

REPORT OF THE  
COMMISSION ON LEGAL PROBLEMS  
OF THE ELDERLY  
PRESENTED JOINTLY WITH THE  
SECTION OF FAMILY LAW

**RECOMMENDATION\***

*RESOLVED*, That the American Bar Association urges:

- 1) the Senate of the United States to give its advice and consent to the ratification of the Hague Convention on the International Protection of Adults, the final text of which was adopted by the Hague Conference on Private International Law on October 3, 1999; and
- 2) the Congress of the United States to enact legislation implementing fully and uniformly this Convention which concerns the protection of adults who, by reason of an impairment or insufficiency of their personal faculties, are not in a position to protect their personal, health care or property interests in an international context.

**REPORT**

As its title indicates, this new Hague Convention establishes internationally agreed standards and procedures for the exercise of jurisdiction over adults who, by reason of an impairment or insufficiency of their personal faculties, are not in a position to protect their interests. The Convention requires Contracting States to recognize and enforce powers of attorney, judgments and other actions taken by individuals and by Contracting States acting consistently with these jurisdictional provi-

sions. Other provisions of the Convention address choice of law matters, emergency measures, and various methods of cooperation among States.

The basic premise of the Convention gives jurisdiction to the State of the adult's habitual residency to take the necessary protective measures with respect to the adult (Article 5). A second very important provision comes in Article 13 where the Convention recognizes the adult's authority to create powers of attorney,

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\*The recommendation was approved. See page 21.

make a choice of applicable law, and define the manner of exercise of protective measures. All other Contracting States are required to recognize those measures, with limited exceptions (Article 21). Flexibility for the exercise of jurisdiction is offered through two somewhat unique provisions. Article 8 allows the State of habitual residence to request another Contracting State with specified connection to the adult to act in a particular case and Article 9 allows other Contracting States to request the State of habitual residence for authority to act in place of the State habitual residence in a situation where they believe that they are better placed to act. Special provisions for the exercise of jurisdiction in connection with urgent measures are provided in Article 10.

In effect, the Convention acts as both a jurisdiction and recognition convention, providing uniform and standardized bases of jurisdiction for States whose authority and actions must then be recognized by all other Contracting States. The Convention provides an international solution to conflicting assertions of state authority over disputes involving incapacitated adults. The Convention offers to practicing attorneys and their clients a reasonable amount of certainty and predictability with respect to the problem of competing assertions of jurisdictional authority in matters involving the care and protection of incapacitated adults.

Following the completion of the Convention on Jurisdiction, Applicable Law Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children adopted by the Hague Conference on Private International Law on October 19, 1996 which the ABA approved in

August 1997, discussion began regarding the protection of adults. Many of the delegations felt that while the protection of adults could not be included in the Children's Convention it would not be difficult to model a convention for the protection of adults based on the one on children. A drafting group was convened in April 1997 in the Hague to consider modifications to the Children's Convention for application to adults. A special session was then called for September 1997 where the structure for the Adult's Convention was put together.

At the conclusion of a Special Commission of diplomatic character a Final Act on the protection of adults was adopted on October 2, 1999. The proceedings included 31 member States, 6 observer States and a number of non-governmental organizations. By unanimous vote the member States adopted the final text of the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Protection of Adults. Delegations from all of the States indicated their general satisfaction with the completed text and their inclination to sign and eventually to ratify the Convention. This final text completed the project, which had been put on the work agenda at the Eighteenth Session of the Hague Conference on Private International Law.

As adopted, the Convention has seven chapters—Scope, Jurisdiction, Applicable Law, Enforcement, Cooperation, General Clauses and Final Clauses. The title, the Preamble and Chapter I (Scope) make its coverage and purpose clear.

