Considerations in Cases with International Connections

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I. HAGUE CONVENTION

The Hague Conference on Private International Law is the world organization for cross-border cooperation in civil and commercial matters. See www.hcch.net. The Hague Conference currently has 82 members: 81 States plus 1 Regional Economic Integration Organization (i.e., the European Union). The United States has been a member of the Hague Conference since the 1960s. The Hague Conference uses the term "State" to refer to an autonomous governing body, which for our purposes refers to the United States federal government and not the 50 States that comprise the United States of America. The member States of the Hague Conference are not required to be Contracting Members (i.e., sign onto and agree to comply with) of every Convention of the Hague Conference; and non-member States may be Contracting States to any Convention of the Hague Conference.

A. International Service of Process

All international service of process must comply with the Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (see EXHIBIT A), which is intended to "create appropriate means to ensure that judicial and extrajudicial documents to be served abroad shall be brought to the notice of the addressee in sufficient time" and "to improve the organisation of mutual judicial assistance for that purpose by simplifying and expediting the procedure." See https://www.hcch.net/en/instruments/conventions/full-text/?cid=17. There are 71 Contracting States to the 1965 Convention, which include the United States (as a Hague Conference member) plus 13 non-member States.

If the person to be served with a North Carolina lawsuit is to be served within a Contracting State outside of the United States, the lawsuit must be served in accordance with the requirements of the 1965 Convention. See id. Per the 1965 Convention, each Contracting State must designate a Central Authority (see the Hague Conference website for a listing of the Central Authority for each Contracting State), which shall serve the document or shall arrange to have the document served by an appropriate agency. The Central Authority shall serve the documents "by a method prescribed by [the Contracting State's] internal law for the service of documents in domestic actions upon person who are within its territory" or "by a particular method requested by the applicant, unless such a method is incompatible with the law of the [Contracting State]." See id., Article 5. The Central Authority of the Contracting State may require the document to be written in, or translated into, the official language of the Contracting State. See id., Article 5. The document may always be served by delivery to an addressee who accepts it voluntarily. See id., Article 5.

This method of service of process, per the 1965 Convention, satisfies the requirements of Rule 4(j3) of the North Carolina Rules of Civil Procedure:

> Service in a foreign country. - Unless otherwise provided by federal law, service upon a defendant, other than an infant or an incompetent person, may be effected in a place not within the United States:

(1) By any internationally agreed means reasonably calculated to give notice, such as those means authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents; or

(2) If there is no internationally agreed means of service or the applicable international agreement allows other means of service, provided that service is reasonably calculated to give notice:

a. In the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction;

b. As directed by the foreign authority in response to a letter rogatory or letter of request; or

c. Unless prohibited by the law of the foreign country, by

1. Delivery to the individual personally of a copy of the summons and the complaint and, upon a corporation, partnership, association or other such entity, by delivery to an officer or a managing or general agent;

2. Any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served; or

(3) By other means not prohibited by international agreement as may be directed by the court.

Service under subdivision (2)c.1. or (3) of this subsection may be made by any person authorized by subsection (a) of this Rule or who is designated by order of the court or by the foreign court.

On request, the clerk shall deliver the summons to the plaintiff for transmission to the person or the foreign court or officer who will make the service. Proof of service may be made as prescribed in G.S. 1-75.10, by the order of the court, or by the law of the foreign country.

Proof of service by mail shall include an affidavit or certificate of addressing and mailing by the clerk of court.

N.C.G.S. § 1A-1, Rule 4(j3).

If the person to be served with a North Carolina lawsuit is to be served within a State outside of the United States that is not a Contracting State of the 1965 Convention, then service of process must be accomplished in accordance with Rule 4(j3) of the North Carolina Rules of Civil Procedure.

B. International Child Abduction

The "Hague Convention" for purposes of child custody litigation is a shorthand reference to the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (see EXHIBIT B), which is a multilateral treaty that "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." See https://www.hcch.net/en/instruments/conventions/specialised-sections/child-abduction. There currently are 96 Contracting States to the 1980 Hague Convention, which include the United States (as a Hague Conference member) plus 24 non-member States.

