Advisory Memorandum #4

To:	**Chief Administrative Judge Lawrence Marks**
From:	**Advisory Council on Immigration Issues in Family Court**
Re:	**Guidance on International Service Requirements and Foreign Documents**
Date:	**March 21, 2019**

The Advisory Council on Immigration Issues in Family Court, co-chaired by Hon. Ruben Martino, Supervising Judge, Family Court, Bronx County, and Theo Liebmann, Clinical Professor and Director of Clinical Programs, Hofstra Law School, was established by Chief Administrative Judge Lawrence Marks in 2015. The Council has prepared this memorandum as the fourth in a series of memoranda, bench aids and other documents to address the variety of immigration issues arising from Family Court proceedings. A list of the Council's members, including the Subcommittee on International Service and Foreign Documents, is attached as Appendix A to this Memorandum.

The goal of this Advisory Memorandum is to provide background information and guidance to New York Family Court practitioners and jurists regarding international service requirements for parties in custody and guardianship proceedings who live outside of the United States. It also provides guidance on proper authentication and admissibility of foreign documents.

International Service Overview

A threshold question for international service is whether the Hague Convention on Service applies.[1] If the Hague Convention does not apply, state law service requirements govern.

If state law controls, then the next question is which body of state law governs. In New York, the Civil Practice Law and Rules ("CPLR") generally applies to all civil proceedings.[2] However, service of the summons and petition in a guardianship or custody case is governed by various provisions of state law, including the Domestic Relations Law ("DRL"), Family Court Act ("FCA"), and the Surrogate's Court Procedure Act ("SCPA"). Service of motions is governed by the CPLR. The CPLR also governs the language of any papers being served either internationally or domestically, and requires only that papers served and filed be in the English language.[3]

Hague Convention

The Hague Convention applies to civil cases where "there is occasion to transmit a judicial or extrajudicial document for service abroad" to a known address in a signatory country.[4] There are three components that must all be met before the Convention applies in Family Court cases:

