Petroutsas, 580 F. 3d 1000, 1020 (9th Cir. 2009).

The Sixth Circuit in "Friedrich II" narrowed the conditions upon which a "grave risk" defense can be mounted because "courts in the abducted-from country are as ready and able as we are to protect children. If return to a country, or to the custody of a parent in that country, is dangerous, we can expect that country's courts to respond accordingly." Friedrich v. Friedrich, 78 F. 3d 1060, 1068 (6th Cir. 1996).

Florida, among other districts, has rejected the Friedrich II approach. "[W]e decline to impose on a responding parent a duty to prove that her child's country of habitual residence is unable or unwilling to ameliorate the grave risk of harm which would otherwise accompany the child's return." Wigley v. Hares, 82 So. 3d 932, 944 (Fla. 4th DCA 2011)(quoting Baran v. Beaty, 526 F. 3d 1340, 1348 (11th Cir.2008)).

(d) Brussels II Revised (BIIR) Exception

Applicable within the European Union after March 1, 2005, "[a] court cannot refuse to return a child under Article 13b of the 1980 Hague Convention if it is established that adequate arrangements have been made to secure the protection of the child after his or her return." Council Regulation (EC) No 2201/2003, Art. 11(4).

Judges in BIIR jurisdictions can still refuse return of a child under the grave risk exception when arrangements intended to mitigate harm upon return would not be adequate.

(e) Mature Child Objection

"The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views." Hague Convention, Art. 3.

(3) Article 20 Defense

Article 20 contains one additional defense related to Public Policy:

"The return of the child under the provisions of Article 12 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." Hague Convention, Art. 20. See Friedrich v. Friedrich, 983 F. 2d 1396 (6th Cir. 1993).

F. Procedure and Evidence

(1) Expedited handling

Signatory countries have agreed that they "shall use the most expeditious procedures available" when processing Convention claims. Hague Convention, Art. 2. In the United States this may mean that a Federal court, rather than a state court will hear the Hague action to ensure its expeditious resolution. See Lops v. Lops, 140 F. 3d 927, 943-44 (11th Cir. 1998) (unlike state court, federal court was able to expedite petition "as required by ICARA")

(2) Evidentiary rules

Because of the need to quickly determine whether the abduction was "wrongful," courts may be required to take judicial notice of foreign law directly, and not apply any special or formal rules of the forum that otherwise would be applied. See Hague Convention, Art. 14. Under the Convention, the Application for Assistance, as well as any documents attached to that application, or submitted to or by the Central Authority, are admissible in a child return proceeding. See Hague Convention, Art. 30. Underlying documents on which the case should be provided in the language of the country of habitual residence and "shall be accompanied by a translation into the official language or one of the official languages of the requested State." Hague Convention, Art. 23.

(3) Concurrent jurisdiction

The "ICARA vests concurrent jurisdiction over claims brought under the Convention in the United States District Courts and in the courts of the states." Strout v. Campbell, 864 So. 2d 1275, 1277 (Fla. 5th DCA 2004), referencing 42 U.S.C. §11603(a).

(4) Burden of Proof

For the Petitioner's case in chief (i.e., proof of the child being under sixteen (16), wrongful removal from the child's habitual residence, and the removal was in violation of the custody rights of the left-behind parent), the burden on the petitioner is a preponderance of the evidence. See 42 U.S.C. § 11603(e)(1)(A).

The Respondent bears the burden of proof of establishing any affirmative defenses to a petition. However, the various defenses are subject to two (2) different burdens of proof.

(a) Preponderance of the Evidence

Three (3) defenses discussed below, may be proved by a preponderance of the evidence:

(1) One Year. The person making the request for return of the child has delayed for more than one year since the wrongful removal or retention, and the child has become settled in the new environment.

(2) Not Exercising Custody. The person, institution, or other body having the care of the child was not actually exercising custody rights at the time of removal or retention.

(3) Consent or Acquiescence. The person, institution, or other body having the care of the child consented to, or subsequently acquiesced in, the removal or retention.

(b) Clear and Convincing Evidence

The two (2) defenses below must be established by clear and convincing evidence:

(1) Grave Risk. The return of the child would expose the child to a grave risk as defined and discussed above.

(2) Public Policy. The return of the child "would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and

fundamental freedoms." Hague Convention, Art. 20, See Hon. James D. Garbolino, *The 1980 Hague Convention on the Civil Aspects of International Child Abduction: A Guide for Judges*, Federal Judicial Center International Litigation Guide, (2012).

(5) Chasing Orders

A chasing order is an order from the child's habitual residence, sought by the left behind parent, after the child has already been removed from the jurisdiction. "The main concern over chasing orders is that they complicate matters in that 'the Hague Convention seeks to return the child to the *status quo* that existed before the wrongful removal,' and 'that objective cannot be accomplished the if the courts of the habitual residence have issued a custody order changing the status quo.'" In re Roy, 432 F. Supp. 2d 1297, 1303 (S.D. Fla. 2006)

(6) Central Authority

Each signatory of the convention must designate a "Central Authority" that a "left-behind" parent can contact. In the United States, the U.S. State Department is the Central Authority under the Convention. The Central Authority assists the left-behind parent by:

(1) Located the child and abducting parent;

(2) Identifying local counsel for the left-behind parent;

(3) Providing explanations and briefing on the operation of the Convention to local counsel and the trial court.

(4) Corresponding with the abducting parent in such a way as to scare that parent into returning the child.

(5) The Central Authority does not:

(6) Hire local counsel

(7) Initial legal proceedings

(8) Take legal positions on whether an abduction has occurred. See Hague Convention, Art. 6.

Central Authorities communicate with each other and they assist parents in filing applications for return of or for access to their children under the Convention. The Department's Office of Children's Issues within the Bureau of Consular Affairs is responsible for administering the day-to-day functions of the U.S. Central Authority.

A Convention case is initiated when the left-behind parent files a Petition for Return in either state or federal court.

(7) Mootness

The return of a child to a foreign country pursuant to a trial court's return order under the Convention does not render an appeal of that trial court's return order moot. The U.S. Supreme Court recently held that if these cases were to become moot upon return, courts would be more likely to grant stays as a matter of course, to prevent the loss of any right to appeal. "The Hague Convention mandates the prompt return of children to their countries of habitual residence. But such return does not render this case moot; there is a live dispute between the parties over where their child will be raised, and there is a possibility of effectual relief for the prevailing party. The courts below therefore continue to have jurisdiction to adjudicate the merits of the parties' respective claims." Chafin v. Chafin, 133 S. Ct. 1017, 1028 (2013).

Table of Citations

Appendix

1. Hague Conference on Private International Law (28. Convention on the Civil Aspects of International Child Abduction)

2. Uniform Child Custody Jurisdiction and Enforcement Act (1997)

3. United States Department of State United States Codes 42 U.S.C. §11601 et seq. INTERNATIONAL CHILD ABDUCTION REMEDIES ACT (ICARA)

4. Parental Kidnapping Prevention Act, 28 U.S.C. §1738A

5. Florida UCCJEA Fla. Stat. §61.501 et. seq.

6. Valenzuela v. Michel, 736 F. 3d 1173 (9th Cir. 2013)

HCCH
HAGUE CONFERENCE ON
PRIVATE INTERNATIONAL LAW
CONFÉRENCE DE LA HAYE
DE DROIT INTERNATIONAL PRIVÉ

28. CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION[1]

(Concluded 25 October 1980)

The States signatory to the present Convention,
Firmly convinced that the interests of children are of paramount importance in matters relating to their custody,
Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access,
Have resolved to conclude a Convention to this effect, and have agreed upon the following provisions –

CHAPTER I – SCOPE OF THE CONVENTION

Article 1

The objects of the present Convention are –

a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and

b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.

Article 2

Contracting States shall take all appropriate measures to secure within their territories the implementation of the objects of the Convention. For this purpose they shall use the most expeditious procedures available.

Article 3

The removal or the retention of a child is to be considered wrongful where –

a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph *a)* above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

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[1] This Convention, including related materials, is accessible on the website of the Hague Conference on Private International Law (www.hcch.net), under "Conventions" or under the "Child Abduction Section". For the full history of the Convention, see Hague Conference on Private International Law, *Actes et documents de la Quatorzième session (1980)*, Tome III, *Child abduction* (ISBN 90 12 03616 X, 481 pp.).

Article 4

The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years.

Article 5

For the purposes of this Convention –

a) "rights of custody" shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;

b) "rights of access" shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.

CHAPTER II – CENTRAL AUTHORITIES

Article 6

A Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention upon such authorities.

Federal States, States with more than one system of law or States having autonomous territorial organisations shall be free to appoint more than one Central Authority and to specify the territorial extent of their powers. Where a State has appointed more than one Central Authority, it shall designate the Central Authority to which applications may be addressed for transmission to the appropriate Central Authority within that State.

Article 7

Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their respective States to secure the prompt return of children and to achieve the other objects of this Convention.

In particular, either directly or through any intermediary, they shall take all appropriate measures –

a) to discover the whereabouts of a child who has been wrongfully removed or retained;

b) to prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures;

c) to secure the voluntary return of the child or to bring about an amicable resolution of the issues;

d) to exchange, where desirable, information relating to the social background of the child;

e) to provide information of a general character as to the law of their State in connection with the application of the Convention;

f) to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, in a proper case, to make arrangements for organising or securing the effective exercise of rights of access;

g) where the circumstances so require, to provide or facilitate the provision of legal aid and advice, including the participation of legal counsel and advisers;

h) to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child;

i) to keep each other informed with respect to the operation of this Convention and, as far as possible, to eliminate any obstacles to its application.

CHAPTER III – RETURN OF CHILDREN

Article 8

Any person, institution or other body claiming that a child has been removed or retained in breach of custody rights may apply either to the Central Authority of the child's habitual residence or to the Central Authority of any other Contracting State for assistance in securing the return of the child.

The application shall contain –

a) information concerning the identity of the applicant, of the child and of the person alleged to have removed or retained the child;
b) where available, the date of birth of the child;
c) the grounds on which the applicant's claim for return of the child is based;
d) all available information relating to the whereabouts of the child and the identity of the person with whom the child is presumed to be.

The application may be accompanied or supplemented by –

e) an authenticated copy of any relevant decision or agreement;
f) a certificate or an affidavit emanating from a Central Authority, or other competent authority of the State of the child's habitual residence, or from a qualified person, concerning the relevant law of that State;
g) any other relevant document.

Article 9

If the Central Authority which receives an application referred to in Article 8 has reason to believe that the child is in another Contracting State, it shall directly and without delay transmit the application to the Central Authority of that Contracting State and inform the requesting Central Authority, or the applicant, as the case may be.

Article 10

The Central Authority of the State where the child is shall take or cause to be taken all appropriate measures in order to obtain the voluntary return of the child.

Article 11

The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children.

If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay. If a reply is received by the Central Authority of the requested State, that Authority shall transmit the reply to the Central Authority of the requesting State, or to the applicant, as the case may be.

Article 12

Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.

Article 13

Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that –

a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or

b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.
In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.

Article 14

In ascertaining whether there has been a wrongful removal or retention within the meaning of Article 3, the judicial or administrative authorities of the requested State may take notice directly of the law of, and of judicial or administrative decisions, formally recognised or not in the State of the habitual residence of the child, without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable.

Article 15

The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention, where such a decision or determination may be obtained in that State. The Central Authorities of the Contracting States shall so far as practicable assist applicants to obtain such a decision or determination.

Article 16

After receiving notice of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under this Convention is not lodged within a reasonable time following receipt of the notice.

Article 17

The sole fact that a decision relating to custody has been given in or is entitled to recognition in the requested State shall not be a ground for refusing to return a child under this Convention, but the judicial or administrative authorities of the requested State may take account of the reasons for that decision in applying this Convention.

Article 18

The provisions of this Chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time.

Article 19

A decision under this Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue.

Article 20

The return of the child under the provisions of Article 12 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.

CHAPTER IV – RIGHTS OF ACCESS

Article 21

An application to make arrangements for organising or securing the effective exercise of rights of access may be presented to the Central Authorities of the Contracting States in the same way as an application for the return of a child.
The Central Authorities are bound by the obligations of co-operation which are set forth in Article 7 to promote the peaceful enjoyment of access rights and the fulfilment of any conditions to which the exercise of those rights may be subject. The Central Authorities shall take steps to remove, as far as possible, all obstacles to the exercise of such rights.
The Central Authorities, either directly or through intermediaries, may initiate or assist in the institution of proceedings with a view to organising or protecting these rights and securing respect for the conditions to which the exercise of these rights may be subject.

CHAPTER V – GENERAL PROVISIONS

Article 22

No security, bond or deposit, however described, shall be required to guarantee the payment of costs and expenses in the judicial or administrative proceedings falling within the scope of this Convention.

Article 23

No legalisation or similar formality may be required in the context of this Convention.

Article 24

Any application, communication or other document sent to the Central Authority of the requested State shall be in the original language, and shall be accompanied by a translation into the official language or one of the official languages of the requested State or, where that is not feasible, a translation into French or English.
However, a Contracting State may, by making a reservation in accordance with Article 42, object to the use of either French or English, but not both, in any application, communication or other document sent to its Central Authority.

Article 25

Nationals of the Contracting States and persons who are habitually resident within those States shall be entitled in matters concerned with the application of this Convention to legal aid and advice in any other Contracting State on the same conditions as if they themselves were nationals of and habitually resident in that State.

Article 26

Each Central Authority shall bear its own costs in applying this Convention.
Central Authorities and other public services of Contracting States shall not impose any charges in relation to applications submitted under this Convention. In particular, they may not require any payment from the applicant towards the costs and expenses of the proceedings or, where applicable, those arising from the participation of legal counsel or advisers. However, they may require the payment of the expenses incurred or to be incurred in implementing the return of the child.
However, a Contracting State may, by making a reservation in accordance with Article 42, declare that it shall not be bound to assume any costs referred to in the preceding paragraph resulting from the participation of legal counsel or advisers or from court proceedings, except insofar as those costs may be covered by its system of legal aid and advice.
Upon ordering the return of a child or issuing an order concerning rights of access under this Convention, the judicial or administrative authorities may, where appropriate, direct the person who removed or retained the child, or who prevented the exercise of rights of access, to pay necessary expenses incurred by or on behalf of the applicant, including travel expenses, any costs incurred or payments made for locating the child, the costs of legal representation of the applicant, and those of returning the child.

Article 27

When it is manifest that the requirements of this Convention are not fulfilled or that the application is otherwise not well founded, a Central Authority is not bound to accept the application. In that case, the Central Authority shall forthwith inform the applicant or the Central Authority through which the application was submitted, as the case may be, of its reasons.

Article 28

A Central Authority may require that the application be accompanied by a written authorisation empowering it to act on behalf of the applicant, or to designate a representative so to act.

Article 29

This Convention shall not preclude any person, institution or body who claims that there has been a breach of custody or access rights within the meaning of Article 3 or 21 from applying directly to the judicial or administrative authorities of a Contracting State, whether or not under the provisions of this Convention.

Article 30

Any application submitted to the Central Authorities or directly to the judicial or administrative authorities of a Contracting State in accordance with the terms of this Convention, together with documents and any other information appended thereto or provided by a Central Authority, shall be admissible in the courts or administrative authorities of the Contracting States.

Article 31

In relation to a State which in matters of custody of children has two or more systems of law applicable in different territorial units –
a) any reference to habitual residence in that State shall be construed as referring to habitual residence in a territorial unit of that State;
b) any reference to the law of the State of habitual residence shall be construed as referring to the law of the territorial unit in that State where the child habitually resides.

Article 32

In relation to a State which in matters of custody of children has two or more systems of law applicable to different categories of persons, any reference to the law of that State shall be construed as referring to the legal system specified by the law of that State.

Article 33

A State within which different territorial units have their own rules of law in respect of custody of children shall not be bound to apply this Convention where a State with a unified system of law would not be bound to do so.

Article 34

This Convention shall take priority in matters within its scope over the *Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of minors*, as between Parties to both Conventions. Otherwise the present Convention shall not restrict the application of an international instrument in force between the State of origin and the State addressed or other law of the State addressed for the purposes of obtaining the return of a child who has been wrongfully removed or retained or of organising access rights.

Article 35

This Convention shall apply as between Contracting States only to wrongful removals or retentions occurring after its entry into force in those States.
Where a declaration has been made under Article 39 or 40, the reference in the preceding paragraph to a Contracting State shall be taken to refer to the territorial unit or units in relation to which this Convention applies.

Article 36

Nothing in this Convention shall prevent two or more Contracting States, in order to limit the restrictions to which the return of the child may be subject, from agreeing among themselves to derogate from any provisions of this Convention which may imply such a restriction.

CHAPTER VI – FINAL CLAUSES

Article 37

The Convention shall be open for signature by the States which were Members of the Hague Conference on Private International Law at the time of its Fourteenth Session.
It shall be ratified, accepted or approved and the instruments of ratification, acceptance or approval shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

Article 38

Any other State may accede to the Convention.
The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.
The Convention shall enter into force for a State acceding to it on the first day of the third calendar month after the deposit of its instrument of accession.

The accession will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession. Such a declaration will also have to be made by any Member State ratifying, accepting or approving the Convention after an accession. Such declaration shall be deposited at the Ministry of Foreign Affairs of the Kingdom of the Netherlands; this Ministry shall forward, through diplomatic channels, a certified copy to each of the Contracting States.
The Convention will enter into force as between the acceding State and the State that has declared its acceptance of the accession on the first day of the third calendar month after the deposit of the declaration of acceptance.

Article 39

Any State may, at the time of signature, ratification, acceptance, approval or accession, declare that the Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect at the time the Convention enters into force for that State.
Such declaration, as well as any subsequent extension, shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

Article 40

If a Contracting State has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in this Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that this Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time.
Any such declaration shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands and shall state expressly the territorial units to which the Convention applies.

Article 41

Where a Contracting State has a system of government under which executive, judicial and legislative powers are distributed between central and other authorities within that State, its signature or ratification, acceptance or approval of, or accession to this Convention, or its making of any declaration in terms of Article 40 shall carry no implication as to the internal distribution of powers within that State.

Article 42

Any State may, not later than the time of ratification, acceptance, approval or accession, or at the time of making a declaration in terms of Article 39 or 40, make one or both of the reservations provided for in Article 24 and Article 26, third paragraph. No other reservation shall be permitted.
Any State may at any time withdraw a reservation it has made. The withdrawal shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands.
The reservation shall cease to have effect on the first day of the third calendar month after the notification referred to in the preceding paragraph.

Article 43

The Convention shall enter into force on the first day of the third calendar month after the deposit of the third instrument of ratification, acceptance, approval or accession referred to in Articles 37 and 38.

Thereafter the Convention shall enter into force –

(1) for each State ratifying, accepting, approving or acceding to it subsequently, on the first day of the third calendar month after the deposit of its instrument of ratification, acceptance, approval or accession;

(2) for any territory or territorial unit to which the Convention has been extended in conformity with Article 39 or 40, on the first day of the third calendar month after the notification referred to in that Article.

Article 44

The Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 43 even for States which subsequently have ratified, accepted, approved it or acceded to it.

If there has been no denunciation, it shall be renewed tacitly every five years.

Any denunciation shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands at least six months before the expiry of the five year period. It may be limited to certain of the territories or territorial units to which the Convention applies.

The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other Contracting States.

Article 45

The Ministry of Foreign Affairs of the Kingdom of the Netherlands shall notify the States Members of the Conference, and the States which have acceded in accordance with Article 38, of the following –

(1) the signatures and ratifications, acceptances and approvals referred to in Article 37;
(2) the accessions referred to in Article 38;
(3) the date on which the Convention enters into force in accordance with Article 43;
(4) the extensions referred to in Article 39;
(5) the declarations referred to in Articles 38 and 40;
(6) the reservations referred to in Article 24 and Article 26, third paragraph, and the withdrawals referred to in Article 42;
(7) the denunciations referred to in Article 44.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.

Done at The Hague, on the 25th day of October, 1980, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Kingdom of the Netherlands, and of which a certified copy shall be sent, through diplomatic channels, to each of the States Members of the Hague Conference on Private International Law at the date of its Fourteenth Session.

UNIFORM CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT (1997)

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

ANNUAL CONFERENCE
MEETING IN ITS ONE-HUNDRED-AND-SIXTH YEAR
IN SACRAMENTO, CALIFORNIA
JULY 25 - AUGUST 1, 1997

WITH PREFATORY NOTE AND COMMENTS

Approved by the American Bar Association
Nashville, Tennessee, February 4, 1998

November 20, 1998

United States Codes

PUBLIC LAW 100-300
100th Congress
(H.R. 3971, 29 April 1988)

42 USC 11601 et seq.
INTERNATIONAL CHILD ABDUCTION REMEDIES ACT (ICARA)

To establish procedures to implement the Convention on the Civil Aspects of International Child Abduction, done at The Hague on October 25, 1980 and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.

Short Title: "This act may be cited as the 'International Child Abduction Remedies Act'."

Section 11601. - Findings and declarations

(a) Findings: The Congress makes the following findings:

(1) The international abduction or wrongful retention of children is harmful to their well-being.

(2) Persons should not be permitted to obtain custody of children by virtue of their wrongful removal or retention.

(3) International abductions and retentions of children are increasing, and only concerted cooperation pursuant to an international agreement can effectively combat this problem.

(4) The Convention on the Civil Aspects of International Child Abduction, done at The Hague on October 25, 1980, establishes legal rights and procedures for the prompt return of children who have been wrongfully removed or retained, as well as for securing the exercise of visitation rights. Children who are wrongfully removed or retained within the meaning of the Convention are to be promptly returned unless one of the narrow exceptions set forth in the Convention applies. The Convention provides a sound treaty framework to help resolve the problem of international abduction and retention of children and will deter such wrongful removals and retentions.

(b) Declarations: The Congress makes the following declarations:

(1) It is the purpose of this chapter to establish procedures for the implementation of the Convention in the United States.

(2) The provisions of this chapter are in addition to and not in lieu of the provisions of the Convention.

(3) In enacting this chapter the Congress recognizes -

(A) the international character of the Convention; and

(B) the need for uniform international interpretation of the Convention.

(4) The Convention and this chapter empower courts in the United States to determine only rights under the Convention and not the merits of any underlying child custody claims

Section 11602. - Definitions

For the purposes of this chapter -

(1) the term "applicant" means any person who, pursuant to the Convention, files an application with the United States Central Authority or a Central Authority of any other party to the Convention for the return of a child alleged to have been wrongfully removed or retained or for arrangements for organizing or securing the effective exercise of rights of access pursuant to the Convention;

(2) the term "Convention" means the Convention on the Civil Aspects of International Child Abduction, done at The Hague on October 25, 1980;

(3) the term "Parent Locator Service" means the service established by the Secretary of Health and Human Services under section 653 of this title;

(4) the term "petitioner" means any person who, in accordance with this chapter, files a petition in court seeking relief under the Convention;

(5) the term "person" includes any individual, institution, or other legal entity or body;

(6) the term "respondent" means any person against whose interests a petition is filed in court, in accordance with this chapter, which seeks relief under the Convention;

(7) the term "rights of access" means visitation rights;

(8) the term "State" means any of the several States, the District of Columbia, and any commonwealth, territory, or possession of the United States; and

(9) the term "United States Central Authority" means the agency of the Federal Government designated by the President under section 11606(a) of this title

Section 11603. - Judicial remedies

(a) Jurisdiction of courts

The courts of the States and the United States district courts shall have concurrent original jurisdiction of actions arising under the Convention.

(b) Petitions

Any person seeking to initiate judicial proceedings under the Convention for the return of a child or for arrangements for organizing or securing the effective exercise of rights of access to a child may do so by commencing a civil action by filing a petition for the relief sought in any court which has jurisdiction of such action and which is authorized to exercise its jurisdiction in the place where the child is located at the time the petition is filed.

(c) Notice

Notice of an action brought under subsection (b) of this section shall be given in accordance with the applicable law governing notice in interstate child custody proceedings.

(d) Determination of case

The court in which an action is brought under subsection (b) of this section shall decide the case in accordance with the Convention.

(e) Burdens of proof

(1) A petitioner in an action brought under subsection (b) of this section shall establish by a preponderance of the evidence -

(A) in the case of an action for the return of a child, that the child has been wrongfully removed or retained within the meaning of the Convention; and

(B) in the case of an action for arrangements for organizing or securing the effective exercise of rights of access, that the petitioner has such rights.

(2) In the case of an action for the return of a child, a respondent who opposes the return of the child has the burden of establishing -

(A) by clear and convincing evidence that one of the exceptions set forth in article 13b or 20 of the Convention applies; and

(B) by a preponderance of the evidence that any other exception set forth in article 12 or 13 of the Convention applies.

(f) Application of Convention

For purposes of any action brought under this chapter -

(1) the term "authorities", as used in article 15 of the Convention to refer to the authorities of the state of the habitual residence of a child, includes courts and appropriate government agencies;

(2) the terms "wrongful removal or retention" and "wrongfully removed or retained", as used in the Convention, include a removal or retention of a child before the entry of a custody order regarding that child; and

(3) the term "commencement of proceedings", as used in article 12 of the Convention, means, with respect to the return of a child located in the United States, the filing of a petition in accordance with subsection (b) of this section.

(g) Full faith and credit

Full faith and credit shall be accorded by the courts of the States and the courts of the United States to the judgment of any other such court ordering or denying the return of a child, pursuant to the Convention, in an action brought under this chapter.

(h) Remedies under Convention not exclusive

The remedies established by the Convention and this chapter shall be in addition to remedies available under other laws or international agreements

Section 11604. - Provisional remedies

(a) Authority of courts

In furtherance of the objectives of article 7(b) and other provisions of the Convention, and subject to the provisions of subsection (b) of this section, any court exercising jurisdiction of an action brought under section 11603(b) of this title may take or cause to be taken measures under Federal or

State law, as appropriate, to protect the well-being of the child involved or to prevent the child's further removal or concealment before the final disposition of the petition.

(b) Limitation on authority

No court exercising jurisdiction of an action brought under section 11603(b) of this title may, under subsection (a) of this section, order a child removed from a person having physical control of the child unless the applicable requirements of State law are satisfied

Section 11605. - Admissibility of documents

With respect to any application to the United States Central Authority, or any petition to a court under section 11603 of this title, which seeks relief under the Convention, or any other documents or information included with such application or petition or provided after such submission which relates to the application or petition, as the case may be, no authentication of such application, petition, document, or information shall be required in order for the application, petition, document, or information to be admissible in court

Section 11606. - United States Central Authority

(a) Designation

The President shall designate a Federal agency to serve as the Central Authority for the United States under the Convention.

(b) Functions

The functions of the United States Central Authority are those ascribed to the Central Authority by the Convention and this chapter.

(c) Regulatory authority

The United States Central Authority is authorized to issue such regulations as may be necessary to carry out its functions under the Convention and this chapter.

(d) Obtaining information from Parent Locator Service

The United States Central Authority may, to the extent authorized by the Social Security Act (42 U.S.C. 301 et seq.), obtain information from the Parent Locator Service.

(e) Grant authority

The United States Central Authority is authorized to make grants to, or enter into contracts or agreements with, any individual, corporation, other Federal, State, or local agency, or private entity or organization in the United States for purposes of accomplishing its responsibilities under the Convention and this chapter

Section 11607. - Costs and fees

(a) Administrative costs

No department, agency, or instrumentality of the Federal Government or of any State or local government may impose on an applicant any fee in relation to the administrative processing of applications submitted under the Convention.

(b) Costs incurred in civil actions

(1) Petitioners may be required to bear the costs of legal counsel or advisors, court costs incurred in connection with their petitions, and travel costs for the return of the child involved and any accompanying persons, except as provided in paragraphs (2) and (3).

(2) Subject to paragraph (3), legal fees or court costs incurred in connection with an action brought under section 11603 of this title shall be borne by the petitioner unless they are covered by payments from Federal, State, or local legal assistance or other programs.

(3) Any court ordering the return of a child pursuant to an action brought under section 11603 of this title shall order the respondent to pay necessary expenses incurred by or on behalf of the petitioner, including court costs, legal fees, foster home or other care during the course of proceedings in the action, and transportation costs related to the return of the child, unless the respondent establishes that such order would be clearly inappropriate

Section 11608. - Collection, maintenance, and dissemination of information

(a) In general

In performing its functions under the Convention, the United States Central Authority may, under such conditions as the Central Authority prescribes by regulation, but subject to subsection (c) of this section, receive from or transmit to any department, agency, or instrumentality of the Federal Government or of any State or foreign government, and receive from or transmit to any applicant, petitioner, or respondent, information necessary to locate a child or for the purpose of otherwise implementing the Convention with respect to a child, except that the United States Central Authority -

(1) may receive such information from a Federal or State department, agency, or instrumentality only pursuant to applicable Federal and State statutes; and

(2) may transmit any information received under this subsection notwithstanding any provision of law other than this chapter.

(b) Requests for information

Requests for information under this section shall be submitted in such manner and form as the United States Central Authority may prescribe by regulation and shall be accompanied or supported by such documents as the United States Central Authority may require.

(c) Responsibility of government entities

Whenever any department, agency, or instrumentality of the United States or of any State receives a request from the United States Central Authority for information authorized to be provided to such Central Authority under subsection (a) of this section, the head of such department, agency, or instrumentality shall promptly cause a search to be made of the files and records maintained by such department, agency, or instrumentality in order to determine whether the information requested is contained in any such files or records. If such search discloses the information requested, the head

of such department, agency, or instrumentality shall immediately transmit such information to the United States Central Authority, except that any such information the disclosure of which -

(1) would adversely affect the national security interests of the United States or the law enforcement interests of the United States or of any State; or

(2) would be prohibited by section 9 of title 13; shall not be transmitted to the Central Authority. The head of such department, agency, or instrumentality shall, immediately upon completion of the requested search, notify the Central Authority of the results of the search, and whether an exception set forth in paragraph (1) or (2) applies. In the event that the United States Central Authority receives information and the appropriate Federal or State department, agency, or instrumentality thereafter notifies the Central Authority that an exception set forth in paragraph (1) or (2) applies to that information, the Central Authority may not disclose that information under subsection (a) of this section.

(d) Information available from Parent Locator Service

To the extent that information which the United States Central Authority is authorized to obtain under the provisions of subsection (c) of this section can be obtained through the Parent Locator Service, the United States Central Authority shall first seek to obtain such information from the Parent Locator Service, before requesting such information directly under the provisions of subsection (c) of this section.

(e) Recordkeeping

The United States Central Authority shall maintain appropriate records concerning its activities and the disposition of cases brought to its attention

Section 11608a. - Office of Children's Issues

(a) Director requirements

The Secretary of State shall fill the position of Director of the Office of Children's Issues of the Department of State (in this section referred to as the "Office") with an individual of senior rank who can ensure long-term continuity in the management and policy matters of the Office and has a strong background in consular affairs.

(b) Case officer staffing

Effective April 1, 2000, there shall be assigned to the Office of Children's Issues of the Department of State a sufficient number of case officers to ensure that the average caseload for each officer does not exceed 75.

(c) Embassy contact

The Secretary of State shall designate in each United States diplomatic mission an employee who shall serve as the point of contact for matters relating to international abductions of children by parents. The Director of the Office shall regularly inform the designated employee of children of United States citizens abducted by parents to that country.

(d) Reports to parents

(1) In general

Except as provided in paragraph (2), beginning 6 months after November 29, 1999, and at least once every 6 months thereafter, the Secretary of State shall report to each parent who has requested assistance regarding an abducted child overseas. Each such report shall include information on the current status of the abducted child's case and the efforts by the Department of State to resolve the case.

(2) Exception

The requirement in paragraph (1) shall not apply in a case of an abducted child if -

(A) the case has been closed and the Secretary of State has reported the reason the case was closed to the parent who requested assistance; or

(B) the parent seeking assistance requests that such reports not be provided

Section 11609. - Interagency coordinating group

The Secretary of State, the Secretary of Health and Human Services, and the Attorney General shall designate Federal employees and may, from time to time, designate private citizens to serve on an interagency coordinating group to monitor the operation of the Convention and to provide advice on its implementation to the United States Central Authority and other Federal agencies. This group shall meet from time to time at the request of the United States Central Authority. The agency in which the United States Central Authority is located is authorized to reimburse such private citizens for travel and other expenses incurred in participating at meetings of the interagency coordinating group at rates not to exceed those authorized under subchapter I of chapter 57 of title 5 for employees of agencies

Section 11610. - Authorization of appropriations

There are authorized to be appropriated for each fiscal year such sums as may be necessary to carry out the purposes of the Convention and this chapter

UNIFORM CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT (1997)

The Committee that acted for the National Conference of Commissioners on Uniform State Laws in preparing the Uniform Child Custody Jurisdiction and Enforcement Act (1997) was as follows:

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Copies of this Act may be obtained from:

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS
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UNIFORM CHILD-CUSTODY JURISDICTION AND ENFORCEMENT ACT (1997)

PREFATORY NOTE

This Act, the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), revisits the problem of the interstate child almost thirty years after the Conference promulgated the Uniform Child Custody Jurisdiction Act (UCCJA). The UCCJEA accomplishes two major purposes.

First, it revises the law on child custody jurisdiction in light of federal enactments and almost thirty years of inconsistent case law. Article 2 of this Act provides clearer standards for which States can exercise original jurisdiction over a child custody determination. It also, for the first time, enunciates a standard of continuing jurisdiction and clarifies modification jurisdiction. Other aspects of the article harmonize the law on simultaneous proceedings, clean hands, and forum non conveniens.

Second, this Act provides in Article 3 for a remedial process to enforce interstate child custody and visitation determinations. In doing so, it brings a uniform procedure to the law of interstate enforcement that is currently producing inconsistent results. In many respects, this Act accomplishes for custody and visitation determinations the same uniformity that has occurred in interstate child support with the promulgation of the Uniform Interstate Family Support Act (UIFSA).

Revision of Uniform Child Custody Jurisdiction Act

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. § 1738A, to address the interstate custody jurisdictional 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 are similar to those in the UCCJA. There are, however, some significant differences. For example, the PKPA authorizes continuing exclusive jurisdiction in the original decree State so long as one parent or the child remains there and that State has continuing jurisdiction under its own law. The UCCJA did not directly address this issue. To further complicate the process, the PKPA partially incorporates state UCCJA law in its language. The relationship between these two statutes became "technical enough to delight a medieval property lawyer." Homer H. Clark, *Domestic Relations* § 12.5 at 494 (2d ed. 1988).

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

The revisions of the jurisdictional aspects of the UCCJA eliminate the inconsistent state interpretations and can be summarized as follows:

1. Home state priority. The PKPA prioritizes "home state" jurisdiction by requiring that full faith and credit cannot be given to a child custody determination by a State that exercises initial jurisdiction as a "significant connection state" when there is a "home State." Initial custody determinations based on "significant connections" are not entitled to PKPA enforcement unless there is no home State. The UCCJA, however, specifically authorizes four independent bases of jurisdiction without prioritization. Under the UCCJA, a significant connection custody determination may have to be enforced even if it would be denied enforcement under the PKPA. The UCCJEA prioritizes home state jurisdiction in Section 201.

2. Clarification of emergency jurisdiction. There are several problems with the current emergency jurisdiction provision of the UCCJA § 3(a)(3). First, the language of the UCCJA does not specify that emergency jurisdiction may be exercised only to protect the child on a temporary basis until the court with appropriate jurisdiction issues a permanent order. Some courts have interpreted the UCCJA language to so provide. Other courts, however, have held that there is no time limit on a custody determination based on emergency jurisdiction. Simultaneous proceedings and conflicting custody orders have resulted from these different interpretations.

Second, the emergency jurisdiction provisions predated the widespread enactment of state domestic violence statutes. Those statutes are often invoked to keep one parent away from the other parent and the children when there is a threat

of violence. Whether these situations are sufficient to invoke the emergency jurisdiction provision of the UCCJA has been the subject of some confusion since the emergency jurisdiction provision does not specifically refer to violence directed against the parent of the child or against a sibling of the child.

The UCCJEA contains a separate section on emergency jurisdiction at Section 204 which addresses these issues.

3. Exclusive continuing jurisdiction for the State that entered the decree. The failure of the UCCJA to clearly enunciate that the decree-granting State retains exclusive continuing jurisdiction to modify a decree has resulted in two major problems. First, different interpretations of the UCCJA on continuing jurisdiction have produced conflicting custody decrees. States also have different interpretations as to how long continuing jurisdiction lasts. Some courts have held that modification jurisdiction continues until the last contestant leaves the State, regardless of how many years the child has lived outside the State or how tenuous the child's connections to the State have become. Other courts have held that continuing modification jurisdiction ends as soon as the child has established a new home State, regardless of how significant the child's connections to the decree State remain. Still other States distinguish between custody orders and visitation orders. This divergence of views leads to simultaneous proceedings and conflicting custody orders.

The second problem arises when it is necessary to determine whether the State with continuing jurisdiction has relinquished it. There should be a clear basis to determine when that court has relinquished jurisdiction. The UCCJA provided no guidance on this issue. The ambiguity regarding whether a court has declined jurisdiction can result in one court improperly exercising jurisdiction because it erroneously believes that the other court has declined jurisdiction. This caused simultaneous proceedings and conflicting custody orders. In addition, some courts have declined jurisdiction after only informal contact between courts with no opportunity for the parties to be heard. This raised significant due process concerns. The UCCJEA addresses these issues in Sections 110, 202, and 206.

4. Specification of what custody proceedings are covered. The definition of custody proceeding in the UCCJA is ambiguous. States have rendered conflicting decisions regarding certain types of proceedings. There is no general agreement on whether the UCCJA applies to neglect, abuse, dependency, wardship, guardianship, termination of parental rights, and protection from domestic violence proceedings. The UCCJEA includes a sweeping definition that, with the exception of adoption, includes virtually all cases that can involve custody of or visitation with a child as a "custody determination."

5. Role of "Best Interests." The jurisdictional scheme of the UCCJA was designed to promote the best interests of the children whose custody was at issue by discouraging parental abduction and providing that, in general, the State with the closest connections to, and the most evidence regarding, a child should decide that child's custody. The "best interest" language in the jurisdictional sections of the UCCJA was not intended to be an invitation to address the merits of the custody dispute in the jurisdictional determination or to otherwise provide that "best interests" considerations should override jurisdictional determinations or provide an additional jurisdictional basis.

The UCCJEA eliminates the term "best interests" in order to clearly distinguish between the jurisdictional standards and the substantive standards relating to custody and visitation of children.

6. Other Changes. This draft also makes a number of additional amendments to the UCCJA. Many of these changes were made to harmonize the provisions of this Act with those of the Uniform Interstate Family Support Act. One of the policy bases underlying this Act is to make uniform the law of interstate family proceedings to the extent possible, given the very different jurisdictional foundations. It simplifies the life of the family law practitioner when the same or similar provisions are found in both Acts.

Enforcement Provisions

One of the major purposes of the revision of the UCCJA was to provide a remedy for interstate visitation and custody cases. As with child support, state borders have become one of the biggest obstacles to enforcement of custody and visitation orders. If either parent leaves the State where the custody determination was made, the other parent faces considerable difficulty in enforcing the visitation and custody provisions of the decree. Locating the child, making service of process, and preventing adverse modification in a new forum all present problems.

There is currently no uniform method of enforcing custody and visitation orders validly entered in another State. As documented by the *Obstacles Study*, despite the fact that both the UCCJA and the PKPA direct the enforcement of visitation and custody orders entered in accordance with mandated jurisdictional prerequisites and due process, neither act provides enforcement procedures or remedies.

As the *Obstacles Study* pointed out, the lack of specificity in enforcement procedures has resulted in the law of enforcement evolving differently in different jurisdictions. In one State, it might be common practice to file a Motion to Enforce or a Motion to Grant Full Faith and Credit to initiate an enforcement proceeding. In

another State, a Writ of Habeas Corpus or a Citation for Contempt might be commonly used. In some States, Mandamus and Prohibition also may be utilized. All of these enforcement procedures differ from jurisdiction to jurisdiction. While many States tend to limit considerations in enforcement proceedings to whether the court which issued the decree had jurisdiction to make the custody determination, others broaden the considerations to scrutiny of whether enforcement would be in the best interests of the child.

Lack of uniformity complicates the enforcement process in several ways: (1) It increases the costs of the enforcement action in part because the services of more than one lawyer may be required – one in the original forum and one in the State where enforcement is sought; (2) It decreases the certainty of outcome; (3) It can turn enforcement into a long and drawn out procedure. A parent opposed to the provisions of a visitation determination may be able to delay implementation for many months, possibly even years, thereby frustrating not only the other parent, but also the process that led to the issuance of the original court order.

The provisions of Article 3 provide several remedies for the enforcement of a custody determination. First, there is a simple procedure for registering a custody determination in another State. This will allow 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. The provision should prove to be very useful in international custody cases.

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.

The scope of the enforcing court's inquiry is limited to the issue of whether the decree court had jurisdiction and complied with due process in rendering the original custody decree. No further inquiry is necessary because neither Article 2 nor the PKPA allows an enforcing court to modify a custody determination.

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.

The involvement of public authorities will also prove more effective in remedying violations of custody determinations. Most parties do not have the resources to enforce a custody determination in another jurisdiction. The availability of the public authorities as an enforcement agency will help ensure that this remedy can be made available regardless of income level. In addition, the public authorities may have resources to draw on that are unavailable to the average litigant.

This Act does not authorize the public authorities to be involved in the action leading up to the making of the custody determination, except when requested by the court, when there is a violation of the Hague Convention on the Civil Aspects of International Child Abduction, or when the person holding the child has violated a criminal statute. The Act does not mandate that public authorities be involved in all cases. Not all States, or local authorities, have the funds necessary for an effective custody and visitation enforcement program.

UNIFORM CHILD-CUSTODY JURISDICTION AND ENFORCEMENT ACT (1997)

[ARTICLE] 1

GENERAL PROVISIONS

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

Comment

Section 1 of the UCCJA was a statement of the purposes of the Act. Although extensively cited by courts, it was eliminated because Uniform Acts no longer contain such a section. Nonetheless, this Act should be interpreted according to its purposes which are to:

(1) Avoid jurisdictional competition and conflict with courts of other States in matters of child custody which have in the past resulted in the shifting of children from State to State with harmful effects on their well-being;

(2) Promote cooperation with the courts of other States to the end that a custody decree is rendered in that State which can best decide the case in the interest of the child;

(3) Discourage the use of the interstate system for continuing controversies over child custody;

(4) Deter abductions of children;

(5) Avoid relitigation of custody decisions of other States in this State;

(6) Facilitate the enforcement of custody decrees of other States;

SECTION 102. DEFINITIONS. In this [Act]:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Comment

The UCCJA did not contain a definition of "child." The definition here is taken from the PKPA.

The definition of "child-custody determination" now closely tracks the PKPA definition. It encompasses any judgment, decree or other order which provides for the custody of, or visitation with, a child, regardless of local terminology, including such labels as "managing conservatorship" or "parenting plan."

The definition of "child-custody proceeding" has been expanded from the comparable definition in the UCCJA. These listed proceedings have generally been determined to be the type of proceeding to which the UCCJA and PKPA are applicable. The list of examples removes any controversy about the types of proceedings where a custody determination can occur. Proceedings that affect access to the child are subject to this Act. The inclusion of proceedings related to protection from domestic violence is necessary because in some States domestic violence proceedings may affect custody of and visitation with a child. Juvenile delinquency or proceedings to confer contractual rights are not "custody proceedings" because they do not relate to civil aspects of access to a child. While a determination of paternity is covered under the Uniform Interstate Family Support Act, the custody and visitation aspects of paternity cases are custody proceedings. Cases involving the Hague Convention on the Civil Aspects of International Child Abduction have not been included at this point because custody of the child is not determined in a proceeding under the International Child Abductions Remedies Act. Those proceedings are specially included in the Article 3 enforcement process.

"Commencement" has been included in the definitions as a replacement for the term "pending" found in the UCCJA. Its inclusion simplifies some of the simultaneous proceedings provisions of this Act.

The definition of "home State" has been reworded slightly. No substantive change is intended from the UCCJA.

The term "issuing State" is borrowed from UIFSA. In UIFSA, it refers to the court that issued the support or parentage order. Here, it refers to the State, or the court, which made the custody determination that is sought to be enforced. It is used primarily in Article 3.

The term "person" has been added to ensure that the provisions of this Act apply when the State is the moving party in a custody proceeding or has legal custody of a child. The definition of "person" is the one that is mandated for all Uniform Acts.

The term "person acting as a parent" has been slightly redefined. It has been broadened from the definition in the UCCJA to include a person who has acted as a parent for a significant period of time prior to the filing of the custody proceeding as well as a person who currently has physical custody of the child. In addition, a person acting as a parent must either have legal custody or claim a right to legal custody under the law of this State. The reference to the law of this State means that a court determines the issue of whether someone is a "person acting as a parent" under its own law. This reaffirms the traditional view that a court in a child custody case applies its own substantive law. The court does not have to undertake a choice-of-law analysis to determine whether the individual who is claiming to be a person acting as a parent has standing to seek custody of the child.

