

HAGUE CONVENTION, PKPA, AND UCCJEA

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I. HAGUE CONVENTIONS APPLICABLE TO DOMESTIC RELATIONS PRACTICE

A. International Law and Treaties

1. Characteristics of States and Nations Laws

- a. **Centralized.** There are clear:
 - i. Recognized sources of laws, such as constitutions, statutes and case law; and
 - ii. Organs of enforcement, such as the sheriff, US Marshals.
- b. **Compulsive.** Citizens of Oregon must live within Oregon law.
- c. **Hierarchical or Vertical.** There are clear lines of authority to decision makers, legislatures, and courts.

2. Characteristics of Public International Law (Which Is Not the Topic Today)

- a. Little or no centralization.
 - i. There are only a few regularized, recognized sources of public international law, and these depend on consensus. International conventions, international custom, the general principles of law recognized by civilized nations, and judicial decisions and writings of the most learned international scholars. Article 38(1)(a)–(d) of the Statute of the International Court of Justice (“ICJ”). The United Nations General Assembly is not a world legislature, although it may pass resolutions.
 - ii. No centralized enforcement: The United Nations Security Council is legally and politically limited. UN Troops serve by agreement.
- b. Adherence with any of the above is not compulsive, although international sanctions can be persuasive.

c. It is a horizontal system; nations must consent, for instance, to the ICJ in the Hague.

3. Characteristics of Private International Law (Our Subject Today)

a. No centralization, except the treaties largely regulate commerce, international civil procedure and the rules for conflicts of laws and recognition and enforcement of foreign judgments. While there is no supreme authority, being economically ostracized can be ruinous.

b. There is some worldwide adjudicative authority, such as the World Trade Organization (“WTO”).

c. Enforcement is a matter of each signatory’s internal law, except where a worldwide or member-wide adjudicative body is a provision of a treaty.

B. Hague Conference on Private International Law

1. “The purpose of the Hague Conference is to work for the progressive unification of the rules of private international law,” Article 1, Statute of the Hague Conference on Private International Law, entered into force July 15, 1955. It is a Eurocentric concept first put into operation by the government of the Netherlands in the 1890s.

2. The institutional structure of the Hague Conference is headed by the Netherlands Standing Government Committee, which directs a Permanent Bureau, seated at the Hague. There is a Secretary General who is chosen by the Dutch government (who pays the expenses of the regular sessions) upon nomination by the Standing Committee. *Id.* at Article 3.

3. The “Members of the Hague Conference on Private International Law are the States which have already participated in one or more Sessions of the Conference and which accept the present Charter.” *Id.* at Article 2. New members are proposed and entry is decided by the current Member states. *Id.* Current Member states and status reports can be found at www.hcch.net.

4. It is critical that before acting on the assumption that a state is either a member or participates in a particular treaty, the status report for the particular

convention is reviewed. Many states participate in the treaties but take *reservations* or make *declarations* on application of certain provisions. States may either ratify, accept, or approve the convention, or accede to it.

a. Signing and then ratification is allowed by Member States only with a few exceptions.

b. Once a convention is entered into force, Nonmembers may accede. Acceptance of an accession by the Members may either be tacit or express, depending on the circumstances. The Convention official status report must be reviewed to ascertain status.

5. New matters are introduced by "... the Standing Government Committee, [which] may set up Special Committees to prepare draft conventions or to study all questions of private international law which come within the purpose of the Conference." Article 7.

C. Conventions and Treaties

In general, conventions are multilateral treaties embodying different fields of private international law "(judicial and administrative co-operation; conflict of laws for contracts, torts, maintenance obligations, status and protection of children, relations between spouses, wills and estates or trusts; recognition of companies; jurisdiction and enforcement of foreign judgments)." Hague Conference on Private International Law.

Each signatory to a treaty implements the treaty according to its internal law. In the United States of America, "Applicable treaties, [are] binding upon federal courts to the same extent as domestic statutes. . . ." 767 *Third Ave. Associates v. Permanent Mission*, 988 F.2d 295, 297 (2nd Cir. 1993) (where the federal district court's ruling that the Vienna Convention on Consular Relations did not override the domestic statutes regarding landlord-tenant law was reversed on appeal). The Supremacy Clause declares the Constitution, federal law, and treaties to be "the supreme Law of the Land." U.S. Const. art. VI, cl. 2., *Cheung v. United States*, ___ F3d ___, (2nd Cir.2000).

D. Select Hague Conventions Applicable to Domestic Relations Practice

1. The Convention on the Service of Process Abroad of Judicial and Extra-Judicial Documents in Civil and Commercial Matters, Done at the Hague November 15, 1965 (Hague Service Convention)

a. The Hague Service Convention applies to the transmission of documents only. It does not set legal standards for what constitutes sufficiency of service or notice.

b. It has three main stated purposes: to simplify transmissions of documents among State parties, to promote notice and opportunity to be heard, and to standardize proof of service.

c. Essentially, the documents are prepared in the *requesting* state and sent to a Central authority in the *addressed* state. There are forms requirements, and the document must be translated into the language of the recipient. See *OSB Family Law Deskbook*, Ch. 1, Dissolution Jurisdiction and Procedure, www.travel.state.gov, and the "Judicial Assistance" links for further information. If any doubt exists as to the applicability of the Hague Service Convention, contact a service-of-process firm that specializes in foreign service.

d. For current list of participating states, see www.hcch.net. These conventions are only applicable to countries that are signatories to the treaties or have otherwise acceded to the treaty.

2. Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, Done at the Hague March 18, 1970

a. This convention provides a means for taking evidence in other signatory countries.

b. The chief method is by judicial request from the requesting state. Information of use of this convention can be found at the website cited above.

3. The Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, Done at the Hague October 19, 1996.

It is often termed the 1996 Protection Convention. Some comments:

a. The United States has not signed nor ratified this treaty; therefore, it is not applicable here;

b. Having said that, it is intriguing in that it seeks to address some shortcomings of the 1980 Hague Convention, including enforcement of custody and access orders, and jurisdictional determinations. The Hague Convention does not—as will be explained below—allow determination of which country has jurisdiction to make a child custody decision. *See Gloria Folger DeHart, The Relationship Between the 1980 Child Abduction Convention and the 1996 Protection Convention*, NYU Journal of International Law and Politics Annual Symposium, February 25, 2000.

4. The Convention on the Civil Aspects of International Child Abduction, Done at the Hague, October 25, 1980, Also Called The Hague Convention on International Child Abduction, or Hague Convention. (Text in Appendix A.)

In the United States, the Hague Convention is codified under the International Child Abduction Remedies Act (ICARA), 42 USC §11601 et seq. and 22 CFR section 94, and section 40.103.

a. The Hague Convention was enacted “to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the state of their habitual residence.” Hague Convention, preamble. “The 1980 Child Abduction Convention has a vital but limited purpose—a rapid remedy to restore the *status quo ante*.” *Id.*, at 84.

b. The child will be returned to the country of his or her *habitual residence* for application of its jurisdictional law.

c. The prohibition of child “abduction” is given more functional meaning in the Convention by definition of *wrongful removal* or *wrongful*

retention being actionable, as long as it is brought within one year of the alleged act. Art 12(1). 42 USC §11603(e)(1)(A).

- d. Venue is where the child is found.
- e. The convention shall cease to apply when the child attains the age of 16 years. Article 4.
- f. The elements of a Hague Action: In its simplest terms, a cause of action under the Hague Convention consists of the following elements.

- i. The prima facie case: There must be a wrongful removal or retention of a child by the respondent within the meaning of the Convention. 42 USC §11603(e)(1)(A). The constituent subelements are:

- (A) When did the removal or retention at issue take place?

- (B) Immediately prior to the removal or retention, in which state was the child habitually resident?

- (C) Did the removal or retention breach the rights of custody attributed to the petitioner under the law of the habitual residence?

- (D) Was the petitioner exercising those rights at the time of the removal or retention?

There is a four-part test as set out in *Mozes and Mozes*, 239 F3d 1067 (9th Cir 2001), where the court states, "In order for a removal or retention to trigger a state's obligations under the Convention, it must satisfy the [above] requirements." These must be proven by the petitioner by a preponderance of the evidence. 42 USC §11603(e)(1)(A).

- ii. The Article 13 defenses: In *Mozes and Mozes*, the court explored the exceptions to the court's duty to return a wrongfully retained child to its state of habitual residence under Article 13 of the convention. 239 at 1085. These are discretionary with the court and consist of the following.

(A) When the person having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention, so-called "acquiescence."

(B) There is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

(C) The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of the child's views, the so-called "child's objection" defense.

g. Following is a selective discussion of elements of the prima facie case. The Hague Convention jurisprudence is extensive. Much of the early cases were decided in England and involved former Commonwealth countries. The best single source for this information is www.hiltonhouse.com.

h. Habitual residence: This is the all-important first step. This locus must be ascertained, because it is this locus that will determine if any "rights of custody" have been breached. The law of habitual residence has been the subject of much judicial debate, because "habitual residence" is undefined in the articles of the Hague Convention. This was intentional, as most courts have treated defining one's habitual residence through a fact-based inquiry on a case-by-case basis. *Silverman v. Silverman*, 267 F3d 788 (8th Cir 2001). Lord Scarman defined habitual residence as a "settled purpose" in *Shah v. Barnet London Borough Council* [1983] 1 A11 ER 226, 233 (Eng. HL). However, the Ninth Circuit Court of Appeals has stated in *Mozes v. Mozes*, 239, F3d 1067, 1075 (9th Cir 2001) that "The first step towards acquiring a new habitual residence is forming a settled intention to leave the one left behind. [A]lthough it is the child's habitual residence that is being determined, 'the intention or purpose that has to be taken into account is that of the person or persons entitled to fix the place of the child's

residence.” Id at 1076. Thus, the *Mozes* court has added more definable criteria to the so-called “settled purpose” doctrine.

i. Rights of custody: The petitioner must prove the removal or retention breached the rights of custody attributed to the petitioner under the law of the habitual residence.

i. Custody rights are those necessary for the care of the child and, in particular for the Convention, include the right to decide residence of the child. These rights may arise *ex lege* if there is no custody order. ORS 109.030. See *Whallon v. Lynn*, ___ F3d ___ (1st Cir 2000), where the court of appeals affirmed the district court’s finding of *ex lege* custody rights based on Mexican law. If custody rights are *ex lege*, or by order, the Central Authority of the country of the “left behind” parent under Article 15 will declare in a document, called an Article 15 Declaration, that the removing parent has breached the rights of custody of the left-behind parent and send the document to the court where the matter is being heard in the removing parent’s jurisdiction.

ii. Each signatory to the Hague Convention must form and maintain a Central Authority. Articles 6 and 7. It is an administrative body that coordinates between the left-behind parent, the courts, and the court and Central Authority of the country of alleged habitual residence of the child. The Office of Children’s Issues in the Bureau of Consular Affairs is designated as the U.S. Central Authority the State Department.

iii. Or rights of custody may arise from a custody order or judgment.

iv. Rights of custody may arise from Juvenile Court wardships.

v. Once rights of custody has been determined, it must be shown that the left-behind parent was exercising those rights.

j. The Article 13 defenses are *discretionary*, meaning that even if a respondent is successful in proving one or more rights of custody, the

return of the child may still be ordered. In *Mozes and Mozes*, the court explored the exceptions to the court's duty to return a wrongfully retained child to its state of habitual residence under Article 13 of the convention that reads:

Notwithstanding the provisions of the preceding article, the judicial or administrative authority of the requested state is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that: "(a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or (b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. (Not a numbered subsection) The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

Hague Convention, Art. 13.

k. Enforcement of access rights: In the international context, visitation or parenting time are called access rights. "An application to make arrangements for organizing or securing the effective exercise of rights of access may be presented to the Central Authorities of the Contracting States in the same way as an application for the return of a child." Article 21.

l. Filing in or removal to federal court—a word about the discretionary nature of the Article 13 defenses: It has been put forth by commentators in this field that these defenses allow a court to make a custody decision on the merits where the Convention is intended to prohibit such a decision. Because there is state and federal concurrent jurisdiction under ICARA, it is thought federal court is the better place to bring and defend a Hague action. The federal court may take its charge to uphold treaty obligations so seriously that it will make the tough decisions more readily. In this case, removal to federal court under 28 USC 1441(b) is appropriate: Subsection

(b). Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties, or laws of the United States shall be removable without regard to the citizenship or residence of the parties. "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 USC 1331.

m. Other federal and state jurisdictional doctrines are applicable to Hague Convention Actions.

