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## Global Child Welfare: The Challenges for Family Law

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# GLOBAL CHILD WELFARE: THE CHALLENGES FOR FAMILY LAW

ANN LAQUER ESTIN\*

*Children in transnational families face the same kinds of crises that other children experience, compounded by issues of language, culture, nationality, and immigration status. Although the global dimension of these families introduces additional concerns, courts and child welfare authorities have the same fundamental obligation to extend their protection to all children present in the United States. This paper reviews a series of problems posed by child welfare cases with international dimensions, and considers how the Hague Child Protection Convention may be useful in these cases, arguing that implementation of the Convention should include significant attention to its cooperation provisions.*

Our child welfare systems make decisions with profound implications for children and their families, against a background of chronic shortages of resources, a complex legal, political and bureaucratic environment, and urgent needs across many sectors of local communities.<sup>1</sup> In these cases, agencies and courts seek to determine and foster the best interests of children, while at the same time carrying out their responsibility to make reasonable efforts to preserve families and respect the rights and interests of parents. Child welfare cases with international issues are even more complex, adding problems of citizenship and immigration status into the mix, along with issues of language and culture and the need for casework and litigation techniques that can reach across national borders.<sup>2</sup>

The additional complexity of transnational family law cases increases the risk that the process will skew against children's interest in family preservation and their parents' right to make decisions concerning the upbringing of their children. In the United States, these interests have significant constitutional weight, elaborated in case law that extends both

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1. Although the specifics of these systems vary significantly from state to state, federal legislation shapes child welfare policy and federal funding supports state child protection programs. See generally Ann Laquer Estin, *Sharing Governance: Family Law in Congress and the States*, 18 CORNELL J. L. & PUB. POL'Y 267, 286-90 (2009).

2. See generally ANNIE E. CASEY FOUND., UNDERCOUNTED, UNDERSERVED: IMMIGRANT AND REFUGEE FAMILIES AND THE CHILD WELFARE SYSTEM (2006); *International Issues in Dependency Court Cases*, Judges' Page Newsl. (Nat'l Council of Juvenile and Family Court Judges & CASA for Children) Feb. 2008.

substantive and procedural protection to the parent-child relationship under the Due Process Clause. As a constitutional matter, parents have the right to notice and an opportunity for a hearing when a state intervenes in a parent-child relationship, and their interests are protected by a heightened standard of proof in cases involving a termination of parental rights.<sup>3</sup> The protection of these constitutional guarantees extends to all persons involved in state court proceedings, whatever their nationality or immigration status.<sup>4</sup> Although implementing these protections may be more difficult in international child welfare cases, courts and case workers have an obligation to make extra efforts to assure the basic fairness of these proceedings in cases with international dimensions.

At the international level, human rights law extends broad protection to family relationships through treaties, including the United Nations Convention on the Rights of the Child<sup>5</sup> and the International Covenant on Civil and Political Rights.<sup>6</sup> In addition, the four Hague Children's Conventions include procedures for cross-border cooperation in individual cases, particularly those involving international child abduction or intercountry adoption.<sup>7</sup> The United States is currently working toward ratification of the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental

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3. Note that there is no constitutional requirement for appointment of counsel in cases involving termination of parental rights of indigent parents. *Lassiter v. Dep't of Social Servs.*, 452 U.S. 18 (1981). *But see* *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996) (holding that indigent parent has right to appeal parental rights termination without paying costs for preparing a transcript).

4. *See* *Interest of Mainor T.*, 674 N.W.2d 442 (Neb. 2004). In *Mathews v. Diaz*, 426 U.S.67 (1976), the Supreme Court wrote: "There are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life, liberty, or property without due process of law. Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection." *Id.* (citations omitted); *see also* *Plyer v. Doe*, 457 U.S. 202, part II (1981) (holding that undocumented aliens are also protected by the Equal Protection Clause).

5. Convention on the Rights of the Child, G.A. Res. 44/25 (Annex), U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/RES/44/49, at 166 (Nov. 20, 1989), *reprinted at* 28 I.L.M. 1456 (1989) (signed but not ratified by the United States) [hereinafter CRC].

6. International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171 (ratified by the United States in 1992) [hereinafter ICCPR].

7. *See generally* Ann Laquer Estin, *Families Across Borders: The Hague Children's Conventions and the Case for International Family Law in the United States*, 62 FLA. L. REV. 47 (2010); *see also* Linda J. Silberman, *Co-Operative Efforts in Private International Law on Behalf of Children: The Hague Children's Conventions*, 323 RECUEIL DES COURS (COLLECTED COURSES OF THE HAGUE ACAD. OF INT'L L.) 261, 329-89 (2006).

Responsibility and Measures for the Protection of Children.<sup>8</sup> Once ratified, this will provide important new channels for communication and cooperation between child protection authorities in the United States and other Convention countries.

Part I of this paper surveys the current landscape of international child welfare proceedings in the United States, noting six types of recurring problems. These include the grounds for asserting jurisdiction over children; protection for procedural rights of parents who are beyond the court's jurisdiction; consular notice under the Vienna Convention on Consular Relations; the role of factors such as culture, language, and immigration status in working with parents and children; procedures for cross-border placements; and children's access to special forms of relief under federal immigration laws. Part II considers the Child Protection Convention, noting ways it might be useful in these cases and concluding that implementation in the United States should include significant efforts to assist the states in improving global cooperation in child welfare cases.

### *I. Transnational Child Protection Cases*

Agencies and courts working with global families caught up in the child welfare system work with the same constitutional requirements, federal statutes, and state law that apply to purely domestic cases. Nearly all states have enacted the Uniform Child Custody Jurisdiction and Enforcement Act (or its predecessor, the Uniform Child Custody Jurisdiction Act), which addresses interstate and international proceedings.<sup>9</sup> In addition, cross-border cases raise questions under international treaties, including the Vienna Convention on Consular Relations<sup>10</sup> and the Hague Conventions on service of process and taking evidence. Federal immigration law

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8. Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, Oct. 19, 1996, 2204 U.N.T.S. 39130, *reprinted in* 35 I.L.M. 1391 (1996) [hereinafter Child Protection Convention]. The United States signed the Child Protection Convention in October 2010; *see infra* part II.

9. Uniform Child Custody Jurisdiction and Enforcement Act § 102(4), 9 U.L.A. (Part 1A) 662 (1999) [hereinafter UCCJEA]. Massachusetts is the only exception. Note, however, that some states have enacted non-uniform versions of the UCCJEA. The District of Columbia and the U.S. Virgin Islands have also adopted the UCCJEA. For more information, see the web site of the Uniform Law Commission at [www.nccusl.org](http://www.nccusl.org).

10. Vienna Convention on Consular Relations, *opened for signature* Apr. 24, 1963, 596 U.N.T.S. 261 (entered into force Mar. 19, 1967) [hereinafter VCCR].

significantly complicates child welfare cases, but it does not generally preempt state jurisdiction.<sup>11</sup>

#### A. Jurisdiction

Courts in the United States take jurisdiction in child welfare cases under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), which applies to any proceeding in which legal custody, physical custody, or visitation with respect to a child is an issue.<sup>12</sup> Section 105(a) directs courts to treat a foreign county as if it were a state of the United States for purposes of determining jurisdiction.<sup>13</sup> In addition, section 105(b) provides for recognition and enforcement of any child-custody determination made in a foreign county under factual circumstances that are consistent with the jurisdictional standards of the statute.<sup>14</sup>

Under the UCCJEA, a state court typically does not have jurisdiction to make a custody determination with respect to a child who has been in the United States for less than six months. The statute accords a jurisdictional priority to the child's "home state," defined as 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 commencement of a child-custody proceeding."<sup>15</sup> Under section 105(a), the child's home state may be a

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11. *See, e.g.*, *Interest of Angelica L.*, 767 N.W.2d 74 (Neb. 2009). This is not true with respect to undocumented immigrant children apprehended by federal immigration authorities; *see infra* notes 131 and accompanying text.

12. UCCJEA, *supra* note 9, at § 102(4), 9 U.L.A. (Part 1A) 662 (1999). In addition to cases of divorce or separation, this includes proceedings for neglect, abuse, dependency, guardianship, paternity, termination of parental rights, and protection from domestic violence.

13. UCCJEA § 105(a).

14. UCCJEA § 105(b). Note, however, that a court need not apply the UCCJEA in this respect "if the child custody law of a foreign country violates fundamental principles of human rights." UCCJEA § 105(c).

15. UCCJEA § 102(7). For a child less than six months of age, the home state is the state "in which the child lived from birth with any of the persons mentioned." The definition also provides that "a period of temporary absence" from the state of any of the persons mentioned is counted as part of the jurisdictional period. The phrase "person acting as a parent" is defined in § 102(13).

Specifically, a state court has jurisdiction to make an initial child-custody determination if the state "is the home State of the child on the date of the commencement of the proceeding, or was the home State of the child within six months before the commencement of the proceeding and the child is absent from this State but a parent or a person acting as a parent continues to live in this State." *See* UCCJEA § 201(a)(1). If this test is met, it is not necessary for the child or the parents to be physically present in the state when the proceeding is commenced, *see In re Claudia S.*, 31 Cal. Rptr. 3d 697 (Ct. App 2005), but the parents must be afforded notice and an opportunity for a hearing, as described below.

foreign country. When a child has been living in a state for at least six months, a court may take jurisdiction based on the child's residence, without regard to the nationality or immigration status of the child or his or her parents.<sup>16</sup>

If no court in the United States or a foreign country can assert "home state" jurisdiction, or if a court in the home state has declined to exercise jurisdiction, a court in another state may assume jurisdiction provided that two additional requirements are met. The child and at least one parent (or "person acting as a parent") must have a significant connection to the state other than mere physical presence, and there must be substantial evidence available in the state concerning "the child's care, protection, training, and personal relationships."<sup>17</sup> Under the UCCJEA, even if a child has a home state in another state or foreign country, a state court may exercise temporary emergency jurisdiction if the child is present in the state and "the child has been abandoned or it is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse."<sup>18</sup> Thus, if a parent dies or disappears or abuses a child shortly after arriving in a state with a child, the state court will be permitted to exercise temporary emergency jurisdiction, at least until the child's other parent is located and arrangements for the child's safe transfer can be made.<sup>19</sup> The same basis for jurisdiction could be applied to an unaccompanied, undocumented immigrant minor found in the United States.<sup>20</sup>

If the court hearing an emergency matter is informed of a custody proceeding or determination in another state or foreign country, the

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16. Cf. *Angelica L.*, 767 N.W.2d at 89; *Arteaga v. Texas Dep't of Protective & Regulatory Servs.*, 924 S.W.2d 756, 760 (Tex. Ct. App. 1996); *In re Stephanie M.*, 867 P.2d 706, 713-717 (Cal. 1994).