The purpose of the 1980 Convention is "to secure the prompt return of children wrongfully removed to or retained in any Contracting State" and "to ensure that rights of custody and access under the law of one Contracting State are effectively respected in the other Contracting States."

See id., Article 1. The 1980 Convention applies to any child under the age of 16 who was "habitually resident in a Contracting State immediately before any breach of custody or access rights." See id., Article 4. "Rights of custody" means "rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence." See id., Article 3. "Rights of access" means "the right to take a child for a limited period of time to a place other than the child's habitual residence." See id., Article 3. "Habitual residence" is not defined in the 1980 Convention, other than to provide that the child's habitual residence is within the territorial unit of the Contracting State if the Contracting State has two or more systems of law applicable in different territorial units. See id., Article 31.

The 1980 Convention requires a Contracting State to promptly return a child located within the Contracting State if (1) the child has been wrongfully removed or retained, and (2) the proceedings to request return of the child were commenced in that State within one year of the wrongful removal or retention. See id., Article 12. Once the proceedings are commenced, the Contracting State that is being asked to order the return of the child is referred to as the "Requested State." The Requested State shall return the child even if the proceedings were commenced more than one year after the wrongful removal or retention "unless it is demonstrated the child is now settled in its new environment." See id., Article 12.

The Requested State is not required to order the return of the child if (a) the person seeking return of the child was not actually exercise custody rights at the time of the removal or retention or had consented to or subsequently acquiesced in the removal or retention; (b) there is a 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; or (c) the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of the child's views. See id., Article 13.

The removal or retention of a child is "wrongful," and falls within the requirements of the 1980 Convention, 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.

See id., Article 3. The party seeking the return of a child who has been wrongfully removed or retained may apply for assistance to the Central Authority of the child's habitual residence or to the Central Authority of any other Contracting State. See id., Article 8. The Central Authority for the United States is the U.S. Department of State; but "applications for assistance" in the United States are more likely to be made in the form of a lawsuit in Federal court. The contents of the application for assistance are set out in Article 8 of the 1980 Convention.

Before entering an order for return of the child, the court of the Requested State may require the applicant to obtain a decision or determination from the court of the child's habitual residence that the removal or retention was wrongful. See id., Article 15. The court in the Requested State may not decide on the merits of child custody until it has been determined that the child is not to be returned under the 1980 Convention. See id., Article 16. If a custody determination has been made that would be enforceable under the laws of the Requested State, that custody determination is not a basis to refuse to return the child under the 1980 Convention but the Requested State may consider the reasons for that determination in applying the 1980 Convention. See id., Article 17.

II. PARENTAL KIDNAPPING PREVENTION ACT ("PKPA")

The PKPA was enacted by Congress in 1980 (coincidentally, the same year as the 1980 Convention of the Hague Conference) to resolve jurisdictional conflicts in custody cases due to inconsistent interpretations of the UCCJA (which is the precursor to our current law, the UCCJEA – more on this below). See 28 U.S.C. § 1738A. The PKPA mandated that state courts give full faith and credit to custody determinations of other states, so long as the determinations were made in conformity with the provisions of the PKPA. Although the PKPA is a federal statute, it does not create a cause of action in federal court. Thompson v. Thompson, 484 U.S. 174 (1988).

In 1997, the UCCJEA was drafted and recommended to all states to bring state laws into conformity with the PKPA. A "practitioner's guide to the PKPA" is attached hereto as EXHIBIT C for reference, but the subsequent enactment of the UCCJEA in North Carolina has incorporated the federal PKPA into North Carolina law. In other words, if a custody determination by a North Carolina court complies with the UCCJEA, then the custody determination also satisfies the PKPA.

III. UNIFORM CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT ("UCCJEA")

The UCCJEA has been adopted in 49 states (including North Carolina), the District of Columbia, Guam, and the US Virgin Islands. Massachusetts and Puerto Rico have not adopted the UCCJEA. North Carolina's version of the UCCJEA is codified at N.C.G.S. § 50A-101 et seq.