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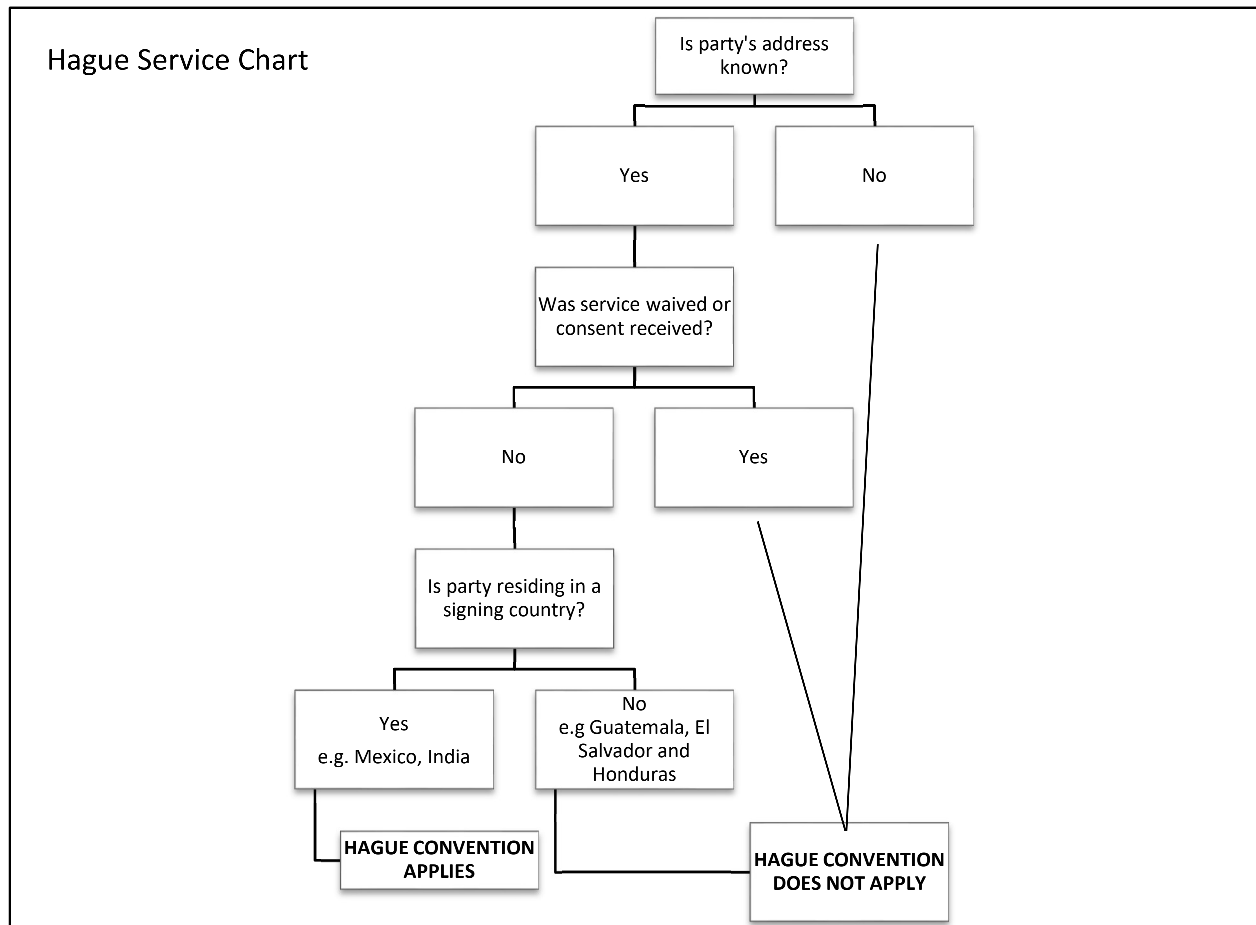
[1] Hague Convention Service methods are required in civil matters only if an individual with a known address resides in a country that is a signatory to the Convention. If those criteria are met, then service is dictated solely by Hague Convention terms.
[2] CPLR § 101.
[3] CPLR § 2101(b). Affidavits or exhibits annexed to papers may be in a foreign language, so long as accompanied by an English translation and translator's affidavit. Id.
[4] Article 1 of the Hague Convention of Service, available at http://www.hcch.net/upload/conventions/txt14en.pdf.

(….continued)

1. The party's address is known;
2. The party lives in a country that is a signatory to the Convention;[5] *and*,
3. Service is in fact necessary – that is, service is not waived or unnecessary pursuant to SCPA 1705(2) or any other statutory provision, or due to obtaining consent from the party (for example, on Form 6-4).

If all of these conditions are met, then the Convention applies and service must be effectuated under its terms, as described below. If any of these conditions are not met (e.g. the Respondent has consented; he/she abandoned the child and thus service is not required pursuant to SCPA 1705(2); or his/her address is not known), then the Convention does not apply and state law governs.



The Convention provides for three primary methods for service: international postal channels; direct service through an agent in the destination state (e.g. personal service effectuated by a person competent under that country's laws to serve process.); or, use of the country's designated Central Authority. A Central Authority is a government office designated by the signatory country and charged with service of process of legal documents.

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[5] A chart of participating countries is available at http://www.hcch.net/index_en.php?act=authorities.listing. *See also* Appendix B.

Under the terms of the Convention, service is "complete" when the documents are transmitted to the Central Authority or via another method allowed by the Convention. Once service has been effectuated under the Convention and enough time has passed for the party to be able to defend the case, generally 21 days, a default judgment may be entered.[6]

If service is effectuated through the Central Authority, the Authority provides the party requesting service with a certificate of service. However, if no certificate of service has been received from a country's Central Authority, U.S. Courts may nevertheless enter default judgments if the document was transmitted by a method prescribed by the Convention; at least six months, or a longer period considered adequate by the judge, has passed since the transmission of the documents; and a reasonable effort was made to obtain a certificate of service from the relevant Authority.[7]

Guardianship - Service of Process (Summons & Petition)

Pursuant to Family Court Act § 661, the Surrogate's Court Procedure Act's provisions on service may apply to guardianship petitions filed in Family Court.[8] What form of service is required under the SCPA depends on whether the person to be served lives inside or outside of New York State, and on whether the parent has abandoned the child. In addition, the SCPA provides jurists discretion over the form of service required for the court to obtain jurisdiction.