In Chapter I (Articles 1–4), the purpose of the Convention is explained. It is made applicable to incapacitated adults who have reached the

age of 18 (Article 2) and specifies, by example but not exclusively, what is included in the Convention—generally measures for the protection of the person, including health care decisions, or property of the adult (Article 3). Article 4 paragraph 1 lists nine subjects that are specifically excluded from the scope of the Convention. Paragraph 2 in Article 4 emphasizes that if a person has a personal representative this Convention does not prohibit the representative from acting on the person's behalf on any subjects specifically excluded by paragraph 1.

Chapter II on jurisdiction (Articles 5–12) is the core of the convention and establishes “habitual residence” as the primary jurisdictional standard. (Habitual residence is traditionally not defined in Hague conventions; however, the same term was used in the 1996 Protection of Children's Convention). When the adult's habitual residence changes, jurisdiction follows. Where an adult has no habitual residence or it cannot be determined (as in the case of a refugee), the State where the adult is present has jurisdiction. Article 7 grants jurisdiction to the State of the habitual residence independent of nationality. However, the primary jurisdiction of the State of habitual residence is maintained because the State of nationality must notify the State of habitual residence before any measures are taken, and any measures taken must lapse when action is taken by the State of habitual residence. Giving some flexibility to the Convention are two articles which make it possible for the State of habitual residence to transfer jurisdiction to other States with specified connections to the adult when that would be appropriate. Authorities are authorized to communicate

with each other in the application of these articles (Articles 7, 8, and 9). When the adult is merely present in a State, that State may take measures in urgent situations or may take measures of a provisional character with limited territorial effect (Articles 10 and 11). Jurisdiction is determined at the time measures have been requested or required and changes to a second State only if the first State has declined jurisdiction. Measures properly taken remain in effect until changed (Article 12). (Article 3 refers to the types of action that a state might take to protect a person or property. This is known as a measure).

Chapter III (Articles 13–21) deals with applicable law. Article 13 establishes the rule that local law is applied in the exercise of jurisdiction, but permits “exceptionally” the application of the law of another State with which the situation has a substantial connection. Under Article 14, the conditions of the implementation of a measure in another State are governed by the law of that State. Article 15, a most significant provision, provides that the power of representation (attorney) granted by an adult is governed by the law of the State of habitual residence or, when designated in writing by the adult, another State with specified connection to the adult. Thus, even if the adult's habitual residence at the time of the granting of the power is in, or changes to, a State which does not provide for such powers of representation, the granted power is governed by the law of the State where exercised. Article 16 permits modification or withdrawal of such a power only when it is not exercised in a manner to protect the adult, and such a modification or withdrawal must take into consideration the law spec-

ified in Article 15. If a state decides that a power of representation does not cover the presenting situation then the state where the adult is may modify the power of attorney or the measure that was taken by the habitual residence. The validity of a transaction by an unauthorized representative of the adult is protected in limited circumstances (Article 17). The provisions of this Chapter apply even if the law designated by them is the law of a non-Contracting State. Articles 20 and 21 allow States to apply mandatory law and public policy exceptions.

Recognition and enforcement are covered in Chapter IV (Articles 22–27), which generally requires the recognition and enforcement of measures taken in Contracting States under the jurisdictional standards of the Convention; recognition may be refused only for limited and specified reasons (Articles 22 and 25). Any interested person may request a decision from the competent authorities on the application of a measure (Article 23), (a competent authority may be a court of law or an administrative agency and they have the responsibility to recognize an action or measure taken in another State by a court or similar administrative agency) and every State must, on request, declare enforceable or register for enforcement an order of another Contracting State using a simple and rapid procedure (Article 25). The State to which the request is made is bound by the findings of fact on which jurisdiction is based (Article 24), and there shall be no review on the merits of the measure taken (Article 26). Thus, stability in the content of a measure is maintained unless a State assumes jurisdiction through a referral (Article 8) or a change in habitual residence.