State courts do not have jurisdiction to determine custody of a child living in another state or a foreign country, unless the requirements for temporary emergency jurisdiction are met. See, e.g., *Baby Boy M.*, 46 Cal. Rptr. 3d 196 (Ct. App. 2006) (no jurisdiction under the UCCJEA where agency could not locate child who had allegedly been taken to another state by his biological father). Cf. *Matter of Stanley R.*, 542 N.Y.S.2d 734 (App. Div. 1989), decided prior to the enactment of the UCCJEA, which found subject matter jurisdiction when the child's parents lived in the state but the child was living in El Salvador.

17. UCCJEA § 201(a)(2).

18. UCCJEA § 204(a). If there is no previous child-custody determination entitled to enforcement under the UCCJEA, a determination made under this section can become a final determination, "if it so provides and this State becomes the home State of the child."

19. State subject matter jurisdiction may be preempted if the child entered the country illegally and is the subject of deportation proceedings. See *infra* note 131 and accompanying text.

20. E.g., *In re Jorge G.*, 78 Cal. Rptr. 3d 552, 558 (Cal. Ct. App. 2008).

UCCJEA provides that the court “shall immediately communicate” with the other court.<sup>21</sup> This was an issue in *In re Nada R.*, after a state court exercised emergency jurisdiction over children who were residents of Saudi Arabia, based on an incident of physical abuse in the United States.<sup>22</sup> The father argued that the juvenile court in California was required to communicate with the court that had granted him custody in Saudi Arabia, and the appellate court remanded for a determination of whether the juvenile court could assert continuing jurisdiction.<sup>23</sup> A child custody determination made on this emergency basis may become a final determination, and the state in which it is made may become the child’s home state, if no proceeding is commenced in a state or foreign country with a basis for jurisdiction consistent with the grounds under the UCCJEA.<sup>24</sup>

Another example, *In re A.C.*, involved a dependency petition filed with respect to a Mexican child who had been hospitalized in California as a result of serious injuries received in an automobile accident.<sup>25</sup> The parents lived in Mexico and were unable to care for the child at the time of her discharge because the mother had also suffered serious injuries. Concluding that Mexico was the child’s home state, the court held that California did not have a basis to exercise subject matter jurisdiction under the UCCJEA. In the circumstances, the court also found that there was no basis for temporary emergency jurisdiction, since the parents had not abandoned the child or subjected her to mistreatment or abuse.<sup>26</sup>

Parents who do not reside in the state where child welfare proceedings are pending sometimes argue that the court should not proceed without obtaining personal jurisdiction over the parents. State courts have

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21. UCCJEA § 204(d).

22. *In re Nada R.*, 108 Cal. Rptr. 2d 493 (Ct. App. 2001). After the abuse occurred in Florida, the mother brought the children to her home in California, and the juvenile court proceeding occurred there. The state also presented significant evidence that the father had failed to protect the older child from sexual abuse in Saudi Arabia.

23. The mother argued that the custody determination made in Saudi Arabia would not be enforceable in the United States because she was not given notice and an opportunity for a hearing, and therefore that the court in California should not be required to communicate with the court in Saudi Arabia. This issue was also remanded to the juvenile court.

24. UCCJEA § 204(d).

25. *In re A.C.*, 30 Cal. Rptr. 3d 431 (Cal. Ct. App. 2005).

26. *Id.* In the face of evidence that the authorities in Mexico would have deferred to the agency in California, because there was no specialized pediatric facility available in the parents’ home town of Tijuana, the court concluded that: “A child who is a foreign national cannot be made the subject of California juvenile dependency law simply because California offers better medical care than the child’s home state.”

concluded that these cases fall within the “status exception” to the personal jurisdiction requirement,<sup>27</sup> concluding that constitutional due process norms are adequately addressed when nonresident parents are given notice and an opportunity to participate in the court’s proceedings.<sup>28</sup> State statutes may provide expressly for jurisdiction over nonresident parents in juvenile cases,<sup>29</sup> and in some circumstances personal jurisdiction might be asserted under a long arm statute applying a “minimum contacts” theory of personal jurisdiction. Not every case is appropriate for this approach, however. In *Interest of John Doe*, the Hawaii Supreme Court concluded that it was unreasonable and unfair on the facts of that case for the state courts to terminate the parental rights of a mother living in the Philippines, whose only contact with the state of Hawaii was to acquiesce in the father’s request to bring the child to the state for a brief visit.<sup>30</sup>

In an action to terminate parental rights based on the child’s presence within the state, especially when the child’s parents are not subject to the court’s personal jurisdiction, a court should consider carefully the extent of the contacts between the child and the state and the possibility that another forum may be more appropriate. The UCCJEA permits a court to decline jurisdiction in this situation based on the motion of any party, the court’s own motion, or the request of another court.<sup>31</sup>

Looking forward, many aspects of the UCCJEA can be harmonized with the Hague Child Protection Convention, but there are also points of difference. As the United States proceeds toward ratification, amendments to the UCCJEA will be needed to assure proper respect for the jurisdiction of foreign courts. To assure that their orders are recognized and enforced abroad, state courts will also need to follow the Convention rules in international cases.

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27. *See Pennoyer v. Neff*, 95 U.S. 714, 734-45 (1877); *Shaffer v. Heitner*, 433 U.S. 186, 208 n. 30 (1977).

28. *E.g.*, *Utah ex rel. W.A. (D.A. v. Utah)*, 63 P.3d 607, 613-17 (Utah 2002) (citing cases); *see also In re Claudia S.*, 31 Cal.Rptr.3d 697, 703-04 (2005); *J.D. v. Tuscaloosa Dep’t of Human Resources*, 923 So.2d 303 (Alab. Ct. Civ. App. 2005) (adopting analysis of *Utah ex rel. W.A.*); *Tammie J.C. v. Robert T.R.*, 663 N.W.2d 734, 741 (Wis. 2003).

29. *E.g.*, UTAH CODE ANN. § 78-3a-110(13) (cited in *Utah ex rel. W.A.*, 63 P.3d at 611-13); Wis. Stat. § 822.12 (cited in *Tammie J.C.*, 663 N.W.2d at 744-45).

30. *Interest of John Doe*, 926 P.2d 1290, 1300 (Haw. 1996). The case was decided before adoption of the UCCJEA, under a statute that allowed the courts to take jurisdiction in child protection proceedings concerning any child “found within the State.”

31. UCCJEA § 207. Similar questions were addressed in international cases under the statute that preceded the UCCJEA. *See Arteaga v. Texas Dep’t of Protective & Regulatory Servs.*, 924 S.W.2d 756 (Tex. Ct. App. 1996) (describing the family’s strong connections to Texas and the United States); *see also In re Stephanie M.*, 867 P.2d 706, 714-15 (Cal. 1994).



### B. Procedural Protections

As a constitutional matter, all parents have a right to notice and an opportunity for a hearing before children are removed from their care.<sup>32</sup> While this may be deferred in emergency situations, or when the child is removed for a brief period for investigation, the hearing must follow as soon as possible.<sup>33</sup> In addition, the Supreme Court has ruled that termination of parental rights must be based on proof of unfitness by clear and convincing evidence.<sup>34</sup> An important basis for this requirement is the risk of an erroneous decision, since termination involves “imprecise subjective standards that leave determinations unusually open to the subjective values of the judge.” Moreover, “[b]ecause parents subject to termination proceedings are often poor, uneducated, or members of minority groups, such proceedings are often vulnerable to judgments based on cultural or class bias.”<sup>35</sup> In some states, statutes require the appointment of counsel for an indigent parent facing termination of parental rights,<sup>36</sup> but this is not required as a matter of federal constitutional law.<sup>37</sup>

These baseline procedural rights pose particular challenges in cases involving parents who do not reside in the United States. If a parent’s whereabouts are unknown, due process requires that authorities make reasonable efforts to locate the parent.<sup>38</sup> Assistance may be obtained from the appropriate consulate<sup>39</sup> or organizations such as International Social

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32. *Stanley v. Illinois*, 405 U.S. 645 (1972).

33. *Nicholson v. Scopetta*, 344 F.3d 154 (2d Cir. 2003). *Cf. Tenenbaum v. Williams*, 193 F.3d 581 (2d Cir. 1999).

34. *Santosky v. Kramer*, 455 U.S. 745 (1982) (applying the Due Process clause of the Fourteenth Amendment). At the adjudication stage, courts may determine that a child is dependent based on proof by a preponderance of the evidence.

35. *Id.* at 762-63.

36. *E.g.*, Cal. Fam. Code § 7862; N.Y. Fam. Ct. Act § 262.

37. *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18 (1981). An indigent parent is entitled to appeal an order terminating parental rights even if the parent cannot afford to pay fees for preparation of a transcript. *See M.L.B. v. S.L.J.*, 519 U.S. 102 (1996). Under federal law, states are directed to provide a guardian ad litem to represent children’s interests in abuse and neglect cases, but not all states comply. *See* 42 U.S.C. § 5106a (b) (2) (A) (xiii); *see generally* Gerard F. Glynn, *The Child’s Representation Under CAPTA: It is Time for Enforcement*, 6 NEV. L.J. 1250 (2006).

38. *See In re Claudia S.*, 31 Cal. Rptr. 3d 697, 704 (Cal. Ct. App. 2005). In this unusual case, the juvenile court in California took jurisdiction and conducted hearings for a year in a case filed after mother and children had moved to Mexico; the appellate court described this as “a continuing charade played out for the benefit of no one” and remanded for new jurisdiction hearing. *Id.*

39. *See infra* part I.C.

Service (ISS), which has a branch in the United States.<sup>40</sup> Once parents are located, it may be necessary to use international litigation tools such as the Hague Convention on Service of Process.<sup>41</sup> A parent may not have the resources or the visa necessary to travel to make an appearance before the court, and even if the parent is present there may be significant cultural or language barriers that complicate the hearing process.

The Child Protection Convention also protects procedural rights of parents and children. In cases that fall within the Convention, another Convention country may refuse to recognize a U.S. court order terminating an individual's parental rights under Article 23(2)(c) "if the order was entered without the individual being given the opportunity to be heard." Similarly, under Article 23(2)(b), recognition may be refused of any order entered, except in urgent situations, without the child having been provided the opportunity to be heard.

