



# Filling the Gaps with Public Policy: the Application of the Hague Convention Protocol in US Courts in the Absence of a Co-Signing State

Andrew A. Zashin, Christopher R. Reynolds, and  
Amy M. Keating<sup>†</sup>

Zashin & Rich Co., L.P.A., 950 Main Avenue, 4th Floor, Cleveland, OH 44113, USA

<sup>†</sup>Corresponding author. E-mail: amk@zrlaw.com

## ABSTRACT

This article will consider a possible avenue for filling ‘gaps’ when the 1980 Hague Abduction Convention or the 1996 Child Protection Convention do not apply in child custody/abduction cases. Specifically, it will explore utilizing internal US domestic relations law to facilitate the return of a child who has been abducted to the USA from a non-signatory country. To better illustrate the potential effects, the article will explore this ‘gap filler’ through the lens of a case study involving Japan, the most prominent first world country that is not yet a signatory to the Convention. The article also considers the implications for the international community.

## I. INTRODUCTION

This article will consider a possible avenue for filling ‘gaps’ when the 1980 Hague Abduction Convention (hereinafter ‘Convention’) or the 1996 Child Protection Convention<sup>1</sup> do not apply in child custody/abduction cases where the child is abducted to the USA. Specifically, it will explore utilizing internal US domestic relations law, specifically the Uniform Child Custody Jurisdiction and Enforcement Act, to facilitate the return of a child who has been abducted to the USA from a non-signatory country. Using US law in this way should effectuate a return of a child tantamount to a return under the Convention.

This use supports the spirit of the Convention and of the majority of US states’ laws by ensuring that the nation/jurisdiction where the child has primarily resided

and has significant connections makes decisions concerning custody of that child. This mechanism presents an alternative to the 'best interests' argument alone via a jurisdictional challenge to be used by Americans and foreign nationals alike in the USA. In effect, it prevents a 'best interests' determination in the USA from occurring when the USA is not the appropriate forum to make this determination.

## II. CASE STUDY: ILLUSTRATING THE 'GAP' PROBLEM

Perhaps the best way to explore this 'gap filler' is through the lens of a case study involving a child abducted from Japan, the most prominent first world country that, when this article was drafted, was not yet a signatory to the Convention,<sup>2</sup> to the USA. The following represents the operational facts necessary to properly frame the issue for present purposes, albeit without personal or other identifying information.

The case involves a dual citizen female child ('Child'), aged 6 years at the time of abduction. The child's father ('Father') is native Japanese and her mother ('Mother') is American. Father was born and raised in western/central Honshu outside a metropolitan area. Mother was born and raised primarily in Florida, though she spent a brief period in central Ohio. Father and Mother met in the USA while Father was on an extended work assignment. After a relatively short, and at times long distance, courtship, Father and Mother married in the USA. However, within months of marrying, the couple moved to Tokyo (where Father had been living and working since 1990). Sometime during 2004, Mother found out she was pregnant. The couple decided Mother would deliver the child in Florida so she could be close to family. Mother was in the USA making preparations when the child was born premature in May 2005. Father flew to the USA and spent several weeks with Mother and Child. Ultimately, the entire family returned to Japan in approximately July 2005. Other than at least annual trips to the USA to visit Mother's family, Child had spent the overwhelming majority of her life in Japan with her parents. Her permanent residence had always been in Japan. The child has/had extended paternal family in Japan, attended school in Japan, and was fully integrated into her life in Japan.

Mother and Father's relationship was a tumultuous one. Retrospectively, there were several allegations made by each parent against the other regarding physical abuse, as well as several instances where one parent would accuse the other of withholding or attempting to withhold the child. In fact, at one point Mother took Child's US passport from the family's safe and refused to return it. Due to the ongoing relational stress, and after the 2011 earthquake and ensuing tsunami, the family relocated to live with Father's family in Japan. Upon arrival, Mother refused to reside in Father's family's house, so Father obtained an apartment for Mother, but refused to allow Child to spend the night with Mother or see Mother out of fear that Mother would abscond with Child, using the passport. After several months, and without Father's knowledge or consent, Mother succeeded, abducted the child and fled to the USA. Mother admittedly engaged in efforts to conceal her and Child's location after leaving Japan. Mother left no indication for Father that she left Japan or where she was going. Mother further admitted that while she could have sent Father an email or otherwise communicated to him or his family that she and Child were safe, she made no such effort. After several months of searching and hiring a private

investigator, Father ultimately learned that Mother was living with the child near Columbus, Ohio, in the USA since mid-August 2011.