The definition of "tribe" is the one mandated for use in Uniform Acts. Should a State choose to apply this Act to tribal adjudications, this definition should be enacted as well as the entirety of Section 104.

The term "contestant" as has been omitted from this revision. It was defined in the UCCJA § 2(1) as "a person, including a parent, who claims a right to custody or visitation rights with respect to a child." It seems to have served little purpose over the years, and whatever function it once had has been subsumed by state laws on who has standing to seek custody of or visitation with a child. In addition UCCJA § 2(5) of the which defined "decree" and "custody decree" has been eliminated as duplicative of the definition of "custody determination."

SECTION 103. PROCEEDINGS GOVERNED BY OTHER LAW. This [Act] does not govern an adoption proceeding or a proceeding pertaining to the authorization of emergency medical care for a child.

Comment

Two proceedings are governed by other acts. Adoption cases are excluded from this Act because adoption is a specialized area which is thoroughly covered by the Uniform Adoption Act (UAA) (1994). Most States either will adopt that Act or will adopt the jurisdictional provisions of that Act. Therefore the jurisdictional provisions governing adoption proceeding are generally found elsewhere.

However, there are likely to be a number of instances where it will be necessary to apply this Act in an adoption proceeding. For example, if a State adopts the UAA then Section 3-101 of the Act specifically refers in places to the Uniform Child Custody Jurisdiction Act which will become a reference to this Act. Second, the UAA requires that if an adoption is denied or set aside, the court is to determine the child's custody. UAA § 3-704. Those custody proceedings would be subject to this Act. See Joan Heifetz Hollinger, The Uniform Adoption Act: Reporter's Ruminations, 30 Fam.L.Q. 345 (1996).

Children that are the subject of interstate placements for adoption or foster care are governed by the Interstate Compact on the Placement of Children (ICPC). The UAA § 2-107 provides that the provisions of the compact, although not jurisdictional, supply the governing rules for all children who are subject to it. As stated in the Comments to that section: "Once a court exercises jurisdiction, the ICPC helps determine the legality of an interstate placement." For a discussion of the relationship between the UCCJA and the ICPC see *J.D.S. v. Franks*, 893 P.2d 732 (Ariz. 1995).

Proceedings pertaining to the authorization of emergency medical care for children are outside the scope of this Act since they are not custody determinations. All States have procedures which allow the State to temporarily supersede parental authority for purposes of emergency medical procedures. Those provisions will govern without regard to this Act.

SECTION 104. APPLICATION TO INDIAN TRIBES.

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

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

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

Comment

This section allows States the discretion to extend the terms of this Act to Indian tribes by removing the brackets. The definition of "tribe" is found at Section 102(16). This Act does not purport to legislate custody jurisdiction for tribal courts. However, a Tribe could adopt this Act as enabling legislation by simply replacing references to "this State" with "this Tribe."

Subsection (a) is not bracketed. If the Indian Child Welfare Act requires that a case be heard in tribal court, then its provisions determine jurisdiction.

SECTION 105. INTERNATIONAL APPLICATION OF [ACT].

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

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

Comment

The provisions of this Act have international application to child custody proceedings and determinations of other countries. Another country will be treated as if it were a State of the United States for purposes of applying Articles 1 and 2 of this Act. Custody determinations of other countries will be enforced if the facts of the case indicate that jurisdiction was in substantial compliance with the requirements of this Act.

In this section, the term "child-custody determination" should be interpreted to include proceedings relating to custody or analogous institutions of the other country. See generally, Article 3 of The Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children. 35 I.L.M. 1391 (1996).

A court of this State may refuse to apply this Act when the child custody law of the other country violates basic principles relating to the protection of human rights and fundamental freedoms. 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.

This section is derived from Section 23 of the UCCJA.

SECTION 106. EFFECT OF CHILD-CUSTODY DETERMINATION. A child-custody determination made by a court of this State that had jurisdiction under this [Act] binds all persons who have been served in accordance with the laws of this State or notified in accordance with Section 108 or who have submitted to the jurisdiction of the court, and who have been given an opportunity to be heard.

As to those persons, the determination is conclusive as to all decided issues of law and fact except to the extent the determination is modified.

Comment

No substantive changes have been made to this section which was Section 12 of the UCCJA.

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

Comment

No substantive change was made to this section which was Section 24 of the UCCJA. The section is placed toward the beginning of Article 1 to emphasize its importance.

The language change from "case" to "question" is intended to clarify that it is the jurisdictional issue which must be expedited and not the entire custody case. Whether the entire custody case should be given priority is a matter of local law.

SECTION 108. NOTICE TO PERSONS OUTSIDE STATE.

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

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

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

Comment

This section authorizes notice and proof of service to be made by any method allowed by either the State which issues the notice or the State where the notice is received. This eliminates the need to specify the type of notice in the Act and therefore the provisions of Section 5 of the UCCJA which specified how notice was to be accomplished were eliminated. The change reflects an approach in this Act to use local law to determine many procedural issues. Thus, service by facsimile is permissible if allowed by local rule in either State. In addition, where special service or notice rules are available for some procedures, in either jurisdiction, they could be utilized under this Act. For example, if a case involves domestic violence and the statute of either State would authorize notice to be served by a peace officer, such service could be used under this Act.

Although Section 105 requires foreign countries to be treated as States for purposes of this Act, attorneys should be cautioned about service and notice in foreign countries. Countries have their own rules on service which must usually be followed. Attorneys should consult the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, 20 U.S.T. 36, T.I.A.S. 6638 (1965).

SECTION 109. APPEARANCE AND LIMITED IMMUNITY.

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

(b) A person who is subject to personal jurisdiction in this State on a basis other than physical presence is not immune from service of process in this State. A

party present in this State who is subject to the jurisdiction of another State is not immune from service of process allowable under the laws of that State.

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

Comment

This section establishes a general principle that participation in a custody proceeding does not, by itself, give the court jurisdiction over any issue for which personal jurisdiction over the individual is required. The term "participate" should be read broadly. For example, if jurisdiction is proper under Article 2, a respondent in an original custody determination, or a party in a modification determination, should be able to request custody without this constituting the seeking of affirmative relief that would waive personal jurisdictional objections. Once jurisdiction is proper under Article 2, a party should not be placed in the dilemma of choosing between seeking custody or protecting a right not to be subject to a monetary judgment by a court with no other relationship to the party.

This section is comparable to the immunity provision of UIFSA § 314. A party who is otherwise not subject to personal jurisdiction can appear in a custody proceeding or an enforcement action without being subject to the general jurisdiction of the State by virtue of the appearance. However, if the petitioner would otherwise be subject to the jurisdiction of the State, appearing in a custody proceeding or filing an enforcement proceeding will not provide immunity. Thus, if the non-custodial parent moves from the State that decided the custody determination, that parent is still subject to the state's jurisdiction for enforcement of child support if the child or an individual obligee continues to reside there. See UIFSA § 205. If the non-custodial parent returns to enforce the visitation aspects of the custody determination, the State can utilize any appropriate means to collect the back-due child support. However, the situation is different if both parties move from State A after the determination, with the custodial parent and the child establishing a new home State in State B, and the non-custodial parent moving to State C. The non-custodial parent is not, at this point, subject to the jurisdiction of State B for monetary matters. See *Kulko v. Superior Court*, 436 U.S. 84 (1978). If the non-custodial parent comes into State B to enforce the visitation aspects of the determination, the non-custodial parent is not subject to the jurisdiction of State B for those proceedings and issues requiring personal jurisdiction by filing the enforcement action.

A party also is immune from service of process during the time in the State for an enforcement action except for those claims for which jurisdiction could be based on contacts other than mere physical presence. Thus, when the non-custodial parent comes into State B to enforce the visitation aspects of the decree, State B cannot acquire jurisdiction over the child support aspects of the decree by serving the non-custodial parent in the State. Cf. UIFSA § 611 (personally serving the obligor in the State of the residence of the obligee is not by itself a sufficient jurisdictional basis to authorize a modification of child support). However, a party who is in this State and subject to the jurisdiction of another State may be served with process to appear in that State, if allowable under the laws of that State.

As the Comments to UIFSA § 314 note, the immunity provided by this section is limited. It does not provide immunity for civil litigation unrelated to the enforcement action. For example, a party to an enforcement action is not immune from service regarding a claim that involves an automobile accident occurring while the party is in the State.

SECTION 110. COMMUNICATION BETWEEN COURTS.

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

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

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

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

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

Comment

This section emphasizes the role of judicial communications. It authorizes a court to communicate concerning any proceeding arising under this Act. This includes communication with foreign tribunals and tribal courts. Communication can occur in many different ways such as by telephonic conference and by on-line or other electronic communication. The Act does not preclude any method of communication and recognizes that there will be increasing use of modern communication techniques.

Communication between courts is required under Sections 204, 206, and 306 and strongly suggested in applying Section 207. Apart from those sections, there may be less need under this Act for courts to communicate concerning jurisdiction due to the prioritization of home state jurisdiction. Communication is authorized, however, whenever the court finds it would be helpful. The court may authorize the parties to participate in the communication. However, the Act does not mandate participation. Communication between courts is often difficult to schedule and participation by the parties may be impractical. Phone calls often have to be made after-hours or whenever the schedules of judges allow.

This section does require that a record be made of the conversation and that the parties have access to that record in order to be informed of the content of the conversation. The only exception to this requirement is when the communication involves relatively inconsequential matters such as scheduling, calendars, and court records. Included within this latter type of communication would be matters of cooperation between courts under Section 112. A record includes notes or transcripts of a court reporter who listened to a conference call between the courts, an electronic recording of a telephone call, a memorandum or an electronic record of the communication between the courts, or a memorandum or an electronic record made by a court after the communication.

The second sentence of subsection (b) protects the parties against unauthorized ex parte communications. The parties' participation in the communication may amount to a hearing if there is an opportunity to present facts and jurisdictional arguments. However, absent such an opportunity, the participation of the parties should not to be considered a substitute for a hearing and the parties must be given an opportunity to fairly and fully present facts and arguments on the jurisdictional issue before a determination is made. This may be

done through a hearing or, if appropriate, by affidavit or memorandum. The court is expected to set forth the basis for its jurisdictional decision, including any court-to-court communication which may have been a factor in the decision.

SECTION 111. TAKING TESTIMONY IN ANOTHER STATE.

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

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

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

Comment

No substantive changes have been made to subsection (a) which was Section 18 of the UCCJA.

Subsections (b) and (c) merely provide that modern modes of communication are permissible in the taking of testimony and the transmittal of documents. See UIFSA § 316.

SECTION 112. COOPERATION BETWEEN COURTS; PRESERVATION OF RECORDS.

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

(1) hold an evidentiary hearing;

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

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

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

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

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

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

(d) A court of this State shall preserve the pleadings, orders, decrees, records of hearings, evaluations, and other pertinent records with respect to a child-custody proceeding until the child attains 18 years of age. Upon appropriate request

by a court or law enforcement official of another State, the court shall forward a certified copy of those records.

Comment

This section is the heart of judicial cooperation provision of this Act. It provides mechanisms for courts to cooperate with each other in order to decide cases in an efficient manner without causing undue expense to the parties. Courts may request assistance from courts of other States and may assist courts of other States.

The provision on the assessment of costs for travel provided in the UCCJA § 19 has been changed. The UCCJA provided that the costs may be assessed against the parties or the State or county. Assessment of costs against a government entity in a case where the government is not involved is inappropriate and therefore that provision has been removed. In addition, if the State is involved as a party, assessment of costs and expenses against the State must be authorized by other law. It should be noted that the term "expenses" means out-of-pocket costs. Overhead costs should not be assessed as expenses.

No other substantive changes have been made. The term "social study" as used in the UCCJA was replaced with the modern term: "custody evaluation." The Act does not take a position on the admissibility of a custody evaluation that was conducted in another State. It merely authorizes a court to seek assistance of, or render assistance to, a court of another State.

This section combines the text of Sections 19-22 of the UCCJA.

[ARTICLE] 2

JURISDICTION

SECTION 201. INITIAL CHILD-CUSTODY JURISDICTION.

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

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

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

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

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

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

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

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

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

Comment

This section provides mandatory jurisdictional rules for the original child custody proceeding. It generally continues the provisions of the UCCJA § 3. However, there have been a number of changes to the jurisdictional bases.

1. Home State Jurisdiction. The jurisdiction of the home State has been prioritized over other jurisdictional bases. Section 3 of the UCCJA provided four independent and concurrent bases of jurisdiction. The PKPA provides that full faith and credit can only be given to an initial custody determination of a "significant connection" State when there is no home State. This Act prioritizes home state jurisdiction in the same manner as the PKPA thereby eliminating any potential conflict between the two acts.

The six-month extended home state provision of subsection (a)(1) has been modified slightly from the UCCJA. The UCCJA provided that home state jurisdiction continued for six months when the child had been removed by a person seeking the child's custody or for other reasons and a parent or a person acting as a parent continues to reside in the home State. Under this Act, it is no longer necessary to determine why the child has been removed. The only inquiry relates to the status of the person left behind. This change provides a slightly more refined home state standard than the UCCJA or the PKPA, which also requires a determination that the child has been removed "by a contestant or for other reasons." The scope of the PKPA's provision is theoretically narrower than this Act. However, the phrase "or for other reasons" covers most fact situations where the child is not in the home State and, therefore, the difference has no substantive effect.

In another sense, the six-month extended home state jurisdiction provision is this Act is narrower than the comparable provision in the PKPA. The PKPA's definition of extended home State is more expansive because it applies whenever a "contestant" remains in the home State. That class of individuals has been

eliminated in this Act. This Act retains the original UCCJA classification of "parent or person acting as parent" to define who must remain for a State to exercise the six-month extended home state jurisdiction. This eliminates the undesirable jurisdictional determinations which would occur as a result of differing state substantive laws on visitation involving grandparents and others. For example, if State A's law provided that grandparents could obtain visitation with a child after the death of one of the parents, then the grandparents, who would be considered "contestants" under the PKPA, could file a proceeding within six months after the remaining parent moved and have the case heard in State A. However, if State A did not provide that grandparents could seek visitation under such circumstances, the grandparents would not be considered "contestants" and State B where the child acquired a new home State would provide the only forum. This Act bases jurisdiction on the parent and child or person acting as a parent and child relationship without regard to grandparents or other potential seekers of custody or visitation. There is no conflict with the broader provision of the PKPA. The PKPA in § (c)(1) authorizes States to narrow the scope of their jurisdiction.

2. Significant connection jurisdiction. This jurisdictional basis has been amended in four particulars from the UCCJA. First, the "best interest" language of the UCCJA has been eliminated. This phrase tended to create confusion between the jurisdictional issue and the substantive custody determination. Since the language was not necessary for the jurisdictional issue, it has been removed.

Second, the UCCJA based jurisdiction on the presence of a significant connection between the child and the child's parents or the child and at least one contestant. This Act requires that the significant connections be between the child, the child's parents or the child and a person acting as a parent.

Third, a significant connection State may assume jurisdiction only when there is no home State or when the home State decides that the significant connection State would be a more appropriate forum under Section 207 or 208. Fourth, the determination of significant connections has been changed to eliminate the language of "present or future care." The jurisdictional determination should be made by determining whether there is sufficient evidence in the State for the court to make an informed custody determination. That evidence might relate to the past as well as to the "present or future."

Emergency jurisdiction has been moved to a separate section. This is to make it clear that the power to protect a child in crisis does not include the power to enter a permanent order for that child except as provided by that section.

Paragraph (a)(3) provides for jurisdiction when all States with jurisdiction under paragraphs (a)(1) and (2) determine that this State is a more appropriate forum. The determination would have to be made by all States with jurisdiction

under subsection (a)(1) and (2). Jurisdiction would not exist under this paragraph because the home State determined it is a more appropriate place to hear the case if there is another State that could exercise significant connection jurisdiction under subsection (a)(2).

Paragraph (a)(4) retains the concept of jurisdiction by necessity as found in the UCCJA and in the PKPA. This default jurisdiction only occurs if no other State would have jurisdiction under subsections (a)(1) through (a)(3).

Subsections (b) and (c) clearly State the relationship between jurisdiction under this Act and other forms of jurisdiction. Personal jurisdiction over, or the physical presence of, a parent or the child is neither necessary nor required under this Act. In other words neither minimum contacts nor service within the State is required for the court to have jurisdiction to make a custody determination. Further, the presence of minimum contacts or service within the State does not confer jurisdiction to make a custody determination. Subject to Section 204, satisfaction of the requirements of subsection (a) is mandatory.

The requirements of this section, plus the notice and hearing provisions of the Act, are all that is necessary to satisfy due process. This Act, like the UCCJA and the PKPA is based on Justice Frankfurter's concurrence in *May v. Anderson*, 345 U.S. 528 (1953). As pointed out by Professor Bodenheimer, the reporter for the UCCJA, no "workable interstate custody law could be built around [Justice] Burton's plurality opinion ... . 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). It should also be noted that since jurisdiction to make a child custody determination is subject matter jurisdiction, an agreement of the parties to confer jurisdiction on a court that would not otherwise have jurisdiction under this Act is ineffective.

SECTION 202. EXCLUSIVE, CONTINUING JURISDICTION.

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

(1) a court of this State determines that neither the child, nor the child and one parent, nor the child and a person acting as a parent have a significant connection with this State and that substantial evidence is no longer available in

this State concerning the child's care, protection, training, and personal relationships; or

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

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

Comment

This is a new section addressing continuing jurisdiction. Continuing jurisdiction was not specifically addressed in the UCCJA . Its absence caused considerable confusion, particularly because the PKPA, § 1738(d), requires other States to give Full Faith and Credit to custody determinations made by the original decree State pursuant to the decree State's continuing jurisdiction so long as that State has jurisdiction under its own law and remains the residence of the child or any contestant.

This section provides the rules of continuing jurisdiction and borrows from UIFSA as well as recent UCCJA case law. The continuing jurisdiction of the original decree State is exclusive. It continues until one of two events occurs:

1. If a parent or a person acting as a parent remains in the original decree State, continuing jurisdiction is lost when neither the child, the child and a parent, nor the child and a person acting as a parent continue to have a significant connection with the original decree State and there is no longer substantial evidence concerning the child's care, protection, training and personal relations in that State. In other words, even if the child has acquired a new home State, the original decree State retains exclusive, continuing jurisdiction, so long as the general requisites of the "substantial connection" jurisdiction provisions of Section 201 are met. If the relationship between the child and the person remaining in the State with exclusive, continuing jurisdiction becomes so attenuated that the court could no longer find significant connections and substantial evidence, jurisdiction would no longer exist.

The use of the phrase "a court of this State" under subsection (a)(1) makes it clear that the original decree State is the sole determinant of whether jurisdiction continues. A party seeking to modify a custody determination must obtain an order from the original decree State stating that it no longer has jurisdiction.

2. Continuing jurisdiction is lost when the child, the child's parents, and any person acting as a parent no longer reside in the original decree State. The exact language of subparagraph (a)(2) was the subject of considerable debate. Ultimately the Conference settled on the phrase that "a court of this State or a court of another State determines that the child, the child's parents, and any person acting as a parent do not presently reside in this State" to determine when the exclusive, continuing jurisdiction of a State ended. The phrase is meant to be identical in meaning to the language of the PKPA which provides that full faith and credit is to be given to custody determinations made by a State in the exercise of its continuing jurisdiction when that "State remains the residence of ... ." The phrase is also the equivalent of the language "continues to reside" which occurs in UIFSA § 205(a)(1) to determine the exclusive, continuing jurisdiction of the State that made a support order. The phrase "remains the residence of" in the PKPA has been the subject of conflicting case law. It is the intention of this Act that paragraph (a)(2) of this section means that the named persons no longer continue to actually live within the State. Thus, unless a modification proceeding has been commenced, when the child, the parents, and all persons acting as parents physically leave the State to live elsewhere, the exclusive, continuing jurisdiction ceases.

The phrase "do not presently reside" is not used in the sense of a technical domicile. The fact that the original determination State still considers one parent a domiciliary does not prevent it from losing exclusive, continuing jurisdiction after the child, the parents, and all persons acting as parents have moved from the State.

If the child, the parents, and all persons acting as parents have all left the State which made the custody determination prior to the commencement of the modification proceeding, considerations of waste of resources dictate that a court in State B, as well as a court in State A, can decide that State A has lost exclusive, continuing jurisdiction.

The continuing jurisdiction provisions of this section are narrower than the comparable provisions of the PKPA. That statute authorizes continuing jurisdiction so long as any "contestant" remains in the original decree State and that State continues to have jurisdiction under its own law. This Act eliminates the contestant classification. The Conference decided that a remaining grandparent or other third party who claims a right to visitation, should not suffice to confer exclusive, continuing jurisdiction on the State that made the original custody determination after the departure of the child, the parents and any person acting as a parent. The significant connection to the original decree State must relate to the child, the child

and a parent, or the child and a person acting as a parent. This revision does not present a conflict with the PKPA. The PKPA's reference in § 1738(d) to § 1738(c)(1) recognizes that States may narrow the class of cases that would be subject to exclusive, continuing jurisdiction. However, during the transition from the UCCJA to this Act, some States may continue to base continuing jurisdiction on the continued presence of a contestant, such as a grandparent. The PKPA will require that such decisions be enforced. The problem will disappear as States adopt this Act to replace the UCCJA.

Jurisdiction attaches at the commencement of a proceeding. If State A had jurisdiction under this section at the time a modification proceeding was commenced there, it would not be lost by all parties moving out of the State prior to the conclusion of proceeding. State B would not have jurisdiction to hear a modification unless State A decided that State B was more appropriate under Section 207.

Exclusive, continuing jurisdiction is not reestablished if, after the child, the parents, and all persons acting as parents leave the State, the non-custodial parent returns. As subsection (b) provides, once a State has lost exclusive, continuing jurisdiction, it can modify its own determination only if it has jurisdiction under the standards of Section 201. If another State acquires exclusive continuing jurisdiction under this section, then its orders cannot be modified even if this State has once again become the home State of the child.

In accordance with the majority of UCCJA case law, the State with exclusive, continuing jurisdiction may relinquish jurisdiction when it determines that another State would be a more convenient forum under the principles of Section 207.

SECTION 203. JURISDICTION TO MODIFY DETERMINATION.

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

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

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

Comment

This section complements Section 202 and is addressed to the court that is confronted with a proceeding to modify a custody determination of another State. It prohibits a court from modifying a custody determination made consistently with this Act by a court in another State unless a court of that State determines that it no longer has exclusive, continuing jurisdiction under Section 202 or that this State would be a more convenient forum under Section 207. The modification State is not authorized to determine that the original decree State has lost its jurisdiction. The only exception is when the child, the child's parents, and any person acting as a parent do not presently reside in the other State. In other words, a court of the modification State can determine that all parties have moved away from the original State. The court of the modification State must have jurisdiction under the standards of Section 201.

SECTION 204. TEMPORARY EMERGENCY JURISDICTION.

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

(b) If there is no previous child-custody determination that is entitled to be enforced under this [Act] and a child-custody proceeding has not been commenced in a court of a State having jurisdiction under Sections 201 through 203, a child-

custody determination made under this section remains in effect until an order is obtained from a court of a State having jurisdiction under Sections 201 through 203. If a child-custody proceeding has not been or is not commenced in a court of a State having jurisdiction under Sections 201 through 203, a child-custody determination made under this section becomes a final determination, if it so provides and this State becomes the home State of the child.

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

(d) A court of this State which has been asked to make a child-custody determination under this section, upon being informed that a child-custody proceeding has been commenced in, or a child-custody determination has been made by, a court of a State having jurisdiction under Sections 201 through 203, shall immediately communicate with the other court. A court of this State which is exercising jurisdiction pursuant to Sections 201 through 203, upon being informed that a child-custody proceeding has been commenced in, or a child-custody determination has been made by, a court of another State under a statute similar to

this section shall immediately communicate with the court of that State to resolve the emergency, protect the safety of the parties and the child, and determine a period for the duration of the temporary order.

Comment

The provisions of this section are an elaboration of what was formerly Section 3(a)(3) of the UCCJA. It remains, as Professor Bodenheimer's comments to that section noted, "an extraordinary jurisdiction reserved for extraordinary circumstances."

This section codifies and clarifies several aspects of what has become common practice in emergency jurisdiction cases under the UCCJA and PKPA. First, a court may take jurisdiction to protect the child even though it can claim neither home State nor significant connection jurisdiction. Second, the duties of States to recognize, enforce and not modify a custody determination of another State do not take precedence over the need to enter a temporary emergency order to protect the child.

Third, a custody determination made under the emergency jurisdiction provisions of this section is a temporary order. The purpose of the order is to protect the child until the State that has jurisdiction under Sections 201-203 enters an order.

Under certain circumstances, however, subsection (b) provides that an emergency custody determination may become a final custody determination. If there is no existing custody determination, and no custody proceeding is filed in a State with jurisdiction under Sections 201-203, an emergency custody determination made under this section becomes a final determination, if it so provides, when the State that issues the order becomes the home State of the child.

Subsection (c) is concerned with the temporary nature of the order when there exists a prior custody order that is entitled to be enforced under this Act or when a subsequent custody proceeding is filed in a State with jurisdiction under Sections 201- 203. Subsection (c) allows the temporary order to remain in effect only so long as is necessary for the person who obtained the determination under this section to present a case and obtain an order from the State with jurisdiction under Sections 201-203. That time period must be specified in the order. If there is an existing order by a State with jurisdiction under Sections 201-203, that order need not be reconfirmed. The temporary emergency determination would lapse by its own terms at the end of the specified period or when an order is obtained from the court with jurisdiction under Sections 202-203. The court with appropriate

jurisdiction also may decide, under the provisions of 207, that the court that entered the emergency order is in a better position to address the safety of the person who obtained the emergency order, or the child, and decline jurisdiction under Section 207.

Any hearing in the State with jurisdiction under Sections 201-203 on the temporary emergency determination is subject to the provisions of Sections 111 and 112. These sections facilitate the presentation of testimony and evidence taken out of State. If there is a concern that the person obtaining the temporary emergency determination under this section would be in danger upon returning to the State with jurisdiction under Sections 201-203, these provisions should be used.

Subsection (d) requires communication between the court of the State that is exercising jurisdiction under this section and the court of another State that is exercising jurisdiction under Sections 201-203. The pleading rules of Section 209 apply fully to determinations made under this section. Therefore, a person seeking a temporary emergency custody determination is required to inform the court pursuant to Section 209(d) of any proceeding concerning the child that has been commenced elsewhere. The person commencing the custody proceeding under Sections 201-203 is required under Section 209(a) to inform the court about the temporary emergency proceeding. These pleading requirements are to be strictly followed so that the courts are able to resolve the emergency, protect the safety of the parties and the child, and determine a period for the duration of the temporary order.

Relationship to the PKPA. The definition of emergency has been modified to harmonize it with the PKPA. The PKPA's definition of emergency jurisdiction does not use the term "neglect." It defines an emergency as "mistreatment or abuse." Therefore "neglect" has been eliminated as a basis for the assumption of temporary emergency jurisdiction. Neglect is so elastic a concept that it could justify taking emergency jurisdiction in a wide variety of cases. Under the PKPA, if a State exercised temporary emergency jurisdiction based on a finding that the child was neglected without a finding of mistreatment or abuse, the order would not be entitled to federal enforcement in other States.

Relationship to Protective Order Proceedings. The UCCJA and the PKPA were enacted long before the advent of state procedures on the use of protective orders to alleviate problems of domestic violence. Issues of custody and visitation often arise within the context of protective order proceedings since the protective order is often invoked to keep one parent away from the other parent and the children when there is a threat of violence. This Act recognizes that a protective order proceeding will often be the procedural vehicle for invoking jurisdiction by authorizing a court to assume temporary emergency jurisdiction

when the child's parent or sibling has been subjected to or threatened with mistreatment or abuse.

In order for a protective order that contains a custody determination to be enforceable in another State it must comply with the provisions of this Act and the PKPA. Although the Violence Against Women's Act (VAWA), 18 U.S.C. § 2265, does provide an independent basis for the granting of full faith and credit to protective orders, it expressly excludes "custody" orders from the definition of "protective order," 22 U.S.C. § 2266.

Many States authorize the issuance of protective orders in an emergency without notice and hearing. This Act does not address the propriety of that procedure. It is left to local law to determine the circumstances under which such an order could be issued, and the type of notice that is required, in a case without an interstate element. However, an order issued after the assumption of temporary emergency jurisdiction is entitled to interstate enforcement and nonmodification under this Act and the PKPA only if there has been notice and a reasonable opportunity to be heard as set out in Section 205. Although VAWA does require that full faith and credit be accorded to ex parte protective orders if notice will be given and there will be a reasonable opportunity to be heard, it does not include a "custody" order within the definition of "protective order."

VAWA does play an important role in determining whether an emergency exists. That Act requires a court to give full faith and credit to a protective order issued in another State if the order is made in accordance with the VAWA. This would include those findings of fact contained in the order. When a court is deciding whether an emergency exists under this section, it may not relitigate the existence of those factual findings.

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

(a) Before a child-custody determination is made under this [Act], notice and an opportunity to be heard in accordance with the standards of Section 108 must be given to all persons entitled to notice under the law of this State as in child-custody proceedings between residents of this State, any parent whose parental rights have not been previously terminated, and any person having physical custody of the child.

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

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

Comment

This section generally continues the notice provisions of the UCCJA. However, it does not attempt to dictate who is entitled to notice. Local rules vary with regard to persons entitled to seek custody of a child. Therefore, this section simply indicates that persons entitled to seek custody should receive notice but leaves the rest of the determination to local law. Parents whose parental rights have not been previously terminated and persons having physical custody of the child are specifically mentioned as persons who must be given notice. The PKPA, § 1738A(e), requires that they be given notice in order for the custody determination to be entitled to full faith and credit under that Act.

State laws also vary with regard to whether a court has the power to issue an enforceable temporary custody order without notice and hearing in a case without any interstate element. Such temporary orders may be enforceable, as against due process objections, for a short period of time if issued as a protective order or a temporary restraining order to protect a child from harm. Whether such orders are enforceable locally is beyond the scope of this Act. Subsection (b) clearly provides that the validity of such orders and the enforceability of such orders is governed by the law which authorizes them and not by this Act. An order is entitled to interstate enforcement and nonmodification under this Act only if there has been notice and an opportunity to be heard. The PKPA, § 1738A(e), also requires that a custody determination is entitled to full faith and credit only if there has been notice and an opportunity to be heard.

Rules requiring joinder of people with an interest in the custody of and visitation with a child also vary widely throughout the country. The UCCJA has a separate section on joinder of parties which has been eliminated. The issue of who is entitled to intervene and who must be joined in a custody proceeding is to be determined by local state law.

A sentence of the UCCJA § 4 which indicated that persons outside the State were to be given notice and an opportunity to be heard in accordance with the provision of that Act has been eliminated as redundant.

SECTION 206. SIMULTANEOUS PROCEEDINGS.

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

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

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

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

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

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

Comment

This section represents the remnants of the simultaneous proceedings provision of the UCCJA § 6. The problem of simultaneous proceedings is no longer a significant issue. Most of the problems have been resolved by the prioritization of home state jurisdiction under Section 201; the exclusive, continuing jurisdiction provisions of Section 202; and the prohibitions on modification of Section 203. If there is a home State, there can be no exercise of significant connection jurisdiction in an initial child custody determination and, therefore, no simultaneous proceedings. If there is a State of exclusive, continuing jurisdiction, there cannot be another State with concurrent jurisdiction and, therefore, no simultaneous proceedings. Of course, the home State, as well as the State with exclusive, continuing jurisdiction, could defer to another State under Section 207. However, that decision is left entirely to the home State or the State with exclusive, continuing jurisdiction.

Under this Act, the simultaneous proceedings problem will arise only when there is no home State, no State with exclusive, continuing jurisdiction and more than one significant connection State. For those cases, this section retains the "first in time" rule of the UCCJA. Subsection (b) retains the UCCJA's policy favoring judicial communication. Communication between courts is required when it is determined that a proceeding has been commenced in another State.

Subsection (c) concerns the problem of simultaneous proceedings in the State with modification jurisdiction and enforcement proceedings under Article 3. This section authorizes the court with exclusive, continuing jurisdiction to stay the modification proceeding pending the outcome of the enforcement proceeding, to enjoin the parties from continuing with the enforcement proceeding, or to continue the modification proceeding under such conditions as it determines are appropriate. The court may wish to communicate with the enforcement court. However,

communication is not mandatory. Although the enforcement State is required by the PKPA to enforce according to its terms a custody determination made consistently with the PKPA, that duty is subject to the decree being modified by a State with the power to do so under the PKPA. An order to enjoin the parties from enforcing the decree is the equivalent of a temporary modification by a State with the authority to do so. The concomitant provision addressed to the enforcement court is Section 306 of this Act. That section requires the enforcement court to communicate with the modification court in order to determine what action the modification court wishes the enforcement court to take.

The term "pending" that was utilized in the UCCJA section on simultaneous proceeding has been replaced. It has caused considerable confusion in the case law. It has been replaced with the term "commencement of the proceeding" as more accurately reflecting the policy behind this section. The latter term is defined in Section 102(5).

SECTION 207. INCONVENIENT FORUM.

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

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

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

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

(3) the distance between the court in this State and the court in the State that would assume jurisdiction;

(4) the relative financial circumstances of the parties;

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

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

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

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

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

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

Comment

This section retains the focus of Section 7 of the UCCJA. It authorizes courts to decide that another State is in a better position to make the custody determination, taking into consideration the relative circumstances of the parties. If so, the court may defer to the other State.

The list of factors that the court may consider has been updated from the UCCJA. The list is not meant to be exclusive. Several provisions require comment. Subparagraph (1) is concerned specifically with domestic violence and other matters affecting the health and safety of the parties. For this purpose, the court should determine whether the parties are located in different States because one party is a victim of domestic violence or child abuse. If domestic violence or child abuse has occurred, this factor authorizes the court to consider which State can best protect the victim from further violence or abuse.

In applying subparagraph (3), courts should realize that distance concerns can be alleviated by applying the communication and cooperation provisions of Sections 111 and 112.

In applying subsection (7) on expeditious resolution of the controversy, the court could consider the different procedural and evidentiary laws of the two States, as well as the flexibility of the court dockets. It also should consider the ability of a court to arrive at a solution to all the legal issues surrounding the family. If one State has jurisdiction to decide both the custody and support issues, it would be desirable to determine that State to be the most convenient forum. The same is true when children of the same family live in different States. It would be inappropriate to require parents to have custody proceedings in several States when one State could resolve the custody of all the children.

Before determining whether to decline or retain jurisdiction, the court of this State may communicate, in accordance with Section 110, with a court of another State and exchange information pertinent to the assumption of jurisdiction by either court.

There are two departures from Section 7 of the UCCJA. First, the court may not simply dismiss the action. To do so would leave the case in limbo. Rather the court shall stay the case and direct the parties to file in the State that has been found to be the more convenient forum. The court is also authorized to impose any other conditions it considers appropriate. This might include the issuance of temporary custody orders during the time necessary to commence a proceeding in the designated State, dismissing the case if the custody proceeding is not commenced in the other State or resuming jurisdiction if a court of the other State refuses to take the case.

Second, UCCJA, § 7(g) which allowed the court to assess fees and costs if it was a clearly inappropriate court, has been eliminated. If a court has jurisdiction under this Act, it could not be a clearly inappropriate court.

SECTION 208. JURISDICTION DECLINED BY REASON OF CONDUCT.

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

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

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

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

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

(c) If a court dismisses a petition or stays a proceeding because it declines to exercise its jurisdiction pursuant to subsection (a), it shall assess against the party

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

Comment

The "Clean Hands" section of the UCCJA has been truncated in this Act. Since there is no longer a multiplicity of jurisdictions which could take cognizance of a child-custody proceeding, there is less of a concern that one parent will take the child to another jurisdiction in an attempt to find a more favorable forum. Most of the jurisdictional problems generated by abducting parents should be solved by the prioritization of home State in Section 201; the exclusive, continuing jurisdiction provisions of Section 202; and the ban on modification in Section 203. For example, if a parent takes the child from the home State and seeks an original custody determination elsewhere, the stay-at-home parent has six months to file a custody petition under the extended home state jurisdictional provision of Section 201, which will ensure that the case is retained in the home State. If a petitioner for a modification determination takes the child from the State that issued the original custody determination, another State cannot assume jurisdiction as long at the first State exercises exclusive, continuing jurisdiction.

Nonetheless, there are still a number of cases where parents, or their surrogates, act in a reprehensible manner, such as removing, secreting, retaining, or restraining the child. This section ensures that abducting parents will not receive an advantage for their unjustifiable conduct. If the conduct that creates the jurisdiction is unjustified, courts must decline to exercise jurisdiction that is inappropriately invoked by one of the parties. For example, if one parent abducts the child pre-decree and establishes a new home State, that jurisdiction will decline to hear the case. There are exceptions. If the other party has acquiesced in the court's jurisdiction, the court may hear the case. Such acquiescence may occur by filing a pleading submitting to the jurisdiction, or by not filing in the court that would otherwise have jurisdiction under this Act. Similarly, if the court that would have jurisdiction finds that the court of this State is a more appropriate forum, the court may hear the case.

This section applies to those situations where jurisdiction exists because of the unjustified conduct of the person seeking to invoke it. If, for example, a parent in the State with exclusive, continuing jurisdiction under Section 202 has either restrained the child from visiting with the other parent, or has retained the child after visitation, and seeks to modify the decree, this section in inapplicable. The conduct of restraining or retaining the child did not create jurisdiction. Jurisdiction existed under this Act without regard to the parent's conduct. Whether a court should decline to hear the parent's request to modify is a matter of local law.

The focus in this section is on the unjustified conduct of the person who invokes the jurisdiction of the court. A technical illegality or wrong is insufficient to trigger the applicability of this section. This is particularly important in cases involving domestic violence and child abuse. Domestic violence victims should not be charged with unjustifiable conduct for conduct that occurred in the process of fleeing domestic violence, even if their conduct is technically illegal. Thus, if a parent flees with a child to escape domestic violence and in the process violates a joint custody decree, the case should not be automatically dismissed under this section. An inquiry must be made into whether the flight was justified under the circumstances of the case. However, an abusive parent who seizes the child and flees to another State to establish jurisdiction has engaged in unjustifiable conduct and the new State must decline to exercise jurisdiction under this section.

Subsection (b) authorizes the court to fashion an appropriate remedy for the safety of the child and to prevent a repetition of the unjustified conduct. Thus, it would be appropriate for the court to notify the other parent and to provide for foster care for the child until the child is returned to the other parent. The court could also stay the proceeding and require that a custody proceeding be instituted in another State that would have jurisdiction under this Act. It should be noted that the court is not making a forum non conveniens analysis in this section. If the conduct is unjustifiable, it must decline jurisdiction. It may, however, retain jurisdiction until a custody proceeding is commenced in the appropriate tribunal if such retention is necessary to prevent a repetition of the wrongful conduct or to ensure the safety of the child.

The attorney's fee standard for this section is patterned after the International Child Abduction Remedies Act, 42 U.S.C. § 11607(b)(3). The assessed costs and fees are to be paid to the respondent who established that jurisdiction was based on unjustifiable conduct.

SECTION 209. INFORMATION TO BE SUBMITTED TO COURT.

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

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

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

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

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

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

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

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

Comment

The pleading requirements from Section 9 of the UCCJA are generally carried over into this Act. 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. See, e.g., California Family Law Code § 3409(a). If a State does not have local law that provides for protecting names and addresses, then subsection (e) or a similar provision should be adopted. Subsection (e) is based on the National Council of Juvenile and Family Court Judge's, Model Code on Domestic and Family Violence § 304(c). There are other models to choose from, in particular UIFSA § 312.

In subsection (a)(2), the term "proceedings" should be read broadly to include more than custody proceedings. Thus, if one parent was being criminally prosecuted for child abuse or custodial interference, those proceedings should be

disclosed. If the child is subject to the Interstate Compact on the Placement of Children, facts relating to compliance with the Compact should be disclosed in the pleading or affidavit.

Subsection (b) has been added. It authorizes the court to stay the proceeding until the information required in subsection (a) has been disclosed, although failure to provide the information does not deprive the court of jurisdiction to hear the case. This follows the majority of jurisdictions which held that failure to comply with the pleading requirements of the UCCJA did not deprive the court of jurisdiction to make a custody determination.

SECTION 210. APPEARANCE OF PARTIES AND CHILD.

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

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

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

(d) If a party to a child-custody proceeding who 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 and other expenses of the party so appearing and of the child.

Comment

No major changes have been made to this section which was Section 11 of the UCCJA. Language was added to subsection (a) to authorize the court to require a non-party who has physical custody of the child to produce the child.

Subsection (c) authorizes the court to enter orders providing for the safety of the child and the person ordered to appear with the child. If safety is a major concern, the court, as an alternative to ordering a party to appear with the child, could order and arrange for the party's testimony to be taken in another State under Section 111. This alternative might be important when there are safety concerns regarding requiring victims of domestic violence or child abuse to travel to the jurisdiction where the abuser resides.

[ARTICLE] 3

ENFORCEMENT

SECTION 301. DEFINITIONS. In this [article]:

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

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

Comment

For purposes of this article, "petitioner" and "respondent" are defined. The definitions clarify certain aspects of the notice and hearing sections.

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

Comment

This section applies the enforcement remedies provided by this article to orders requiring the return of a child issued under the authority of the International Child Abduction Remedies Act (ICARA), 42 U.S.C. § 11601 et seq., implementing the Hague Convention on the Civil Aspects of International Child Abduction. Specific mention of ICARA proceedings is necessary because they often occur prior to any formal custody determination. However, the need for a speedy enforcement remedy for an order to return the child is just as necessary.

SECTION 303. DUTY TO ENFORCE.

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

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

Comment

This section is based on Section 13 of the UCCJA which contained the basic duty to enforce. The language of the original section has been retained and the duty to enforce is generally the same.

Enforcement of custody determinations of issuing States is also required by federal law in the PKPA, 28 U.S.C. § 1738A(a). The changes made in Article 2 of this Act now make a State's duty to enforce and not modify a child custody determination of another State consistent with the enforcement and nonmodification provisions of the PKPA. Therefore custody determinations made by a State pursuant to the UCCJA that would be enforceable under the PKPA will generally be enforced under this Act. However, if a State custody determination made pursuant to the UCCJA would not be enforceable under the PKPA, it will also not be enforceable under this Act. Thus a custody determination made by a "significant connection" jurisdiction when there is a home State is not enforceable under the PKPA regardless of whether a proceeding was ever commenced in the home State. Even though such a determination would be enforceable under the UCCJA with its four concurrent bases of jurisdiction, it would not be enforceable under this Act. This carries out the policy of the PKPA of strongly discouraging a State from exercising its concurrent "significant connection" jurisdiction under the UCCJA when another State could exercise "home state" jurisdiction.

This section also incorporates the concept of Section 15 of the UCCJA to the effect that a custody determination of another State will be enforced in the same manner as a custody determination made by a court of this State. Whatever remedies are available to enforce a local determination can be utilized to enforce a custody determination of another State. However, it remains a custody determination of the State that issued it. A child-custody determination of another State is not subject to modification unless the State would have jurisdiction to modify the determination under Article 2.

The remedies provided by this article for the enforcement of a custody determination will normally be used. This article does not detract from other remedies available under other local law. There is often a need for a number of remedies to ensure that a child-custody determination is obeyed. If other remedies would easily facilitate enforcement, they are still available. The petitioner, for example, can still cite the respondent for contempt of court or file a tort claim for intentional interference with custodial relations if those remedies are available under local law.

SECTION 304. TEMPORARY VISITATION.

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

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

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

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

Comment

This section authorizes a court to issue a temporary order if it is necessary to enforce visitation rights without violating the rules on nonmodification contained in Section 303. Therefore, if there is a visitation schedule provided in the custody determination that was made in accordance with Article 2, a court can issue an order under this section implementing the schedule. An implementing order may include make-up or substitute visitation.

A court may also issue a temporary order providing for visitation if visitation was authorized in the custody determination, but no specific schedule was included in the custody determination. Such an order could include a substitution of a specific visitation schedule for "reasonable and seasonable."

However, a court may not, under subsection (a)(2) provide for a permanent change in visitation. Therefore, requests for a permanent change in the visitation schedule must be addressed to the court with exclusive, continuing jurisdiction under Section 202 or modification jurisdiction under Section 203. As under Section 204, subsection (b) of this section requires that the temporary visitation order stay in effect only long enough to allow the person who obtained the order to obtain a permanent modification in the State with appropriate jurisdiction under Article 2.

SECTION 305. REGISTRATION OF CHILD-CUSTODY DETERMINATION.

(a) A child-custody determination issued by a court of another State may be registered in this State, with or without a simultaneous request for enforcement, by sending to [the appropriate court] in this 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 the persons named pursuant to subsection (a)(3) and provide them with an opportunity to contest the registration in accordance with this section.

