

UCCJEA AND INTERNATIONAL JURISDICTION IN CUSTODY CASES: THE UCCJEA and THE HAGUE

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I. History Involving the UCCJA

A. Executive Summary re the Original Act—the UCCJA.

The Uniform Child Custody Jurisdiction Act (UCCJA) had been proposed in 1968. By 1981, it was adopted by every state in the U.S. The UCCJA, in its original form, was intended to prohibit parental interstate kidnapping and forum shopping by the non-custodial parent looking for a forum which may render a favorable result. The UCCJA sought to: (1) establish jurisdiction over a child custody case in only one state; and (2) protect a custody order of that state from modification in any other state, so long as the original state retains jurisdiction over the case. The reason for the UCCJA was that if a non-custodial parent could not take a child to another state and petition the court of that state for a favorable modification of an existing custody order, the incentive to run with the child would be diminished.

B. History of the PKPA:

By the time all states adopted the UCCJA, however, Congress had drafted and enacted the Parental Kidnapping Prevention Act (PKPA). This Federal Act spoke to the same issues of parental kidnapping. The PKPA required all states to give full faith and credit to a custody adjudication made by another state. Thus, the UCCJA and the PKPA had often competed in application, despite sharing a common purpose and design.

- The UCCJA did not give first priority to the home state of the child in determining which state may exercise jurisdiction over a child custody dispute. The PKPA does.
- The PKPA also provides that once a state has exercised jurisdiction, that jurisdiction remains the continuing, exclusive jurisdiction until every party to the dispute has exited that state. (There is a similar continuing exclusive jurisdiction provision found in Uniform Interstate Family Support Act (UIFSA)).

Eventually, state courts and legislatures realized the myriad of conflicts needed be resolved or the

UCCJA would lose its import as a “uniform” system.

C. PROBLEMS WITH THE UCCJA AND PKPA

There were issues within the standards of the UCCJA and the PKPA that left custody jurisdiction law ineffective. Examples of other problems with the UCCJA/PKPA were:

1. **Failure to Prioritize Home State:** The PKPA prioritized various criteria such as home state, emergency jurisdiction, etc., while the UCCJA did not, thereby leaving the conflict between states often unresolved. The UCCJA did not anticipate how it would address a situation where two states met different criteria for exercising jurisdiction. For example, if one state served as the child’s “home state” (the place where the child lived for six months or more) and another state met the criteria for significant connections, then which state would have jurisdiction?
2. **Emergency Prong Jurisdiction Problems:** Another problem with the UCCJA was that it created questions and various lines of caselaw about what constituted an “emergency” and whether emergency jurisdiction could be used to bootstrap longer-term jurisdiction. The terms of the UCCJA did not provide that the court was only to use its emergency jurisdiction power on a temporary basis until the appropriate court (the home state) could take jurisdiction and issue an appropriate permanent order. Further, the emergency jurisdiction provisions of the UCCJA predated the adoption of domestic violence statutes. The relationship between domestic violence proceedings and the emergency jurisdiction prong of the UCCJA thus created problems. [And we still see problems with an understanding of the limited nature of the emergency prong jurisdiction under the UJCCJEA.]
3. **Clarifying Role of Continuing Exclusive Jurisdiction:** A third problem with the UCCJA was the failure to clarify continuing exclusive jurisdiction in the state that entered the original custody decree. This failure led to conflicting interpretations regarding how long the original state would have continuing exclusive jurisdiction (CEJ). Some courts had held (in the preferred view) that exclusive jurisdiction lasted until the last contestant left the state, regardless of how tenuous the child’s relationship to the original state had become. Other courts relying only on the UCCJA and not the PKPA, concluded that continuing jurisdiction ended as soon as the child established a new home state. [There were several poorly reasoned decisions of the Illinois appellate courts following this line of cases.] Still other courts distinguished between custody orders and visitation. A related issue was difficulties in determining when the state with continuing exclusive jurisdiction relinquished it. The UCCJA provided no guidance in terms of what may be sufficient for either the court or the parties to relinquish continuing exclusive jurisdiction. Ambiguity in terms of whether a court had declined to exercise jurisdiction resulted in a conflicting body of appellate case law. In addition, some courts declined to exercise jurisdiction after the informal

conference between the judges (over the telephone) with no opportunity of the parties to be heard, raising due process concerns.

4. **Type of Cases Covered Under the Act:** The UCCJA also failed to define what type of custody cases were covered under the Act. There was no agreement regarding whether the UCCJA applied to neglect, abuse, dependency, wardship, guardianship, termination of parental rights, and domestic violence proceedings.
5. **Court's Confusion by Inclusion of "Best Interest" Language:** The most significant failure of the UCCJA had been to include "best interest" of the child language. Some decisions relied on this language in their consideration that the best interest of the child was a factor in the issue of determining the jurisdiction of the court in child custody proceedings. The UCCJEA has eliminated the reference to the best-interest standard.

After the UCCJA was adopted, all states adopted the UIFSA and all states have now adopted amendments to the UIFSA. Thus, one of the goals of the UCCJEA was to make the provisions of the law regarding interstate support as consistent as is possible with the law regarding interstate custody jurisdictional disputes.

6. **Enforcement Provisions:** As will be discussed below, the UCCJEA includes enforcement provisions.

II. THE UCCJEA.

The UCCJEA was approved by the National Conference of Commissioners on State Laws in 1997 and was recommended to all states by the American Bar Association in 1998. The number of states that adopting the UCCJEA has steadily risen. By 2014, the UCCJEA had been enacted in 50 states if we include the U.S. Virgin Islands. Every year since 2014 there have been introductions in the hold out state – Massachusetts. Keep in mind that unlike the UIFSA that went through a series of amendments, there is only one version of the UCCJEA.

Practice Tip: To determine the status of the "hold out" state (MA) and the fact that it has been enacted in that form in every other state, see:

<https://www.uniformlaws.org/committees/community-home?CommunityKey=4cc1b0be-d6c5-4bc2-b157-16b0baf2c56d>

There is a 2013 of the UCCJEA that has not been adopted by any States as of 2020 due to the lack of Federal implementing legislation as there was regarding the UIFSA.

