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Court of Appeals No. 77630-4-I

IN THE SUPREME COURT FOR
THE STATE OF WASHINGTON

Marriage of:

CHANDRA LONG,

Respondent,

and

MICHELANGELO BORRELLO,

Petitioner.

PETITION FOR REVIEW

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INTRODUCTION

The child at issue has lived with her father in Italy since June 2016. The Court of Rome exercised jurisdiction under Article 11 of the Hague Convention on Jurisdiction, allowing it to “take any necessary measures” to protect a child in “cases of urgency.” The Court of Rome found it necessary that A remain in Italy until the Contracting State where she habitually resides makes a final decision addressing the Court of Rome’s concerns. This is consistent with Washington law, preferring the least disruption possible in pre-trial parenting plans. But without addressing the Court of Rome order, the trial court directly contradicted it, ordering A’s immediate relocation to the U.S. pending trial. This offends the doctrine of comity, the HCCH, and the UCCJEA.

The trial court assumed UCCJEA jurisdiction without addressing whether Italy has jurisdiction under Article 5 (placing jurisdiction in the Contracting State where A habitually resides). The appellate court incorrectly held that Washington has Article 5 jurisdiction based on an Italian order addressing A’s habitual residence in 2015. Milan recently asserted Article 5 jurisdiction.

Conflicts abound, and substantial questions require this Court’s determination. This Court should accept review and reverse.

ISSUES PRESENTED FOR REVIEW

1. The 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (“1996 HCCH”) provides that in “all cases of urgency, the authorities of any Contracting State in whose territory the child ... is present have jurisdiction to take any necessary measures of protection.” Art. 11.1. Those measures lapse when the authorities of the Contracting State in which the child habitually resides “have taken the measures required by the situation.” Art. 11.2. (A) Does it violate the doctrine of comity for the superior court to ignore an Article 11 order, and order a child’s immediate relocation before trial, where that child has lived with her father in the Article 11 Contracting State since June 2016? (B) Does the same violate RCW 26.09.197? (C) Does the Article 11 court have the authority to rule that it is in the child’s best interest to remain in one parent’s care, in that Country, until the other Contracting State enters final orders adjudicating the child’s best interests, and must that order be enforced under the UCCJEA?

2. Does it upset the UCCJEA, comity, and Supremacy Clause jurisprudence to apply the UCCJEA rather than the 1996 HCCH to determine jurisdiction over a child?

FACTS RELEVANT TO PETITION FOR REVIEW

The parties' only child "A" was born in Catania, Italy, on March 8, 2009. CP 1106. A holds Italian and American citizenship. CP 557. She lived in Italy for 4.5 years, interrupted only in Spring 2011, when Respondent Chandra Long brought A to Washington on vacation, but wrongfully retained her here. CP 722, 933, 970-72; RP 18-19. On July 18, 2011, the Washington court granted Petitioner Michelangelo Borrello's petition for A's immediate return to Italy, brought under the 1980 Hague Convention on the Civil Aspects of International Child Abduction, ruling that A habitually resided in Italy and that Long wrongfully retained her in Washington. CP 970-72.

Once back in Italy, A remained there until Long relocated with her to Washington in September 2013. ***Marriage of Long v. Borrello***, No. 77630-4-I, 2018 Wn. App. LEXIS 1578, at *3 (July 9, 2018) (attached as App. A); CP 555, 751; RP 19. But when Long repeatedly failed to follow the parties' "consensual separation" agreement, entered in the Court of Rome, Borrello moved the Court of Rome to modify it in April 2015. CP 555, 1103-05, 1115-1129. Long appeared through counsel to contest jurisdiction on the basis that A habitually resided in Washington. CP 555. She did not otherwise participate. CP 505, 562.

Instead, Long filed a dissolution petition in Washington in November 2015. CP 1088-95. One month later, she appealed Rome's decision taking jurisdiction to Italy's highest court, the Court of Cassation. CP 503-04, 505. The Court of Rome continued to move forward with Borrello's motion while Long's appeal was pending, as is permitted. CP 505, 562. Long declined to participate. *Id.*

The Court of Rome ordered, among other things, that A should reside with Borrello. *Id.* The court-appointed psychological evaluator ("CTU") recommended that A live primarily with Borrello, in large part because Borrello was more capable of ensuring that A maintains a relationship with both parties. CP 571. By contrast, Long is incapable of cooperating with Borrello and unconcerned about facilitating his relationship with A. CP 573.

On February 26, 2016, Long filed a Motion for Temporary Orders in Washington despite the proceedings in the Court of Rome and the Cassation Court. CP 750. Borrello moved to dismiss in March, and the Superior Court stayed all proceedings. CP 750-51.

On June 22, 2016, A returned to Italy for her residential time with Borrello. CP 542. One week later, the parties agreed in court that A would reside in Italy for the 2016-2017 school-year. CP 505. The parties affirmed the same on October 11, 2016, specifically

agreeing: (1) that A live with Borrello in Italy until the Cassation Court decided Long's appeal; (2) that Borrello would have "temporary sole custody" of A; (3) that Long would pay 50% of the agreed extraordinary expenses; and (4) that Long would have visitation in Catania, Italy. CP 505, 743. This agreement is documented in multiple court orders. CP 432-33, 557, 562, 743.

A has remained in Italy with Borrello since. CP 372, 505, 562, 743. Despite court orders authorizing visitation, and despite Borrello's invitations, Long never visited. *Id.*

On June 5, 2017, the Cassation Court published its decision that Italy lacked jurisdiction over Borrello's petition to modify the parties' separation agreement, where A lived in Washington in 2015 when Borrello filed.¹ CP 506, 557-58. Shortly thereafter, Borrello moved the Court of Rome to exercise its jurisdiction under the 1996 HCCH Article 11, conferring jurisdiction to any Contracting State² where a child is present to take "any necessary measures of protection" in "cases of urgency":

¹ Although the Court rendered its decision in February, June was the first notice to the parties. CP 506, 558.

² A Contracting State has "consented to be bound by a convention, *whether or not that Convention has entered into force* for that State." **Long** at *6 fn.9 (citing <https://www.hcch.net/en/instruments/conventions/specialised-sections/apostille/faq1>, emphasis original).

In all cases of urgency, the authorities of any Contracting State in whose territory the child or property belonging to the child is present have jurisdiction to take any necessary measures of protection.

CP 561; 1996 HCCH Art. 11.1 (1996 HCCH attached as App. B). On June 21, 2017, the Court of Rome closed proceedings on Borrello's petition to modify (pursuant to the Cassation decision) and granted his motion to take urgent measures under Article 11. CP 561-63.

The Court of Rome deemed it "absolutely necessary for [A's] interest that she remain in Italy" with Borrello "[u]ntil such time when the US court may make any final decision" and "evaluate[s] the array of elements indicated," including:

- ◆ That A "has been in Italy since June 2016 upon mutual consent of the spouses, ... has successfully attended school, so that she can be guaranteed, in her best interest, attendance in the following school year and ensured academic continuity and a consistent educational path";
- ◆ That Long failed to participate in the Italian proceedings;
- ◆ That Long had not visited A since June 2016;
- ◆ That the CTU found that Long had been trying to draw A away from Borrello;
- ◆ That there is a "need to ensure" A's visitation with Borrello; and
- ◆ That Long had previously wrongfully retained A in the United States, against A's best interests.

CP 562-63. Long did not appeal this order.

On July 14, 2017, Long moved the Superior Court to lift the stay entered in May 2016, seeking temporary orders. CP 734-39. Long ignored the 1996 HCCH and omitted that Rome had exercised Article 11 jurisdiction, asking Washington to exercise UCCJEA jurisdiction. *Id.* Borrello answered that A's habitual residence had changed to Italy, such that Italy, not Washington, has jurisdiction under the 1996 HCCH Article 5, providing that the Contracting State where a child habitually resides has jurisdiction and that when a child's habitual residence changes, the new Contracting State has jurisdiction (CP 637-38; 1996 HCCH Art. 5):

(1) The judicial or administrative authorities of the Contracting State of the habitual residence of the child have jurisdiction to take measures directed to the protection of the child's person or property.

(2) Subject to Article 7,^[3] in case of a change of the child's habitual residence to another Contracting State, the authorities of the State of the new habitual residence have jurisdiction.

³ Article 7 governs wrongful removal or retention. Although Long claimed that Borrello wrongfully removed or retained A on appeal, she never raised this issue before the trial court, and has never brought a Hague Convention petition for A's "return" to the United States. In any event, Borrello did not wrongfully remove A, who went to Italy in June 2016 for court-ordered visitation. **Long** at *3; CP 360, 432-33, 505, 562, 557, 743. He did not wrongfully retain A, who has remained in Italy per agreement and court order. *Id.*

On September 6, 2017, Borrello petitioned the Civil Court of Milan (where he and A reside) to take jurisdiction under the 1996 HCCH Article 5, and to confirm A's sole custody with Borrello and continued residence in Italy. CP 365, 375-78, 382. He sought the same relief under related EU Regulations. CP 375-78.