As Japan was not a signatory of the Convention,<sup>3</sup> Father filed a series of legal proceedings in Ohio in early January 2012. While Father initially alleged that Ohio had proper jurisdiction to make a custody determination (and arguing the court should award custody solely to him), when Mother filed her predictable counterclaim for custody, Father asserted an affirmative defence, using Ohio state law,<sup>4</sup> that Ohio is without subject matter jurisdiction to make any final custody determinations concerning his child and that Japan is the only appropriate jurisdiction to do so. Subsequently, Father instituted custody proceedings in Japan.<sup>5</sup>

At trial in Ohio, Father argued that Ohio is without subject matter jurisdiction to determine the child's custody and requested that the Ohio Court issue an order determining Japan to be the child's home state and permitting Father to arrange for the child's return for further proceedings in the Japanese courts.<sup>6</sup>

### III. IDENTIFYING THE PROBLEM

Under the Convention, a return of the child to Japan would have been virtually guaranteed so that Japan – where the child had lived the great majority of her life – could make a custody determination. Instead, because Japan was not a signatory to the Convention, Father was functionally left without a mechanism to bring his daughter back, at least not without the USA actually making a determination on the merits of the competing custody claims. In essence, the single fact that completely changes the outcome for this family and for this child is that Japan was not a signatory to the Convention.

The authors recognize that there are a host of policy reasons why signatory nations are treated differently than non-signatory nations. However, for purposes of this discussion, we ask that you suspend those ideas, at least for now. We ask that you focus on the more human and moral questions that this problem presents for all of us. Specifically, *should* this child and this family be treated 'differently' simply because Japan was not a signatory to the Convention? Put another way, if there is virtual unanimity that, factually, this case belongs in the Japanese courts why, as a matter of law, should that not be the result?

If we go 'back to basics' and focus on the essential purposes of the Convention and the problems it sought to remedy, we remember that, collectively, the Convention drafters, proponents, signatories and subsequent ratifying nations determined that it was important and necessary to keep children from being pawns in both parental and political conflicts. If we agree that certain behaviours on the part of a parent – ie to cross a border to gain some form of custody advantage – are inherently wrong, are not they wrong regardless of whether that parent left a signatory or non-signatory nation? With all of that in mind, we query: does a legal framework exist that would approximate the same result that could be obtained using the Convention and to obtain what we have collectively determined is the appropriate result? In the USA, we propose that the answer already exists. We believe that USA internal law *can* serve as a mechanism to do just that; specifically, the Uniform Child Custody Jurisdiction and Enforcement Act ('UCCJEA') is an answer.

#### IV. UCCJEA: A PRIMER

The UCCJEA is a state-level jurisdictional statute that confers subject matter jurisdiction by way of forum selection. It has been adopted by almost every state [49 states, DC, Guam and the US Virgin Islands] with essentially the same language since it was originally promulgated in 1997.<sup>7</sup> In Ohio, the UCCJEA is codified in Ohio Revised Code §3127.01-3127.53. In addition to other things, the UCCJEA determines which state has proper jurisdiction to make an initial determination of child custody. To do that in the usual course,<sup>8</sup> the analysis focuses on the geographic locus of the child and the amount of time the child resided in that location to make this determination. Once a state obtains and exercises custody jurisdiction, it maintains exclusive, continuing jurisdiction over custody matters unless certain exceptions apply. Even if a state obtains the right to exercise jurisdiction but has not yet exercised it, it maintains super priority over any other place until it either exercises its jurisdiction or loses that priority. The UCCJEA provides the framework for determination of which state may enter a child custody order; it rejects using a 'best interests' standard in determining jurisdiction to avoid ruling on the merits of a custody dispute.<sup>9</sup>

The UCCJEA is the most recent iteration of law that has been in effect since 1968. At that time, the National Conference of Commissioners on Uniform State Laws promulgated the Uniform Child Custody Jurisdiction Act ('UCCJA'). The UCCJA was subsequently adopted by all 50 states and the District of Columbia (Blumberg, 2103). The UCCJA addressed the increased mobility of parents and the negative results thereof, namely kidnapping of children by parents looking to re-litigate custody determinations in a more favourable forum.<sup>10</sup> The UCCJA sought to accomplish the following goals: allowing only one state to exercise jurisdiction to decide a child custody case; protect the resulting custody order from modification in other states unless certain criteria were met; deter interstate jurisdictional competition or parental abduction; promote cooperation between courts; avoid re-litigation of custody decisions; and assure that litigation takes place in the state with the closest connection to the child and the best access to evidence concerning the child (Blumberg, 2013). Unfortunately, the UCCJA left some uncertainty about two different bases for exercising custody jurisdiction,<sup>11</sup> leading to inconsistent results and case law.

In 1980, US Congress enacted the Parental Kidnapping Prevention Act ('PKPA').<sup>12</sup> The PKPA had similar purposes as the UCCJA, but was federal in nature and preempted any conflicting state law. The PKPA also differed slightly from the UCCJA in the following ways: emphasizing the priority of where the child had resided for the six months preceding the filing of the custody action and emphasizing that jurisdiction's exclusive, continuing jurisdiction over custody.<sup>13</sup> In light of the PKPA and almost 30 years of inconsistent case law under the UCCJA, the UCCJEA was promulgated in 1997.<sup>14</sup> The UCCJEA intended to reconcile the UCCJA with the PKPA, especially by emphasizing the priority of the child's 'home state'. The UCCJA's two sources of potential initial custody jurisdiction were refined, clarified, and, in fact, reordered. In the end, the child's 'home state' has super priority.