<https://www.uniformlaws.org/committees/community-home?CommunityKey=9a8f1eb5-79ce-4fa1-b3be-45d5170a5351>

With the UCCJEA comes prioritization of jurisdictional determiners and enforcement tools, as well as terms of art for cases falling within the Act.

A. UCCJEA Terms of Art

The UCCJEA defines and identifies a distinct definitional difference between a child custody determination and a child **custody proceeding**. A child custody proceeding is any court proceeding aimed at resolving custody **or visitation**. Included within the definition of a custody proceeding are cases for:

Divorce and separation,
Abuse and neglect, Dependency, Guardianship,
Paternity and determination of parental rights; and
Domestic violence.

The Act specifically excludes proceedings regarding emancipation and juvenile delinquency, although each may be relevant to a custody determination.

A child **custody determination** is a judgment, decree or other court order which provides for child custody or visitation. This includes **temporary** and permanent orders, as well as initial orders and orders of modification. (Although the Act does not specifically state, I urge that an emergency order of protection fits soundly within the concept of a temporary order following a proceeding related to domestic violence, which is a custody proceeding, as discussed above.)

The Act goes on to identify that an **initial determination** is the very first custody determination made regarding an individual child. Thus, there may be a variety of initial determination dates and orders if there are new children born after the commencement of proceedings regarding the oldest child which can pose a complication when prioritizing jurisdictional criteria under the UCCJEA.

The drafters of the Act also saw fit to specify that a **modification** is any change, replacement, supercession or other determination made after a previous or initial determination regarding the same child, regardless of whether made by the same court.

The UCCJEA identifies that a **court** will include any entity authorized to establish, enforce or modify a custody determination. At first glance, this could be argued to include an administrative order entered by the Illinois Department of Healthcare and Family Services (HFS) in a paternity action. HFS can enter an administrative order for child support, thereby adjudicating the obligor as the father of a child. In doing so, the administrative order can be argued to be an adjudication of child custody because where it allocates the mother as the recipient of support, it implicitly

establishes that she is the child's custodian. However, the new terms of art carefully exclude such orders in that they are specifically excluded in the Act's definition of a child custody determination. However, where an administrative order for support has been ordered, it is important to examine other methods of establishing jurisdiction under the Act before concluding that there is no formal custody determination elsewhere in a paternity case.

A child's **home state** under the Act is substantially the same as it was under the UCCJA. However, an important new distinction exists. As before, the home state of a child is that state where the child lived with a parent or custodian for at least six consecutive months before a custody proceeding began. Where the UCCJEA reaches further than did the UCCJA is with regard to children who are less than six months of age. The UCCJA did not address this issue, thus making it impossible or extremely complicated to determine home state jurisdiction for infant children. The UCCJEA solves that problem by acknowledging that the home state for a child less than six months of age is the state where the child has lived from birth with a parent or person acting as a parent. As can be seen by the 2005 Illinois Supreme Court case and the other cases, even this change, however, has not provided certainty as to the issue of the home state for a child under the age of six months. The obvious examples are the cases where the child has lived in two states from birth and is less than six months and where the child is born in an out of state hospital.

As many of the definitions above have shown, there is now a significant emphasis placed upon **persons acting as parents**. Such people are identified by the Act as being any person, other than a parent, who has physical custody of a child for at least six consecutive months within the one year period immediately preceding commencement of custody proceedings, when physical possession has been adjudicated by a court or other order, or that person claims to have a right to legal custody pursuant to Illinois law.

Visitation under the Act identifies simply the right of a parent or a person acting as a parent to the possession of or access to the child.

B. Original Jurisdiction

As discussed in section II above, the UCCJA and PKPA could not reconcile the conflict that arose regarding prioritization of home state determination. As a result, some jurisdictions such as Illinois would selectively ignore the PKPA and establish jurisdiction if it fulfilled criteria for another method of exercising jurisdiction. Therefore, the drafters of the UCCJEA prioritized home state jurisdiction above other forms of allowable original jurisdiction.

C. Emergency Jurisdiction

The UCCJA did not clarify whether emergency jurisdiction could be exercised on a temporary basis or whether an emergency custody determination would have the effect of a permanent order, thus establishing the state of emergency jurisdiction as the final resting place for all

subsequent custody determinations. Thus, simultaneous custody proceedings could occur in various states, none of which encourage or require a determination which state should make the final determination in a particular proceeding. The UCCJEA strives to resolve this uncertainty.

The emergency jurisdiction provision of various forms of state UCCJA provisions were enacted before most domestic violence statutes. As domestic violence legislation grew in the states, it became important to ensure that the UCCJA did not conflict with a state's domestic violence provisions which may allow for the temporary withholding from the alleged abuser of the location of a victim or victims. The conflict over emergency jurisdiction was proven more complicated by the fact that the UCCJA required that an interested party be notified of a custody proceeding. The many state domestic violence statutes allow some form of *ex parte* proceeding which could result in a temporary or emergency custody and visitation determination. This conflict created a conundrum because without proper notice to a party, the emergency jurisdiction exercised was relatively irrelevant because the resulting custody determination would not have been enforceable in any other state.

The UCCJEA tries to reconcile these conflicts by accommodating state domestic violence legislation and allowing emergency orders to be enforceable in other states if there is notice and a reasonable opportunity to be heard as set forth in Section 205 of the Act. This is consistent with the PKPA which provides at §1738(a)(e) that a custody determine if only entitled to full faith and credit if there is notice and reasonable opportunity to be heard. Under the terms of the UCCJEA, emergency jurisdiction can ripen into continuing jurisdiction only if no other state with grounds for continuing jurisdiction can be found or, if found, another state declines to take jurisdiction.