II. PARENTAL KIDNAPING PROTECTION ACT (PKPA)

A. Congress enacted the Parental Kidnaping Prevention Act (PKPA), 28 USC §1738A, in 1980 to close the loopholes created by the various forms of the Uniform Child Custody Jurisdiction Act (UCCJA), that had been passed by the states beginning around 1970. The PKPA was a strong message sent by the federal government to various state governments that each state must honor its sister states' judgments, without exception. *Thompson and Thompson*, 484 US 174, 108 SCT 513, 98 LEd2d 312 (1988).

B. The PKPA is better understood by considering its place within the federal constitutional and statutory scheme.

1. Article IV, Section 1 of the US Constitution: Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.

2. 28 USC Section 1738: Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

3. 28 USC Section 1738A: Full faith and credit given to child custody determinations. *See Appendix B.*

4. 28 USC Section 1738B: Full faith and credit for child support orders.
 5. 28 USC Section 1738C: Certain acts, records, and proceedings and the effect thereof. No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record or judicial proceeding of any other State, territory, possession or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession or tribe, or a right or claim arising from such relationship.
- C. Not to be confused with the International Parental Kidnaping Crime Act, 18 USC §1204 (“IPKCA”), which is a federal criminal statute imposing penalties for removal or retention of child from the United States. The IPKCA provides for a fine and maximum sentence of three years for international removal of a child with intent to obstruct the lawful exercise of parental rights. 18 USC §1204(a). No actual court order awarding custody to either parent need exist. This is similar to ORS 163.257 and 163.245, the Crimes of Custodial Interference, in that no actual order is necessary as long as one parent intends to keep the child away from the other parent. *State v. Fitouri*, 133 Or App 672, 677, 893 P2d 556 (1995).
- D. The PKPA prioritizes the state courts of the “home state” of the child to make a custody determination and empowers it to retain jurisdiction to modify that order, with exceptions.
- E. PKPA is a “full faith and credit” provision only and does not allow a private right of action in the lower federal courts. *Thompson and Thompson, supra*, at 188.
- F. PKPA does not have international application.
- G. While PKPA may appear to confer subject matter jurisdiction, the Oregon Court of Appeals has held that, “[T]he PKPA controls only whether one state must enforce or may modify another state’s custody decree. Non-compliance with the PKPA does not render a state’s decree void or voidable for lack of jurisdiction; it means only that the decree is vulnerable to another state’s exercise of jurisdiction.” *In re Hayes*; 160 Or. App. 24, 36–37, 979 P2d 779 (1999). Thus, if a child custody determination is registered in Oregon under ORS 109.787, the practitioner must see that it was made in conformance with the PKPA. If not, it need not be enforced by the Oregon court, and the Oregon

court may modify it. Practically speaking, if not made in conformance with the PKPA, it may also have been made not conforming to the UCCJEA(UCCJA), and if not, it may be void.

H. Practice.

1. Initial orders—the relevant section of the PKPA is 28 USC §1738A(c)(2)(A). That section sets forth the criteria that a state court must use to assume initial order jurisdiction: (a) home state, (b) significant connection, (c) emergency jurisdiction, and (d) no other state would have jurisdiction under (a) through (c) or “vacuum jurisdiction.”

2. Modifications—under the PKPA, the state court retains continuing jurisdiction to modify its order: (a) as long as there was a valid exercise of SMJ at initial custody determination, (b) one party or the child continues to reside in the decree state, (c) the state has not declined jurisdiction, and (d) the state still has jurisdiction under local law. *Accord Henry and Keppel*, 326 Or 166, 951 P2d 135 (1997).

a. Prior to *Henry and Keppel* and the adoption of the Uniform Custody and Jurisdiction and Enforcement Act (UCCJEA), modification analysis was problematic, and numerous state court decisions from Oregon and elsewhere failed to apply the continuing exclusive jurisdiction provisions of the PKPA.

b. The UCCJEA, at ORS 109.744 and 109.747, now embodies the CEJ provisions of the PKPA as explained in *Henry and Keppel*.

I. Comparison chart of provisions.

	PKPA 28 USC 1738A	UCCJEA ORS 109.701 to 109.834	UCCJA former ORS 109.700 to ORS 109.930
Home State	28 USC 1738A(c)(2)(A)	ORS 109.741(1)(a)	ORS 109.730(1)(a)
Significant Connection	28 USC 1738A(c)(2)(B)	ORS 109.741(1)(b)	ORS 09.730(1)(b)

	PKPA 28 USC 1738A	UCCJEA ORS 109.701 to 109.834	UCCJA former ORS 109.700 to ORS 109.930
Temporary Emergency Jurisdiction	28 USC 1738A(c)(2)(c)	ORS 109.751	ORS 109.730(1)(c)
Declination Jurisdiction	No counterpart	ORS 109.741(c)	No counterpart
Vacuum Jurisdiction	28 USC 1738A(c)(2)(D)	ORS 109.741(d)	ORS 109.730(1)(d)
Continuing Exclusive Jurisdiction	28 USC 1738A(c)(2)(E)	ORS 109.744	No counterpart

III. UCCJEA

A. Generally

The National Conference of Commissioners on Uniform State Laws (NCCUSL) promulgated the UCCJEA in 1997, and in Oregon the legislature adopted the UCCJEA in 1999, and it became effective for all actions filed after November 4, 1999. The original Act and commentary are useful for everyday UCCJEA practice, and the text of both can be found at <http://www.nccusl.org>. The UCCJEA addresses many of the problems that have arisen in the almost 30 years since the promulgation of the UCCJA and, later, the PKPA. The effects of the UCCJEA can be categorized into two major areas.

1. It incorporates the aims of the federal act and corrects the inconsistencies that have arisen in application and in development of case law from state to state.
 - a. It provides clear standards for the exercise of original jurisdiction and clarifies modification jurisdiction.
 - b. Sets out a legal standard for continuing exclusive jurisdiction (CEJ).
 - c. There are clearer procedures set forth for interstate judicial communication in simultaneous proceedings.

- d. Sets forth a clear legal analysis for forum non conveniens and “unclean hands.”
 - e. Eliminates the “best interests” standard in jurisdiction determinations.
2. It provides a detailed procedural and substantive enforcement scheme.
- a. It sets forth a uniform enforcement process that will:
 - i. Decrease costs since it does not require a lawyer in both jurisdictions;
 - ii. Bring more predictability to the outcome; and
 - iii. Speed up the enforcement process.
 - b. It limits the scope of the enforcing court’s inquiry.

B. Confers Subject Matter Jurisdiction

The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) gives the court its subject matter jurisdiction (SMJ) to make child custody determinations. *Chester and Chester*, 172 Or App 462, 469 18 P3d 1111 (2001).

- 1. Subject matter jurisdiction gives a court its legal authority to act or, in other words, the power to make an inquiry into a matter of dispute between parties and shape a remedy. “Jurisdiction of the subject matter is the power to deal with the general subject involved. In other words, the court must have cognizance of the class of cases for which the one to be adjudicated belongs.” *Callahan v. Employment Division*, 97 Or App 234, 238, 776 P2d 21 (1989). Subject matter jurisdiction depends on whether a court has constitutional or statutory authority to make an inquiry. *Watanabe and Watanabe*, 140 Or. App. 85, 88, 914 P2d 701 (1996), *rev denied* 324 Or 176 (1996).
- 2. “Jurisdiction cannot be conferred by the parties by consent, nor can the want of jurisdiction be remedied by waiver, or by estoppel.” *Wink v. Marshall*, 237 Or 589, 592, 392 P2d 768 (1964). Likewise, subject matter jurisdiction is not susceptible to the principle of invited error. *St. John v. Yachats Planning Commission*, 138 Or App 43, 46, 906 P2d 304 (1995).

3. Without SMJ, any court's order is void ab initio. Contempt will not lie under such an order. *Rowland v. Kingman*, 131 Or App 204, 208, 884 P2d 561 (1994). It is a nullity and subject to collateral attack at any time. *Wood and Wood*, 28 Or App 175, 558 P2d 1289 (1997).

4. The issue of lack of SMJ can be raised in trial court or on appeal, by the parties or the judge. "We consider jurisdictional issues regardless of when they are presented." *Baty v. Slater*, 161 Or App 653, 656, 984 P2d 342 (1999), *on recons* 164 Or App 779, 995 P2d 1176, *rev den* 331 Or 191 (2000). A judge who knowingly acts in the absence of SMJ may be liable for civil damages. *Stump v. Sparkman*, 435 US 349, 98 SCT 1099, 55 LEd2d 331 (1978).

C. Applicability

ORS 109.704(4): List of actions in statute, but left out of the list are adoptions. No application to support orders. Subsection (3). *Medill and Medill*, 170 Or App 630, 40 P3d 1087(2002) (en banc).

D. Pleadings

ORS 109.767 requires certain information in pleadings. *State ex rel Pennsylvania v. Stork*, 56 Or App 335, 340, 641 P2d 660, *rev den* 293 Or 190 (1982). Lack of these provisions and no further reference to them in the case render any resulting order void.

E. Bifurcation of Proceedings

If another state has UCCJEA jurisdiction but only the Oregon forum is available for a decision on all other issues in a domestic relations case, the proceeding should be bifurcated. *Mackie and Mackie*, 113 Or App 273, 277, 832 P2d 1240 (1992) (holding that a trial court must examine its jurisdiction under ORS 109.730 (1991) before making any child custody award in a situation where more than one state might exercise jurisdiction).

F. Personal Jurisdiction and Limited Appearance

ORS 109.727 provides that the limited appearance by a parent in a UCCJEA proceeding does not otherwise subject him or her to personal jurisdiction on other issues.

G. Notice and Opportunity to Be Heard

This concept undergirds UCCJEA enforcement. Proper notice is required as set forth by ORS 109.754 and ORS 109.724.