## V. CORRELATIONS BETWEEN THE UCCJEA AND THE CONVENTION

The UCCJEA and the Convention share similar purposes and policy goals. The UCCJEA seeks to avoid jurisdictional conflict and competition, to deter abductions of children, and to prevent forum shopping.<sup>15</sup> As detailed by its history above, the UCCJEA has evolved to address custody jurisdiction forum issues in an increasingly mobile society. Similarly, the Convention was expressly designed to protect children from the harmful effects of their wrongful removal by establishing procedures to ensure the child's prompt return.<sup>16</sup> To achieve this, the Convention seeks to deter abductions of children<sup>17</sup> and its fundamental purpose is to deter parents from engaging in forum shopping and to prevent parents from securing an advantage in an anticipated or actual custody dispute by crossing international borders in search of a more sympathetic court.<sup>18</sup> The underlying purposes and policies of the UCCJEA and the Convention are remarkably similar and simple: both seek to minimize and deter jurisdictional conflict for the child's benefit.

For both the UCCJEA and the Convention, the pivotal determination concerning *where* a custody matter should be decided focuses on geographic locus and time. The UCCJEA puts great emphasis on the geographic location where the child has resided for a sufficient period of time prior to the filing of a custody action. The UCCJEA provides four types of initial jurisdiction.<sup>19</sup> The first and most important type of initial jurisdiction is 'home state' jurisdiction. The term 'home state' is defined as 'the state in which a child lived with a parent...for at least six consecutive months immediately preceding the commencement of a child custody proceeding and, if a child is less than six months old, the state in which the child lived from birth...'.<sup>20</sup> If there is a 'home state' of a child or if there was a home state of the child within six months before the commencement of the proceeding, that place is the appropriate jurisdiction to make an initial custody determination concerning that child;<sup>21</sup> all other types of jurisdiction only apply if a 'home state' has declined to exercise that jurisdiction or the child does not have a 'home state'. By focusing on *where* the child has resided for a period of time, the UCCJEA seeks to ensure that the state/place with optimum access to relevant facts and information about the child makes the custody determination.<sup>22</sup>

Similarly, the Convention's core concern is the child's 'habitual residence',<sup>23</sup> and the overwhelming remainder of issues in a Convention case revolve around that nucleus. While the term 'habitual residence' is not formally defined in the Convention or elsewhere, it is a fact-intensive determination that considers geographic location and the passage of time.<sup>24</sup> US case law has described 'habitual residence' to include: the change of geography/geographic location; the passage of time in a particular location; evidence of a significant connection with a particular place; and considering these issues of connection through the viewpoint of the child.<sup>25</sup> The Convention also relies on the presumption that a child's best interest is served by the court with optimum access to information and evidence about the child and his/her life.<sup>26</sup> The definition of 'habitual residence', then, is directly shaped by the overarching goals of the Convention. The authors recognize that 'habitual residence' and 'home state' are not one and the same. The definition of 'home state' is more formulaic and precise, relying on where the child has lived for a specifically prescribed period of time.<sup>27</sup> 'Habitual residence' is a fact-intensive determination that relies on more subjective

concepts.<sup>28</sup> Despite some differences, both terms share the same conceptual core; both seek to determine which jurisdiction has the greatest connection to the child at issue by focusing on the intersection between geographic location and time spent in said location.

Both the UCCJEA and the Convention emphasize the importance of exclusive jurisdiction over custody matters. Under the UCCJEA, the state/place that exercises appropriate custody jurisdiction – often the child’s ‘home state’ – maintains exclusive, continuing jurisdiction over custody matters unless specific exceptions apply.<sup>29</sup> The Convention also envisions that the courts of a country exercising appropriate jurisdiction (the child’s ‘habitual residence’) has exclusive jurisdiction over child custody.

## VI. UCCJEA: APPLICABILITY TO THE INTERNATIONAL SCENE

So, one might ask: How does the UCCJEA – which deals with forum determination between United States’ states – have any bearing on the international community? The UCCJEA answers that question through its text: foreign nations are treated as ‘states’ under the UCCJEA.<sup>30</sup> One of the primary tenets of statutory construction in the USA is that the plain, unambiguous text of a statute should be conclusive.<sup>31</sup> The language of the UCCJEA unambiguously declares that foreign nations shall be treated as states, showing a clear legislative intent that the principles of the UCCJEA should apply in international border-crossing situations. The plain text by itself is conclusive; one can only conclude that the legislative body contemplated the UCCJEA’s application in international abduction cases. Moreover, the Comments to the model UCCJEA promulgated in 1997 clearly indicate that the UCCJEA will have international application.<sup>32</sup> The express language of the statute confirms the intention to treat the UCCJEA as an analogue to the Convention – and the intention that the UCCJEA be used in international border-crossing scenarios.