### *1. Hague Litigation Conventions*

As with any other international civil litigation, service of process in child welfare proceedings must conform to the Hague Service Convention if it is made in any of the more than 60 countries which are Contracting States. Service in participating countries that does not comply with the treaty is ineffective, even if the respondent had actual notice.<sup>42</sup> These principles are discussed in a series of California child welfare cases, which affirm that the initial service on a parent in another Convention country must meet the requirements of state law as well as the treaty.<sup>43</sup> Once notice of the proceeding is made and jurisdiction established, subsequent communications may be transmitted less formally.<sup>44</sup>

Most foreign countries do not have the kinds of pretrial discovery practices used in the United States, and lawyers must be extremely cautious before attempting to collect evidence abroad. Parties may initiate a request

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40. Information is available on their web site at [www.iss-usa.org](http://www.iss-usa.org).

41. Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, 20 U.S.T. 361, T.I.A.S. 6638, 658 U.N.T.S. 163, *reprinted in* 4 I.L.M. 341 (1965) (hereinafter Service Convention).

*See also* Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil and Commercial Matters, 23 U.S.T. 2555, T.I.A.S. 7444, 847 U.N.T.S. 231, appended to 28 U.S.C. § 1781, *reprinted in* 8 I.L.M. 37 (1969) (hereinafter Evidence Convention).

42. *E.g., In re Alyssa F.*, 6 Cal. Rptr. 3d 1 (Cal. Ct. App. 2003).

43. *See id.*; *see also In re Jorge G.*, 78 Cal. Rptr. 3d 552 (Cal. Ct. App. 2008). Defective service may be waived if the parent makes a general appearance. *See In re Vanessa Q.*, 114 Cal. Rptr. 3d 294 (Cal. Ct. App. 2010).

44. *See In re Jennifer O.*, 108 Cal. Rptr. 3d 846 (Cal. Ct. App. 2010) (applying *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694 (1988)).

for letters rogatory, requesting the cooperation of a foreign judge, or may utilize the more streamlined procedures available in more than 50 countries under the Hague Evidence Convention. In child welfare cases, these procedures may assist a court in obtaining genetic evidence to determine a child's parentage.<sup>45</sup>

## 2. Hearings

Despite the constitutional stature of the right to a hearing in proceedings concerning parental rights, parents who are incarcerated or have been removed from the United States may be unable to appear. Courts have a responsibility to assure that these parents have the opportunity to participate. For example, *Interest of Mainor T.* involved a mother who was arrested and then deported to Guatemala without her children after they were taken into custody.<sup>46</sup> She was not present for any proceedings in the case, including an initial hearing held while she was incarcerated in a jail next door to the courthouse. The Nebraska Supreme Court eventually reversed the lower court's termination of her parental rights, emphasizing that the courts have a "responsibility to ensure that proceedings which lead to the termination of a familial relationship are fundamentally fair."<sup>47</sup>

When it is not possible for a parent to be present, courts have arranged for participation by alternative means, such as a telephone conference call or video conferencing.<sup>48</sup> In *Termination of Parental Rights to Adrianna A.E.* the Wisconsin Court of Appeals noted arrangements made to allow a father to appear by a two-way webcam, with an additional connection that allowed the father to communicate privately with his lawyer by instant messages.<sup>49</sup> The court concluded that these measures had extended the father an opportunity for meaningful participation in the hearing and

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45. Courts in the United States also handle incoming requests for the same kinds of evidence; see, e.g., *In re Letter Rogatory from the Nedenes District Court, Norway*, 216 F.R.D. 277 (S.D. N.Y. 2003).

46. *Interest of Mainor T.*, 674 N.W.2d 442 (Neb. 2004). In this case, the only abuse alleged was that the mother had slapped the older child.

47. *Id.*; see also *Interest of Angelica L.*, 767 N.W.2d 74 (Neb. 2009), in which a mother was present for an initial hearing before being deported to Guatemala. Although unable to attend the adjudicatory and dispositional hearings, she was eventually able to obtain a visa and returned to participate in termination hearings, more than two and a half years after her children were taken into custody. The court reversed an order terminating her parental rights, concluding that there was not clear and convincing evidence of her unfitness.

48. E.g., *Interest of M.G.F.*, 476 S.E.2d 100 (Ga. Ct. App. 1996) (participation by conference call).

49. *Termination of Parental Rights to Adrianna A.E.*, 745 N.W.2d 701 (Wisc. Ct. App. 2007).

effective assistance of counsel. Although the right to participate may be waived, courts have a responsibility to inquire whether efforts have been made to facilitate the appearance of an absent parent.<sup>50</sup> In some cases, a continuance may be appropriate, particularly when parents have been making good faith efforts to remain in contact with their children and the court.<sup>51</sup>

### C. Consular Notification under the Vienna Convention

Provided the jurisdictional principles of the UCCJEA are followed, it does not matter whether the children or parents involved in a child protection proceeding are U.S. or foreign nationals.<sup>52</sup> When the individuals involved are not U.S. citizens, however, courts and agencies have additional responsibilities under the Vienna Convention on Consular Relations (“VCCR”).<sup>53</sup> To comply with the VCCR, local authorities must notify the appropriate consulate whenever a guardian or trustee is appointed for a minor or incapacitated person who is a foreign citizen,<sup>54</sup> and must inform a foreign citizen who is arrested, imprisoned, or detained of his or her right to consular notice and access.<sup>55</sup> Consular officials may also provide other assistance to foreign nationals present in the United States in matters pending before courts or other authorities.<sup>56</sup> Consular officials of the

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50. *E.g.*, *New Mexico ex rel. Steven*, 992 P.2d 317 (N.M. Ct. App. 1999).

51. *Cf. M.G.F.*, 476 S.E.2d at 100 (upholding refusal to grant continuance after mother was deported to Germany).

52. *See, e.g.*, *Interest of J.H.*, 536 S.E.2d 805 (Ga. Ct. App. 2000).

53. VCCR, *supra* note 10. Note that additional bilateral agreements exist with some countries. Practical information for state and local authorities in the United States is included in U.S. Dep’t of State, *Consular Notification and Access* (3d ed. 2010), available at [http://travel.state.gov/pdf/cna/CNA\\_Manual\\_3d\\_Edition.pdf](http://travel.state.gov/pdf/cna/CNA_Manual_3d_Edition.pdf). *See generally* LUKE T. LEE & JOHN QUIGLEY, *CONSULAR LAW AND PRACTICE* (3d ed. 2008).

54. VCCR, *supra* note 10, art. 37. *See also id.*, art. 5(h), which defines “consular functions” to include “safeguarding, within the limits imposed by the laws and regulations of the receiving State, the interests of minors and other persons lacking full capacity who are nationals of the sending State, particularly where any guardianship or trusteeship is required with respect to such person.”

55. *Id.*, art. 36(1). In some bilateral consular conventions, notice that a foreign citizen has been arrested or detained is mandatory. After being notified, consular officials have rights to visit, converse and correspond with an individual in prison, custody or detention. *See id.* The implementation of these rights in the United States was addressed in *Medellín v. Texas*, 522 U.S. 491 (2008), which held that the VCCR is not self-executing.

56. VCCR, *supra* note 10, art. 5(I) defines consular functions to include:

[S]ubject to the practices and procedures obtaining in the receiving State, representing or arranging appropriate representation for nationals of the sending State before tribunals and other authorities of the receiving State, of the purpose of obtaining, in accordance with the laws and regulations of the receiving State, provisional measures for the preservation of the

United States have the same rights to notice and communication with U.S. nationals who may be caught up in foreign child protection, guardianship, or criminal proceedings.<sup>57</sup>

State courts have concluded that failure to give notice under the VCCR does not deprive the court of jurisdiction in child protection cases.<sup>58</sup> These courts focus on language in the Convention providing that consular aid must be conducted “within the limits imposed by the laws and regulations” of the forum state,<sup>59</sup> or providing that notice shall be “without prejudice to the operation of the laws and regulations” of the forum state.<sup>60</sup> Borrowing from the principles applied in criminal cases, some courts hold that a parent must be able to show that he or she was prejudiced by the lack of consular notification.<sup>61</sup> Other cases have concluded that notice was sufficient when the consulate obtained knowledge of proceedings concerning a child, even if the notice did not come from the state.<sup>62</sup> In *Arteaga v. Texas Department of Protective and Regulatory Services*, the court described the state’s actions as constituting “the bare minimum of acceptable notice to the Mexican consulate,” and urged agency caseworkers to provide a clear record demonstrating that the consulate “received adequate notice affording it the opportunity for intervention if desired.”<sup>63</sup> Another court pointed out that the lack of compliance with the VCCR by federal and state agencies is often the result of ignorance, and noted assurances by the local social

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rights and interests of these nationals, where, because of absence or other reason, such nationals are unable at the proper time to assume the defence of their rights and interests.

*Id.*

57. See U.S. Dep’t of State, Foreign Affairs Manual (FAM) vol. 7, Consular Protection of U.S. Nationals Abroad. The sections on children’s issues include: Child Abuse or Neglect, 7 FAM 1720, available at <http://www.state.gov/documents/organization/86820.pdf>; Child Exploitation, 7 FAM 1730, available at <http://www.state.gov/documents/organization/86821.pdf>; Forced Marriage of Minors, 7 FAM 1740, available at <http://www.state.gov/documents/organization/86822.pdf>; and Runaways, Abandoned Children and Other Unaccompanied Minors, 7 FAM 1760, available at <http://www.state.gov/documents/organization/86824.pdf>.

58. *E.g.*, *In re Stephanie M.*, 867 P.2d 706, 712-13 (Cal. 1994). *Stephanie M.* also held that the failure to notify the Mexican consulate was not a violation of the parents’ due process rights. *Id.* at 717; see also *In re Angelica L.*, 767 N.W.2d 74 (Neb. 2009); *Arteaga v. Texas Dep’t of Protective & Regulatory Servs.*, 924 S.W.2d 756, 761 (Tex. Ct. App. 1996) (holding that state adequately complied with VCCR).

59. *Stephanie M.*, 867 P.2d at 712 (quoting VCCR, *supra* note 10, art. 5(h)).

60. *Id.* (quoting VCCR, *supra* note 10, art. 5(I)).

61. *E.g.*, *Interest of Antonio O.*, 784 N.W.2d 457, 466-67 (Neb. Ct. App. 2010); *E.R. v. Marion Cnty. Office of Family & Children*, 729 N.E.2d 1052, 1057-59 (Ind. Ct. App. 2000).

62. *E.g.* *E.R.*, 729 N.E.2d at 1056-59; *Interest of L.A.M.*, 996 P.2d 839 (Kan. 2000).