H. Outline of the Overall Analysis

The two-step procedure the law requires the courts to follow is to determine whether Oregon has jurisdiction and, if so, whether it should exercise jurisdiction. Before this can be determined, a more basic analysis must be made of whether this is an initial custody order determination or a modification of a prior custody order.

I. First Determine If this Is an *Initial Custody Order Determination*

If there is no prior custody order anywhere, then begin with ORS 109.741. *See* Commentary to Section 201 of the Uniform Act. The text of the commentary may be found at http://www.law.upenn.edu/bll/ulc/ulc_frame.htm.

1. The first question is whether Oregon has some jurisdictional basis to act.
 - a. Is this is the child's "home state" under ORS 107.741(1)(a)? The keystone is recognizing that the child's "home state" has jurisdictional priority. It is defined in ORS 109.704(7): "Home state" means the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement [filing] of a child custody proceeding. In the case of a child less than six months of age, "home state" means the state in which the child lived from birth with any of the persons mentioned. Any temporary absence of any of the mentioned persons is part of the period. If Oregon is the "home state," go

to the next question of whether the court should exercise that jurisdiction. See below.

b. But if Oregon is not the “home state,” determine if there is a “home state.” A “home state” could include a foreign country. ORS 109.714(1), overruling *Horiba and Horiba*, 151 Or. App. 489, 950 P2d 340 (1997), which held Japan not a “state” under UCCJA. There may not be a “home state.” If there is, it has priority, and Oregon does not have jurisdiction, unless it has jurisdiction under ORS 109.751, temporary emergency jurisdiction. See below.

c. If there is no home state, determine if there is a state with significant connections to the child, under ORS 109.741(1)(b):

(b) A court of another state does not have jurisdiction under subsection (1)(a) of this section, or a court of the home state of the child has declined to exercise jurisdiction on the ground that this state is the more appropriate forum under ORS 109.761 or 109.764, and: (A) The child and the child’s parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this state other than mere physical presence; and (B) Substantial evidence is available in this state concerning the child’s care, protection, training and personal relationships.

See Medill and Medill, supra.

d. If Oregon has these significant connections, it may exercise “significant connection” jurisdiction.

e. If there is a “home state” that has declined jurisdiction in favor of Oregon, then it may exercise “significant connection” jurisdiction. If there is another state with these significant connections and has declined jurisdiction in favor of Oregon, Oregon may exercise “significant connection” jurisdiction. ORS 109.741(1)(c).

f. If no other state has either “home state” or “significant connection” jurisdiction, then Oregon may exercise “vacuum jurisdiction under ORS 109.741(1)(d).”

g. Emergency temporary jurisdiction (TEJ): In the absence of another jurisdictional basis, an Oregon court could take jurisdiction in an emergency:

ORS 109.751 Temporary emergency jurisdiction. (1) A court of this state has temporary emergency jurisdiction if the child is present in this state and the child has been abandoned or it is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse.

(2) If there is no previous child custody determination that is entitled to be enforced under ORS 109.701 to 109.834 and a child custody proceeding has not been commenced in a court of a state having jurisdiction under ORS 109.741 to 109.747, a child custody determination made under this section remains in effect until an order is obtained from a court of a state having jurisdiction under ORS 109.741 to 109.747. If a child custody proceeding has not been or is not commenced in a court of a state having jurisdiction under ORS 109.741 to 109.747, a child custody determination made under this section becomes a final determination if the determination so provides and this state becomes the home state of the child.

2. The second step is whether the Oregon court should exercise jurisdiction.
 - a. Should the Oregon court decline within its discretion under the inconvenient forum factors of ORS 109.761?
 - b. Should the Oregon court decline under the unjustifiable conduct factors of ORS 109.764? This may be mandatory unless one of the three provisions listed in the statute are triggered. The Section 208 Commentary is particularly helpful here.

J. Modification Analysis

If there is already a custody determination, then one must engage in a *modification analysis*. The question the practitioner will be seeking to answer is whether the state that entered the initial custody determination has Continuing Exclusive Jurisdiction (CEJ) over the child custody matter under ORS 107.747.

1. The first question is whether an Oregon court issued and entered the initial custody order. If the answer is yes, then Oregon has CEJ unless ORS 107.744(1)(a) or (b) is true.

(a) A court of this state determines that neither the child, nor the child and one parent, nor the child and a person acting as a parent have a significant connection with this state and that substantial evidence is no longer available in this state concerning the child's care, protection, training and personal relationships; or

(b) A court of this state or a court of another state determines that the child, the child's parents and any person acting as a parent do not presently reside in this state.

If the Oregon court finds it has CEJ, should it exercise jurisdiction?

2. If the custody determination before the court for modification was issued and entered in another state, that other state will have CEJ under ORS 109.747 unless:

a. A court of this state has jurisdiction to make an initial custody order determination under ORS 109.741 (1)(a) or (b), *and*

b. The court of the issuing state determines that it no longer has exclusive, continuing jurisdiction under ORS 109.744; or

c. That a court of this state would be a more convenient forum under ORS 109.761; or

d. A court of this state or a court of the other state determines that the child, the child's parents, and any person acting as a parent do not presently reside in the other state.

e. In order to make the determination under ORS 109.747(1) second clause, the Oregon attorney and client will need to retain counsel in the issuing state and have that person file a motion asking the issuing court to decline further jurisdiction. The case in Oregon can be filed and stayed pending the inconvenient forum action in the issuing state. *See Snow and Snow*, ___ Or App ___ (filed August 13, 2003), where the Court of Appeals affirmed the trial court's dismissal of a petition under ORS 109.119, where

it sought to modify a North Dakota custody determination, where the North Dakota court had CEJ and had not declined further jurisdiction).

f. The Oregon court may also take TEJ under ORS 109.751(3). If it is determined that a prior child custody determination made in accordance with the PKPA and UCCJEA has been issued and is entitled to enforcement, or if an action has been commenced under “home state” or “significant connection” jurisdiction, then any TEJ order issued by the Oregon court must specify in the order a period that the court considers adequate to allow the person seeking an order in Oregon to apply for and obtain an order from the state having jurisdiction under the regular bases. ORS 109.751(3). The Oregon order then remains in effect until an order is obtained from the other state within the prescribed period. *Id.*

K. Temporary Emergency Jurisdiction

First, it allows SMJ to make a child custody determination not only when the child is abused, mistreated, or in danger of the same, but also when the child’s sibling or parent “. . . is subjected to or threatened with mistreatment or abuse.” ORS 109.751(1). This gives the court wide latitude to protect a child. ORS 109.741, the “regular” jurisdictional bases, cited in the chart below, require jurisdictional facts concerning the child. This raises a number of issues.

1. Out-of-state contestant obtains FAPA order in Oregon; home state is achieved in six months unless order is challenged.
2. Defending a FAPA could be considered acquiescence under ORS 109.764.
3. Should an action be filed in the “home state” to protect the home state basis?
4. There is a specific basis for forum non conveniens regarding DV issues. ORS 109.761(2)(a).
5. Notice is required under ORS 109.754 before any order is enforced.
6. In a temporary emergency jurisdiction case, if the Oregon court is informed that another child custody proceeding has been commenced, or an order has

actually been issued in another state having proper jurisdictional bases, the Oregon court must stay the Oregon action and *must* immediately communicate with the other court. ORS 109.751(4) and ORS 109.757(1) and (2). Likewise, if a court of this state happens to be entertaining a child custody proceeding under the regular bases, upon being informed that a temporary emergency jurisdiction order is being sought in another state, it must communicate with that court.

7. Other bases of judicial communication.

a. ORS 109.731 governs, in general, communication between courts. Note that at a minimum, parties have a right to present facts and legal argument before a decision is made based upon the intercourt communication.

b. The practitioner can file a motion with the court to commence an interstate judicial communication. Attorneys for parties may be present during the communication. ORS 109.731(2). It is helpful to the court in the motion if the practitioner obtains the name and telephone number of the judge presiding over the child custody proceeding in the other court.

c. Three communication provisions: ORS 109.731 deals with communication between courts in general; ORS 109.751(4) with temporary emergency situations; ORS 109.757 deals with simultaneous proceedings generally distinct from emergency temporary jurisdictional matters and ORS 109.794 with simultaneous enforcement proceedings. All promote intercourt communication. However, all deferrals by one court to another must be made only when the court not deferring has initial order jurisdiction or CEJ or temporary emergency jurisdiction, ORS 109.751. ORS 109.744. The "best interest" of the child determination does not enter into the analysis as it did under the UCCJA, former ORS 109.730(1)(b) and (d). Thus, the court "taking" the case must have proper SMJ. The two judges cannot look only to the merits of the custody question in deciding which should "take" the case.

L. Enforcement

1. Duty to enforce—ORS 109.781 requires a court of this state to enforce a child custody determination of a court of another state with a statutory scheme “in substantial conformity” with the UCCJEA. Any enforcement remedy is available under subsection (2) available under state law may be used, including contempt of court, ORS 33.105 et seq., and Orders of Assistance, although the UCCJEA provides similar remedies.

2. In addition, these specific remedies available under the UCCJEA are standardized and available in all states that have adopted the UCCJEA.

a. Temporary emergency visitation orders—ORS 109.784.

b. Registration of child custody determinations—ORS 109.787. The statutory requirements must be met strictly. *See Dagan and Dagan*, 103 Or App 453, 456 798 P2d 253 (1990) (where the court of appeals affirmed the trial court’s dismissal of an action to amend a judgment based on faulty registration of a foreign country custody determination). *But see Davis v. Guerrero*, 64 SW2d 685 Tex App 2002), *rehearing overruled* (where litigants were estopped from arguing lack of registration where they acknowledged existence of Kansas order in their Texas petition).

i. Registration may be accomplished without a concomitant request for enforcement. Commentary to section 305.

ii. Once registered and notice served upon the respondent, it has 21 days to object to the registration, the defenses being:

(A) The issuing court did not have jurisdiction;

(B) The child custody determination has been vacated state or modified by court of competent jurisdiction;

(C) The child custody proceeding out of which the order was issued did not provide proper notice to the respondent. ORS 109.787(5)(a)–(c).

iii. If the defenses are not well taken, or, a timely request for hearing to contest the validity of the registration is not made, the registration is confirmed as a matter of law. The respondent must be notified of the confirmation. *Id.* at subsection (6). Once confirmed, registration and recognition is complete and no further defenses can be raised that could've been raised at the time of the registration. *Id.* at subsection (7).

c. Expedited enforcement of the child custody determination—ORS 109.797.

d. Production of the child—sometimes called “turbo habeas.” ORS 109.797. This is available where the child is in imminent danger of being harmed or removed from the jurisdiction and requires the filing of the petition, testimony, and finding of probable cause that the child is at risk of serious harm. The order can direct that law-enforcement officials immediately take the child into custody. This remedy is contemplated where the person holding the child may leave the jurisdiction, the child has been physically harmed or it is likely that the child will be physically harmed, or where the custodian is in violation of a child custody determination or there are pending criminal proceedings against him or her.

e. Authorization of public officials to assist in enforcing child—Oregon defines the role of the district attorney to locate child, obtain the return of the child, or enforce a child custody determination if there's an existing child custody order and request a record of any pending child custody proceeding if he/she reasonably believes a criminal statute has been violated or he/she reasonably believes the child has been wrongfully removed to retain in violation of the Hague Convention.