On September 19, the Superior Court Commissioner lifted the stay and took jurisdiction over A under the UCCJEA. CP 422, 1098. The Commissioner denied Long's request to immediately relocate A to Washington, noting that she very rarely relocates children on temporary orders, even when geographic distance is minimal. CP 1098; RP 32, 37. The Commissioner did not address the 1996 HCCH, or the Court of Rome order. CP 422-24, 1098.

On revision, the Superior Court: (1) "found" that Long was A's "primary caretaker" (although she had been living with Borrello since June 2016); (2) took personal jurisdiction over Borrello; (3) ordered the parties to draft a temporary parenting plan following their then five-year-old 2012 separation agreement; and (4) without appointing a GAL, ordered Borrello to relocate A to the United States within two weeks. CP 356-57. The trial court registered the Court of Rome order, but did not address it. CP 356-57, 423, 1098. Neither did it address the 1996 HCCH, or A's habitual residence. *Id.*

Two days after Borrello filed a Notice of Discretionary Review, on November 15, 2017, the Superior Court denied his motion to stay and entered Long's proposed temporary parenting plan that placed A with her. CP 25-39, 43-54. The appellate court later stayed all trial court proceedings and accepted review.

The appellate court affirmed in a published decision. Borrello asks this Court to accept review and reverse.

REASONS THIS COURT SHOULD ACCEPT REVIEW

A. The appellate decision on the 1996 HCCH Article 11 conflicts with the HCCH itself, numerous cases from this Court and the appellate courts, and RCW 26.09.197, and raises issues of substantial public interest this Court should address. RAP 13.4(b)(1)&(2)&(4).

1. The appellate decision conflicts with the doctrine of comity and numerous cases applying it.

As addressed above, the Court of Rome ordered that it was “absolutely necessary for [A’s] interest that she remain in Italy” until the Washington court⁴ makes a “final decision” evaluating Rome’s reasons for taking urgent measures to protect A. CP 562-63. Under the doctrine of comity, “a court has discretion to ‘give effect to laws [and resulting judicial orders] of another jurisdiction out of deference

⁴ Article 11 assumes that another Contracting State has jurisdiction under Articles 5-10. The Court of Rome assumed that Washington has Article 5 jurisdiction. Italy, not Washington, now has Article 5 jurisdiction, where A’s habitual residence has changed. *Infra*, Argument § B.

and respect, considering the interests of each [jurisdiction].”

MacKenzie v. Barthol, 142 Wn. App. 235, 240, 173 P.3d 980 (2007) (quoting ***Haberman v. Wash. Pub. Power Supply Sys.***, 109 Wn.2d 107, 160-61, 744 P.2d 1032 (1987)). As this Court stated it over a century ago, foreign orders ““will be recognized and given force if it be found that they do not conflict with the local law, inflict an injustice on our own citizens, or violate the public policy of the state.”

Reynolds v. Day, 79 Wash. 499, 506, 140 P. 681 (1914) (quoting ***State ex rel. Baker River & Shuiksan R.R. v. Nichols***, 51 Wash. 619, 621, 99 P. 876 (1909)); ***MacKenzie***, 142 Wn. App. at 240.

Under this doctrine, the trial court should have enforced the Court of Rome order, as it is consistent with Washington’s laws and policies.

Rome’s principal concern was A’s best interest, consistent with Washington laws and the 1966 HCCH. CP 562-63; RCW 26.09.197; HCCH preamble. Also consistent with RCW 26.09.197, the Court of Rome order maintains the “parenting arrangements [that] will cause the least disruption to the child's emotional stability while the action is pending,” by keeping her in Italy with her father until Washington enters a final order after adjudicating Rome’s reasons for taking urgent measures. CP 562-63. Enforcing that order would not work an injustice on Long who had representation in Italy

and the opportunity to participate in the proceedings, and did not appeal the Court of Rome order. CP 554-55.

The appellate court held the “doctrine of comity does not apply here because the trial court was not recognizing or enforcing the Civil Court of Rome’s order.” **Long** at *16. Rather, the appellate court believes that Washington’s UCCJEA jurisdiction “caused the Civil Court of Rome’s order to lapse,” so the trial court “had no obligation to address the Civil Court of Rome’s order and did not fail to respect it.” *Id.* This holding contravenes the 1996 HCCH’s very purposes:

- ◆ To determine which Contracting State has jurisdiction;
- ◆ To “provide for the recognition and enforcement” of the measures Contracting States take to protect children; and
- ◆ To “establish such co-operation between the authorities of the Contracting States as may be necessary in order to achieve the purposes of this Convention.”

Art. 1.1. If the 1996 HCCH and the doctrine of comity mean anything, it is that courts in each Contracting State must give deference to one another’s orders.

In sum, the appellate decision conflicts with century-old law from this Court and the appellate courts. This Court should accept review and reverse.

2. The appellate decision conflicts with RCW 26.09.197.

A temporary parenting entered before trial must be in the “best interest of the child,” considering the same factors governing the entry of permanent parenting plans, but giving particular consideration to: “(1) The relative strength, nature, and stability of the child’s relationship with each parent; and (2) Which parenting arrangements will cause the least disruption to the child’s emotional stability while the action is pending.” RCW 26.09.197. The closest the trial court came to addressing the first factor was “finding” that Long is A’s “primary caretaker,” despite the fact that A has lived with Borrello in Italy since June 2016 without seeing Long. *Compare* CP 356 *with* CP 505, 562-63, 743. The trial court did not address which parenting arrangements would be best for A or her best interests. CP 23-37, 223-24, 356-57, 422-24, 1096-98.

But Rome did address A’s best interests, deeming it “absolutely necessary for the minor’s interest that she remain in Italy” based in significant part on A’s need to maintain contact with Borrello, and Long’s refusal to visit. CP 562-63. This answers the second factor too – it will “cause the least disruption” for A to remain

in Italy with Borrello, in her school and her home, until a court makes a final decision about residential placement. RCW 26.09.197(2).

As to the first factor, the appellate court held that “the parties’ 2012 separation agreement state[s] that A. has a stronger relationship with Long in Washington than with Borrello in Italy.” **Long** at *18. The appellate court may not go back six years to ignore the child’s current situation. While RCW 26.09.197(1) was amended to remove consideration of the parent who has taken on greater parenting responsibilities in the last 12 months, that does not excuse ignoring the last two years. *Id.* at *16-18.

The appellate court does not address the second factor, ignoring that with Long’s consent, A has lived in Italy with her father for well over two years, during which time Long had not visited. CP 505, 562-63, 743. Further, while the appellate court was persuaded by the fact that A resided in Washington for three years before returning to Italy in 2016, it ignores that before that, A spent the first four years of her young life in Italy with both parents. **Long** at *18. It is plainly disruptive to relocate A across the world pending trial.

Finally, the appellate court held that it is not an abuse of discretion to decide “that A. live in her ‘home state’ with her custodial parent.” *Id.* Again, A has not lived here since June 2016, and again

too, Borrello is her primary *residential* parent. CP 505, 562-63, 743. The decision at hand was not whether A will live in her “home state,” but whether she will have to relocate across the world before a court has made a final decision about where she will live. Both the trial and appellate courts seem to have predetermined that question.

3. The appellate decision conflicts with the 1996 HCCH Article 11 and the UCCJEA.

Both the HCCH and the UCCJEA require the Superior Court to recognize and enforce the Court of Rome order. Yet the court directly contradicted that order, ordering A’s immediate relocation to the U.S. without making a final decision or addressing Rome’s concerns. The appellate court does not disagree.

Instead, the appellate court held that the Court of Rome exceeded its authority, an argument Long never raised.⁵ *Long* at *7-9. The appellate court relies on Article 11.2, providing that urgent measures taken under Article 11.1 “lapse as soon as the authorities

⁵ Long argued only (1) that “final decision” does not mean final, contrary to uncontested expert opinion on Italian law; and (2) that Washington did consider Rome’s concerns, despite never addressing them in its orders. Neither did the Superior Court address the Court of Rome order at all, much less the scope of Rome’s authority. CP 23-37, 223-24, 356-57, 422-24, 1096-98. That is, the appellate court decided this matter on an issue that was not raised and did not form the basis of the trial court’s decision. In doing so, the appellate court has created a question of statutory interpretation reviewed *de novo*.

which have jurisdiction under Articles 5 to 10 have taken the measures required by the situation.” According to the appellate court, Rome’s order lapsed as soon as Washington “exercised its article 5 authority and issued its temporary order.” *Id.* at *8.

The first flaw in that analysis is that the superior court did not exercise its Article 5 authority, and has none. Urgent measures lapse only when a court that has jurisdiction under Articles 5-10 takes the required measures. Art. 11.2. As addressed below, Washington does not have Article 5 jurisdiction and did not purport to act under the 1996 HCCH. *Infra*, Argument § B.