63. *Arteaga*, 924 S.W.2d at 761 n.6.

services agency that they were developing a protocol to assure compliance in the future.<sup>64</sup>

Some state or local social services agencies have entered into a Memorandum of Understanding with a foreign consulate in the United States to spell out consular notice procedures. This has been particularly common for cases involving children with Mexican citizenship.<sup>65</sup> Social services agencies should build consular notification into their procedures and assure that caseworkers have the training and resources needed to follow through in these cases.<sup>66</sup> Statutes in Nebraska articulate a series of requirements for child protection cases involving a foreign national minor or a minor having multiple nationalities, including providing certain written information to the minor and his or her parents, in English and the minor's native language, and providing notice to the appropriate consulate within ten working days.<sup>67</sup>

Although there is no direct interface between the consular notice requirements of the VCCR and the cooperation provisions of the Hague Child Protection Convention, countries may find it useful to coordinate the consular and Central Authority functions in child welfare cases. Consular officials are likely to continue to play an important role as the local representatives of foreign countries working with children, parents and local authorities, particularly when no court proceedings have been commenced.

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64. *E.R.*, 729 N.E.2d at 1059; *see also Angelica L.*, 767 N.W.2d at 96-97 (Gerrard, J., concurring) (criticizing agency's "cursory compliance with what was apparently regarded as a legal technicality" and noting that facts illustrate why "involvement of a foreign juvenile's consulate should be regarded as important to promoting the juvenile's best interests.")

65. *See, e.g.*, Memorandum of Understanding on Consular Protection of Mexican Nationals between the county of Riverside Department of Public Social Services, California, and the Consulate of Mexico in San Bernardino, California, *available at* <http://www.f2f.ca.gov/res/pdf/RiversideMOUMexicanConsulate.pdf>.

66. *See, e.g.*, Iowa Dep't of Human Servs., Employees' Manual Title 17 Chapter C(1): Child Welfare--Case Planning Procedures 38-39 (rev. June 25, 2010), *available at* [http://www.dhs.state.ia.us/policyanalysis/PolicyManualPages/Manual\\_Documents/Master/17-C1.pdf](http://www.dhs.state.ia.us/policyanalysis/PolicyManualPages/Manual_Documents/Master/17-C1.pdf). The Iowa Manual includes links to the DHS policy statement on case planning for children with Mexican citizenship, the state's Memorandum of Understanding with Mexico, and a consular notification form with instructions. Case workers are also instructed to provide written information to the child and the child's parents or custodian in both English and Spanish to explain the juvenile court process and their rights in juvenile court, with a link to a brochure that can be used for this purpose.

67. Neb. Rev. Stat. § 43-3804(2) (discussed in *Angelica L.*, 767 N.W.2d 74).

#### *D. Transnational Family Interventions*

Navigating child welfare cases within a diverse and heterogeneous population requires a high level of “cultural competence” from courts and agencies.<sup>68</sup> As noted by Lori Klein, “[f]rom the outset of a child dependency case, the social worker assigned to the case makes highly subjective decisions about whether and to what degree the parent poses a risk to her child, and about whether and to what degree the parent would benefit from reunification services.”<sup>69</sup> Beyond the general questions of cultural or religious difference, courts and agencies also need to understand how issues of immigration status may affect family relationships, and how state intervention may further complicate an immigrant family’s already-precarious situation.<sup>70</sup>

##### *1. Defining Neglect, Abuse and Abandonment*

State agencies have a responsibility to respond when they learn of children who may be abused, neglected, or abandoned. After investigation, if an agency seeks a judicial determination that a child is “dependent and neglected,” or “in need of assistance,” its next step is to work with the family to remedy the problems that led to the abuse or neglect. Federal legislation frames the state’s obligation in terms of making “reasonable efforts” to preserve and reunify families.<sup>71</sup> This obligation exists in all

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68. See Lori Klein, *Doing What’s Right: Providing Culturally Competent Reunification Services*, 12 BERKELEY WOMEN’S L.J. 20, 21 (1997). See also Note, *Do “Reasonable Efforts” Require Cultural Competence? The Importance of Culturally Competent Reunification Services in the California Child Welfare System*, 5 HASTING RACE & POV. L.J. 397 (2008) (reviewing reunification efforts made in cases with elements of cultural diversity).

69. Klein, *supra* note 68, at 31. In *Dependency of A.A.*, 20 P.3d 492 (Wash. Ct. App. 2001), a case involving domestic violence, sexual abuse, and alcohol abuse, the courts rejected the father’s argument that the court should consider his Roma culture, saying “No matter what country or culture a family comes from, returning children to such an environment would clearly not be in their best interests.”

70. See Kerry Abrams, *Immigration Status and the Best Interests of the Child Standard*, 14 VA. J. SOC. POL’Y & L. 87, 92-94 (2006) (noting as a problem the family courts’ lack of expertise in federal immigration law). For an illustration of the cascade of problems that may follow a child welfare intervention, see *In re Mainor T.*, 674 N.W.2d 442 (Neb. 2004), discussed in David B. Thronson, *Creating Crisis: Immigration Raids and the Destabilization of Immigrant Families*, 43 WAKE FOREST L. REV. 391 (2008). See generally Casey Found., *supra* note 2.

71. 42 U.S.C. § 671(a)(15)(B) (2010). In making these efforts, however, the child’s health and safety remain “the paramount concern.” 42 U.S.C. § 671 (a)(15)(A) (2010). These requirements were elaborated in the Adoption Assistance and Child Welfare Act of 1980 and the Adoption and Safe Families Act of 1997. For a description of the process in

cases, unless a court determines that parents have subjected a child to “aggravated circumstances.”<sup>72</sup> If the agency’s efforts to work with the family are not successful, the court and agency may proceed to terminate the parental rights of one or both parents.<sup>73</sup> Given the high standard of proof required, however, a court may not terminate parental rights solely on the basis that allowing the child to remain in foster care, or in the United States, would be in the child’s best interests.<sup>74</sup>

Despite the wide global consensus on the general principle of protecting the child’s welfare or best interests, more specific notions of what is appropriate or acceptable treatment of children diverge significantly.<sup>75</sup> Even within the United States, child rearing norms are strongly determined by culture, religion, or class.<sup>76</sup> As a constitutional matter, law defines a zone within which parents have authority to make decisions without intervention from the state. The borders of this protected zone have been defined primarily in law addressing educational and religious decisions, where parental autonomy is generally well-protected.<sup>77</sup> There is no constitutional protection for practices that place a child’s physical well-being in serious jeopardy, even if those practices are permitted or required within a parent’s cultural or religious community. This is most notable in cases involving spiritual treatment as an alternative to conventional medical care,<sup>78</sup> or practices such as female genital cutting.<sup>79</sup>

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California, written before ASFA, see Klein, *supra* note 68, at 22-29.

72. 42 U.S.C. § 671(A)(15)(D).

73. To address the risk that children may spend long periods of time in foster care prior to reunification or termination, federal law also requires a permanency planning process to begin within a year after a child enters foster care. 42 U.S.C. § 675(5)(c) (2010).

74. *E.g.*, Interest of Angelica L., 767 N.W.2d 74 (Neb. 2009). See also Adoption of C.M.B.R., 332 S.W.3d 793, 810-12 (Mo. 2011) (reversing termination of parental rights after trial court failed to order investigation and social study to determine whether termination was in child’s best interests). See generally C. Elizabeth Hall, *Where are My Children, , , and My Rights? Parental Rights Termination as a Consequence of Deportation*, 60 DUKE L.J. 1459 (2011).

75. See INT’L SOCIETY FOR PREVENTION OF CHILD ABUSE & NEGLECT, *WORLD PERSPECTIVES ON CHILD ABUSE* (8th ed. 2008).

76. See generally ALISON DUNDES RENTELN, *THE CULTURAL DEFENSE* 48-72 (2004).

77. Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Society of Sisters, 268 U.S. 510 (1925), Wisconsin v. Yoder, 406 U.S. 205 (1972). Cf. Prince v. Massachusetts, 321 U.S. 158 (1944) (sustaining child labor law).

78. See also RENTELN, *supra* note 76, at 61-72 (recommending state intervention only when necessary to prevent irreparable harm to a child).

79. Cf. Adoption of Peggy, 767 N.E.2d 29 (Mass. 2002). See also RENTELN, *supra* note 76, at 51-53. Other issues, such as physical discipline, fall between these two ends of the spectrum. See RENTELN, at 54-58.



Parents may place their children informally with relatives or friends or through an agency for some form of temporary care. This alone should not constitute abandonment or neglect under state child welfare statutes, provided that the parents continue to maintain contact with the child.<sup>80</sup> Defining child abandonment presents particular problems in global cases, where there are many reasons why a child may be present in the country without his or her parents. A minor may be admitted on a nonimmigrant basis, for educational purposes or medical care,<sup>81</sup> or as a refugee.<sup>82</sup> A child may have entered illegally, or been the victim of trafficking. The child may be a U.S. citizen, entitled to enter and remain in the United States even though his or her parents are not.<sup>83</sup> The child may have been left alone in the United States after the death of a parent.<sup>84</sup>

Appellate courts agree that a parent's undocumented status is not a sufficient basis for termination of parental rights.<sup>85</sup> Courts have also refused to rule that a child has been abandoned based solely on the fact that

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80. *E.g.*, *Adoption of A.M.H.*, 215 S.W.3d 793 (Tenn. 2007); *Matter of Sanjivini K.*, 391 N.E.2d 1316 (N.Y. 1979). The parents in *A.M.H.* spent years trying to regain custody of their daughter in a case that drew significant public attention; *see, e.g.*, Andrew Jacobs, *Chinese and American Cultures Clash in Custody Battle for Girl*, N.Y. TIMES, Mar. 2, 2004, at 5. *Cf.* *Adoption of C.M.B.R.*, 332 S.W.3d 793, 813-18 (Mo. 2011) (finding sufficient evidence of abandonment).

81. *E.g.*, *In re A.C.*, 30 Cal. Rptr. 3d 431, 433 (Ct. App. 2005) (child transferred from hospital in Mexico to California for specialized medical care).

82. *See infra* note 133 and accompanying text; *see also* *Nahid H. v. Superior Court*, 62 Cal. Rptr. 2d 281, 284-85 (Ct. App. 1997) (mother sent children to United States to escape Iran-Iraq war).

83. Numerous cases suggest that an alien parent facing deportation is entitled to decide whether to leave with his or her minor U.S.-citizen child or allow the child to remain in the United States. *See In re B. & J.*, 756 N.W.2d 234, 240 n.5 (Mich. Ct. App. 2008).