The UCCJEA is broader in scope than the 1980 Convention in several respects: (a) the UCCJEA defines child as "an individual who has not attained 18 years of age" (as compared to the 1980 Convention, which no longer applies when a child reaches age 16); (b) the UCCJEA applies to any "child-custody proceeding" and is not limited to an emergency or kidnapping situation; and (c) the UCCJEA provides a specific definition for "Home State" (as compared to the undefined "habitual residence" that controls jurisdiction under the 1980 Convention). See § 50A-102.

The UCCJEA is a statutory framework that overlays all custody proceedings in North Carolina. Practitioners (and judges!) may not give any thought to the UCCJEA when both parties and the children are long-time North Carolina residents, but every run-of-the-mill custody action must comply with the UCCJEA. The UCCJEA is the reason that every North Carolina custody complaint or motion must be accompanied by an Affidavit as to Status of Minor Child (or the necessary allegations must be included within the body of the verified pleading).

For purposes of the UCCJEA, a "child-custody proceeding" includes any "proceeding for divorce, separation, neglect, abuse, dependency, guardianship, paternity, termination of parental rights, and protection from domestic violence in which the issue [of child custody] may appear. The term does not include a proceeding involving juvenile delinquency, contractual emancipation, or enforcement under Part 3 of this Article." § 50A-102. A "child-custody determination" is "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." Id.

UCCJEA uses the term "Issuing State" to refer to the jurisdiction in which the child custody order is entered. "Responding State" refers to the jurisdiction that is being asked by a party to enforce a child custody determination entered in another jurisdiction.

A. NORTH CAROLINA AS THE ISSUING STATE

Under the UCCJEA, a North Carolina court may make an initial child-custody determination if North Carolina is the "home state" of the child. The "home state" is "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." § 50A-102.

North Carolina 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 subdivision (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 G.S. 50A-207 or G.S. 50A-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 subdivision (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 G.S. 50A-207 or G.S. 50A-208; or
> (4) No court of any other state would have jurisdiction under the criteria specified in subdivision (1), (2), or (3).

§ 50A-201. North Carolina retains "exclusive, continuing jurisdiction" over that child-custody proceeding (i.e., no other state may modify the initial child-custody determination) until the occurrence of an emergency as set out in § 50A-204 or:

> (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.

§ 50A-202.

If North Carolina no longer retains "exclusive, continuing jurisdiction," then a North Carolina court may not modify the initial child-custody determination and the proceeding must be resolved in the court of another state that would have jurisdiction to make an initial determination under § 50A-201.

A flowchart is attached hereto as EXHIBIT D that depicts when a North Carolina court has jurisdiction under the UCCJEA and the PKPA to make an initial child-custody determination.

B. NORTH CAROLINA AS THE RESPONDING STATE

The UCCJEA requires North Carolina courts to enforce the child-custody determinations of other States within North Carolina. "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." § 50A-101. The UCCJEA requires enforcement of child-custody determinations issued by foreign governments in certain circumstances:

> (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 Parts 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 Article must be recognized and enforced under Part 3.
> (c) A court of this State need not apply this Article if the child-custody law of a foreign country violates fundamental principles of human rights.

§ 50A-105. Furthermore, a North Carolina may use the provisions of the UCCJEA to "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." § 50A-302. In other words, a parent may obtain an order from a foreign government under the 1980 Convention that orders the return of the child; register that order in the North Carolina district court in accordance with the UCCJEA; and the North Carolina court shall enforce that foreign order if the foreign order meets the requirements of § 50A-105.

A North Carolina court shall (mandatory, not discretionary) enforce the child-custody determination of another state (or foreign country in accordance with § 50A-105) if the child-custody determination was issued by a court in substantial conformity with the jurisdictional requirements of the UCCJEA and has not been modified by a court with jurisdiction to modify under the UCCJEA. § 50A-303. The child-custody determination to be enforced must be registered

in North Carolina as set out in § 50A-305. Upon registration, the child-custody determination is enforceable in North Carolina by the same means available under the law for enforcement of a child-custody determination issued in North Carolina. § 50A-306.