D. Exclusive Continuing Jurisdiction

As discussed above, the UCCJA did not specify whether a state which entered an original decree (divorce, parentage, etc.) retained exclusive jurisdiction. Thus, there was significant confusion among the states as to whether another state could modify an original determination so long as one party or the child continued to reside in the original decree state. Some states adopted a strict construction of the UCCJA language and determined that all parties and the child must be absent before another state could entertain a modification proceeding. However, other states took a more liberal approach and interpreted exclusive continuing jurisdiction to extend only until the child at issue attained a new home state. It was this conflict within the realm of exclusive continuing jurisdiction that lead to yet another branch of competing simultaneous proceedings and resultant conflicting custody determinations.

Ultimately, the UCCJEA aimed to resolve the conflict by specifying that all parties and the child must be absent from the original decree state before another state can pursue a modification of an original determination.

Some writers will refer to the concept of continuous exclusive jurisdiction as "CEJ." It is one of the most important principles in both the UCCJEA. However, there is significantly greater

ambiguity in terms of continuing exclusive jurisdiction with the UCCJEA compared to the UIFSA.

The critical language of the statute provides: (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, 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

(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.”

Thus, if everyone has left the State, then another state can make the determination that CEJ is lost. If at least one person remains but there is no significant connection and there is no substantial evidence available, then it could be only the original state which makes this discretionary determination.

The commentary stresses the point which should now be obvious. They 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.” Under the commentary the situations where the connection with the original state becomes so attenuated ... is generally limited to situations where, for example, the visitation parent rarely if ever exercises visitation over a long period of time.

E. **Home State**

The UCCJEA supports the PKPA position regarding home state priority (which was the *de facto* law in each state because of federal preemption — in spite of numerous misguided state court opinions on the issue). Any state that is not the home state of the child will defer to the home state, if there is one, in taking jurisdiction over a child custody dispute. Temporary emergency jurisdiction may be taken, but only long enough to secure the safety of the threatened child and to transfer the proceeding to the home state, or if none, to a state with another ground for jurisdiction.

F. **Relinquishment of Jurisdiction - Inconvenient Forum**

Under the UCCJA, there was frequently conflict over one state's exercise of jurisdiction when that state believed another had relinquished jurisdiction. If the state assuming new jurisdiction

erred and the original state had, in fact, not given up jurisdiction, there was no remedy for the conflict under the UCCJA. Thus, the UCCJEA works to avoid such error by establishing the concept of relinquishment of jurisdiction. Under the UCCJEA, a court of proper jurisdiction must formally relinquish jurisdiction to another state who seeks to exercise modification, emergency, or continuing exclusive jurisdiction. Although, by defining the concept, the UCCJEA adds a step to an already protracted process, it is a necessary step if the UCCJEA is to be successful in limiting and reducing the risk of competing jurisdictions and conflicting custody orders.

A court can also relinquish or decline jurisdiction any time it determines that it would be an inconvenient forum. See: *Gitlin on Divorce*: § 11-2[b][2][B] “Forum Selection Clause.”

In examining whether another state would be a more appropriate forum, courts can examine several factors:

1. Has there been domestic violence?
2. How long has the child resided in another state?
3. What is the distance between the competing states?
4. What are the parties’ financial circumstances?
5. Have the parties reached an agreement as to jurisdiction?
6. What is the nature and location of the evidence sought to be introduced in the custody litigation?
7. Which court could decide the matter most expeditiously?
8. How familiar is each court with the facts and circumstances of the pending custody litigation?

A court can may be justified in relinquishing jurisdiction if the person seeking to invoke its jurisdiction has done so in bad faith or through unjustifiable conduct. Unless the parties acquiesce to jurisdiction, the court can unilaterally determine it has the most appropriate claim to jurisdiction or no other court will accept jurisdiction under the Act.

In negotiated removal cases one thing that is often attempted to be negotiated is to provide that the original forum state will continue to have exclusive jurisdiction per the UCCJEA so long as the “non-residential” parent continues to reside in that state. This can also be referred to as a “forum selection” clause. As is indicated above, the agreement as to jurisdiction is but one of the factors the court considers under the UCCJEA and the only Illinois appellate court case to address that issue has stated that the forum selection clause is not dispositive.

Thus, in *IRMO Horgan v. Romans*, 366 Ill. App. 3d 180 (First Dist., 2006), the issue was a motion seeking the Illinois court to find that it was an inconvenient forum based on the forum selection clause as part of an agreement for removal. The *Horgan* court stated, “The fifth factor in section 207 specifically allows the circuit court to consider “**any agreement** of the parties as to which state should assume jurisdiction” alongside and with equal importance as the other seven factors. (Emphasis supplied.) 750 ILCS 36/207(b)(5).”

I disagree with *Horgan* because it treats the agreement as just one factor among others. While not dispositive, the agreement should be given a higher priority than the other factors under the UCCJEA. Also note that this case merely involved the situation where the appellate court affirmed the decision of the trial court. Unfortunately, the appellate court did not cite case law from other jurisdictions addressing this issue.

G. Reprehensible Conduct

Section 208 of the UCCJEA is seldom used because it is seldom needed. It incorporates provisions where a court may decline jurisdiction due to "unjustifiable conduct." The 2021 *Hernandez Camberos v. Palacio* decision referred to this as reprehensible conduct. See: § 11-2[b][3] "Jurisdiction Declined by Reason of Conduct."

H. Enforcement Provided

Neither the UCCJA nor the PKPA had addressed interstate *enforcement* of child custody orders (including visitation provisions). There have been provisions in the law of the states to permit interstate enforcement of child support orders since the 1950's, leading ultimately to the UIFSA as is currently amended based the 2008 Uniform Law now in effect in every state. Because of Federal law mandating the adoption of the UIFSA as amended, UIFSA had been a significantly more modern interstate statutory scheme compared to the patch-work of the PKPA and the UCCJA. Interstate enforcement of child custody and visitation orders, therefore, remained a last frontier to be crossed to make the law pertaining to children's needs more complete – when viewed from the perspective of the United States alone. It is important to note in this regard that the UCCJEA stemmed from the goal of passing a law addressing enforcement of visitation rights nationwide — that is, the creation of a nationwide uniform visitation law.