Nor does Article 5 itself give a court with Article 5 jurisdiction the authority to determine what measures must be taken for another State’s urgent measures to lapse. **Long** at *9. Indeed, Article 5 is silent on its relationship to Article 11, so offers no support for the appellate court’s conclusion.

Rome did not exceed its authority – under Article 11.1 it may take “any necessary measures of protection” in “cases of urgency.” Rome plainly gets to determine which “measures” are necessary to protect A, and did, ordering that she remain in Italy until there is a final decision on her residential placement addressing her best interests. CP 562-63. That is entirely consistent with Washington law

in that it preserves A's status quo pending trial, and is principally concerned with her best interests. See RCW 26.09.197. Denying Rome (or any Article 11 court) the opportunity to define how it will protect a child is denying it the right to take "any necessary measures of protection." Art. 11.1.

The appellate court takes the view that the Court of Rome limited Washington's authority. Long at *9. But Rome did not direct Washington to do anything. Rather, it ruled that it was necessary for A's protection to remain in Italy until an Article 5 court makes a final decision addressing her best interests. Again, the ability to determine how to protect A is squarely within the province of an Article 11 court.

In short, the trial and appellate decisions frustrate many bodies of law by refusing to enforce a foreign order. Too, there is substantial public interest in determining whether a Washington Superior Court is free to ignore Article 11 orders issued by a Contracting State to the 1996 HCCH. This Court should accept review and reverse.

B. The appellate decision preferring the UCCJEA to the 1996 HCCH creates an issue of substantial public interest this Court should determine. RAP 13.4(b)(4).

The trial court took UCCJEA jurisdiction without addressing Article 5, and the appellate court addressed Article 5 jurisdiction only

insofar as it held that the Cassation Court resolved the issue. CP 23-37, 223-24, 356-57, 422-24, 1096-98; **Long** at *10. That is incorrect. The tension between the UCCJEA and the 1996 HCCH creates an issue of substantial public interest this Court should determine. RAP 13.4(b)(4). This Court should accept review and reverse.

Borrello has argued throughout these proceedings that A now habitually resides in Italy, giving Italy, not the U.S., Article 5 jurisdiction. CP 376-77, 506, 637-38. Borrello also informed the trial and appellate courts that he had petitioned the Court of Milan to take Article 5 jurisdiction over A, and to confirm her sole custody with him and continued residence in Italy. CP 768-83. The Court of Milan recently determine that Italy has Article 5 jurisdiction over A, suspending further proceedings until Washington rules that it lacks Article 5 jurisdiction. Borrello has appealed the suspension. As of this writing he awaits a certified translation of that order.

The appellate court is simply incorrect that the Cassation decision resolves which State currently has Article 5 jurisdiction. **Long** at *10. The Cassation Court addressed jurisdiction over a motion filed in April 2015, holding only that Washington had Article 5 jurisdiction over said motion because A was living here at the time. CP 555-56, 558. Uncontroverted expert testimony provides that: (1)

the Cassation decision “is limited” to the April 2015 jurisdictional question, and “does not refer to jurisdiction in other proceedings between the parties”; (2) after the Cassation decision either party could initiate a “new custody proceeding”; and (3) for any new custody proceeding, “jurisdiction is to be identified pursuant to current habitual residence of the minor.” CP 506-07. The Cassation Court did not determine Article 5 jurisdiction over future proceedings.

Nor could it. The appellate court’s flawed analysis fails to recognize that under the 1996 HCCH, a child’s habitual residence can change, and when it does, “the authorities of the State of the new habitual residence have jurisdiction.” Art. 5.2. Thus, it would be impossible for any court to predict jurisdiction years in advance.

This raises a question of substantial public interest this Court should determine. RAP 13.4(b)(4). Although the United States signed the 1996 HCCH, it has not ratified the 1996 HCCH. <https://www.hcch.net/en/instruments/conventions/status-table>.

Thus, the 1996 HCCH has not entered into force in the United States. Art. 57, 61. Italy has, however, ratified the 1996 HCCH, and it has taken force there, as in all EU nations. *Id.*; *supra*, HCCH status table. Hence, the substantial question of first impression: should a trial court in this State proceed under the UCCJEA, when a Contracting

State in which the 1996 HCCH has taken force has Article 5 jurisdiction?

This question implicates the UCCJEA requirements that our courts “shall treat a foreign country as if it were a state of the United States,” and “must” recognize and enforce a foreign country’s child custody determinations. RCW 26.27.051(1)&(2). It also implicates the doctrine of comity, addressed above. And it implicates Supremacy Clause jurisprudence.

The Supremacy Clause provides that treaties made “under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.” U.S. Const. Art. VI. Over a century ago, this Court held it well settled that when state law conflicts with a U.S. treaty, “such law must give way, and its application to the subject-matter covered by the treaty held in abeyance... .” ***Estate of Stixrud***, 58 Wash. 339, 342, 109 P. 343 (1910); see also ***Hauenstein v. Lynham***, 100 U.S. 483, 490, 25 L. Ed. 628 (1879) (“the constitution, laws, and treaties of the United States are as much a part of the law of every state as its own local laws and constitution”); and ***Volkswagenwerk Aktiengesellschaft v. Schlunk***, 486 U.S. 694,

699, 108 S. Ct. 2104, 100 L. Ed. 2d 722 (1988); **Broad v. Mannesmann**, 141 Wn.2d 670, 674-75, 10 P.3d 371 (2000); **Delex Inc. v. Sukhoi Civil Aircraft Co.**, 193 Wn. App. 464, 469-71, 372 P.3d 797 (2016) (addressing the Supremacy Clause in relation to the 1965 Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters).

In sum, the appellate decision creates an issue of substantial public interest this Court should determine.

CONCLUSION

This Court should accept review and reverse.

RESPECTFULLY SUBMITTED this 7th day of August 2018.

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CERTIFICATE OF SERVICE

I certify that I caused to be filed and served, a copy of the foregoing, **PETITION FOR REVIEW**, on the 7th day of August 2018, as follows:

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APPENDIX A

Marriage of Long v. Borrello, No. 77630-4-1,
2018 Wn. App. LEXIS 1578 (July 9, 2018)

In re Marriage of Long

Court of Appeals of Washington, Division One
May 31, 2018, Oral Argument; July 9, 2018, Filed
No. 77630-4-I

Reporter

2018 Wash. App. LEXIS 1578 *; 2018 WL 3342698

In the Matter of the Marriage of CHANDRA LONG, *Respondent*, and MICHELANGELO BORRELLO, *Petitioner*.

Prior History: [*1] Appeal from Snohomish Superior Court. Docket No: 15-3-02848-2. Judge signing: Honorable Ellen J Fair. Judgment or order under review. Date filed: 11/06/2017.

Counsel: *Lisa M. Micheli*; and *Shelby R. Frost Lemmel* and *Kenneth W. Masters* (of *Masters Law Group PLLC*), for petitioner.

Vicki L. Oslund and *Matthew D. Taylor* (of *McKinley Irvin*), for respondent.

Judges: Authored by J. Leach. Concurring: David Mann, Stephen Dwyer.

Opinion by: J. Leach

Opinion

¶1 LEACH, J. — Michelangelo Borrello appeals the trial court's decisions requiring the relocation of the parties' nine-year-old daughter, A., from Italy to Washington State before a permanent parenting plan has become final. His challenge requires

resolution of the relationship between an emergency order entered by the Civil Court of Rome under article 11 of the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (1996 Hague Convention),¹ article 5 of this treaty, Washington's Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA)², and a later order entered by a Washington court [*2] asserting jurisdiction under the UCCJEA.

¶2 The trial court properly exercised jurisdiction under the UCCJEA. Because its order temporarily relocating A. addressed “the measures required by the situation,”³ it satisfied the requirements of the 1996 Hague Convention, and the Civil Court of Rome's emergency order lapsed. The order did not violate the doctrine of comity or [RCW 26.09.197](#). We affirm.

¹ Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, Oct. 19, 1996, [35 I.L.M. 1391](#), <https://assets.hcch.net/docs/f16ebd3d-f398-4891-bf47-110866e171d4.pdf>.

² [Ch. 26.27 RCW](#).

³ 1996 Hague Convention art. 11(3).

FACTS

¶3 Borrello is an Italian citizen, and Chandra Long is a United States citizen who grew up in Everett, Washington. They married in the United States in 2008 but later moved to Italy. A., their only child, was born in Italy in March 2009. In March 2011, Long brought A. to Washington. Borrello petitioned a Washington court under the 1980 Hague Convention on the Civil Aspects of International Child Abduction⁴ for A.'s return to Italy. In August 2011, the Washington court granted Borrello's request and ordered that A. return to Italy.