## VII. ‘UNJUSTIFIABLE CONDUCT’

The UCCJEA contains a provision that states that if a court has jurisdiction because a person seeking to evoke its jurisdiction has engaged in ‘unjustifiable conduct’, the court shall decline to exercise its jurisdiction unless specific exceptions apply. ‘Unjustifiable conduct’ is defined as ‘conduct by a parent or that parent’s surrogate that attempts to create jurisdiction in this state by removing the child from the child’s home state, secreting the child, retaining the child, or restraining or otherwise preventing the child from returning to the child’s home state in order to prevent the other parent from commencing a child custody proceeding in the child’s home state’.<sup>33</sup> The unjustifiable conduct provision construed together with home state prioritization is intended to prevent parents from abducting their children or engaging in reprehensible conduct such as removing, secreting, retaining, or restraining children in order to establish jurisdiction.<sup>34</sup> The Comments to section 208 of the model UCCJEA state that the focus of the section is the *conduct* of the parent in question and that abducting parents will not receive an advantage for their conduct,<sup>35</sup> showing legislative intent concerned with the wrongful conduct of the abducting parent and with preventing said parent from being rewarded.

This language in the UCCJEA is strikingly similar to the language of the Convention, which seeks to secure the prompt return of children wrongfully removed to, or retained in, any Contracting State.<sup>36</sup> The Convention defines ‘wrongful’ as a breach of custody rights under the laws of the child’s habitual residence immediately before the removal or retention.<sup>37</sup> The Convention does not require *mens rea*; the removal or retention may be wrongful even if the party is unaware of the existence of custody rights of the other party. However, the Convention does focus on the conduct and actions of the removing parent. If that conduct constitutes a wrongful removal or retention, it cannot stand. The removing/retaining parent cannot benefit from his/her actions. The ‘unjustifiable conduct’ provision in the UCCJEA echoes the Convention with a focus on the following: wrongful removal/retention should not be rewarded, forum shopping should be deterred, and the child’s *status quo* should be maintained.

#### VIII. HOW CAN THIS BE USED TO APPROXIMATE A RETURN UNDER THE CONVENTION?

The UCCJEA does not expressly provide that a court has the power to order the return of a child to that child’s ‘home state’; however, we believe that the UCCJEA does assert an implied power to order a child’s return. When several sections of the UCCJEA are read in concert with one another and against the backdrop of the purpose and policies underlying the Act, those sections clearly create authority courts *must* possess to remedy identified problems. The UCCJEA states that a court ‘may fashion an appropriate remedy to ensure the safety of a child and prevent the repetition of conduct, including staying the proceeding until a child custody proceeding is commenced in a court having jurisdiction’.<sup>38</sup> The plain language of this text – *safety of a child* and *prevent the repetition of conduct* – was specifically chosen to echo the language surrounding the Convention. Given all of the similarities between the UCCJEA and the Convention, an order to return a child to his/her ‘home state’ is an appropriate remedy to ensure the safety of that child and prevent the repetition of the removing parent’s conduct.<sup>39</sup>

While a non-‘home state’ court does not have jurisdiction to determine the *merits* of a custody determination, that court is not completely powerless. The UCCJEA expressly gives a court power to ‘fashion an appropriate remedy’ to ensure the child’s safety and to prevent repetition of the abducting parent’s conduct. This shows an intention to give the non-‘home state’ court the power to issue orders concerning the parties and the child, specifically orders focused on redirecting the custody determination back to the appropriate forum and not rewarding the actions of the abducting parent. Moreover, the statute’s use of the language – ‘fashion an appropriate remedy’ – suggests the non-‘home state’ court is given broad power and discretion to determine what remedy is appropriate and how it should be implemented. The statute itself chooses not to define the terms ‘appropriate remedy’; the absence of a definition of this phrase cedes the authority to make this determination to the court based on the factual circumstances presented. In addition, nothing in the statute expressly limits what ‘appropriate remedy’ can include. While no formal definition is provided, the Comments to section 208 of the model UCCJEA state that ‘it would be

appropriate [when a court declines to exercise jurisdiction] to notify the other parent and to provide for foster care for the child until the child is *returned* to the other parent<sup>40</sup> (emphasis added). These Comments show that the broad authority granted to the non-‘home state’ court includes the power to return the child to the left-behind parent. The intention to provide the non-‘home state’ with broad discretion under these circumstances is consistent with the other provisions of the UCCJEA (and how they have been interpreted and applied), including provisions emphasizing the exclusive jurisdiction of the child’s ‘home state’ and declining jurisdiction when one parent has engaged in ‘unjustifiable conduct’.

The non-‘home state’ court *can* issue orders concerning the parties and the child – just not orders that make a determination about the *merits* of the custody determination. We believe that this includes the ability to issue an order returning the child to his or her ‘home state’. It should also include issuing orders concerning the mechanics of the return, including the ability to issue an order that the abducted-from parent can transport the child back to his or her ‘home state’. This is the appropriate application of the law, entirely consistent with intent of the original drafters of the UCCJEA.<sup>41</sup> Even if one does not believe that the court’s power is *that* affirmative, the court could issue orders stating that the abducting parent cannot interfere with the other parent transporting the child back to his/her ‘home state’ (ie putting the child on a plane).