M. Discovery Provisions

The UCCJEA allows seeking the court's assistance interstate to collect evidence, including the taking of depositions.

NOTES

**APPENDIX A—CONVENTION ON THE CIVIL
ASPECTS OF INTERNATIONAL CHILD ABDUCTION**

(Concluded October 25, 1980)

The States signatory to the present Convention,
Firmly convinced that the interests of children are of paramount importance in matters relating to their custody,

Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access,

Have resolved to conclude a Convention to this effect, and have agreed upon the following provisions—

CHAPTER I—SCOPE OF THE CONVENTION

Article 1

The objects of the present Convention are—

- a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and
- b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.

Article 2

Contracting States shall take all appropriate measures to secure within their territories the implementation of the objects of the Convention. For this purpose they shall use the most expeditious procedures available.

Article 3

The removal or the retention of a child is to be considered wrongful where—

- a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
- b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

Article 4

The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years.

Article 5

For the purposes of this Convention—

- a) “rights of custody” shall include rights relating to the care of the person of the child and, in particular, the right to determine the child’s place of residence;
- b) “rights of access” shall include the right to take a child for a limited period of time to a place other than the child’s habitual residence.

CHAPTER II—CENTRAL AUTHORITIES

Article 6

A Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention upon such authorities.

Federal States, States with more than one system of law or States having autonomous territorial organizations shall be free to appoint more than one Central Authority and to specify the territorial extent of their powers. Where a State has appointed more than one Central Authority, it shall designate the Central Authority to which applications may be addressed for transmission to the appropriate Central Authority within that State.

Article 7

Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their respective State to secure the prompt return of children and to achieve the other objects of this Convention.

In particular, either directly or through any intermediary, they shall take all appropriate measures—

- a) to discover the whereabouts of a child who has been wrongfully removed or retained;
- b) to prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures;
- c) to secure the voluntary return of the child or to bring about an amicable resolution of the issues;
- d) to exchange, where desirable, information relating to the social background of the child;
- e) to provide information of a general character as to the law of their State in connection with the application of the Convention;

- f) to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, in a proper case, to make arrangements for organizing or securing the effective exercise of rights of access;
- g) where the circumstances so require, to provide or facilitate the provision of legal aid and advice, including the participation of legal counsel and advisers;
- h) to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child;
- l) to keep each other informed with respect to the operation of this Convention and, as far as possible, to eliminate any obstacles to its application.

CHAPTER III—RETURN OF CHILDREN

Article 8

Any person, institution or other body claiming that a child has been removed or retained in breach of custody rights may apply either to the Central Authority of the child's habitual residence or to the Central Authority of any other Contracting State for assistance in securing the return of the child.

The application shall contain—

- a) information concerning the identity of the applicant, of the child and of the person alleged to have removed or retained the child;
- b) where available, the date of birth of the child;
- c) the grounds on which the applicant's claim for return of the child is based;
- d) all available information relating to the whereabouts of the child and the identity of the person with whom the child is presumed to be.

The application may be accompanied or supplemented by—

- e) an authenticated copy of any relevant decision or agreement;
- f) a certificate or an affidavit emanating from a Central Authority, or other competent authority of the State of the child's habitual residence, or from a qualified person, concerning the relevant law of that State;
- g) any other relevant document.

Article 9

If the Central Authority which receives an application referred to in Article 8 has reason to believe that the child is in another Contracting State, it shall directly and without delay transmit the application to the Central Authority of that Contracting State and inform the requesting Central Authority, or the applicant, as the case may be.

Article 10

The Central Authority of the State where the child is shall take or cause to be taken all appropriate measures in order to obtain the voluntary return of the child.

Article 11

The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children.

If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay. If a reply is received by the Central Authority of the requested State, that Authority shall transmit the reply to the Central Authority of the requesting State, or to the applicant, as the case may be.

Article 12

Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.

Article 13

Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that—

a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or

b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.

Article 14

In ascertaining whether there has been a wrongful removal or retention within the meaning of Article 3, the judicial or administrative authorities of the requested State may take notice directly of the law of, and of judicial or administrative decisions, formally recognized or not in the State of the habitual residence of the child, without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable.

Article 15

The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention, where such a decision or determination may be obtained in that State. The Central Authorities of the Contracting States shall so far as practicable assist applicants to obtain such a decision or determination.

Article 16

After receiving notice of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under this Convention is not lodged within a reasonable time following receipt of the notice.

Article 17

The sole fact that a decision relating to custody has been given in or is entitled to recognition in the requested State shall not be a ground for refusing to return a child under this Convention, but the judicial or administrative authorities of the requested State may take account of the reasons for that decision in applying this Convention.

Article 18

The provisions of this Chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time.

Article 19

A decision under this Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue.

Article 20

The return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.

CHAPTER IV—RIGHTS OF ACCESS

Article 21

An application to make arrangements for organizing or securing the effective exercise of rights of access may be presented to the Central Authorities of the Contracting States in the same way as an application for the return of a child.

The Central Authorities are bound by the obligations of co-operation which are set forth in Article 7 to promote the peaceful enjoyment of access rights and the fulfilment of any conditions to which the exercise of those rights may be subject. The Central Authorities shall take steps to remove, as far as possible, all obstacles to the exercise of such rights.

The Central Authorities, either directly or through intermediaries, may initiate or assist in the institution of proceedings with a view to organizing or protecting these rights and securing respect for the conditions to which the exercise of these rights may be subject.

CHAPTER V—GENERAL PROVISIONS

Article 22

No security, bond or deposit, however described, shall be required to guarantee the payment of costs and expenses in the judicial or administrative proceedings falling within the scope of this Convention.

Article 23

No legalization or similar formality may be required in the context of this Convention.

Article 24

Any application, communication or other document sent to the Central Authority of the requested State shall be in the original language, and shall be accompanied by a translation into the official language or one of the official languages of the requested State or, where that is not feasible, a translation into French or English.

However, a Contracting State may, by making a reservation in accordance with Article 42, object to the use of either French or English, but not both, in any application, communication or other document sent to its Central Authority.

Article 25

Nationals of the Contracting States and persons who are habitually resident within those States shall be entitled in matters concerned with the application of this Convention to legal aid and advice in any other Contracting State on the same conditions as if they themselves were nationals of and habitually resident in that State.

Article 26

Each Central Authority shall bear its own costs in applying this Convention.

Central Authorities and other public services of Contracting States shall not impose any charges in relation to applications submitted under this Convention. In particular, they may not require any payment from the applicant towards the costs and expenses of the proceedings or, where applicable, those arising from the participation of legal counsel or advisers. However, they may require the payment of the expenses incurred or to be incurred in implementing the return of the child.

However, a Contracting State may, by making a reservation in accordance with Article 42, declare that it shall not be bound to assume any costs referred to in the preceding paragraph resulting from the participation of legal counsel or advisers or from court proceedings, except insofar as those costs may be covered by its system of legal aid and advice.

Upon ordering the return of a child or issuing an order concerning rights of access under this Convention, the judicial or administrative authorities may, where appropriate, direct the person who removed or retained the child, or who prevented the exercise of rights of access, to pay necessary expenses incurred by or on behalf of the applicant, including travel expenses, any costs incurred or payments made for locating the child, the costs of legal representation of the applicant, and those of returning the child.

Article 27

When it is manifest that the requirements of this Convention are not fulfilled or that the application is otherwise not well founded, a Central Authority is not bound to accept the application. In that case, the Central Authority shall forthwith inform the applicant or the Central Authority through which the application was submitted, as the case may be, of its reasons.

Article 28

A Central Authority may require that the application be accompanied by a written authorization empowering it to act on behalf of the applicant, or to designate a representative so to act.

Article 29

This Convention shall not preclude any person, institution or body who claims that there has been a breach of custody or access rights within the meaning of Article 3 or 21 from applying directly to the judicial or administrative authorities of a Contracting State, whether or not under the provisions of this Convention.

Article 30

Any application submitted to the Central Authorities or directly to the judicial or administrative authorities of a Contracting State in accordance with the terms of this Convention, together with documents and any other information appended thereto or provided by a Central Authority, shall be admissible in the courts or administrative authorities of the Contracting States.

Article 31

In relation to a State which in matters of custody of children has two or more systems of law applicable in different territorial units—

- a) any reference to habitual residence in that State shall be construed as referring to habitual residence in a territorial unit of that State;
- b) any reference to the law of the State of habitual residence shall be construed as referring to the law of the territorial unit in that State where the child habitually resides.

Article 32

In relation to a State which in matters of custody of children has two or more systems of law applicable to different categories of persons, any reference to the law of that State shall be construed as referring to the legal system specified by the law of that State.

Article 33

A State within which different territorial units have their own rules of law in respect of custody of children shall not be bound to apply this Convention where a State with a unified system of law would not be bound to do so.

Article 34

This Convention shall take priority in matters within its scope over the Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of minors, as between parties to both Conventions. Otherwise the present Convention shall not restrict the application of an international instrument in force between the State of origin and the State addressed or other law of the State addressed for the purposes of obtaining the return of a child who has been wrongfully removed or retained or of organizing access rights.

Article 35

This Convention shall apply as between Contracting States only to wrongful removals or retentions occurring after its entry into force in those States.

Where a declaration has been made under Article 39 or 40, the reference in the preceding paragraph to a Contracting State shall be taken to refer to the territorial unit or units in relation to which this Convention applies.

Article 36

Nothing in this Convention shall prevent two or more Contracting States, in order to limit the restrictions to which the return of the child may be subject, from agreeing among themselves to derogate from any provisions of this Convention which may imply such a restriction.

CHAPTER VI—FINAL CLAUSES

Article 37

The Convention shall be open for signature by the States which were Members of the Hague Conference on Private International Law at the time of its Fourteenth Session.

It shall be ratified, accepted or approved and the instruments of ratification, acceptance or approval shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

Article 38

Any other State may accede to the Convention.

The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

The Convention shall enter into force for a State acceding to it on the first day of the third calendar month after the deposit of its instrument of accession.

The accession will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession. Such a declaration will also have to be made by any Member State ratifying, accepting or approving the Convention after an accession. Such declaration shall be deposited at the Ministry of Foreign Affairs of the Kingdom of the Netherlands; this Ministry shall forward, through diplomatic channels, a certified copy to each of the Contracting States.

The Convention will enter into force as between the acceding State and the State that has declared its acceptance of the accession on the first day of the third calendar month after the deposit of the declaration of acceptance.

Article 39

Any State may, at the time of signature, ratification, acceptance, approval or accession, declare that the Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect at the time the Convention enters into force for that State.

Such declaration, as well as any subsequent extension, shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

Article 40

If a Contracting State has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in this Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that this Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time.

Any such declaration shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands and shall state expressly the territorial units to which the Convention applies.