The UCCJEA finally unified enforcement procedures and provided weight to the influence of the PKPA. Thus, if a court seeks to enforce jurisdiction, it may inquire as to whether a competing state court had *in personam* and *in rem* jurisdiction and whether the parties' due process rights were protected in the course of the custody proceeding (notice given, etc.). Once the challenging court makes its inquiry, the UCCJEA requires the court to compel the appearance of the respondent.

If the respondent does not appear, the UCCJEA gives the court authority to issue a **warrant** to compel the respondent to appear or for authorities to take physical possession of the child if there is reason to believe the respondent might remove the child from the jurisdiction and conceal that child elsewhere.

The Act also allows for state prosecutors and other law enforcement officials to enforce jurisdictional determinations.

There is an expedited remedy, however, that also is available. Upon receiving a verified petition,

the court orders the party with the child to submit to an immediate hearing (the next judicial day unless impossible) for enforcement. The court may rule with respect to enforcement at the hearing, although there are provisions to allow for extended hearing and standards to contest enforcement. This remedy operates much like *habeas corpus*, in which the body subject to the writ must be presented immediately to the court.

III. REMAINING COMMON ISSUES WITH THE UCCJEA

Although the objective of the UCCJEA was to resolve the conflicts that exist between the UCCJA and the PKPA, the UCCJEA itself presents its own complications.

A. Terms of Art

1. Definition of a Child – Emancipated Child?:

Within the UCCJEA, a **child** (Section 102(2)) is defined as an individual who has not yet attained the age of 18. However, it makes no provision for an individual under the age of 18 who is otherwise emancipated. Thus, a complication could arise if one parent seeks to adjudicate custody regarding a child under the age of 18 who may have been emancipated by another state.

2. What if No Home State or Home State Not Clear?:

Similarly, the expanded definition of **home state** (Section 102(7)) as applied to children *under* six months of age fails to articulate how jurisdiction should be evaluated if the child has lived in more than one state since birth. Although the UCCJEA prioritizes home state above the other jurisdictional determiners, it does not provide guidance as to which basis for jurisdiction should be examined if home state is not applicable. In [*People v. Hollis* \(In re D.S.\)](#), 217 Ill. 2d 306 (2005) addressed an outlier situation involving the temporary-hospital-stay exception to the home-state definition involving infants. In that case, the mother had only given birth out of state in Indiana and otherwise resided in Illinois. The argument against UCCJEA jurisdiction in Illinois in that case was that the child had been born in Indiana prior to being brought to Illinois by the DCFS. The State countered by arguing that given the temporary hospital stay *only*, there was no home state and Illinois had jurisdiction under Sections 201(a)(2) and (4) which provide:

- (2) a court of another state does not have jurisdiction under paragraph (1) *** 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; ***
- (4) no court of any other state would have jurisdiction under the criteria specified in paragraph (1), (2), or (3)." 750 ILCS 36/201(a)."

The Illinois Supreme Court then looked to the decisions of other states on the point of addressing the home state or lack thereof for a child under the age of six months under the UCCJEA in this case of first impression (in Illinois.) The Illinois appellate court cited with approval the following cases: *In re R.P.*, 966 S.W.2d 292 (Mo. App. 1998); *Adoption House, Inc. v. A.R.*, 820 A.2d 402 (Del. Fam. Ct. 2003) and *Joselit v. Joselit*, 375 Pa. Super. 203, 544 A.2d 59 (1988). The Court then stated, "We find these cases entirely persuasive. By itself, a temporary hospital stay incident to delivery is simply insufficient to confer "home state" jurisdiction under the UCCJEA."

D.S. then reasoned that, "allowing a temporary hospital stay to confer "home state" jurisdiction would undermine the public policy goals of the UCCJEA, which include ensuring that "a custody decree is rendered in that State which can best decide the case in the interest of the child." (Emphasis added.) 9 U.L.A. §101, Comment, at 657 (1999) The court explained:

Consider, again, a Galena mother who chooses to deliver her baby in a Dubuque hospital. In addition to living in Illinois, this mother may work in Illinois, have a husband and other children in Illinois, pay taxes in Illinois, attend church in Illinois, and send her children to Illinois schools. Clearly, if the occasion arose, Illinois would be the state "which can best decide" a case involving the interest of this mother's children. Yet, if respondent is correct, and a mere hospital stay is sufficient to confer home state jurisdiction under the UCCJEA, Iowa would possess exclusive jurisdiction over this newborn, based solely on the location of the obstetrician's practice. Such formalism turns the UCCJEA on its head, conferring jurisdiction on a state with a *de minimis* interest in the child, to the exclusion of the only state that could conceivably be called the child's "home." We refuse to endorse this interpretation."

The struggle for the High court was avoiding the strict language of the UCCJEA which provides that the home state for a child under age 6 months is the state where the child has lived from birth. In this case the mother had no intention of returning to Indiana following the child's birth.

3. **What about a case where a parent lives in one state but then moves while pregnant to another State?**

[*Fleckles v. Diamond*](#), 2015 IL App (2d) 141229, (2nd Dist., 2015).

The father of an unborn child sought to establish paternity, joint custody, and visitation prior to the unborn child's birth pursuant to the UCCJEA. The evidence found that the mother lived in Illinois through August 12, 2014. She moved to Colorado that month and gave birth in Colorado in September 15th In consideration of the UCCJEA's definitions of child and home state, the court found that the UCCJEA did not apply to unborn children.