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

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

(2) a hearing to contest the validity of the registered determination must be requested within 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 contest the validity of a registered order must request a hearing within 20 days after service of the notice. At that hearing, the

court shall confirm the registered order unless the person contesting registration establishes that:

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

(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; 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.

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

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

Comment

This remainder of this article provides enforcement mechanisms for interstate child custody determinations.

This section authorizes a simple registration procedure that can be used to predetermine the enforceability of a custody determination. It parallels the process in UIFSA for the registration of child support orders. It should be as much of an aid to pro se litigants as the registration procedure of UIFSA.

A custody determination can be registered without any accompanying request for enforcement. This may be of significant assistance in international cases. For example, the custodial parent under a foreign custody order can receive an advance determination of whether that order would be recognized and enforced

before sending the child to the United States for visitation. Article 26 of the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children, 35 I.L.M. 1391 (1996), requires those States which accede to the Convention to provide such a procedure.

SECTION 306. ENFORCEMENT OF REGISTERED DETERMINATION.

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

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

Comment

A registered child-custody determination can be enforced as if it was a child-custody determination of this State. However, it remains a custody determination of the State that issued it. A registered custody order is not subject to modification unless the State would have jurisdiction to modify the order under Article 2.

SECTION 307. SIMULTANEOUS PROCEEDINGS. If a proceeding for enforcement under this [article] is commenced in a court of this State and the court determines that a proceeding to modify the determination is pending in a court of another State having jurisdiction to modify the determination under [Article] 2, the enforcing court shall immediately communicate with the modifying court. The

proceeding for enforcement continues unless the enforcing court, after consultation with the modifying court, stays or dismisses the proceeding.

Comment

The pleading rules of Section 308, require the parties to disclose any pending proceedings. Normally, an enforcement proceeding will take precedence over a modification action since the PKPA requires enforcement of child custody determinations made in accordance with its terms. However, the enforcement court must communicate with the modification court in order to avoid duplicative litigation. The courts might decide that the court with jurisdiction under Article 2 shall continue with the modification action and stay the enforcement proceeding. Or they might decide that the enforcement proceeding shall go forward. The ultimate decision rests with the court having exclusive, continuing jurisdiction under Section 202, or if there is no State with exclusive, continuing jurisdiction, then the decision rests with the State that would have jurisdiction to modify under Section 203. Therefore, if that court determines that the enforcement proceeding should be stayed or dismissed, the enforcement court should stay or dismiss the proceeding. If the enforcement court does not do so, the court with exclusive, continuing jurisdiction under Section 202, or with modification jurisdiction under Section 203, could enjoin the parties from continuing with the enforcement 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 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] 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, 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 the filing of a petition, the court shall issue an order directing the respondent to appear in person with or without the child at a hearing and may enter any order necessary to ensure the safety of the parties and the child. The hearing must be held on the next judicial day after service of the order unless that date is impossible. In that event, the court shall hold the hearing on the first judicial day possible. The court may extend the date of hearing at the request of the petitioner.

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

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

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

(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; or

(C) the respondent was entitled to notice, but notice was not given in accordance with the standards of Section 108, in the proceedings before the court that issued the order for which enforcement is sought; 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 having jurisdiction to do so under [Article] 2.

Comment

This section provides the normal remedy that will be used in interstate cases: the production of the child in a summary, remedial process based on habeas corpus.

The petition is intended to provide the court with as much information as possible. Attaching certified copies of all orders sought to be enforced allows the

court to have the necessary information. Most of the information relates to the permissible scope of the court's inquiry. The petitioner has the responsibility to inform the court of all proceedings that would affect the current enforcement action. Specific mention is made of certain proceedings to ensure that they are disclosed. A "procedure relating to domestic violence" includes not only protective order proceedings but also criminal prosecutions for child abuse or domestic violence.

The order requires the respondent to appear at a hearing on the next judicial day. The term "next judicial day" in this section means the next day when a judge is at the courthouse. At the hearing, the court will order the child to be delivered to the petitioner unless the respondent is prepared to assert that the issuing State lacked jurisdiction, that notice was not given in accordance with Section 108, or that the order sought to be enforced has been vacated, modified, or stayed by a court with jurisdiction to do so under Article 2. The court is also to order payment of the fees and expenses set out in Section 312. The court may set another hearing to determine whether additional relief available under this state's law should be granted.

If the order has been registered and confirmed in accordance with Section 304, the only defense to enforcement is that the order has been vacated, stayed or modified since the registration proceeding by a court with jurisdiction to do so under Article 2.

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

Comment

In keeping with other sections of this Act, the question of how the petition and order should be served is left to local law.

SECTION 310. HEARING AND ORDER.

(a) Unless the court issues a temporary emergency order pursuant to Section 204, upon 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;

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

(C) the respondent was entitled to notice, but notice was not given in accordance with the standards of Section 108, in the proceedings before the court that issued the order for which enforcement is sought; 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 having jurisdiction to do so under [Article] 2.

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

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

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

Comment

The scope of inquiry for the enforcing court is quite limited. Federal law requires the court to enforce the custody determination if the issuing state's decree was rendered in compliance with the PKPA. 28 U.S.C. § 1738A(a). This Act requires enforcement of custody determinations that are made in conformity with Article 2's jurisdictional rules.

The certified copy, or a copy of the certified copy, of the custody determination entitling the petitioner to the child is prima facie evidence of the issuing court's jurisdiction to enter the order. If the order is one that is entitled to be enforced under Article 2 and if it has been violated, the burden shifts to the respondent to show that the custody determination is not entitled to enforcement.

It is a defense to enforcement that another jurisdiction has issued a custody determination that is required to be enforced under Article 2. An example is when one court has based its original custody determination on the UCCJA § 3(a)(2) (significant connections) and another jurisdiction has rendered an original custody determination based on the UCCJA § 3(a)(1) (home State). When this occurs, Article 2 of this Act, as well as the PKPA, mandate that the home state determination be enforced in all other States, including the State that rendered the significant connections determination.

Lack of notice in accordance with Section 108 by a person entitled to notice and opportunity to be heard at the original custody determination is a defense to enforcement of the custody determination. The scope of the defense under this Act is the same as the defense would be under the law of the State that issued the notice. Thus, if the defense of lack of notice would not be available under local law if the respondent purposely hid from the petitioner, took deliberate steps to avoid service of process or elected not to participate in the initial proceedings, the defense would also not be available under this Act.

There are no other defenses to an enforcement action. If the child would be endangered by the enforcement of a custody or visitation order, there may be a basis for the assumption of emergency jurisdiction under Section 204 of this Act. Upon the finding of an emergency, the court issues a temporary order and directs the parties to proceed either in the court that is exercising continuing jurisdiction over

the custody proceeding under Section 202, or the court that would have jurisdiction to modify the custody determination under Section 203.

The court shall determine at the hearing whether fees should be awarded under Section 312. If so, it should order them paid. The court may determine if additional relief is appropriate, including requesting law enforcement officers to assist the petitioner in the enforcement of the order. The court may set a hearing to determine whether further relief should be granted.

The remainder of this section is derived from UIFSA § 316 with regard to the privilege of self-incrimination, spousal privileges, and immunities. It is included to keep parallel the procedures for child support and child custody proceedings to the extent possible.

SECTION 311. WARRANT TO TAKE PHYSICAL CUSTODY OF CHILD.

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

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

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

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

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

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

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

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

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

Comment

The section provides a remedy for emergency situations where there is a reason to believe that the child will suffer imminent, serious physical harm or be removed from the jurisdiction once the respondent learns that the petitioner has filed an enforcement proceeding. If the court finds such harm exists, it should temporarily waive the notice requirements and issue a warrant to take physical custody of the child. Immediately after the warrant is executed, the respondent is to receive notice of the proceedings.

The term "harm" cannot be totally defined and, as in the issuance of temporary retraining orders, the appropriate issuance of a warrant is left to the circumstances of the case. Those circumstances include cases where the respondent is the subject of a criminal proceeding as well as situations where the respondent is

secreting the child in violation of a court order, abusing the child, a flight risk and other circumstances that the court concludes make the issuance of notice a danger to the child. The court must hear the testimony of the petitioner or another witness prior to issuing the warrant. The testimony may be heard in person, via telephone, or by any other means acceptable under local law. The court must State the reasons for the issuance of the warrant. The warrant can be enforced by law enforcement officers wherever the child is found in the State. The warrant may authorize entry upon private property to pick up the child if no less intrusive means are possible. In extraordinary cases, the warrant may authorize law enforcement to make a forcible entry at any hour.

The warrant must provide for the placement of the child pending the determination of the enforcement proceeding. Since the issuance of the warrant would not occur absent a risk of serious harm to the child, placement cannot be with the respondent. Normally, the child would be placed with the petitioner. However, if placement with the petitioner is not indicated, the court can order any other appropriate placement authorized under the laws of the court's State. Placement with the petitioner may not be indicated if there is a likelihood that the petitioner also will flee the jurisdiction. Placement with the petitioner may not be practical if the petitioner is proceeding through an attorney and is not present before the court.

This section authorizes the court to utilize whatever means are available under local law to ensure the appearance of the petitioner and child at the enforcement hearing. Such means might include cash bonds, a surrender of a passport, or whatever the court determines is necessary.

SECTION 312. COSTS, FEES, AND EXPENSES.

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

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

Comment

This section is derived from the International Child Abduction Remedies Act, 42 U.S.C. § 11607(b)(3). Normally the court will award fees and costs against the non-prevailing party. Included as expenses are the amount of investigation fees incurred by private persons or by public officials as well as the cost of child placement during the proceedings.

The non-prevailing party has the burden of showing that such an award would be clearly inappropriate. Fees and costs may be inappropriate if their payment would cause the parent and child to seek public assistance.

This section implements the policies of Section 8(c) of Pub.L. 96-611 (part of the PKPA) which provides that:

> In furtherance of the purposes of section 1738A of title 28, United States Code [this section], as added by subsection (a) of this section, State courts are encouraged to –
> (2) award to the person entitled to custody or visitation pursuant to a custody determination which is consistent with the provisions of such section 1738A [this section], necessary travel expenses, attorneys' fees, costs of private investigations, witness fees or expenses, and other expenses incurred in connection with such custody determination ... .

The term "prevailing party" is not given a special definition for this Act. Each State will apply its own standard.

Subsection (b) was added to ensure that this section would not apply to the State unless otherwise authorized. The language is taken from UIFSA § 313 (court may assess costs against obligee or support enforcement agency only if allowed by local law).

SECTION 313. RECOGNITION AND ENFORCEMENT. A court of this State shall accord full faith and credit to an order issued by another State and consistent with this [Act] which enforces a child-custody determination by a court

of another State unless the order has been vacated, stayed, or modified by a court having jurisdiction to do so under [Article] 2.

Comment

The enforcement order, to be effective, must also be enforced by other States. This section requires courts of this State to enforce and not modify enforcement orders issued by other States when made consistently with the provisions 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 a temporary emergency order under Section 204, the enforcing court may not stay an order enforcing a child-custody determination pending appeal.

Comment

The order may be appealed as an expedited civil matter. An enforcement order should not be stayed by the court. Provisions for a stay would defeat the purpose of having a quick enforcement procedure. If there is a risk of serious mistreatment or abuse to the child, a petition to assume emergency jurisdiction must be filed under Section 204. This section leaves intact the possibility of obtaining an extraordinary remedy such as mandamus or prohibition from an appellate court to stay the court's enforcement action. In many States, it is not possible to limit the constitutional authority of appellate courts to issue a stay. However, unless the information before the appellate panel indicates that emergency jurisdiction would be assumed under Section 204, there is no reason to stay the enforcement of the order pending appeal.

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

(a) In a case arising under this [Act] or involving the Hague Convention on the Civil Aspects of International Child Abduction, the [prosecutor or other appropriate public official] may take any lawful action, including resort to a

proceeding under this [article] or any other available civil proceeding to locate a child, obtain the return of a child, or enforce a child-custody determination if there is:

(1) an existing child-custody determination;

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

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

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

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

Comment

Sections 315-317 are derived from the recommendations of the *Obstacles Study* that urge a role for public authorities in civil enforcement of custody and visitation determinations. One of the basic policies behind this approach is that, as is the case with child support, the involvement of public authorities will encourage the parties to abide by the terms of the court order. The prosecutor usually would be the most appropriate public official to exercise authority under this section. However, States may locate the authority described in the section in the most appropriate public office for their governmental structure. The authority could be, for example, the Friend of the Court Office or the Attorney General. If the parties know that prosecutors and law enforcement officers are available to help secure the return of a child, the parties may be deterred from interfering with the exercise of rights established by court order.

The use of public authorities should provide a more effective method of remedying violations of the custody determination. Most parties do not have the resources to enforce a custody determination in another jurisdiction. The availability of the prosecutor or other government official as an enforcement agency will help ensure that remedies of this Act can be made available regardless of

income level. In addition, the prosecutor may have resources to draw on that are unavailable to the average litigant.

The role of the public authorities should generally not begin until there is a custody determination that is sought to be enforced. The Act does not authorize the public authorities to be involved in the action leading up to the making of the custody determination, except when requested by the court, when there is a violation the Hague Convention on the Civil Aspects of International Child Abduction, or when the person holding the child has violated a criminal statute. This Act does not mandate that the public authorities be involved in all cases referred to it. There is only so much time and money available for enforcement proceedings. Therefore, the public authorities eventually will develop guidelines to determine which cases will receive priority.

The use of civil procedures instead of, or in addition to, filing and prosecuting criminal charges enlarges the prosecutor's options and may provide a more economical and less disruptive means of solving problems of criminal abduction and retention. With the use of criminal proceedings alone, the procedure may be inadequate to ensure the return of the child. The civil options would permit the prosecutor to resolve that recurring and often frustrating problem.

A concern was expressed about whether allowing the prosecutor to use civil means as a method of settling a child abduction violated either DR 7-105(A) of the Code of Professional Responsibility or Model Rule of Professional Responsibility 4.4. Both provisions either explicitly or implicitly disapprove of a lawyer threatening criminal action to gain an advantage in a civil case. However, the prohibition relates to threats that are solely to gain an advantage in a civil case. If the prosecutor has a good faith reason for pursuing the criminal action, there is no ethical violation. See *Committee on Legal Ethics v. Printz*, 416 S.E. 2d 720 (W.Va. 1992) (lawyer can threaten to press criminal charges against a client's former employee unless employee made restitution).

It must be emphasized that the public authorities do not become involved in the merits of the case. They are authorized only to locate the child and enforce the custody determination. The public authority is authorized by this section to utilize any civil proceeding to secure the enforcement of the custody determination. In most jurisdictions, that would be a proceeding under this Act. If the prosecutor proceeds pursuant to this Act, the prosecutor is subject to its provisions. There is nothing in this Act that would prevent a State from authorizing the prosecutor or other public official to use additional remedies beyond those provided in this Act.

The public authority does not represent any party to the custody determination. It acts as a "friend of the court." Its role is to ensure that the custody determination is enforced.

Sections 315-317 are limited to cases covered by this Act, i.e. interstate cases. However, States may, if they wish, extend this part of the Act to intrastate cases.

It should also be noted that the provisions of this section relate to the civil enforcement of child custody determinations. Nothing in this section is meant to detract from the ability of the prosecutor to use criminal provisions in child abduction cases.

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

Comment

This section authorizes law enforcement officials to assist in locating a child and enforcing a custody determination when requested to do so by the public authorities. It is to be read as an enabling provision. Whether law enforcement officials have discretion in responding to a request by the prosecutor or other public official is a matter of local law.

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

Comment

One of the major problems of utilizing public officials to locate children and enforce custody and visitation determinations is cost. This section authorizes the prosecutor and law enforcement to recover costs against the non-prevailing party. The use of the term "direct" indicates that overhead is not a recoverable cost. This section cannot be used to recover the value of the time spent by the public authorities' attorneys.

[ARTICLE] 4

MISCELLANEOUS PROVISIONS

SECTION 401. 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 402. SEVERABILITY CLAUSE. 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.

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

SECTION 404. REPEALS. The following acts and parts of acts are hereby repealed:

(1) The Uniform Child Custody Jurisdiction Act;

(2) .....

(3) .....

SECTION 405. 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.

Comment

A child custody proceeding will last throughout the minority of the child. The commencement of a child custody proceeding prior to this Act does not mean that jurisdiction will continued to be governed by prior law. The provisions of this act apply if a motion to modify an existing determination is filed after the enactment of this Act. A motion that is filed prior to enactment may be completed under the rules in effect at the time the motion is filed.

Parental Kidnapping Prevention Act

28 U.S.C. § 1738A

§ 1738A. Full faith and credit given to child custody determinations

(a) The appropriate authorities of every State shall enforce according to its terms, and shall not modify except as provided in subsections (f), (g), and (h) of this section, any custody determination or visitation determination made consistently with the provisions of this section by a court of another State.

(b) As used in this section, the term--

(1) "child" means a person under the age of eighteen;

(2) "contestant" means a person, including a parent or grandparent, who claims a right to custody or visitation of a child;

(3) "custody determination" means a judgment, decree, or other order of a court providing for the custody of a child, and includes permanent and temporary orders, and initial orders and modifications;

(4) "home State" means the State in which, immediately preceding the time involved, the child lived with his parents, a parent, or a person acting as parent, for at least six consecutive months, and in the case of a child less than six months old, the State in which the child lived from birth with any of such persons. Periods of temporary absence of any of such persons are counted as part of the six-month or other period;

(5) "modification" and "modify" refer to a custody or visitation determination which modifies, replaces, supersedes, or otherwise is made subsequent to, a prior custody or visitation determination concerning the same child, whether made by the same court or not;

(6) "person acting as a parent" means a person, other than a parent, who has physical custody of a child and who has either been awarded custody by a court or claims a right to custody;

(7) "physical custody" means actual possession and control of a child;

(8) "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a territory or possession of the United States; and

(9) "visitation determination" means a judgment, decree, or other order of a court providing for the visitation of a child and includes permanent and temporary orders and initial orders and modifications.

(c) A child custody or visitation determination made by a court of a State is consistent with the provisions of this section only if--

(1) such court has jurisdiction under the law of such State; and

(2) one of the following conditions is met:

(A) such State (i) is the home State of the child on the date of the commencement of the proceeding, or (ii) had been the child's home State within six months before the date of the commencement of the proceeding and the child is absent from such State

because of his removal or retention by a contestant or for other reasons, and a contestant continues to live in such State;

(B) (i) it appears that no other State would have jurisdiction under subparagraph (A), and (ii) it is in the best interest of the child that a court of such State assume jurisdiction because (I) the child and his parents, or the child and at least one contestant, have a significant connection with such State other than mere physical presence in such State, and (II) there is available in such State substantial evidence concerning the child's present or future care, protection, training, and personal relationships;

(C) the child is physically present in such State and (i) the child has been abandoned, or (ii) it is necessary in an emergency to protect the child because the child, a sibling, or parent of the child has been subjected to or threatened with mistreatment or abuse;

(D) (i) it appears that no other State would have jurisdiction under subparagraph (A), (B), (C), or (E), or another State has declined to exercise jurisdiction on the ground that the State whose jurisdiction is in issue is the more appropriate forum to determine the custody or visitation of the child, and (ii) it is in the best interest of the child that such court assume jurisdiction;

or

(E) the court has continuing jurisdiction pursuant to subsection (d) of this section.

(d) The jurisdiction of a court of a State which has made a child custody or visitation determination consistently with the provisions of this section continues as long as the requirement of subsection (c)(1) of this section continues to be met and such State remains the residence of the child or of any contestant.

(e) Before a child custody or visitation determination is made, reasonable notice and opportunity to be heard shall be given to the contestants, any parent whose parental rights have not been previously terminated and any person who has physical custody of a child.

(f) A court of a State may modify a determination of the custody of the same child made by a court of another State, if--

(1) it has jurisdiction to make such a child custody determination; and

(2) the court of the other State no longer has jurisdiction, or it has declined to exercise such jurisdiction to modify such determination.

(g) A court of a State shall not exercise jurisdiction in any proceeding for a custody or visitation determination commenced during the pendency of a proceeding in a court of another State where such court of that other State is exercising jurisdiction consistently with the provisions of this section to make a custody determination.

(h) A court of a State may not modify a visitation determination made by a court of another State unless the court of the other State no longer has jurisdiction to modify such determination or has declined to exercise jurisdiction to modify such determination.

Florida UCCJEA

Fla. Stat. § 61.501 et seq.

§ 61.501. Short title

This part may be cited as the "Uniform Child Custody Jurisdiction and Enforcement Act."

§ 61.502. Purposes of part; construction of provisions

The general purposes of this part are to:

(1) Avoid jurisdictional competition and conflict with courts of other states in matters of child custody which have in the past resulted in the shifting of children from state to state with harmful effects on their well-being.

(2) Promote cooperation with the courts of other states to the end that a custody decree is rendered in the state that can best decide the case in the interest of the child.

(3) Discourage the use of the interstate system for continuing controversies over child custody.

(4) Deter abductions.

(5) Avoid relitigating the custody decisions of other states in this state.

(6) Facilitate the enforcement of custody decrees of other states.

(7) Promote and expand the exchange of information and other forms of mutual assistance between the courts of this state and those of other states concerned with the same child.

(8) Make uniform the law with respect to the subject of this part among the states enacting it.

§ 61.503. Definitions

As used in this part, the term:

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

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

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

(4) "Child custody proceeding" means a proceeding in which legal custody, physical custody, residential care, 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 *ss. 61.524-61.540.*

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

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

(7) "Home state" means the state in which a child lived with a parent or a person acting as a parent for at least 6 consecutive months immediately before the commencement of a child custody proceeding. In the case of a child younger than 6 months of age, the term means the state in which the child lived from birth with any of the persons mentioned. A period of temporary absence of any of the mentioned persons is part of the period.

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

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

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

(11) "Modification" means a child custody determination that changes, replaces, supersedes, or is otherwise made after a previous determination concerning the same child, regardless of whether it is made by the court that made the previous determination.

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

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

(a) Has physical custody of the child or has had physical custody for a period of 6 consecutive months, including any temporary absence, within 1 year immediately before the commencement of a child custody proceeding; and

(b) Has been awarded a child-custody determination by a court or claims a right to a child-custody determination under the laws of this state.

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

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

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

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

§ 61.504. Proceedings governed by other law

This part does not govern a proceeding pertaining to the authorization of emergency medical care for a child.

§ 61.505. Application to Indian tribes

(1) A child custody proceeding that pertains to an Indian child, as defined in the Indian Child Welfare Act, *25 U.S.C. ss. 1901* et seq., is not subject to this part to the extent that it is governed by the Indian Child Welfare Act.

(2) A court of this state shall treat a tribe as if it were a state of the United States for purposes of applying *ss. 61.501-61.523*.

(3) A child custody determination made by a tribe under factual circumstances in substantial conformity with the jurisdictional standards of this part must be recognized and enforced under *ss. 61.524-61.540.*

§ 61.506. International application of part

(1) A court of this state shall treat a foreign country as if it were a state of the United States for purposes of applying *ss. 61.501-61.523.*

(2) Except as otherwise provided in subsection (3), a child custody determination made in a foreign country under factual circumstances in substantial conformity with the jurisdictional standards of this part must be recognized and enforced under *ss. 61.524-61.540.*

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

§ 61.507. Effect of child custody determination

A child custody determination made by a court of this state which had jurisdiction under this part binds all persons who have been served in accordance with the laws of this state or notified in accordance with *s. 61.509* or who have submitted to the jurisdiction of the court, and who have been given an opportunity to be heard. As to those persons, the determination is conclusive as to all decided issues of law and fact except to the extent the determination is modified.

§ 61.508. Priority

If a question of existence or exercise of jurisdiction under this part is raised in a child custody proceeding, the question, upon request of a party, must be given priority on the calendar and handled expeditiously.

§ 61.509. Notice to persons outside the state

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

(2) Proof of service may be made in the manner prescribed by the laws of the state in which the service is made.

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

§ 61.510. Appearance and limited immunity

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

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

(3) The immunity granted by subsection (1) does not extend to civil litigation based on an act unrelated to the participation in a proceeding under this part which was committed by an individual while present in this state.

§ 61.511. Communication between courts

(1) A court of this state may communicate with a court in another state concerning a proceeding arising under this part.

(2) The court shall allow the parties to participate in the communication. If the parties elect to participate in the communication, they must be given the opportunity to present facts and legal arguments before a decision on jurisdiction is made.

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

(4) Except as otherwise provided in subsection (3), a record must be made of a communication under this section. The parties must be informed promptly of the communication and granted access to the record.

(5) For purposes of this section, the term "record" means a form of information, including, but not limited to, an electronic recording or transcription by a court reporter which creates a verbatim memorialization of any communication between two or more individuals or entities.

§ 61.512. Taking testimony in another state

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

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

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

§ 61.513. Cooperation between courts; preservation of records

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

(a) Hold an evidentiary hearing;

(b) Order a person to produce or give evidence pursuant to the laws of that state;

(c) Order that an evaluation be made with respect to the custody of a child involved in a pending proceeding pursuant to the laws of the state where the proceeding is pending;

(d) Forward to the court of this state a certified copy of the transcript of the record of the hearing, the evidence otherwise presented, and any evaluation prepared in compliance with the request; or

(e) Order a party to a child custody proceeding or any person having physical custody of the child to appear in the proceeding with or without the child.

(2) Upon request of a court of another state, a court of this state may hold a hearing or enter an order described in subsection (1).

(3) Travel and other necessary and reasonable expenses incurred under subsections (1) and (2) may be assessed against the parties according to the laws of this state if the court has personal jurisdiction over the party against whom these expenses are being assessed.

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

§ 61.514. Initial child custody jurisdiction

(1) Except as otherwise provided in *s. 61.517*, a court of this state has jurisdiction to make an initial child custody determination only if:

(a) This state is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within 6 months before the commencement of the proceeding and the child is absent from this state but a parent or person acting as a parent continues to live in this state;

(b) A court of another state does not have jurisdiction under paragraph (a), or a court of the home state of the child has declined to exercise jurisdiction on the grounds that this state is the more appropriate forum under *s. 61.520* or *s. 61.521*, and:

1. The child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this state other than mere physical presence; and

2. Substantial evidence is available in this state concerning the child's care, protection, training, and personal relationships;

(c) All courts having jurisdiction under paragraph (a) or paragraph (b) have declined to exercise jurisdiction on the grounds that a court of this state is the more appropriate forum to determine the custody of the child under *s. 61.520* or *s. 61.521*; or

(d) No court of any other state would have jurisdiction under the criteria specified in paragraph (a), paragraph (b), or paragraph (c).

(2) Subsection (1) is the exclusive jurisdictional basis for making a child custody determination by a court of this state.

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

§ 61.515. Exclusive, continuing jurisdiction

(1) Except as otherwise provided in *s. 61.517*, a court of this state which has made a child custody determination consistent with *s. 61.514* or *s. 61.516* has exclusive, continuing jurisdiction over the determination until:

(a) A court of this state determines that the child, the child's parents, and any person acting as a parent do not have a significant connection with this state and that substantial evidence is no longer available in this state concerning the child's care, protection, training, and personal relationships; or

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

(2) A court of this state which has made a child custody determination and does not have exclusive, continuing jurisdiction under this section may modify that determination only if it has jurisdiction to make an initial determination under *s. 61.514*.

§ 61.516. Jurisdiction to modify a determination

Except as otherwise provided in *s. 61.517*, a court of this state may not modify a child custody determination made by a court of another state unless a court of this state has jurisdiction to make an initial determination under *s. 61.514(1)(a)* or (b) and:

(1) The court of the other state determines it no longer has exclusive, continuing jurisdiction under *s. 61.515* or that a court of this state would be a more convenient forum under *s. 61.520*; or

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

§ 61.517. Temporary emergency jurisdiction

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

(2) If there is no previous child custody determination that is entitled to be enforced under this part, and a child custody proceeding has not been commenced in a court of a state having jurisdiction under *ss. 61.514-61.516*, a child custody determination made under this section remains in effect until an order is obtained from a court of a state having jurisdiction under *ss. 61.514-61.516*. If a child custody proceeding has not been or is not commenced in a court of a

state having jurisdiction under *ss. 61.514-61.516*, a child custody determination made under this section becomes a final determination if it so provides and this state becomes the home state of the child.

(3) If there is a previous child custody determination that is entitled to be enforced under this part, or a child custody proceeding has been commenced in a court of a state having jurisdiction under *ss. 61.514-61.516*, any order issued by a court of this state under this section must specify in the order a period that the court considers adequate to allow the person seeking an order to obtain an order from the state having jurisdiction under *ss. 61.514-61.516*. The order issued in this state remains in effect until an order is obtained from the other state within the period specified or the period expires.

(4) A court of this state which has been asked to make a child custody determination under this section, upon being informed that a child custody proceeding has been commenced in, or a child custody determination has been made by, a court of a state having jurisdiction under *ss. 61.514-61.516*, shall immediately communicate with the other court. A court of this state which is exercising jurisdiction under *ss. 61.514-61.516*, upon being informed that a child custody proceeding has been commenced in, or a child custody determination has been made by, a court of another state under a statute similar to this section shall immediately communicate with the court of that state to resolve the emergency, protect the safety of the parties and the child, and determine a period for the duration of the temporary order.

§ 61.518. Notice; opportunity to be heard; joinder

(1) Before a child custody determination is made under this part, notice and an opportunity to be heard in accordance with the standards of *s. 61.509* must be given to all persons entitled to notice under the laws of this state as in child custody proceedings between residents of this state, any parent whose parental rights have not been previously terminated, and any person acting as a parent.

(2) This part does not govern the enforceability of a child custody determination made without notice or an opportunity to be heard.

(3) The obligation to join a party and the right to intervene as a party in a child custody proceeding under this part are governed by the laws of this state as in child custody proceedings between residents of this state.

§ 61.519. Simultaneous proceedings

(1) Except as otherwise provided in *s. 61.517*, a court of this state may not exercise its jurisdiction under *ss. 61.514-61.524* if, at the time of the commencement of the proceeding, a proceeding concerning the custody of the child had been commenced in a court of another state having jurisdiction substantially in conformity with this part, unless the proceeding has been terminated or is stayed by the court of the other state because a court of this state is a more convenient forum under *s. 61.520*.

(2) Except as otherwise provided in *s. 61.517*, a court of this state, before hearing a child custody proceeding, shall examine the court documents and other information supplied by the parties pursuant to *s. 61.522*. If the court determines that a child custody proceeding was

previously commenced in a court in another state having jurisdiction substantially in accordance with this part, the court of this state shall stay its proceeding and communicate with the court of the other state. If the court of the state having jurisdiction substantially in accordance with this part does not determine that the court of this state is a more appropriate forum, the court of this state shall dismiss the proceeding.

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

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

(b) Enjoin the parties from continuing with the proceeding for enforcement; or

(c) Proceed with the modification under conditions it considers appropriate.

§ 61.520. Inconvenient forum

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

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

(a) Whether domestic violence has occurred and is likely to continue in the future and which state could best protect the parties and the child;

(b) The length of time the child has resided outside this state;

(c) The distance between the court in this state and the court in the state that would assume jurisdiction;

(d) The relative financial circumstances of the parties;

(e) Any agreement of the parties as to which state should assume jurisdiction;

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

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

(h) The familiarity of the court of each state with the facts and issues in the pending litigation.

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

(4) A court of this state may decline to exercise its jurisdiction under this part if a child custody determination is incidental to an action for divorce or another proceeding while still retaining jurisdiction over the divorce or other proceeding.

§ 61.521. Jurisdiction declined by reason of conduct

(1) Except as otherwise provided in *s. 61.517* or by other law of this state, if a court of this state has jurisdiction under this part because a person seeking to invoke its jurisdiction has engaged in unjustifiable conduct, the court shall decline to exercise its jurisdiction unless:

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

(b) A court of the state otherwise having jurisdiction under *ss. 61.514-61.516* determines that this state is a more appropriate forum under *s. 61.520*; or

(c) No court of any other state would have jurisdiction under the criteria specified in *ss. 61.514-61.516*.

(2) If a court of this state declines to exercise its jurisdiction under subsection (1), it may fashion an appropriate remedy to ensure the safety of the child and prevent a repetition of the unjustifiable conduct, including staying the proceeding until a child custody proceeding is commenced in a court having jurisdiction under *ss. 61.514-61.516*.

(3) If a court dismisses a petition or stays a proceeding because it declines to exercise its jurisdiction under subsection (1), it shall assess against the party seeking to invoke its jurisdiction necessary and reasonable expenses, including costs, communication expenses, attorney's fees, investigative fees, expenses for witnesses, travel expenses, and expenses for child care during the course of the proceedings, unless the party from whom fees are sought establishes that the assessment would be clearly inappropriate. The court may not assess fees, costs, or expenses against this state unless authorized by law other than this part.

§ 61.522. Information to be submitted to the court

(1) Subject to Florida law providing for the confidentiality of procedures, addresses, and other identifying information in a child custody proceeding, each party, in its first pleading or in an attached affidavit, shall give information, if reasonably ascertainable, under oath as to the child's present address or whereabouts, the places where the child has lived during the last 5 years, and the names and present addresses of the persons with whom the child has lived during that period. The pleading or affidavit must state whether the party:

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

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

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

(2) If the information required by subsection (1) is not furnished, the court, upon motion of a party or its own motion, may stay the proceeding until the information is furnished.

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

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

§ 61.523. Appearance of parties and child

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

(2) If a party to a child custody proceeding whose presence is desired by the court is outside this state, the court may order that a notice given pursuant to *s. 61.509* 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.

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

(4) If a party to a child custody proceeding who is outside this state is directed to appear under subsection (2) or desires to appear in person before the court with or without the child, the court may require another party to pay reasonable and necessary travel and other expenses of the party so appearing and of the child.

§ 61.524. Definitions

As used in *ss. 61.524-61.540*, the term:

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

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

§ 61.525. Enforcement under the Hague Convention

Under this part, a court of this state may enforce an order for the return of a child made under the Hague Convention on the Civil Aspects of International Child Abduction as if it were a child custody determination.

§ 61.526. Duty to enforce

(1) A court of this state shall recognize and enforce a child custody determination of a court of another state if the latter court exercised jurisdiction in substantial conformity with this part or the determination was made under factual circumstances meeting the jurisdictional standards of this part and the determination has not been modified in accordance with this part.

(2) A court of this state may use any remedy available under other laws of this state to enforce a child custody determination made by a court of another state. The remedies provided by *ss. 61.524-61.540* are cumulative and do not affect the availability of other remedies to enforce a child custody determination.

§ 61.527. Temporary visitation

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

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

(b) The visitation provisions of a child custody determination of another state which does not provide for a specific visitation schedule.

(2) If a court of this state makes an order under paragraph (1)(b), it shall specify in the order a period that it considers adequate to allow the petitioner to obtain an order from a court having jurisdiction under the criteria specified in *ss. 61.514-61.523*. The order remains in effect until an order is obtained from the other court or the period expires.

§ 61.528. Registration of child custody determination

(1) A child custody determination issued by a court of another state may be registered in this state, with or without a simultaneous request for enforcement, by sending to the circuit court of the county where the petitioner or respondent resides or where a simultaneous request for enforcement is sought:

(a) A letter or other document requesting registration;

(b) 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

(c) Except as otherwise provided in *s. 61.522*, 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.

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

(a) 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

(b) Serve notice upon the persons named pursuant to paragraph (1)(c) and provide them with an opportunity to contest the registration in accordance with this section.

(3) The notice required by paragraph (2)(b) must state that:

(a) 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;

(b) A hearing to contest the validity of the registered determination must be requested within 20 days after service of notice; and

(c) 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.

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

(a) The issuing court did not have jurisdiction under *ss. 61.514-61.523*;

(b) The child custody determination sought to be registered has been vacated, stayed, or modified by a court having jurisdiction to do so under *ss. 61.514-61.523*; or

(c) The person contesting registration was entitled to notice, but notice was not given in accordance with the standards of *s. 61.509* in the proceedings before the court that issued the order for which registration is sought.

(5) 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.

(6) 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.

§ 61.529. Enforcement of registered determination

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

(2) A court of this state shall recognize and enforce but may not modify, except in accordance with *ss. 61.514-61.523*, a registered child custody determination of another state.

§ 61.530. Simultaneous proceedings

If a proceeding for enforcement under *ss. 61.524-61.540* is commenced in a court of this state and the court determines that a proceeding to modify the determination is pending in a court of another state having jurisdiction to modify the determination under *ss. 61.514-61.523*, the enforcing court shall immediately communicate with the modifying court. The proceeding for enforcement continues unless the enforcing court, after consultation with the modifying court, stays or dismisses the proceeding.

§ 61.531. Expedited enforcement of child custody determination

(1) A petition under *ss. 61.524-61.540* 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.

(2) A petition for enforcement of a child custody determination must state:

(a) Whether the court that issued the determination identified the jurisdictional basis it relied upon in exercising jurisdiction and, if so, specify the basis;

(b) Whether the determination for which enforcement is sought has been vacated, stayed, or modified by a court whose decision must be enforced under this part and, if so, identify the court, the case number, and the nature of the proceeding;

(c) 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, the case number, and the nature of the proceeding;

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

(e) 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 officers and, if so, the relief sought; and

(f) If the child custody determination has been registered and confirmed under *s. 61.528*, the date and place of registration.

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

(4) An order issued under subsection (3) must state the time and place of the hearing and advise the respondent that at the hearing the court will order that the petitioner may take immediate physical custody of the child and the payment of fees, costs, and expenses under *s. 61.535* and may schedule a hearing to determine whether further relief is appropriate, unless the respondent appears and establishes that:

(a) The child custody determination has not been registered and confirmed under *s. 61.528* and that:

1. The issuing court did not have jurisdiction under *ss. 61.514-61.523*;

2. The child custody determination for which enforcement is sought has been vacated, stayed, or modified by a court of a state having jurisdiction to do so under *ss. 61.514-61.523*; or

3. The respondent was entitled to notice, but notice was not given in accordance with the standards of *s. 61.509* in the proceedings before the court that issued the order for which enforcement is sought; or

(b) The child custody determination for which enforcement is sought was registered and confirmed under *s. 61.528*, but has been vacated, stayed, or modified by a court of a state having jurisdiction to do so under *ss. 61.514-61.523*.

§ 61.532. Service of petition and order

Except as otherwise provided in *s. 61.534*, the petition and order must be served by any method authorized by the laws of this state upon the respondent and any person who has physical custody of the child.

§ 61.533. Hearing and order

(1) Unless the court enters a temporary emergency order under *s. 61.517*, upon 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:

(a) The child custody determination has not been registered and confirmed under *s. 61.528* and that:

1. The issuing court did not have jurisdiction under *ss. 61.514-61.523*;

2. The child custody determination for which enforcement is sought has been vacated, stayed, or modified by a court of a state having jurisdiction to do so under *ss. 61.514-61.523*; or

3. The respondent was entitled to notice, but notice was not given in accordance with the standards of *s. 61.509* in the proceedings before the court that issued the order for which enforcement is sought; or

(b) The child custody determination for which enforcement is sought was registered and confirmed under *s. 61.528*, but has been vacated, stayed, or modified by a court of a state having jurisdiction to do so under *ss. 61.514-61.523*.

(2) The court shall award the fees, costs, and expenses authorized under *s. 61.535* and may grant additional relief, including a request for the assistance of law enforcement officers, and set a further hearing to determine whether additional relief is appropriate.

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

(4) 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 *ss. 61.524-61.540*.

§ 61.534. Warrant to take physical custody of child

(1) Upon the filing of a petition seeking enforcement of a child custody determination, the petitioner may file a verified application for the issuance of a warrant to take physical custody of the child if the child is likely to imminently suffer serious physical harm or removal from this state.

(2) If the court, upon the testimony of the petitioner or other witness, finds that the child is likely to imminently suffer serious physical harm or removal from this state, it may issue a warrant to take physical custody of the child. The petition must be heard on the next judicial day after the warrant is executed unless that date is impossible. In that event, the court shall hold the hearing on the first judicial day possible. The application for the warrant must include the statements required by *s. 61.531(2)*.

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

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

(b) Direct law enforcement officers to take physical custody of the child immediately; and

(c) Provide for the placement of the child pending final relief.

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

(5) A warrant to take physical custody of a child is enforceable throughout this state. If the court finds on the basis of the testimony of the petitioner or other witness that a less intrusive

remedy is not effective, it may authorize law enforcement officers to enter private property to take physical custody of the child. If required by exigent circumstances of the case, the court may authorize law enforcement officers to make a forcible entry at any hour.

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

§ 61.535. Costs, fees, and expenses

(1) So long as the court has personal jurisdiction over the party against whom the expenses are being assessed, the court shall award the prevailing party, including a state, necessary and reasonable expenses incurred by or on behalf of the party, including costs, communication expenses, attorney's fees, investigative fees, expenses for witnesses, travel expenses, and expenses for child care during the course of the proceedings, unless the party from whom fees or expenses are sought establishes that the award would be clearly inappropriate.

(2) The court may not assess fees, costs, or expenses against a state unless authorized by law other than this part.

§ 61.536. Recognition and enforcement

A court of this state shall accord full faith and credit to an order issued by another state and consistent with this part which enforces a child custody determination by a court of another state unless the order has been vacated, stayed, or modified by a court having jurisdiction to do so under *ss. 61.514-61.523*.

§ 61.537. Appeals

An appeal may be taken from a final order in a proceeding under *ss. 61.524-61.540* in accordance with expedited appellate procedures in other civil cases. Unless the court enters a temporary emergency order under *s. 61.517*, the enforcing court may not stay an order enforcing a child custody determination pending appeal.

§ 61.538. Role of state attorney

(1) In a case arising under this part or involving the Hague Convention on the Civil Aspects of International Child Abduction, the state attorney may take any lawful action, including resort to a proceeding under *ss. 61.524-61.540* or any other available civil proceeding, to locate a child, obtain the return of a child, or enforce a child custody determination, if there is:

(a) An existing child custody determination;

(b) A request to do so from a court in a pending child custody proceeding;

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

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

(2) A state attorney acting under this section acts on behalf of the court and may not represent any party.

§ 61.539. Role of law enforcement officers

At the request of a state attorney acting under *s. 61.538*, a law enforcement officer may take any lawful action reasonably necessary to locate a child or a party and assist a state attorney with responsibilities under *s. 61.538*.

§ 61.540. Costs and expenses

The court may assess against the nonprevailing party all direct expenses and costs incurred by the state attorney and law enforcement officers under *s. 61.538* or *s. 61.539* so long as the court has personal jurisdiction over the nonprevailing party.

§ 61.541. Application and construction

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

§ 61.542. Transitional provision

A motion or other request for relief made in a child custody proceeding or to enforce a child custody determination that was commenced before the effective date of this part is governed by the law in effect at the time the motion or other request was made.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BLANCA ELISA REYES VALENZUELA, *Petitioner-Appellant*, v. STEVE LOUIS MICHEL, *Respondent-Appellee.*	No. 12-17205 D.C. No. 4:12-cv-00215-RCC OPINION

Appeal from the United States District Court
for the District of Arizona
Raner C. Collins, District Judge, Presiding

Argued and Submitted
August 14, 2013—San Francisco, California

Filed November 15, 2013

Before: Stephen Reinhardt, John T. Noonan,
and Andrew D. Hurwitz, Circuit Judges.

Opinion by Judge Noonan;
Concurrence by Judge Reinhardt

736 F.3d 1173 (9th Cir. 2013)

SUMMARY*

Hague Convention

The panel affirmed the district court's denial, after a bench trial, of a mother's petition under the Hague Convention on the Civil Aspects of International Child Abduction for the return of her children to Mexico.

The children were born in Mexico. Their parents had used a "shuttle custody" arrangement in which the children had split their time between Mexico and the United States. The panel held that the Convention did not attach because the parents shared a settled intention to abandon Mexico and adopt the United States as the children's habitual residence.

The panel concluded that the father also could have prevailed on the basis that he and the mother shared a settled intention to abandon Mexico as the children's *sole* habitual residence, that there was an actual change in geography, and that an appreciable period of time had passed; therefore, the children were habitually resident in the United States when the father retained them.

Judge Reinhardt concurred in his colleagues' conclusions. He wrote that the questions of "shuttle custody" and "dual habitual residence" were deserving of more thorough consideration than was possible in this case.

The panel ordered the mandate to issue at once.

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

COUNSEL

Ann Haralambie, Tucson, Arizona, for Petitioner-Appellant.

Scott Gan, Tucson, Arizona, for Respondent-Appellee.

OPINION

NOONAN, Circuit Judge:

We are tasked with deciding whether twin girls, now resident with their father in the United States, should be returned to their mother in Mexico. The U.S. District Court for District of Arizona ruled that they should not. We affirm.

FACTS

In late 2006, Steve Michel and Blanca Reyes Valenzuela chose to live together in Nogales, Mexico. The twins were born in 2008.

According to Steve's undisputed testimony, the couple lived together in Nogales, Mexico. The couple agreed in 2009 that to avoid having to cross the border for work, Steve should move to the Arizona side. They agreed to "set a pattern to keep [the twins] in the United States" in order to take advantage of education, medical help and government support in the United States.