We recognize that this position faces some criticisms and counterarguments. We will address a few of these potential criticisms here with the goal of furthering the ongoing discussion about these issues. First, using the UCCJEA to effectuate a return similar to the Convention does not consider the argument that courts should evaluate the legal system of the nation it is returning the child to. A version of this argument is set forth in [Morley \(2013\)](#) where he emphasizes the importance of US courts evaluating the legal system of foreign nations to determine whether a custody order will be recognized and/or enforced in said foreign nation. He asserts that while courts are often reluctant to engage in this evaluation, it is a critical assessment. Morley also reminds us that the UCCJEA is an unusual statute when considered from a global perspective; most ‘foreign countries do not have laws that parallel the UCCJEA’s rules concerning recognition, registration and enforcement of foreign custody orders’. Instead, nations may have laws that permit modification of a foreign custody order or do not require its enforcement at all. He also argues the importance of assessing the actual operation of the foreign legal system in question, considering things like speed, presumptions, or deference to its own citizens over that of foreign-born parents.

That article makes many important points and raises thought-provoking questions; however, it is limited to cases concerning a child’s proposed visit to a foreign country or a child’s international relocation. In essence, it involves *prospective* travel to a foreign nation. It involves considering whether a child should be permitted to travel and planning how said travel should be accomplished, if at all. In contrast, our contemplated scenario involves a *remedial* measure – a child has already been abducted from another nation to the USA. The ‘wrong’ has already been done as defined by our public policy. The legal system of the nation where the child should be returned is irrelevant (with some limited exceptions as set forth below). For a US

court to engage in a qualitative valuation of another country's legal system under these circumstances would go against the clear purposes of both the Convention and the UCCJEA. Both emphasize that the jurisdiction where a child has spent a significant portion of his/her life – focusing on geography and time – is the appropriate jurisdiction to make a custody determination. Additionally, both seek to deter abduction and eliminate one parent's ability to gain a custody advantage through 'bad' behaviour. For a US court to evaluate the legal system of a foreign nation prior to effectuating a return, with some limited exceptions, would allow the abducting parent to get a 'pass' for his/her wrongful behaviour simply because that particular court finds fault with the child's 'home state's' legal system.

As stated above, we recognize that both the Convention and the UCCJEA have specific exceptions that address situations where a child cannot be returned to his/her 'home state' or habitual residence safely (ie returning the child to known violence, war, etc.).<sup>42</sup> We argue that those same exceptions should apply when using the UCCJEA to effectuate a return as if under the Convention and are appropriate considerations; however, those exceptions address the actual *environment* where the child is being returned and whether that child's return can be accomplished without seriously compromising his/her safety. While political or national considerations may factor into this assessment, they are not conclusive. The environment to where that child is being returned requires a focus on the specific circumstances of that child, including but not limited to his/her local community within that nation, his/her family, etc. This evaluation is very different than a qualitative evaluation of the legal system of that foreign nation. An assessment of the *substance* of a nation's legal system does not fit into the specific exceptions contemplated by Articles 13(b) and 20 of the Convention. It should not be relevant in addressing and remedying a remedial situation where a child has already been wrongfully abducted to the USA.

Another potential criticism of the position of this article is the argument that the UCCJEA should not be applicable if the foreign nation in question does not have laws in conformity with the UCCJEA. One simple answer to this critique is to point out that nothing in the statute itself requires that the home state have an analogue to the UCCJEA in place in order for the UCCJEA to apply; the UCCJEA simply defers to the super-priority of the 'home state'. Additionally, as [Morley \(2013\)](#) points out, the UCCJEA is more the exception than the rule in the international arena. Refusing to return a child to his/her 'home state' because that 'home state's' legal system does not have an internal law comparable to the UCCJEA – which few nations, if any, do – would contradict the spirit of the Act as well as potentially reward an abducting parent. The authors recognize that the model UCCJEA promulgated in 1997 does state that 'a child-custody determination made in a foreign country under factual circumstances in substantial conformity with the jurisdictional standards of this [Act] must be recognized and enforced under [Article] 3'.<sup>43</sup> Most often, this argument is discussed in the context of enforcing foreign orders (ie whether to enforce a foreign order from a nation that does not have substantial compliance with the UCCJEA); however, the position set forth in this article focuses on situations in which no custody order from any jurisdiction has been issued.