¶4 In December 2012, the Civil Court of Rome approved the parties' "non-consensual separation" agreement. The agreement stated that Borrello and Long would have shared custody of A. but A. would be placed with Long. It also permitted Long to transfer A.'s residence to Washington [*3] State and specified Borrello's visitation rights and child support obligations. Long and A. moved from Italy to Everett, Washington, in September 2013. In April 2015, Borrello asked the Civil Court of Rome to modify the agreement, claiming that Long prevented him from contacting and forming a relationship with A. The Civil Court of Rome exercised jurisdiction in October 2015.

¶5 In November 2015, Long filed a petition for dissolution in Washington. In

December, she appealed the Civil Court of Rome's decision to Italy's highest court, the Court of Cassation, challenging its jurisdiction. In February 2016, Long asked the Washington court to move forward with the dissolution proceedings, and Borrello asked the court to dismiss them. The Washington court stayed both requests pending the outcome of the Italian proceedings.

¶6 In June 2016, A. returned to Italy for her summer visitation with Borrello. The Civil Court of Rome then awarded Borrello temporary sole custody of A. to allow A. to live in Italy for the 2016-2017 school year pending the outcome of the Court of Cassation's ruling. In February 2017, the Court of Cassation held that Italy lacked jurisdiction over Borrello's request to modify the parties' separation [*4] agreement. Borrello later asked the Civil Court of Rome to exercise emergency jurisdiction under article 11 of the 1996 Hague Convention.

¶7 In June 2017, the Civil Court of Rome closed the pending proceedings based on the Court of Cassation's decision that it lacked jurisdiction but granted Borrello's request that it take urgent measures. It held that it was "absolutely necessary for [A.'s] interest" that she remain in Italy and continue her schooling based on a number of factors, including Long's behavior suggesting that she was trying to make it difficult for Borrello to develop a relationship with A. It ordered that A. remain in Italy until "such time when the American court will be able to evaluate the array of elements indicated so far" and

⁴Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11670, 1343 U.N.T.S. 49, <https://assets.hcch.net/docs/e86d9f72-dc8d-46f3-b3bf-e102911c8532.pdf>.

“may make any final decision attributable to it alone.”

¶8 In July 2017, Long asked the Washington trial court to order A.'s return to Washington, to lift the stay on the dissolution proceedings, and to convert the parties' 2012 separation agreement to a decree of dissolution, a permanent parenting plan, and an order of child support. Long alleged that the court had jurisdiction under the UCCJEA. Borrello disagreed. He also petitioned the Civil Court of Milan to confirm [*5] A.'s sole custody with him and her continued residence in Italy.

¶9 In September 2017, a Washington State superior court commissioner found that Washington had jurisdiction to decide parenting issues involving A. under the UCCJEA, lifted the stay on the dissolution proceedings, denied Borrello's motion to dismiss, and refused to order A.'s return to Washington. In October, the superior court granted Long's request to revise the commissioner's decision and ordered A.'s return to Washington State within two weeks. In November, the court denied Borrello's motion for reconsideration.

¶10 Borrello asked this court for interlocutory review of the trial court decisions finding jurisdiction under the UCCJEA and ordering the return of A. The trial court denied his motion to stay the trial court proceedings pending appellate review. In December, this court stayed all trial court proceedings. In January 2018, we granted discretionary review and extended the stay. Borrello appeals.

STANDARD OF REVIEW

[1-3] ¶11 An appellate court reviews de novo questions of law, including jurisdictional issues.⁵ It reviews temporary parenting plans for an abuse of discretion.⁶ “A trial court abuses its discretion when its order is manifestly [*6] unreasonable or based on untenable grounds.”⁷

ANALYSIS

The Trial Court's Order Was Not in Conflict with the 1996 Hague Convention

[4, 5] ¶12 Borrello asserts that the trial court lacked jurisdiction to order A.'s return from Italy until it entered a final parenting plan and the parties had exhausted their right to appellate review of it. He claims that article 11 and article 5 of the 1996 Hague Convention require this result. We disagree.

¶13 Both Italy and the United States are contracting states to the Hague Conference.⁸ Article 5 of the 1996 Hague Convention generally describes the authority of contracting states to make child custody decisions. It gives the “Contracting State”⁹

⁵ *In re Marriage of Tostado*, 137 Wn. App. 136, 144, 151 P.3d 1060 (2007).

⁶ *In re Parentage of Jannot*, 149 Wn.2d 123, 128, 65 P.3d 664 (2003).

⁷ *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993).

⁸ *Hague Conference Members*, HAGUE CONF. ON PRIV. INT'L L., <https://www.hcch.net/en/states/hcch-members> (last visited June 29, 2018).

⁹ “‘Contracting State’ refers to a state which has consented to be bound by a convention, *whether or not that Convention has entered into force* for that State.” *FAQ: What Is the Difference between Member, State Party and Contracting State?*, HAGUE CONF. ON PRIV.

of the child's "habitual residence" jurisdiction to take protective measures: "(1) The judicial or administrative authorities of the Contracting State of the habitual residence of the child have jurisdiction to take measures directed to the protection of the child's person or property."

¶14 But article 11 provides [*7] that any contracting state where the child is located has jurisdiction to take protective measures "[i]n all cases of urgency": "(1) In all cases of urgency, the authorities of any Contracting State in whose territory the child or property belonging to the child is present have jurisdiction to take any necessary measures of protection."

¶15 Article 11 also limits the duration of urgent protective measures taken under it: "(2) The measures taken under the preceding paragraph with regard to a child habitually resident in a Contracting State shall lapse as soon as the authorities which have jurisdiction under Articles 5 to 10 have taken the measures required by the situation."

¶16 In February 2017, the Court of Cassation held that the Italian courts did not have jurisdiction under article 5 to modify the parties' parenting agreement: "[T]he fact that [A.] has been habitually residing in the US since 2013 is clearly reflected in the court records, therefore the Italian courts['] lack of jurisdiction is confirmed."

¶17 Borrello then asked the Civil Court of Rome to exercise its authority under article

11 to impose urgent protective measures and prevent Long from returning A. to the United States. The Civil Court of Rome granted [*8] Borrello's request. It ordered that A. remain in Italy until "such time when the American court will be able to evaluate the array of elements indicated so far" and "may make any final decision attributable to it alone." Borrello claims that this provision limited the trial court's authority under article 5 to decide for itself when it had "taken the measures required by the situation" as article 11 requires. Borrello misinterprets the Civil Court of Rome's authority under article 11.

¶18 Under article 11(2), a contracting state's emergency measures "shall lapse as soon as the authorities which have jurisdiction under articles 5 to 10 have taken the measures required by the situation." Both the Court of Cassation and the Civil Court of Rome acknowledged that the United States is A.'s habitual residence and that the United States has jurisdiction under article 5. As discussed below, the Washington superior court determined that it had jurisdiction under the UCCJEA. Thus, under article 11(2), when the trial court exercised its article 5 authority and issued its temporary order, the Civil Court of Rome's order lapsed.

¶19 Borrello misinterprets the scope of article 11 authority when he claims that "the [Civil] Court of [*9] Rome identified the 'measures required by the situation' that the Article 5 court must take." Article 11 states that a court exercising emergency jurisdiction may take "any necessary measures of protection," which lapse when

INT'L <https://www.hcch.net/en/instruments/conventions/specialized-sections/apostille/fag1> (last visited June 29, 2018).

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an article 5 court has “taken the measures required by the situation.”¹⁰ Article 11 does not grant to that court the authority to define what measures taken by an article 5 court are those “required by the situation.” Borello cites no authority interpreting the 1996 Hague Convention to provide a court exercising emergency jurisdiction under article 11 to so limit the authority of a court exercising jurisdiction under article 5. He offers no persuasive reason why this court should interpret the 1996 Hague Convention this way.

¶20 Article 5 gave Washington State, as the habitual residence of A., the authority to decide and take “the measures required by the situation,” including the authority to enter a temporary parenting plan. Article 11 did not limit this authority, nor could the Civil Court of Rome's order. The trial court's temporary parenting plan and associated orders did not contravene the 1996 Hague Convention.

*Washington State Has Jurisdiction over A. under the UCCJEA [*10]*

¶21 Borrello claims that the UCCJEA did not provide the trial court with authority to enter a temporary parenting plan. In July 2017, when Long asked the Snohomish County Superior Court to order a temporary parenting plan and require A.'s return to Washington, the trial court exercised jurisdiction over A. under the UCCJEA. Borrello asserts that the trial court should not have looked to the UCCJEA to

determine whether it had jurisdiction to enter temporary orders. He claims that because Italy and the United States are both contracting states to the 1996 Hague Convention, article 5 of the 1996 Hague Convention not the UCCJEA, determines jurisdiction. Relatedly, he asserts that the trial court should have determined A. habitually resides in Italy within the meaning of article 5, so Washington does not have article 5 jurisdiction. We address each of his arguments in turn.