Out of state caselaw relies on where a child has resided since birth. This includes:

- *Loeb v. Vergara*, 2020-0261 (La. App. 4 Cir 01/27/21), 313 So. 3d 346, 392. Same conclusion and cites the IL *Fleckles* decision.
- *Gray v. Gray*, 139 So.3d 802 (Al. Ct. App. 2013) (Alabama was not home state for UCCJEA jurisdiction where mother moved to Michigan prior to child’s birth);
- *Arnold v. Price*, 365 S.W.3d 455, 461 (Tex. App.2012) (concluding that a homestate determination could not be made at the commencement of a child-custody proceeding when the child was yet unborn and that the state in which the child was later born would become his home state at the time of his birth);
- *B.B. v. A.B.*, 916 N.Y.S.2d 920 (Sup. Ct.2011) (determining that the home state of a child born in Minnesota after the mother decided not to return to New York after a visit to her childhood home in Minnesota was Minnesota and not New York, where the mother and father had resided as a married couple);
- *Waltenburg v. Waltenburg*, 270 S.W.3d 308, 318 (Tex.App.2008) (deciding under the Texas version of the UCCJEA that the UCCJEA “does not authorize jurisdiction over a child custody claim concerning a child before its birth”);
- *In re Custody of Kalbes*, 302 Wis.2d 215, 733 N.W.2d 648 (Ct.App.2007) (determining that Idaho did not have jurisdiction under the UCCJEA of a child who was not born at the time the Idaho action was instituted and who was later born in Wisconsin);
- *In re Marriage of Tonnessen*, 189 Ariz. 225, 227, 941 P.2d 237, 239 (Az Ct.App. 1997) (determining under the UCCJEA that Arizona was the home state of a child born in Arizona and stating that “[t]he statute does *not* contemplate the *in utero* period of time in determining ... home state; it contemplates a postnatal child”). See also:

In re Marriage of Tonnessen, 937 P.2d 863 (Colo.Ct.App.1996) (concluding under the UCCJA that Arizona was the home state of the children born in Arizona after the institution of an action in Colorado).

- *Arkansas Dep't of Human Servs. v. Cox*. 349 Ark. 205, 214, 82 S.W.3d 806; 349 Ark. 205, 82 S.W.3d 806, 812-13 (2002). The Court in reasoned that “[a] ‘child’ for purposes of the UCCJEA ‘means an individual who has not attained eighteen years of age.’ This means that the UCCJEA does not apply to unborn infants.”

- *Loeb v. Vergara*, 2020-0261 (La. App. 4 Cir 01/27/21), 313 So. 3d 346, 392.

“Thus, based on the above, and especially in light of the legislature's silence with regard to treating embryos, that are not implanted into a woman's womb, like children in the Human Embryo Statutes, we find that the UCCJEA does not apply to embryos or unborn children. As such, the UCCJEA is inapplicable in the instant matter and the trial court did not commit legal error in sustaining the exception of lack of subject matter jurisdiction and ultimately dismissing the current action, with prejudice. Thus, we find that this assignment is without merit.”

4. **What is a Person Who Claims a Right to Legal Custody Under State Law?:**

Within its definition of a **parent or person acting as parent**, (Section 102(13)) the UCCJEA includes a person who claims a right to legal custody under state law. Some critics have argued that a claim is too vague a term and could allow for UCCJEA litigation by individuals who may not even be able to make a *prima facie* case for state based custody litigation. Similarly, the UCCJEA does not address the circumstances facing children who are in the physical custody of a state agency at the time a custody proceeding is initiated.

Other Case Law: One issue that can often occur under either the UCCJA or the UCCJEA is the issue of temporary absence from the child's home state. A 2004 case decided that this issue should be decided under a totality of the circumstances test (North Carolina court of appeals). See [Chick v. Chick](#), (N.C. Ct. App. 2004). In this case the court decided that Vermont was the home state of the two children despite the fact that their parents brought them back to North Carolina where the family used to reside for a six week period. The court first noted that Vermont had not yet adopted the UCCJEA and still had adhered to the UCCJA. This case is good reading as to the temporary absence issue.

In an interesting case, the Tennessee Court of appeals instructed a state court to decline jurisdiction over a resident's custody petition after determining that Illinois, where the children were living with their mother, was the more appropriate forum. Finding that neither Tennessee nor Illinois had home state or “extended home state” jurisdiction, the court stated that Illinois' status as the more convenient forum trumped any possible claim to significant connection jurisdiction that Tennessee may have had. [Doss v. Doss](#), (Tenn. Ct. App., 2005).

B. **Notice Requirements**

Notice According to State Law May Not Allow Sufficient Travel Time: The UCCJEA seems to disregard the present travel circumstances facing Americans. The notice requirements of the UCCJEA do not seem to take into consideration the potential for a parent to reside in California while the other parent and the child reside in New York. Thus, by allowing notice to be served

according to the laws of the state in which service will be sought, the laws of the state where jurisdiction is sought may not permit the respondent enough time to travel to the state seeking jurisdiction in order to appear before the court. Similarly, the rules of service in the competing states may conflict significantly.

C. Communication between Courts

The UCCJEA requires a record of communications between courts in Section 110. It provides that except for “communication between courts on schedules, calendars, court records, and similar matters” there must be a record of the communications. However, the definition of record is ambiguous because the Act defines it only as “information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.” The commentary to the UCCJEA suggests that, “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.” Because there is no requirement that the communications must be recorded *verbatim*, there is the potential problem that each court could a record that differs somewhat as to what was discussed. It appears that, especially when dealing with matters of custody, a *verbatim* recording would preserve any such issues for the purpose of appeal; but this is not what the Act requires.

Another matter for discretion under the Act, is that the court may allow or choose not to allow *the parties* to observe the telephone or Zoom conference between judges. However, there are no standards for a lawyer to urge that he should be able to even be present during such a communication. Instead, the law only provides that, “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.” What is clear is that the judges do *not* have to allow the lawyers the opportunity to first address their concerns prior to the communication between the judges, even though best practices would provide for this. All that is required is that the court withhold its jurisdictional decision until there has been the opportunity to present facts and legal arguments. In short, the communication between the judges cannot alone decide the jurisdictional issue.