C. SAMPLE LANGUAGE FOR NORTH CAROLINA CUSTODY ORDER

17. The parties shall execute whatever documents are necessary to apply for a US passport for the minor children within ninety (90) days of entry of this Order. If possible, the parties shall indicate that each child's passport is to be delivered directly to Jill Jackson at THARRINGTON SMITH; or if the passport cannot be delivered directly to Jill Jackson, then at such time as each US passport is issued, each child's US passport immediately shall be delivered by Plaintiff and/or Defendant (whichever party first comes into possession of the passport) to Jill Jackson at THARRINGTON SMITH, 150 Fayetteville Street, Suite 1800, Raleigh, North Carolina 27601. Each child's passport shall thereafter be held in trust by Jill Jackson and/or THARRINGTON SMITH, LLP, and shall not be released to either party except as set forth below or pursuant to written consent in advance from both parties or pursuant to subsequent Order of this Court.

A. If either child will be traveling outside the United States at any time, the traveling party must provide a copy to the other party of all travel-related documents (plane tickets, train tickets, itinerary, Visas, hotel reservations, etc.) promptly after his/her reservations have been made but no later than three (3) weeks prior to departure. The traveling party must provide the other party with detailed information about the child(ren)'s whereabouts (including name, address, and telephone number of any location where the child(ren) will be staying) throughout the duration of the trip.

B. In the event that either party must obtain a Visa for the minor child(ren) prior to international travel, JILL JACKSON and/or a lawyer from Tharrington Smith, LLP, shall be responsible for sending the passport directly to the Embassy or Consulate to apply for the Visa at the expense of the traveling party; and JILL JACKSON and/or a lawyer from Tharrington Smith, LLP, shall be responsible for receiving the passport back from the Embassy or Consulate. JILL JACKSON and/or a lawyer from Tharrington Smith, LLP, notify each party in writing of the date on which the passport is sent to the Embassy or Consulate and the date on which the passport is returned to Jill Jackson and/or THARRINGTON SMITH. The child(ren)'s passport shall not be released into either party's possession, custody or control at any time during this Visa application process; and JILL JACKSON and/or a lawyer from THARRINGTON SMITH, LLP, shall provide a copy of the minor child(ren)'s Visa to each party attorney contemporaneously with written notification that the passport has been returned to THARRINGTON SMITH.

C. At any time that either party intends to travel with the minor child(ren) outside the United States, the party who intends to travel with the child(ren) (the "traveling party") must post a bond of $_____.00 with JILL JACKSON and/or a lawyer from THARRINGTON SMITH, LLP. At such time as the party requesting the passport has posted the $_____.00 bond, JILL JACKSON and/or a lawyer from THARRINGTON SMITH, LLP, shall release the passport to the party who will be traveling with the child(ren). If the child(ren) has not been returned to Wake County, North Carolina, and the regular custodial schedule has not resumed within three (3) days of the child(ren)'s

scheduled return date, the non-traveling party (or his/her lawyer) may contact JILL JACKSON and/or a lawyer from THARRINGTON SMITH, LLP, and the $_____.00 bond shall be released to the non-traveling party upon 24-hour notification by JILL JACKSON and/or a lawyer from THARRINGTON SMITH, LLP, to the traveling party (and/or his/her attorney) of the deadline for the release of the bond. If the child(ren) has returned to Wake County, North Carolina, and the regular custodial schedule has resumed within three (3) days of the child(ren)'s scheduled return date and upon delivery of the child(ren)'s passport to THARRINGTON SMITH, then JILL JACKSON and/or a lawyer from THARRINGTON SMITH, LLP, shall release the $_____.00 bond to the traveling party who posted the bond. The $_____.00 bond to be posted by the traveling party pursuant to this Paragraph is intended to secure the return of the minor child(ren) to North Carolina and is not an appearance bond and is not intended to be a fine or forfeiture within the meaning of Article 9, Section 7, of the North Carolina Constitution.