Chapter V (Articles 28–37) provides a system of cooperation considered essential to the success of the Convention. The Convention mandates the designation of a central authority for each State (Article 28). Federal States, States with more than one system of law, are free to appoint multiple Central Authorities making sure that there is one through which communication can be assured (Article 28). Central Authorities are required to cooperate and promote cooperation among competent authorities and to provide information on laws and services in their States (Article 29). The Chapter's provisions on cooperation are also available to and are to be utilized not just by appropriate Authorities but also by the public and other bodies and authorities concerned in the measures to be taken. Cooperation includes facilitation of communication by mediation or similar means (Article 31). Cooperation also includes, on request, providing a report on the adult or requesting a competent authority to take measures of protection (Article 32); consulting and obtaining the consent of the competent authority of another state when a placement in an institution is contemplated to take place in that State (Article 33); and the requesting of relevant information from the authority of another State. Article 34 requires a competent authority which has taken or is contemplating taking measures to protect an adult in serious danger to inform the central authority of a State where the adult is present about the danger. Information need not be transmitted under Chapter V if to do so would place the adult in danger (Article 35). Other than reasonable fees for the provision of services, Central Authorities and other public authorities bear

their own costs (Article 36). The Chapter also provides that Contracting States may enter into bilateral or other agreements in relation to costs (Article 36 ¶ 2) or to improve the operation of the Chapter (Article 37).

Chapter VI contains the General Provisions of the Convention including the authority to issue a certificate indicating the capacity and powers of a person to act for the adult (Article 38); the confidentiality of information transmitted (Articles 39 and 40); inability to establish a person's legal status for citizenship purposes (Article 41); and the designation of authorities for certain purposes (Articles 42 and 43). Under Article 44, the internal application of the Convention among the political subdivisions within a Party State is not required, and Articles 45-47 are clauses clarifying the relation of a federal State to its territorial units in reference to relevant law and other factors. The relation to the 1905 Convention *concernant l'interdiction et les mesures de protection analogues*, signed at the Hague 17 July 1905 is clarified in Article 48. This Convention does not affect any other international instrument to which Contracting States are parties nor does it preclude the possibility of agreements by one or more Contracting states which agreements do not affect the relation to other Contracting States on matters covered by the Convention (Article 49). Other Articles provide that the Convention is not retroactive (Article 50); that communications shall be in the language of the State addressed or, where that is not feasible, in French or English to only one of which an objection may be raised (Article 51); and that the Secretary General of the Permanent Bureau of the Hague Conference is to convoke a special

commission at regular intervals to review the operation of the Convention (Article 52).

Chapter VII (Articles 53-59)—Final Clauses—has the usual treaty technical provisions, including its entry into force after three ratifications and descriptions of the required declarations and permitted reservations.

Because widespread ratification of this Convention would provide United States adults with protection, particularly in health care decision making and recognition of powers of representation, which is now lacking, it is desirable for the United States to endorse the Convention as soon as possible. The United States played a prominent role in developing the Convention with the active participation of the American Bar Association Sections of Family Law and International Law and the Commission on Legal Problems of the Elderly. The latter hosted study group meetings to develop United States policy and positions. Members of the seven person United States delegation to the 1999 diplomatic session included four active members of the Sections of Family Law and International Law and the Director of the Commission on Legal Problems of the Elderly.

Endorsement of this Convention is consistent with American Bar Association support for the 1996 Hague Child Protection Convention and with the ABA's support of the 1998 Uniform Guardianship and Protective Proceedings Act.

The American Bar Association supports many of the elements contained in this Hague Convention. The ABA has supported the use of powers of representation for both health care and property management since the early 1980s. Programs and publications put forward by the Commis-

sion on Legal Problems of the Elderly, the Section of Real Property Probate and Trust Law, the Senior Lawyers Division and others have advocated the use of planning documents in order to avoid unnecessary guardianships. The ABA has also been in the forefront of considering guardianship reform that would include many of the due process considerations present in the Hague Convention. The National Commissioners of Uniform State Laws has developed, and the ABA approved two uniform acts that are pertinent to

the Hague Conference report. These include the Uniform Health Care Decisions Act of 1994 and the Uniform Guardianship and Protective Proceedings Act of 1998.

Respectfully submitted,

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*Chair*

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