D. Taking Testimony in Another State / Travel and Other Necessary Expenses in Obtaining Cooperation between the Courts:

The *UIFSA* provides at Section 316 that,

In a proceeding under this Act, a tribunal of this State **shall** permit a party or **witness** residing in another state to be deposed or to testify by telephone, audiovisual means, or other electronic means at a designated tribunal or other location in that state. A tribunal of this State shall cooperate with tribunals of

other states in designating an appropriate location for the deposition or testimony.

UCCJEA [Section 111\(a\) and \(b\)](#) are permissive in nature. Section (a) relates to non-parties, and Section (b) relates to parties. Regarding other witnesses, the UCCJEA provides:

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.

Regarding testimony by a party, the UCCJEA provides:

(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.

Additionally, the Act provides at [Section 112\(c\)](#) that travel and other necessary expenses incurred in obtaining cooperation between the courts *may* be assessed against the parties. The language provides no guidance as to when and upon what basis these expenses might be assessed. For example, will the assessment be based upon ability of the parties to pay, the merit of the issues, a combination of these factors, etc.? The law simply states that this assessment would be “assessed according to the law of this state.”

E. Significant Connections

The UCCJEA correctly prioritizes home state as the first source for determining jurisdiction. The next best basis to examine is significant connections. But the UCCJEA does not provide guidance as to what constitutes a significant connection. Within the study of conflict of laws between states, we may find guidance from the “most significant relationship” approach discussed in the Second Restatement.

In 2006 the Illinois appellate court addressed the significant contacts issue. *IRMO Diaz*, 363 Ill. App. 3d 1091 (2nd Dist., 2006) held that the trial court erred when it dismissed the custody portion of the petition for dissolution of marriage pursuant to 2-619 of the Code (based on lack of subject matter jurisdiction). Neither Michigan, where father resides, nor Illinois, where mother resided, qualified as home state of the child. Additionally, Illinois was determined to have significant connections to the child, being the place where the mother resided at the time of the hearing, where the child was born, and where mother returned each time she separated from father. Accordingly, Section 201(a)(2) of UCCJEA gave Illinois subject matter jurisdiction over

infant's custody.

However, until caselaw within Illinois begins to examine the issue of significant connections, there remains room for interpretation which could lead to conflicting results.

F. Exclusive, Continuing Jurisdiction

Some writers will refer to the concept of continuous exclusive jurisdiction as "CEJ." It is one of the most important principles in both the UCCJEA and the UIFSA. However, there is significantly greater ambiguity in terms of continuing exclusive jurisdiction with the UCCJEA compared to the UIFSA.

Although the fine tuning of exclusive continuing jurisdiction makes application of the concept more easily understood, it remains an imperfect idea. The critical language of the statute provides: (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, 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 (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."

Although the fine tuning of exclusive continuing jurisdiction makes application of the concept more easily understood, it remains an imperfect idea. The provision of the UCCJEA which permits a court to relinquish jurisdiction if there are no "significant connections" with Illinois and "substantial evidence" is a troublesome standard. Are there significant connections in the original home state if the parent who is left behind does not exercise visitation for a given period of time. It is clear that the terms of the UCCJEA in this regard do not adopt the bright line rules of the UIFSA.

G. Enforcement

The UCCJEA allows police officers to assist in locating a child and enforcing a custody order at the request of a prosecutor or other appropriate public official. However, certainly circumstances may arise outside of regular business hours where an individual needs the assistance of law enforcement and time does not permit that individual or law enforcement officers to locate a prosecutor or other appropriate public official. Another issue which might complicate the willingness of police officers to act according to the UCCJEA is when asking them to determine who is a public official.

IV. INTERNATIONAL APPLICATION OF THE UCCJEA

Section 103 of the Act provides that child custody determinations made under factual circumstances in **substantial conformity** with the jurisdictional standards of the Act will be recognized and enforced if there has been reasonable notice and opportunity to be heard. A court may refuse to apply the UCCJEA when the child custody law of another country ignores “**fundamental principles of human rights.**”

The query is what standard would be used to determine whether such “fundamental principles” would be ignored by other countries. 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. The UCCJEA 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.

It is important to note that, within the enforcement section, a petitioner is defined to include individuals seeking the return of a child under the Hague Convention on the Civil Aspects of International Child Abduction (referred to the Hague Convention although it is important to recognize that there are many Hague Conventions). The respondent is similarly defined to include a reference to the [Hague Convention](#).) Many family lawyers refer to this simply as the Hague Convention despite the fact that there are many other Hague conventions. There are now [over 100 countries which have ratified this Hague Convention](#).

[Section 302](#) of the UCCJEA provides, “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.” The commentary in this regard states:

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.

V. UCCJEA CASE LAW RE VISITATION IN FOREIGN COUNTRIES IN CASE WITH HAGUE IMPLICATIONS

IRMO Saheb, 377 Ill.App.3d 615 (First Dist., 2007), is of interest because of the international parenting issues at play. On appeal, the father asked the First District court to reverse that portion of the modified joint parenting order which granted visitation in the UAE in part because the UAE is not a party to the Hague Convention on the Civil Aspects of International Child Abduction (Hague) and thus would not enforce an American court order. The case contains a good discussion of the standard visitation versus restricted visitation in Section 607(a) and (c) of the IMDMA, and cited previously case law for the proposition that eliminating a standard aspect of visitation requires a finding of serious endangerment. The appellate court stated:

In the case at bar, the trial court granted visitation in the home of the noncustodial parent, which would certainly be standard, but for the fact that it occurs in the UAE. While visitation in the noncustodial home is “standard,” regular visitation in a foreign country 24 hours away by plane is not. Although Section 607(c) protects “the standard aspects of visitation,” it does not protect “unusual rights.” Thus, the serious endangerment standard of Section 607(c) does not apply to the case at bar. The issue in the case at bar is whether the trial court abused its broad discretion in fashioning the terms of visitation pursuant to Section 607(a).

After a good discussion of the Hague Convention the appellate court stated:

The father claims that since the UAE is not a Hague signatory, he will have no legal recourse if the mother refuses to return the child from a visit to the UAE. However, contrary to the father’s claim, he was able to obtain some legal recourse in the UAE. A court in the UAE issued an order on March 17, 2005, at the father’s request in order to prevent the child from traveling to Iraq; and then apparently at the father’s request, the UAE court cancelled the ban on May 16, 2005, to allow the child to travel back to Chicago.