[6, 7] ¶22 Article 5 of the 1996 Hague Convention resolves the general authority of two contracting states, the United States and Italy, to decide the parenting dispute between Long and Borrello. The Court of Cassation decided that the courts of the United States, not Italy, had jurisdiction to decide this dispute because A. habitually resided in the [*11] United States. So Borrello's claim that the trial court should have looked to article 5 instead of to the UCCJEA makes little sense. The same is true for his claim that A. habitually resided in Italy. But this does not resolve the authority of the courts of Washington State to resolve the custody issue. Borrello provides no authority to support the proposition that the 1996 Hague Convention, rather than the UCCJEA, determines Washington State's jurisdiction. Neither Washington case law nor the UCCJEA supports his position.

¶23 Washington courts look to the UCCJEA to determine their authority to decide a child custody dispute.¹¹ This includes making an

¹⁰ 1996 Hague Convention art. 11(1)-(2).

¹¹ [In re Marriage of Ieronimakis, 66 Wn. App. 83, 90, 831 P.2d 172](#)

initial custody determination, modifying a custody determination, or issuing a temporary emergency custody order. The petitioner has the burden to establish jurisdiction.¹² Apart from his failed argument about the relationship of articles 5 and 11, Borrello does not identify any legal authority questioning the UCCJEA as the legal authority for determining the trial court's authority to act in this case.

¶24 Borrello also contends that Long did not establish jurisdiction under the UCCJEA. But Long met her burden to establish jurisdiction in Washington. [*12]

[8, 9] ¶25 The UCCJEA defines an “initial determination” as “the first child custody determination concerning a particular child.”¹³ Here, the Civil Court of Rome made the initial determination in 2012 when it approved the parties' “non-consensual separation” agreement. The trial court's order requiring A.'s temporary return to Washington State is therefore a modification of the original determination. A Washington State court has jurisdiction to modify a child custody determination made by a court of another state or foreign country¹⁴ if (1) it has jurisdiction to make an “initial custody determination” and (2) the court of the other state “determines it no longer has exclusive, continuing jurisdiction

(1992) (referring to the Uniform Child Custody Jurisdiction Act, the previous iteration of the UCCJEA); see [ch. 26.27 RCW](#).

¹² [Ieronimakis, 66 Wn. App. at 90](#).

¹³ [RCW 26.27.021\(8\)](#).

¹⁴ “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 Articles 1 and 2.” [RCW 26.27.051](#).

... or that a court of this state would be a more convenient forum.”¹⁵

(1) [A Washington State court] 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 [*13] have jurisdiction under (a) of this subsection, 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 [RCW 26.27.261](#) or [26.27.271](#), and:

(i) 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

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

(c) All courts having jurisdiction under (a) of this subsection 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 [RCW](#)

¹⁵ [RCW 26.27.221\(1\)](#).

[26.27.261](#) or [26.27.271](#); or

(d) No court of any other state would have jurisdiction under the criteria specified in (a), (b), or (c) of this subsection.¹⁶

¶26 “‘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.”¹⁷ Here, Long started modification proceedings when she filed a petition for dissolution in Washington state in November 2015. [*14] A. lived continuously with Long in Washington from September 2013 until June 2016. Then A. went to Italy for her scheduled summer visitation with Borrello. The Civil Court of Rome then ordered A. to remain in Italy with Borrello until the Court of Cassation issued its decision on whether the Italian courts had jurisdiction to modify the parties' parenting plan. So A. remained in Italy until the trial court ordered that she return to Long's care in Washington by October 24, 2017. Because A. continuously lived with Long in Washington for more than two years before Long started the dissolution proceedings in 2015, Washington is A.'s “home state” under the UCCJEA.

¶27 Further, no other state is A.'s home state. The Court of Cassation held that Italy lacked jurisdiction based on its finding that A. had habitually resided in the United States since 2013. In addition, both A. and

Long have a significant connection with Washington. A. lived in Everett, Washington, from September 2013 until June 2016. Long was raised in Everett and has lived there since 2013. In her motion to establish jurisdiction under the UCCJEA, Long identified substantial evidence of the care and protection A. receives in Washington: [*15] before October 2016 when the Civil Court of Rome ordered that A. stay in Italy for the school year, A. had a number of friends at her elementary school where she attended kindergarten and first grade, she participated in weekly activities such as art class, her maternal grandparents lived four blocks away, and her pediatrician and dentist were located in Everett. Finally, no court of any other state could satisfy the UCCJEA requirements and exercise jurisdiction to make an initial child custody determination. The trial court thus properly exercised jurisdiction under the UCCJEA.

The Trial Court's Order Does Not Contravene the Doctrine of Comity or [RCW 26.09.197](#)

A. The Doctrine of Comity

[10] ¶28 Borrello claims that the trial court's order temporarily relocating A. violates the doctrine of comity because it does not respect the Civil Court of Rome's order requiring that A. remain in Italy until an American court makes a final decision. This doctrine provides that “a court has discretion to ‘give effect to laws [and resulting judicial orders] of another jurisdiction out of deference and respect,

¹⁶ [RCW 26.27.201](#).

¹⁷ [RCW 26.27.021\(7\)](#).

considering the interests of each [jurisdiction].”¹⁸ “Orders ‘will be recognized and given force if it be found that they do not [*16] conflict with the local law, inflict an injustice on our own citizens, or violate the public policy of the state.’”¹⁹

[11] ¶29 The doctrine of comity does not apply here because the trial court was not recognizing or enforcing the Civil Court of Rome's order. In its original order, the trial court did “confirm[] registration” of the Court of Cassation's and the Civil Court of Rome's orders. But because the trial court had jurisdiction over A. under the UCCJEA and its orders were independent of the Civil Court of Rome's temporary order under article 11 of the 1996 Hague Convention and caused the Civil Court of Rome's order to lapse, it had no obligation to address the Civil Court of Rome's order and did not fail to respect it. The trial court did not abuse its discretion by entering temporary orders.

B. [RCW 26.09.197](#)

[12] ¶30 Finally, Borrello relies on *In re Marriage of Kovacs*,²⁰ in which our Supreme Court examined a previous version of [RCW 26.09.197](#)²¹ to support his claim

that the trial court's order ignores the considerations listed in this statute.

¶31 The first factor in the former version of the statute interpreted in *Kovacs* required a trial court awarding temporary custody to consider “[w]hich parent has taken greater responsibility during the last twelve months for performing [*17] parenting functions relating to the daily needs of the child.”²² Borrello claims that because A. lived with him for more than 12 months leading up to the trial court's order temporarily relocating A. to Washington State, the trial court did not adequately consider the first factor and erred in issuing its orders. Borrello's argument does not take into consideration the legislature's substantial amendment of [RCW 26.09.197](#) in 2007. The amended statute states as follows:

After considering the affidavit required by [RCW 26.09.194\(1\)](#) and other relevant evidence presented, the court shall make a temporary parenting plan that is in the best interest of the child. In making this determination, the court shall give particular consideration to:

- (1) The relative strength, nature, and stability of the child's relationship with each parent; and
- (2) Which parenting arrangements will cause the least disruption to the child's emotional stability while the action is pending.

The court shall also consider the

¹⁸ *MacKenzie v. Barthol*, 142 Wn. App. 235, 240, 173 P.3d 980 (2007) (alterations in original) (quoting *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 160-61, 744 P.2d 1032, 750 P.2d 254 (1987)).

¹⁹ *MacKenzie*, 142 Wn. App. at 240 (internal quotation marks omitted) (quoting *Reynolds v. Day*, 79 Wash. 499, 506, 140 P. 681 (1914)).

²⁰ 121 Wn.2d 795, 808-09, 854 P.2d 629 (1993).

²¹ Former [RCW 26.09.197](#) (1987).

²² Former [RCW 26.09.197\(1\)](#); *Kovacs*, 121 Wn.2d at 808.

factors used to determine residential provisions in the permanent parenting plan.

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¶32 The trial court's orders are consistent with the current version of the statute. The UCCJEA and the parties' 2012 separation agreement state that A. [*18] has a stronger relationship with Long in Washington than with Borrello in Italy. Before living with Borrello during the 2016-2017 school year, A. lived with Long in Washington for almost three years. Washington is A.'s "home state" as defined by the UCCJEA, and Borrello and Long's 2012 separation agreement stated that A. would be placed with Long. The trial court modeled the temporary parenting plan after the parties' 2012 separation agreement and thus designated Long as A.'s custodian. The trial court's decision that A. live in her "home state" with her custodial parent is not contrary to the statute and is not an abuse of discretion.

CONCLUSION

¶33 The trial court's temporary orders do not contravene the 1996 Hague Convention, the rule of comity, or [RCW 26.09.197](#). The trial court has jurisdiction under the UCCJEA. We affirm.

MANN, A.C.J., and DWYER, J., concur.