Our focus has admittedly been initial custody determinations where no court orders have been issued concerning the child in question – meaning that no court

has yet invoked custody jurisdiction over the child. The fact pattern we use to illustrate our argument is just that situation. If we extend our argument to circumstances where a prior court order already exists, we believe that the UCCJEA can still be used to obtain a result consistent with US public policy. Specifically, if a prior foreign court order concerning custody already exists, that court has already exercised custody jurisdiction over the child. Its continuing, exclusive jurisdiction should remain in effect unless the specific exceptions of the UCCJEA apply. The US court would not have subject matter jurisdiction over the matter; it could use the UCCJEA to decline custody jurisdiction, thereby deferring to the jurisdiction of the 'home state'. So long as the US court is not being asked to enforce the prior court order, it does not need to address or consider whether that foreign nation is substantially compliant with the UCCJEA. Instead, if the issuing jurisdiction was the 'home state' of the child, the US court is without subject matter jurisdiction. Unless the US court must take emergency custody jurisdiction<sup>44</sup> or the 'home state' court has relinquished jurisdiction, the analysis ends when the court determines it does not have subject matter jurisdiction. The US court can then issue any necessary orders to defer to the 'home state'.

We acknowledge that this legal theory is not yet a 'finished product'. However, it is a defensible idea that *should* work. It is a theory that requires a reasonable – and not excessive – extension of existing internal US law, the UCCJEA. The purposes, policies, and text of the UCCJEA and the Convention are so similar that effectuating a return to the child's 'home state' is a logical extension of the express provisions of the UCCJEA. It is the correct application of existing law and is how the UCCJEA was intended to be applied when a child has been abducted to the USA.<sup>45</sup>

### IX. APPLIED TO THE CASE STUDY

In order to understand how the theory could be applied, we return to the case study presented earlier. Under that fact pattern, Japan – not Ohio – is the 'home state' of the child for purposes of the UCCJEA. To determine the child's 'home state', the proper inquiry is whether the child has resided in a state for a period of six consecutive months prior to the commencement of a child custody proceeding.<sup>46</sup> Furthermore, and most importantly, pursuant to the express terms of the UCCJEA, Ohio courts *must* consider foreign nations as 'states' for purposes of the UCCJEA.<sup>47</sup> In the instant matter, the child had not resided in Ohio for 6 months when the custody action was filed in the Ohio court. Moreover, the salient facts confirmed that the child had spent the great majority of her life in Japan, had family in Japan, and virtually all information regarding the child – ie her medical/dental records, educational information, etc. – existed only in Japan. The child's best interest is served by having the court with optimum access to information and evidence about the child and her life make the custody determination.

Because Japan, not Ohio, is the child's 'home state', the Japanese court has exclusive jurisdictional priority over any custody issues regarding the minor child. The Ohio court lacks any jurisdiction over *the substantive issue of the child's custody*<sup>48</sup> and therefore must defer any determination on that issue to the Japanese courts. No evidence was presented – nor any representation that any such evidence could ever be

presented – that Japan has ever declined to exercise jurisdiction. In fact, Father had instituted custody proceedings in Japan. Even if Ohio had custody jurisdiction under the UCCJEA, Mother had engaged in ‘unjustifiable conduct’, so the Ohio court must decline to exercise jurisdiction. Mother admitted that she secretly removed the child from Japan without the consent of Father, withheld the child’s whereabouts from Father for several months, and admitted at deposition and at trial that by doing these things she was attempting to artificially establish jurisdiction in this state in order to file for divorce and obtain custody of the child with no interference from her husband. She clearly engaged in ‘conduct...that attempt[ed] to create jurisdiction in this state by removing the child from the child’s home state, secreting the child, retaining the child,...and otherwise preventing the child from returning to the child’s home state in order to prevent the other parent from commencing a child custody’. As a result, Ohio cannot reward her conduct and must affirmatively decline to exercise jurisdiction.

While the Ohio court is devoid of custody jurisdiction and cannot issue orders on the *merits*, it still has the power to ‘fashion an appropriate remedy to ensure the safety of a child and prevent the repetition of Mother’s conduct. The Ohio court should issue orders to effectuate the return of the child to Japan so that the Japanese court can exercise custody jurisdiction over the child. This return would be the most ‘appropriate remedy’ under the circumstances; it would return the child to her *status quo* and to her life in Japan. The Ohio court can use its authority to fashion that remedy and issue orders allowing Father to travel with the child back to Japan, preferably affirmative orders ordering the return. Alternatively, the Ohio court can issue orders stating that Mother cannot interfere with Father’s ability to return to Japan with the child. The mere fact that the Convention did not directly apply does not mean that the law and public policy of both Ohio and the USA are irrelevant and/or not controlling. Instead, both Ohio and US law and express public policy (ie the Convention and UCCJEA) demand that the child be returned to her rightful home of Japan so any issue regarding her custody can be addressed by the courts best suited to make such a determination – and her return must happen regardless of whatever legal mechanism is utilized, or however that return is packaged.