The appellate court concluded, “In light of the fact that the father was able to obtain some legal recourse in the UAE and the fact that the mother returned the daughter to the United States from the UAE, this court cannot find that the trial court abused its discretion in permitting visitation in the UAE.”

VI. **Misconceptions Re the UCCJEA:**

An excellent article addressing misconceptions under the UCCJEA is:

www.gregoryforman.com/blog/2011/01/common-misconceptions-about-multi-state-custody-jurisdiction/

His misconception number two is that home state always has priority in jurisdiction. He states:

While home state jurisdiction, if it exists, has priority in initial custody determinations, it is of greatly diminished importance in modification actions. A state retains exclusive

jurisdiction to modify its own custody order so long as it has jurisdiction under any of the tests for an initial custody case and so long as the child, a parent, or a person acting as a parent remains in the issuing state. S.C. Code § 63-15-332. Thus, a child could have left the issuing state years ago but so long as the other parent remains in the issuing state and so long as there is substantial evidence concerning the child's care, protection, training, and personal relationships in the issuing state, that state will retain continuing exclusive jurisdiction to modify child custody, even if it stopped being the home state years ago.

VII. SUMMARY AND CONCLUSION RE UCCJEA

The UCCJEA offers many solutions to problems and conflicts which previously occurred under the UCCJA and the PKPA. Unfortunately, as with any new law, it will take time to learn of its deficiencies and its weaknesses. A perfect example of a weakness of the new law is the failure to have language which addresses the issue of a child under age 6 months potentially having no home state. Time will pass before the courts of the states that have adopted the Act begin to interpret its terms within the scope of their individual state's interests, constitution and needs. The 2005 Illinois Supreme Court decision is an example of the fact that we are beginning to see a body of law developing regarding the UCCJEA – often law taken from other states who have had longer experience with the law. The UCCJEA is a good solution to a flawed predecessor, but it may prove to be equally imperfect in other ways. It will be with longevity that the Act will be able to demonstrate whether it will provide new direction and continuity between state determinations of custody as intended.

VIII. HAGUE CONVENTION

Other important jurisdictional provisions for a family lawyer to be aware of is the Hague Convention on the Civil Aspects of International Child Abduction. While family lawyers refer to this as **the** Hague Convention, there are other conventions. One example is the *Convention on the International Recovery of Child Support And Other Forms of Family Maintenance*. There are many countries (called states) are not parties to the Hague.

Perhaps the Hague can be best referenced by its terms. I will quote from Articles 1 through 20 of the Convention. The key to the convention is to understand what it is and what it is not. At its heart it is merely a convention to secure the prompt return of children wrongfully removed or retained. The core question in Article 3 is whether a removal or retention is wrongful. For more information on the Hague: See: http://www.hcch.net/index_en.php?act=text.display&tid=21 What the convention does not do is to provide any substantive rights, e.g., the right to determine custody per the best interests of the child, etc. Return of the child is to the member nation rather than specifically to the left behind parent.

A key term in dealing with the Hague Convention on Civil Aspects of Child Convention is that

the convention requires the return of children only if the person was **habitually a resident** of the country immediately before the action that results in the breach of rights of custody or rights (and likely rights of access.) The issue in [*Abbott v. Abbott*](#), U.S. Supreme Court (May 17, 2010), was whether a party has rights of custody under the Hague by virtue of a *ne exeat* clause (an order preventing exit with the children from the country). *Abbott* held that a parent has a right of custody under the Hague Convention by reason of that parent's *ne exeat* right. A key aspect of the case was not necessary the *ne exeat* order but the fact that under Chilean law provides that "[o]nce the court has decreed" that one of the parents has visitation rights, that parent's "authorization" generally "shall also be required" before the child may be taken out of the country. So, the Convention requires the return of children only if the person was **habitually a resident** of the country immediately before the action that results in the breach of rights of custody.

There are special rules of evidence in the convention. The court in which a Convention action is proceeding shall "take notice directly of the law of, and of judicial or administrative decisions, formally recognized or not in the State of 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" when determining whether there is a wrongful removal or retention under the Convention.

Under the ICARA, a petitioner establishes the elements of wrongful removal or retention under the ICARA through demonstrating by a preponderance of the evidence that:

- (1) the habitual residence of the child immediately before the date of the allegedly wrongful removal or retention was in the country to which return is sought;
- (2) the removal or retention breached the petitioner's custody rights under the law of the child's habitual residence;
- (3) the petitioner was actually exercising or would have been exercising custody rights of the child at the time of the child's removal or retention; and
- (4) the child has not attained the age of 16 years.

A. **Potential Defenses:**

There are five potential defenses: 1) consent or acquiescence; 2) mature child's objection; 3) one-year and settled; 4) grave risk of harm; 5) return would violate "fundamental principles of human rights" Several of these defenses are commonly asserted:

1. **Consent or Acquiescence:** by a preponderance of the evidence, that Petitioner "**had consented to or acquiesced in the removal or retention**" under Article 13;
2. **Mature Child Defense:** The child of sufficient age and maturity objects to being returned. One provides by a preponderance of the evidence that the child is old enough and has a sufficient degree of maturity to knowingly object to being

returned to the Petitioner and that it is appropriate to heed that objection, under Article 13;

3. **Passage of One-Year / Well Settled Defense:** One proves by a preponderance of the evidence, that **more than one year** has passed from the time of wrongful removal or retention until the date of the commencement of judicial or administrative proceedings, under Article 12 and the child is settled in its new environment. (the so called well-settled defense.)

See: *Gitlin on Divorce*: § 11-2[c][3][B] “Habitual Residence Caselaw.”