After the twins received their passports in May 2009, until the fall of 2010, they split their time between Mexico and the United States. They lived with Blanca in Mexico Monday

through Wednesday and lived with Steve in the United States Thursday through Sunday.

In September 2010, the relationship between Blanca and Steve soured. Blanca threatened to have him beaten up or killed. For around two months in the fall of 2010, Blanca did not allow him to have any contact with the twins. Under the belief that she posed a danger to the children, Steve reported Blanca to Arizona Child Protective Services and to its Mexican equivalent, DIF, in November 2010.

From Christmas 2010 to February 2011, the twins split their time between Steve and Blanca evenly. In February 2011, Blanca would not regularly meet Steve or respond to his messages to go to the border so he could take the twins to the United States. Steve did take the children on March 24, 2011. He told Blanca he would return them at 7 PM on March 27th, but he sent Blanca a text message on March 27th saying he would not bring them back.

PROCEEDINGS

Blanca filed her application under the Hague Convention on International Aspects of Child Abduction, 19 I.L.M 1501 (entered into force October 25, 1980) ["Convention"], two days after Steve retained the twins; she also filed a petition for Writ of Habeas Corpus for Return of Child in the District Court claiming Steve violated the Convention and its implementing legislation, 42 U.S.C. §11063(a), the International Child Abduction Remedies Act ["ICARA"].

At trial, Blanca and her witnesses testified via telephone from Mexico with the help of an interpreter. Steve testified that Blanca agreed to keep the twins in the United States to

send them to school and get them better medical care. Blanca, in her testimony, disagreed with much of what Steve had said during his testimony. She also talked over some of her witnesses. The district court found Steve's testimony to be more credible, noting that Blanca seemed to be coaching her witnesses. Based on Steve's testimony and the testimony of Fernando Leal, the DIF social worker, the district court held that the parties "abandoned Mexico as [the children's] habitual state of residence when their parents decided they should, for an indefinite period, spend the majority of their time in the United States."

The district court denied Blanca's motion for reconsideration, holding that (1) substantial evidence supported the judgment; and (2) Steve's testimony was more credible on the issue of habitual residence, despite Leal's affidavit withdrawing a portion of his trial testimony.

Blanca timely appeals.

ANALYSIS

Both the United States and Mexico are parties to the Convention. The central purpose of the Convention is to prevent forum shopping in custody battles. PAUL R. BEAUMONT & PETER E. MCELEAVY, THE HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION, 1 (1999). It explicitly is not aimed at adjudicating the underlying custody dispute. Convention, Art. 19. "The Convention's focus is . . . whether a child should be returned to a country for custody proceedings and not what the outcome of those proceedings should be." *Holder v. Holder*, 392 F.3d 1009, 1013 (9th Cir. 2004). The drafters intended that the Convention be interpreted uniformly across

jurisdictions in order to avoid forum shopping. The Senate, in adopting the Convention into law, reaffirmed that goal. Elisa Perez-Vera, Explanatory Report ¶ 66, *in* 3 Hague Conference on Private International Law, Acts and Documents of the Fourteenth Session, Child Abduction 426 (1982) ["Perez-Vera Report"]; ICARA § 11601(b)(3)(B).

Under Article 3 of the Convention,

> The removal or the retention of a child is to be considered wrongful where –
>
> a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
>
> b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The official report for the Convention describes "habitual residence" as "a well-established concept in the Hague Conference, which regards it as a question of pure fact, differing in that respect from domicile." Perez-Vera Report ¶ 66. We, however, have rejected a purely factual approach to habitual residence for reasons laid out by Chief Judge Kozinski in *Mozes v. Mozes*, 239 F.3d 1067, 1071–73 (9th Cir. 2001) ("'Habitual residence' is the central – often outcome-determinative – concept on which the entire system is founded. Without intelligibility and consistency in its

application, parents are deprived of crucial information they need to make decisions, and children are more likely to suffer the harms the Convention seeks to prevent."). Along with other circuits, we approach the question of habitual residence as a mixed question of law and fact. *See In re B. Del C.S.B*, 559 F.3d 999, 1008 (9th Cir. 2009); *Silverman v. Silverman*, 338 F.3d 886, 896 (8th Cir. 2003); *Feder v. Evans-Feder*, 63 F.3d 217, 222 n. 9 (3d Cir. 1995). We "review 'essentially factual' questions for clear error and the ultimate issue of habitual residence de novo." *In re B. Del C.S.B*, 559 F.3d at 1008 (quoting *Holder*, 392 F.3d at 1015).

It is undisputed that Blanca was exercising her rights of custody at the time of retention. The question is whether the children were habitually resident in Mexico, the United States, or both, at the time of their retention.

Factual determinations

"Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility." Fed. R. Civ. P. 52. Where, as here, findings of fact turn on credibility determinations, the findings receive heightened deference in light of "the fact finder's unique opportunity to observe the demeanor of the witnesses." *Newton v. National Broadcasting Co., Inc.*, 930 F.2d 662, 671 (9th Cir.1990) (citation omitted). A finding of clear error requires a "definite and firm conviction that a mistake has been committed." *Gonzalez-Caballero v. Mena*, 251 F.3d 789, 792 (9th Cir. 2001).

The district court based its findings of fact primarily on three key credibility determinations. First, it found that Steve's version of the facts was credible. Second, it found that Blanca's account was not consistent with her earlier statement to the social worker about how long the twins were living in the United States. Finally, it found that Blanca's witnesses either lacked independent foundation for their testimony or were being audibly coached while they were testifying, possibly by Blanca herself. The court therefore adopted Steve's testimony in its findings of fact with occasional reliance on the social worker's testimony. These credibility determinations are supported by the record and were not clear error. *See United States v. Lang*, 149 F.3d 1044, 1046 (9th Cir. 1998) (reviewing credibility determinations under a clear error standard).

In particular, Steve's testimony as to the frequency with which he had the children was supported by the testimony of another of his daughters. His testimony about the duration of the shuttle custody arrangement was supported by this daughter as well as by Blanca's testimony. Steve's testimony about the timing and nature of his complaint to the Mexican DIF was supported by the DIF social worker.

Blanca undermined her own credibility. In at least two places in the transcript Blanca seems to be participating while Lupita, her sister-in-law, testified. We find no clear error in the district court's findings of fact.

Legal Determinations

Despite the drafters' insistence that "habitual residence" does not need defining, courts have inevitably tried. The resulting lack of uniformity across jurisdictions is

unsurprising, especially in light of the variety of situations in which a dispute over habitual residence can arise. In the Ninth Circuit, we look for the last shared, settled intent of the parents in an attempt to determine which country is the "locus of the children's family and social development." *Mozes*, 239 F.3d at 1084. *Mozes* requires that there be a shared intent to abandon the prior habitual residence, unless the child "consistently splits time more or less evenly between two locations, so as to retain alternating habitual residences in each." *Id.* at 1081 and n.17. Once intent is shown, *Mozes* requires an "actual change in geography" combined with an "appreciable period of time" to establish a change in habitual residence. *Id.* at 1078 (citing *Friedrich v. Friedrich*, 983 F.2d 1396 (6th Cir. 1993) for the former factor and *C v S (minor: abduction: illegitimate child)*, [1990] 2 All E.R. 961, 965 (Eng.H.L.) for the latter).

Following *Mozes*, the district court ruled that Steve and Blanca had a shared, settled intent to abandon Mexico and adopt the United States as the twins' habitual residence, and therefore the Convention does not attach. We agree that the Convention does not attach. Along with our affirmance of the district court's decision, we offer an alternate route to the same outcome, which reflects our efforts to further the Senate's goal of uniform interpretation of the Convention.

Most habitual residence cases fit one of the following two patterns:

I. Parent 1 and Parent 2 decide to move with their children from Country A to Country B. After some time in Country B, Parent 1 decides that she does not want to live in Country B and moves with the children

back to Country A. Parent 2 petitions for return of the children, arguing that the children had acquired habitual residence in Country B.

II. Parent 1 and Parent 2 live in Country A. They decide together that Parent 2 and the children will visit Country B for a predetermined amount of time, returning to Country A after the visit. After arriving in Country B, Parent 2 decides to extend his time there indefinitely and to keep the children with him. Parent 1 petitions for return of the children, arguing that they had not acquired habitual residence in Country B.

Very few cases arising under the Convention feature shuttle custody. In shuttle custody situations, Parent 1 and Parent 2 agree to split custody between two countries, shuttling the children between the countries on a regular basis. Steve and Blanca decided the children would split time between countries before their relationship soured, and the children were shuttled more frequently than in any other cases. Blanca's and Steve's residences, as of the time of the petition, are in two different countries, but they are only around ten miles apart, by far the closest of any two parents in all of the habitual residence cases brought under the treaty worldwide.

The only U.S. court to entertain the possibility that a child had alternating habitual residences was a district court in New York. In *Brooke v. Willis*, a court-ordered custody arrangement dictated that a child spend fifty percent of her

time in the United States and the other fifty percent in England. 907 F. Supp. 57 (S.D.N.Y. 1995). After a fall semester in California, the mother retained the child in California in breach of the agreement. The father, in England, filed a petition under the Convention. The court ruled that the child was habitually resident in England at the time of her retention, with the caveat that "it is arguable that [the child] is also a habitual resident of the United States under the Convention. However, for purposes of this petition it is only crucial to determine if England can be considered [her] habitual residence." *Id.* at 61 n.2. No other U.S. court has been faced with shuttle custody under the Convention.

The closest fact pattern to the one before us is from a case decided by the High Court of Northern Ireland. In *In re C.L. (a minor)*, a child shuttled between Belfast and Dublin, a distance of 105 miles. After acknowledging that the fact pattern is "unusual if not unique," the court found that when the child moved between his parents "on a weekly basis, he was habitually resident in whichever jurisdiction he was living in." In particular, the judge said that

> [t]he decision to share the responsibility for the upbringing of the child on an alternate week basis in the jurisdictions was a major step in the child's life. It is also significant that the week in Dublin was spent in a home which was the habitual residence of his carers for that week and with whom he was familiar. It was not intended that his stay there on an alternate week basis would be either "merely transient or temporary". *Thus residence solely in Northern Ireland was broken and the respondent agreed to that.* The continuance of

> this new arrangement must inevitably lead to the child having that degree of continuity in the other jurisdiction, which is required for habitual residence in that jurisdiction when he is residing there. *Thus by January 1998 the child was habitually resident in whichever jurisdiction he was living for a particular week. . . . Should he remain longer than a week in one jurisdiction his habitual residence would not change so long as he remains there.*

In re C.L. (a minor) and In re the Child Abduction and Custody Act 1985; JS v CL (unreported NIFam HIGJ2630 25 Aug. 1998) (emphasis added).

Like the *In re C.L.* court in Northern Ireland, courts in other jurisdictions have held that the shuttle custody cases before them reflect serial, or alternating, habitual residence. In *Wilson v. Huntley*, a Canadian case, a three-year-old girl split time between her parents, who lived in Germany (mother) and Canada (father). The splits varied in length, from three to six months. A few weeks before she was to return from Canada to Europe, the father informed the mother that he wanted to keep his daughter in Canada. The court found that a person, including a child, could have consecutive, alternative habitual residences in two different States at separate times. The court held that at the time of retention, the girl was habitually resident in Canada. *Wilson v. Huntley*, 2005 CarswellOnt 1606 (WL), (Can. O.N. S.C.) ¶ 28 ("It is of course not in doubt that a person, including a child, may have a habitual residence in two different countries at different times of the year.") (quoting *In the Matter of A. (Abduction: Habitual Residence)*, [1998] 1 F.L.R. 497 (Eng.), *available at* http://www.hcch.net/

incadat/fullcase/0176.htm) (internal citation omitted). *See also Watson v. Jamieson*, (1998) S.L.T. 180, 182 (Scot.) ("Where residence with two parents is divided equally it is unreal, in the absence of other differentiating factors, to see residence with one parent as primary and the stays with the other parent as interruptions.").

The district court judge below did not err in deciding that Blanca and Steve shared a settled intention to abandon Mexico – they had immediate plans to avail the twins of government assistance in the United States as well as longer-term plans to educate the children in the United States. We note that, based on the shuttle custody cases from our sister courts presented above, Steve could have prevailed by showing that he and Blanca shared a settled intention to abandon Mexico as the twins' *sole* habitual residence, that there was an actual change in geography, and that an appreciable period of time had passed. Because all three elements are present here, we affirm the district court in its decision that the twins were habitually resident in the United States when Steve retained them.

While the emotional aspects of this case are fraught, the law is clear. The children were habitually resident in the United States when Steve retained them. Their retention was therefore not "wrongful" under the Convention. Steve is not required by the Convention or this court to return the children to Mexico.

AFFIRMED.

The mandate shall issue at once. Fed.R.App.P. 2.

REINHARDT, Circuit Judge, Concurring:

As Judge Noonan reports, this case presents a unique fact pattern. Given the district court's findings, I concur in my colleagues' conclusions. I also believe, however, that the questions of "shuttle custody" and "dual habitual residence" are deserving of more thorough consideration than is possible in the case before us. Still, Judge Noonan has done us a service by beginning that exploration here.

The Down Town Association
60 Pine Street
New York, NY 10005

A View From and Presentation to the Bench: Hague and International Law Issues and Assessing Flight Risk

Justice Linda Christopher, New York, New York
Sylvia Goldschmidt, New York, New York
Lawrence Katz, Miami, Florida

UNIFORM CHILD ABDUCTION PREVENTION ACT

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

ANNUAL CONFERENCE
MEETING IN ITS ONE-HUNDRED-AND-FIFTEENTH YEAR
HILTON HEAD, SOUTH CAROLINA

July 7-14, 2006

WITH PREFATORY NOTE AND COMMENTS

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UNIFORM CHILD ABDUCTION PREVENTION ACT

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UNIFORM CHILD ABDUCTION PREVENTION ACT

Prefatory Note

Child abduction is a serious problem both in scope and effect. A study commissioned by the Office of Juvenile Justice and Delinquency Prevention estimated that 262,100 children were abducted in 1999; 203,900 (78 per cent) of them were abducted by a parent or family member; approximately 1000 of the abductions were international.[1] The purpose of the Uniform Child Abduction Prevention Act is to deter both predecree and postdecree domestic and international child abductions by parents, persons acting on behalf of a parent or others. Family abductions may be preventable through the identification of risk factors and the imposition of appropriate preventive measures.

The Uniform Child Abduction Prevention Act is premised on the general principle that preventing an abduction is in a child's best interests. Abducted children may suffer long-lasting harm. Federal law recognizes that parental abduction is harmful to children.[2] Child abductions can occur before or after entry of a child-custody determination. This Act allows the court to impose abduction prevention measures at any time.

Many abductions occur before a court has had the opportunity to enter a child-custody determination. Children at the center of custody disputes are at the highest risk for potential abductions.[3] Jurisdictional laws help deter abductions by specifying the proper state to handle custody litigation. The Uniform Child Custody Jurisdiction Act[4] sets out four concurrent bases for jurisdiction. Congress passed the Parental Kidnapping Prevention Act of 1980 to deter abductions, discourage interstate conflicts, and promote cooperation between states about custody matters by resolving jurisdictional conflicts.[5] The Parental Kidnapping Prevention Act prioritizes the state in which the child has lived for six months preceding the filing of the petition (the home state) as the place for custody litigation[6] and prohibits a second state from assuming jurisdiction if there is an action pending in the state that has

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[1] See DAVID FINKELHOR, HEATHER HAMMER & ANDREA J. SEDLAK, NATIONAL INCIDENCE STUDIES OF MISSING, ABDUCTED, RUNAWAY, AND THROWNAWAY CHILDREN, CHILDREN ABDUCTED BY FAMILY MEMBERS: NATIONAL ESTIMATE AND CHARACTERISTICS (Oct. 2002).

[2] International Child Abduction Remedies Act, 42 U.S.C. § 11601(a)(1)("The Congress makes the following findings: (1) The international abduction or wrongful retention of children is harmful to their well-being…"). *See also* Dorothy S. Huntington, Parental Kidnapping: A New Form of Child Abuse, available at http://www.hiltonhouse.com/articles/child_abuse=huntington.txt. (characterizing child abduction as abuse.)

[3] AMERICA'S HIDDEN CRIME: WHEN THE KIDNAPPER IS KIN 10-11 (Polly Klaas Foundation 2004). *See also* Janet R. Johnston et al., Early Identification of Risk Factors for Parental Abduction (OJJDP March 2001)(indicating that men are more likely to abduct before an order is entered while women are more likely to abduct after a child custody determination).

[4] 9 UNIF. L. ANN. Part I 115 (1988).

[5] Pub. L. No. 96-611, note 7 to 28 U.S.C. §1738A.

[6] 28 U.S.C. Section 1738A(c).

proper jurisdiction.[7] The Uniform Child Custody Jurisdiction and Enforcement Act,[8] now in 45 jurisdictions, also prioritizes home state jurisdiction notwithstanding the child's absence. Jurisdictional laws do not provide prevention measures for abduction.

Post-decree abductions often occur because the existing child-custody determinations lack sufficient protective provisions to prevent an abduction. An award of joint physical custody without a designation of specific times; a vague order granting "reasonable visitation"; or the lack any restrictions on custody and visitation make orders hard to enforce. The awareness of abduction risk factors and preventive measures available can reduce the threat of abduction by giving the court the tools to make the initial child-custody determination clearer, more specific, and more easily enforceable.

If an abduction occurs after a child-custody determination, all states have enforcement remedies. Forty-six jurisdictions use the procedures in Article 3 of the Uniform Child Custody Jurisdiction and Enforcement Act. In addition, courts can punish abductors for contempt and allow tort actions for custodial interference. Several federal laws help locate missing children[9] and criminalize international parental kidnapping.[10] While there is no federal law criminalizing interstate parental kidnapping, there is a mechanism for apprehending persons who violate state parental kidnapping laws and travel across state lines.[11] While every state criminally forbids custodial interference by parents or relatives of the child, the laws differ as to the elements of the offenses, the punishments given, and whether a child-custody determination must exist for a violation to occur.[12]

If the abduction is international, the Hague Convention on the Civil Aspects of International Child Abduction, currently in effect between the United States and fifty-five countries, facilitates the return of an abducted child to the child's habitual residence.[13] Many

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[7] 28 U.S.C.A. Section 1738A(g).

[8] 9 UNIF. L. ANN. Part I 657 (1999).

[9] Missing Children Act, 28 U.S.C. § 534 (1982); Missing Children Search Assistance Act and the National Child Search Assistance Act, 42 U.S.C. § 5779 & § 5780 (1990); and the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act of 2003, Pub. L. 108-21, 117 Stat. 650 (AMBER Alert Program).

[10] *See* International Parental Kidnapping Crime Act (IPKCA), 18 U.S.C. § 1204; The Fugitive Felon Act, 18 U.S.C. § 1073; and The Extradition Treaties Interpretation Act of 1998, 18 U.S.C. § 3181.

[11] Unlawful Flight to Avoid Prosecution, 18 U.S.C. § 1204; The Fugitive Felon Act, 18 U.S.C. § 1073. When enacting the Parental Kidnapping Prevention Act, Congress declared that the Unlawful Flight to Avoid Prosecution provision applies to cases involving parental kidnapping and interstate or international flight to avoid prosecution. Pub. L. No. 96-611, 10(a).

[12] Appendix A. Citation List of State Parental Kidnapping Statutes, National Clearinghouse for the Defense of Battered Women, The Impact of Parental Kidnapping Laws and Practice on Domestic Violence Survivors 32 (2005).

[13] *See* The Hague Convention on the Civil Aspects of International Child Abduction, 51 Fed. Reg. § 10494 et seq. (1986); the International Child Abduction Remedies Act (ICARA), 42 U.S.C. §§ 11601-11610. For a current

countries, however, have not ratified the Hague Convention on the Civil Aspects of International Child Abduction, the United States has not accepted all nations' accessions, and some countries that have ratified do not comply with the treaty obligations.

This Act is civil law and complements existing state law. This Act does not limit, contradict, or supercede the Uniform Child Custody Jurisdiction and Enforcement Act or the Uniform Child Custody Jurisdiction Act. This Act is not meant to prevent a legitimate relocation action filed in accordance with the law of the state having jurisdiction to make a child-custody determination nor to prevent a victim of domestic violence from escaping abuse.

The Uniform Child Abduction Prevention Act applies to predecree and intrastate cases, to emergency situations, and to cases in which risk factors exist and the current child-custody determination lacks abduction prevention measures. Only three states have enacted comprehensive child abduction prevention statutes;[14] two other states include provisions to reduce the risk of abduction.[15] This Act will fill a void in the majority of states by identifying circumstances indicating a risk of abduction and providing measures to prevent the abduction of children, predecree or postdecree.

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list of United States treaty partners, visit www.travel.state.gov/family/abduction/hague_issues/hague_issues_1487.html.

[14] *See* ARK. STAT. ANN. § 9-13-401-407 (2005); CAL. FAM. CODE § 3048 (2004); TEX. FAM. CODE § 153.501- § 153.503 (2003).

[15] *See* FLA. STAT. § 61.45 (2005); OR. REV. STAT. § 109.035 (2005).

UNIFORM CHILD ABDUCTION PREVENTION ACT

SECTION 1. SHORT TITLE. This [act] may be cited as the Uniform Child Abduction Prevention Act.

SECTION 2. DEFINITIONS. In this [act]:

(1) "Abduction" means the wrongful removal or wrongful retention of a child.

(2) "Child" means an unemancipated individual who is less than 18 years of age.

(3) "Child-custody determination" means a judgment, decree, or other order of a court providing for the legal custody, physical custody, or visitation with respect to a child. The term includes a permanent, temporary, initial, and modification order.

(4) "Child-custody proceeding" means a proceeding in which legal custody, physical custody, or visitation with respect to a child is at issue. The term includes a proceeding for divorce, dissolution of marriage, separation, neglect, abuse, dependency, guardianship, paternity, termination of parental rights, or protection from domestic violence.

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

(6) "Petition" includes a motion or its equivalent.

(7) "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.

(8) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States. The term includes a federally recognized Indian tribe or nation.

(9) "Travel document" means records relating to a travel itinerary, including

travel tickets, passes, reservations for transportation, or accommodations. The term does not include a passport or visa.

(10) "Wrongful removal" means the taking of a child that breaches rights of custody or visitation given or recognized under the law of this state.

(11) "Wrongful retention" means the keeping or concealing of a child that breaches rights of custody or visitation given or recognized under the law of this state.

Comment

To the extent possible, the definitions track the Uniform Child Custody Jurisdiction and Enforcement Act. The definition of a child as a person under age 18 is the same as in Section 102(2) of the Uniform Child Custody Jurisdiction and Enforcement Act. State law determines when a child becomes emancipated before age 18. This Act is limited to the abduction of minors even though the risk of abduction may apply to a disabled adult who has an appointed adult guardian.

The definition of "child-custody determination" is the same as the definition in Section 102(3) of the Uniform Child Custody Jurisdiction and Enforcement Act. This Act uses the traditional terminology of "custody" and "visitation" because that is the language used in the Uniform Child Custody Jurisdiction and Enforcement Act although local terminology may differ. The definition of a child-custody proceeding differs insignificantly from Section 102(4) of the Uniform Child Custody Jurisdiction and Enforcement Act.

The definition of abduction covers wrongful removal or wrongful retention. The definition is broad enough to encompass not only an abduction committed by either parent or a person acting on behalf of the parent but also other abductions. Generally both parents have the right to companionship and access to their child unless a court states otherwise. Abductions can occur against an individual or other entity with custody rights, as well as against an individual with visitation or access rights. A parent with joint legal or physical custody rights, by operation of law, court order, or legally binding agreement, commits an abduction by wrongfully interfering with the other parent's rights. A removal or retention of a child can be "wrongful" predecree or postdecree. An abduction is wrongful where it is in breach of an existing "child-custody determination" or, if predecree, in violation of rights attributed to a person by operation of law. The term "breaches rights of custody" tracks Article 3 of the Hague Convention on the Civil Aspects of International Child Abduction.

SECTION 3. COOPERATION AND COMMUNICATION AMONG COURTS.

Sections [110], [111], and [112] of [insert citation to the provisions of the Uniform Child

Custody Jurisdiction and Enforcement Act or its equivalent in the state] apply to cooperation and communications among courts in proceedings under this [act].

Comment

It is possible, even likely, that abduction situations will involve more than one state. Thus, there is a need for mechanisms for communication among courts, for testimony to be obtained quickly by means other than physical presence, and for cooperation between courts in different states. Sections 110, 111, and 112 of the Uniform Child Custody Jurisdiction and Enforcement Act provide mechanisms to deal with these issues. States that do not have the Uniform Child Custody Jurisdiction and Enforcement Act may want to include these provisions or use some similar provision of existing state law.

SECTION 4. ACTIONS FOR ABDUCTION PREVENTION MEASURES.

(a) A court on its own motion may order abduction prevention measures in a child-custody proceeding if the court finds that the evidence establishes a credible risk of abduction of the child.

(b) A party to a child-custody determination or another individual or entity having a right under the law of this state or any other state to seek a child-custody determination for the child may file a petition seeking abduction prevention measures to protect the child under this [act].

(c) A prosecutor or public authority designated under [insert citation to Section 315 of the Uniform Child Custody Jurisdiction and Enforcement Act or applicable law of this state] may seek a warrant to take physical custody of a child under Section 9 or other appropriate prevention measures.

Comment

An abduction may occur before a child-custody proceeding has commenced, after the filing but before entry of a child-custody determination, or in violation of an existing child-custody determination. To obtain abduction prevention measures, either the court on its own may impose the measures or a party to a child custody proceeding or an individual or entity having the right to seek custody may file a petition seeking abduction prevention measures.

A court hearing a child custody case may determine that the evidence shows a credible risk of abduction. Therefore, even without a party filing a petition under this Act, the court on its own motion can impose appropriate abduction prevention measures. Usually, however, a parent who fears that the other parent or family members are preparing to abduct the child will file a petition in an existing custody dispute. An individual or other entity, such as the state child welfare agency, which has a right to lawful custody may file a petition alleging a risk of abduction and seeking prevention measures with respect to a child who is not yet the subject of a child-custody determination.

The Act allows a prosecutor or public authority designated in Section 315 of the Uniform Child Custody Jurisdiction and Enforcement Act to seek a warrant under Section 9 of this Act if there is an imminent risk of wrongful removal.

SECTION 5. JURISDICTION

(a) A petition under this [act] may be filed only in a court that has jurisdiction to make a child-custody determination with respect to the child at issue under [insert citation to Uniform Child Custody Jurisdiction and Enforcement Act or the Uniform Child Custody Jurisdiction Act].

(b) A court of this state has temporary emergency jurisdiction under [insert citation to Section 204 of the Uniform Child Custody Jurisdiction and Enforcement Act or Section 3(a)(3) of the Uniform Child Custody Jurisdiction Act] if the court finds a credible risk of abduction.

Comment

This Act complements, but does not limit, contradict, or supercede the Uniform Child Custody Jurisdiction and Enforcement Act, 9 U.L.A. Part I 657 (1999), or the Uniform Child Custody Jurisdiction Act, 9 U.L.A. Part I 115 (1988). A court must have jurisdiction sufficient to make an initial child-custody determination, a modification, or temporary emergency jurisdiction to issue prevention measures under this Act.

The Parental Kidnapping Prevention Act prioritizes the child's home state as the primary jurisdictional basis; prohibits a court in one state from exercising jurisdiction if a valid custody proceeding is already pending in another state; and requires that states give full faith and credit to sister state decrees made in accordance with its principles. The Uniform Child Custody Jurisdiction and Enforcement Act follows the Parental Kidnapping Prevention Act.

A court has temporary emergency jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act only if the child has been abandoned or it is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse. This Act equates a credible risk of abduction with threatened mistreatment or abuse for emergency jurisdiction purposes.

If a state would be able to exercise emergency jurisdiction under Section 204 the Uniform Child Custody Jurisdiction and Enforcement Act, it can do so even if another court has issued a child-custody determination and has continuing exclusive jurisdiction. The reference to Section 204 brings in all of its provisions that include communication, length of time of temporary orders, and the like.

Under Section 208 of the Uniform Child Custody Jurisdiction and Enforcement Act, if a court has jurisdiction because a person seeking to invoke its jurisdiction has engaged in unjustifiable conduct, the court shall decline to exercise its jurisdiction. However, as the comment to Section 208 explains, domestic violence victims should not be charged with unjustifiable conduct for conduct that occurred in the process of fleeing domestic violence. Domestic violence also shall be considered in a court's inconvenient forum analysis under Section 207(b)(1) of the Uniform Child Custody Jurisdiction and Enforcement Act.

SECTION 6. CONTENTS OF PETITION. A petition under this [act] must be verified and include a copy of any existing child-custody determination, if available. The petition must specify the risk factors for abduction, including the relevant factors described in Section 7. Subject to [insert citation to Section 209(e) of the Uniform Child Custody Jurisdiction and Enforcement Act or cite the law of this state providing for the confidentiality of procedures, addresses, and other identifying information], if reasonably ascertainable, the petition must contain:

(1) the name, date of birth, and gender of the child;

(2) the customary address and current physical location of the child;

(3) the identity, customary address, and current physical location of the respondent;

(4) a statement of whether a prior action to prevent abduction or domestic

violence has been filed by a party or other individual or entity having custody of the child, and the date, location, and disposition of the action;

(5) a statement of whether a party to the proceeding has been arrested for a crime related to domestic violence, stalking, or child abuse or neglect, and the date, location, and disposition of the case; and

(6) any other information required to be submitted to the court for a child-custody determination under [insert citation to Section 209 of the Uniform Child Custody Jurisdiction and Enforcement Act or applicable law of this state].

Comment

The contents of the petition follow those for pleadings under Section 209 of the Uniform Child Custody Jurisdiction and Enforcement Act. The information is made subject to state law on the protection of names or 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 by keeping confidential the victims' names, addresses, and other information. These procedures must be followed if the state law requires their applicability. If a state does not protect names and addresses, then a provision similar to Section 209(e) of the Uniform Child Custody Jurisdiction and Enforcement Act should be added. That provision reads:

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

The requirement for information on domestic violence or child abuse is to alert the court to the possibility that a batterer or abuser is attempting to use the Act. Domestic violence underlies large numbers of parental kidnapping. One study found that approximately one half of abductors had been violent toward the other parent during the marriage or relationship. Some batterers abduct their children during or after custody litigation; others abduct before initiating legal proceedings. The court should not allow a batterer to use this Act to gain temporary custody or additional visitation in an uncontested hearing. A person who has committed domestic violence or child abuse poses a risk of harm to the child. Such a person, however, may still seek relief in a contested hearing where the issues can be fully examined by the court. In order to screen for domestic violence or child abuse, the petition requires disclosure of all relevant information and the court can inquire about domestic violence at any hearing.

Notice and opportunity to be heard should be given according to the law of the state and may be by publication if other means are not effective. See Section 108(a) of the Uniform Child Custody Jurisdiction and Enforcement Act.

SECTION 7. FACTORS TO DETERMINE RISK OF ABDUCTION.

(a) In determining whether there is a credible risk of abduction of a child, the court shall consider any evidence that the petitioner or respondent:

(1) has previously abducted or attempted to abduct the child;

(2) has threatened to abduct the child;

(3) has recently engaged in activities that may indicate a planned abduction, including:

(A) abandoning employment;

(B) selling a primary residence;

(C) terminating a lease;

(D) closing bank or other financial management accounts, liquidating assets, hiding or destroying financial documents, or conducting any unusual financial activities;

(E) applying for a passport or visa or obtaining travel documents for the respondent, a family member, or the child; or

(F) seeking to obtain the child's birth certificate or school or medical records;

(4) has engaged in domestic violence, stalking, or child abuse or neglect;

(5) has refused to follow a child-custody determination;

(6) lacks strong familial, financial, emotional, or cultural ties to the state

or the United States;

(7) has strong familial, financial, emotional, or cultural ties to another state or country;

(8) is likely to take the child to a country that:

(A) is not a party to the Hague Convention on the Civil Aspects of International Child Abduction and does not provide for the extradition of an abducting parent or for the return of an abducted child;

(B) is a party to the Hague Convention on the Civil Aspects of International Child Abduction but:

(i) the Hague Convention on the Civil Aspects of International Child Abduction is not in force between the United States and that country;

(ii) is noncompliant according to the most recent compliance report issued by the United States Department of State; or

(iii) lacks legal mechanisms for immediately and effectively enforcing a return order under the Hague Convention on the Civil Aspects of International Child Abduction;

(C) poses a risk that the child's physical or emotional health or safety would be endangered in the country because of specific circumstances relating to the child or because of human rights violations committed against children;

(D) has laws or practices that would:

(i) enable the respondent, without due cause, to prevent the petitioner from contacting the child;

(ii) restrict the petitioner from freely traveling to or exiting

from the country because of the petitioner's gender, nationality, marital status, or religion; or

(iii) restrict the child's ability legally to leave the country after the child reaches the age of majority because of a child's gender, nationality, or religion;

(E) is included by the United States Department of State on a current list of state sponsors of terrorism;

(F) does not have an official United States diplomatic presence in the country; or

(G) is engaged in active military action or war, including a civil war, to which the child may be exposed;

(9) is undergoing a change in immigration or citizenship status that would adversely affect the respondent's ability to remain in the United States legally;

(10) has had an application for United States citizenship denied;

(11) has forged or presented misleading or false evidence on government forms or supporting documents to obtain or attempt to obtain a passport, a visa, travel documents, a Social Security card, a driver's license, or other government-issued identification card or has made a misrepresentation to the United States government;

(12) has used multiple names to attempt to mislead or defraud; or

(13) has engaged in any other conduct the court considers relevant to the risk of abduction.

(b) In the hearing on a petition under this [act], the court shall consider any evidence that the respondent believed in good faith that the respondent's conduct was necessary to avoid imminent harm to the child or respondent and any other evidence that may be relevant to whether the respondent may be permitted to remove or retain the child.

Comment

The list of risk factors constitutes a summary of the wide variety of types of behaviors and characteristics that researchers have found to be present. The risk factors are based on research that has been done during the last twelve years. Research also shows that abducting parents dismiss the value of the other parent in the child's life; have young children or children vulnerable to influence; and often have the support of their family and others. Parents who have made credible threats to abduct a child or have a history are particularly high risk especially when accompanied by other factors, such as quitting a job, selling a home, and moving assets. *See* Janet Johnston & Linda Girdner, *Family Abductors: Descriptive Profiles and Preventative Interventions* (U.S. Dep't of Justice, OJJDP 2001 NCJ 182788); ABA, Early Identification of Risk Factors for Parental Abduction (NCJ185026). The more of these factors that are present, the more likely the chance of an abduction. However, the mere presence of one or more of these factors does not mean that an abduction will occur just as the absence of these factors does not guarantee that no abduction will occur. Some conduct described in the factors can be done in conjunction with a relocation petition, which would negate an inference that the parent is planning to abduct the child.

International abductions pose more obstacles to return of a child than do abductions within the United States. Courts should consider evidence that the respondent was raised in another country and has family support there, has a legal right to work in a foreign country and has the ability to speak that foreign language. There are difficulties associated with securing return of children from countries that are not treaty partners under the Hague Convention on the Civil Aspects of Child Abduction or are not compliant with the Convention. Compliance Reports are available at the United States Department of State website or may be obtained by contacting the Office of Children's Issues in Department of State.

Courts should be particularly sensitive to the importance of preventive measures where there is an identified risk of a child being removed to countries that are guilty of human rights violations, including arranged marriages of children, child labor, lack of child abuse laws, female genital mutilation, sexual exploitation, any form of child slavery, torture, and the deprivation of liberty. These countries pose potentially serious obstacles to return of a child and pose the possibility of harm.

Courts need to be sensitive to domestic violence issues. Batterers often abduct their children before as well as during and after custody litigation. However, courts also need to be aware of the dynamics of domestic violence. Rather than a vindictive reason for taking the child, a victim fleeing domestic violence may be attempting to protect the victim and the child. Almost half of the parents in one parental kidnapping study were victims of domestic violence and half of the parents who were contemplating abducting their children were motivated by the perceived need to protect their child from physical, sexual, and emotional abuse. Geoffrey L. Greif & Rebecca L. Hegar, When Parents Kidnap: The Families Behind the Headlines 8 (1993). Some of the risk factors involve the same activities that might be undertaken by a victim of domestic violence who is trying to relocate or flee to escape violence. If the evidence shows that the parent preparing to leave is fleeing domestic violence, the court must consider that any order restricting departure or transferring custody may pose safety issues for the respondent and the

child, and therefore, should be imposed only when the risk of abduction, the likely harm from the abduction, and the chances of recovery outweigh the risk of harm to the respondent and the child.

The Uniform Child Custody Jurisdiction and Enforcement Act recognizes that domestic violence victims should be considered. The Comment to Section 208 of the Uniform Child Custody Jurisdiction and Enforcement Act (Jurisdiction Declined by Reason of Conduct) states that "Domestic violence victims should not be charged with unjustifiable conduct for conduct that occurred in the process of fleeing domestic violence, even if their conduct is technically illegal. An inquiry must be made whether the flight was justified under the circumstances of the case."

SECTION 8. PROVISIONS AND MEASURES TO PREVENT ABDUCTION.

(a) If a petition is filed under this [act], the court may enter an order that must include:

(1) the basis for the court's exercise of jurisdiction;

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

(3) a detailed description of each party's custody and visitation rights and residential arrangements for the child;

(4) a provision stating that a violation of the order may subject the party in violation to civil and criminal penalties; and

(5) identification of the child's country of habitual residence at the time of the issuance of the order.

(b) If, at a hearing on a petition under this [act] or on the court's own motion, the court after reviewing the evidence finds a credible risk of abduction of the child, the court shall enter an abduction prevention order. The order must include the provisions required by subsection (a) and measures and conditions, including those in subsections (c), (d), and (e), that are reasonably calculated to prevent abduction of the child, giving due consideration to the

custody and visitation rights of the parties. The court shall consider the age of the child, the potential harm to the child from an abduction, the legal and practical difficulties of returning the child to the jurisdiction if abducted, and the reasons for the potential abduction, including evidence of domestic violence, stalking, or child abuse or neglect.

(c) An abduction prevention order may include one or more of the following:

(1) an imposition of travel restrictions that require that a party traveling with the child outside a designated geographical area provide the other party with the following:

(A) the travel itinerary of the child;

(B) a list of physical addresses and telephone numbers at which the child can be reached at specified times; and

(C) copies of all travel documents;

(2) a prohibition of the respondent directly or indirectly*:*

(A) removing the child from this state, the United States, or another geographic area without permission of the court or the petitioner's written consent;

(B) removing or retaining the child in violation of a child-custody determination;

(C) removing the child from school or a child-care or similar facility; or

(D) approaching the child at any location other than a site designated for supervised visitation;

(3) a requirement that a party register the order in another state as a prerequisite to allowing the child to travel to that state;

(4) with regard to the child's passport:

(A) a direction that the petitioner place the child's name in the United States Department of State's Child Passport Issuance Alert Program;

(B) a requirement that the respondent surrender to the court or the petitioner's attorney any United States or foreign passport issued in the child's name, including a passport issued in the name of both the parent and the child; and

(C) a prohibition upon the respondent from applying on behalf of the child for a new or replacement passport or visa;

(5) as a prerequisite to exercising custody or visitation, a requirement that the respondent provide:

(A) to the United States Department of State Office of Children's Issues and the relevant foreign consulate or embassy, an authenticated copy of the order detailing passport and travel restrictions for the child;

(B) to the court:

(i) proof that the respondent has provided the information in subparagraph (A); and

(ii) an acknowledgment in a record from the relevant foreign consulate or embassy that no passport application has been made, or passport issued, on behalf of the child;

(C) to the petitioner, proof of registration with the United States Embassy or other United States diplomatic presence in the destination country and with the Central Authority for the Hague Convention on the Civil Aspects of International Child Abduction, if that Convention is in effect between the United States and the destination country, unless one of the parties objects; and

(D) a written waiver under the Privacy Act, 5 U.S.C. Section 552a [as amended], with respect to any document, application, or other information pertaining to the child authorizing its disclosure to the court and the petitioner; and

(6) upon the petitioner's request, a requirement that the respondent obtain an order from the relevant foreign country containing terms identical to the child-custody determination issued in the United States.

(d) In an abduction prevention order, the court may impose conditions on the exercise of custody or visitation that:

(1) limit visitation or require that visitation with the child by the respondent be supervised until the court finds that supervision is no longer necessary and order the respondent to pay the costs of supervision;

(2) require the respondent to post a bond or provide other security in an amount sufficient to serve as a financial deterrent to abduction, the proceeds of which may be used to pay for the reasonable expenses of recovery of the child, including reasonable attorneys fees and costs if there is an abduction; and

(3) require the respondent to obtain education on the potentially harmful effects to the child from abduction.

(e) To prevent imminent abduction of a child, a court may:

(1) issue a warrant to take physical custody of the child under Section 9 or the law of this state other than this [act];

(2) direct the use of law enforcement to take any action reasonably necessary to locate the child, obtain return of the child, or enforce a custody determination under this [act] or the law of this state other than this [act]; or

(3) grant any other relief allowed under the law of this state other than this [act].

(f) The remedies provided in this [act] are cumulative and do not affect the availability of other remedies to prevent abduction.

Comment

This act provides courts with a choice of remedies. Ideally the court will choose the least restrictive measures and conditions to maximize opportunities for continued parental contact while minimizing the opportunities for abduction. The most restrictive measures should be used when there have been prior custody violations and overt threats to take the child; when the child faces substantial potential harm from an abducting parent who may have serious mental or personality disorder, history of abuse or violence or no prior relationship with the child; or when the obstacles to recovering the child are formidable due to countries not cooperating and enforcing orders from the United States, not being signatories to the Hague Convention on the Civil Aspects of International Child Abduction or non-compliant. Section 8 lists the possible prevention measures categorized as travel restrictions, conditions on the exercise of custody and visitation, and urgent measures when abduction is imminent or in progress.

If a person files a petition under this Act, even if the court decides not to order restrictive measures or impose conditions, the court may clarify and make more specific the existing child-custody determination. To enter an abduction prevention order, the court must have jurisdiction to make a child-custody determination even if it is emergency jurisdiction. The court should set out the basis for the court's exercise of jurisdiction. The more apparent on the face of the document that the court issuing the order had proper jurisdiction, the more likely courts in other states and countries are to recognize it as valid. The court should also include a statement showing that the parties were properly served and given adequate notice. This makes it apparent on the face of the order that due process was met. *See* Sections 108 and 205 of the Uniform Child Custody Jurisdiction and Enforcement Act. States do not require personal jurisdiction to make a child-custody determination.

The court may make an existing child-custody order clearer and more specific. Vague orders are difficult to enforce without additional litigation. The term "reasonable visitation" can lead to conflicts between the parents and make it difficult for law enforcement officers to know if the order is being violated. The court may specify the dates and times for each party's custody and visitation, including holidays, birthdays, and telephone or Internet contact. Because joint custody arrangements create special enforcement problems, the court should ensure that the order specifies the child's residential placement at all times. Whenever possible, the residential arrangements should represent the parents' agreement. However, to prevent abductions, it is important for the court order to be specific as to the residential arrangements for the child. If there is a threat of abduction, awarding sole custody to one parent makes enforcement easier.

The court may also include language in the prevention order to highlight the importance

of both parties complying with the court order by including in bold language: "VIOLATION OF THIS ORDER MAY SUBJECT THE PARTY IN VIOLATION TO CIVIL AND CRIMINAL PENALTIES."

Because every abduction case may be a potential international abduction case, the prevention order should identify the place of habitual residence of a child. Although the Hague Convention on the Civil Aspects of International Child Abduction does not define "habitual residence" and the determination is made by the court in the country hearing a petition for return of a child, a statement in the child-custody determination or prevention order may help. A typical statement reads:

> The State of _____, United States of America, is the habitual residence of the minor children within the meaning of the Hague Convention on the Civil Aspects of International Child Abduction.

If the court finds a credible risk of abduction, this Act provides numerous measures to prevent an abduction. Courts can require a party traveling outside a specified geographical area to provide the other party with all relevant information about where the child will be and how to contact the child. The court can impose travel restrictions prohibiting the respondent from leaving the United States or a specific geographical area; from removing the child from school, day care or other facilities, and can restrict contact other than as specified in the order. The court may also impose passport restrictions and require the respondent to provide assurances and safeguards as a condition of traveling with the child.

The court may also choose to impose restrictions on custody or visitation. The most common, and one of the most effective, restrictions is supervised visitation. Visitation should remain supervised until the court decides the threat of abduction has passed. In addition, the court may require the posting of a bond sufficient to serve both as a deterrent and as a source of funds for the cost of the return of the child. If domestic violence is present, the court may want to order the abusive person to obtain education, counseling or attend a batterers' intervention and prevention program.