Article 41

Where a Contracting State has a system of government under which executive, judicial and legislative powers are distributed between central and other authorities within that State, its signature or ratification, acceptance or approval of, or accession to this Convention, or its making of any declaration in terms of Article 40 shall carry no implication as to the internal distribution of powers within that State.

Article 42

Any State may, not later than the time of ratification, acceptance, approval or accession, or at the time of making a declaration in terms of Article 39 or 40, make one

or both of the reservations provided for in Article 24 and Article 26, third paragraph. No other reservation shall be permitted.

Any State may at any time withdraw a reservation it has made. The withdrawal shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

The reservation shall cease to have effect on the first day of the third calendar month after the notification referred to in the preceding paragraph.

Article 43

The Convention shall enter into force on the first day of the third calendar month after the deposit of the third instrument of ratification, acceptance, approval or accession referred to in Articles 37 and 38.

Thereafter the Convention shall enter into force—

(1) for each State ratifying, accepting, approving or acceding to it subsequently, on the first day of the third calendar month after the deposit of its instrument of ratification, acceptance, approval or accession;

(2) for any territory or territorial unit to which the Convention has been extended in conformity with Article 39 or 40, on the first day of the third calendar month after the notification referred to in that Article.

Article 44

The Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 43 even for States which subsequently have ratified, accepted, approved it or acceded to it.

If there has been no denunciation, it shall be renewed tacitly every five years.

Any denunciation shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands at least six months before the expiry of the five year period. It may be limited to certain of the territories or territorial units to which the Convention applies.

The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other Contracting States.

Article 45

The Ministry of Foreign Affairs of the Kingdom of the Netherlands shall notify the States Members of the Conference, and the States which have acceded in accordance with Article 38, of the following—

(1) the signatures and ratifications, acceptances and approvals referred to in Article 37;

(2) the accessions referred to in Article 38;

(3) the date on which the Convention enters into force in accordance with Article 43;

(4) the extensions referred to in Article 39;

- (5) the declarations referred to in Articles 38 and 40;
- (6) the reservations referred to in Article 24 and Article 26, third paragraph, and the withdrawals referred to in Article 42;
- (7) the denunciations referred to in Article 44.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.

Done at The Hague, on the 25th day of October, 1980, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Kingdom of the Netherlands, and of which a certified copy shall be sent, through diplomatic channels, to each of the States Members of the Hague Conference on Private International Law at the date of its Fourteenth Session.

APPENDIX B—PARENTAL KIDNAPING PROTECTION ACT

(a) The appropriate authorities of every State shall enforce according to its terms, and shall not modify except as provided in subsections (f), (g), and (h) of this section, any custody determination or visitation determination made consistently with the provisions of this section by a court of another State.

(b) As used in this section, the term—

(1) “child” means a person under the age of eighteen;

(2) “contestant” means a person, including a parent or grandparent, who claims a right to custody or visitation of a child;

(3) “custody determination” means a judgment, decree, or other order of a court providing for the custody of a child, and includes permanent and temporary orders, and initial orders and modifications;

(4) “home State” means the State in which, immediately preceding the time involved, the child lived with his parents, a parent, or a person acting as parent, for at least six consecutive months, and in the case of a child less than six months old, the State in which the child lived from birth with any of such persons. Periods of temporary absence of any of such persons are counted as part of the six-month or other period;

(5) “modification” and “modify” refer to a custody or visitation determination which modifies, replaces, supersedes, or otherwise is made subsequent to, a prior custody or visitation determination concerning the same child, whether made by the same court or not;

(6) “person acting as a parent” means a person, other than a parent, who has physical custody of a child and who has either been awarded custody by a court or claims a right to custody;

(7) “physical custody” means actual possession and control of a child;

(8) “State” means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a territory or possession of the United States; and

(9) “visitation determination” means a judgment, decree, or other order of a court providing for the visitation of a child and includes permanent and temporary orders and initial orders and modifications.

(c) A child custody or visitation determination made by a court of a State is consistent with the provisions of this section only if—

(1) such court has jurisdiction under the law of such State; and

(2) one of the following conditions is met:

(A) such State (i) is the home State of the child on the date of the commencement of the proceeding, or (ii) had been the child’s home State within six months before the date of the commencement of the proceeding and the child is absent from such State because of his removal or retention by a contestant or for other reasons, and a contestant continues to live in such State;

(B) (i) it appears that no other State would have jurisdiction under subparagraph (A), and (ii) it is in the best interest of the child that a court of such State assume jurisdiction because (i) the child and his parents, or the child and at least one contestant,

have a significant connection with such State other than mere physical presence in such State, and (II) there is available in such State substantial evidence concerning the child's present or future care, protection, training, and personal relationships;

(C) the child is physically present in such State and (I) the child has been abandoned, or (ii) it is necessary in an emergency to protect the child because the child, a sibling, or parent of the child has been subjected to or threatened with mistreatment or abuse;

(D) (I) it appears that no other State would have jurisdiction under subparagraph (A), (B), (C), or (E), or another State has declined to exercise jurisdiction on the ground that the State whose jurisdiction is in issue is the more appropriate forum to determine the custody or visitation of the child, and (ii) it is in the best interest of the child that such court assume jurisdiction; or

(E) the court has continuing jurisdiction pursuant to subsection (d) of this section.

(d) The jurisdiction of a court of a State which has made a child custody or visitation determination consistently with the provisions of this section continues as long as the requirement of subsection (c)(1) of this section continues to be met and such State remains the residence of the child or of any contestant.

(e) Before a child custody or visitation determination is made, reasonable notice and opportunity to be heard shall be given to the contestants, any parent whose parental rights have not been previously terminated and any person who has physical custody of a child.

(f) A court of a State may modify a determination of the custody of the same child made by a court of another State, if—

(1) it has jurisdiction to make such a child custody determination; and

(2) the court of the other State no longer has jurisdiction, or it has declined to exercise such jurisdiction to modify such determination.

(g) A court of a State shall not exercise jurisdiction in any proceeding for a custody or visitation determination commenced during the pendency of a proceeding in a court of another State where such court of that other State is exercising jurisdiction consistently with the provisions of this section to make a custody or visitation determination.

(h) A court of a State may not modify a visitation determination made by a court of another State unless the court of the other State no longer has jurisdiction to modify such determination or has declined to exercise jurisdiction to modify such determination.

APPENDIX C—UNIFORM CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT

109.701 Short title. ORS 109.701 to 109.834 may be cited as the Uniform Child Custody Jurisdiction and Enforcement Act. [1999 c.649 §1]

Note: 109.701 to 109.834 were enacted into law by the Legislative Assembly but were not added to or made a part of ORS chapter 109 or any series therein by legislative action. See Preface to Oregon Revised Statutes for further explanation.

109.704 Definitions for ORS 109.701 to 109.834. As used in ORS 109.701 to 109.834:

(1) "Abandoned" means left without provision for reasonable and necessary care or supervision.

(2) "Child" means an individual who has not attained 18 years of age.

(3) "Child custody determination" means a judgment or other order of a court providing for the legal custody, physical custody, parenting time or visitation with respect to a child. "Child custody determination" includes a permanent, temporary, initial and modification order. "Child custody determination" does not include an order relating to child support or other monetary obligation of an individual.

(4) "Child custody proceeding" means a proceeding in which legal custody, physical custody, parenting time or visitation with respect to a child is an issue. "Child custody proceeding" includes a proceeding for divorce, separation, neglect, abuse, dependency, guardianship, paternity, termination of parental rights and protection from domestic violence in which the issue may appear. "Child custody proceeding" does not include a proceeding involving juvenile delinquency, contractual emancipation or enforcement under ORS 109.774 to 109.827.

(5) "Commencement" means the filing of the first pleading in a proceeding.

(6) "Court" means an entity authorized under the law of a state to establish, enforce or modify a child custody determination.

(7) "Home state" means the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding. In the case of a child less than six months of age, "home state" means the state in which the child lived from birth with any of the persons mentioned. Any temporary absence of any of the mentioned persons is part of the period.

(8) "Initial determination" means the first child custody determination concerning a particular child.

(9) "Issuing court" means the court that makes a child custody determination for which enforcement is sought under ORS 109.701 to 109.834.

(10) "Issuing state" means the state in which a child custody determination is made.

(11) "Modification" means a child custody determination that changes, replaces, supersedes or is otherwise made after a previous determination concerning the same child, whether or not it is made by the court that made the previous determination.

(12) "Person" means an individual, corporation, public corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government or a governmental subdivision, agency or instrumentality, or any other legal or commercial entity.

(13) "Person acting as a parent" means a person, other than a parent, who:

(a) Has physical custody of the child or has had physical custody for a period of six consecutive months, including any temporary absence, within one year immediately before the commencement of a child custody proceeding; and

(b) Has been awarded legal custody by a court or claims a right to legal custody under the law of this state.

(14) "Physical custody" means the physical care and supervision of a child.

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

(16) "Tribe" means an Indian tribe or band, or Alaskan Native village, that is recognized by federal law or formally acknowledged by a state.

(17) "Warrant" means an order issued by a court authorizing law enforcement officers to take physical custody of a child. [1999 c.649 §2; 2003 c.576 §159]

Note: See note under 109.701.

109.707 Proceedings governed by other law. ORS 109.701 to 109.834 do not govern a proceeding pertaining to the authorization of emergency medical care for a child. [1999 c.649 §3]

Note: See note under 109.701.

109.710 [1973 c.375 §2; 1997 c.707 §23; repealed by 1999 c.649 §55]

109.711 Application to Indian tribes. (1) A child custody proceeding that pertains to an Indian child as defined in the Indian Child Welfare Act (25 U.S.C. 1901 et seq.), is not subject to ORS 109.701 to 109.834 to the extent that the proceeding is governed by the Indian Child Welfare Act.

(2) A court of this state shall treat a tribe as if it were a state of the United States for the purpose of applying ORS 109.701 to 109.771.

(3) A child custody determination made by a tribe under factual circumstances in substantial conformity with the jurisdictional standards of ORS 109.701 to 109.834 must be recognized and enforced under ORS 109.774 to 109.827. [1999 c.649 §4]

Note: See note under 109.701.

109.714 International application of ORS 109.701 to 109.834. (1) A court of this state shall treat a foreign country as if it were a state of the United States for the purpose of applying ORS 109.701 to 109.771.

(2) Except as otherwise provided in subsection (3) of this section, a child custody determination made in a foreign country under factual circumstances in substantial conformity with the jurisdictional standards of ORS 109.701 to 109.834 must be recognized and enforced under ORS 109.774 to 109.827.

(3) A court of this state need not apply ORS 109.701 to 109.834 if the child custody law of a foreign country violates fundamental principles of human rights. [1999 c.649 §5]

Note: See note under 109.701.

109.717 Effect of child custody determination. A child custody determination made by a court of this state that has jurisdiction under ORS 109.701 to 109.834 binds all persons who have been served in accordance with the laws of this state or notified in accordance with ORS 109.724 or who have submitted to the jurisdiction of the court, and who have been given an opportunity to be heard. As to those persons, the determination is conclusive as to all decided issues of law and fact except to the extent the determination is modified. [1999 c.649 §6]

Note: See note under 109.701.