The 2014 *Lozano v. Montoya Alvarez*, 572 U.S. 1, decision addressed the one-year deadline within the Convention for bringing a petition. The Court observed that if the petition is timely filed, a court “shall order the return of the child forthwith.” But if the petition is filed after the one-year period expires, there is the well-settled defense. This defense only exists if the petition is brought after a period of one year following the removal or retention. *Lozano* addressed the issue of whether the one-year period might be tolled due to concealment of the child. The Court held that Section 12’s one-year language requirement is not subject to equitable tolling. Yet the abducting parent does not necessarily profit by running out the clock since both American courts and Convention signatories consider concealment as a factor in determining whether a child is well settled. Put another way, the possibility of concealment was already baked into the language of the Convention. The Court thus reasoned that equitable tolling was neither required nor was it the only available means to advance the directives of the Convention.

4. **Grave Risk of Harm / Intolerable Situation:** by clear **and convincing** evidence, that “there is **grave risk** that the child’s return would expose the child to **physical or psychological harm or otherwise place the child in an intolerable situation,**” under Article 13(b); or

See: *Gitlin on Divorce*: § 11-2[c][3][C] “Grave Risk of Harm Defense.”

5. **Return in Violation of Basic Human Rights / Fundamental Freedoms:** by clear and convincing evidence, that return of the child would subject the child to violation of basic human rights and fundamental freedoms, under Article 20.

B. Well Settled Case Law:

For well-settled case law see:

Riley v. Gooch case (D. Or., January 29, 2010): A two year old girl who was only five months old when she accompanied her parents to the U.S. from Germany and later retained by her father

in Germany was not well settled in the U.S. The mother had sole custody under Germany law. That court noted the factors set out in *In Re B. Del.* CSB 559 F.2d 999 (9th Cir, 2009).

Wojcik v. Wojcik, 959 F.Supp. 413 (E.D. Mich. 1997), in which children ages 5 and 8 were well settled. That case specifically compared the result from *David S. v. Zamira S.*, 574 N.Y.S.2d 429 (N.Y. Fam. Ct., 1991) involving younger children (one and three) and the court rejected a well settled defense.

C. Grave Risk of Harm Caselaw.

A recent case addressing the grave-risk defense of Article 13(b) is the Illinois' appellate court decision of *Montes v. Toscan (In re M.V.U.)*. 2020 IL App (1st) 191762. Here the First District Illinois appellate court addressed the divergent views of the Federal courts in considering domestic violence not necessarily directed at the child. The father had petitioned to return his daughter to Mexico under the Hague Convention, but the appellate court reasoned that the trial had properly denied his petition. *M.V.U.* found that the mother proved by clear-and-convincing evidence that she was justified in removing the child from Mexico because of the child's grave risk of harm. The appellate court found that the mother's evidence clearly and convincingly established a pattern of escalating domestic abuse beginning with the father's demand that she needed to obtain an abortion and ending with him choking her while she held the child in her arms.

The appellate court noted that since the adoption of the Hague Convention, there has been a shift toward recognizing domestic violence as posing a grave risk toward the child. Yet it noted the lack of consensus. Some federal courts read "grave risk" narrowly. Others including the Seventh Circuit take a broader view, recognizing that domestic violence toward a spouse can amount to a grave risk of psychological injury to the child. The Federal courts that take a broader view include the Second and Seventh Districts. This line of cases acknowledges that "sporadic or isolated incidents of physical discipline directed at the child, or some limited incidents aimed at persons other than the child, even if witnessed by the child, have not been found to constitute a grave risk."

But this line of cases stakes out the position that certain cases evidence of spousal abuse, even if not directed toward the child, can support a grave-risk-of-harm defense. Where not directed at the child, usually in such cases there is a demonstration of the child's exposure to the abuse. While a showing of exposure is helpful in providing this defense, it is not a requirement—at least according to the cases that have taken this broader view.

The opinion notes that the State Department has cautioned that "the person opposing the child's return must show that the risk to the child is grave, not merely serious." The opinion also recognizes that the State Department has stressed that Article 13(b) "was not intended to be used by defendants as a vehicle to litigate (or relitigate) the child's best interests." In this case, the appellate court held that the evidence demonstrated an escalating pattern of violence as well as in

"interference with the personal liberty" of the mother. This, in turn, effected the psychological welfare of the child. The evidence had indicated threats to kill the mother if she decided to leave the father. And the mother did, in fact, secretly leave with the child in the middle of the night while the father was asleep-immediately after this threat was made.

M.V.U. rejected the father's assertions that the grave-risk defense shown by clear and convincing evidence must have occurred over an extended period and must have involved vicious circumstances. Accordingly, the appellate court affirmed the trial court based upon the corroborated evidence of abuse amounting to a grave risk of harm to the child.

D. The Language of the Convention

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 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.

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**; [e.g. equivalent of *ne exeat* order.]

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 organizations 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

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- 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 organizing 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 other 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.

[**Note by Gunnar J. Gitlin:** See the attached and very recent Panamanian case under an Article 13(b) claim. It is excellent reading.]

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 recognized 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 the 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 determination on the merits of any custody issue.

Article 20

The return of the child under the provision 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**.

See:

- “The UCCJEA: What is it and How Does it Affect Battered Women in Child- Custody Disputes,” Joan Zorza, 37 Fordham Urban Law Journal 909 (2000).
- “[Why States Should Adopt the UCCJEA](#),” by the National Conference of Commissioners on Uniform Laws.
- **2013 UCCJEA Amendments:** These comport to the Hague Convention on Jurisdiction, etc. No Federal implementing legislation has yet been drafted unlike the UIFSA (whose 2008 as of 2016 is now the law in all states):
[http://www.uniformlaws.org/Act.aspx?title=Child%20Custody%20Jurisdiction%20and%20Enforcement%20Act%20\(2013\)](http://www.uniformlaws.org/Act.aspx?title=Child%20Custody%20Jurisdiction%20and%20Enforcement%20Act%20(2013))
- [Intolerable Situations and Counsel for Children: Following Switzerland’s Example in Hague Abduction Cases](#), Merle H. Weiner* See:
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