## X. CONCLUSION: APPLICABILITY FOR THE INTERNATIONAL COMMUNITY

The solution proposed in this article provides a mechanism to address and remedy a scenario when a child has been abducted to the USA from a nation that is not a signatory to the Convention. It suggests using internal US law to effectuate a return similar to a return via the Convention, arguing that the abducting parent should not be rewarded for his/her wrongful behaviour simply because he/she came from a nation that is not yet a signatory. The fact pattern presented involves Japan, which was not a signatory to the Convention at the time these events unfolded despite its status as a member of the ‘first world’ and a highly developed nation. While Japan was in the process of becoming a signatory at the time this article was being written, this fact pattern is not limited to Japan. It is important to consider that the world is not a static place. Many non-signatory nations are developing rapidly – and their signing

of the Convention lags behind that development. It is only a matter of time before a parent from another developed/developing nation (which has not yet signed the Convention) finds himself/herself in a similar situation, trying to find a legal mechanism to remedy an abduction of a child to the USA.

Arguably, even if a child is abducted to the USA from a signatory nation, the left behind parent could simultaneously use both the existing Convention process and a state court process under the UCCJEA if a stay is not immediately recognized in state court.<sup>49</sup> While the Convention requires an automatic stay of the US court's custody proceeding once a Convention case has commenced, using the UCCJEA to bolster the left-behind parent's arguments and may assist the state court in staying its proceedings more quickly.

Using the UCCJEA to effectuate a return of a child supports the spirit of the Convention and of US law by ensuring that the nation/jurisdiction where the child has primarily resided and has significant connections should make decisions concerning custody of that child. This mechanism provides a jurisdictional challenge to be used by Americans and foreign nationals alike in the USA. It applies to existing US law appropriately and correctly; it uses internal law in a manner consistent with stated purposes and policies. Most importantly, it presents a legal avenue to remedy the abduction of a child to the USA and to ensure that an abducting parent's wrongful conduct is not rewarded simply because he/she came from a non-signatory nation. It is a potential solution to a very glaring 'gap' in the existing legal structure concerning child abduction.

## NOTES

1. The USA signed the 1980 Child Abduction Convention on 23 December 1981 and ratified the same on 29 April 1988. The 1980 Convention entered into force with regard to the USA on 1 July 1988. The USA also signed the 1996 Child Protection Convention on 22 October 2010 but has not ratified it. See [www.hcch.net](http://www.hcch.net).
2. However, Japan signed and ratified the 1980 Convention on 24 January 2014, with the Convention entering into force 1 April 2014. See [http://www.hcch.net/index\\_en.php?act=conventions.status&cid=24](http://www.hcch.net/index_en.php?act=conventions.status&cid=24).
3. All parties in the Ohio litigation agree that if Japan had been subject to the Convention in January 2012, the case would have functionally been over before it started and the child would have been immediately returned to her habitual residence in Japan.
4. Uniform Child Custody Jurisdiction and Enforcement Act, codified in Ohio Revised Code Chapter 3127.01 *et seq.*
5. Father filed for divorce in Japan in June 2012. It is worth noting that due to Father's particular religious beliefs, he struggled with the decision to divorce his wife.
6. The Ohio magistrate erroneously found that Ohio had proper subject matter jurisdiction and awarding custody to Mother. Father has objected to the decision.
7. See <http://law.unh.libguides.com/nhfamilylaw>. The UCCJEA superseded the UCCJA which had been in effect since the 1960s and sought to further create a seamless system by rectifying some of the problems with its predecessor, including those which were attempted to be rectified via the federal Parental Kidnapping Prevention Act (Pub. L. 96-611, 94 Stat. 3573, enacted 28 December 1980, 28 U.S.C. § 1738A). See further, *infra*.
8. There are outlier situations, such as very young children, emergencies involving an abused or neglected child, or where no place actually qualifies as the undisputed best location to determine custody, but these are largely irrelevant to the instant discussion.