84. Children may appear to be living alone when they avoid disclosing their parents' actual place of residence in an effort to avoid immigration consequences. Involvement of consular representatives is particularly important in these cases.

85. *See Marina P. v. Ariz. Dep't of Econ. Sec.*, 152 P.3d 1209, 1216 (Ariz. Ct. App. 2007); *Interest of M.M.*, 587 S.E.2d 825, 832 (Ga. Ct. App. 2003). As articulated by the court in *Interest of M.M.*:

Essentially, the termination of the father's parental rights was based on the possibility that the father could someday be deported and, . . . [the child] might be returned to DFACS's custody or sent to Mexico. When we wield the awesome power entrusted to us in these cases, our decisions must be based on clear and convincing evidence of parental misconduct or inability and that termination is in the best interest of the child, and not speculation about 'the vagaries or vicissitudes that beset every family on its journey through the thickets of life.'

587 S.E.2d at 832.

the parent has been deported,<sup>86</sup> or because the parent has left the country to obtain a visa,<sup>87</sup> or because the parent failed to come forward when his or her child was taken into state custody.<sup>88</sup> A parent's immigration status may contribute toward circumstances that present an "imminent danger of abuse or neglect" for the child, however.<sup>89</sup> In these cases, courts focus attention on parents' efforts to arrange appropriate care for their children, to maintain regular contact, and to provide financial support as far as they are able.<sup>90</sup> If parents do not reside in the United States, the most appropriate course of action may be to arrange for children to return to their parents' care in the country where the parents are living,<sup>91</sup> and courts have emphasized that the perceived advantages of living in the United States cannot be a basis for a termination of parental rights.<sup>92</sup>

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86. See, e.g., *Interest of Angelica L.*, 767 N.W.2d 74, 94 (Neb. 2009); *B & J*, 756 N.W.2d at 241 n.3; see also Ginger Thompson, *After Losing Freedom, Some Immigrants Face Loss of Custody of Their Children*, N.Y. TIMES, Apr. 23, 2009, at A0. In a particularly egregious case, federal authorities deported a U.S. citizen child with her father just hours after arresting him, despite knowledge that the child's mother – also a U.S. citizen – claimed custody and was seeking an emergency family court order to confirm this. See *Castro v. U.S.*, 608 F.3d 266, 267-68 (5th Cir. 2010) (per curiam); Adam Liptak, *Family Fight, Border Patrol Raid, Baby Deported*, N.Y. TIMES, Sept. 10, 2010, at A0.

87. See *J.B. v. DeKalb Cnty. Dep't of Human Res.*, 12 So. 3d 100, 112-14 (Ala. Civ. App. 2008).

88. *Marina P.*, 152 P.3d at 1214-15; see also *In re V.S.*, 548 S.E.2d 490, 494 (Ga. Ct. App. 2001) (reversing the termination of parental rights that treated as abandonment a father's failure to file a petition to establish parentage within 30 days of being notified of termination proceedings).

89. *Marina P.*, 152 P.3d at 1216 n.9 ("That Mother is attempting to evade detection and deportation does not, in and of itself, create probable cause to believe her children are in imminent danger of abuse or neglect. Again, while her illegal status may . . . contribute to such circumstances, in the absence of facts demonstrating that it does, it is not a sufficient basis on which CPS can take temporary custody."); see also *Interest of Aaron D.*, 691 N.W.2d 164, 167 (Neb. 2005) (noting that the mother's immigration status "is not relevant to our analysis of this appeal, except insofar as it has affected her ability to obtain transportation and employment"). Cf. *Rico v. Rodriguez*, 120 P.3d 812, 816-17 (Nev. 2005) (considering a parent's immigration status as a factor in the context of a custody dispute).

90. E.g., *J.B.*, 12 So. 3d at 113-14; *Angelica L.*, 767 N.W.2d at 94-95; *Interest of Mainor T.*, 674 N.W.2d 442, 462-63 (Neb. 2004).

91. See *B. & J.*, 756 N.W.2d at 241-42; see also *Angelica L.*, 767 N.W.2d at 93-94; *In re Adoption of A.M.H.*, 215 S.W.3d 793, 813 (Tenn. 2007).

92. E.g., *Angelica L.*, 767 N.W.2d at 93-94; *In re Adoption of A.M.H.*, 215 S.W.3d at 813.

## 2. Reasonable Efforts and Alternative Care

State agencies have an obligation to provide parents with reasonable reunification services in all cases,<sup>93</sup> but devising a treatment plan is often difficult in cases involving parents living in another country or undocumented immigrant parents in the United States. Differences of language, culture and religion may complicate the process of assessing and working with these parents and children.<sup>94</sup> Parents living in another country may not have access to the kinds of social services contemplated by the agency's treatment plan.<sup>95</sup> Immigration status issues may make it difficult to locate parents or other relatives, or render parents ineligible to participate in the services that are ordinarily available to help preserve and reunify families, such as food stamps, SSI, or TANF.<sup>96</sup> Caseworkers may face pressure to cooperate with federal immigration authorities.<sup>97</sup> If a parent is subject to removal, the case plan must take this into account in a reasonable way,<sup>98</sup> particularly when circumstances change so that a parent finds it difficult or impossible to comply with the original plan.<sup>99</sup>

State and federal laws provide that agencies should give special consideration to relatives in making foster care or adoptive placements, including an obligation to make diligent efforts to locate and evaluate any appropriate relatives.<sup>100</sup> Parents may also request that their children be placed with particular family members or in a culturally appropriate foster home, but these provisions are not mandatory, and placement decisions are

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93. See, e.g., *B & J*, 756 N.W.2d at 241; *Matter of Kittridge*, 714 N.Y.S.2d 653 (Fam. Ct. 2000).

94. E.g., *Edwards v. Cnty. of Arlington*, 361 S.E.2d 644 (Va. Ct. App. 1987).

95. E.g., *B & J*, 756 N.W.2d at 241; cf. *M.V. v. Superior Court*, 83 Cal. Rptr. 3d 864 (Ct. App. 2008) (noting that mother received services in Mexico after being deported).

96. See 8 U.S.C. § 1611 (2010); *Casey Found.*, *supra* note 2, at 16.

97. See, e.g., *Marina P. v. Ariz. Dep't of Econ. Sec.*, 152 P.3d 1209 (Ariz. Ct. App. 2007); cf. *Matter of A.C.*, 27 P.3d 960 (Mont. 2001) (parent arrested by immigration authorities after testimony in child protection proceeding). Note that states must have procedures in place to verify children's citizenship and immigration status. See 42 U.S.C. § 671(27) (2010).

In an action described by the court as both "morally repugnant" and a violation of due process rights, a human services agency involved in one published case reported the parents to immigration authorities and then argued that they were unable to provide proper care for the children. See *B & J*, 756 N.W.2d at 241.

98. E.g., *Interest of Mainor T.*, 674 N.W.2d 442 (Neb. 2004) (holding that case plan provided mother with no means of achieving permanency objective of reunification); *In re Maria S.*, 98 Cal. Rptr. 2d 655 (Ct. App. 2000) (finding that case plan was unreasonable where mother was subject to deportation).

99. E.g., *Marina P.*, 152 P.3d at 1214-15, 1217.

100. See 42 U.S.C. § 671(a)(19), (29) (2006); see, e.g., Cal. Fam. Code § 7950 (2004).

ultimately controlled by the child's best interests.<sup>101</sup> Despite the priority given to placement of children with relatives, these placements are much more difficult to accomplish when extended family members live in another country.<sup>102</sup>

Ideally, agency caseworkers in international cases work collaboratively with their counterparts in another country to investigate placements with grandparents or other family members, including obtaining a home study and determining if a local agency will be able to assume supervision of the placement.<sup>103</sup> Consular representatives may facilitate or participate in cross-border placement efforts.<sup>104</sup> In reality, the process does not work well, due to resource constraints and other complications.<sup>105</sup> This is an area in which careful implementation of the cooperation provisions of the Hague Child Protection Convention might provide substantial assistance. In 2010, the United Nations approved Guidelines for the Alternative Care of Children, which were intended to help inform policy and practice under various international instruments "regarding the protection and well-being of children who are deprived of parental care or who are at risk of being so."<sup>106</sup> These Guidelines support the goal of keeping children in or returning them to the care of their family, and state that "[a]ll decisions concerning alternative care should take full account of the desirability, in principle, of maintaining the child as close as possible to his/her habitual place of residence, in order to facilitate contact and potential reintegration with his/her family and to minimize disruption of his/her educational, cultural and social life."<sup>107</sup> They include guidelines addressing the

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101. *See, e.g.*, E.R. v. Marion Cnty. Office of Family & Children, 729 N.E.2d 1052, 1060-61 (Ind. Ct. App. 2000) (rejecting the argument that failure to place children in Spanish-speaking foster home, or with relatives in Mexico, was contrary to the children's best interests); *In re Dependency of A.A.*, 20 P.3d 492, 495 (Wash. Ct. App. 2001) (rejecting the argument that agency was required to pursue placement with grandparents); *see also In re S.M.*, 938 S.W.2d 910, 921-23 (Mo. Ct. App. 1997) (finding that the benefits of placement of an orphaned refugee with relatives are outweighed by considerations of stability and established relationships).

102. A placement out of the country could foreclose the possibility of the child's reunification with his or her parents.

103. *See, e.g., In re Stephanie M.*, 867 P.2d 706, 711-12 (Cal. 1994).

104. *See id.* at 710-11.

105. *See generally* Casey Found., *supra* note 2, at 15-21. Under federal law, there is no funding under the Title IV-E foster care program for cases involving undocumented immigrant children, unless they become eligible for Special Immigrant Juvenile Status or some other form of immigration relief.

106. *See* United Nations Guidelines for the Alternative Care of Children, G.A. Res. 64/142, U.N. Doc. A/RES/64/142 (Feb. 24, 2010).

107. *Id.* ¶ 11.

placement of children for care in a country outside their habitual residence, “whether for medical treatment, temporary hosting, respite care or any other reason,”<sup>108</sup> and guidelines applicable to arrangements for a child needing care in a country other than his or her habitual residence.<sup>109</sup> The Guidelines encourage states to ratify or accede to the Child Protection Convention in order to ensure appropriate international cooperation.<sup>110</sup>

#### *E. Cross-Border Placement and Cooperation*

Courts and agencies handling international child welfare cases must often consider placing children with a parent, relative, or extended family member in another country.<sup>111</sup> This requires significant cooperation between authorities in both countries, typically beginning with a home study or other investigation of the proposed custodian.<sup>112</sup> This may be coordinated through the involvement local consulates, or agencies such as International Social Service.<sup>113</sup> When there is no parent living in the United States, a foreign placement with a relative is often clearly preferable to placement for foster care in the United States.<sup>114</sup> However, if the child has been removed from the custody of a parent living in the United States, a foreign placement is likely to make reunification significantly more difficult to achieve, and agencies have been appropriately cautious in these circumstances.<sup>115</sup>

In order to design a permanency plan for a child who has been placed abroad, a state court and social services agency will need to consider the alternatives available under the law of the country where the child has been placed.<sup>116</sup> Until the child is a permanently placed for adoption or legal guardianship, or transferred to the custody of a parent, the court maintains

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108. *Id.* ¶ 137.