References

LexisNexis Practice Guide: Washington
Family Law

Annotated Revised Code of Washington by
LexisNexis

APPENDIX B

Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children (1996)

**34. CONVENTION ON JURISDICTION, APPLICABLE LAW,
RECOGNITION, ENFORCEMENT AND CO-OPERATION
IN RESPECT OF PARENTAL RESPONSIBILITY AND
MEASURES FOR THE PROTECTION OF CHILDREN¹**

(Concluded 19 October 1996)

The States signatory to the present Convention,
Considering the need to improve the protection of children in international situations,
Wishing to avoid conflicts between their legal systems in respect of jurisdiction, applicable law,
recognition and enforcement of measures for the protection of children,
Recalling the importance of international co-operation for the protection of children,
Confirming that the best interests of the child are to be a primary consideration,
Noting that the *Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of minors* is in need of revision,
Desiring to establish common provisions to this effect, taking into account the *United Nations Convention on the Rights of the Child* of 20 November 1989,
Have agreed on the following provisions –

CHAPTER I – SCOPE OF THE CONVENTION

Article 1

- (1) The objects of the present Convention are –
 - a) to determine the State whose authorities have jurisdiction to take measures directed to the protection of the person or property of the child;
 - b) to determine which law is to be applied by such authorities in exercising their jurisdiction;
 - c) to determine the law applicable to parental responsibility;
 - d) to provide for the recognition and enforcement of such measures of protection in all Contracting States;
 - e) to establish such co-operation between the authorities of the Contracting States as may be necessary in order to achieve the purposes of this Convention.
- (2) For the purposes of this Convention, the term ‘parental responsibility’ includes parental authority, or any analogous relationship of authority determining the rights, powers and responsibilities of parents, guardians or other legal representatives in relation to the person or the property of the child.

Article 2

The Convention applies to children from the moment of their birth until they reach the age of 18 years.

¹ This Convention, including related materials, is accessible on the website of the Hague Conference on Private International Law (www.hcch.net), under “Conventions”. For the full history of the Convention, see Hague Conference on Private International Law, *Proceedings of the Eighteenth Session (1996)*, Tome II, *Protection of children* (615 pp.).

Article 3

The measures referred to in Article 1 may deal in particular with –

- a) the attribution, exercise, termination or restriction of parental responsibility, as well as its delegation;
- b) rights of custody, including rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence, as well as rights of access including the right to take a child for a limited period of time to a place other than the child's habitual residence;
- c) guardianship, curatorship and analogous institutions;
- d) the designation and functions of any person or body having charge of the child's person or property, representing or assisting the child;
- e) the placement of the child in a foster family or in institutional care, or the provision of care by *kafala* or an analogous institution;
- f) the supervision by a public authority of the care of a child by any person having charge of the child;
- g) the administration, conservation or disposal of the child's property.

Article 4

The Convention does not apply to –

- a) the establishment or contesting of a parent-child relationship;
- b) decisions on adoption, measures preparatory to adoption, or the annulment or revocation of adoption;
- c) the name and forenames of the child;
- d) emancipation;
- e) maintenance obligations;
- f) trusts or succession;
- g) social security;
- h) public measures of a general nature in matters of education or health;
- i) measures taken as a result of penal offences committed by children;
- j) decisions on the right of asylum and on immigration.

CHAPTER II – JURISDICTION

Article 5

- (1) The judicial or administrative authorities of the Contracting State of the habitual residence of the child have jurisdiction to take measures directed to the protection of the child's person or property.
- (2) Subject to Article 7, in case of a change of the child's habitual residence to another Contracting State, the authorities of the State of the new habitual residence have jurisdiction.

Article 6

- (1) For refugee children and children who, due to disturbances occurring in their country, are internationally displaced, the authorities of the Contracting State on the territory of which these children are present as a result of their displacement have the jurisdiction provided for in paragraph 1 of Article 5.
- (2) The provisions of the preceding paragraph also apply to children whose habitual residence cannot be established.

Article 7

- (1) In case of wrongful removal or retention of the child, the authorities of the Contracting State in which the child was habitually resident immediately before the removal or retention keep their jurisdiction until the child has acquired a habitual residence in another State, and

- a) each person, institution or other body having rights of custody has acquiesced in the removal or retention; or
 - b) the child has resided in that other State for a period of at least one year after the person, institution or other body having rights of custody has or should have had knowledge of the whereabouts of the child, no request for return lodged within that period is still pending, and the child is settled in his or her new environment.
- (2) 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.
- (3) So long as the authorities first mentioned in paragraph 1 keep their jurisdiction, the authorities of the Contracting State to which the child has been removed or in which he or she has been retained can take only such urgent measures under Article 11 as are necessary for the protection of the person or property of the child.

Article 8

- (1) By way of exception, the authority of a Contracting State having jurisdiction under Article 5 or 6, if it considers that the authority of another Contracting State would be better placed in the particular case to assess the best interests of the child, may either
- request that other authority, directly or with the assistance of the Central Authority of its State, to assume jurisdiction to take such measures of protection as it considers to be necessary, or
 - suspend consideration of the case and invite the parties to introduce such a request before the authority of that other State.
- (2) The Contracting States whose authorities may be addressed as provided in the preceding paragraph are
- a) a State of which the child is a national,
 - b) a State in which property of the child is located,
 - c) a State whose authorities are seised of an application for divorce or legal separation of the child's parents, or for annulment of their marriage,
 - d) a State with which the child has a substantial connection.
- (3) The authorities concerned may proceed to an exchange of views.
- (4) The authority addressed as provided in paragraph 1 may assume jurisdiction, in place of the authority having jurisdiction under Article 5 or 6, if it considers that this is in the child's best interests.

Article 9

- (1) If the authorities of a Contracting State referred to in Article 8, paragraph 2, consider that they are better placed in the particular case to assess the child's best interests, they may either
- request the competent authority of the Contracting State of the habitual residence of the child, directly or with the assistance of the Central Authority of that State, that they be authorised to exercise jurisdiction to take the measures of protection which they consider to be necessary, or
 - invite the parties to introduce such a request before the authority of the Contracting State of the habitual residence of the child.
- (2) The authorities concerned may proceed to an exchange of views.
- (3) The authority initiating the request may exercise jurisdiction in place of the authority of the Contracting State of the habitual residence of the child only if the latter authority has accepted the request.

Article 10

- (1) Without prejudice to Articles 5 to 9, the authorities of a Contracting State exercising jurisdiction to decide upon an application for divorce or legal separation of the parents of a child habitually resident in another Contracting State, or for annulment of their marriage, may, if the law of their State so provides, take measures directed to the protection of the person or property of such child if
 - a) at the time of commencement of the proceedings, one of his or her parents habitually resides in that State and one of them has parental responsibility in relation to the child, and
 - b) the jurisdiction of these authorities to take such measures has been accepted by the parents, as well as by any other person who has parental responsibility in relation to the child, and is in the best interests of the child.
- (2) The jurisdiction provided for by paragraph 1 to take measures for the protection of the child ceases as soon as the decision allowing or refusing the application for divorce, legal separation or annulment of the marriage has become final, or the proceedings have come to an end for another reason.

Article 11

- (1) In all cases of urgency, the authorities of any Contracting State in whose territory the child or property belonging to the child is present have jurisdiction to take any necessary measures of protection.
- (2) The measures taken under the preceding paragraph with regard to a child habitually resident in a Contracting State shall lapse as soon as the authorities which have jurisdiction under Articles 5 to 10 have taken the measures required by the situation.
- (3) The measures taken under paragraph 1 with regard to a child who is habitually resident in a non-Contracting State shall lapse in each Contracting State as soon as measures required by the situation and taken by the authorities of another State are recognised in the Contracting State in question.

Article 12

- (1) Subject to Article 7, the authorities of a Contracting State in whose territory the child or property belonging to the child is present have jurisdiction to take measures of a provisional character for the protection of the person or property of the child which have a territorial effect limited to the State in question, in so far as such measures are not incompatible with measures already taken by authorities which have jurisdiction under Articles 5 to 10.
- (2) The measures taken under the preceding paragraph with regard to a child habitually resident in a Contracting State shall lapse as soon as the authorities which have jurisdiction under Articles 5 to 10 have taken a decision in respect of the measures of protection which may be required by the situation.
- (3) The measures taken under paragraph 1 with regard to a child who is habitually resident in a non-Contracting State shall lapse in the Contracting State where the measures were taken as soon as measures required by the situation and taken by the authorities of another State are recognised in the Contracting State in question.

Article 13

- (1) The authorities of a Contracting State which have jurisdiction under Articles 5 to 10 to take measures for the protection of the person or property of the child must abstain from exercising this jurisdiction if, at the time of the commencement of the proceedings, corresponding measures have been requested from the authorities of another Contracting State having jurisdiction under Articles 5 to 10 at the time of the request and are still under consideration.
- (2) The provisions of the preceding paragraph shall not apply if the authorities before whom the request for measures was initially introduced have declined jurisdiction.

Article 14

The measures taken in application of Articles 5 to 10 remain in force according to their terms, even if a change of circumstances has eliminated the basis upon which jurisdiction was founded, so long as the authorities which have jurisdiction under the Convention have not modified, replaced or terminated such measures.