9. *Hensley v. Kanizai*, Ala.Civ.App. No. 2120459, 2013 Ala.Civ.App. LEXIS 165 (26 July 2013); *Brandt v. Brandt*, 2012 CO 3, 268 P.3d 406 (2012).
10. *Toland v. Futagi*, 425 Md. 365, 40 A.3d 1051 (2012).
11. The UCCJA provided for two kinds of initial custody jurisdiction: 'home state' jurisdiction and 'significant connection' jurisdiction.
12. 28 U.S.C. 1738A.
13. See 28 U.S.C. §1738A(c)(2)(A).
14. *Toland v. Futagi*, 425 Md. 365.
15. *Upson v. Wallace*, 3 A.3d 1148 (D.C. 2010); *Mulatu v. Grisha*, No. CA2011-07-051, 2011-Ohio-6226; *In re Lewin*, 149 S.W.3d 727 (Tex.2004).
16. *Abdollah Naghash Souratgar v. Fail*, 720 F.3d 96 (2nd Cir. 2013).
17. *Barzilay v. Barzilay*, 600 F.3d 912 (8th Cir. 2010).
18. *Redmond v. Redmond*, 724 F.3d 729 (7th Cir. 2013); *Hofman v. Sender*, 716 F.3d 282 (2nd Cir. 2013); *Selo v. Selo*, 929 F. Supp. 2d 718 (E.D. Mich. 2013).
19. See *In Re J.E.*, No. 97116, 2012-Ohio-704 citing *Rosen v. Celebrezze*, 117 Ohio St.3d 241, 2008-Ohio-853, 883 N.E.2d 420.
20. O.R.C. 3127.01(B)(7).
21. O.R.C. §3127.15(A).
22. *State ex rel Morenz v. Kerr*, 104 Ohio St.3d 148, 2004-Ohio-6208, 818 N.E.2d 1162.
23. *Guzzo v. Cristofano*, 719 F.3d 100 (2nd Cir. 2013).
24. See Atkinson (2011: 648–9). In some borderline cases, policy considerations have also been considered in determining 'habitual residence': see Shuz (2001).
25. *Friedrich v. Friedrich*, 983 F.2d 1396 (6th Cir. 1993); *Pasten v. Velasquez*, 462 F. Supp. 2d 1206 (N.D. Ala. 2006); Atkinson, *The Meaning of Habitual Residence Under the Hague Convention on the Civil Aspects of International Child Abduction and the Hague Convention on the Protection of Children* at 650–7.
26. *Abbott v. Abbott*, 560 U.S. 1, 130 S. Ct. 1983, 176 L.Ed.2d. 789 (2010); *White v. White*, 718 F.3d 300 (4th Cir. 2013); *Barzilay v. Barzilay*, 600 F.3d 912 (8th Cir. 2010).
27. Atkinson (2011: 658–60).
28. *Ibid.*
29. O.R.C. 3127.16; said court maintains exclusive jurisdiction 'until the court 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'.
30. O.R.C. 3127.04.
31. We begin with the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive: *Consumer Product Safety Commission et al. v. GTE Sylvania, Inc. et al.*, 447 U.S. 102, 100 S. Ct. 2051, 64 L.Ed.2d. 766 (1980). '[I]n interpreting a statute a court should always turn to one cardinal canon before all others...[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there.' *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 112 S. Ct. 1146, 117 L.Ed.2d. 391 (1992). Indeed, 'when the words of a statute are unambiguous, then, this first canon is also the last: "judicial inquiry is complete"'.  
 32. Comments to Section 105 of the model UCCJEA, drafted by the National Conference of Commissioners on Uniform State Laws (1997) states that '[t]he provisions of this Act have international application to child custody proceedings and determinations of other countries. Another country will be treated as if it were a State of the United States for purposes of applying Articles 1 and 2 of this Act'.
33. O.R.C. 3127.22(D).
34. *In re the Parental Responsibilities of L.S.*, 257 P.3d.201 (Colo. 2011).

35. Comments to Section 208 of the UCCJEA, drafted by the National Conference of Commissioners on Uniform State Laws (1997).
36. Article I(a) of the Hague Convention.
37. Article III of the Hague Convention.
38. O.R.C.3127.22(B).
39. The US Department of State, Bureau of Consular Affairs, International Parental Child Abduction section compares the Convention and the UCCJEA and offers them as remedies in child abduction scenarios on its website, <http://travel.state.gov/content/childabduction/english/to/getting-your-custody-order-recognized—enforced-in-the-u-s.html>.
40. Comments to Section 208 of the UCCJEA, drafted by the National Conference of Commissioners on Uniform State Laws (1997).
41. Ibid.
42. Article 13(b) of the Hague Convention which does not require return if 'there is grave risk that the child's return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation'; Article 20 of the Hague Convention also does not require return if that return of the child would subject the child to violation of basic human rights and fundamental freedoms. The UCCJEA provides for temporary emergency custody jurisdiction when it is 'necessary to protect the child' who is threatened with or subjected to abuse. O.R.C. 3127.18(A). Moreover, Section 105(c) of the model UCCJEA states that '[a] court of this State need not apply this [Act] if the child custody law of a foreign country violates fundamental principles of human rights'.
43. Section 105 of the UCCJEA, drafted by the National Conference of Commissioners on Uniform State Laws (1997).
44. See O.R.C. 3127.18; in the case of emergency temporary custody jurisdiction, said court may take jurisdiction temporarily until the home state can take action.
45. Comments to Section 208 of the UCCJEA, drafted by the National Conference of Commissioners on Uniform State Laws (1997).
46. See *In Re J.E.*, *supra*; *Mulatu v. Girsha*, No. CA2011-07-051, 2011-Ohio-6226; and *Burnett v. Dewey*, No. S-11-021, 2011-Ohio-4678.
47. See also, eg, *Ogawa v. Ogawa*, 125 Nev. 660, 57 A.L.R.6th 711, 125 Nev. Adv. Rep. 51 (2009) (holding that the UCCJEA considers foreign nations as states).
48. It is important to note that simply because this Court lacks jurisdiction to enter an initial determination does not mean this Court is powerless to act in any capacity. See further discussion, *infra*.
49. Pendency of a Petition for return under the Convention in any US court requires that state court custody proceedings be stayed. See Note 10, Article 16 of the Convention; *Yang v. Tsui*, 416 F.3d 199, 2013 (3rd Cir. 2005).

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