109. *Id.* ¶ 140-152.

110. *Id.* ¶ 139.

111. *See In re Sabrina H.*, 57 Cal. Rptr. 3d 863, 868-69 (Ct. App. 2007).

112. *See, e.g., In re Joshua S.*, 159 P.3d 49, 51 (Cal. 2007) (describing home study of child’s grandmother in Saskatchewan); *In re Sabrina H.*, 57 Cal. Rptr. 3d at 871-73 (approving home study of grandfather conducted in Mexico by Desarrollo Integral de la Familia but holding that criminal background check was also required by statute).

113. *See* <http://www.iss-usa.org>.

114. *See* Amity R. Boye, Note, *Making Sure Children Find Their Way Home: Obligating States Under International Laws to Return Dependent Children to Family Members Abroad*, 69 BROOKLYN L. REV. 1515, 1531-33 (2004).

115. *See, e.g., In re Karla C.*, 113 Cal. Rptr. 3d 163, 181-82 (Ct. App. 2010); *cf. In re Sabrina H.*, 57 Cal. Rptr. 3d at 870.

116. *See, e.g., In re Rosalinda C.*, 20 Cal. Rptr. 2d 58, 59-61 (Ct. App. 1993) (noting that Mexican consulate had obtained follow-up home study from the Mexican Social Service Agency).

its dependency jurisdiction.<sup>117</sup> In the case of a child placed abroad, this requires further ongoing cooperation between authorities.<sup>118</sup>

Can a state court retain jurisdiction over a child welfare case after the child is placed in another country? The court faced this question in *In re Karla C.*, after a child was removed from her mother's custody because the mother had failed to protect the child from sexual abuse by the child's stepfather.<sup>119</sup> The trial court ordered placement of the child with her father, a Peruvian national living in Peru, and retained jurisdiction.<sup>120</sup> On appeal, the court held that the juvenile court should have considered whether it would lose the ability to make or enforce further orders that might be necessary or appropriate after placing the child abroad.<sup>121</sup> "Should problems with the placement arise, or should the court determine that Karla should be returned to Mother's custody, and the juvenile court is unable to effect her return to California, Karla's welfare would be jeopardized."<sup>122</sup> The jurisdictional problem arose because of the ongoing child protection matter, and the court noted that there would be no issue if the court had granted legal and physical custody to the father and terminated its dependency jurisdiction.<sup>123</sup>

Here as well, channels for communication and cooperation between authorities in different countries are important. Implementation of the Child Protection Convention may facilitate this process, but is not necessary. For

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117. *See id.* at 61.

118. *See, e.g., id.* at 60 (noting follow-up home study obtained by Mexican consulate from the Mexican Social Service Agency). Children placed in foster care in other countries are not eligible for federally-subsidized foster care payments. *See In re Joshua S.*, 159 P.3d 49,58-59 (Cal. 2007).

119. *See* 113 Cal. Rptr. 3d at 165-66.

120. *See id.* at 180.

121. *See id.* at 186.

122. *Id.* In reaching this conclusion, the court considered a series of earlier decisions in international relocation disputes. *See id.* at 182-86. Those cases held that if the non-relocating parent maintained custody and visitation rights, the courts should take steps to insure that its orders would remain enforceable. *See Marriage of Condon v. Cooper*, 73 Cal. Rptr. 2d 33, 35 (Ct. App. 1998); *see also Marriage of Abargil*, 131 Cal. Rptr. 2d 429, 432 (Ct. App. 2003); *In re Marriage of Lasich*, 121 Cal. Rptr. 2d 356, 368-69 (Ct. App. 2002), *abrogated by In re Marriage of LaMusga*, 88 P.3d 81, 95 (Cal. 2004).

123. *See In re Karla C.*, 113 Cal. Rptr. 3d at 186. The current law in the United States accords continuing exclusive jurisdiction to the court making the initial determination. *See UCCJEA, supra* note 9, § 202. This rule conflicts with the approach taken by the Hague Child Protection Convention. Under the Child Protection Convention, jurisdiction to take "measures directed to the protection of the child's person" is assigned to the authorities of the child's state of habitual residence. *See Child Protection Convention, supra* note 8, art. 5(2). When the child's habitual residence changes, the authorities of the new habitual residence take jurisdiction. *See id.* art. 5(2).

example, in *L.H. v. Youth Welfare Office of Wiesbaden*,<sup>124</sup> a U.S. court was asked to take jurisdiction after German welfare authorities had intervened to protect the child of a member of the U.S. armed services stationed in Germany. After discussing the matter with the German judge presiding over the case, the Family Court in New York refused to modify the German orders.

Placement of a child who resides in another country for alternative care in the United States raises significant issues if the child does not already hold U.S. citizenship or nationality or permanent resident status. Placement for purposes of adoption must follow the visa requirements of federal immigration law, as well as the provisions of the Hague Intercountry Adoption Convention if the child is habitually resident in another Convention country. If no adoption is contemplated, placement in the United States may require obtaining a temporary humanitarian parole to allow the child to enter without a visa.

#### *F. Immigration Relief for Children*

Since 1990, federal immigration law has allowed some minors who are present in the United States to petition for lawful permanent resident status under the “special immigrant juvenile” rules.<sup>125</sup> A child is not eligible unless a state court determines, before the child reaches age 21, that “reunification with 1 or both immigrant’s parents is not viable due to abuse, neglect, abandonment or a similar basis found under State law.”<sup>126</sup> For a child to be eligible, a judicial or administrative authority must determine “that it would not be in the [child’s] best interest to be returned to the [child’s] or parent’s previous country of nationality or the country of last habitual residence.”<sup>127</sup> In addition, the Department of Homeland Security

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124. *L.H. v. Youth Welfare Office*, 568 N.Y.S.2d 852 (Fam. Ct. 1991).

125. See Pub. L. No. 110-457, 122 Stat. 5079 (2008) (codified at 8 U.S.C. § 1101(a)(27)(J)(I)); 8 CFR § 204.11 (2011); see also David Thronson, *Kids Will be Kids? Reconsidering Conceptions of Children’s Rights Underlying Immigration Law*, 63 OHIO ST. L.J. 979, 1003-1013 (2002). Note, however, that any admissions or findings in family court proceedings may have collateral immigration consequences for the child’s parents. See Theo Liebmann, *Family Court and the Unique Needs of Children and Families Who Lack Immigration Status*, 40 COLUM. J.L. & SOC. PROBS. 583, 593-98 (2007).

126. Pub. L. No. 110-457, 122 Stat. 5079 (2008) (codified at 8 U.S.C. § 1101(a)(27)(J)(I)); see 8 CFR § 204.11 (2011); see also Thronson, *supra* note 125, at 1003-1013.

127. 8 U.S.C. § 1101(a)(27)(J)(ii) (2006); see, e.g., *In re Interest of T.J.*, 59 So.3d 1187 (Fla. Ct. App. 2011); *In re Interest of Luis G.*, 764 N.W.2d 648, 654-55 (Neb. Ct. App. 2009); *In re Emma M.*, 902 N.Y.S.2d 651, 651 (App. Div. 2010).

must give its consent to the grant of special immigrant juvenile status.<sup>128</sup> If the statutory requirements are met, it does not matter whether the child is out of status or entered the country illegally.

This is a complicated area of immigration law, with many unresolved questions, in which the petitioning child's eligibility depends upon the findings made by the state court.<sup>129</sup> State agencies and caseworkers should be prepared to assist undocumented children in foster care in obtaining access to qualified immigration counsel to determine their eligibility.<sup>130</sup>

Undocumented immigrant children apprehended by U.S. immigration authorities at the border are usually returned immediately to their country of origin. Children detained or apprehended within the United States are placed in the custody of the U.S. Department of Health and Human Services (HHS), and these children may petition for special immigrant juvenile status.<sup>131</sup> Responsibility for Unaccompanied Alien Children is assigned within HHS to the Division of Unaccompanied Children's Services of the Office of Refugee Resettlement in the Administration for Children and Families.<sup>132</sup> The Office of Refugee Resettlement is also

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128. See Pub. L. No. 110-457, 122 Stat. 5079 (2008) (to be codified at 8 U.S.C. § 1101(a)(27)(J)(iii)); see generally SARAH B. IGNATIUS & ELISABETH S. STICKNEY, IMMIGRATION LAW AND THE FAMILY §§ 14.84-14.87 (2010). Although relief under the statute may be available as long as the petition is filed before the child reaches age 21, juvenile court jurisdiction in many states ends when a child reaches age 18. See *id.* at § 14.84; see, e.g., *Trudy-Ann W. v. Joan W.*, 901 N.Y.S.2d 296, 298 (App. Div. 2010). There are other important limitations, for example, Special Immigrant Juvenile status is not available for children with criminal convictions.

129. The requirements for section 1101 were modified by the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044. The consent procedures of section 1101 have also been subject of a recent Settlement Agreement in class action litigation pending in the Central District of California. See Settlement Agreement, *Perez-Olano v. Holder*, No. CV 05-3604 (C.D. Cal. May 4, 2010).

130. See, e.g., Minnesota Dep't of Human Servs., Bulletin #10-68-06, Special Immigrant Juvenile Status (May 14, 2010), available at [http://www.f2f.ca.gov/res/pdf/State\\_of\\_Minnesota.pdf](http://www.f2f.ca.gov/res/pdf/State_of_Minnesota.pdf).

131. Consent of HHS is required; see 8 U.S.C. § 1101(a)(27)(J) (iii) (I). The current HHS procedure is set out in this program instruction: [http://www.acf.hhs.gov/programs/orr/whatsnew/Special\\_Immigrant\\_Juvenile\\_StatusInterim\\_Specific\\_Consent\\_Program\\_Instructions.pdf](http://www.acf.hhs.gov/programs/orr/whatsnew/Special_Immigrant_Juvenile_StatusInterim_Specific_Consent_Program_Instructions.pdf). According to these instructions, juveniles in HHS custody do not need "specific consent" from HHS unless they ask the state juvenile court to determine or alter their custody status.