CHAPTER III – APPLICABLE LAW

Article 15

- (1) In exercising their jurisdiction under the provisions of Chapter II, the authorities of the Contracting States shall apply their own law.
- (2) However, in so far as the protection of the person or the property of the child requires, they may exceptionally apply or take into consideration the law of another State with which the situation has a substantial connection.
- (3) If the child's habitual residence changes to another Contracting State, the law of that other State governs, from the time of the change, the conditions of application of the measures taken in the State of the former habitual residence.

Article 16

- (1) The attribution or extinction of parental responsibility by operation of law, without the intervention of a judicial or administrative authority, is governed by the law of the State of the habitual residence of the child.
- (2) The attribution or extinction of parental responsibility by an agreement or a unilateral act, without intervention of a judicial or administrative authority, is governed by the law of the State of the child's habitual residence at the time when the agreement or unilateral act takes effect.
- (3) Parental responsibility which exists under the law of the State of the child's habitual residence subsists after a change of that habitual residence to another State.
- (4) If the child's habitual residence changes, the attribution of parental responsibility by operation of law to a person who does not already have such responsibility is governed by the law of the State of the new habitual residence.

Article 17

The exercise of parental responsibility is governed by the law of the State of the child's habitual residence. If the child's habitual residence changes, it is governed by the law of the State of the new habitual residence.

Article 18

The parental responsibility referred to in Article 16 may be terminated, or the conditions of its exercise modified, by measures taken under this Convention.

Article 19

- (1) The validity of a transaction entered into between a third party and another person who would be entitled to act as the child's legal representative under the law of the State where the transaction was concluded cannot be contested, and the third party cannot be held liable, on the sole ground that the other person was not entitled to act as the child's legal representative under the law designated by the provisions of this Chapter, unless the third party knew or should have known that the parental responsibility was governed by the latter law.
- (2) The preceding paragraph applies only if the transaction was entered into between persons present on the territory of the same State.

Article 20

The provisions of this Chapter apply even if the law designated by them is the law of a non-Contracting State.

Article 21

- (1) In this Chapter the term "law" means the law in force in a State other than its choice of law rules.
- (2) However, if the law applicable according to Article 16 is that of a non-Contracting State and if the choice of law rules of that State designate the law of another non-Contracting State which would apply its own law, the law of the latter State applies. If that other non-Contracting State would not apply its own law, the applicable law is that designated by Article 16.

Article 22

The application of the law designated by the provisions of this Chapter can be refused only if this application would be manifestly contrary to public policy, taking into account the best interests of the child.

CHAPTER IV – RECOGNITION AND ENFORCEMENT

Article 23

- (1) The measures taken by the authorities of a Contracting State shall be recognised by operation of law in all other Contracting States.
- (2) Recognition may however be refused –
 - a) if the measure was taken by an authority whose jurisdiction was not based on one of the grounds provided for in Chapter II;
 - b) if the measure was taken, except in a case of urgency, in the context of a judicial or administrative proceeding, without the child having been provided the opportunity to be heard, in violation of fundamental principles of procedure of the requested State;
 - c) on the request of any person claiming that the measure infringes his or her parental responsibility, if such measure was taken, except in a case of urgency, without such person having been given an opportunity to be heard;
 - d) if such recognition is manifestly contrary to public policy of the requested State, taking into account the best interests of the child;
 - e) if the measure is incompatible with a later measure taken in the non-Contracting State of the habitual residence of the child, where this later measure fulfils the requirements for recognition in the requested State;
 - f) if the procedure provided in Article 33 has not been complied with.

Article 24

Without prejudice to Article 23, paragraph 1, any interested person may request from the competent authorities of a Contracting State that they decide on the recognition or non-recognition of a measure taken in another Contracting State. The procedure is governed by the law of the requested State.

Article 25

The authority of the requested State is bound by the findings of fact on which the authority of the State where the measure was taken based its jurisdiction.

Article 26

- (1) If measures taken in one Contracting State and enforceable there require enforcement in another Contracting State, they shall, upon request by an interested party, be declared enforceable or registered for the purpose of enforcement in that other State according to the procedure provided in the law of the latter State.
- (2) Each Contracting State shall apply to the declaration of enforceability or registration a simple and rapid procedure.
- (3) The declaration of enforceability or registration may be refused only for one of the reasons set out in Article 23, paragraph 2.

Article 27

Without prejudice to such review as is necessary in the application of the preceding Articles, there shall be no review of the merits of the measure taken.

Article 28

Measures taken in one Contracting State and declared enforceable, or registered for the purpose of enforcement, in another Contracting State shall be enforced in the latter State as if they had been taken by the authorities of that State. Enforcement takes place in accordance with the law of the requested State to the extent provided by such law, taking into consideration the best interests of the child.

CHAPTER V – CO-OPERATION

Article 29

- (1) A Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention on such authorities.
- (2) Federal States, States with more than one system of law or States having autonomous territorial units shall be free to appoint more than one Central Authority and to specify the territorial or personal extent of their functions. Where a State has appointed more than one Central Authority, it shall designate the Central Authority to which any communication may be addressed for transmission to the appropriate Central Authority within that State.

Article 30

- (1) Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their States to achieve the purposes of the Convention.
- (2) They shall, in connection with the application of the Convention, take appropriate steps to provide information as to the laws of, and services available in, their States relating to the protection of children.

Article 31

The Central Authority of a Contracting State, either directly or through public authorities or other bodies, shall take all appropriate steps to –

- a) facilitate the communications and offer the assistance provided for in Articles 8 and 9 and in this Chapter;
- b) facilitate, by mediation, conciliation or similar means, agreed solutions for the protection of the person or property of the child in situations to which the Convention applies;
- c) provide, on the request of a competent authority of another Contracting State, assistance in discovering the whereabouts of a child where it appears that the child may be present and in need of protection within the territory of the requested State.

Article 32

On a request made with supporting reasons by the Central Authority or other competent authority of any Contracting State with which the child has a substantial connection, the Central Authority of the Contracting State in which the child is habitually resident and present may, directly or through public authorities or other bodies,

- a) provide a report on the situation of the child;
- b) request the competent authority of its State to consider the need to take measures for the protection of the person or property of the child.

Article 33

- (1) If an authority having jurisdiction under Articles 5 to 10 contemplates the placement of the child in a foster family or institutional care, or the provision of care by *kafala* or an analogous institution, and if such placement or such provision of care is to take place in another Contracting State, it shall first consult with the Central Authority or other competent authority of the latter State. To that effect it shall transmit a report on the child together with the reasons for the proposed placement or provision of care.
- (2) The decision on the placement or provision of care may be made in the requesting State only if the Central Authority or other competent authority of the requested State has consented to the placement or provision of care, taking into account the child's best interests.

Article 34

- (1) Where a measure of protection is contemplated, the competent authorities under the Convention, if the situation of the child so requires, may request any authority of another Contracting State which has information relevant to the protection of the child to communicate such information.
- (2) A Contracting State may declare that requests under paragraph 1 shall be communicated to its authorities only through its Central Authority.

Article 35

- (1) The competent authorities of a Contracting State may request the authorities of another Contracting State to assist in the implementation of measures of protection taken under this Convention, especially in securing the effective exercise of rights of access as well as of the right to maintain direct contacts on a regular basis.
- (2) The authorities of a Contracting State in which the child does not habitually reside may, on the request of a parent residing in that State who is seeking to obtain or to maintain access to the child, gather information or evidence and may make a finding on the suitability of that parent to exercise access and on the conditions under which access is to be exercised. An authority exercising jurisdiction under Articles 5 to 10 to determine an application concerning access to the child, shall admit and consider such information, evidence and finding before reaching its decision.
- (3) An authority having jurisdiction under Articles 5 to 10 to decide on access may adjourn a proceeding pending the outcome of a request made under paragraph 2, in particular, when it is considering an application to restrict or terminate access rights granted in the State of the child's former habitual residence.
- (4) Nothing in this Article shall prevent an authority having jurisdiction under Articles 5 to 10 from taking provisional measures pending the outcome of the request made under paragraph 2.

Article 36

In any case where the child is exposed to a serious danger, the competent authorities of the Contracting State where measures for the protection of the child have been taken or are under consideration, if they are informed that the child's residence has changed to, or that the child is present in another State, shall inform the authorities of that other State about the danger involved and the measures taken or under consideration.

Article 37

An authority shall not request or transmit any information under this Chapter if to do so would, in its opinion, be likely to place the child's person or property in danger, or constitute a serious threat to the liberty or life of a member of the child's family.

Article 38

- (1) Without prejudice to the possibility of imposing reasonable charges for the provision of services, Central Authorities and other public authorities of Contracting States shall bear their own costs in applying the provisions of this Chapter.
- (2) Any Contracting State may enter into agreements with one or more other Contracting States concerning the allocation of charges.