Because of international abduction cases are the most complex and difficult, reasonable restrictions to prevent such abductions are necessary. If a credible risk of international abduction of the child exists, passport controls and travel restrictions may be indispensable. It may be advantageous in some cases to obtain a "mirror"or reciprocal order. Before exercising rights, the respondent would need to get a custody order from the country to which the respondent will travel that recognizes both the United States order and the court's continuing jurisdiction. The foreign court would need to agree to order return of the child if the child was taken in violation of the court order. This potentially expensive and time consuming remedy should only be ordered when likely to be of assistance. Because the foreign court may subsequently modify its order, problems can arise.

The court may do whatever is necessary to prevent an abduction, including using the warrant procedure under this act or under the law of the state. Many law enforcement officers are unclear about their role in responding to parental kidnapping cases. One study showed that

70 percent of law enforcement agencies reported that they did not have written policies and procedures governing child abduction cases. A provision in the custody order directing law enforcement officer to "accompany and assist" a parent to recover an abducted child may be useful but is not included in this Act. The language tracks Section 316 of the Uniform Child Custody Jurisdiction and Enforcement Act that authorizes law enforcement to take any lawful action reasonably necessary to locate a child or a party and assist a prosecutor or appropriate public official in obtaining return of a child or enforcing a child-custody determination.

The remedies provided in this Act are intended to supplement and complement existing law.

SECTION 9. WARRANT TO TAKE PHYSICAL CUSTODY OF CHILD.

(a) If a petition under this [act] contains allegations, and the court finds that there is a credible risk that the child is imminently likely to be wrongfully removed, the court may issue an ex parte warrant to take physical custody of the child.

(b) The respondent on a petition under subsection (a) must be afforded an opportunity to be heard at the earliest possible time after the ex parte warrant is executed, but not later than the next judicial day unless a hearing on that date is impossible. In that event, the court shall hold the hearing on the first judicial day possible.

(c) An ex parte warrant under subsection (a) to take physical custody of a child must:

(1) recite the facts upon which a determination of a credible risk of imminent wrongful removal of the child is based;

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

(3) state the date and time for the hearing on the petition; and

(4) provide for the safe interim placement of the child pending further order of the court.

(d) If feasible, before issuing a warrant and before determining the placement of the child after the warrant is executed, the court may order a search of the relevant databases of the National Crime Information Center system and similar state databases to determine if either the petitioner or respondent has a history of domestic violence, stalking, or child abuse or neglect.

(e) The petition and warrant must be served on the respondent when or immediately after the child is taken into physical custody.

(f) A warrant to take physical custody of a child, issued by this state or another state, is enforceable throughout this state. If the court finds that a less intrusive remedy will not be effective, it may authorize law enforcement officers to enter private property to take physical custody of the child. If required by exigent circumstances, the court may authorize law enforcement officers to make a forcible entry at any hour.

(g) If the court finds, after a hearing, that a petitioner sought an ex parte warrant under subsection (a) for the purpose of harassment or in bad faith, the court may award the respondent reasonable attorney's fees, costs, and expenses.

(h) This [act] does not affect the availability of relief allowed under the law of this state other than this [act].

Comment

This section authorizes issuance of a warrant in an emergency situation, such as an allegation that the respondent is preparing to abduct the child to a foreign country and is on the way to the airport. The harm is the credible risk of imminent removal. If the court finds such a risk, the court should temporarily waive the notice requirements and issue a warrant to take physical custody of the child. Immediately after the warrant is executed, the respondent is to receive notice of the proceedings. This section mirrors Section 311 of the Uniform Child Custody Jurisdiction and Enforcement Act on warrants to pick up a child which are available when there is an existing child-custody determination. In many states, the term used in civil cases is "writ of attachment."

The court should hear the testimony of the petitioner or another witness before issuing the warrant. The testimony may be heard in person, by telephone, or by any other means acceptable under local law, which may include video conferencing or use of other technology.

Domestic violence includes "family" violence. Because some batterers may try to use the warrant procedure to prevent victims and the children from escaping domestic violence or child abuse, the court should check relevant state and national databases to see if either the petitioner or respondent's name is listed or if relevant information exists that has not been disclosed before issuing the warrant and ordering placement. Lundy Bancroft & Jay G. Silverman, The Batterer as Parent: Addressing the Impact of Domestic Violence on Family Dynamics 73, 75 (2002)(indicating that most parental abductions take place in the context of a history of domestic violence because threatening to take the child from the mother is a form of control).

Some courts have computer terminals on the bench and a database search takes seconds. Courts without computer access can seek the assistance of law enforcement. Unless impracticable, the court should conduct a search of all person databases of the National Crime Information Center system, including the protection order file, the historical protection order file, the warrants file, the sex offender registry, and the persons on supervised release file. In addition, it is recommended that courts run searches in the National Law Enforcement Telecommunication System in the petitioner's state of birth, current state of residence, and other recent states of residence. Civil courts are authorized by statute and National Crime Information Center policy to have access to information in several files for domestic violence and stalking cases. Because child abduction involves family members and can harm children, and violence between the parents is often a factor leading to child abduction, cases in which a parent alleges a risk of wrongful removal should permit access to the relevant databases.

The court should also view comparable state databases, such as the state department of social service registry of persons found to have abused or neglected children. If the petitioner or respondent are listed for a reason related to a crime of domestic or family violence, the court may refuse to issue a warrant or order any appropriate placement authorized under the laws of the state. The warrant must provide for the placement of a child pending the hearing. Temporary placement will most often be with the petitioner unless the database check reveals the petitioner is a likely or known abuser.

The court must state the reasons for issuance of the warrant. The warrant can be enforced by law enforcement officers wherever the child is found in the state. The warrant may authorize entry upon private property to pick up the child if no less intrusive means are possible. In extraordinary cases, the warrant may authorize law enforcement to make a forcible entry at any hour. This section also authorizes law enforcement officers to enforce out of state warrants.

Section 9 applies only to wrongful removals, not wrongful retentions. It does not hinder a court from issuing any other immediate ex parte relief to prevent a wrongful removal or retention as may be allowed under law other than this act.

SECTION 10. DURATION OF ABDUCTION PREVENTION ORDER. An

abduction prevention order remains in effect until the earliest of:

(1) the time stated in the order;

(2) the emancipation of the child;

(3) the child's attaining 18 years of age; or

(4) the time the order is modified, revoked, vacated, or superseded by a court with jurisdiction under [insert citation to Sections 201 through 203 of the Uniform Child Custody Jurisdiction and Enforcement Act or Section 3 of the Uniform Child Custody Jurisdiction Act and applicable law of this state].

SECTION 11. 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 12. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT. This [act] modifies, limits, and supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001, et seq., but does not modify, limit, or supersede Section 101(c) of the 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 13. EFFECTIVE DATE. This [act] takes effect on . . . .

"UU" UCAPA: Understanding and Using UCAPA to Prevent Child Abduction

PATRICIA M. HOFF*

The National Conference of Commissioners on Uniform State Laws (NCCUSL) has been engaged in crafting uniform law to deter child abduction for nearly forty years, beginning in 1968 with the Uniform Child Custody Jurisdiction Act (UCCJA), continuing in 1997 with the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), and culminating most recently with the Uniform Child Abduction Prevention Act (UCAPA or Act),[1] which NCCUSL approved and recommended for enactment at its annual conference in July 2006. The response to UCAPA has been swift and favorable, as evidenced by its enactment in six states and introduction in five other legislatures.[2] The American Bar Association House of Delegates endorsed the Act in February 2007.

 The author, a legal consultant and authority on interstate and international parental kidnapping law, participated in the UCAPA drafting process as an observer and consultant on behalf of the Office of Juvenile Justice and Delinquency Prevention of the U.S. Department of Justice and Fox Valley Technical College. The views she expressed were her own and did not necessarily represent the official position of either entity. Ms. Hoff's involvement began with the submission of extensive comments and recommendations on the January 10, 2006 Master Draft, and continued through final approval of the Act.

1. UCAPA can be found online at NCCUSL's Web site. Visit www.nccusl.org. From the homepage, click the "Final Acts & Legislation" link. In the "Select an Act Title" box, choose "Child Abduction Prevention." On the next page, click "Final Act." UCAPA is also available directly at http://www.law.upenn.edu/bll/ulc/ucapa/2006_finalact.htm.

2. Enacted in Colorado (COLO. REV. STAT. § 14-13.5-101 et seq.); Kansas (not yet codified nor section assigned); Nebraska (NEB. REV. STAT. § 43-1230 et seq.); Nevada (will be Chapter 11 but not yet assigned a section); South Dakota (not yet codified nor section assigned); and Utah (UTAH CODE ANN. § 78-62-101 et seq.). Introduced in legislative sessions in Connecticut, Louisiana, South Carolina, Texas and U.S. Virgin Islands. "Bill tracing" is *available at* NCCUSL's Web site at http://www.nccusl.org/Update/Act SearchResults.aspx

The Act takes a new approach to preventing child abduction. Whereas the jurisdictional criteria of the UCCJA and UCCJEA, and the UCCJEA's expedited enforcement mechanisms, remove legal incentives parents once had to kidnap their children, UCAPA helps judges identify children at risk of abduction, and provides a cascade of alternative prevention measures from which to fashion an appropriate prevention order. Novelty aside, the Act piggybacks on numerous of its predecessors' provisions.[3] Most notably, proceedings under UCAPA must be brought in courts having child custody jurisdiction with respect to the at-risk child.

This article begins with a brief description of how this uniform law was developed (Constructing UCAPA), and continues with a user-friendly analysis of the Act (Deconstructing UCAPA). The article complements the Prefatory Notes and the Comments to the Act, both of which are recommended reading for UCAPA users.[4]

I. Constructing UCAPA

Concerned about the high incidence of family abductions as reported in national incidence surveys[5] and the harmful effects suffered by children,[6] influenced by studies of abduction risk factors and prevention interven-

3. *See* UCAPA § 3 (Cooperation and Communication Among Courts), § 5 (Jurisdiction), § 6(6) (Contents of Petition, and § 10(4) (Duration of Abduction Prevention Order). *See also* UCAPA § 2 (Definitions) and accompanying comment ("To the extent possible, the definitions track the Uniform Child Custody Jurisdiction and Enforcement Act.").

4. The Prefatory Note and Comments are in the "Final Act," which is available online. *See supra* note 1.

5. The Office of Juvenile Justice and Delinquency Prevention commissioned two incidence studies, referred to as "NISMART-1" (D. Finkelhor, G. Hotaling, and A. Sedlak, *Missing, Abducted, Runaway, and Thrownaway Children in America. First Report: Numbers and Characteristics National Incidence Studies,* 1990, and "NISMART-2" (Heather Hammer, David Finkelhor, and Andrea Sedlak, *Missing, Abducted, Runaway, and Thrownaway Children in America, October 2002, Children Abducted by Family Members: National Estimates and Characteristics*. NISMART-2 estimated that 203,900 children were victims of a family abduction in 1999. Among these, 117,200 were missing from their caretakers, and, of these, an estimated 56,500 were reported to authorities for assistance in locating the children. The study recommended focusing prevention efforts on younger children who are at greater risk of family abduction, especially those who do not live with both biological parents. NISMART-2 is *available at* http://www.ncjrs.gov/pdffiles1/ ojjdp/196466.pdf.

6. *See generally* Prefatory Note, n.2, *supra* note 4; PATRICIA M. HOFF, FAMILY ABDUCTION: PREVENTION AND RESPONSE (National Center for Missing & Exploited Children, 5th ed. 2002), [hereinafter cited as FAMILY ABDUCTION]. In FAMILY ABDUCTION, see chapters titled *Psychological Issues in Recovery and Family Reunification* (JoAnn Behrman-Lippert & Christ Hatcher) and *The Impact of Abduction on Children* (Geoffrey L. Greif & Rebecca L. Hegar). FAMILY ABDUCTION is *available at* http://www.ncmec.org/en_US/publications/NC75.pdf. *See also* R. Hegar & G. Grief, *Impact on Children of Abduction by a Parent: A Review of the Literature*, 62(4) AM. J. ORTHOPSYCHIATRY 599 (1992).

tions,[7] and inspired by nascent state abduction prevention legislation,[8] NCCUSL appointed a drafting committee to write a model or uniform law to prevent international child abduction. The legislation's scope was promptly expanded to include domestic abductions,[9] a change supported by research[10] and reflected in the broader title of the final version of the Act. A detailed narrative about the committee's origins and undertakings is found in the Prefatory Note to the August 24, 2004 draft[11] of the then-titled "Standards for the Protection of Children From International Abduction Act."

Without a drafting committee and reporter, nothing would come of good ideas.[12] In this case, NCCUSL selected Lyle W. Hillyard (Utah) as

7. Janet R. Johnston & Linda K. Girdner, *Family Abductors: Descriptive Profiles and Preventive Interventions* (JUV. JUST. BULL.) (OJJDP Jan. 2001), *available at* http://www.ncjrs.gov/pdffiles1/ojjdp/182788.pdf; J. Johnston, Inger Sagatun-Edwards, Martha-Elin Blomquist, and L. Girdner, *Early Identification of Risk Factors for Parental Abduction* (JUV. JUST. BULL.) (OJJDP Mar. 2001), *available at* http://www.ncjrs.gov/pdffiles1/ojjdp/185026.pdf.

8. In June 2003, Texas enacted a child abduction prevention law, TEX. FAM. CODE §§ 153.501–153.503. Two months later, in August 2003, NCCUSL took the first step toward drafting similar law. *See infra* note 11. Before UCAPA was completed, four other states had enacted abduction prevention laws: California (CAL. FAM. CODE § 3408 (2004)), Arkansas (ARK. CODE ANN. §§ 9-13-401 to -407 (2005)), Florida (FLA. STAT. § 61.45 (2005)), and Oregon (OR. REV. STAT. § 109.035) (2005).

9. *See infra* note 11.

10. *See* FINAL REPORT: OBSTACLES TO THE RECOVERY AND RETURN OF PARENTALLY ABDUCTED CHILDREN (Linda Girdner & Patricia Hoff eds., 1993), [hereinafter cited as OBSTACLES REPORT] (recommending that state legislatures should pass statutes to prevent parental abductions and to require flagging of school and birth records, Research Summary at 13). The OBSTACLES REPORT (NCJ-188063), including its Appendices (NCJ-188062) and Research Summary (NCJ-143458), may be ordered from the Juvenile Justice Clearinghouse at 1-800-638-8736 or online at www.ncjrs.gov. *See also* GUIDE TO GOOD PRACTICE UNDER THE HAGUE CONVENTION OF 25 OCTOBER, 1980 ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ADDUCTION, PART III: PREVENTIVE MEASURES, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW (2005) [hereinafter cited as GUIDE TO GOOD PRACTICE) (suggesting the types of preventive measures that States might consider adopting in order to reduce the incidence of child abduction), *available at* http://www.hcch.net/upload/abdguideiii_e.pdf.

11. The August 24, 2004 draft is available from NCCUSL's Web site. Go to http://www.nccusl.org/Update/CommitteeSearchResults.aspx?committee=236. Click the link for "September 2004 Meeting Draft." It is also accessible directly at http://www.law.upenn.edu/bll/ulc/spciaa/Sept2004MtgDraft.htm. The Prefatory Note explains:

> In August 2003, the National Conference of Commissioners on Uniform State Laws appointed a study committee to explore the feasibility of a uniform law to prevent international child abduction. The possible scope of the project was discussed at a meeting of the Joint Editorial Board for Uniform Family Law Acts on October 18, 2003. The Joint Editorial Board urged the NCCUSL Committee on Scope and Program to recommend the rapid creation of a drafting committee in this area. . . . The initial mandate to the committee was: *Resolved*, that a drafting committee on the Prevention of Child Abduction in International Custody Disputes be approved by the Committee on Scope and Program to draft model or uniform legislation in this area, with an initial scope as suggested in this report. . . . NCCUSL expanded the drafting committee's scope to prevent domestic as well as international abductions in August 2004.

12. For a brief description of the composition of NCCUSL drafting committees and their meetings, visit http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=0&tabid=59.

Chair, and Professor Linda Elrod as Reporter. The Reporter's service to the committee under difficult circumstances was truly remarkable.[13] In addition to the commissioners appointed to the committee,[14] an official advisor[15] and numerous observers[16] participated in the drafting process. In all, there were six drafting committee meetings plus two readings of the legislation.[17] Successive drafts of the legislation considered at these meetings are available at NCCUSL's Web site.[18]

II. Deconstructing UCAPA

To facilitate understanding and use of the Act, the questions listed below are addressed in this section under corresponding headings:

- What is the purpose of the Act?
- Which children are protected by the Act?
- Who may seek relief under UCAPA?
- When and where may relief be sought?
- What are the pleading and notice requirements?
- What are risk factors for abduction?
- What is the required showing for issuance of an abduction prevention order?
- What must every abduction prevention order include?
- What other prevention provisions may be included in the order?
- What relief is available when abduction is imminent or in progress?
- What is the duration of an abduction prevention order?
- What safeguards protect against misuse of the Act?

13. Prof. Elrod's unwavering dedication to the project, even as she underwent unexpected surgery and post-operative treatment, raised the bar on professionalism. Her resilience and good humor awed and amazed this observer.

14. Cynthia Bosco (California), Vincent C. Deliberato, Jr. (Pennsylvania), W. Michael Dunn (New Hampshire), Gorman Houston, Jr. (Enactment Plan Coordinator; Alabama), Peter K. Munson (Texas), Marian Opala (Oklahoma), Cam Ward (Alabama), Howard Swibel (*Ex officio*, NCCUSL President; Illinois), Tom Bolt (*Ex officio*, Division Chair member; Virgin Islands).

15. Bruce A. Boyer (Illinois), American Bar Association Advisor.

16. Jeff Atkinson, American Bar Association Section of Family Law; Richard Barry, American Academy of Matrimonial Lawyers; Patricia M. Hoff, legal consultant; Teresa Lauderdale, parent; Prof. Robert Spector, University of Oklahoma Law Center; Jenni Thompson, consultant, formerly with the Polly Klaas Foundation; Prof. Merle Weiner, University of Oregon School of Law; Lawrence R. Whyte, parent.

17. Drafting committee meetings occurred on April 9–11, 2004, September 10–12, 2004, April 8–10, 2005, November 11–12, 2005, March 17–19, 2006, and April 28–29, 2006. In addition, the drafting committee convened for the Act's first reading at NCCUSL's annual conference on July 26–27, 2005, and on July 10–13, 2006, for second reading, at which time UCAPA was approved and recommended for enactment.

18. http://www.nccusl.org/Update/CommitteeSearchResults.aspx?committee=236.

A. Purpose

The Act's purpose is to prevent child abduction. As explained in the Prefatory Note, UCAPA is "premised on the general principle that preventing abduction is in a child's best interests."[19]

B. Children Protected by the Act

The Act seeks to protect unemancipated children under age 18[20] from abduction, which is defined to mean "wrongful removal" or "wrongful retention."[21] Wrongful removals and retentions together include the taking, keeping, or concealing of a child in violation of custody or visitation rights "given or recognized under the law of this state."[22]

The definition is intentionally broad[23] to protect children from the risk of being wrongfully removed or retained at any time—whether before a child custody determination or in violation of an existing child custody determination. The Act is responsive to the reality that many children are wrongfully removed or retained pre-decree by one parent in violation of the other parent's equal rights.

C. Petitioners Under the Act

UCAPA sections 4(b) and 4(c) provide that prevention measures may be sought by:

- a party to a child custody determination;[24]
- another individual or entity having a right under state law to seek a child custody determination for the child; and

19. *See supra* note 4.

20. UCAPA § 2(2) (definition of "child"). See also UCAPA § 10(2) ("An abduction prevention order remains in effect until the earliest of . . . the emancipation of the child….").

21. UCAPA § 2(1) ("Abduction"); UCAPA § 2(10) ("'Wrongful removal' means the taking of a child that breaches rights of custody or visitation given or recognized under the law of this state."); UCAPA § 2(11) ("'Wrongful retention' means the keeping or concealing of a child that breaches rights of custody or visitation given or recognized under the law of this state.").

22. *Id.*

23. UCAPA's broad scope finds precedent in the Hague Convention on the Civil Aspects of International Child Abduction (Convention), and the International Child Abduction Remedies Act (ICARA), 42 U.S.C. §§ 11601 et seq., the federal law implementing the Convention in the U.S. The Convention's prompt return remedy applies when children are wrongfully removed or retained pre- and post-decree. ICARA defines the Convention terms "wrongful removal or retention" and "wrongfully removed or retained" to include "a removal or retention of a child before the entry of a custody order regarding that child." 42 U.S.C. § 11603(f)(2).

24. As defined in UCAPA § 2(3), "child custody determination" includes "a judgment, decree, or other court order . . . providing for visitation with respect to a child."

- a prosecutor or other public authority designated under section 315 of the UCCJEA.[25]

The Act also grants courts authority to order prevention measures *sua sponte*. Section 4(a) provides that "A court on its own motion may order abduction prevention measures in a child-custody proceeding if the court finds that the evidence establishes a credible risk of abduction of the child."[26] The import is that courts can issue abduction prevention orders in the context of child custody proceedings even if a UCAPA petition has not been filed by a person or entity noted above. The only limitation on issuing relief *sua sponte* is under Section 9 of UCAPA, discussed *infra*.

25. Arizona (ARIZ. REV. STAT. ANN. § 25-1065, prosecutor); Arkansas (ARK. CODE ANN. § 9-19-315, prosecutor or public official); California (CAL. FAM. CODE § 3455 (West 2006), district attorney); District of Columbia (D.C. CODE § 16-460315 (2001), attorney general); Florida (FLA. STAT. § 61.538, state attorney); Georgia (GEORGIA CODE ANN. § 19-9-95, district attorney); Hawaii (HAW. REV. STAT. § 583A-315, attorney general and prosecuting attorneys); Idaho (IDAHO CODE ANN. § 32-11-315, county prosecuting attorney); Illinois (ILL. COMP. STAT. 750 ILCS 36/315, state's attorney or other appropriate public); Indiana (IND. CODE § 31-21-18(a), prosecuting attorney or other appropriate public official); Kansas (KAN. STAT. ANN. § 38-1372, prosecutor); Kentucky (KY. REV. STAT. § 403.870, county attorney or other appropriate public official; KY. REV. STAT. § 403.872, peace officer); Louisiana (LA. REV. STAT. ANN. 13:1837 (2007), prosecutor or other appropriate public official, effective 8/15/2007); Maine (ME. REV. STAT. ANN. tit. 19, § 1775, prosecutor); Maryland (MD. CODE ANN., FAM. LAW § 9.5-315, attorney general); Michigan (MICH. COMP. LAWS. § 722.1314, prosecutor or attorney general); Minnesota (MINN. STAT. § 518D.315, prosecutor or other appropriate public official); Mississippi (MISS. CODE ANN. 1972, § 93-27-315, prosecutor or other appropriate public official); Montana (MONT. CODE ANN. § 40-7-315, prosecutor); Nebraska (NEB. REV. STAT. § 43-1262 (1943), county attorney or the attorney general); Nevada (NEV. REV. STAT. § 125A.565, district attorney or the attorney general); New Jersey (N.J. STAT. ANN. § 2A:34-89, prosecutor or other appropriate official); New Mexico (N.M. STAT. § 40-10A-315 (1978), prosecutor or other appropriate public official); New York (N.Y. DOM. REL. LAW § 77-n (McKinney 1978), prosecutor or other appropriate public official); North Carolina (N.C. GEN. STAT. § 50A-315, prosecutor or other appropriate public official); North Dakota (N.D. CENT. CODE § 14-14.1-35, State's Attorney); Ohio (OHIO REV. CODE ANN. § 3127.45, prosecutors); Oklahoma (OKLA. STAT. tit. 43, § 551-315, district attorney); Oregon (OR. REV. STAT. § 109.821, district attorney); Pennsylvania (PA. CONS. STAT. ANN. § 5455, prosecutor or other appropriate public official); Rhode Island (R.I. GEN. LAWS § 15-14.1-37 (1956), prosecutor or other public official); South Carolina (S.C. CODE ANN. § 20-7-6078, prosecutor); South Dakota (S.D. Codified Laws § 26-5B-315, prosecutor or other appropriate public official); Tennessee (TENN. CODE ANN. § 36-6-239, prosecutor or other appropriate public official); Texas (TEX. FAM. CODE ANN. § 152.315, prosecutor or other appropriate public official); U.S. Virgin Islands (V.I. CODE ANN. tit. 16, § 140k, prosecutor); Utah (UTAH CODE ANN. § 78-45c-315 (1953), prosecutor or attorney general); Washington (WASH REV. CODE § 26.27.541, prosecutor or attorney general); West Virginia (W. VA. CODE § 48-20-315, prosecutor or other appropriate public official); Wisconsin (WIS. STAT. §§ 822.45, prosecutor); Wyoming (WYO. STAT. ANN. §§ 20-5-415, prosecutor or other appropriate public official).

26. Note that the California and Texas prevention statutes also provide for courts to act on their own motion in prevention cases, though these statutes are distinguishable from UCAPA. *See infra* note 54 for the text of the California and Texas statutes, as well as an analysis of the relationship between UCAPA §§ 4(a) and 8(b).

1. PARENTS

The typical petitioner will be a parent who is apprehensive that the other parent plans to "wrongfully remove" or "wrongfully retain" the child, as these terms are defined in UCAPA sections 2(10) and 2(11).[27] Custodial and noncustodial parents, even in the absence of a custody determination, may petition for prevention measures pursuant to UCAPA in most circumstances.[28]

In pre-decree situations, both parents have joint custody rights by operation of law. This Act seeks to reduce the risk that one parent will unilaterally and without consent interfere with the other's custody rights by removing or retaining the child, and allows a petitioner to seek an abduction prevention order under the Act to deter such conduct. Accordingly, either parent may seek prevention measures before custody has been adjudicated when there is a credible risk of abduction.

When there is a child custody/visitation determination in place, the petitioner would seek measures and conditions to prevent the respondent from violating the order or, put another way, to compel respondent's compliance with the order. For instance, the custodial parent may seek prevention measures when there is a credible risk that the noncustodial parent will take the child out of the country in violation of the order, just as the noncustodial parent may seek prevention measures when there is a credible risk that the custodial parent will refuse to send the child for the summer visit prescribed in the order. When, as in the latter example, the perceived risk pertains to a wrongful retention, a court may order suitable relief, with the exception of a warrant under Section 9 of UCAPA.[29]

2. PROSECUTORS

Albeit less typical, a prosecutor or other public official authorized by the UCCJEA[30] to locate a child, obtain the return of a child, or enforce a child custody determination may also petition under UCAPA for prevention measures, including, but not limited to, a warrant to take physical custody of a child in exigent circumstances addressed in Section 9 of UCAPA.

27. *See supra* note 21.

28. A "warrant to take physical custody of child" authorized by UCAPA § 9 is only available in imminent wrongful removal cases (*i.e.,* to prevent the imminent taking of a child). It may not be issued in imminent wrongful retention of a child (*i.e.,* to prevent the keeping or concealing of a child).

29. *See infra* note 73 and accompanying text.

30. For a description of the prosecutor's role under the UCCJEA, including a profile of California prosecutors' long-standing experience under the statutory prototype for UCCJEA §§ 315–317, *see* P. Hoff, *The Uniform Child Custody Jurisdiction and Enforcement Act* (JUV. JUST. BULL.) (OJJDP Dec. 2001), *available at* http://www.ncjrs.gov/pdffiles1/ojjdp/189181.pdf.

Currently, prosecutors (or other designated officials) in forty-one jurisdictions[31] have been authorized by the UCCJEA to resolve child abduction cases using civil means. Prosecutors inclined to exercise their discretionary UCCJEA authority[32] may find it cost effective to seek civil remedies under UCAPA (in particular, a warrant under Section 9 of UCAPA) to prevent abductions, thereby avoiding the substantially higher costs of prosecuting abductors.

3. "Another Individual or Entity"

The language in Section 4(b) of UCAPA enables parents, others individuals (*e.g.*, grandparents), and entities (*e.g.,* child welfare agencies) with standing to seek a child custody determination to petition for abduction prevention measures. The right to seek relief is based on the right under state law to seek a child custody determination (which by definition includes a visitation determination[33]).

D. Timing

The Act makes it possible to petition for prevention measures at any time there is a credible risk of abduction with respect to a child protected by the Act. Jurisdictional requirements limit where relief may be sought.

E. Jurisdiction

A UCAPA petition may only be filed in a state court having jurisdiction to make a child custody determination respecting the child at risk of abduction, whether by initial order, modification order, or temporary emergency order.[34] In all but the five jurisdictions that still follow the UCCJA,[35] the UCCJEA governs jurisdiction over UCAPA actions. The Parental Kidnapping Prevention Act must also be considered.[36]

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31. See *supra* note 25.

32. Through a U.S. Department of Justice initiative, training is available to prosecutors interested in learning more about their civil authority under the UCCJEA in child abduction cases. For information about the *Prosecutors' Strategies in Child Abduction Cases* course, visit http://www.amber-net.org. Click on "Prosecutors."

33. *See supra* note 24.

34. UCAPA § 5. In a departure from earlier drafts, the March 6, 2006 draft eliminated personal jurisdiction as a basis for exercising jurisdiction over a UCAPA petition. The change was made to ensure consistency with the UCCJEA.

35. Massachusetts, Missouri, New Hampshire, Vermont, Puerto Rico.

36. States exercising child custody jurisdiction must do so consistently with the Parental Kidnapping Prevention Act (PKPA), 28 U.S.C. § 1738A, in order for their custody determinations to be entitled as a matter of federal law to nationwide enforcement. States exercising jurisdiction pursuant to the UCCJA may run afoul of the PKPA's home state preference and

1. INITIAL JURISDICTION

The petitioner need not have a child custody determination to seek prevention measures under UCAPA. In pre-decree cases where there is no custody determination (because custody has never been litigated or an initial child custody proceeding is pending), the petitioner may seek a custody order with appropriate prevention provisions from a court with jurisdiction to make a child custody determination. Petitions for initial custody determinations, including petitions for prevention measures, normally would be filed in the child's "home state."

Ideally, prevention concerns will be anticipated and addressed in the initial custody determination, with the goal of deterring future violations (*i.e.,* the taking, retention, or concealment of the child in violation of custody and visitation rights specified in the order).

2. MODIFICATION JURISDICTION

When the need for prevention measures did not exist or was not anticipated at the time of the initial custody determination, a petitioner could seek to have the existing order modified to incorporate prevention measures to reduce the risk of future (or repeat) abductions. The UCAPA petition would be filed in a court having modification jurisdiction. Look first to the decree court to determine if it has, and will exercise, exclusive continuing jurisdiction. If so, the UCAPA petition should be filed there.

3. TEMPORARY EMERGENCY JURISDICTION

A petitioner may seek relief under UCAPA on emergency grounds. Under Section 5(b) of UCAPA, "a court of this state has temporary emergency jurisdiction under [the UCCJEA[37] or UCCJA] if the court finds a credible risk of abduction." The comment to Section 5 of UCAPA explains that the Act "equates a credible risk of abduction with threatened mistreatment or abuse for emergency jurisdiction purposes." The intent is to allow a court to exercise emergency jurisdiction to enter a temporary abduction prevention order if the child is present in the state and it is necessary in an emergency to protect the child because of a credible risk of abduction.

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continuing jurisdiction provisions, with the resulting effect that sister states may not enforce their custody determinations. Courts exercising jurisdiction pursuant to the UCCJEA, which was purposely modeled on the PKPA, can expect a sister state's court to enforce and not modify their orders.

37. UCCJEA § 204(a) provides: "A court of this State has temporary emergency jurisdiction if the child is present in this State and the child has been abandoned or it is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse."

When UCCJEA emergency jurisdiction is invoked, all of the restrictions and requirements of Section 204 of the UCCJEA are incorporated by reference. Thus, a prevention order entered on the basis of emergency jurisdiction will be a temporary order. It may be necessary (depending upon whether the emergency order ripens into a final determination or the court with jurisdiction defers to the emergency court following judicial communication) for petitioners to file for prevention measures in the court having jurisdiction under sections 201–203 of the UCCJEA.[38]

Note that not all prevention orders are emergency orders and that courts need not exercise emergency jurisdiction to issue abduction prevention orders when there is another basis for doing so (*i.e.*, initial, exclusive continuing, or modification jurisdiction).

F. Pleading Requirements

A petition for relief under UCAPA must be verified and provide the information specified in Section 6 of UCAPA, which incorporates by reference UCCJEA pleading requirements and confidentiality protections.[39] The petition must allege risk factors for abduction, including but not limited to those listed in Section 7 of UCAPA (discussed *infra*).

Required information about the parties' relevant legal histories (*i.e.,* existing custody determinations; previous prevention or domestic violence proceedings; criminal arrests for domestic violence, stalking or child abuse or neglect)[40] could affect a court's determination of, and response to, abduction risk. A child custody determination would inform the court of the parties' respective rights, from which the court might surmise a parent's right to relocate with the child. Evidence of previous abductions and/or past violence may reveal to the court when a petitioner is using the Act as a weapon against the other parent instead of as a shield to protect a child from abduction.

Beyond the required information, the petition should provide detailed supporting evidence, and the prayer for relief should request specific pre-

38. UCCJEA § 201 (Initial jurisdiction), § 202 (Exclusive, continuing jurisdiction), § 203 (Jurisdiction to modify determination).

39. *See* UCCJEA § 209 (or the comparable section of state law) for applicable pleading requirements. UCCJEA § 209 or state domestic violence law may also protect certain information (such as past and present addresses of the child and respondent) from disclosure.

40. *See* comment to UCAPA § 6: "The requirement for information on domestic violence or child abuse is to alert the court to the possibility that a batterer or abuser is attempting to use the Act. Domestic violence underlies large numbers of parental kidnapping. . . . The court should not allow a batterer to use this Act to gain temporary custody or additional visitation in an uncontested hearing. A person who committed domestic violence or child abuse poses a risk of harm to the child. Such a person, however, may still seek relief in a contested hearing where the issues can be fully examined by the court. . . ."

vention measures including, but not limited to, select options set forth in sections 8 and 9 of UCAPA.

G. Notice

According to the last paragraph of the comment to Section 6 of UCAPA, "notice and opportunity to be heard should be given according to state law, and may be by publication if other means are ineffective." Perhaps the reason this important point is made in a comment rather than statutory text is that the entire Act is premised on relief being sought in courts validly exercising child custody jurisdiction. To do so requires due process notice to affected parties. The requirements are set forth in the UCCJEA (or UCCJA) and the PKPA.

Section 9 of UCAPA allows for a court to issue an ex parte pick-up order to prevent a child's imminent wrongful removal. The respondent must be served virtually simultaneously with the execution of the warrant and is entitled to be heard promptly thereafter.[41]

H. Abduction Risk Factors

A key element of this Act is the list of risk factors set forth in Section 7, which will help parents frame their prevention requests and courts identify children at risk of abduction. Section 7 of UCAPA, along with the Section 8 list of abduction prevention provisions, are the crux of the Act. Both sections are essential reading for anyone involved in an abduction prevention case.

The listed risk factors address potential intrastate, interstate and international abductions. A history of abduction, attempted abductions, and threats to abduct top the list,[42] followed by abduction planning activities[43] and intrafamily violence and conduct violative of an order.[44] The number and strength of the respondent's ties to the state and country, and other states or countries, are among the listed factors.[45] When a risk of international abduction is specifically alleged, evidence may be presented regarding potential legal and practical obstacles to securing the child's return from the destination country,[46] and the potential in that country for harm

41. *See* text under the heading "§ 9 Warrant to Take Physical Custody of Child."
42. UCAPA at § 7(a)(1)–(2).
43. *Id.* at § 7(a)(3)(A)–(F).
44. *Id.* at § 7(a)(4)–(5).
45. *Id.* at § 7(a)(6)–(7).
46. When the alleged abduction risk involves a potential wrongful removal to, or retention in, a country party to the Hague Convention on the Civil Aspects of International Child Abduction, UCAPA recognizes that Hague countries may be noncompliant with the Convention

to the child.[47] Other factors focus on citizenship and immigration status that could affect a party's opportunity for contact with the child, and certain fraudulent or criminal behavior.[48] The list of risk factors, though lengthy, is not exhaustive.[49] Petitioners may offer evidence of conduct not expressly mentioned in the Act.[50]

A prevention case is not meant to be one-sided. Courts are required to consider evidence regarding both parties.[51] The Act is silent about the weight the evidence is to be given. A petitioner will allege risk factors, including any from the list set forth in Section 7 of UCAPA, with supporting evidence concerning the respondent's conduct (and likely destination country, when the alleged risk is an international abduction). The respondent may counter with allegations about the petitioner in its responsive pleading. Additionally, Section 7(b) of UCAPA requires a court hearing a UCAPA petition to "consider any evidence that the respondent believed in good faith that the respondent's alleged conduct was necessary to avoid imminent harm to the child or respondent and any other evidence that may be relevant to whether the respondent may be permitted to remove or retain the child."[52]

I. Abduction Prevention Order Required Upon Finding Credible Risk of Abduction

Courts are required to issue abduction prevention orders upon finding a credible risk of abduction[53] (*i.e.,* wrongful removal or retention) based on

and/or lack procedures for enforcing return orders under the Convention, or may not be U.S. treaty partners. These are listed risk factors; *see* UCAPA § 8(B)(i) – (iii). Country compliance reports are available on the State Department Web site. *See infra* note 87.

47. UCAPA § 7(a)(8)(A)–(G).

48. UCAPA § 7(a)(9)–(12).

49. For instance, social scientists have identified six personality profiles that may be helpful in predicting which parents may pose a risk of abduction. They are reported in *Family Abductors: Descriptive Profiles and Preventive Interventions*, *supra* note 7, and summarized in *Family Abduction*, *supra* note 6.

50. UCAPA § 7(a)(13) provides that the court shall consider any evidence that the petitioner or respondent "has engaged in any other conduct the court considers relevant to the risk of abduction."

51. UCAPA § 7(a) ("In determining whether there is a credible risk of abduction of a child, the court shall consider any evidence that the petitioner or respondent . . .") Even in UCAPA § 9 *ex parte* warrant cases, the respondent is entitled to a hearing promptly after the warrant is executed.

52. See the concluding two paragraphs of the UCAPA § 7 comment for an explanation of how this section might come into play when the respondent is legitimately seeking to relocate or escape domestic violence.

53. Early drafts of the Act required a petitioner to establish a *substantial risk* of abduction in order to trigger issuance of an abduction prevention order. The March 6, 2006 draft adopted the *credible risk* standard found in the final Act. "Credible risk" represents a middle ground

evidence presented at a hearing under the Act. Courts can also issue prevention orders on their own motion[54] in other child custody proceedings when the evidence establishes a credible risk of abduction.

J. Contents of an Abduction Prevention Order

Every abduction prevention order must include certain mandatory provisions; the remainder of the order is at the court's discretion.

1. Mandatory Provisions

At a minimum, UCAPA Section 8(b) requires every abduction prevention order to include the five provisions set forth in sections 8(a)(1)–(5):

> (1) the basis for the court's exercise of jurisdiction; (2) the manner in which notice and opportunity be heard were given to the persons entitled to notice of the proceedings; (3) a detailed description of each party's custody and visitation rights and residential arrangements for the child; (4) a provision stating that a violation of the order may subject the party in violation to civil and criminal penalties; and (5) identification of the child's country of habitual residence at the time of the issuance of the order.

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between the earlier drafts and the California statute, which simply requires *a risk* of abduction. It finds support in the Hague Conference on Private International Law's *Guide to Good Practice* (*supra* note 10), which recommends that domestic legal provisions should enable State authorities to respond rapidly and effectively where there is a *credible risk* of abduction.

54. UCAPA § 8(b) provides: "If, at a hearing on a petition under this [act] or on the court's own motion, the court after reviewing the evidence finds a credible risk of abduction of the child, the court shall enter an abduction prevention order." When UCAPA § 8(b) is read in conjunction with UCAPA § 4(a) (*see* text accompanying note 26), there is some ambiguity as to whether it is mandatory or discretionary for a court to issue a prevention order on its own motion if the evidence establishes a credible risk of abduction. To reconcile the seeming incongruity, it is useful to compare the purposes of the two sections. UCAPA § 4 establishes standing to use UCAPA. It does not, however, require its use. Individuals and entities have the right under UCAPA §§ 4(b) and 4(c)—but not the obligation—to seek relief pursuant to the Act. By analogy, UCAPA § 4(a) confers on courts the authority, but not the duty, to act *sua sponte*. UCAPA § 8(b) describes the relief that must be ordered when a court, acting on it own motion pursuant to the authority granted by UCAPA § 4(a), finds a credible risk of abduction. In essence, when a court acts *sua sponte* and finds a credible risk of abduction, it must issue relief in accordance with UCAPA § 8(b).

The Texas and California prevention statutes also authorize courts to act on their own motion in prevention cases, but the statutes are worded and operate differently. Cal. Fam. Code § 3048(b)(1) provides: "In cases in which the court becomes aware of facts which may indicate that there is a risk of abduction of a child, the court shall, either on its own motion or at the request of a party, determine whether measures are needed to prevent the abduction of the child by one parent. To make that determination, the court shall consider the risk of abduction of the child, obstacles to location, recovery and return if the child is abducted, and potential harm to the child if he or she is abducted." Tex. Fam. Code § 153.501 provides: "In a suit, if credible evidence is presented to the court indicating a potential risk of the international abduction of a child by a parent of the child, the court, on its own motion or at the request of a party to the suit, shall determine . . . whether it is necessary for the court to take one or more of the measures described by Section . . . to protect the child from the risk of abduction by the parent."

Because these provisions are a matter of good drafting that help not only to prevent abductions but also to facilitate enforcement of custody determinations, the Act expressly provides that courts may include these provisions in their orders even when abduction prevention provisions are not ordered.[55] In practice, they should be included in every child custody determination.

Add to the above list of mandatory provisions other "measures and conditions, including those in subsections (c), (d), and (e), that are reasonably calculated to prevent abduction of the child, giving due consideration to the custody and visitation rights of the parties."[56] The court may choose which measures and conditions to include from the statutory list or otherwise;[57] there is no fixed formula.[58] Optimally, courts will issue abduction prevention orders capable of achieving their objective without unduly burdening parental rights, recognizing, however, that restrictive measures are warranted under certain circumstances.[59]

To determine what is reasonably calculated to prevent abduction, the court is required to consider "the age of the child, the potential harm to the child from an abduction,[60] the legal and practical difficulties of returning the child to the jurisdiction if abducted,[61] and the reasons for the potential abduction, including evidence of domestic violence, stalking, or child abuse or neglect."[62] (Footnotes added). From a practical standpoint, this

55. UCAPA § 8(a). *See also* UCAPA § 8 cmt., paras. 2–5.

56. UCAPA § 8(b).

57. UCAPA § 8(c)–8(e).

58. The studies cited in note 7, *supra*, offer useful guidance in fashioning prevention orders because they correlate specific risk factors with suggested interventions.

59. In *Family Abductors: Descriptive Profiles and Preventive Interventions*, *supra* note 7, at 7, social scientists Johnston and Girdner:

> propose that the more restrictive measures suggested in this Bulletin are warranted under three conditions: (1) When the risks for abduction are particularly high, as indicated by prior custody violations, clear evidence of plans to abduct, and overt threats to take the child; (2) When obstacles to locating and recovering an abducted child would be particularly great, as they would be in uncooperative jurisdictions in some States and abroad—especially in countries not party to the Hague Convention; and (3) When the child faces substantial potential harm from an abducting parent, such as a parent who has a serious mental or personality disorder, a history of abuse or violence, or little or no prior relationship with the child.

60. *See supra* note 6. For insights into the child's perspective on being abducted, visit the Web site of Take Root (www.takeroot.org), a nonprofit organization of adults who were abducted as children by a parent or family member. Also visit the Polly Klaas Foundation's parental kidnapping Web site at http://www.stopfamilyabductionsnow.org. Click the link for "Families and Their Stories."

61. *See* OBSTACLES REPORT, *supra* note 10; FAMILY ABDUCTION, *supra* note 6; A FAMILY RESOURCE GUIDE ON INTERNATIONAL PARENTAL KIDNAPPING (OJJDP Jan. 2007), *available at* http://www.ncjrs.gov/pdffiles1/ojjdp/215476.pdf; Patricia Hoff, Parental Kidnapping: Prevention and Remedies (ABA Center on Children and the Law, rev. 2000) [hereinafter cited as Prevention and Remedies], *available at* http://www.abanet.org/ftp/pub/child/pkprevrem.doc.

62. UCAPA § 8(b).

means that the court must consider petitioner's evidence as to the potential harm to the child and obstacles to securing the child's return if an abduction were to occur,[63] as well as respondent's evidence in explanation and/or justification for the alleged potential conduct.

2. Other Prevention Provisions

The prevention provisions, measures, and conditions set forth in Section 8 of UCAPA are neither exhaustive nor exclusive.[64] A petitioner may request, and a court may order, preventive measures not included in the Act. The organization of the prevention measures in the Act may suggest others. Specifically, sections 8(c), 8(d), and 8(e) of UCAPA, respectively, list: (i) prerequisites to, and restrictions on, travel with the child; (ii) prerequisites to exercising custody or visitation; and (iii) urgent measures to prevent imminent abductions.