Earlier cases, holding that federal immigration proceedings preempted state court jurisdiction, include *In re Zaim R.*, 822 N.Y.S.2d 368 (Fam. Ct. 2006), and *Matter of CMK*, 552 N.W.2d 768 (Minn. Ct. App. 1996). But see *Gao v. Jenifer*, 185 F.3d 548 (6th Cir. 1999). The preemption principle was the basis for the Florida court's ruling in the case involving *Elian Gonzalez*. See *infra* note 134.

132. Unaccompanied Alien Children (UAC) are children who have no lawful



responsible for Unaccompanied Refugee Minors, who are children identified by the State Department overseas as refugees eligible for resettlement in the US, and children who enter as refugees with their families and experience family breakdown after arriving in the United States.<sup>133</sup> Children in both of these programs are generally placed in foster care.

Children present in the United States may also apply for asylum, either affirmatively or in response to the commencement of immigration removal proceedings, and generally must file within a year after entering the United States.<sup>134</sup> A child may also be eligible for a nonimmigrant U visa as a victim of criminal activity such as domestic violence or trafficking if the child suffered substantial physical or mental abuse as a crime victim, and the child has information concerning that criminal activity and can be helpful in its investigation or prosecution. Trafficking victims may also be eligible for a non-immigrant T visa. In both of these categories, there is the further possibility that the child may obtain derivative visas for qualified family members, including parents, children and unmarried siblings under age 18.<sup>135</sup>

## II. Using the Hague Child Protection Convention

In October 2010, the United States signaled its intention to ratify the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children.<sup>136</sup> Among the purposes of the

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immigration status in the United States, who have not reached age 18, and with respect to whom there is either no parent or legal guardian in the United States or no parent or legal guardian in the United States available to provide care and physical custody. *See generally* [http://www.acf.hhs.gov/programs/orr/programs/unaccompanied\\_alien\\_children.htm](http://www.acf.hhs.gov/programs/orr/programs/unaccompanied_alien_children.htm). In Fiscal Year 2009, 6074 children were apprehended and placed into ORR/DUCS care on this basis. On broader issues concerning unaccompanied children, *see* Thronson, *supra* note 125, at 997-1003; *see also* Reno v. Flores, 507 U.S. 292 (1993).

133. *See* Office of Refugee Resettlement, *Unaccompanied Refugee Minors*, U.S. DEP'T OF HEALTH & HUMAN SERVS., ADMIN. FOR CHILDREN & FAMILIES (Jan. 31, 2011), [http://www.acf.hhs.gov/programs/orr/programs/unaccompanied\\_refugee\\_minors.htm](http://www.acf.hhs.gov/programs/orr/programs/unaccompanied_refugee_minors.htm). At the present time, there are fewer than 1000 unaccompanied refugee minors in this program.

134. One high-profile child welfare case involving a child for whom refugee status was claimed was *In re Gonzalez*, 2000 WL 492101 (Fla. Cir. Ct. 2000). For the federal litigation, *see Gonzalez v. Reno*, 212 F.3d 1338 (11th Cir. 2000); *see also* Sean D. Murphy, *Return of Elián González to Cuba*, 94 Am. J. Int'l. L. 516 (2000).

135. *See* 8 U.S.C. §§ 1101(a)(15)(U), 1184(p) (U visa); 8 U.S.C. §§ 1101(a)(15)(T), 1184(o) (T visa).

136. The Child Protection Convention is one of four Children's Conventions developed

Child Protection Convention are “to determine the State whose authorities have jurisdiction to take measures directed to the protection of the person or property of the child,”<sup>137</sup> and “to provide for recognition and enforcement of such measures in all Contracting States.”<sup>138</sup> In the United States, these aspects of the Convention will be accomplished at the state level through amendments to the UCCJEA.<sup>139</sup> In addition, the Convention establishes a process for international cooperation, based on a network of Central Authorities in each Contracting State.<sup>140</sup> The Convention extends to a wide range of subjects, including both public sector child welfare proceedings and custody and access issues in private litigation.<sup>141</sup> The Convention is legally binding between Contracting States,<sup>142</sup> and applies to children from birth through age 18.<sup>143</sup>

#### A. Jurisdictional Provisions

Article 5 of the Child Protection Convention allocates primary responsibility in matters concerning children to the authorities of the child’s

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by the Hague Conference on Private International Law. The United States already participates in two of these, the Child Abduction Convention and the Intercountry Adoption Convention, and has taken steps toward ratification of the Family Maintenance Convention and the Child Protection Convention. See generally Ann Laquer Estin, *Families Across Borders: The Hague Children’s Conventions and the Case for International Family Law in the United States*, 62 FLA. L. REV. 47 (2010).

137. Child Protection Convention, *supra* note 8, art. 1 (1)(a); these provisions are in Chapter II of the Convention.

138. *Id.*, art. 1(1)(d); these provisions are in Chapter IV. The Convention also addresses choice of law issues; see Child Protection Convention, art. 1(1)(b) and (c), and these issues are covered in Chapter III.

139. See Robert G. Spector, *Memorandum: Accommodating the UCCJEA and the 1996 Hague Convention*, 63 OKLA. L. REV. 615 (2011).

140. Child Protection Convention, *supra* note 8, art. 1(e); these provisions are in Chapter V.

141. *Id.*, art. 3. The Convention does not apply to parentage determination, adoption, the child’s name, emancipation, maintenance obligations, trusts or succession, social security, public measures regarding education or health, juvenile offenses, or decisions concerning asylum or immigration. *Id.*, art. 4.

142. As of September 2011, the Child Protection Convention has been joined by 33 Contracting States, including a large number of European nations. These countries include: Albania, Armenia, Australia, Austria, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Dominican Republic, Ecuador, Estonia, Finland, France, Germany, Hungary, Ireland, Latvia, Lithuania, Luxembourg, Malta, Monaco, Morocco, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Switzerland, Ukraine, Uruguay. Another six nations have signed the Convention, including Belgium, Greece, Italy, Sweden, the United Kingdom and the United States. Current information is available on the Hague Conference web site at [www.hcch.net](http://www.hcch.net).

143. Child Protection Convention, *supra* note 8, art. 2.

place of habitual residence.<sup>144</sup> In Hague Conference practice, habitual residence is a straightforward issue of fact, which may be determined without resort to legal technicalities that might vary significantly from one country to another.<sup>145</sup> When a child's habitual residence changes from one Contracting State to another, the authorities in the new habitual residence acquire jurisdiction, subject to an exception that applies to cases of wrongful removal or retention from the prior habitual residence.<sup>146</sup> There is an exception to the habitual residence principle that allows authorities exercising jurisdiction in divorce, separation, or annulment proceedings concerning the child's parents to take measures concerning the protection of the child's person or property, even if the child is not habitually resident in that State.<sup>147</sup> This creates a limited category of cases in which authorities in two States may have concurrent jurisdiction, and the Convention includes a rule requiring authorities to abstain from exercising jurisdiction if, "at the time of the commencement of the proceedings, corresponding measures have been requested from the authorities of another Contracting State having jurisdiction."<sup>148</sup>

Authorities may exercise jurisdiction based on the child's physical presence in a number of specific situations, including cases under Article 6 involving refugee children, children who are internationally displaced as a

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144. *Id.*, art. 5(1). See Paul Lagarde, Explanatory Report, Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, Hague Conference on Private International Law, II Actes et documents de la Dix-huitième session 539, ¶¶ 6, 37 (1996).

145. The drafters decided not to include a definition, but agreed that "the temporary absence of the child from the place of his or her habitual residence for reasons of vacation, for school attendance or the exercise of access rights, for example, did not modify in principle the child's habitual residence." See *id.*, ¶ 40. The Hague Intercountry Adoption Convention and the Child Abduction Convention also utilize the habitual residence principle. See Estin, *supra* note 135, at 53; see also PAUL R. BEAUMONT & PETER E. MCELEAVY, THE HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION 88-90 (1999).

Although issues of nationality or immigration status should be largely irrelevant to this inquiry, there are tensions between the norms of citizenship and habitual residence. See Ann Laquer Estin, *Where (in the World) Do Children Belong?*, 25 BYU J. PUBLIC L. 217 (2011); see also Catherine Norris, *Immigration and Abduction: The Relevance of U.S. Immigration Status to Defenses Under the Hague Convention on International Child Abduction*, 98 CAL. L. REV. 159 (2010) (arguing that U.S. courts enforcing the Convention take immigration status into account when they should not and fail to weigh immigration status when they should).

146. Child Protection Convention, *supra* note 8, art. 5(2) and art. 7. The Convention's applicable law rules are also based on habitual residence. See *id.*, arts. 15-22.

147. See *id.*, art. 10 (defining requirements). Note that this jurisdiction ends as soon as the divorce or other proceedings are concluded.

148. *Id.*, art. 13.

result of disturbances in their country, and children whose habitual residence cannot be identified. Additionally, in urgent situations, Article 11 states that “authorities of any Contracting State in whose territory the child . . . is present have jurisdiction to take any necessary measures of protection.”<sup>149</sup> Similarly, Article 12 allows a Contracting State to enter provisional orders to protect the child’s person or property, provided those orders must not be incompatible with measures already in place.<sup>150</sup> Both of these types of jurisdiction are temporary, and lapse once the appropriate authorities assert their jurisdiction.

The Child Protection Convention allows for a transfer of jurisdiction from authorities exercising jurisdiction based on habitual residence or presence to authorities in another Contracting State that might be “better placed in the particular case to assess the best interests of the child.”<sup>151</sup> Under Articles 8 and 9, this transfer could be made to authorities in the State of the child’s nationality, a State where the child has property, a State where authorities are hearing a divorce, legal separation, or annulment action involving the child’s parents, or a State with which the child has a substantial connection.<sup>152</sup> The transfer process might be requested by the authorities on either side, who may communicate with each other either directly or with assistance of the Central Authority, and “may proceed to an exchange of views.”<sup>153</sup>

These jurisdictional provisions are largely consistent with U.S. law, except for the approach to continuing jurisdiction in cases in which the child obtains a new habitual residence. In child welfare cases, Articles 6 and 11 allow authorities to take steps to protect any child present within their territory, in terms largely consistent with UCCJEA § 204. If a transfer of jurisdiction is contemplated, Articles 8 and 9 encourage and facilitate communication between authorities regarding such a transfer, and Article 14 provides that measures of protection taken in one Contracting State remain in force according to their terms until the point when the appropriate new authorities modify, replace, or terminate the existing orders.