Inside New York

For respondents who are domiciled in New York, personal service is required.[9] The Court may direct an alternate form of service, provided that there is a showing that with due diligence, personal service within New York cannot be effectuated, or upon a showing of good cause that personal service within New York would be impracticable.[10] Once good cause/due diligence is shown, the SCPA has a non-exclusive list of methods of alternate service that may be ordered by a Judge, including mail, publication, or substituted service such as e-mail or Facebook (*see* discussion of "Court Ordered Service" and relevant references, below).[11]

Outside New York

Those outside of New York can be served by various methods, including personal, mail, publication, substituted service, email and Facebook service; no showing of due diligence/good cause is necessary before such service is ordered.[12]

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[6] If a default judgment is entered, a respondent may move to vacate the default by showing that service was not proper. *E.g. Vikram J. v Anupama S.*, 2014 NY Slip Op (1st Dept. 2014) (custody order vacated because India's Central Authority did not transmit documents to respondent parent).
[7] Article 15 of the Convention.
[8] FCA § 661(a); SCPA §§ 102, 307; *see also* FCA § 154.
[9] SCPA § 307(1).
[10] SCPA § 307(3).
[11] SCPA § 307(3).
[12] SCPA § 307(2 and 3).
(….continued)

Abandoned Child
The SCPA specifies that service is not necessary on a parent who has abandoned an infant.[13] A child is considered abandoned if a "parent evinces an intent to forego his or her parental rights and obligations as manifested by his or her failure to visit the child and communicate with the child."[14]

Court Ordered Service (Email and Facebook)
Jurists may also order any other form of service, such as service via Facebook or email; CPLR 308(5) gives a court "broad discretion to fashion proper methods of notice in unpredictable circumstances."[15] Due process requires that whatever form of service is ordered must be "reasonably calculated" to appraise the respondent of the pendency of proceedings.[16]

Affidavits of Service
An affidavit of service that comports with the requirements of the CPLR is prima facie evidence that process was properly served and creates a rebuttable presumption of proper service.[17] Any deficiency in the affidavit of service does not strip away the jurisdiction which was obtained.[18]

Custody - Service of Process (Summons & Petition)

In custody cases filed in Family Court, the service provisions of the DRL normally apply when service will be made out of state.[19] Provisions of the CPLR, FCA or case law may also apply, particularly when ordering alternatives to personal service, including service by publication, e-mail, Facebook, or other means[20] (*see* discussion of "Court Ordered Service," and relevant references, above). DRL § 75-g(1) explains that "[n]otice must be given in a matter reasonably calculated to give actual notice."

Service of Motions

Service of motions in virtually all civil court actions is governed by the CPLR, which provides that mail service upon attorneys or parties who are unrepresented is generally sufficient.[21]

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[13] SCPA § 1705(2).
[14] FCA § 1012(f)(ii), citing SSL § 384-b.
[15] CPLR § 308(5); *Maloney v. Ensign,* 43 A.D.2d 902 (4th Dept. 1974); *Harkness v. Doe*, 261 A.D.2d 846 (4th Dept. 1999); see also *Matter of J.T.*, 2016 N.Y. Slip Op. 26286 (Fam. Ct., Onondaga Co. 2016) (authorizing service by email); *Baidoo v. Blood-Dzraku*, 5 N.Y.S.3d 709 (Sup. Ct. N.Y. Co. 2015) (authorizing service by Facebook).
[16] *Maloney,* 43 A.D.2d 902; *Harkness*, 261 A.D.2d 846; see also *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306 (1950). Reasonableness only requires a likelihood that a party will learn of the action and not that the transmission will actually be received. *Id.* Indeed, "in the case of persons missing or unknown, employment of an indirect and even a probably futile means of notification is all that the situation permits." *Mullane.* 339 U.S. at 317.
[17] CPLR § 306. *Genway Corp. v. Elgut*, 177 A.D. 2d 467 (2nd Dept. 1991).
[18] *Morrissey v. Sostar, S.A.*, 63 A.D.2d 944 (1st Dept. 1978).
[19] DRL § 75-g; see also CPLR § 2103, FCA § 154.
[20] DRL § 75-g(c); see also CPLR § 2103, FCA § 154.
[21] CPLR § 2214; see also *Matter of Elida Edith Vaillatoro Ramirez,* 136 A.D.3d. 666 (2nd Dept. 2016) (holding that personal service of a SIJS motion was not required and that mail service on the father's last known address was sufficient).
(….continued)