109.720 [1973 c.375 §§1,23; repealed by 1999 c.649 §55]

109.721 Priority. If a question of existence or exercise of jurisdiction under ORS 109.701 to 109.834 is raised in a child custody proceeding, the question, upon request of a party, must be given priority on the calendar and handled expeditiously. [1999 c.649 §7]

Note: See note under 109.701.

109.724 Notice to persons outside state. (1) Notice required for the exercise of jurisdiction when a person is outside this state may be given in a manner prescribed by the law of this state for service of process or by the law of the state in which the service is made. Notice must be given in a manner reasonably calculated to give actual notice but may be by publication if other means are not effective.

(2) Proof of service may be made in the manner prescribed by the law of this state or by the law of the state in which the service is made. If service is made by mail, proof of service may be a receipt signed by the addressee or other evidence of delivery to the addressee.

(3) Notice is not required for the exercise of jurisdiction with respect to a person who submits to the jurisdiction of the court. [1999 c.649 §8]

Note: See note under 109.701.

109.727 Appearance and limited immunity. (1) A party to a child custody proceeding, including a modification proceeding, or a petitioner or respondent in a proceeding to enforce or register a child custody determination, is not subject to personal jurisdiction in this state for another proceeding or purpose solely by reason of having participated, or of having been physically present for the purpose of participating, in the proceeding.

(2) A person who is subject to personal jurisdiction in this state on a basis other than physical presence is not immune from service of process in this state. A party present in this state who is subject to the jurisdiction of another state is not immune from service of process allowable under the laws of that state.

(3) The immunity granted by subsection (1) of this section does not extend to civil litigation based on acts unrelated to the participation in a proceeding under ORS 109.701 to 109.834 committed by an individual while present in this state. [1999 c.649 §9]

Note: See note under 109.701.

109.730 [1973 c.375 §3; repealed by 1999 c.649 §55]

109.731 Communication between courts. (1) A court of this state may communicate with a court in another state concerning a proceeding arising under ORS 109.701 to 109.834.

(2) The court may allow the parties to participate in the communication. If the parties are not able to participate in the communication, they must be given the opportunity to present facts and legal arguments before a decision on jurisdiction is made.

(3) Communication between courts on schedules, calendars, court records and similar matters may occur without informing the parties. A record need not be made of the communication.

(4) Except as otherwise provided in subsection (3) of this section, a record must be made of a communication under this section. The parties must be informed promptly of the communication and granted access to the record.

(5) For the purposes of this section, "record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form. [1999 c.649 §10]

Note: See note under 109.701.

109.734 Taking testimony in another state. (1) In addition to other procedures available to a party, a party to a child custody proceeding may offer testimony of witnesses who are located in another state, including testimony of the parties and the child, by deposition or other means allowable in this state for testimony taken in another state. The court on its own motion may order that the testimony of a person be taken in another state and may prescribe the manner in which and the terms upon which the testimony is taken.

(2) A court of this state may permit an individual residing in another state to be deposed or to testify by telephone, audiovisual means or other electronic means before a designated court or at another location in that state. A court of this state shall cooperate with courts of other states in designating an appropriate location for the deposition or testimony.

(3) Documentary evidence transmitted from another state to a court of this state by technological means that does not produce an original writing may not be excluded from evidence on an objection based on the means of transmission. [1999 c.649 §11]

Note: See note under 109.701.

109.737 Cooperation between courts; preservation of records. (1) A court of this state may request the appropriate court of another state to:

(a) Hold an evidentiary hearing;

(b) Order a person to produce or give evidence pursuant to procedures of that state;

(c) Order that an evaluation be made with respect to the custody of a child involved in a pending proceeding;

(d) Forward to the court of this state a certified copy of the transcript of the record of the hearing, the evidence otherwise presented and any evaluation prepared in compliance with the request; and

(e) Order a party to a child custody proceeding or any person having physical custody of the child to appear in the proceeding with or without the child.

(2) Upon request of a court of another state, a court of this state may hold a hearing or enter an order described in subsection (1) of this section.

(3) Travel and other necessary and reasonable expenses incurred under subsections (1) and (2) of this section may be assessed against the parties according to the law of this state.

(4) A court of this state shall preserve the pleadings, orders, judgments, records of hearings, evaluations and other pertinent records with respect to a child custody proceeding for the time required by the retention schedule adopted under ORS 8.125 (11). The retention schedule shall require retention at least until the child attains 18 years of age. Upon appropriate request by a court or law enforcement official of another state, the court shall forward a certified copy of those records. [1999 c.649 §12; 2003 c.576 §160]

Note: See note under 109.701.

109.740 [1973 c.375 §4; repealed by 1999 c.649 §55]

(Jurisdiction)

109.741 Initial child custody jurisdiction. (1) Except as otherwise provided in ORS 109.751, a court of this state has jurisdiction to make an initial child custody determination only if:

(a) This state is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding and the child is absent from this state but a parent or person acting as a parent continues to live in this state;

(b) A court of another state does not have jurisdiction under subsection (1)(a) of this section, or a court of the home state of the child has declined to exercise jurisdiction on the ground that this state is the more appropriate forum under ORS 109.761 or 109.764, and:

(A) The child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this state other than mere physical presence; and

(B) Substantial evidence is available in this state concerning the child's care, protection, training and personal relationships;

(c) All courts having jurisdiction under subsection (1)(a) or (b) of this section have declined to exercise jurisdiction on the ground that a court of this state is the more appropriate forum to determine the custody of the child under ORS 109.761 or 109.764; or

(d) No court of any other state would have jurisdiction under the criteria specified in subsection (1)(a), (b) or (c) of this section.

(2) Subsection (1) of this section is the exclusive jurisdictional basis for making a child custody determination by a court of this state.

(3) Physical presence of, or personal jurisdiction over, a party or a child is not necessary or sufficient to make a child custody determination. [1999 c.649 §13]

Note: See note under 109.701.

109.744 Exclusive, continuing jurisdiction. (1) Except as otherwise provided in ORS 109.751, a court of this state that has made a child custody determination consistent with ORS 109.741 or 109.747 has exclusive, continuing jurisdiction over the determination until:

(a) A court of this state determines that neither the child, nor the child and one parent, nor the child and a person acting as a parent have a significant connection with this state and that substantial evidence is no longer available in this state concerning the child's care, protection, training and personal relationships; or

(b) A court of this state or a court of another state determines that the child, the child's parents and any person acting as a parent do not presently reside in this state.

(2) A court of this state that has made a child custody determination and does not have exclusive, continuing jurisdiction under this section may modify that determination only if the court has jurisdiction to make an initial determination under ORS 109.741. [1999 c.649 §14]

Note: See note under 109.701.

109.747 Jurisdiction to modify determination. Except as otherwise provided in ORS 109.751, a court of this state may not modify a child custody determination made by a court of another state unless a court of this state has jurisdiction to make an initial determination under ORS 109.741 (1)(a) or (b) and:

(1) The court of the other state determines that it no longer has exclusive, continuing jurisdiction under ORS 109.744 or that a court of this state would be a more convenient forum under ORS 109.761; or

(2) A court of this state or a court of the other state determines that the child, the child's parents and any person acting as a parent do not presently reside in the other state. [1999 c.649 §15]

Note: See note under 109.701.

109.750 [1973 c.375 §5; repealed by 1999 c.649 §55]

109.751 Temporary emergency jurisdiction. (1) A court of this state has temporary emergency jurisdiction if the child is present in this state and the child has been abandoned or it is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse.

(2) If there is no previous child custody determination that is entitled to be enforced under ORS 109.701 to 109.834 and a child custody proceeding has not been commenced in a court of a state having jurisdiction under ORS 109.741 to 109.747, a child custody determination made under this section remains in effect until an order is obtained from a court of a state having jurisdiction under ORS 109.741 to 109.747. If a child custody proceeding has not been or is not commenced in a court of a state having jurisdiction under ORS 109.741 to 109.747, a child custody determination made under this section becomes a final determination if the determination so provides and this state becomes the home state of the child.

(3) If there is a previous child custody determination that is entitled to be enforced under ORS 109.701 to 109.834, or a child custody proceeding has been commenced in a court of a state having jurisdiction under ORS 109.741 to 109.747, any order issued by a court of this state under this section must specify in the order a period that the court considers adequate to allow the person seeking an order to obtain an order from the state having jurisdiction under ORS 109.741 to 109.747. The order issued in this state remains in effect until an order is obtained from the other state within the period specified or the period expires.

(4) A court of this state that has been asked to make a child custody determination under this section, upon being informed that a child custody proceeding has been commenced in, or a child custody determination has been made by, a court of a state having jurisdiction under ORS 109.741 to 109.747, shall immediately communicate with the other court. A court of this state that is exercising jurisdiction under ORS 109.741 to 109.747, upon being informed that a child custody proceeding has been commenced in, or a child custody determination has been made by, a court of

another state under a statute similar to this section, shall immediately communicate with the court of that state to resolve the emergency, protect the safety of the parties and the child and determine a period for the duration of the temporary order. [1999 c.649 §16]

Note: See note under 109.701.

109.754 Notice; opportunity to be heard; joinder. (1) Before a child custody determination is made under ORS 109.701 to 109.834, notice and an opportunity to be heard in accordance with the standards of ORS 109.724 must be given to all persons entitled to notice under the law of this state as in child custody proceedings between residents of this state, any parent whose parental rights have not been previously terminated and any person having physical custody of the child.

(2) ORS 109.701 to 109.834 do not govern the enforce ability of a child custody determination made without notice or an opportunity to be heard.

(3) The obligation to join a party and the right to intervene as a party in a child custody proceeding under ORS 109.701 to 109.834 are governed by the law of this state as in child custody proceedings between residents of this state. [1999 c.649 §17]

Note: See note under 109.701.

109.757 Simultaneous proceedings. (1) Except as otherwise provided in ORS 109.751, a court of this state may not exercise its jurisdiction under ORS 109.741 to 109.771 if, at the time of the commencement of the proceeding, a proceeding concerning the custody of the child has been commenced in a court of another state having jurisdiction substantially in conformity with ORS 109.701 to 109.834, unless the proceeding has been terminated or is stayed by the court of the other state because a court of this state is a more convenient forum under ORS 109.761.

(2) Except as otherwise provided in ORS 109.751, a court of this state, before hearing a child custody proceeding, shall examine the court documents and other information supplied by the parties under ORS 109.767. If the court determines that a child custody proceeding has been commenced in a court in another state having jurisdiction substantially in accordance with ORS 109.701 to 109.834, the court of this state shall stay its proceeding and communicate with the court of the other state. If the court of the state having jurisdiction substantially in accordance with ORS 109.701 to 109.834 does not determine that the court of this state is a more appropriate forum, the court of this state shall dismiss the proceeding.

(3) In a proceeding to modify a child custody determination, a court of this state shall determine whether a proceeding to enforce the determination has been commenced in another state. If a proceeding to enforce a child custody determination has been commenced in another state, the court may:

(a) Stay the proceeding for modification pending the entry of an order of a court of the other state enforcing, staying, denying or dismissing the proceeding for enforcement;

(b) Enjoin the parties from continuing with the proceeding for enforcement; or

(c) Proceed with the modification under conditions it considers appropriate. [1999 c.649 §18]

Note: See note under 109.701.