By way of example only—and not as a substitute for reading Section 8 of UCAPA—the court may order the party traveling with the child to provide the other party with a travel itinerary, contact information for the child while away, and copies of travel documents[65] (such as airline tickets). The respondent may be prohibited from removing the child from the country (and other specified locations) without prior consent or applying for new or replacement passports or visas for the child, or may be required to surrender U.S. and foreign passports for the child. The court may order supervised visitation or require the respondent to post a bond or other security.[66] Imminent and in-progress abductions may necessitate special court orders (discussed, *infra)*.

Parents concerned about domestic abductions are advised also to consider measures aimed principally at international abductions, because the relative ease of travel often leaves that door open. It is far better to prevent an international abduction than it is to navigate the complexities of securing a child's return from abroad—a result that is never guaranteed. Certain precautions are worth considering in every case, such as requesting entry of the child's name into the child's passport issuance alert pro-

63. *See* Family Abduction, *supra* note 6, chapters titled *Preventing Abduction* and *Preventing International Abduction.*

64. *See* UCAPA § 8(f) ("The remedies provided in this [act] are cumulative and do not affect the availability of other remedies to prevent abduction."), and UCAPA § 8(e)(3) (To prevent imminent abduction of a child, a court may "grant any other relief allowed under the law of this state other than this [act].").

65. "Travel document" is a defined term. *See* UCAPA § 2(9).

66. Of the reported prevention cases, many involve bonds, supervised visitation and passport controls. Case law summaries and citations are available, respectively, *in* Prevention and Remedies, *supra* note 61, and Family Abduction, *supra* note 6 (in the Appendix titled *Directory of Family Abduction Laws and Resources*).

gram.[67] Yet beware that this is an imperfect solution in cases involving dual national children, because foreign governments may freely issue travel documents to their citizens without regard to U.S. court orders; other preventive measures may also be beneficial (*e.g.*, supervised visitation, bonds, mirror orders).

Recall that custodial and noncustodial parents (and certain others) may seek prevention orders under UCAPA. Thus, the petitioner may be a custodial parent and the respondent a noncustodial parent, or vice versa. Prevention orders may bind one or both parties: most apply exclusively to the respondent, one applies only to the petitioner,[68] and several apply to either or both.[69] One provision directed at a respondent may only be ordered upon petitioner's request.[70]

Judges writing orders pursuant to UCAPA may find it helpful to review, and possibly adapt, the form California judges use when issuing prevention orders (see page 54). At a minimum, language satisfying the mandatory requirements of UCAPA sections 8(a)(1)-(5) would have to be added. The form is available online at http://www.courtinfo.ca.gov/forms/documents/fl341b.pdf.

K. Relief When Abduction Is Imminent

Section 8(e) of UCAPA lists remedies available to prevent imminent abductions.[71] With the exception of the section 9 warrant incorporated by

67. UCAPA § 8(4)(a). A request form for entering a child's name into the passport issuance alert program is available on the State Department's Web site at http://www.travel.state.gov/pdf/entrychild_issuance.pdf. Other international abduction prevention information is available on the State Department Web site. *See infra* note 87.

68. UCAPA § 8(c)(4)(A) (directs the petitioner to place the child's name in the passport name-check system).

69. UCAPA § 8(c)(1) (applies to "a party traveling with the child"); § 8(c)(3) (requires a party to register the order in another state).

70. UCAPA § 8(6) ("upon the petitioner's request, a requirement that the respondent obtain an order from the relevant foreign country containing terms identical to the child-custody determination issued in the United States."). Requiring respondent to obtain a so-called "mirror order" can backfire if the foreign court addresses custody on the merits. Thus, the burden is placed on the petitioner to request this measure specifically, presumably after assessing the risks (which may be particularly challenging for pro se petitioners). Information about foreign law may be available from the State Department Office of Children's Issues and from the National Center for Missing and Exploited Children, International Division. Contact information is provided in note 87, *infra.*

71. UCAPA § 8(e) provides: "To prevent imminent abduction of a child, a court may: (1) issue a warrant to take physical custody of the child under Section 9 or the law of this state other than this [act]; (2) direct the use of law enforcement to take any action reasonably necessary to locate the child, obtain return of the child, or enforce a custody determination under this [act] or the law of this state other than this [act]; or (3) grant any other relief allowed under the law of this state other than this [act]."

reference in Section 8(e)(1), the remedies apply to both wrongful removals and retentions. Each subparagraph makes clear that the court may also issue relief under other state law.[72] This is an important reminder to consider all available remedies, not only those found in UCAPA.

In fact, there are circumstances when effective relief may *only* be available under state law other than the UCAPA. Imminent wrongful retention cases that cannot be remedied under Section 9 of UCAPA (which is limited to imminent wrongful removals), or other sections of the Act, are an example. It might be possible to obtain injunctive or other relief to prevent an imminent wrongful retention that could not be redressed under section 9.[73]

1. Section 9 Warrant to Take Physical Custody of Child

Extraordinary relief in the form of a warrant to take physical custody of child ("warrant," "§ 9 warrant," "pick up order"), issued ex parte, is available under Section 9(a) if a petition filed under UCAPA alleges and "the court finds that there is a credible risk that the child is imminently likely to be wrongfully removed." This relief is neither required nor automatic, but it is an effective intervention that courts can use to prevent an imminent wrongful removal.

A Section 9 warrant is reserved for urgent situations and only when certain conditions are met. As noted above, a warrant is only available to prevent the imminent wrongful removal of a child. A court may not issue a Section 9 warrant unless a UCAPA petition has been filed.[74] This contrasts with all other prevention measures in the Act, which may be ordered by a court *sua sponte* in *any* child custody proceeding.[75] However, the absence of a specific prayer for relief in a UCAPA petition does not constrain a court from issuing a warrant under Section 9.

72. *Id. See also* UCAPA §§ 8(f) and 9(h).

73. Wrongful retentions not remediable with a UCAPA § 9 warrant might include, for example, the anticipated refusal by a noncustodial parent to return a child after a lawful visit, or by a custodial parent to allow the child to visit as prescribed by the custody order. State law other than UCAPA may allow for issuance of an injunction to compel compliance with the order. Alternatively, enforcing an existing custody/visitation determination would be a viable remedy if the anticipated wrongful retention were to occur. Expedited enforcement procedures, most with "next day" hearings, are available in most states under the UCCJEA. Prevention measures could be sought under this Act in the appropriate court to deter future compliance problems. In a pre-decree wrongful retention scenario, a party could seek prevention measures (other than a § 9 warrant) under UCAPA in the context of a proceeding for an initial custody determination or temporary emergency order.

74. UCAPA § 9(a).

75. *Id.* at § 4(a).

L. Relevant Evidence: Petition and Database Searches

The court may issue a Section 9 warrant based on allegations in the UCAPA petition.[76] In addition, Section 9(d) authorizes courts to order a search of computerized federal and state databases[77] for information about the parties' histories with respect to domestic violence, stalking, or child abuse or neglect. Courts may have second thoughts about issuing ex parte relief to petitioners with abusive backgrounds. If the court determines to issue the warrant, this information may be useful in choosing an appropriate interim placement for the child pending the hearing.

These discretionary database searches may be ordered "if feasible."[78] The court should weigh the information that may be gleaned from database searches with the time it takes to run them, as time is of the essence in imminent removal cases. If information can be obtained without delay—and in many cases it can—then searches are worth conducting. Judges unfamiliar with conducting database searches will find the comment to this section particularly instructive.

The Act itself does not require a hearing.[79] Thus, under Section 9(a) the court may issue the warrant on the basis of the allegations in the petition if it finds "that there is a credible risk that the child is imminently likely to be wrongfully removed."

M. Contents of the Warrant

The warrant must include the four provisions set forth in Section 9(c) of UCAPA. The most important from the petitioner's standpoint is the directive to law enforcement to pick up the child. The respondent, on the other hand, will appreciate Section 9(b), which says that the warrant must set a hearing date "at the earliest possible time after the ex parte warrant is executed, but not later than the next judicial day unless a hearing on that

76. A petition for a § 9 warrant is a UCAPA petition and as such must satisfy the UCAPA § 6 pleading requirements.

77. The UCAPA § 9 comment identifies numerous databases that may have relevant information, and explains how these databases may be checked. Federal databases include National Crime Information Center (NCIC) files (e.g., protection order files; warrant files) and the national sex offender registry. States may have comparable databases and also may maintain registries of persons convicted of child abuse and neglect.

78. UCAPA § 9(d).

79. UCAPA § 9(a) differs from its prototype, UCCJEA § 311(b), which requires a court to hear the testimony of the petitioner or another witness prior to issuing a pick-up order for a child. The second paragraph of the UCAPA § 9 comment would import that requirement: "The court should hear the testimony of the petitioner or another witness before issuing the warrant. The testimony may be heard in person, by telephone, or by any other means acceptable under local law, which may include video conferencing or use of other technology."

date is impossible." Thus, it is conceivable that the hearing could be held on the same day the warrant is executed.

The warrant is enforceable intrastate and interstate. Section 9(f) of UCAPA expressly provides that "a warrant to take physical custody of a child, issued by this state or another state, is enforceable throughout this state."[80] This enables law enforcement in State A to enlist the help of law enforcement in State B to execute State A's pick-up order if/when the abductor and child are located in State B. This is an especially important tool to stop an abductor who is in flight with the child and may be traveling interstate.

The respondent must be served virtually simultaneously with the child's pick-up.[81] At the hearing, the respondent can contest the underlying allegations, and may also present evidence that the petitioner sought the warrant in bad faith or to harass. If persuaded by such evidence, the court may award the respondent reasonable attorney's fees, costs and expenses.[82]

Section 9 of UCAPA is modeled on Section 311 of the UCCJEA.[83] A critical distinction is that a UCAPA Section 9 warrant may be obtained pre- and post-decree; a custody determination need not be in effect. In contrast, a UCCJEA Section 311 warrant is only available post-decree. It must be requested in conjunction with an action to enforce an existing custody determination. To illustrate the difference, a parent may petition for a warrant under UCAPA, even though there is no custody order concerning the child, upon discovering that the other parent has secretly obtained a passport for the child and has purchased airline tickets for the two of them on a flight the same day. The parent could not seek a warrant under UCCJEA because there is no custody determination to enforce. If there is a custody order, the parent could elect to seek a warrant under UCAPA or UCCJEA.

80. The language resembles Section 4 ("Nonjudicial Enforcement of Order") of the Uniform Interstate Enforcement of Domestic Violence Protection Orders Act (*available at* http://www.law.upenn.edu/bll/ulc/uiedvoa/2002final.htm), to the effect that law enforcement officers shall enforce a valid foreign order as if it were a local order.

81. UCAPA § 9(e).

82. *Id.* at § 9(g).

83. UCCJEA § 311 authorizes and provides procedures for an enforcing court to issue a "warrant to take physical custody of child" when a child is imminently likely to be removed from the state. Issuance of a warrant under UCCJEA § 311 is tied to an enforcement action (*i.e.*, a warrant may only be issued in conjunction with proceedings to enforce an existing custody/visitation order). The UCCJEA provides no comparable relief to prevent pre-decree imminent abductions. UCAPA § 9 fills this void. It also charts new territory. Courts are authorized to assess attorney's fees against petitioners seeking UCAPA § 9 warrants in bad faith or to harass, and to search state and federal databases for parties' relevant histories to safeguard against issuance of ex parte orders that might endanger the child.

N. Duration of Abduction Prevention Orders[84]

The court may expressly provide an expiration date in the abduction prevention order. The provisions may be set to expire at different times. Absent an expiration date(s), the order remains in effect until the child turns 18 or is emancipated, or the order is modified, revoked, vacated, or superceded by a court with child custody jurisdiction.

O. Safeguards Against Misuse of the Act

UCAPA seeks to deter wrongful removal and retention of children. The operative word is "wrongful." Courts will judge from the pleadings and evidence whether the conduct sought to be prevented is wrongful and, if so, will issue suitable prevention measures. The Prefatory Note is unequivocal: "The Act is not meant to prevent a legitimate relocation action filed in accordance with the law of the state having jurisdiction to make a child custody determination nor to prevent a victim of domestic violence from escaping abuse." Numerous comments sound the same theme, shedding light on what is *not* intended as wrongful.[85] Provisions of the Act dealing with pleading requirements, evidence, and database searches seek to alert courts when the Act is being used by abductors or abusers, or for unintended purposes, and the fee-shifting provision in Section 9 enables courts to impose attorney's fees, costs, and expenses on petitioners seeking warrants in bad faith or to harass.

III. Conclusion

Anyone who has been involved in any aspect of a domestic or international child abduction case understands the truth to the adage: *Prevention is worth a pound of cure*. The Uniform Child Abduction Prevention Act is worth a pound of cure. However, it is not a panacea. The Act does not and cannot eliminate all risk of abduction, but that does not detract from its value.

Parents who have tried unsuccessfully to persuade courts to take preemptive action to prevent abductions, only to have their children abducted after being denied relief,[86] can appreciate the significance of a law that

84. UCAPA § 10.

85. *See* comments accompanying UCAPA § 5 (last paragraph), § 6 (penultimate paragraph) (quoted in note 40, *supra*), § 7 (first, fourth and fifth paragraphs), § 9 (third, fourth, and fifth paragraphs).

86. *See, e.g.*, Mubarak v. Mubarak, 420 S.E.2d 225 (Va. Ct. App. 1992). (In an earlier phase of the reported case, the mother sought to have the father's visitation supervised following his threats to kidnap the couple's three children and remove them from the United States. The court denied supervised visitation. Subsequently, the father disappeared with the three children, then

codifies risk factors for abduction. So, too, should judges appreciate the guidance this law provides. Finally there is a statutory rubric for considering parents' pleas for prevention orders and responding constructively. Judges do not need UCAPA to issue orders protecting children at risk of abduction. However, the Act transforms an *ad hoc* process into a more methodical analysis of risk factors and available interventions.

Significantly, UCAPA by its own terms does not preempt the prevention field. Neither its risk factors nor its remedies are exclusive or exhaustive. UCAPA users should consider it a starting point but not necessarily an endpoint in making abduction prevention cases and orders. Much useful prevention information and guidance is available from the National Center for Missing and Exploited Children, the Department of State Office of Children's Issues, and the Hague Conference on Private International Law.[87]

If its brief legislative history[88] is any indication, UCAPA should receive favorable consideration in legislatures across the country, especially in states that have already enacted the UCCJEA. (Indeed, by all rights, UCAPA could have been Article 4 of the UCCJEA.[89]) Importantly, UCAPA's utility is not limited to enacting states. Even before its enactment, UCAPA can serve as a valuable resource for lawyers framing prevention petitions and judges issuing abduction prevention orders. The key lies in understanding and using the Act.

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ages 4, 3, and 1. The children were located in Jordan several months later, and the mother regained physical custody through the intervention of the Jordanian government and army.)

87. The U.S. Department of State, Office of Children's Issues (OCI), handles hundreds of international child abduction cases annually, as does the International Division of the National Center for Missing & Exploited Children (NCMEC), which also has a domestic abduction caseload.

Contact OCI at 1-888-407-4747, or visit the Web site, www.travel.state.gov, for a wealth of material. From the top of the homepage, click the "Children and Family" link, then click the "International Child Abduction" link and follow all prompts beginning with "Prevention Tools."

Contact NCMEC's International Division toll free at 1-888-246-2632. Ask about NCMEC's prevention package. Take advantage of the materials available on the Web site at www.missingkids.com. From the homepage, click on "Resources for Attorneys." Then click the "International Abductions" link, followed by the "Preventing Child Abduction" link. The next page is a virtual gateway to many relevant studies, publications, and other resources, many of which are cited elsewhere in this article.

If there is a concern about a possible abduction to a country that is a U.S. treaty partner under the Hague Convention on the Civil Aspects of International Child Abduction, visit the Web site of the Hague Conference on Private International Law at www.hcch.net. Follow the prompts for the Child Abduction Section to find an array of resources about the Convention. The GUIDE TO GOOD PRACTICE, *supra* note 10, is recommended reading when the risk of international abduction is of primary concern.

88. *See supra* note 2.

89. The five jurisdictions (listed in note 35, *supra*) that have not yet enacted the UCCJEA should consider enacting it simultaneously with UCAPA. Legislative counsel responsible for codifying law should ensure UCAPA's proximity in the code to the UCCJEA.

UNIFORM CHILD ABDUCTION PREVENTION ACT

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

ANNUAL CONFERENCE
MEETING IN ITS ONE-HUNDRED-AND-FIFTEENTH YEAR
HILTON HEAD, SOUTH CAROLINA

July 7-14, 2006

WITH PREFATORY NOTE AND COMMENTS

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UNIFORM CHILD ABDUCTION PREVENTION ACT

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UNIFORM CHILD ABDUCTION PREVENTION ACT

Prefatory Note

Child abduction is a serious problem both in scope and effect. A study commissioned by the Office of Juvenile Justice and Delinquency Prevention estimated that 262,100 children were abducted in 1999; 203,900 (78 per cent) of them were abducted by a parent or family member; approximately 1000 of the abductions were international.[1] The purpose of the Uniform Child Abduction Prevention Act is to deter both predecree and postdecree domestic and international child abductions by parents, persons acting on behalf of a parent or others. Family abductions may be preventable through the identification of risk factors and the imposition of appropriate preventive measures.

The Uniform Child Abduction Prevention Act is premised on the general principle that preventing an abduction is in a child's best interests. Abducted children may suffer long-lasting harm. Federal law recognizes that parental abduction is harmful to children.[2] Child abductions can occur before or after entry of a child-custody determination. This Act allows the court to impose abduction prevention measures at any time.

Many abductions occur before a court has had the opportunity to enter a child-custody determination. Children at the center of custody disputes are at the highest risk for potential abductions.[3] Jurisdictional laws help deter abductions by specifying the proper state to handle custody litigation. The Uniform Child Custody Jurisdiction Act[4] sets out four concurrent bases for jurisdiction. Congress passed the Parental Kidnapping Prevention Act of 1980 to deter abductions, discourage interstate conflicts, and promote cooperation between states about custody matters by resolving jurisdictional conflicts.[5] The Parental Kidnapping Prevention Act prioritizes the state in which the child has lived for six months preceding the filing of the petition (the home state) as the place for custody litigation[6] and prohibits a second state from assuming jurisdiction if there is an action pending in the state that has

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[1] See DAVID FINKELHOR, HEATHER HAMMER & ANDREA J. SEDLAK, NATIONAL INCIDENCE STUDIES OF MISSING, ABDUCTED, RUNAWAY, AND THROWNAWAY CHILDREN, CHILDREN ABDUCTED BY FAMILY MEMBERS: NATIONAL ESTIMATE AND CHARACTERISTICS (Oct. 2002).

[2] International Child Abduction Remedies Act, 42 U.S.C. § 11601(a)(1)("The Congress makes the following findings: (1) The international abduction or wrongful retention of children is harmful to their well-being…"). *See also* Dorothy S. Huntington, Parental Kidnapping: A New Form of Child Abuse, available at http://www.hiltonhouse.com/articles/child_abuse=huntington.txt. (characterizing child abduction as abuse.)

[3] AMERICA'S HIDDEN CRIME: WHEN THE KIDNAPPER IS KIN 10-11 (Polly Klaas Foundation 2004). *See also* Janet R. Johnston et al., Early Identification of Risk Factors for Parental Abduction (OJJDP March 2001)(indicating that men are more likely to abduct before an order is entered while women are more likely to abduct after a child custody determination).

[4] 9 UNIF. L. ANN. Part I 115 (1988).

[5] Pub. L. No. 96-611, note 7 to 28 U.S.C. §1738A.

[6] 28 U.S.C. Section 1738A(c).

proper jurisdiction.[7] The Uniform Child Custody Jurisdiction and Enforcement Act,[8] now in 45 jurisdictions, also prioritizes home state jurisdiction notwithstanding the child's absence. Jurisdictional laws do not provide prevention measures for abduction.

Post-decree abductions often occur because the existing child-custody determinations lack sufficient protective provisions to prevent an abduction. An award of joint physical custody without a designation of specific times; a vague order granting "reasonable visitation"; or the lack any restrictions on custody and visitation make orders hard to enforce. The awareness of abduction risk factors and preventive measures available can reduce the threat of abduction by giving the court the tools to make the initial child-custody determination clearer, more specific, and more easily enforceable.

If an abduction occurs after a child-custody determination, all states have enforcement remedies. Forty-six jurisdictions use the procedures in Article 3 of the Uniform Child Custody Jurisdiction and Enforcement Act. In addition, courts can punish abductors for contempt and allow tort actions for custodial interference. Several federal laws help locate missing children[9] and criminalize international parental kidnapping.[10] While there is no federal law criminalizing interstate parental kidnapping, there is a mechanism for apprehending persons who violate state parental kidnapping laws and travel across state lines.[11] While every state criminally forbids custodial interference by parents or relatives of the child, the laws differ as to the elements of the offenses, the punishments given, and whether a child-custody determination must exist for a violation to occur.[12]

If the abduction is international, the Hague Convention on the Civil Aspects of International Child Abduction, currently in effect between the United States and fifty-five countries, facilitates the return of an abducted child to the child's habitual residence.[13] Many

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[7] 28 U.S.C.A. Section 1738A(g).

[8] 9 UNIF. L. ANN. Part I 657 (1999).

[9] Missing Children Act, 28 U.S.C. § 534 (1982); Missing Children Search Assistance Act and the National Child Search Assistance Act, 42 U.S.C. § 5779 & § 5780 (1990); and the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act of 2003, Pub. L. 108-21, 117 Stat. 650 (AMBER Alert Program).

[10] *See* International Parental Kidnapping Crime Act (IPKCA), 18 U.S.C. § 1204; The Fugitive Felon Act, 18 U.S.C. § 1073; and The Extradition Treaties Interpretation Act of 1998, 18 U.S.C. § 3181.

[11] Unlawful Flight to Avoid Prosecution, 18 U.S.C. § 1204; The Fugitive Felon Act, 18 U.S.C. § 1073. When enacting the Parental Kidnapping Prevention Act, Congress declared that the Unlawful Flight to Avoid Prosecution provision applies to cases involving parental kidnapping and interstate or international flight to avoid prosecution. Pub. L. No. 96-611, 10(a).

[12] Appendix A. Citation List of State Parental Kidnapping Statutes, National Clearinghouse for the Defense of Battered Women, The Impact of Parental Kidnapping Laws and Practice on Domestic Violence Survivors 32 (2005).

[13] *See* The Hague Convention on the Civil Aspects of International Child Abduction, 51 Fed. Reg. § 10494 et seq. (1986); the International Child Abduction Remedies Act (ICARA), 42 U.S.C. §§ 11601-11610. For a current

countries, however, have not ratified the Hague Convention on the Civil Aspects of International Child Abduction, the United States has not accepted all nations' accessions, and some countries that have ratified do not comply with the treaty obligations.

This Act is civil law and complements existing state law. This Act does not limit, contradict, or supercede the Uniform Child Custody Jurisdiction and Enforcement Act or the Uniform Child Custody Jurisdiction Act. This Act is not meant to prevent a legitimate relocation action filed in accordance with the law of the state having jurisdiction to make a child-custody determination nor to prevent a victim of domestic violence from escaping abuse.

The Uniform Child Abduction Prevention Act applies to predecree and intrastate cases, to emergency situations, and to cases in which risk factors exist and the current child-custody determination lacks abduction prevention measures. Only three states have enacted comprehensive child abduction prevention statutes;[14] two other states include provisions to reduce the risk of abduction.[15] This Act will fill a void in the majority of states by identifying circumstances indicating a risk of abduction and providing measures to prevent the abduction of children, predecree or postdecree.

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list of United States treaty partners, visit www.travel.state.gov/family/abduction/hague_issues/hague_issues_1487.html.

[14] *See* ARK. STAT. ANN. § 9-13-401-407 (2005); CAL. FAM. CODE § 3048 (2004); TEX. FAM. CODE § 153.501- § 153.503 (2003).

[15] *See* FLA. STAT. § 61.45 (2005); OR. REV. STAT. § 109.035 (2005).

UNIFORM CHILD ABDUCTION PREVENTION ACT

SECTION 1. SHORT TITLE. This [act] may be cited as the Uniform Child Abduction Prevention Act.

SECTION 2. DEFINITIONS. In this [act]:

(1) "Abduction" means the wrongful removal or wrongful retention of a child.

(2) "Child" means an unemancipated individual who is less than 18 years of age.

(3) "Child-custody determination" means a judgment, decree, or other order of a court providing for the legal custody, physical custody, or visitation with respect to a child. The term includes a permanent, temporary, initial, and modification order.

(4) "Child-custody proceeding" means a proceeding in which legal custody, physical custody, or visitation with respect to a child is at issue. The term includes a proceeding for divorce, dissolution of marriage, separation, neglect, abuse, dependency, guardianship, paternity, termination of parental rights, or protection from domestic violence.

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

(6) "Petition" includes a motion or its equivalent.

(7) "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.

(8) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States. The term includes a federally recognized Indian tribe or nation.

(9) "Travel document" means records relating to a travel itinerary, including

travel tickets, passes, reservations for transportation, or accommodations. The term does not include a passport or visa.

(10) "Wrongful removal" means the taking of a child that breaches rights of custody or visitation given or recognized under the law of this state.

(11) "Wrongful retention" means the keeping or concealing of a child that breaches rights of custody or visitation given or recognized under the law of this state.

Comment

To the extent possible, the definitions track the Uniform Child Custody Jurisdiction and Enforcement Act. The definition of a child as a person under age 18 is the same as in Section 102(2) of the Uniform Child Custody Jurisdiction and Enforcement Act. State law determines when a child becomes emancipated before age 18. This Act is limited to the abduction of minors even though the risk of abduction may apply to a disabled adult who has an appointed adult guardian.

The definition of "child-custody determination" is the same as the definition in Section 102(3) of the Uniform Child Custody Jurisdiction and Enforcement Act. This Act uses the traditional terminology of "custody" and "visitation" because that is the language used in the Uniform Child Custody Jurisdiction and Enforcement Act although local terminology may differ. The definition of a child-custody proceeding differs insignificantly from Section 102(4) of the Uniform Child Custody Jurisdiction and Enforcement Act.

The definition of abduction covers wrongful removal or wrongful retention. The definition is broad enough to encompass not only an abduction committed by either parent or a person acting on behalf of the parent but also other abductions. Generally both parents have the right to companionship and access to their child unless a court states otherwise. Abductions can occur against an individual or other entity with custody rights, as well as against an individual with visitation or access rights. A parent with joint legal or physical custody rights, by operation of law, court order, or legally binding agreement, commits an abduction by wrongfully interfering with the other parent's rights. A removal or retention of a child can be "wrongful" predecree or postdecree. An abduction is wrongful where it is in breach of an existing "child-custody determination" or, if predecree, in violation of rights attributed to a person by operation of law. The term "breaches rights of custody" tracks Article 3 of the Hague Convention on the Civil Aspects of International Child Abduction.

SECTION 3. COOPERATION AND COMMUNICATION AMONG COURTS.

Sections [110], [111], and [112] of [insert citation to the provisions of the Uniform Child

Custody Jurisdiction and Enforcement Act or its equivalent in the state] apply to cooperation and communications among courts in proceedings under this [act].

Comment

It is possible, even likely, that abduction situations will involve more than one state. Thus, there is a need for mechanisms for communication among courts, for testimony to be obtained quickly by means other than physical presence, and for cooperation between courts in different states. Sections 110, 111, and 112 of the Uniform Child Custody Jurisdiction and Enforcement Act provide mechanisms to deal with these issues. States that do not have the Uniform Child Custody Jurisdiction and Enforcement Act may want to include these provisions or use some similar provision of existing state law.

SECTION 4. ACTIONS FOR ABDUCTION PREVENTION MEASURES.

(a) A court on its own motion may order abduction prevention measures in a child-custody proceeding if the court finds that the evidence establishes a credible risk of abduction of the child.

(b) A party to a child-custody determination or another individual or entity having a right under the law of this state or any other state to seek a child-custody determination for the child may file a petition seeking abduction prevention measures to protect the child under this [act].

(c) A prosecutor or public authority designated under [insert citation to Section 315 of the Uniform Child Custody Jurisdiction and Enforcement Act or applicable law of this state] may seek a warrant to take physical custody of a child under Section 9 or other appropriate prevention measures.

Comment

An abduction may occur before a child-custody proceeding has commenced, after the filing but before entry of a child-custody determination, or in violation of an existing child-custody determination. To obtain abduction prevention measures, either the court on its own may impose the measures or a party to a child custody proceeding or an individual or entity having the right to seek custody may file a petition seeking abduction prevention measures.

A court hearing a child custody case may determine that the evidence shows a credible risk of abduction. Therefore, even without a party filing a petition under this Act, the court on its own motion can impose appropriate abduction prevention measures. Usually, however, a parent who fears that the other parent or family members are preparing to abduct the child will file a petition in an existing custody dispute. An individual or other entity, such as the state child welfare agency, which has a right to lawful custody may file a petition alleging a risk of abduction and seeking prevention measures with respect to a child who is not yet the subject of a child-custody determination.

The Act allows a prosecutor or public authority designated in Section 315 of the Uniform Child Custody Jurisdiction and Enforcement Act to seek a warrant under Section 9 of this Act if there is an imminent risk of wrongful removal.

SECTION 5. JURISDICTION

(a) A petition under this [act] may be filed only in a court that has jurisdiction to make a child-custody determination with respect to the child at issue under [insert citation to Uniform Child Custody Jurisdiction and Enforcement Act or the Uniform Child Custody Jurisdiction Act].

(b) A court of this state has temporary emergency jurisdiction under [insert citation to Section 204 of the Uniform Child Custody Jurisdiction and Enforcement Act or Section 3(a)(3) of the Uniform Child Custody Jurisdiction Act] if the court finds a credible risk of abduction.

Comment

This Act complements, but does not limit, contradict, or supercede the Uniform Child Custody Jurisdiction and Enforcement Act, 9 U.L.A. Part I 657 (1999), or the Uniform Child Custody Jurisdiction Act, 9 U.L.A. Part I 115 (1988). A court must have jurisdiction sufficient to make an initial child-custody determination, a modification, or temporary emergency jurisdiction to issue prevention measures under this Act.

The Parental Kidnapping Prevention Act prioritizes the child's home state as the primary jurisdictional basis; prohibits a court in one state from exercising jurisdiction if a valid custody proceeding is already pending in another state; and requires that states give full faith and credit to sister state decrees made in accordance with its principles. The Uniform Child Custody Jurisdiction and Enforcement Act follows the Parental Kidnapping Prevention Act.

A court has temporary emergency jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act only if the child has been abandoned or it is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse. This Act equates a credible risk of abduction with threatened mistreatment or abuse for emergency jurisdiction purposes.

If a state would be able to exercise emergency jurisdiction under Section 204 the Uniform Child Custody Jurisdiction and Enforcement Act, it can do so even if another court has issued a child-custody determination and has continuing exclusive jurisdiction. The reference to Section 204 brings in all of its provisions that include communication, length of time of temporary orders, and the like.

Under Section 208 of the Uniform Child Custody Jurisdiction and Enforcement Act, if a court has jurisdiction because a person seeking to invoke its jurisdiction has engaged in unjustifiable conduct, the court shall decline to exercise its jurisdiction. However, as the comment to Section 208 explains, domestic violence victims should not be charged with unjustifiable conduct for conduct that occurred in the process of fleeing domestic violence. Domestic violence also shall be considered in a court's inconvenient forum analysis under Section 207(b)(1) of the Uniform Child Custody Jurisdiction and Enforcement Act.

SECTION 6. CONTENTS OF PETITION. A petition under this [act] must be verified and include a copy of any existing child-custody determination, if available. The petition must specify the risk factors for abduction, including the relevant factors described in Section 7. Subject to [insert citation to Section 209(e) of the Uniform Child Custody Jurisdiction and Enforcement Act or cite the law of this state providing for the confidentiality of procedures, addresses, and other identifying information], if reasonably ascertainable, the petition must contain:

(1) the name, date of birth, and gender of the child;

(2) the customary address and current physical location of the child;

(3) the identity, customary address, and current physical location of the respondent;

(4) a statement of whether a prior action to prevent abduction or domestic

violence has been filed by a party or other individual or entity having custody of the child, and the date, location, and disposition of the action;

(5) a statement of whether a party to the proceeding has been arrested for a crime related to domestic violence, stalking, or child abuse or neglect, and the date, location, and disposition of the case; and

(6) any other information required to be submitted to the court for a child-custody determination under [insert citation to Section 209 of the Uniform Child Custody Jurisdiction and Enforcement Act or applicable law of this state].

Comment

The contents of the petition follow those for pleadings under Section 209 of the Uniform Child Custody Jurisdiction and Enforcement Act. The information is made subject to state law on the protection of names or 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 by keeping confidential the victims' names, addresses, and other information. These procedures must be followed if the state law requires their applicability. If a state does not protect names and addresses, then a provision similar to Section 209(e) of the Uniform Child Custody Jurisdiction and Enforcement Act should be added. That provision reads:

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

The requirement for information on domestic violence or child abuse is to alert the court to the possibility that a batterer or abuser is attempting to use the Act. Domestic violence underlies large numbers of parental kidnapping. One study found that approximately one half of abductors had been violent toward the other parent during the marriage or relationship. Some batterers abduct their children during or after custody litigation; others abduct before initiating legal proceedings. The court should not allow a batterer to use this Act to gain temporary custody or additional visitation in an uncontested hearing. A person who has committed domestic violence or child abuse poses a risk of harm to the child. Such a person, however, may still seek relief in a contested hearing where the issues can be fully examined by the court. In order to screen for domestic violence or child abuse, the petition requires disclosure of all relevant information and the court can inquire about domestic violence at any hearing.

Notice and opportunity to be heard should be given according to the law of the state and may be by publication if other means are not effective. See Section 108(a) of the Uniform Child Custody Jurisdiction and Enforcement Act.

SECTION 7. FACTORS TO DETERMINE RISK OF ABDUCTION.

(a) In determining whether there is a credible risk of abduction of a child, the court shall consider any evidence that the petitioner or respondent:

(1) has previously abducted or attempted to abduct the child;

(2) has threatened to abduct the child;

(3) has recently engaged in activities that may indicate a planned abduction, including:

(A) abandoning employment;

(B) selling a primary residence;

(C) terminating a lease;

(D) closing bank or other financial management accounts, liquidating assets, hiding or destroying financial documents, or conducting any unusual financial activities;

(E) applying for a passport or visa or obtaining travel documents for the respondent, a family member, or the child; or

(F) seeking to obtain the child's birth certificate or school or medical records;

(4) has engaged in domestic violence, stalking, or child abuse or neglect;

(5) has refused to follow a child-custody determination;

(6) lacks strong familial, financial, emotional, or cultural ties to the state

or the United States;

(7) has strong familial, financial, emotional, or cultural ties to another state or country;

(8) is likely to take the child to a country that:

(A) is not a party to the Hague Convention on the Civil Aspects of International Child Abduction and does not provide for the extradition of an abducting parent or for the return of an abducted child;

(B) is a party to the Hague Convention on the Civil Aspects of International Child Abduction but:

(i) the Hague Convention on the Civil Aspects of International Child Abduction is not in force between the United States and that country;

(ii) is noncompliant according to the most recent compliance report issued by the United States Department of State; or

(iii) lacks legal mechanisms for immediately and effectively enforcing a return order under the Hague Convention on the Civil Aspects of International Child Abduction;

(C) poses a risk that the child's physical or emotional health or safety would be endangered in the country because of specific circumstances relating to the child or because of human rights violations committed against children;

(D) has laws or practices that would:

(i) enable the respondent, without due cause, to prevent the petitioner from contacting the child;

(ii) restrict the petitioner from freely traveling to or exiting

from the country because of the petitioner's gender, nationality, marital status, or religion; or

(iii) restrict the child's ability legally to leave the country after the child reaches the age of majority because of a child's gender, nationality, or religion;

(E) is included by the United States Department of State on a current list of state sponsors of terrorism;

(F) does not have an official United States diplomatic presence in the country; or

(G) is engaged in active military action or war, including a civil war, to which the child may be exposed;

(9) is undergoing a change in immigration or citizenship status that would adversely affect the respondent's ability to remain in the United States legally;

(10) has had an application for United States citizenship denied;

(11) has forged or presented misleading or false evidence on government forms or supporting documents to obtain or attempt to obtain a passport, a visa, travel documents, a Social Security card, a driver's license, or other government-issued identification card or has made a misrepresentation to the United States government;

(12) has used multiple names to attempt to mislead or defraud; or

(13) has engaged in any other conduct the court considers relevant to the risk of abduction.

(b) In the hearing on a petition under this [act], the court shall consider any evidence that the respondent believed in good faith that the respondent's conduct was necessary to avoid imminent harm to the child or respondent and any other evidence that may be relevant to whether the respondent may be permitted to remove or retain the child.

Comment

The list of risk factors constitutes a summary of the wide variety of types of behaviors and characteristics that researchers have found to be present. The risk factors are based on research that has been done during the last twelve years. Research also shows that abducting parents dismiss the value of the other parent in the child's life; have young children or children vulnerable to influence; and often have the support of their family and others. Parents who have made credible threats to abduct a child or have a history are particularly high risk especially when accompanied by other factors, such as quitting a job, selling a home, and moving assets. *See* Janet Johnston & Linda Girdner, *Family Abductors: Descriptive Profiles and Preventative Interventions* (U.S. Dep't of Justice, OJJDP 2001 NCJ 182788); ABA, Early Identification of Risk Factors for Parental Abduction (NCJ185026). The more of these factors that are present, the more likely the chance of an abduction. However, the mere presence of one or more of these factors does not mean that an abduction will occur just as the absence of these factors does not guarantee that no abduction will occur. Some conduct described in the factors can be done in conjunction with a relocation petition, which would negate an inference that the parent is planning to abduct the child.

International abductions pose more obstacles to return of a child than do abductions within the United States. Courts should consider evidence that the respondent was raised in another country and has family support there, has a legal right to work in a foreign country and has the ability to speak that foreign language. There are difficulties associated with securing return of children from countries that are not treaty partners under the Hague Convention on the Civil Aspects of Child Abduction or are not compliant with the Convention. Compliance Reports are available at the United States Department of State website or may be obtained by contacting the Office of Children's Issues in Department of State.

Courts should be particularly sensitive to the importance of preventive measures where there is an identified risk of a child being removed to countries that are guilty of human rights violations, including arranged marriages of children, child labor, lack of child abuse laws, female genital mutilation, sexual exploitation, any form of child slavery, torture, and the deprivation of liberty. These countries pose potentially serious obstacles to return of a child and pose the possibility of harm.

Courts need to be sensitive to domestic violence issues. Batterers often abduct their children before as well as during and after custody litigation. However, courts also need to be aware of the dynamics of domestic violence. Rather than a vindictive reason for taking the child, a victim fleeing domestic violence may be attempting to protect the victim and the child. Almost half of the parents in one parental kidnapping study were victims of domestic violence and half of the parents who were contemplating abducting their children were motivated by the perceived need to protect their child from physical, sexual, and emotional abuse. Geoffrey L. Greif & Rebecca L. Hegar, When Parents Kidnap: The Families Behind the Headlines 8 (1993). Some of the risk factors involve the same activities that might be undertaken by a victim of domestic violence who is trying to relocate or flee to escape violence. If the evidence shows that the parent preparing to leave is fleeing domestic violence, the court must consider that any order restricting departure or transferring custody may pose safety issues for the respondent and the

child, and therefore, should be imposed only when the risk of abduction, the likely harm from the abduction, and the chances of recovery outweigh the risk of harm to the respondent and the child.

The Uniform Child Custody Jurisdiction and Enforcement Act recognizes that domestic violence victims should be considered. The Comment to Section 208 of the Uniform Child Custody Jurisdiction and Enforcement Act (Jurisdiction Declined by Reason of Conduct) states that "Domestic violence victims should not be charged with unjustifiable conduct for conduct that occurred in the process of fleeing domestic violence, even if their conduct is technically illegal. An inquiry must be made whether the flight was justified under the circumstances of the case."

SECTION 8. PROVISIONS AND MEASURES TO PREVENT ABDUCTION.

(a) If a petition is filed under this [act], the court may enter an order that must include:

(1) the basis for the court's exercise of jurisdiction;

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

(3) a detailed description of each party's custody and visitation rights and residential arrangements for the child;

(4) a provision stating that a violation of the order may subject the party in violation to civil and criminal penalties; and

(5) identification of the child's country of habitual residence at the time of the issuance of the order.

(b) If, at a hearing on a petition under this [act] or on the court's own motion, the court after reviewing the evidence finds a credible risk of abduction of the child, the court shall enter an abduction prevention order. The order must include the provisions required by subsection (a) and measures and conditions, including those in subsections (c), (d), and (e), that are reasonably calculated to prevent abduction of the child, giving due consideration to the

custody and visitation rights of the parties. The court shall consider the age of the child, the potential harm to the child from an abduction, the legal and practical difficulties of returning the child to the jurisdiction if abducted, and the reasons for the potential abduction, including evidence of domestic violence, stalking, or child abuse or neglect.

(c) An abduction prevention order may include one or more of the following:

(1) an imposition of travel restrictions that require that a party traveling with the child outside a designated geographical area provide the other party with the following:

(A) the travel itinerary of the child;

(B) a list of physical addresses and telephone numbers at which the child can be reached at specified times; and

(C) copies of all travel documents;

(2) a prohibition of the respondent directly or indirectly*:*

(A) removing the child from this state, the United States, or another geographic area without permission of the court or the petitioner's written consent;

(B) removing or retaining the child in violation of a child-custody determination;

(C) removing the child from school or a child-care or similar facility; or

(D) approaching the child at any location other than a site designated for supervised visitation;

(3) a requirement that a party register the order in another state as a prerequisite to allowing the child to travel to that state;

(4) with regard to the child's passport:

(A) a direction that the petitioner place the child's name in the United States Department of State's Child Passport Issuance Alert Program;

(B) a requirement that the respondent surrender to the court or the petitioner's attorney any United States or foreign passport issued in the child's name, including a passport issued in the name of both the parent and the child; and

(C) a prohibition upon the respondent from applying on behalf of the child for a new or replacement passport or visa;

(5) as a prerequisite to exercising custody or visitation, a requirement that the respondent provide:

(A) to the United States Department of State Office of Children's Issues and the relevant foreign consulate or embassy, an authenticated copy of the order detailing passport and travel restrictions for the child;

(B) to the court:

(i) proof that the respondent has provided the information in subparagraph (A); and

(ii) an acknowledgment in a record from the relevant foreign consulate or embassy that no passport application has been made, or passport issued, on behalf of the child;

(C) to the petitioner, proof of registration with the United States Embassy or other United States diplomatic presence in the destination country and with the Central Authority for the Hague Convention on the Civil Aspects of International Child Abduction, if that Convention is in effect between the United States and the destination country, unless one of the parties objects; and

(D) a written waiver under the Privacy Act, 5 U.S.C. Section 552a [as amended], with respect to any document, application, or other information pertaining to the child authorizing its disclosure to the court and the petitioner; and

(6) upon the petitioner's request, a requirement that the respondent obtain an order from the relevant foreign country containing terms identical to the child-custody determination issued in the United States.

(d) In an abduction prevention order, the court may impose conditions on the exercise of custody or visitation that:

(1) limit visitation or require that visitation with the child by the respondent be supervised until the court finds that supervision is no longer necessary and order the respondent to pay the costs of supervision;

(2) require the respondent to post a bond or provide other security in an amount sufficient to serve as a financial deterrent to abduction, the proceeds of which may be used to pay for the reasonable expenses of recovery of the child, including reasonable attorneys fees and costs if there is an abduction; and

(3) require the respondent to obtain education on the potentially harmful effects to the child from abduction.

(e) To prevent imminent abduction of a child, a court may:

(1) issue a warrant to take physical custody of the child under Section 9 or the law of this state other than this [act];

(2) direct the use of law enforcement to take any action reasonably necessary to locate the child, obtain return of the child, or enforce a custody determination under this [act] or the law of this state other than this [act]; or

(3) grant any other relief allowed under the law of this state other than this [act].

(f) The remedies provided in this [act] are cumulative and do not affect the availability of other remedies to prevent abduction.

Comment

This act provides courts with a choice of remedies. Ideally the court will choose the least restrictive measures and conditions to maximize opportunities for continued parental contact while minimizing the opportunities for abduction. The most restrictive measures should be used when there have been prior custody violations and overt threats to take the child; when the child faces substantial potential harm from an abducting parent who may have serious mental or personality disorder, history of abuse or violence or no prior relationship with the child; or when the obstacles to recovering the child are formidable due to countries not cooperating and enforcing orders from the United States, not being signatories to the Hague Convention on the Civil Aspects of International Child Abduction or non-compliant. Section 8 lists the possible prevention measures categorized as travel restrictions, conditions on the exercise of custody and visitation, and urgent measures when abduction is imminent or in progress.