Validity and Admissibility of Foreign Documents

Neither the Family Court Act nor the Surrogate Court Procedure Act has requirements for the authentication and admissibility of foreign documents. Accordingly, the provisions of the CPLR apply. CPLR § 4542(a) provides that original foreign documents sought to be admitted into evidence, such as birth certificates, passports and foreign court orders are self-authenticating, and admissible. In addition, CPLR § 2101(e) permits the court to accept copies of documents, even where an original is otherwise required.

The Apostille Convention is an international treaty which specifies the ways a document in one of the signatory countries can be certified for legal purposes in another signatory state. The Apostille Convention was created to remove the need for double certification from an originating country to a receiving country. An apostille simply serves to verify that the document was issued by the appropriate authority.

An apostille is required only if the following conditions are met: both countries are signatories;[22] the document is covered by the Convention (e.g. a public document); and the U.S. requires an apostille to recognize it as a foreign public document. However, the Convention contains explicit exemptions from its applicability.[23] Given the CPLR provision permitting the use of original foreign documents as admissible evidence, the Apostille Convention will rarely apply. Additionally, an apostille does not address the content of the document, merely its certification.

When a sworn document, such as a signed consent to jurisdiction of the court and waiver of service of process, has a proper certification, it should be treated the same as oaths and affirmations taken within New York.[24] The CPLR likewise provides that oaths and affirmations taken outside of NY should be treated the same as those taken inside.[25] As a result, consents executed by respondent parents which waive the issuance of service of process have been upheld by appellate courts.[26]

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[22] Not all countries are a signatory to the Apostille Convention (https://www.hcch.net/en/instruments/conventions/status-table/?cid=41).

[23] Exemptions include: If the domestic law of the State of destination has eliminated, limited or further simplified the authentication requirement; the domestic law of the State of destination does not impose any authentication requirement; or an applicable treaty, convention, agreement or other similar instrument (incl. a regulation) has eliminated, limited or further simplified such a requirement. http://www.hcch.net/upload/apostille_hbe.pd.

[24] CPLR § 4538.

[25] CPLR § 2309(c).

[26] *Matter of Ramirez v. Palacios*, 136 A.D.3d 666 (2nd Dept. 2016).

Appendix A. Advisory Council on Immigration Issues in Family Court

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Appendix B: Hague Signatories[27]

[27] For a complete description of each signatory country's specific international service provisions under the Hague Convention, go to https://www.hcch.net/en/instruments/conventions/status-table/print/?cid=17.

Albania
Antigua and Barbuda
Argentina
Armenia
Australia
Bahamas
Barbados
Belarus
Belgium
Belize
Bosnia and Herzegovina
Botswana
Bulgaria
Canada
China, People's Republic of
China (Hong Kong)
China (Macao)
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Kuwait
Latvia
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Luxembourg
Malawi
Malta
Mexico

Monaco
Montenegro
Morocco
Netherlands
Norway
Pakistan
Poland
Portugal
Republic of Moldova
Romania
Russian Federation
Saint Vincent and the Grenadines
San Marino
Serbia
Seychelles
Slovakia
Slovenia
Spain
Sri Lanka
Sweden
Switzerland
The Former Yugoslav Republic of Macedonia
Turkey
Ukraine
United Kingdom
United States of America
Venezuela