109.760 [1973 c.375 §6; repealed by 1999 c.649 §55]

109.761 Inconvenient forum. (1) A court of this state that has jurisdiction under ORS 109.701 to 109.834 to make a child custody determination may decline to exercise its jurisdiction at any time if the court determines that it is an inconvenient forum under the circumstances and that a court of another state is a more appropriate forum. The issue of inconvenient forum may be raised upon the motion of a party, the court's own motion or the request of another court.

(2) Before determining whether a court of this state is an inconvenient forum, the court shall consider whether it is appropriate for a court of another state to exercise jurisdiction. For this purpose, the court shall allow the parties to submit information and shall consider all relevant factors, including:

(a) Whether domestic violence has occurred and is likely to continue in the future and which state could best protect the parties and the child;

(b) The length of time the child has resided outside this state;

(c) The distance between the court in this state and the court in the state that would assume jurisdiction;

(d) The relative financial circumstances of the parties;

(e) Any agreement of the parties as to which state should assume jurisdiction;

(f) The nature and location of the evidence required to resolve the pending litigation, including testimony of the child;

(g) The ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence; and

(h) The familiarity of the court of each state with the facts and issues in the pending litigation.

(3) If a court of this state determines that it is an inconvenient forum and that a court of another state is a more appropriate forum, it shall stay the proceedings upon condition that a child custody proceeding be promptly commenced in another designated state and may impose any other condition the court considers just and proper.

(4) A court of this state may decline to exercise its jurisdiction under ORS 109.701 to 109.834 if a child custody determination is incidental to an action for divorce or another proceeding while still retaining jurisdiction over the divorce or other proceeding. [1999 c.649 §19]

Note: See note under 109.701.

109.764 Jurisdiction declined by reason of conduct. (1) Except as otherwise provided in ORS 109.751 or 419B.100, if a court of this state has jurisdiction under ORS 109.701 to 109.834 because a person seeking to invoke its jurisdiction has engaged in

unjustifiable conduct to so invoke the jurisdiction, the court shall decline to exercise its jurisdiction unless:

(a) The parents and all persons acting as parents have acquiesced in the exercise of jurisdiction;

(b) A court of the state otherwise having jurisdiction under ORS 109.741 to 109.747 determines that this state is a more appropriate forum under ORS 109.761; or

(c) No court of any other state would have jurisdiction under the criteria specified in ORS 109.741 to 109.747.

(2) If a court of this state declines to exercise its jurisdiction under subsection (1) of this section, it may fashion an appropriate remedy to ensure the safety of the child and prevent a repetition of the unjustifiable conduct, including staying the proceeding until a child custody proceeding is commenced in a court having jurisdiction under ORS 109.741 to 109.747.

(3) If a court dismisses a petition or stays a proceeding because it declines to exercise its jurisdiction under subsection (1) of this section, it shall assess against the party seeking to invoke its jurisdiction necessary and reasonable expenses including costs, communication expenses, attorney fees, investigative fees, expenses for witnesses, travel expenses and child care expenses during the course of the proceeding unless the party from whom necessary and reasonable expenses are sought establishes that the assessment would be clearly inappropriate. The court may not assess fees, costs or expenses against this state unless authorized by law other than ORS 109.701 to 109.834. [1999 c.649 §20]

Note: See note under 109.701.

109.767 Information to be submitted to court. (1) In a child custody proceeding, each party, in its first pleading or in an attached affidavit, shall give information, if reasonably ascertainable, under oath as to the child's present address or whereabouts, the places where the child has lived during the last five years and the names and present addresses of the persons with whom the child has lived during that period. The pleading or affidavit must state whether the party:

(a) Has participated, as a party or witness or in any other capacity, in any other proceeding concerning the custody of or parenting time or visitation with the child and, if so, identify the court, the case number and the date of the child custody determination, if any;

(b) Knows of any proceeding that could affect the current proceeding, including proceedings for enforcement and proceedings relating to domestic violence, protective orders, termination of parental rights and adoptions and, if so, identify the court, the case number and the nature of the proceeding; and

(c) Knows the names and addresses of any person not a party to the proceeding who has physical custody of the child or claims rights of legal custody or physical custody of, or parenting time or visitation with, the child and, if so, the names and addresses of those persons.

(2) If the information required by subsection (1) of this section is not furnished, the court, upon motion of a party or its own motion, may stay the proceeding until the information is furnished.

(3) If the declaration as to any of the items described in subsection (1) of this section is in the affirmative, the declarant shall give additional information under oath as required by the court. The court may examine the parties under oath as to details of the information furnished and other matters pertinent to the court's jurisdiction and the disposition of the case.

(4) Each party has a continuing duty to inform the court of any proceeding in this or any other state that could affect the current proceeding.

(5) If a party alleges in an affidavit or a pleading under oath that the health, safety or liberty of a party or child would be jeopardized by disclosure of identifying information, the information must be sealed and may not be disclosed to the other party or the public unless the court orders the disclosure to be made after a hearing in which the court takes into consideration the health, safety or liberty of the party or child and determines that the disclosure is in the interest of justice. Costs incurred by the court when special notice procedures are made necessary by the nondisclosure of identifying information shall be paid by the parties as deemed appropriate by the court. [1999 c.649 §21]

Note: See note under 109.701.

109.770 [1973 c.375 §7; 1981 c.897 §34; repealed by 1999 c.649 §55]

109.771 Appearance of parties and child. (1) In a child custody proceeding in this state, the court may order a party to the proceeding who is in this state to appear before the court in person with or without the child. The court may order any person who is in this state and who has physical custody or control of the child to appear in person with the child.

(2) If a party to a child custody proceeding whose presence is desired by the court is outside this state, the court may order that a notice given under ORS 109.724 include a statement directing the party to appear in person with or without the child and informing the party that failure to appear may result in a decision adverse to the party.

(3) The court may enter any orders necessary to ensure the safety of the child and of any person ordered to appear under this section.

(4) If a party to a child custody proceeding who is outside this state is directed to appear under subsection (2) of this section or desires to appear personally before the court with or without the child, the court may require another party to pay reasonable and necessary travel and other expenses of the party and the child so appearing. [1999 c.649 §22]

Note: See note under 109.701.

(Enforcement)

109.774 Definitions for ORS 109.774 to 109.827. As used in ORS 109.774 to 109.827:

(1) "Petitioner" means a person who seeks enforcement of an order for return of a child under the Hague Convention on the Civil Aspects of International Child Abduction or enforcement of a child custody determination.

(2) "Respondent" means a person against whom a proceeding has been commenced for enforcement of an order for return of a child under the Hague Convention on the Civil Aspects of International Child Abduction or enforcement of a child custody determination. [1999 c.649 §23]

Note: See note under 109.701.

109.777 Enforcement under Hague Convention. Under ORS 109.774 to 109.827, a court of this state may also enforce an order for the return of the child made under the Hague Convention on the Civil Aspects of International Child Abduction as if the order were a child custody determination. [1999 c.649 §24]

Note: See note under 109.701.

109.780 [1973 c.375 §8; 1981 c.897 §35; repealed by 1999 c.649 §55]

109.781 Duty to enforce. (1) A court of this state shall recognize and enforce a child custody determination of a court of another state if the latter court exercised jurisdiction in substantial conformity with ORS 109.701 to 109.834 or the determination was made under factual circumstances meeting the jurisdictional standards of ORS 109.701 to 109.834 and the determination has not been modified in accordance with ORS 109.701 to 109.834.

(2) A court of this state may utilize any remedy available under other law of this state to enforce a child custody determination made by a court of another state. The remedies provided in ORS 109.774 to 109.827 are cumulative and do not affect the availability of other remedies to enforce a child custody determination. [1999 c.649 §25]

Note: See note under 109.701.

109.784 Temporary order for parenting time or visitation. In a child custody enforcement proceeding authorized by law:

(1) A court of this state that does not have jurisdiction to modify a child custody determination may issue a temporary order enforcing:

- (a) A parenting time or visitation schedule made by a court of another state; or
- (b) The visitation or parenting time provisions of a child custody determination of another state that permit visitation or parenting time but do not provide for a specific visitation or parenting time schedule.

(2) If a court of this state makes an order under subsection (1)(b) of this section, the court shall specify in the order a period that it considers adequate to allow the petitioner to obtain an order from a court having jurisdiction under the criteria specified in ORS 109.741 to 109.771. The order remains in effect until an order is obtained from the other court or the period expires. [1999 c.649 §26]

Note: See note under 109.701.

109.787 Registration of child custody determination; notice; hearing. (1) A child custody determination issued by a court of another state may be registered in this state, with or without a simultaneous request for enforcement, by sending to any circuit court in this state:

(a) A letter or other document requesting registration;

(b) Two copies, including one certified copy, of the determination sought to be registered and a statement under penalty of perjury that to the best of the knowledge and belief of the person seeking registration the order has not been modified; and

(c) Except as otherwise provided in ORS 109.767, the name and address of the person seeking registration and any parent or person acting as a parent who has been awarded custody, parenting time or visitation in the child custody determination sought to be registered.

(2) On receipt of the documents required by subsection (1) of this section, the registering court shall cause the determination to be filed as a foreign judgment, together with one copy of any accompanying documents and information, regardless of their form.

(3) The person seeking registration of a child custody determination shall serve notice upon the persons named under subsection (1)(c) of this section notifying them of the opportunity to contest the registration in accordance with this section.

(4) The notice required by subsection (3) of this section must state that:

(a) A registered determination is enforceable as of the date of the registration in the same manner as a determination issued by a court of this state;

(b) A hearing to contest the validity of the registered determination must be requested within 21 days after service of notice; and

(c) Failure to contest the registration will result in confirmation of the child custody determination and preclude further contest of that determination with respect to any matter that could have been asserted.

(5) A person seeking to contest the validity of a registered order must request a hearing within 21 days after service of the notice. At that hearing, the court shall confirm the registered order unless the person contesting registration establishes that:

(a) The issuing court did not have jurisdiction under ORS 109.741 to 109.771;

(b) The child custody determination sought to be registered has been vacated, stayed or modified by a court having jurisdiction to do so under ORS 109.741 to 109.771; or

(c) The person contesting registration was entitled to notice, but notice was not given in accordance with the standards of ORS 109.724, in the proceedings before the court that issued the order for which registration is sought.

(6) If a timely request for a hearing to contest the validity of the registration is not made, the registration is confirmed as a matter of law and the person requesting registration and all persons served must be notified of the confirmation.

(7) Confirmation of a registered order, whether by operation of law or after notice and hearing, precludes further contest of the order with respect to any matter that could have been asserted at the time of registration. [1999 c.649 §27]

Note: See note under 109.701.

109.790 [1973 c.375 §9; 1997 c.707 §24; repealed by 1999 c.649 §55]

109.791 Enforcement of registered determination. (1) A court of this state may grant any relief normally available under the law of this state to enforce a registered child custody determination made by a court of another state.

(2) A court of this state shall recognize and enforce, but may not modify, except in accordance with ORS 109.741 to 109.771, a registered child custody determination of a court of another state. [1999 c.649 §28]

Note: See note under 109.701.