If a person files a petition under this Act, even if the court decides not to order restrictive measures or impose conditions, the court may clarify and make more specific the existing child-custody determination. To enter an abduction prevention order, the court must have jurisdiction to make a child-custody determination even if it is emergency jurisdiction. The court should set out the basis for the court's exercise of jurisdiction. The more apparent on the face of the document that the court issuing the order had proper jurisdiction, the more likely courts in other states and countries are to recognize it as valid. The court should also include a statement showing that the parties were properly served and given adequate notice. This makes it apparent on the face of the order that due process was met. *See* Sections 108 and 205 of the Uniform Child Custody Jurisdiction and Enforcement Act. States do not require personal jurisdiction to make a child-custody determination.

The court may make an existing child-custody order clearer and more specific. Vague orders are difficult to enforce without additional litigation. The term "reasonable visitation" can lead to conflicts between the parents and make it difficult for law enforcement officers to know if the order is being violated. The court may specify the dates and times for each party's custody and visitation, including holidays, birthdays, and telephone or Internet contact. Because joint custody arrangements create special enforcement problems, the court should ensure that the order specifies the child's residential placement at all times. Whenever possible, the residential arrangements should represent the parents' agreement. However, to prevent abductions, it is important for the court order to be specific as to the residential arrangements for the child. If there is a threat of abduction, awarding sole custody to one parent makes enforcement easier.

The court may also include language in the prevention order to highlight the importance

of both parties complying with the court order by including in bold language: "VIOLATION OF THIS ORDER MAY SUBJECT THE PARTY IN VIOLATION TO CIVIL AND CRIMINAL PENALTIES."

Because every abduction case may be a potential international abduction case, the prevention order should identify the place of habitual residence of a child. Although the Hague Convention on the Civil Aspects of International Child Abduction does not define "habitual residence" and the determination is made by the court in the country hearing a petition for return of a child, a statement in the child-custody determination or prevention order may help. A typical statement reads:

> The State of _____, United States of America, is the habitual residence of the minor children within the meaning of the Hague Convention on the Civil Aspects of International Child Abduction.

If the court finds a credible risk of abduction, this Act provides numerous measures to prevent an abduction. Courts can require a party traveling outside a specified geographical area to provide the other party with all relevant information about where the child will be and how to contact the child. The court can impose travel restrictions prohibiting the respondent from leaving the United States or a specific geographical area; from removing the child from school, day care or other facilities, and can restrict contact other than as specified in the order. The court may also impose passport restrictions and require the respondent to provide assurances and safeguards as a condition of traveling with the child.

The court may also choose to impose restrictions on custody or visitation. The most common, and one of the most effective, restrictions is supervised visitation. Visitation should remain supervised until the court decides the threat of abduction has passed. In addition, the court may require the posting of a bond sufficient to serve both as a deterrent and as a source of funds for the cost of the return of the child. If domestic violence is present, the court may want to order the abusive person to obtain education, counseling or attend a batterers' intervention and prevention program.

Because of international abduction cases are the most complex and difficult, reasonable restrictions to prevent such abductions are necessary. If a credible risk of international abduction of the child exists, passport controls and travel restrictions may be indispensable. It may be advantageous in some cases to obtain a "mirror"or reciprocal order. Before exercising rights, the respondent would need to get a custody order from the country to which the respondent will travel that recognizes both the United States order and the court's continuing jurisdiction. The foreign court would need to agree to order return of the child if the child was taken in violation of the court order. This potentially expensive and time consuming remedy should only be ordered when likely to be of assistance. Because the foreign court may subsequently modify its order, problems can arise.

The court may do whatever is necessary to prevent an abduction, including using the warrant procedure under this act or under the law of the state. Many law enforcement officers are unclear about their role in responding to parental kidnapping cases. One study showed that

70 percent of law enforcement agencies reported that they did not have written policies and procedures governing child abduction cases. A provision in the custody order directing law enforcement officer to "accompany and assist" a parent to recover an abducted child may be useful but is not included in this Act. The language tracks Section 316 of the Uniform Child Custody Jurisdiction and Enforcement Act that authorizes law enforcement to take any lawful action reasonably necessary to locate a child or a party and assist a prosecutor or appropriate public official in obtaining return of a child or enforcing a child-custody determination.

The remedies provided in this Act are intended to supplement and complement existing law.

SECTION 9. WARRANT TO TAKE PHYSICAL CUSTODY OF CHILD.

(a) If a petition under this [act] contains allegations, and the court finds that there is a credible risk that the child is imminently likely to be wrongfully removed, the court may issue an ex parte warrant to take physical custody of the child.

(b) The respondent on a petition under subsection (a) must be afforded an opportunity to be heard at the earliest possible time after the ex parte warrant is executed, but not later than the next judicial day unless a hearing on that date is impossible. In that event, the court shall hold the hearing on the first judicial day possible.

(c) An ex parte warrant under subsection (a) to take physical custody of a child must:

(1) recite the facts upon which a determination of a credible risk of imminent wrongful removal of the child is based;

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

(3) state the date and time for the hearing on the petition; and

(4) provide for the safe interim placement of the child pending further order of the court.

(d) If feasible, before issuing a warrant and before determining the placement of the child after the warrant is executed, the court may order a search of the relevant databases of the National Crime Information Center system and similar state databases to determine if either the petitioner or respondent has a history of domestic violence, stalking, or child abuse or neglect.

(e) The petition and warrant must be served on the respondent when or immediately after the child is taken into physical custody.

(f) A warrant to take physical custody of a child, issued by this state or another state, is enforceable throughout this state. If the court finds that a less intrusive remedy will not be effective, it may authorize law enforcement officers to enter private property to take physical custody of the child. If required by exigent circumstances, the court may authorize law enforcement officers to make a forcible entry at any hour.

(g) If the court finds, after a hearing, that a petitioner sought an ex parte warrant under subsection (a) for the purpose of harassment or in bad faith, the court may award the respondent reasonable attorney's fees, costs, and expenses.

(h) This [act] does not affect the availability of relief allowed under the law of this state other than this [act].

Comment

This section authorizes issuance of a warrant in an emergency situation, such as an allegation that the respondent is preparing to abduct the child to a foreign country and is on the way to the airport. The harm is the credible risk of imminent removal. If the court finds such a risk, the court should temporarily waive the notice requirements and issue a warrant to take physical custody of the child. Immediately after the warrant is executed, the respondent is to receive notice of the proceedings. This section mirrors Section 311 of the Uniform Child Custody Jurisdiction and Enforcement Act on warrants to pick up a child which are available when there is an existing child-custody determination. In many states, the term used in civil cases is "writ of attachment."

The court should hear the testimony of the petitioner or another witness before issuing the warrant. The testimony may be heard in person, by telephone, or by any other means acceptable under local law, which may include video conferencing or use of other technology.

Domestic violence includes "family" violence. Because some batterers may try to use the warrant procedure to prevent victims and the children from escaping domestic violence or child abuse, the court should check relevant state and national databases to see if either the petitioner or respondent's name is listed or if relevant information exists that has not been disclosed before issuing the warrant and ordering placement. Lundy Bancroft & Jay G. Silverman, The Batterer as Parent: Addressing the Impact of Domestic Violence on Family Dynamics 73, 75 (2002)(indicating that most parental abductions take place in the context of a history of domestic violence because threatening to take the child from the mother is a form of control).

Some courts have computer terminals on the bench and a database search takes seconds. Courts without computer access can seek the assistance of law enforcement. Unless impracticable, the court should conduct a search of all person databases of the National Crime Information Center system, including the protection order file, the historical protection order file, the warrants file, the sex offender registry, and the persons on supervised release file. In addition, it is recommended that courts run searches in the National Law Enforcement Telecommunication System in the petitioner's state of birth, current state of residence, and other recent states of residence. Civil courts are authorized by statute and National Crime Information Center policy to have access to information in several files for domestic violence and stalking cases. Because child abduction involves family members and can harm children, and violence between the parents is often a factor leading to child abduction, cases in which a parent alleges a risk of wrongful removal should permit access to the relevant databases.

The court should also view comparable state databases, such as the state department of social service registry of persons found to have abused or neglected children. If the petitioner or respondent are listed for a reason related to a crime of domestic or family violence, the court may refuse to issue a warrant or order any appropriate placement authorized under the laws of the state. The warrant must provide for the placement of a child pending the hearing. Temporary placement will most often be with the petitioner unless the database check reveals the petitioner is a likely or known abuser.

The court must state the reasons for issuance of the warrant. The warrant can be enforced by law enforcement officers wherever the child is found in the state. The warrant may authorize entry upon private property to pick up the child if no less intrusive means are possible. In extraordinary cases, the warrant may authorize law enforcement to make a forcible entry at any hour. This section also authorizes law enforcement officers to enforce out of state warrants.

Section 9 applies only to wrongful removals, not wrongful retentions. It does not hinder a court from issuing any other immediate ex parte relief to prevent a wrongful removal or retention as may be allowed under law other than this act.

SECTION 10. DURATION OF ABDUCTION PREVENTION ORDER. An

abduction prevention order remains in effect until the earliest of:

(1) the time stated in the order;

(2) the emancipation of the child;

(3) the child's attaining 18 years of age; or

(4) the time the order is modified, revoked, vacated, or superseded by a court with jurisdiction under [insert citation to Sections 201 through 203 of the Uniform Child Custody Jurisdiction and Enforcement Act or Section 3 of the Uniform Child Custody Jurisdiction Act and applicable law of this state].

SECTION 11. 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 12. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT. This [act] modifies, limits, and supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001, et seq., but does not modify, limit, or supersede Section 101(c) of the 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 13. EFFECTIVE DATE. This [act] takes effect on . . . .

The Down Town Association
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Speakers Curriculum Vitae

Patricia Apy	Red Bank, New Jersey
Robert Arenstein	New York, New York
Nancy Zalusky Berg	Minneapolis, Minnesota
Charlotte Butruille-Cardew	Paris, France
Laura Dale	Houston, Texas
Sylvia Goldschmidt	New York, New York
Lawrence Katz	Miami, Florida
Rachael Kelsey	Edinburgh, Scotland
Daniel Klimow	U.S. Department of State
Nicholas Lobenthal	New York, New York
William Longrigg	London, England
Evan Marks	Miami, Florida
Thomas Sasser	West Palm Beach, Florida
Donald Schuck	New York, New York
Michael Stutman	New York, New York
Ashley Tomlinson	Houston, Texas
Sandra Verburgt	The Hague, Netherlands
Oren Weinberg	Toronto, Canada
Eric Wrubel	New York, New York

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PATRICIA APY HAS FOR TWENTY ONE YEARS BEEN A PARTNER IN THE LAW FIRM OF PARAS, APY, & REISS, A PROFESSIONAL CORPORATION SPECIALIZING IN THE PRACTICE OF FAMILY LAW. MS APY'S AREA OF EXPERTISE IS IN COMPLEX FAMILY LITIGATION, PARTICULARLY INTERNATIONAL AND INTERSTATE CHILD CUSTODY LITIGATION.

MS APY HAS LITIGATED, BEEN QUALIFIED AS AN EXPERT WITNESS AND CONSULTED ON INTERNATIONAL FAMILY DISPUTES THROUGHOUT THE WORLD, INCLUDING LOCATIONS AS DIVERSE AS THE UNITED KINGDOM, BRAZIL, ITALY, ISRAEL, GERMANY, AUSTRALIA, PAKISTAN, SOUTH AFRICA, EGYPT , JORDAN AND UNITED ARAB EMIRATES. MS. APY FREQUENTLY CONSULTS AND IS REGULARLY QUALIFIED AS AN EXPERT AND SPEAKS THROUGHOUT THE UNITED STATES AND CANADA ON INTERNATIONAL FAMILY DISPUTE RESOLUTION , THE INTERNATIONAL ENFORCEABILITY OF CHILD CUSTODY DETERMINATIONS AND RISK FACTORS FOR CHILD ABDUCTION. SHE ALSO HAS CONDUCTED OVER 1000 CONTINUING LEGAL EDUCATION HOURS FOR JUDGE ADVOCATE GENERAL OF ALL OF THE ARMED SERVICES AT BASES AND ON VESSELS AROUND THE WORLD.

EDUCATION

CASE WESTERN RESERVE UNIVERSITY SCHOOL OF LAW, CLEVELAND, OHIO
Juris Doctorate Degree, 1986.

UNIVERSITY OF MISSOURI, COLUMBIA MISSOURI
Masters in Social Work Degree, Clinical Concentration in Family and Children. 1983.

ORAL ROBERTS UNIVERSITY, TULSA, OKLAHOMA
Bachelor of Social Work Degree, Concentration in Community Organization. 1978.

EXPERIENCE

SHE HAS BEEN A FELLOW OF THE INTERNATIONAL ACADEMY OF FAMILY LAWYERS (IAFL) SINCE 1998. SHE IS A MEMBER OF THE INTERNATIONAL BAR ASSOCIATION (GENERAL PRACTICE COMMITTEE 4 – FAMILY LAW) AND (ARAB FORUM - BUSINESS SECTION). SHE SERVED AS THE CHAIR OF THE INTERNATIONAL LAW AND PROCEDURE COMMITTEE OF THE FAMILY LAW SECTION OF THE AMERICAN BAR ASSOCIATION FOR OVER A DECADE.

SHE SERVED AS A LEGAL ADVISOR TO THE UNITED STATES DELEGATION TO THE HAGUE IN NOVEMBER 1995 AND RETURNED AS A DELEGATE IN OCTOBER 1996 TO THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW FOR NEGOTIATION OF THE PROTECTION OF MINORS TREATY. SHE SERVED AS THE REPRESENTATIVE OF THE INTERNATIONAL ACADEMY OF FAMILY LAWYERS AT THE HAGUE FOR THE REVIEW OF THE TREATY ON INTERCOUNTRY ADOPTION, WITH PARTICULAR ATTENTION TO CHILD TRAFFICKING. SHE HAS SERVED AS A CONSULTANT TO THE UNITED STATES DEPARTMENTS OF STATE, AND DEFENSE ON NUMEROUS ISSUES INVOLVING FAMILIES AND CHILDREN AND THE APPLICATION OF TREATY LAW. SHE HAS SIX TIMES TESTIFIED BEFORE CONGRESS, THREE TIMES BEFORE SUBCOMMITTEES OF THE HOUSE COMMITTEE ON FOREIGN AFFAIRS AND ONCE BEFORE BOTH THE HOUSE COMMITTEE ON VETERAN'S AFFAIRS, AND THE SENATE SUBCOMMITTEE

ON VETERAN'S AFFAIRS, ON BEHALF OF THE PRESIDENT OF THE AMERICAN BAR ASSOCIATION.
SHE IS AMONG THE PRINCIPAL AUTHORS OF THE SEAN AND DAVID GOLDMAN INTERNATIONAL PARENTAL KIDNAPPING PREVENTION AND RECOVERY ACT , ENACTED IN THE 113TH CONGRESS AND SIGNED BY THE PRESIDENT OBAMA ON AUGUST 9, 2014. FOR THAT, AND HER BODY OF WORK IN PROTECTING THE LEGAL RIGHTS OF MILITARY MEMBERS , SHE RECEIVED THE AMERICAN BAR ASSOCIATION 2015 GRASSROOTS ADVOCACY AWARD, GIVEN IN THE SUPREME COURT OF THE UNITED STATES ON APRIL 15, 2015 .
SHE IS ALSO THE AUTHOR OF AMENDMENTS TO THE CUSTODY STATUTE OF THE STATE OF NEW JERSEY TO PROTECT MILITARY MEMBERS AND THEIR FAMILIES. FOR THAT WORK SHE WAS RECOGNIZED BY THE NEW JERSEY STATE BAR ASSOCIATION WITH THE 2010 DISTINGUISHED LEGISLATIVE SERVICE AWARD AND THE SECOND ANNUAL MILITARY SUPPORT AWARD IN OCTOBER OF 2011.
MS. APY BEGAN IN SEPTEMBER OF 2001 AS THE LIAISON FROM THE FAMILY LAW SECTION TO THE AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON LEGAL ASSISTANCE TO MILITARY PERSONNEL AND WAS APPOINTED IN AUGUST OF 2005 TO SERVE AS A COMMITTEE MEMBER. IN 2003 SHE WAS APPOINTED TO SERVE ON AN ABA PRESIDENTIAL TASK FORCE ADDRESSING THE LEGAL NEEDS OF SERVICE MEMBERS , AND DIRECTLY CONTRIBUTED TECHNICAL EXPERTISE TO THE DEPARTMENT OF DEFENSE IN ALTERING ITS POLICY AND PROVIDE LEGAL SERVICES REGARDING FAMILY CARE PLAN REQUIREMENTS FOR ACTIVE DUTY SERVICE MEMBERS

MS. APY HAS PARTICIPATED IN NUMEROUS REPORTED DECISIONS. OF NOTE, SHE SERVED AS COUNSEL FOR DAVID GOLDMAN, A NEW JERSEY FATHER WHOSE SON WAS THE FIRST AMERICAN CHILD RETURNED PURSUANT TO THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION FROM BRAZIL TO THE UNITED STATES.
SHE ARGUED THE FIRST CASE IN THE UNITED STATES ADDRESSING THE 1996 HAGUE PROTECTION OF MINORS TREATY, *IVALDI V. IVALDI*, , IN A UCCJEA MATTER INVOLVING MOROCCO, BEFORE THE NEW JERSEY SUPREME COURT IN DECEMBER 1996. SHE HAS ARGUED TO THE UNITED STATES COURT OF APPEALS REGARDING THE APPLICATION OF THE HAGUE ABDUCTION CONVENTION NUMEROUS TIMES IN A NUMBER OF CIRCUITS. IN 2002 ON APPOINTMENT BY THE UNITED STATES FOURTH CIRCUIT, TO PREVAIL IN THE CASE OF *FAWCETT V MCROBERT,* REGARDING THE APPLICATION OF THE ABDUCTION CONVENTION TO RIGHTS OF ACCESS.
SHE RETURNED TO THE FOURTH CIRCUIT IN COHEN V COHEN, SUCCESSFULLY REPRESENTING A UNITED STATES MILITARY OFFICER, ADDRESSING THE EXERCISE OF JURISDICTION BY ART.III COURTS OVER PETITIONS FOR THE ORGANIZATION OF RIGHTS OF PARENTAL ACCESS UNDER THE INTERNATIONAL CHILD ABDUCTIONS REMEDIES ACT, SHE PREVAILED IN THE UNITED STATES COURT OF APPEALS FOR THE 8TH CIRCUIT IN THE CASE OF BARZILAY V. BARZILAY REGARDING THE EXERCISE OF CONCURRENT JURISDICTION AND THE DOCTRINE OF THE FEDERAL ABSTENTION DOCTRINE. MRS. APY REGULARLY PRACTICES IN THE COURTS OF THE UNITED STATES AND HAS BEEN ADMITTED TO THE UNITED STATES DISTRICT COURTS OF NEW JERSEY, THE NORTHERN DISTRICT OF NEW YORK, EASTERN DISTRICT OF MISSOURI, DISTRICT OF PUERTO RICO, DISTRICT OF MARYLAND, WESTERN DISTRICT OF VIRGINIA, AND THE UNITED STATES COURT OF APPEALS FOR THE FIRST, THIRD, FOURTH, FIFTH, AND EIGHTH CIRCUITS.

SHE SERVES AS GUEST FACULTY AT THE JUDGE ADVOCATE GENERAL SCHOOL OF THE ARMY – UNIVERSITY OF VIRGINIA, THE NAVAL JUSTICE SCHOOL, AND THE AIR FORCE JUDGE ADVOCATE GENERAL SCHOOL OF THE UNITED STATES ON ISSUES OF ADVANCED FAMILY LAW, INTERNATIONAL CHILD CUSTODY AND CHILD SUPPORT LAW AND PROCEDURES; FAMILY CARE PLANS AND GUARDIANSHIP/ESTATE PLANNING ISSUES.
IN THE FALL OF 2013 SHE SERVED AS GUEST FACULTY AT ORAL ROBERTS UNIVERSITY TEACHING "INTERNATIONAL LAW & PEACEMAKING" IN THE DEPARTMENT OF HISTORY AND GOVERNMENT.

MS APY REGULARLY SERVES AS A SPEAKER AND CONTRIBUTOR ON INTERSTATE AND INTERNATIONAL FAMILY LAW, HAVING MADE APPEARANCES ON NUMEROUS NATIONAL AND INTERNATIONAL MEDIA INCLUDING: NIGHTLINE, CNN INTERNATIONAL, NBC NIGHTLY NEWS; ABC WORLD NEWS TONIGHT; THE TODAY SHOW; FOX NEWS; AS A COMMENTATOR ON LEGAL ISSUES INVOLVING INTERNATIONAL LAW ISSUES.

EXPERT TESTIMONY:

NOTABLE PRESENTATIONS :

.

SECOND WORLD CONGRESS ON FAMILY LAW AND THE RIGHTS OF CHILDREN AND YOUTH IN SAN FRANCISCO, JUNE 1997 , "USE OF HAGUE AND UN CONVENTION IN INTERNATIONAL LITIGATION"

"HAGUE CONVENTION ON SERVICE OF PROCESS ABROAD" – NATIONAL CHILD SUPPORT ASSOCIATION, PHOENIX, AZ

"ISSUES OF MUSLIM FAMILY LAW" TO THE INTERNATIONAL BAR ASSOCIATION MEETING IN NEW DELHI, INDIA , NOVEMBER OF 1997

"**MANAGING LITIGATION IN NON-HAGUE COUNTRIES/HAGUE CONVENTION ON JURISDICTION, APPLICABLE LAW, RECOGNITION, ENFORCEMENT AND CO-OPERATION IN RESPECT OF PARENTAL RESPONSIBILITY AND MEASURES FOR THE PROTECTION OF CHILDREN – INTERNATIONAL ACADEMY OF MATRIMONIAL ATTORNEYS, WASHINGTON, DC, 1997**

"**THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD: BENEFITS TO AMERICAN CHILDREN, EFFECTS ON AMERICAN LAW" – GEORGETOWN UNIVERSITY, FEBRUARY 1998.**

"**PRACTICES, PERSPECTIVE, RESPONSE AND COMMENTARY TO THE USE OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD IN FAMILY LITIGATION INVOLVING AMERICAN CHILDREN, INTERNATIONAL BAR ASSOCIATION HUMAN RIGHTS INSTITUTE, DUBAI, UNITED ARAB EMIRATES SEPTEMBER 1998.**

INTERNATIONAL BAR ASSOCIATION MEETING : ARAB FORUM PROGRAM, "THE EFFECTS OF SANCTIONS ON PRIVATE INTERNATIONAL LAW", VANCOUVER, BC, SEPTEMBER 1998.

INTERNATIONAL LAW PROGRAM: ABA FAMILY LAW SECTION, SPRING CLE MEETING ADDRESSING "INTERNATIONAL FAMILY LAW ISSUES OF LATIN AMERICA", APRIL 21-24, 1999, MIAMI, FL

MISSISSIPPI BAR ASSOCIATION, SUMMER SCHOOL FOR LAWYERS, "HAGUE CONVENTION AND UIFSA, CASE LAW REVIEW", SANDESTIN, FL, JULY 12-17, 1999

NINOS PRIMERO 2000; SECOND BORDER INITIATIVE TRAINING CONFERENCE, FEBRUARY 2ND-4TH,2000 REVIEWING "RECENT CASES AND APPLICATION OF THE UCCJA AND UCCJEA IN TRANSBORDER LITIGATION INVOLVING MEXICO AND THE UNITED STATES."

AMERICAN BAR ASSOCIATION , PRESIDENTIAL SHOWCASE, ANNUAL MEETING JULY 2000; "RELIGION AND CHILD CUSTODY LITIGATION, PRACTITIONER'S PERSPECTIVE".

COMMITTEE CLE, INTERNATIONAL LAW PROGRAM ABA FAMILY LAW SECTION, "HAGUE CONVENTION 2000", OCTOBER, 2000, TAMPA, FL

TRAINING CONFERENCE – INTERNATIONAL FAMILY LAW ISSUES; UNITED STATES JUDGE ADVOCATE GENERAL'S CORPS., CAMP FOSTER, OKINAWA, JAPAN, JUNE 2000.

TRAINING CONFERENCE – INTERNATIONAL FAMILY LAW ISSUES, UNITED STATES JUDGE ADVOCATE GENERAL'S CORPS, RAF ALCONBURY, UNITED KINGDOM, FEBRUARY 2001.

MISSISSIPPI BAR, SUMMER SCHOOL FOR LAWYERS, FEDERAL LAW IMPACT ON STATE FAMILY LAW, SANDESTIN, FL, JULY 9-14,2001.

TRAINING CONFERENCE- AMERICAN BAR ASSOCIATION LAMP COMMITTEE, INTERNATIONAL FAMILY LAW ISSUES, NAVAL JUSTICE SCHOOL, NEWPORT, RHODE ISLAND , AUGUST 2001.

NEW YORK, NY NATIONAL ASSOCIATION OF WOMEN JUDGES, "INTERNATIONAL MATRIMONIAL LITIGATION INVOLVING 'NON-HAGUE' JURISDICTIONS", OCTOBER 2001

SALISHAN, OREGON: OREGON SECTION OF FAMILY LAW; "OVERVIEW OF THE UNIFORM CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT" COMPREHENSIVE CASE LAW REVIEW AND ANALYSIS, NOVEMBER 2001."

TRAINING CONFERENCE- AMERICAN BAR ASSOCIATION LAMP COMMITTEE, INTERNATIONAL FAMILY LAW ISSUES, NAVAL COMMAND PACIFIC FLEET, PEARL HARBOR, HAWAII , JANUARY 2002.

UNIVERSITY OF VIRGINIA: JUDGE ADVOCATE GENERAL SCHOOL-ARMY, FACULTY ADVANCED FAMILY LAW CURRICULUM, 2002 TO NOVEMBER 2012 : TOPICS: INTERSTATE AND INTERNATIONAL CHILD CUSTODY; FAMILY CARE PLANS, FAMILY LAW SCRA AND UIFSA .

NAVAL JUSTICE SCHOOL, FACULTY: ADVANCED FAMILY LAW CURRICULUM, JULY 2002 – SEPTEMBER 2012 .

NAVAL JUSTICE SCHOOL, FACULTY: ESTATE PLANNING, FAMILY CARE PLANS AND GUARDIANSHIP SEPTEMBER 2006.

WASHINGTON, DC, AMERICAN BAR ASSOCIATION , ANNUAL MEETING, SECTION ON INTERNATIONAL LAW, PRESENTER, " INTERNATIONAL ISSUES IN FAMILY LAW" AUGUST 2002.

TRAINING CONFERENCE-AMERICAN BAR ASSOCIATION LAMP COMMITTEE, INTERSTATE CHILD CUSTODY LITIGATION AND DRAFTING OF INTERSTATE AGREEMENTS UNDER THE UCCJEA AND UIFSA, FT. BRAGG, FAYETTEVILLE, NORTH CAROLINA, NOVEMBER 2002; NOVEMBER 2005.

TRAINING ON SITE- INTERSTATE AND INTERNATIONAL CHILD CUSTODY DISPUTES , RAMSTEIN AIR FORCE BASE, JUNE 19,2003.

MAXWELL AIR FORCE BASE , UNITED STATES AIR FORCE, JUDGE ADVOCATE GENERAL SCHOOL- "FAMILY LAW CHALLENGES AND THE AIR FORCE" JULY 2003.

TRAINING CONFERENCE-AMERICAN BAR ASSOCIATION, LAMP COMMITTEE, INTERSTATE CHILD CUSTODY ISSUES , UNITED STATES AIR FORCE ACADEMY , COLORADO SPRINGS, CO, JULY 2003.

TRAINING ON SITE: MC CHORD AFB, WASHINGTON, BREMERTON NAVAL STATION, WASHINGTON: "FAMILY LAW AND DEPLOYMENT" OCTOBER 16TH AND 17TH 2003.

TRAINING CONFERENCE-AMERICAN BAR ASSOCIATION, LAMP COMMITTEE, INTERSTATE CHILD CUSTODY ISSUES, NAVAL AMPHIBIOUS BASE, CORONADO CA, NOVEMBER 13TH AND 14TH 2003.

NEW BRUNSWICK, NEW JERSEY CONTINUING LEGAL EDUCATION, STATE BAR ASSOCIATION MILITARY LAW COMMITTEE, FAMILY LAW AND THE MILITARY, JANUARY 2003, JANUARY 24, 2004; APRIL 30, 2005; APRIL 29,2006; APRIL 21,2007, APRIL 2009 TO 2011: OCTOBER 2012; OCTOBER 2013; OCTOBER 2014 , APRIL 2016, APRIL 2017.

SAN JUAN PUERTO RICO, AMERICAN BAR ASSOCIATION FAMILY LAW SECTION MEETING : FAMILY LAW CLE PROVIDING LEGAL ASSISTANCE TO MILITARY PERSONNEL: INTERSTATE AND INTERNATIONAL CHILD CUSTODY AND FAMILY CARE PLANS, APRIL 28TH 2004.

TRAINING CONFERENCE-AMERICAN BAR ASSOCIATION, LAMP COMMITTEE, INTERSTATE AND INTERNATIONAL CHILD CUSTODY ISSUES AND FAMILY CARE PLANS, FT. LEWIS TACOMA, WASHINGTON JULY 2004.

"CREATING AND DISSOLVING FAMILIES ACROSS BORDERS: HOW INTERNATIONAL FAMILY LAW AFFECTS YOUR PRACTICE" PRESENTATION ON INTERNATIONAL CHILD CUSTODY AND ABDUCTION: UNIVERSITY OF TULSA COLLEGE OF LAW, TULSA, OK OCTOBER 15TH 2004;

TRAINING CONFERENCE-AMERICAN BAR ASSOCIATION LAMP COMMITTEE, FAMILY CARE PLANS, INTERSTATE AND INTERNATIONAL CHILD CUSTODY ISSUES, COAST GUARD STATION: YORKTOWN, VIRGINIA NOVEMBER 2004.

TRAINING CONFERENCE-AMERICAN BAR ASSOCIATION, LAMP COMMITTEE, INTERSTATE AND INTERNATIONAL CHILD CUSTODY ISSUES, JACKSONVILLE NAVAL AIR STATION, FLORIDA MARCH 17TH 2005

TRAINING ON SITE: JUDGE ADVOCATE GENERAL CORPS: FT HOOD TEXAS, FAMILY LAW, LEGAL ASSISTANCE TO MILITARY PERSONNEL, INTERNATIONAL AND INTERSTATE CUSTODY LITIGATION APRIL, 2005.

SAN DIEGO CALIFORNIA, AMERICAN BAR ASSOCIATION FAMILY LAW SECTION MEETING: FAMILY LAW CLE PROVIDING LEGAL ASSISTANCE TO MILITARY PERSONNEL: FAMILY CARE PLANS, CUSTODY AND DEPLOYMENT, SEPTEMBER 27TH 2005.

TRAINING CONFERENCE-AMERICAN BAR ASSOCIATION, LAMP COMMITTEE, INTERSTATE AND INTERNATIONAL CHILD CUSTODY ISSUES; MARINE CORPS CAMP PENDLETON, CA MARCH 2006.

NEW YORK, NEW YORK, AMERICAN BAR ASSOCIATION INTERNATIONAL LAW SECTION MEETING: HAGUE CONVENTION AND UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, APRIL 2006.

TRAINING CONFERENCE AMERICAN BAR ASSOCIATION, LAMP COMMITTEE, "GOOD TO GO" FAMILY LAW AND DEPLOYMENT ISSUES. NAVAL JUSTICE SCHOOL, NEWPORT RHODE ISLAND, JULY 2006; FORT SAM HOUSTON, SAN ANTONIO TEXAS, NOVEMBER 2006.

"UNIFORM CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT" AMERICAN BAR ASSOCIATION , FAMILY LAW SECTION MEETING, PRESENTER, MEMPHIS TENNESSEE, OCTOBER 2007.

TRAINING CONFERENCE AMERICAN BAR ASSOCIATION, LAMP COMMITTEE, FAMILY CARE PLANS AND DEPLOYMENT, SCRA, ETC. UNITED STATES COAST GUARD REGIONAL HEADQUARTERS, SEATTLE, WASHINGTON , NOVEMBER 2007.

SOUTH ASIAN BAR ASSOCIATION, LAHORE PAKISTAN, APRIL 2009 INTERNATIONAL CHILD ABDUCTION, INTERNATIONAL COMITY AND THE RULE OF LAW

NATIONAL CENTER FOR FAMILY LAW AT THE UNIVERSITY OF RICHMOND SCHOOL OF LAW: STATE OF THE FAMILY 2009, SECOND NATIONAL FAMILY LAW SYMPOSIUM, SEPTEMBER2009, INTERNATIONAL PARENTAL CHILD ABDUCTION DEVELOPMENTS IN ABDUCTION LITIGATION.

AMERICAN BAR ASSOCIATION, ANNUAL MEETING/ JUDICIAL SECTION: SERVICE MEMBERS CIVIL RELIEF ACT AND FAMILY LAW , NEW YORK, AUGUST 2009.

ABA FAMILY LAW SECTION MEETING MONTREAL CANADA: PLENARY SESSION INTERNATIONAL PARENTAL KIDNAPPING COMPARATIVE LAW ISSUES, OCTOBER 2009.

NJ BAR ASSOCIATION MID-YEAR MEETING, SAN FRANCISCO CALIFORNIA : FAMILY CARE PLANS AND THE SCRA. MILITARY CUSTODY, NOVEMBER 2009.

INTERNATIONAL ACADEMY US CHAPTER: PUERTO RICO: HAGUE ABDUCTION CONVENTION, TRENDS IN LITIGATION , FEBRUARY 2010.

JUDICIAL TRAINING LOUISIANA BAR ASSOCIATION: SPRING 2010, MILITARY LAW ISSUES, MILITARY CHILD CUSTODY DISPUTES.

NJ BAR ASSOCIATION CLE: SPRING 2010; 2013; 2014 INTERNATIONAL CHILD CUSTODY DISPUTES, UNDERSTANDING JURISDICTION IN FAMILY LAW CASES.

JUDICIAL COLLEGE , NEW JERSEY JUDICIAL COLLEGE, NOVEMBER 2010 SERVICE MEMBERS CIVIL RELIEF ACT, FAMILY LAW IMPLICATIONS.

VIRGINIA FAMILY LAW RETREAT : INTERNATIONAL FAMILY LAW FOR LAWYERS AND JUDGES SPRING 2011, TYSON'S CORNER VA.

SOUTH CAROLINA BAR ASSOCIATION : INTERNATIONAL FAMILY LAW AND INTERNATIONAL IMPLICATIONS OF THE UCCJEA SPRING 2011.

GA BAR ASSOCIATION : FAMILY LAW SEMINAR : INTERNATIONAL FAMILY LAW, COMMENTARY ON THE HAGUE ABDUCTION CASE : GOLDMAN V. GOLDMAN AND RIBIERO. SPRING 2011.

PRESENTATION TO NJ LEGISLATURE AND STAFF : MARCH 2013 COMPARATIVE REVIEW NEW JERSEY SERVICE MEMBERS CIVIL RELIEF ACT AND FEDERAL LAW

UCCJEA 101 : APRIL 2014

PRESENTATION TO FAMILY COURT JUDICIARY ANNUAL TRAINING SEMINAR GALLOWAY NJ JURISDICTION , UNPACKING THE UCCJEA AND UIFSA : DECEMBER 2014

CONTINUING LEGAL EDUCATION BURLINGTON COUNTY FAMILY COURT CLE

INTERSECTION OF UCCJEA AND UIFSA APRIL 2015

PRESENTATION TO FAMILY COURT JUDICIARY ANNUAL TRAINING SEMINAR GALLOWAY NJ

SERVICE OF PROCESS, JURISDICTION AND MILITARY ISSUES MAY 2015

PRESENTATION TO MILITARY LAW SYMPOSIUM, FAMILY LAW SECTION SPRING CLE CARLSBAD CA

INTERNATIONAL CHILD ABDUCTION PREVENTION AND RECOVERY ACT, THE CASE FOR RECIPROCITY

PRESENTATION AT IAML HAGUE TRAINING , QUEBEC CANADA JUNE 2015

PRESENTATION AT IAFL HAGUE TRAINING : DRAFTING PREVENTION ORDERS , NEW YORK, NY APRIL 2016.

PRESENTATION TO FAMILY COURT JUDICIARY ANNUAL TRAINING SEMINAR GALLOWAY NJ : INTERNATIONAL CHILD ABDUCTION, JUDICIAL TOOLS FOR PREVENTATIVE MEASURES APRIL 2016

PRESENTATION TO NEW JERSEY ASSOCIATION FOR JUSTICE : SPEAKER REGARDING ORDERS ADDRESSING INTERNATIONAL PARENTAL ABDUCTION, REVIEW OF ICAPRA , ATLANTIC CITY NJ APRIL 2016

PRESENTATION TO NEW JERSEY STATE BAR ASSOCIATION , MILITARY LAW SECTION , SCRA AND FAMILY LAW, MILITARY CUSTODY ISSUES AND THE UCCJEA, ATLANTIC CITY NJ MAY 2016.

PRESENTATION TO INTERNATIONAL ACADEMY OF FAMILY LAWYERS: DRAFTING PROTECTIVE ORDERS AND UNDERSTANDING ICAPRA , NEW YORK, NY APRIL 2017.

PUBLICATIONS

"MANAGING CHILD CUSTODY CASES INVOLVING NON-HAGUE CONTRACTING STATES", JOURNAL OF THE AMERICAN ACADEMY OF MATRIMONIAL LAWYERS, VOL. 14, SUMMER 1997 FOR WHICH SHE RECEIVED A COMMENDATION FOR EXCELLENCE FROM THE AMERICAN ACADEMY OF MATRIMONIAL LAWYERS.

"USE OF UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD IN PRIVATE FAMILY LITIGATION", GEORGETOWN UNIVERSITY JOURNAL ON FIGHTING POVERTY , FALL 1998.

SELECTED TOPICS IN INTERNATIONAL LAW FOR THE FAMILY PRACTITIONER", GUEST EDITOR, ABA FAMILY LAW QUARTERLY, VOL. 32, FALL 1998.

"DISTANT DISCOVERY", FAMILY ADVOCATE VOL. 21, NO. 3, AMERICAN BAR ASSOCIATION, FALL 1998.

COMPULSORY CONVERSATION : THE MANDATORY JUDICIAL COMMUNICATION REQUIREMENTS OF THE UCCJEA" OCTOBER 2001 PRESENTED ABA FAMILY LAW SECTION MEETING, VANCOUVER BC;

"DISTANCE LEARNING PROGRAM ABA LAMP COMMITTEE, UIFSA AND THE UCCJEA AND MILITARY MEMBERS", WEB AND CD ROM PROGRAM : PRESENTER, PRODUCED JUNE 2003

"THE CASE FOR RECIPROCITY : UNDERSTANDING THE SEAN AND DAVID GOLDMAN INTERNATIONAL PARENTAL KIDNAPPING PREVENTION AND RECOVERY ACT" , JUNE 2015 TO BE PRESENTED AT THE IAML US-CANADA CHAPTER MEETING QUEBEC CANADA JUNE 9, 2015 AND THEREAFTER PUBLISHED IN NEW JERSEY LAWYER. OCTOBER 2015 NO.296, P.46-53

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Curriculum Vitae of.

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EDUCATION

Ithaca College (B.S., *cum laude*, 1968)
St. John's University (J.D., 1972)
Certified Public Accountant (NY 1973)
New York University (LL.M., Taxation, 1976)

COURT ADMISSION

1973	--	Admitted to Bar, New York and U.S. Tax Court
1974	--	U.S. District Courts, Southern and Eastern Districts of New York
	--	U.S. Court of Appeals, Second Circuit
1976	--	U.S. Supreme Court and District of Columbia
1979	--	New Jersey and Florida

PUBLISHED ARTICLES

The Hague Convention - Understanding & Litigating Under the Treaty
The Hague Convention - Educating the State Court Judge
Distribution of Military Benefits - The Need for Reform
Distribution of Military Benefits - Congressional Reform
Interjurisdictional Enforcement of Matrimonial Orders - A Proposal
Divorce Law in China - Domestic Relations Tax Reform Act, 1984
How to try a Hague Case.
Made a Tape for Students studying for certification to American Academy of Matrimonial Lawyers

EXPERTISE

Expert Witness on various court cases throughout the nation on Interstate and International Child Abduction Cases

Liaison to International Child Abduction Project sponsored by the ABA Center on Children and the Law - Department of Justice OJJDP, (1993-96)

Chairman of the Mentoring Committee of the International Child Abduction Attorneys Network (ICAAN), funded by the Dept. of Justice OJJDP in conjunction with ABA Center on Children and the Law and the National Center for Missing and Exploited Children (NCMEC)

Consultant to the United States State Department, Bureau of Consular Affairs, Children's Issues Department and National Center for Missing and Exploited Children (MCMEC) on International Child Abductions

Certificate of Appreciation from the United States Department of State- March 1996

Participant in Hague Convention Meetings on Implementation of Treaty, Hague Convention on Civil Aspects of International Child Abduction, Netherlands, 1993, 1996, 1999, 2003, 2007

Member of United States delegation to the Hague-1996

Expert Witness before U.S. House of Representatives; House Ways and Means Committee, Child Support Amendments, 1984, 1988, Social Security Amendments, 1989

Expert Witness before Senate and Assembly Judiciary Committee of New York on Hearings of Surrogate Parent Bill, 1986

Expert Witness before U.S. Senate, Committee on Armed Services, Uniform Services Former Spouses Protection Act, 1982

Speaker/Lecturer on Interstate and/or International Child Custody, at various Institutes, including:

- Second World Congress on the Rights of Children (1997)
- American Bar Association's annual winter and spring meetings
- International Academy of Matrimonial Lawyers (1997; 1992)
- American Family Conciliation Courts National Conferences
- American Association of Trial Lawyers
- Hispanic Bar Association
- New Jersey Continuing Legal Education Institute
- COURT TV
- American Academy of Matrimonial Lawyers 2002, 2006
- International Academy of Matrimonial Lawyers 2004
- Hague Convention Delegate on the Implementation of the Treaty on Child Abduction September, 2007
- Fairfield County Bar Association, Connecticut , 2007
- Cross Border Mediation and the Hague Convention on International Parental Child Abduction, University of Miami School of Law, February, 2008

  How to try a Hague Convention Case- International Academy of Matrimonial Layers June, 2008 Boston, Mass
-

I have been continuously active in the practice of law for the past forty three years (43), and for the last forty (40) years have devoted my practice, almost entirely, to that of matrimonial and family law. I am a Fellow of the American Academy of Matrimonial Lawyers and Secretary of the New York Chapter and a previous chair of the National Legislation Committee. I have chaired many committees in that organization. I am a Fellow of the International Academy of Matrimonial Lawyers and Vice President and Former Secretary of the American Chapter of that organization. I am a member of the National Panel of Marital Arbitrators of the American Arbitration Association. I am also a member of the Executive Committee of the Family Law Section of the New York Bar Association. In addition, I was a member of the Executive Council of the American Bar Association's Family Law Section, and a member of various matrimonial law committees both in New York State and American Bar Associations. I chaired the Federal Kidnapping Committee of the Academy of Matrimonial Lawyers and I was liaison to ABA Parental Abduction Project. I was the Chairman of the Mentoring Committee of the International Child Abduction Attorneys Network (ICAAN), funded by the Dept. of Justice OJJDP in conjunction with ABA Center on Children and the Law and the National Center for Missing and Exploited Children. I have been an expert witness before the United States Senate Armed Services Committee on issues relating to military pension, the House Ways and Means Committee on issues relating to child support, and before the New York State and New Jersey State Assembly's Judiciary Committees on the subject of surrogate parenting and have advised the U.S. State Department on various occasions including speaking in the North American Symposium on International Child Abduction. My experience in the matrimonial field is extensive and varied and includes the handling of all types of matrimonial actions and proceedings in the trial and appellate courts of the State of New York and elsewhere including almost four hundred (400) cases under the Hague Convention. I have been a Lecturer at Various Institutes on Interstate and International Child Custody, including American Family Conciliation Courts National Conferences, American Bar Association's annual winter and spring meetings, American Academy of Matrimonial Lawyers, International Academy of Matrimonial Lawyers, American Association of Trial Lawyers, Hispanic Bar Association, New Jersey Continuing Legal Education Institute, COURT TV, and various other bar associations. My firm has handled many international custody actions and many interstate custody actions involving the Uniform Child Custody Jurisdiction Act and the Parental Kidnapping Prevention Act.