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149. *Id.*, art. 11(1).

150. *Id.*, art. 12.

151. *Id.*, art. 8(1); *see also id.*, art. 9.

152. *Id.*, arts. 8(2) and 9(1).

153. Jurisdiction may be transferred if the authorities on both sides accept the request. *See Lagarde, supra* note 143, ¶¶ 53-60.

### B. Recognition and Enforcement

If the United States joins the Child Protection Convention, state and federal courts and agencies will be required to recognize and give effect to measures taken in other countries within the scope of the Convention as a matter of law.<sup>154</sup> Recognition may be refused on a limited number of grounds, including a conclusion that the measure was taken by an authority that did not have a basis for jurisdiction under the Convention. In addition, Contracting States need not recognize measures taken “without the child having been provided the opportunity to be heard, in violation of the fundamental principles of procedure of the requested State,”<sup>155</sup> and may decline recognition on the request of a person claiming that the measure infringes his or her parental responsibility, if that person was not given an opportunity to be heard.<sup>156</sup>

Beyond these jurisdictional and procedural grounds, recognition may be refused “if such recognition is manifestly contrary to public policy of the requested State, taking into account the best interests of the child.”<sup>157</sup> Although this appears to be a traditional *ordre public* clause, the exception is narrowed both by use of the term “manifestly” and by reference to the child’s best interests, suggesting that public policy arguments that are not tied directly to the child’s interests are not an appropriate basis for refusing recognition.<sup>158</sup>

To facilitate cross-border recognition, the Child Protection Convention provides that each Contracting State must have a “simple and rapid procedure” for declaration of enforceability and registration of measures taken in another State,<sup>159</sup> without review of the merits.<sup>160</sup> “Any interested person” may request that the authorities decide whether or not a measure taken in another Contracting State will be recognized.<sup>161</sup> Once a measure is declared to be enforceable or registered for enforcement, it must be

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154. Child Protection Convention, *supra* note 8, art. 23(1).

155. *Id.*, art. 23(2)(b). According to Lagarde, *supra* note 143, ¶ 123, this “does not apply in cases of urgency, for which the requirements of procedural due process ought to be interpreted more flexibly.”

156. Child Protection Convention, *supra* note 8, art. 23(2)(c). There is an exception here as well for emergency circumstances.

157. *Id.*, art. 23(2)(d).

158. See Lagarde, *supra* note 143, ¶ 125 (noting that this is the same language used in Article 24 of the Intercountry Adoption Convention, which is discussed at some length in the Explanatory Report for that Convention).

159. Child Protection Convention, *supra* note 8, art. 26(2).

160. *Id.*, art. 27.

161. *Id.*, art. 24.

enforced in accordance with the law of the requested State, taking into consideration the child's best interests.<sup>162</sup>

Although a wide range of foreign country child custody and visitation orders are already subject to recognition under the UCCJEA, the Child Protection Convention will provide a basis to secure reciprocal recognition in other Contracting States of orders entered in the United States. This has been the central rationale for ratification of the Convention, and it offers obvious benefits for private litigation involving matters such as custody, relocation, and access rights.<sup>163</sup> The recognition principle should also assist authorities in public child welfare proceedings working with transnational families, although in these cases the cooperation provision of the Convention are also important.

### *C. International Cooperation*

Under the Child Protection Convention, each Contracting State must designate a Central Authority with responsibilities for promoting cooperation to achieve the purposes of the Convention.<sup>164</sup> Central Authorities have specific duties, including providing information regarding the laws and services available for the protection of children,<sup>165</sup> facilitating communications between courts or other authorities,<sup>166</sup> and providing assistance in discovering the whereabouts of a child who may be present and in need of protection in the requested State.<sup>167</sup> A Central Authority may be asked to provide a report on the situation of a child who is habitually resident in a Contracting State, or to request that the appropriate authorities take action to protect the child.<sup>168</sup> Central Authorities are also charged with facilitating “by mediation, conciliation or similar means,

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162. *Id.*, art. 28. Lagarde, *supra* note 143, ¶ 135, uses the example of a child placed with his family under the supervision of social authorities. If the child and his family relocate to another Contracting State, enforcement may require that local authorities in the new State are authorized to carry out the supervision.

163. See, e.g., Linda J. Silberman, *The 1996 Hague Convention on the Protection of Children: Should the United States Join?*, 34 FAM. L.Q. 239 (2000).

164. Child Protection Convention, *supra* note 8, arts. 29 and 30(1).

165. *Id.*, art. 30(2).

166. *Id.*, art. 31(a).

167. *Id.*, art. 31(c). Note the confidentiality principle in Art. 37: authorities “shall not request or transmit any information under this chapter if to so would, in its opinion, be likely to place the child's person or property in danger, or constitute a serious threat to the liberty or life of a member of the child's family.”

168. *Id.*, art. 32. This may be done “[o]n a request made with supporting reasons” by the authorities “of any Contracting State with which the child has a substantial connection.”

agreed solutions for the protection of the person or property of the child in situations to which the Convention applies.”<sup>169</sup>

The Child Protection Convention anticipates the need for communication between the courts and agencies of different Contracting States, which may be channeled through the Central Authorities. For example, a court in one country considering measures of protection for a child might request that authorities in another Contracting State communicate information that would be relevant to the proceeding.<sup>170</sup> A court in one Contracting State may request that authorities in another assist in implementing measures of protection, or in securing effective exercise of access rights.<sup>171</sup>

Cooperation between Central Authorities is obligatory in the case of a transborder placement of a child for some type of alternative care. The authorities of a Contracting State proposing to place a child abroad must consult with authorities in the other State, and transmit to them a report on the child with the reasons for the proposed placement. The placement may be made only if authorities in the requested State consent to the placement or provision of care.<sup>172</sup> Cooperation is also obligatory in any case in which a child is exposed to a serious danger, and the child’s residence is changed to another country. If authorities in a State which has taken measures to protect the child are informed that child’s residence has been changed or that the child is present in another country, they must inform authorities there about the situation.<sup>173</sup>

These provisions for international cooperation fall largely beyond the scope of the UCCJEA and the uniform laws project, and effective implementation will require a strong role for the U.S. Central Authority, which is likely to be the Office of Children’s Issues (OCI) located in the Bureau of Consular Affairs in the State Department. In developing this system, OCI can build on its experience under the Hague Abduction Convention and the Hague Adoption Convention, and on the broader experience of the State Department handling traditional consular functions related to child protection. As a federal nation, the United States could implement a system in which each state designates its own Central

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169. *Id.*, art. 31(b). A number of these duties can be delegated to other bodies. See Lagarde, *supra* note 143, ¶ 140.

170. Child Protection Convention, *supra* note 8, art. 34(1). Providing such information is not obligatory. See Lagarde, *supra* note 143, ¶ 144.

171. Child Protection Convention, *supra* note 8, art. 35(1).

172. *Id.*, art. 33.

173. *Id.*, art. 36. Lagarde, *supra* note 143, ¶ 150, cites these examples of serious danger: “an illness requiring constant treatment, drugs, unhealthy influence of a sect.” This obligation applies even when the other country involved is not a Contracting State.

Authority, but the Convention requires that a single Central Authority be designated to receive and transmit communications under the conventions.

*D. Implementing the Child Protection Convention*

Global child welfare cases present unique challenges, even in comparison to the subjects of the other Hague Children's Conventions. Although all state child welfare systems in the United States include a series of components required by federal law, there is significant variation among the states in the design of these systems, and no uniform state law comparable to the UCCJEA that is available as a basis for harmonizing the differences at a national level. Even in purely domestic cases, achieving cooperation between child welfare authorities in different states has been extremely difficult.<sup>136</sup>

A strong Central Authority providing assistance to the states in international child welfare cases could be enormously helpful to state courts and agencies struggling to do justice in exceptionally difficult circumstances. This would not have to wait until ratification of the Child Protection Convention is accomplished. The Convention offers a useful structure for cooperation, but many of its purposes could be accomplished within the broad scope of the State Department's consular authority.

The Office of Children's Issues already maintains excellent web sites collecting information and resources on child abduction and intercountry adoption, but there is very little addressing global child welfare issues. Development of this information, and a clearinghouse on state child protection laws that would satisfy Article 30(2), could precede ratification. Similarly, the appointment of several U.S. judges to the Hague Judicial Network has helped to build channels for international judicial cooperation even without explicit treaty language on point. Judges with expertise in child welfare cases could be added to the network. When the United States is ready to ratify, these already-established channels would help satisfy the requirements of Article 31(a).

Other Central Authority responsibilities under the Child Protection Convention build readily on traditional consular functions and relationships. Foreign countries already make requests for information on the whereabouts and welfare of children or parents or extended family

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136. See generally Vivek Sankaran, *Perpetuating the Impermanence of Foster Children: A Critical Analysis of Efforts to Reform the Interstate Compact on the Placement of Children*, 40 FAM. L.Q. 435 (2006); Robert G. Spector & Cara N. Rodriguez, *Jurisdiction Over Children in Interstate Placement: The UCCJEA, Not the ICPC, Is the Answer*, 41 FAM. L.Q. 145 (2007).



members within the United States, and state authorities already request this kind of information from their counterparts in other countries. States would benefit from assistance in carrying out their consular notice obligations under the Vienna Convention, and a framework for assuring that this notice occurs would help to prevent difficult foreign relations situations. At present, it appears that these matters are handled on a largely ad hoc basis, which could be made more efficient and reliable. Development of channels for these communications would put the United States in position to implement Articles 31(c) and 32 of the Protection Convention.

### *Conclusion*

All children and parents have rights and relationships worthy of comparable respect, but our child welfare agencies and courts do not have the tools they need to protect children's interests in global cases of abuse, neglect, exploitation, abandonment, or parent loss. Lawyers, judges and caseworkers may lack the training and experience to make the best use of those tools that are available to provide assistance. The chronic shortage of resources for child protection is particularly acute in this setting, especially for undocumented immigrant children or families. The problems have been aggravated by our federalist system, in which states have bottom-line responsibility for child welfare, but the federal government sets policies in immigration and international relations.

The Hague Child Protection Convention will not solve these difficult problems, but implementation of the Convention, with a strong Central Authority at the national level, could offer important assistance for states. This role is consistent with the consular functions of the State Department, and the work of the Office of Children's Issues in intercountry adoption and international child abduction cases. Implementation should also build on the federal government's longstanding role in funding and setting the framework for state child welfare systems under the Social Security Act. Before the Convention can be implemented, and beyond what it can contribute, state courts and agencies will continue to bear the ultimate responsibility to address the needs of children in transnational child welfare cases.