109.794 Simultaneous proceedings. If a proceeding for enforcement under ORS 109.774 to 109.827 is commenced in a court of this state and the court determines that a proceeding to modify the determination is pending in a court of another state having jurisdiction to modify the determination under ORS 109.741 to 109.771, the enforcing court shall immediately communicate with the modifying court. The proceeding for enforcement continues unless the enforcing court, after consultation with the modifying court, stays or dismisses the proceeding. [1999 c.649 §29]

Note: See note under 109.701.

109.797 Expedited enforcement of child custody determination. (1) A petition under ORS 109.774 to 109.827 must be verified. Certified copies of all orders sought to be enforced and of any order confirming registration must be attached to the petition. A copy of a certified copy of an order may be attached instead of the original.

(2) A petition for enforcement of a child custody determination must state:

(a) Whether the court that issued the determination identified the jurisdictional basis it relied upon in exercising jurisdiction and, if so, what the basis was;

(b) Whether the determination for which enforcement is sought has been vacated, stayed or modified by a court whose decision must be enforced under ORS 109.701 to 109.834 and, if so, must identify the court, the case number and the nature of the proceeding;

(c) Whether any proceeding has been commenced that could affect the current proceeding, including proceedings relating to domestic violence, protective orders, termination of parental rights and adoptions and, if so, must identify the court, the case number and the nature of the proceeding;

(d) The present physical address of the child and the respondent, if known;

(e) Whether relief in addition to the immediate physical custody of the child and attorney fees is sought, including a request for assistance from law enforcement officials and, if so, the relief sought; and

(f) If the child custody determination has been registered and confirmed under ORS 109.787, the date and place of registration.

(3) Upon the filing of a petition, the court shall issue an order directing the respondent to appear in person with or without the child at a hearing and may enter any order necessary to ensure the safety of the parties and the child. If the court issues an order, the order shall be served in the manner the court determines to be appropriate under the circumstances of the case and may include service by the sheriff. The person requesting the order shall pay the costs of service. The court shall hold the hearing as soon as reasonably possible and shall expedite the hearing if it finds an emergency is present.

(4) An order issued under subsection (3) of this section must state the time and place of the hearing and advise the respondent that at the hearing the court will order that the petitioner may take immediate physical custody of the child and will order the payment of fees, costs and expenses under ORS 109.811, and may schedule a hearing to determine whether further relief is appropriate, unless the respondent appears and establishes that:

(a) The child custody determination has not been registered and confirmed under ORS 109.787 and that:

(A) The issuing court did not have jurisdiction under ORS 109.741 to 109.771;

(B) The child custody determination for which enforcement is sought has been vacated, stayed or modified by a court having jurisdiction to do so under ORS 109.741 to 109.771; or

(C) The respondent was entitled to notice, but notice was not given in accordance with the standards of ORS 109.724, in the proceedings before the court that issued the order for which enforcement is sought; or

(b) The child custody determination for which enforcement is sought was registered and confirmed under ORS 109.787, but has been vacated, stayed or modified by a court of a state having jurisdiction to do so under ORS 109.741 to 109.771. [1999 c.649 §30]

Note: See note under 109.701.

109.800 [1973 c.375 §10; 1997 c.707 §25; repealed by 1999 c.649 §55]

109.801 Service of petition and order. Except as otherwise provided in ORS 109.807, the petition and order for enforcement of a child custody determination must

be served by the petitioner, by any method authorized for service of process within this state, upon the respondent and any person who has physical custody of the child. [1999 c.649 §31]

Note: See note under 109.701.

109.804 Immediate physical custody of child allowed; exceptions; spousal privilege not allowed in certain proceedings. (1) Unless the court issues a temporary emergency order under ORS 109.751, upon a finding that a petitioner is entitled to immediate physical custody of the child under the controlling child custody determination, the court shall order that the petitioner may take immediate physical custody of the child unless the respondent establishes that:

(a) The child custody determination has not been registered and confirmed under ORS 109.787 and that:

(A) The issuing court did not have jurisdiction under ORS 109.741 to 109.771;

(B) The child custody determination for which enforcement is sought has been vacated, stayed or modified by a court of a state having jurisdiction to do so under ORS 109.741 to 109.771; or

(C) The respondent was entitled to notice, but notice was not given in accordance with the standards of ORS 109.724, in the proceedings before the court that issued the order for which enforcement is sought; or

(b) The child custody determination for which enforcement is sought was registered and confirmed under ORS 109.787, but has been vacated, stayed or modified by a court of a state having jurisdiction to do so under ORS 109.741 to 109.771.

(2) The court shall award the fees, costs and expenses authorized under ORS 109.811, may grant additional relief, including a request for the assistance of law enforcement officials, and may set further hearings, if necessary, to determine whether additional relief is appropriate.

(3) A privilege against disclosure of communications between spouses and a defense of immunity based on the relationship of husband and wife or parent and child may not be invoked in a proceeding under ORS 109.774 to 109.827. [1999 c.649 §32]

Note: See note under 109.701.

109.807 Warrant to take physical custody of child. (1) Upon the filing of a petition seeking enforcement of a child custody determination, the petitioner may file a verified application for the issuance of a warrant to take physical custody of the child if the child is immediately likely to suffer serious physical harm or be removed from this state.

(2) If the court, upon the testimony of the petitioner or other witness, is satisfied that there is probable cause to believe that the child is imminently likely to suffer serious physical harm or be removed from this state, it may issue a warrant to take physical custody of the child. The petition must be heard on the next judicial day after the warrant is executed unless that date is impossible. In that event, the court shall hold

the hearing on the first judicial day possible. The application for the warrant must include the statements required by ORS 109.797 (2).

(3) A warrant to take physical custody of a child must:

(a) Recite the facts upon which a conclusion of imminent serious physical harm or removal from the jurisdiction is based;

(b) Direct law enforcement officers to take physical custody of the child immediately; and

(c) Provide for the placement of the child pending final relief.

(4) The respondent must be served with the petition, warrant and order immediately after the child is taken into physical custody.

(5) A warrant to take physical custody of a child is enforceable throughout this state. If the court finds on the basis of the testimony of the petitioner or other witness that a less intrusive remedy is not effective, it may authorize law enforcement officers to enter private property to take physical custody of the child. If required by exigent circumstances of the case, the court may authorize law enforcement officers to make a forcible entry at any hour.

(6) The court may impose conditions upon placement of a child to ensure the appearance of the child and the child's custodian. [1999 c.649 §33]

Note: See note under 109.701.

109.810 [1973 c.375 §11; repealed by 1999 c.649 §55]

109.811 Costs, fees and expenses. (1) The court shall award the prevailing party, including a state, necessary and reasonable expenses incurred by or on behalf of the party, including costs, communication expenses, attorney fees, investigative fees, expenses for witnesses, travel expenses and child care expenses during the course of the proceedings, unless the party from whom fees or expenses are sought establishes that the award would be clearly inappropriate. An award may be inappropriate if the award would cause the parent or child to seek public assistance.

(2) The court may not assess fees, costs or expenses against a state unless authorized by law other than ORS 109.701 to 109.834. [1999 c.649 §34]

Note: See note under 109.701.

109.814 Recognition and enforcement. A court of this state shall accord full faith and credit to an order issued by another state and consistent with ORS 109.701 to 109.834 that enforces a child custody determination by a court of another state unless the order has been vacated, stayed or modified by a court having jurisdiction to do so under ORS 109.741 to 109.771. [1999 c.649 §35]

Note: See note under 109.701.

109.817 Appeals. An appeal may be taken from a final order in a proceeding under ORS 109.774 to 109.827 in accordance with ORS chapter 19. Unless the court

enters a temporary emergency order under ORS 109.751, the enforcing court may not stay an order enforcing a child custody determination pending appeal. [1999 c.649 §36]

Note: See note under 109.701.

109.820 [1973 c.375 §12; repealed by 1999 c.649 §55]

109.821 Role of district attorney. (1) In a case arising under ORS 109.701 to 109.834 or involving the Hague Convention on the Civil Aspects of International Child Abduction, the district attorney may take any lawful action, including resort to a proceeding under ORS 109.774 to 109.827 or any other available civil proceeding, to locate a child, obtain the return of a child or enforce a child custody determination if there is:

- (a) An existing child custody determination;
- (b) A request to do so from a court in a pending child custody proceeding;
- (c) A reasonable belief that a criminal statute has been violated; or
- (d) A reasonable belief that the child has been wrongfully removed or retained in violation of the Hague Convention on the Civil Aspects of International Child Abduction.

(2) A district attorney acting under this section acts on behalf of the state to protect the state's interest in the enforcement of ORS 109.701 to 109.834 and may not represent any party. [1999 c.649 §37]

Note: See note under 109.701.

109.824 Role of law enforcement officer. At the request of a district attorney acting under ORS 109.821, a law enforcement officer may take any lawful action reasonably necessary to locate a child or a party and assist a district attorney with responsibilities under ORS 109.821. [1999 c.649 §38]

Note: See note under 109.701.

109.827 Costs and expenses of district attorney and law enforcement officers. If the respondent is not the prevailing party, the court may assess against the respondent all direct expenses and costs incurred by the district attorney and law enforcement officers under ORS 109.821 or 109.824. [1999 c.649 §39]

Note: See note under 109.701.

109.830 [1973 c.375 §13; repealed by 1999 c.649 §55]

(Miscellaneous Provisions)

109.831 Application and construction. In applying and construing ORS 109.701 to 109.834, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it. [1999 c.649 §40]

Note: See note under 109.701.

109.834 Severability clause. If any provision of ORS 109.701 to 109.834 or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of ORS 109.701 to 109.834 that can be given effect without the invalid provision or application, and to this end the provisions of ORS 109.701 to 109.834 are severable. [1999 c.649 §41]

Note: See note under 109.701.

109.840 [1973 c.375 §14; repealed by 1999 c.649 §55]

109.850 [1973 c.375 §15; 1981 c.897 §36; repealed by 1999 c.649 §55]

109.860 [1973 c.375 §16; repealed by 1999 c.649 §55]

109.870 [1973 c.375 §17; repealed by 1999 c.649 §55]

109.880 [1973 c.375 §18; repealed by 1999 c.649 §55]

109.890 [1973 c.375 §19; repealed by 1999 c.649 §55]

109.900 [1973 c.375 §20; repealed by 1999 c.649 §55]

109.910 [1973 c.375 §21; repealed by 1999 c.649 §55]

109.920 [1973 c.375 §22; repealed by 1999 c.649 §55]

109.930 [1973 c.375 §24; repealed by 1999 c.649 §55]

PENALTY

109.990 Penalty. (1) A person who violates ORS 109.311 (3) or who submits a false statement under ORS 109.311 (1) commits a Class C felony.

(2) A person who violates any provision of ORS 109.311 (4) or 109.502 to 109.507 or any rule adopted pursuant to ORS 109.506 commits a Class A misdemeanor. [1985 c.403 §2 (4); 1993 c.717 §5; subsection (3) of 1993 Edition enacted as 1993 c.410 §9; 1995 c.79 §44; 1995 c.730 §4]

Note: See note under 109.425.