AMERICAN ACADEMY OF MATRIMONIAL LAWYERS - New York Chapter

Fellow (1984-present)
Chairman/Member, Kidnapping Committee (1994-6), (1996-present)
Chairman, Meeting Committee (1986-1998)
Member, Legislation Committee (1991-1998)
Parliamentarian (1995-96; 1991-92)
Member, National Budget and Finance Committee (1994-95)
Co-Chairman, National Legislation Committee (1990-91)
Chairman, Committee on Surrogate Parenting (1986)
Board of Managers, New York Chapter (1986-90) (1993-1996) (1999-2002)
Specialization Committee (1985)
Secretary (1999- Present)

AMERICAN BAR ASSOCIATION - Member (1972-present)

Family Law Section --

Council Member (1996-99; 1985-91)
International Law and Procedures (1991-present)
Chairman/Member, Federal Legislation & Procedures (1989-present)
Vice Chair/Member, Federal Task Force on Legislation (1992-present)
Parliamentarian (1995-96)
Liaison to International Child Abduction Project (1993-96)
Co-Chairman, Bankruptcy Committee, (1992-94)
Advisory Committee (1991-94)
Chairman, By-Laws Committee (1990-91; 1982-84)
Law and the Fifty States (1985-94)
Chairman/Member, Scope & Correlations Committee (1987-90)
Ad hoc Committee on Surrogacy (1987-88)
Editorial Board, Family Law Quarterly (1987)
Chairman, Research Committee Member (1986)
Member, Annual Meeting Coordination Committee (1985-86)
Chairman, Policy & Procedures Handbook Committee (1982-86)
Membership Chairman (1983-85)
Chairman, Interstate/Federal Support Laws & Procedures Committee (1981-85)
Vice Chairman Divorce Laws and Procedures Committee (1980-82)
Alimony, Support and Maintenance Committee (1977-80)

Young Lawyers Division
Member, Liaison with Other Professions and Organizations (1981-82)
Member, Child Advocacy and Protection Committee (1980-82)
Delegate (1974-81)

INTERNATIONAL ACADEMY OF MATRIMONIAL LAWYERS - Member (1988-present)
Vice President, American Chapter (2010- present)
Board of Managers, American Chapter (1996-present)
Secretary, American Chapter (1994-95)
Counsel to the President (2006-2008)

NEW YORK STATE BAR ASSOCIATION - Member (1972-present)

Chairman, International Custody Committee (1995-1998)
Executive Committee (1979-2009)
Program Chairman, Annual Meeting (1985-91)
Co-chairman, Committee on Surrogate Parenting (1986-87)
Program Chairman, Young Lawyers Section (1985)
Chairman, Long Range Planning, Family Law Section (1979-85)
Liaison, Executive Committee, Young Lawyers Section (1979-82)
At Large Delegate- 2006-present

ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK - 1973

Member, Committee on Matrimonial Law (1991-1996)
Liaison to Committee on Matrimonial Law (1985)

NEW JERSEY BAR ASSOCIATION -
Co-chairman, Specialization Committee Member (1983-84)
Legislation Committee (1984)

Westchester County Bar Association - 1973
Bergen County Bar - 1979
Essex County Bar Association - 1979
District of Columbia Bar Association
Florida Bar Association
American Association of Attorneys-CPA's - 1973
American Arbitration Association - 1973
National Panel of Marital Arbitrators (1978-present)
Commercial Panel Arbitrators (1975)

Employment

Law Offices of Robert D. Arenstein (New York & New Jersey) (1984 to present)
Arenstein & Huston, P.C., President (1980-84)
Self-Employed (1975-80)
Shapiro, Weiden & Mortman, P.C. (1974-75)
Hofheimer, Gartlir, Gottlieb & Gross (1973-74)

Born: January 16, 1947
New York, New York

Nancy Zalusky Berg

Nancy Zalusky Berg is a founding partner of Berg, Debele, DeSmidt & Rabuse, P.A., a nine lawyer firm limiting its practice to all aspects of family, juvenile, ARTS and adoption law. Ms. Berg has limited her practice to all aspects of family law since 1985, with an emphasis on international aspects. She is the current President of the International Academy of Family Lawyers (www.iafl.com), past President of the IAFL – USA Chapter, a member of the American Academy of Matrimonial Lawyers, (www.aaml.org), a member of the International Bar Association and a past member of the Lawyers Professional Responsibility Board. She has been listed in the "Best Lawyers in America" and has been identified as one of Minnesota's "Super Lawyers" of *Law & Politics*, *Minnesota Monthly* and *Mpls-St. Paul* magazines since 1993. She has been listed as one of the top 100 lawyers in Minnesota for several years and is one of the top 40 lawyers in the Family Law practice area by *Law & Politics*. Ms. Berg has received a peer review rating of AV Preeminent by American Registry since 1995. She is a qualified neutral under Rule 114 of the Minnesota General Rule of Practice. Ms. Berg has also served on a variety of community non-profit boards and is an active glass and mosaic artist. *Berg, Debele, DeSmidt & Rabuse, P.A., 121 South 8th Street, Suite 1100, Minneapolis, MN 55402 Phone: (612)340-1150 Fax: (612)340-1154 Email: n.berg@innovativefamilylaw.com*

Charlotte Butruille Cardew

CBBC Avocats

Charlotte is partner and co-founder of the firm CBBC.
Before starting CBBC, Charlotte worked in London and Paris Business Law, then family law and heritage. She has particularly focused her work towards international affairs with complex financial issues in family law. She has developed a particular expertise in prenuptial agreements, international civil partnerships and the Board or the litigation involving wealth structuring.

Charlotte emphasizes teamwork as well as listening and talking in order to understand the specific needs of each client and to work in the best interests of everyone.

Accredited Practitioner and Trainer in collaborative law, alternative dispute resolution technique based on integrative negotiation, introduced in France in 2007, Charlotte has also developed a real expertise in such international negotiations, and thus can provide her clients with a tailored alternative, fast and discreet.

She works in both French and English.

She is a member of many international organizations, working closely with universities and also teaching.

LAURA DALE & ASSOCIATES, P.C.
ATTORNEYS AND COUNSELORS AT LAW

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Houston, Texas 77056
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Professional Background:

Laura is Board Certified in Family Law by the Texas Board of Legal Specialization, and Legal Counsel to the Consulate General of France in Houston Texas. Laura practices in the area of family law, with the majority of her cases involving high conflict divorce and custody case, international abduction and other cases brought under the Hague Convention and is a Fellow of the International Academy of Matrimonial Lawyers. She is fluent in French.

Laura is a certified mediator in Texas, a certified collaborative law attorney in Texas, and a certified parenting coordinator under the Texas parenting coordinator statute. She received her *juris doctor* from South Texas College of Law and is licensed by the Texas Supreme Court, and admitted to practice in the Supreme Court of the United States, the United States Court of Appeals for the Fifth Circuit Court of Appeals, the Seventh Circuit Court of Appeals, the Tenth Circuit Court of Appeals, the Texas Eastern District Court, the Texas Northern District Court, the Texas Southern District/Bankruptcy Court, the Texas Western Bankruptcy Court, and the Texas Western District Court.

Laura received a BA from the University of Texas in 1978, where she majored in psychology. She obtained a master's degree in psychophysiology and a doctoral degree in neuroscience from the *Université Louis Pasteur* in Strasbourg, France. There she served as a recherché attaché with the *Centre Nationale de Recherche Scientifique* and published in several internationally recognized medical journals.

Laura has an extensive business management background, and served as vice president a non-profit, non-partisan, national advocacy organization with a membership base of more than 250,000 and a $15,000,000 operating budget. Laura is a Trustee and President of the Board for the Harris Country Hospital District Foundation which raises funds for the district's multiple hospitals and clinics which serves the underinsured in the third most populous county in the United States.

Areas of Practice:

- Complex Family Law Litigation
- Complex Jurisdictional Disputes Involving Family Law Matters
- Child Abduction Suits Brought Under the Hague Convention in Federal and State Courts
- Federal and State Appeals Involving Family Law Matters
- Complex Premarital and Marital Agreements Involving Questions of Jurisdiction

Certification/Specialties:

- Certified in Family Law, Texas Board of Legal Specialization
- Mediation and Collaborative Law
- Collaborative Law
- Certified Parenting Coordinator

Bar Admission:

- Texas
- Supreme Court of the United States
- U.S. Court of Appeals for the Fifth Circuit
- U.S. Court of Appeals for the Seventh Circuit
- U.S. Court of Appeals for the Tenth Circuit
- U.S. District Court for the Eastern District of Texas
- U.S. District Court for the Southern District of Texas
- U.S. District Court for the Northern District of Texas
- U.S. District Court for the Western District of Texas
- U.S. District Court for the Southern District of Texas Bankruptcy Court
- U.S. District Court for the Western District of Texas Bankruptcy Court

Education:

- South Texas College of Law, Houston, Texas, J.D.
- Université Louis Pasteur, Strasbourg, France, doctoral dégrée – neuroscience
- Université Louis Pasteur, Strasbourg, France, Maîtrise en psychophysiologie
- University of Texas, Austin, B.A. Psychology

Representative Cases:

- *Salazar v. Maimon*, 750 F.3d 514 (5th Cir. 2014)
- *Loftis v. Loftis*, 2014 U.S. Dist. LEXIS 178084 (S.D. Tex. 2014)
- *Berezowsky v. Ojeda*, 2013 U.S. Dist. LEXIS 5337 (S.D. Tex. 2013), *rev'd*, 765 F.3d 456 (5th Cir. 2014), cert. denied
- *Munoz v. Rodriguez*, 923 F.Supp 2d 931 (W.D. Tex. 2013)
- *Rovirosa v. Paetau*, 2012 U.S. Dist. LEXIS 173304 (S.D. Tex. 2012)
- *Aduli v. Aduli*, 368 S.W.3d 805 (Tex. App.—Houston [14th Dist.] 2012)
- *Norinder v. Norinder*, 657 F.3d 526 (7th Cir. 2011)
- *In re J.P.L.*, 359 S.W.3d 695 (Tex. App.—San Antonio 2011)

Publications:

- The Economic Impact of Replacing the Federal Income Tax with a Federal Consumption Tax: Leveling the International Playing Field, Currents International Law Journal, Spring 2001
- Don't be a Neanderthal: Case Management Software—The Time for Evolution is Now! 2002 So. Tex. Fam. L. Gen. Practice Ch. I
- A Client for Life—How to Keep Those Referrals Coming, Houston Bar Association, March 2004;
- Informal Marriage and Marriages in Other States, Marriage Dissolution Conference April 2004
- Cultural Aspects of Divorce, South Texas College of Law Continuing Legal Education, February 2007
- Handling Special Property Division Issues, Half Moon CLE, January 2007

- Why Shouldn't I Handle a Family Law Case on My Own? Winstead University, November 2008
- Examining the Examiner, Advanced Family Law 2009
- Dealing with Ethnic and Religious Issues in Suits Affecting the Parent-Child Relationship, 2010 Parent-Child Relationships, University of Texas CLE.
- International Issues – Travel, Advanced Family Law Drafting Course 2010
- Valuing Assets Outside the U.S.: Why Doesn't Everyone Play by OUR Rules?, AICPA/AAML National Conference on Divorce, May 10-11, 2012, Las Vegas, Nevada.

Professional Association and Memberships:

- State Bar of Texas, Family Law Section
- College of the State Bar of Texas
- International Academy of Matrimonial Lawyers
- Texas Academy of Family Law Specialists, Former Newsletter Editor
- Houston Bar Association
- Burta Rhodes Raborn Family Law Inns of Court
- Association of Women Attorneys
- Association of Family and Conciliation Courts
- Phi Delta Phi International Legal Fraternity
- American Bar Association
- French-American Chamber of Commerce
- French Section of the Louisiana State Bar
- Trustee/President, Harris Country Hospital District Foundation

Past Professional Experience:

- Jenkins & Kamin, LLP, partner 2011
- Myres, Dale & Associates P.C., founding member and partner, 2001-2010
- Americans for Fair Taxation, VP & Director of Research, 1995-2000
- EDS, Inc., President, 1985 – 1995
- CNRS, France, Research Attaché, 1979 – 1985

SYLVIA GOLDSCHMIDT
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Sylvia Goldschmidt, Esq., founding partner at GOLDSCHMIDT & GENOVESE, LLP, White Plains, New York graduated from State University of New York at Buffalo, *magna cum laude,* obtained her J.D. degree from Brooklyn Law School, and thereafter an LL.M. degree in Taxation from New York University School of Law.

Ms. Goldschmidt has been engaged in the private practice of law, predominantly in the field of matrimonial and family law, for almost thirty-five (35) years. Her experience in this field is immeasurable and includes the litigation of all aspects of divorce proceedings, custody and support matters, negotiations and drafting of separation, settlement and pre-nuptial agreements. Ms. Goldschmidt is also trained in the Collaborative Law and Mediation processes. She practices primarily in Westchester, New York, and Rockland Counties, but also represents clients in the counties of Orange, Dutchess, Putnam, Bronx, Queens, Kings and Nassau. Many of the matters handled by Ms. Goldschmidt are complex, involving sophisticated and/or unique issues of law and finance, including family law matters with international elements, custody and financial.

Ms. Goldschmidt is a Past President of the International Academy of Matrimonial Lawyers ("IAML") - US Chapter, former President of the New York Chapter of the American Academy of Matrimonial Lawyers ("AAML"), a former member of the National Board of Governors of the AAML, member of the Executive Committees of the New York State Bar Association ("NYSBA") - Family Law Section and the Family Law Section of the Westchester

County Bar Association. She is a member of the Advisory Committee for the Honoring Families Initiative of the Institute for the Advancement of the American Legal System ("HFI-IAALS") based at the University of Denver. Ms. Goldschmidt formerly sat on the Board of the Westchester Women's Bar Association and has Co-chaired the Legislative and Matrimonial Committees of that association. Ms. Goldschmidt is a former Chair of the WBASNY Matrimonial Law Committee (statewide). In addition to numerous other affiliations and honors, Ms. Goldschmidt has been listed in The Best Lawyers in America for each of the years 1999/2000 through the present having been designated as the Family Law Lawyer of the Year in 2014 and 2017 for her geographic area; and has been awarded the distinction of being included as a *New York Super Lawyers.* Ms Goldschmidt is a faculty member for the American Academy of Matrimonial Law Annual Institute and has been on the faculty of the AICPA Expert Witness Training Workshop in 2011 and 2013; was a co-lecturer at the joint program of the Association of Family and Conciliation Courts ("AFCC") and AAML on advanced issues in child custody in 2011; and has been a lecturer for Pace Law School Continuing Legal Education Program, the Family Law Section of the NYSBA, AAML, IAML, Practicing Law Institute ("PLI") and other bar associations and organizations. Ms. Goldschmidt has also written articles for various bar associations and publications.

Lawrence S. Katz, P.A.
Two Datran Center - Suite 1511
9130 South Dadeland Boulevard
Miami, Florida 33156-7850
Telephone: 305-670-8656
Telefax: 305-670-1314
Email: lkatz@katzfamilylaw.com
www.katzfamilylaw.com

EDUCATION

J.D., University of Miami, 1968 Phi Alpha Delta
Law Fraternity

B.B.A., University of Miami 1965
Phi Epsilon Pi Fraternity, President

ADMISSIONS

Mr. Katz was admitted to the Florida Bar in 1968 and to the Florida Supreme Court, U.S. District Court, Southern District of Florida and the U.S. Court of Appeals, 5th Circuit; 1974, U.S. Supreme Court; 1980, U.S. District Court, Middle District of Florida; 1981, U.S. Court of Appeals, 11th Circuit; 1996, U.S Court of Appeals 3rd Circuit; and, 2014, U.S. Court of Appeals 9th Circuit.

ACTIVITIES AND LECTURES

Lecturer, "Records and the Abducted Child," Children's Records Law in Florida, 1999, 2000, 2001.

Lecturer, Twelfth Annual Nuts and Bolts of Divorce, DCBA Family Courts Committee (2005). “Economic Injunctions/Freeze Orders Domestic and Foreign.”

Lecturer, “Abduction Factors and Fla. Stat. §61.45 as it Concerns International Visitation and Child Custody,” First Family American Inn of Court (2006).

Lecturer, Family Law Update 19th Judicial Circuit in St. Lucie County, Florida (2007), “Int'l Child Abduction: Returning Kids Home & Making the Abductor Pay Through Hague or UCCJEA."

Lecturer, “Cross-Border Family Mediation with an Emphasis on the 1980 Hague Convention on the Civil Aspects of International Child Abduction” sponsored by the University of Miami School of Law and the National Center for Missing and Exploited Children (NCMEC) (February 2008)

Participant, ICARA 15 Symposium. Office of Children’s Issues, U.S. Department of State, 2003.

Attended the Fifth meeting of the Special Commission to Review the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction held at the Hague, Netherlands 2006.

Member of Study Group of the Secretary of State Advisory Committee of Private International Law considering the 1996 Hague Protection of Children Convention, 2007.

Lecturer, “From Ferreting to Fetching: How to Find, Freeze and Retrieve Marital Assets

Hidden Abroad," ABA Section of Family Law, 2009 Spring CLE Conference.

Lecturer, "Moving from Kansas to Oz: Competing Paradigms and Practical Issues in International Child Custody Relocation Cases," Association of Family and Conciliation Courts (AFCC), 46th Annual Conference, May 2009.

Lecturer, "Transnational Families: Where International Law and Family Law Intersect," 2009 Florida College of Advanced Judicial Studies.

Lecturer, "Mediating International Child Abduction Cases and Other High Conflict Cross-Border Custody Disputes," ABA Section of International Law, 2009 Fall CLE Conference.

Lecturer, "Alternative to the Hague by Returning Kids Home and Making the Abductor Pay Through the UCCJEA", U.S. Chapter of the IAFL, 2011 Annual General Meeting.

Observer/attendee on behalf of IAFL (NGO) at the Sixth meeting of the Special Commission to Review the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction and the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforceability and Measures for the Protection of Children held at the Hague, Netherlands, June, 2011.

Lecturer, "Case Study: Application to Remove a Child From the Jurisdiction", IAFL, 2011 Annual General Meeting held at Harrogate, U.K., September 2011.

Lecturer, "1980 Hague Convention", Lunch and Learn Seminar Sponsored by Family Court Services, October 2011.

Observer/attendee on behalf of IAFL (NGO) at the Sixth meeting of the Special Commission to Review the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction and the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforceability and Measures for the Protection of Children held at the Hague, Netherlands, January, 2012.

Lecturer, "Representing the Abducting Parent", Japanese Symposium, IAFL, U.S. Chapter held at Minneapolis, MN, June 2012.

Lecturer, "Enforcement of Mediated Agreements", Japanese Symposium, IAFL, U.S. Chapter held at Minneapolis, MN, June 2012.

Lecturer, "International Enforcement of Mediated Agreements: Properly Structuring Your Agreements for Enforcement Success.", IAFL, U.S. Chapter Annual Meeting held at Minneapolis, MN, June 2012.

Lecturer, "Mediating Hague Abduction Cases." Phoenix Symposium, IAFL, U.S. Chapter Annual Meeting held at Carefree, AZ, February 2013.

Lecturer, "International Relocation", IAFL Hague Symposium, held at Colegio Puplico de Abogados de Capital Federal, Buenos Aires, Argentina, September 2013.

Lecturer, "Domestic Violence and the Article 13(b), Grave Risk Defense", IAFL Annual Meeting held at Buenos Aires, Argentina, September 2013.

Lecturer, "2007 Hague Maintenance Convention, 1996 Hague Jurisdictional Convention, the Cuban Adjustment Act and Asylum vs. Art. 13(b) grave risk", IAFL European Chapter Annual Meeting held at Bordeaux, France, March 2014.

Lecturer, “The Aftermath of *Lozano*: Defending Against the Well Settled Defense Under Art. 12”, IAFL, U.S. Chapter Annual Meeting held at New York City, NY, June 2014.

Lecturer, “Hague Abduction Convention and UCCJEA”, Florida Chapter of the AAML, The 37th Annual Institute, Tampa, FL, May 2015.

Lecturer, “Article 13(b) and Asylum in the U.S.”, IAFL Hague Symposium, held at Quebec City, Canada, June 2015.

Lecturer, “UCCJEA or Hague Convention”, IAFL Symposium on International Family Law, held at The Down Town Association, New York City, NY, April 2016.

Presenter, “Enforcement of the Hague Abduction Convention: A Project for Japan”, International Visitor Leadership Program, Bureau of Educational and Cultural Affairs, U.S. Dept. of State, Miami, FL, December 2016.

PUBLICATION

Author, “When the? Involves an International Move, The Answer May Lie in Retaining U.S. Jurisdiction,” ABA Section Family Law, Family Advocate Spring 2006.

AWARDS AND RECOGNITIONS

International Academy of Family Lawyers, U.S. Chapter, June 2014, Bill Hilton Memorial Award for Exceptional Contributions to International Family Law.

Super Lawyers 2010 through 2016 (Top Attorneys in Florida). Florida Trend, the State’s Legal Leaders. Florida Legal Elite 2009-2016. Top Lawyers in Florida (2014-16). The First Family Law American Inns of Court Awards for Service (2008-10). Awards of Merit from the National Center for Missing and Exploited Children and the U.S Department of State Certificate of Appreciation for Extraordinary Assistance to Hague Convention Applicants. "AV" rated by Martindale Hubbell since 1976. Certificate of Recognition from ABA, Section of Family Law for Service as Chair of the International Law Committee. Listed in the Bar Register of Preeminent Lawyers. Supreme Court Certified Family Mediator. Listed in “Who’s Who in America, the World and Law”.

MEMBERSHIPS

Fellow, International Academy of Family Lawyers (IAFL), Board of Managers and Chairman of Committee on Hague Conventions (2010-2016): U.S. Chapter of the IAFL, Chairman of the Committee on Hague Conventions (2010-2016) and member of the Admissions Committee (2010-2016) American Bar Association: Family Law Section, International Law Committee, Chairman (2007-9) and Immediate Past Chairman (2009-2011), Domestic Violence Committee, Vice Chairman (2009-2011); International Law Section, Family Law Committee, member of Steering Committee; Florida Bar Association: former member; Continuing Legal Education, Children's Issues Committees, Legislation, Mental Health in Litigation, and Domestic Violence Committees; Mentor, International Child Abduction Attorney's Network (ICAAN) and the U.S. Department of State, Office of Children’s Issues Attorney Network; Member, International Society of Family Law; and, Member, Association of Family and Conciliation Courts.

REPORTED FAMILY CASES

In Re Cabrera, 323 F.Supp.2d 1303 (S.D. Fla. 2004) (return to Argentina the court found equitable tolling and held that a child should be returned rather than threatened with possible deportation).

In Re Arison-Dorsman, U.S. Dist. Lexis 9861, 32 Media L. Rep. 1699 (S.D. Fla. 2004) (return ordered to Israel: record should not be sealed).

Leslie v. Noble, 377 F.Supp. 2d 1232 (S.D. Fla. 2005) (held that father had rights of custody before, during and after paternity court proceedings in Belize).

Marcos v. Haecker, 915 So.2d 703 (Fla. 3rd DCA 2005) (international paternity case involving Spain, Mexico and Florida where a motion to quash service of process was affirmed on appeal).

Dallemagne v Dallemagne, 440 F. Supp. 2d 1283 (M.D. Fla. 2006) (return to France and provides an excellent analysis of burden of proof and defenses).

Angulo Garcia v. Fernandez Angarita, 440 F. Supp. 2d 1364 (S.D. Fla. 2006) (return to Colombia and held, in part, that consent to travel is invalid if procured by fraud).

Hanley v. Roy, 485 F.3rd 641 (11th Cir. 2007) (return to Ireland and held that district court made a "mockery" of Convention refusing to order the return of children to grandparents/guardians).

Dyce v. Christie, 17 So.3rd 892 (Fla. 4th DCA 2009) (expedited enforcement of final decree from Jamaica, child abduction, collateral attack of foreign judgment and due process of law).

Abdo v. Ichai, 34 So.3rd 13 (Fla. 4th DCA 2010) (PCA affirmed order permitting mother to relocate to France, retaining habitual residence in the United States and transferring jurisdiction to California).

Sarpel v. Eflanli, 65 So.3rd 1080 (Fla. 4th DCA 2011) (Temporary absence and the establishment of "home state" subject matter jurisdiction pursuant to the U.C.C.J.E.A. and anti-suit injunction preventing the former wife from attempting to modify the final judgment from Florida and "mirror orders" entered in Turkey).

Sahibzada v. Sahibzada, 2014 Ga. LEXIS 219 *(*S.Ct. Ga. 2014) (Supreme Court quoted from ABA article on relocation)

Carlwig v. Carlwig, 16 F. Supp. 3d 1075 (C.D. Ca. 2014) (Case of first impression on habitual residence by returning infant born in California to Sweden along with older brother where parties had shared intent to do so).

Carlwig v. Carlwig, U.S. App. LEXIS, 6353 (9th Cir. 2015) (Infant was not habitual residence of either U.S. or Sweden. Both children shall remain in Sweden).

Rachael KELSEY, Solicitor

Rachael is a solicitor and one of the eponymous founding directors of SKO Family Law Specialists, the largest niche family practice in Scotland.

Rachael works in Edinburgh and London, practising Scots Law. She advises on the full range of family law matters, with a particular interest and expertise on jurisdictional issues in family law cases, with over 90% of her practice now having some kind of jurisdictional element to it. She is one of only three 'leading individuals' in Scotland for family law in the current edition of the Legal 500. She has been in 'Band 1' of matrimonial lawyers in Scotland in Chambers and Partners for many years, where her firm is top ranked, as it is in the Legal 500.

Rachael is Secretary of the IAFL having previously been Counsel to the Academy. In 2016 Rachael was appointed for a period of 3 years to the Family Law Committee of the Scottish Civil Justice Council. She was a member of the Scottish Government Civil Sub-Group working on the implementation of vulnerable witness legislation and also on the Lord Advocate's working group on child witnesses; was previously Chair of the Family Law Association (2005-2006); is currently Chair, and a trustee, of Family Mediation Lothian and is Treasurer of CALM (the organisation of solicitor mediators in Scotland).

Rachael is accredited by the Law Society of Scotland as a Specialist in Family Law and as a Family Mediator. She was trained as a Collaborative lawyer in 2004 and is a member of CFL (Collaborative Family Law, formerly Central London Collaborative Forum). She was a founding member of the group set up to institute a bespoke Family Arbitration scheme in Scotland- FLAGS- and now trains arbitrators (family and commercial) as well as acting as arbitrator. She is a co-opted member of the management committee of the Scottish branch of the Chartereed Institute of Arbitrators.

Contact details:

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93 George Street
Edinburgh
EH2 3ES

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Fax: +44 (0) 131 243 2582
Mobile: +44 (0) 7917 094 371
Email: Rachael.Kelsey@sko-family.co.uk

Daniel Klimow, J.D.

Daniel Klimow is an Attorney Adviser in the U.S. Department of State's Bureau of Consular Affairs, Directorate of Overseas Citizens Services, Office of Legal Affairs. He provides legal and policy guidance to consular officers on a broad array of issues including social security totalization agreements, acquisition of U.S. citizenship, property, and death and arrest cases involving U.S. citizens abroad. He also provides guidance on bilateral and multilateral judicial assistance matters, and serves on the Hague Conference on Private International Law's Experts' Group on the Use of Video-link and other Modern Technologies in the Taking of Evidence Abroad. Prior to joining the Office of Legal Affairs, Mr. Klimow worked on international parental child abduction cases in the U.S. Department of State's Office of Children's Issues, which is also in the Directorate of Overseas Citizens Services. Mr. Klimow received his Juris Doctor degree from George Mason University School of Law, and a Bachelor of Arts degree from San Diego State University.

Nicholas W. Lobenthal

Undergraduate degree in history, cum laude, from Yale University. JD from Columbia University School of Law; Stone Scholar; editor-in-chief Journal of Law & Social Problems; Wertheimer Prize for labor law. Partner, Teitler & Teitler, LLP, 1998 to present. Peer ratings: AV preeminent (legal ability and ethical standards, including opinions of judiciary) and "Superlawyer." Member of board of managers of nonprofit Lotos Foundation supporting emerging artists. Singing member of Oratorio Society of New York and Florilegium Chamber Choir.

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William Longrigg

Partner

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William specialises in divorce, financial relief (to include pre-nuptial and post-nuptial agreements) and private law children cases.

William is the former head of the family sector at Charles Russell Speechlys and specialises in divorce, financial relief (to include pre-nuptial and post-nuptial agreements) and private law children matters. He also lectures on a range of family law issues including trusts and matrimonial breakdown and is a joint author with Sarah Higgins of *Family Breakdown and Trusts* for Butterworths. He has wide experience of cases with an international element and is Immediate Past President of the International Academy of Family Lawyers. William was named 2014 International Family Lawyer of the Year at the prestigious Jordans Family Law Awards and Family Lawyer of the Year 2016 at the *Spears Wealth* awards.

William is ranked as a “leading individual” by Chambers & Partners and listed in the Honours List of Leading Lawyers in the Family & Matrimonial category of the Citywealth Leaders List 2013. He was ranked in the top 10 London Family Law solicitors by Spears Wealth Magazine in 2015 and 2017.

Evan R. Marks is a board certified marital and family law attorney licensed in the State of Florida. He practices family law with his wife, Carolyn West, and two associates, at the Law firm of Marks & West, P.A., with offices in downtown Miami Florida. The Firm has a comprehensive practice in all aspects of marital and family law, with extensive experience in complex family law litigation and appeals, paternity, custody and international parental kidnapping matters, pre-and post-marital agreements, and alternative dispute resolution, including the collaborative law process.

Having received his Bachelor's and Law degrees from the University of Miami, Mr. Marks has been a Member of the Florida Bar since 1981 and Board Certified by the Florida Bar as a specialist in Marital and Family Law since 1995. He is a Fellow in the International Academy of Family Lawyers. He is AV rated by Martindale-Hubbell. Mr. Marks is the current President of the Collaborative Family Law Institute (CFLI), in addition to being a former President of the Family Law Section of the Florida Bar (2004), former Member of the Florida Commission on Responsible Fatherhood (1996-2002), former President of the First Family Law Inn of Court (2000-01), and former President of the North Dade Bar Association (1995-96).

Mr. Marks is a frequent author and lecturer on family law topics and professional ethics. He has taught at the Florida Conference of Circuit Court Judges and in June 2009 he served on the Faculty at the Florida Advanced Judicial Studies College. He is the proud father of four children, Lynx, Benjamin, Danny and Whitney.

Ronald H. Kauffman is the founder of Ronald H. Kauffman, P.A. He is board certified in marital and family law. He currently serves on the Executive Council of the Florida Bar Family Law Section, and is a member of both the California and Florida Bars. Ron is currently serving as President of the First Family Law American Inns of Court, and formerly served as Vice-Chair of the *Florida Bar Journal*. His most recent article "To Catch a Time-sharing Deviation" was published in *The Florida Bar Journal*, and is cited as a reference in the Florida Benchbook on Child Support. Outside the courtroom, Ron, and his wife Lisa, have three children: Jake, Matt and Scott.

THOMAS J. SASSER

Curriculum Vitae

Date and Place of Birth:
June 17, 1970;
West Palm Beach, Florida

Education:

Juris Doctor, The University of Florida College of Law, Gainesville, Florida 1995
Honors, Summer 1993, Fall 1994, Summer 1995
Honors, Legal Research and Writing
1994 Book Award for Trial Practice
Teaching Fellow for Legal Research and Writing
Council of Ten - Teaching Fellow for Contracts

Bachelor of Arts, The College of William and Mary Williamsburg Virginia, 1992
-Degrees in English and History

Bar Admission:

Florida Bar, 1995
U.S. District Court for the Southern District of Florida, 1995

Certification:

Marital and Family Law Florida Bar Board Certification, 2002

Designations:

Fellow of the American Academy of Matrimonial Lawyers

Fellow of the International Academy of Matrimonial Lawyers

Affiliations:

The Florida Bar since 1995

- Family Law Section since 1995
  - Chair 2006 - 2007
  - Executive Council Member since 1999
    Support Issues Committee
    - Chair 1998 - 1999, 2000 - 2001

- Commentator Committee 1995 - 2001
  - Chair 2000 - 2001
- Continuing Legal Education Committee
  - Chair 2002 – 2003, 2003 – 2004
- Chair Board Cert. Review Course 2003, 2004, 2005, 2006
- Legislation Committee 2000 – 2002, 2004 - 2005
  - Chair 2004 - 2005
- FAMSEG Committee 2000 - 2004
  - Chair 2002 – 2003, 2003 -2004

American Academy of Matrimonial Lawyers since 2006

- Associates Institute Committee 2006 - 2007

International Academy of Matrimonial Lawyers since 2006

- United States Chapter Executive Council 2007 - 2008

American Bar Association since 1995

- Family Law Section since 1995

Palm Beach County Bar Association since 1995

- Family Law Practice Committee since 1995
  - Chair 2003 – 2008

South Palm Beach County Bar Association since 1995

Awards:

Florida Bar Family Law Section Chair's Outstanding Service Award 1999 - 2000
Florida Bar Family Law Section Chair's Outstanding Service Award 2000 – 2001
Florida Bar Family Law Section Chair's Outstanding Service Award 2002 – 2003
Florida Bar Family Law Section Chair's Outstanding Service Award 2003 – 2004
Florida Bar Family Law Section Chair's Outstanding Service Award 2004 - 2005
Florida Trend's Florida Legal Elite 2004, 2005, 2006 & 2007
Florida Super Lawyers 2006, 2007

Authorship:

"10 Technological Advances which Improve the Practice of Law."
The Family Law Section Commentator, Sept. 1998.
"Back to the Future: Calculating Child Support Based upon the 1999 Amendments

to § 61.30." The Family Law Section Commentator, Sept. 1999.
"Child Support Myths and Truths: Exploring the Assumptions Underlying Florida's Statutory Guidelines." The Florida Bar Journal, Oct. 1999.
"Protecting Your Client's Privacy in an Age of Public Information: The Florida Legislature Takes Preliminary Steps to Limit Access to Information Contained in the Court Files of Family Law Cases." FAMSEG, July 29, 2002.

"Neither A Borrower, Nor A Lender Be: Civil Contempt Proceedings in the Wake of Sibley." FAMSEG, March 3, 2003.

Lectures:

Lecturer for Palm Beach County Bar Association:

"Basic Family Law", CLE Program, November 1997
"Evidence Issues in Family Law", CLE Program, April 1998
"Family Law Update", CLE Program, April 2004

Lecturer for the American Academy of Matrimonial Lawyers, Florida Chapter:

"Resistance is Futile - How to Implement and Use Law Office Technology", January 1998
"Law Office Technology in 1999: Is it the End of the World As We Know It?" January 1999
"The Good Old Fashioned Future: Using Technology to Enhance the Family Law Office". May 2000
"Tackling Technology for the Non-Tech", January 2001

Lecturer for The Florida Bar Family Law Section:

"60 Tips in 60 Minutes", April 1999
"Should I Stay or Should I Go: Relocation Modifications", September 2000
"Family Law Legislative Update", July 2001
"Family Law Legislative Update", July 2002
"Harvesting the Fruits of Your Labor: Enforcing and Collecting Attorneys' Fees in Family Law Cases", September 2002
"Mechanics of the Marital and Family Law Board Certification Exam",

December 2002
"Mechanics of the Marital and Family Law Board Certification Exam", December 2003
"Mechanics of the Marital and Family Law Board Certification Exam", December 2004
"Alimony & Child Support: the Basics and Beyond, March 2005
"Family Law Legislative Update", August 2005

Donald Schuck

Donald Lockhart Schuck co-chairs Pryor Cashman's Family Law group, where he represents high net worth individuals in a wide range of family law matters. Don has considerable experience litigating, through trial and appeal, complex asset and business distributions, as well as child custody and support matters. He also represents clients, both in New York and abroad, in negotiating and drafting pre-nuptial, post-nuptial and cohabitation agreements.

Don is a graduate of Fordham Law School in New York, where he was a member of the Law Review. Prior to devoting his practice to family law, he was involved in securities law and white collar criminal litigation as an attorney at Skadden Arps Slate Meagher & Flom and Curtis Mallet-Prevost Colt & Mosle.

Don is a member of the International Academy of Family Lawyers, the American Academy of Matrimonial Lawyers, the New York State Bar Association's Family Law section and the Dutch Association of Family Lawyers and Divorce Mediators. He has been named a top family law attorney by *Super Lawyers* and *Best Lawyers* every year for the past 10 years.

Founding partner Michael Stutman's prestigious career spans three decades around the globe. He has been leading his peers, and is sought out as an expert in matrimonial law. Michael's depth of knowledge not only on current family law but the way it is evolving combined with his strong resilient courtroom presence provide a winning edge when handling settlements and trials for his high net worth and notable clients.

Mr. Stutman takes a straightforward approach instilling a level of trust and confidence at a time when people need it most. From heading up the New York matrimonial practice at the firm that handled Princess Diana's divorce to authoring two books on divorcing in New York and speaking at the nation's top Universities, Michael is known for taking the time to explain the intricate divorce process and all of the options. He arms his clients with everything they need to make important decisions.

Some of Mr. Stutman's most notable cases include one in which a wife received 100% of marital property, another in which his client's right to use captured computer files was upheld and most recently in a matter where Michael prevailed in having a New York Court recognize and enforce a Father's rights in a Singapore child custody arrangement—with the Mother being found in contempt and ordered to pay the Father's expenses and counsel fees.

Michael has served terms as both the Vice President and President of the American Academy of Matrimonial Lawyers, New York Chapter. He is also a Fellow of the Academy and serves on its National Board of Governors. He is again serving a three-year term on the prestigious Matrimonial Law Committee of the City Bar and has served two three-year terms on the Trust, Estate and Surrogates Court Committee of the City Bar. He is the co-author, along with Grier Raggio, of 'How to Divorce in New York' and he is the author of 'Divorce in New York'. Since 2008 he has been certified as one of the Best Lawyers in America and has been listed in the annual Super Lawyers publications since its inception in 2006 and is rated AV Preeminent by Martindale-Hubbell. Michael is regularly sought after by numerous media outlets to comment and provide insight concerning legislation and notable cases.

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Professional Background:

Ashley began working with Laura Dale of Laura Dale & Associates in 2010. She practices in family law with a substantial portion of her practice devoted to child abduction suits, family law matters involving complex jurisdictional disputes, and federal and state appeals involving family law and child abduction suits.

Ashley earned her *juris doctor* from Tulane University, where she focused on international law and family law. She served as the Senior Articles Editor for the Tulane Journal of International and Comparative Law, one of the leading scholarly journals in international law. In 2008, she was the recipient of a grant to conduct comparative legal research with a non-governmental organization in New Delhi, India on the subject of juvenile justice issues in migrant and refugee populations. She was also a member of the Tulane Domestic Violence Law Clinic, where she represented indigent clients in divorce and protective order cases. Ashley has a unique legislative background, with previous experience in the United States Senate, United States House of Representatives, and as a registered lobbyist with the American Civil Liberty Union's National Legislative Office in Washington, D.C.

Education:

Tulane University School of Law, J.D.

- Senior Articles Editor, Tulane Journal of International and Comparative Law

Hollins University, B.A., *magna cum laude*

- Hollins Scholar
- Hollins Trustee Scholarship
- Political Science Departmental Scholar
- Jane Kuhn Award for Outstanding Honors Thesis in International Relations
- Jesse H. Jones and Mary Gibbs Jones Houston Endowment Scholarship

Areas of Practice:

- Child abduction suits under The Hague Convention
- Federal and State Appeals (family law and child abduction suits)
- Family law litigation

Bar Admission:

- State Bar of Texas
- U.S. Court of Appeals for the Fifth Circuit
- U.S. District Court for the Southern District of Texas

Representative Cases:

- *Rios Lopez v. Rosales Maldonado*, Case No. 14-cv-03685 (S.D. Tex. April 17, 2015)
- *Gee v. Hendroffe*, 2015 U.S. Dist. LEXIS 59759 (S.D. Tex. 2015)
- *Loftis v. Loftis*, 2014 U.S. Dist. LEXIS 178084 (S.D. Tex. 2014)
- *Boschi v. Izaguirre*, Case No. 14-cv-00331 (S.D. Tex. Nov. 5, 2014)
- *Salazar v. Maimon*, 750 F.3d 514 (5th Cir. 2014)
- *Berezowsky v. Ojeda*, 2013 U.S. Dist. LEXIS 5337 (S.D. Tex. 2013), *rev'd*, 765 F.3d 456 (5th Cir. 2014), cert. denied
- *Munoz v. Rodriguez*, 923 F.Supp 2d 931 (W.D. Tex. 2013)
- *Rovirosa v. Paetau*, 2012 U.S. Dist. LEXIS 173304 (S.D. Tex. 2012)
- *Messier v. Messier*, 389 S.W.3d 904 (Tex. App.—Houston [14th Dist.] 2012)
- *Aduli v. Aduli*, 368 S.W.3d 805 (Tex. App.—Houston [14th Dist.] 2012)
- *Norinder v. Norinder*, 657 F.3d 526 (7th Cir. 2011)
- *In re J.P.L.*, 359 S.W.3d 695 (Tex. App.—San Antonio 2011) (pet. denied)

Publications:

- Valuing Assets Outside the U.S.: Why Doesn't Everyone Play by OUR Rules?, AICPA/AAML National Conference on Divorce, May 10-11, 2012, Las Vegas, Nevada.
- Slavery in India: The False Hope of Universal Jurisdiction, 18 TUL. J. INT'L & COMP. L. 231 (2010)

SANDRA VERBURGT

International Family Lawyer
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Practice
Sandra is a partner at Delissen Martens. She is in charge of the private clients and international relationships team, which provides specialised advice and advocacy on various practice areas to both international clients and professionals working for international clients. Her practice includes mainly divorces and financial relief (maintenance, divisions and prenuptial agreements), both contentious and non-contentious. Many of these disputes involve complex and financial aspects, often with an international element. Since 2007 Sandra also deals with cross border disputes.

Delissen Martens
Delissen Martens advocaten belastingadviseurs mediation is a powerful, medium-sized law firm in The Hague/the Netherlands, that is able to provide private and corporate clients with legal services of the highest quality.

Publications/Lectures
Sandra is co-author of the chapter on Private International law and Maintenance law in the explanatory commentary "*SDU Commentaar Relatierecht" (SDU, April 2014)* and the online equivalent of Dutch Legal Publisher SDU since 2012.
Furthermore she has written several publications in Dutch and English law journals.
Sandra is also a member of the editorial board of the IAFL Online News, in which E-journal she publishes frequently.
Sandra is a trainer of DM Academy, the training establishment of Delissen Martens, certified by the Dutch Bar Organisation.
Furthermore she frequently lectures during conferences of the International Academy of Family Lawyers (IAFL).

Memberships
Sandra is an accredited family lawyer/mediator and member of the Dutch Association of Family Lawyers and Divorce Mediators (vFAS) and a fellow of the International Academy of Family Lawyers (IAFL), for which body she is serving as a Vice President of the Executive Committee and Vice President of the European Chapter.

https://www.delissenmartens.nl/en/team/sandra-verburgt

Oren Weinberg
Partner at Boulby Weinberg LLP

Oren has practiced family law exclusively since 2005. He advocates for his clients when negotiating agreements, appearing before trial and appellate courts as well as in mediations and arbitrations. Oren handles all aspects of family law including property and support, custody and access. Oren acts for clients based in Ontario and internationally.

Oren graduated from York University with an Honours Bachelor of Arts in 1995. He obtained a Masters of Arts in 1997 from the University of Toronto. Oren backpacked through Asia and Australia and worked for a major Canadian bank before attending law school. He graduated from the University of Western Ontario with an LL.B. in 2004. He was called to the Ontario bar in 2005.

Oren participated in the Program on Negotiation at the Harvard Negotiation Institute where he completed the Mediating Disputes Workshop.

Oren is a member of the Ontario Bar Association and the Advocates' Society. He is a member of Fellow of the International Academy of Family Lawyers.

As a mediator, Oren focusses on his client's needs in order to tailor a solution focussed process that promotes the parties' participation in resolving their own differences. When asked, Oren will also arbitrate.

Oren has a passion for travel. He is an avid water skier and cyclist.

Eric Wrubel

Eric Wrubel is the chair of the matrimonial department of Warshaw Burstein, LLP. He has been practicing law more than twenty years solely in the areas of family and matrimonial law. He is a Fellow of the American Academy of Matrimonial Lawyers (AAML). He sits on the Board of Managers for the New York Chapter of the AAML. He is a Fellow of the International Academy of Family Lawyers (IAFL). He has been in Best Lawyers in America since 2010. He is the chair of the Committee on LGBT People and the Law of the New York State Bar Association. He sits on the Executive Committee of the Family Law Section of the New York State Bar Association. He is an adjunct professor at Cardozo Law School where he teaches a seminar on Family Law. He has an AV Preeminent Rating from Martindale. Mr. Wrubel was lead appellate counsel to the appellant, the Attorney for the Child, in the case of In the Matter of Brooke S.B. v. Elizabeth A.C.C., 26 N.Y. 3d 901 (Sept. 1, 2015) where New York's highest court overruled a long line of precedent and re-defined who is a parent in New York. Mr. Wrubel lectures on numerous issues, including the dissolution of same-sex relationships.

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