Article 39

Any Contracting State may enter into agreements with one or more other Contracting States with a view to improving the application of this Chapter in their mutual relations. The States which have concluded such an agreement shall transmit a copy to the depositary of the Convention.

CHAPTER VI – GENERAL PROVISIONS

Article 40

- (1) The authorities of the Contracting State of the child's habitual residence, or of the Contracting State where a measure of protection has been taken, may deliver to the person having parental responsibility or to the person entrusted with protection of the child's person or property, at his or her request, a certificate indicating the capacity in which that person is entitled to act and the powers conferred upon him or her.
- (2) The capacity and powers indicated in the certificate are presumed to be vested in that person, in the absence of proof to the contrary.
- (3) Each Contracting State shall designate the authorities competent to draw up the certificate.

Article 41

Personal data gathered or transmitted under the Convention shall be used only for the purposes for which they were gathered or transmitted.

Article 42

The authorities to whom information is transmitted shall ensure its confidentiality, in accordance with the law of their State.

Article 43

All documents forwarded or delivered under this Convention shall be exempt from legalisation or any analogous formality.

Article 44

Each Contracting State may designate the authorities to which requests under Articles 8, 9 and 33 are to be addressed.

Article 45

- (1) The designations referred to in Articles 29 and 44 shall be communicated to the Permanent Bureau of the Hague Conference on Private International Law.
- (2) The declaration referred to in Article 34, paragraph 2, shall be made to the depositary of the Convention.

Article 46

A Contracting State in which different systems of law or sets of rules of law apply to the protection of the child and his or her property shall not be bound to apply the rules of the Convention to conflicts solely between such different systems or sets of rules of law.

Article 47

In relation to a State in which two or more systems of law or sets of rules of law with regard to any matter dealt with in this Convention apply in different territorial units –

- (1) any reference to habitual residence in that State shall be construed as referring to habitual residence in a territorial unit;
- (2) any reference to the presence of the child in that State shall be construed as referring to presence in a territorial unit;
- (3) any reference to the location of property of the child in that State shall be construed as referring to location of property of the child in a territorial unit;
- (4) any reference to the State of which the child is a national shall be construed as referring to the territorial unit designated by the law of that State or, in the absence of relevant rules, to the territorial unit with which the child has the closest connection;
- (5) any reference to the State whose authorities are seised of an application for divorce or legal separation of the child's parents, or for annulment of their marriage, shall be construed as referring to the territorial unit whose authorities are seised of such application;
- (6) any reference to the State with which the child has a substantial connection shall be construed as referring to the territorial unit with which the child has such connection;
- (7) any reference to the State to which the child has been removed or in which he or she has been retained shall be construed as referring to the relevant territorial unit to which the child has been removed or in which he or she has been retained;
- (8) any reference to bodies or authorities of that State, other than Central Authorities, shall be construed as referring to those authorised to act in the relevant territorial unit;
- (9) any reference to the law or procedure or authority of the State in which a measure has been taken shall be construed as referring to the law or procedure or authority of the territorial unit in which such measure was taken;
- (10) any reference to the law or procedure or authority of the requested State shall be construed as referring to the law or procedure or authority of the territorial unit in which recognition or enforcement is sought.

Article 48

For the purpose of identifying the applicable law under Chapter III, in relation to a State which comprises two or more territorial units each of which has its own system of law or set of rules of law in respect of matters covered by this Convention, the following rules apply –

- a) if there are rules in force in such a State identifying which territorial unit's law is applicable, the law of that unit applies;
- b) in the absence of such rules, the law of the relevant territorial unit as defined in Article 47 applies.

Article 49

For the purpose of identifying the applicable law under Chapter III, in relation to a State which has two or more systems of law or sets of rules of law applicable to different categories of persons in respect of matters covered by this Convention, the following rules apply –

- a) if there are rules in force in such a State identifying which among such laws applies, that law applies;

- b) in the absence of such rules, the law of the system or the set of rules of law with which the child has the closest connection applies.

Article 50

This Convention shall not affect the application of the *Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, as between Parties to both Conventions. Nothing, however, precludes provisions of this Convention from being invoked for the purposes of obtaining the return of a child who has been wrongfully removed or retained or of organising access rights.

Article 51

In relations between the Contracting States this Convention replaces the *Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of minors*, and the *Convention governing the guardianship of minors*, signed at The Hague 12 June 1902, without prejudice to the recognition of measures taken under the Convention of 5 October 1961 mentioned above.

Article 52

- (1) This Convention does not affect any international instrument to which Contracting States are Parties and which contains provisions on matters governed by the Convention, unless a contrary declaration is made by the States Parties to such instrument.
- (2) This Convention does not affect the possibility for one or more Contracting States to conclude agreements which contain, in respect of children habitually resident in any of the States Parties to such agreements, provisions on matters governed by this Convention.
- (3) Agreements to be concluded by one or more Contracting States on matters within the scope of this Convention do not affect, in the relationship of such States with other Contracting States, the application of the provisions of this Convention.
- (4) The preceding paragraphs also apply to uniform laws based on special ties of a regional or other nature between the States concerned.

Article 53

- (1) The Convention shall apply to measures only if they are taken in a State after the Convention has entered into force for that State.
- (2) The Convention shall apply to the recognition and enforcement of measures taken after its entry into force as between the State where the measures have been taken and the requested State.

Article 54

- (1) Any communication sent to the Central Authority or to another authority of a Contracting 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 other State or, where that is not feasible, a translation into French or English.
- (2) However, a Contracting State may, by making a reservation in accordance with Article 60, object to the use of either French or English, but not both.

Article 55

- (1) A Contracting State may, in accordance with Article 60,
 - a) reserve the jurisdiction of its authorities to take measures directed to the protection of property of a child situated on its territory;
 - b) reserve the right not to recognise any parental responsibility or measure in so far as it is incompatible with any measure taken by its authorities in relation to that property.
- (2) The reservation may be restricted to certain categories of property.

Article 56

The Secretary General of the Hague Conference on Private International Law shall at regular intervals convoke a Special Commission in order to review the practical operation of the Convention.

CHAPTER VII – FINAL CLAUSES

Article 57

- (1) 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 Eighteenth Session.
- (2) 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, depositary of the Convention.

Article 58

- (1) Any other State may accede to the Convention after it has entered into force in accordance with Article 61, paragraph 1.
- (2) The instrument of accession shall be deposited with the depositary.
- (3) Such accession shall have effect only as regards the relations between the acceding State and those Contracting States which have not raised an objection to its accession in the six months after the receipt of the notification referred to in sub-paragraph *b* of Article 63. Such an objection may also be raised by States at the time when they ratify, accept or approve the Convention after an accession. Any such objection shall be notified to the depositary.

Article 59

- (1) If a 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 the 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.
- (2) Any such declaration shall be notified to the depositary and shall state expressly the territorial units to which the Convention applies.
- (3) If a State makes no declaration under this Article, the Convention is to extend to all territorial units of that State.

Article 60

- (1) 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 59, make one or both of the reservations provided for in Articles 54, paragraph 2, and 55. No other reservation shall be permitted.
- (2) Any State may at any time withdraw a reservation it has made. The withdrawal shall be notified to the depositary.
- (3) 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 61

- (1) The Convention shall enter into force on the first day of the month following the expiration of three months after the deposit of the third instrument of ratification, acceptance or approval referred to in Article 57.
- (2) Thereafter the Convention shall enter into force –
 - a) for each State ratifying, accepting or approving it subsequently, on the first day of the month following the expiration of three months after the deposit of its instrument of ratification, acceptance, approval or accession;

- b) for each State acceding, on the first day of the month following the expiration of three months after the expiration of the period of six months provided in Article 58, paragraph 3;
- c) for a territorial unit to which the Convention has been extended in conformity with Article 59, on the first day of the month following the expiration of three months after the notification referred to in that Article.

Article 62

- (1) A State Party to the Convention may denounce it by a notification in writing addressed to the depositary. The denunciation may be limited to certain territorial units to which the Convention applies.
- (2) The denunciation takes effect on the first day of the month following the expiration of twelve months after the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation takes effect upon the expiration of such longer period.

Article 63

The depositary shall notify the States Members of the Hague Conference on Private International Law and the States which have acceded in accordance with Article 58 of the following –

- a) the signatures, ratifications, acceptances and approvals referred to in Article 57;
- b) the accessions and objections raised to accessions referred to in Article 58;
- c) the date on which the Convention enters into force in accordance with Article 61;
- d) the declarations referred to in Articles 34, paragraph 2, and 59;
- e) the agreements referred to in Article 39;
- f) the reservations referred to in Articles 54, paragraph 2, and 55 and the withdrawals referred to in Article 60, paragraph 2;
- g) the denunciations referred to in Article 62.

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

Done at The Hague, on the 19th day of October 1996, 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 Eighteenth Session.

MASTERS LAW GROUP

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