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Jurisdiction in Child Custody and Abduction Cases: A Judge's Guide to the UCCJA, PKPA, and the Hague Child Abduction Convention

by

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American Bar Association
Center on Children and the Law

udges' Guide to Criminal Parental Kidnapping Cases

by

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National Council of Juvenile and Family Court Judges

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Preface

Jurisdiction in Child Custody and Abduction Cases: A Judge's Guide to the UCCJA, PKPA, and the Hague Child Abduction Convention and Judges' Guide to Criminal Parental Kidnapping Cases

As a young prosecutor in 1983, my boss came to me with the request to start a parental kidnapping unit within the office and to handle all the cases. My response — "what's parental kidnapping?" — came to reverberate in my ears for many years to come. I still have vivid memories of entering a judge's chambers and hearing the next typical response: "This case does not belong in my department." As if we were in a proverbial ping-pong game, judges attempted to bounce custody-related cases to any department other than their own.

Unfortunately, these problems did not stop when I became a judge. My colleagues were more than delighted to transfer any case that appeared to involve custody issues to me. I generally accepted the cases because it was easier to take them than endeavor to explain the law or refer the judges to resources spread throughout the law library. Now, don't get me wrong, the judges had the best of intentions, but the fear of the unknown often drives the best to a course of inaction. Oh, how often I wished that someday there would be a bench book or single reference source for judges such as existed on so many other topics.

Well, that dream has come true. The two bench books before you contain the harvest of many years of work and research by authors from the American Bar Association Center on Children and the Law, APRI's National Center for Prosecution of Child Abuse and the National Council of Juvenile and Family Court Judges. Not only are they well written, but they are infused with the care and concern of professionals who have worked in this field for many years. The authors offer judges the tools to make custody jurisdiction and litigation comprehensible, together with compassion for the children and families directly affected by the judicial decisions rendered. These texts provide any judge, sitting on any court, the resources to make an intelligent decision, whether in the criminal or civil venue.

Custody disputes and parental kidnapping are not just local problems, but ones that often encompass interstate and international jurisdictional issues that require solutions in both the civil and criminal courts of this nation and others. While I wish every judge the success of resolving custody cases in the civil venue, there will be many that reach the criminal courtroom. Studies show there may be as many as 350,000 abductions each year with varying degrees of severity. They run the gamut from relatively simple weekend visitation violations to long-term out-of-state or international abductions. Many parental kidnappings occur in families already torn apart by domestic violence and child abuse.

Hopefully, judges will look to these bench books not only in a time of need, but also as a resource they can use to acquaint themselves with the issues at their leisure. Recognition and understanding of the underlying causes of parental abduction will allow judges to spot

troublesome cases as they emerge and then implement preventive measures. These bench books provide in-depth discussions, practical tips, and forms on how to craft enforceable orders for both civil and criminal court purposes. There are also full discussions of the Uniform Child Custody Jurisdiction Act (UCCJA) and Parental Kidnapping Prevention Act (PKPA) — the least understood but most fundamental statutes any judge or attorney working in this field must comprehend — as well as a discussion of efforts and legislation to eliminate the current conflict between the two statutes.

I believe all judges and attorneys, whether new or vastly experienced, will find these two bench books an invaluable resource. The welfare of families — especially the children caught in these disputes — deserves and needs intelligent and reasoned resolutions. With some careful reading, the hallways and chambers of courtrooms throughout the nation will no longer echo with the words I first heard almost fifteen years ago.

The Honorable Paul Cole
Santa Clara County Municipal Court

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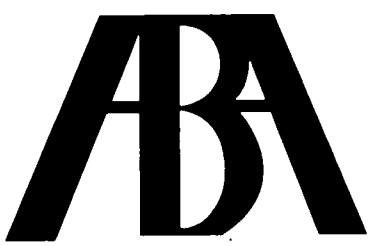

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Points of view or opinions in these materials are those of the authors and do not necessarily represent the official position of the Department of Justice.

The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and accordingly, should not be construed as representing the policy of the American Bar Association.

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Acknowledgments

This bench book was written by attorneys Patricia M. Hoff and Adrienne E. Volenik. Linda K. Girdner, Ph.D., also was a contributing author.

Ms. Hoff is the legal director of the "Obstacles to the Recovery and Return of Parentally Abducted Children: Training, Technical Assistance, and Product Resources" project at the ABA Center on Children and the Law. She had primary responsibility for developing this bench book.

Ms. Volenik is director of the Mental Disability Law Clinic, T.C. Williams School of Law, University of Richmond. She collaborated with Ms. Hoff and Joanne Schulman on two similar manuals: *Interstate Child Custody Disputes and Parental Kidnapping: Policy, Practice and Law* (1982) and the *1990 Supplement*. These were produced jointly by the National Center on Women and Family Law, Inc., the National Center for Youth Law, and the Child Custody Project of the American Bar Association, under a grant from the Legal Services Corporation.

Dr. Girdner is director of research at the ABA Center on Children and the Law, and is project director of several grants relating to parental kidnapping, including this one. She shares her considerable knowledge of domestic violence issues in interstate custody cases, as well as obstacles to recovery, in Chapters 7 and 9. Dr. Girdner's contributions to this book go beyond her writing. She created a positive working relationship between the Obstacles Project and the National Council of Juvenile and Family Court Judges, which made this joint venture possible.

Dr. Janet Johnston and Dr. Girdner collaborated on the section on risk factors for abduction in Chapter 7. Dr. Johnston was principal investigator of the research on "Prevention of Parent and Family Abduction Through Early Identification of Risk Factors."

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We appreciate Marie R. Mildon's enthusiastic reception to our idea of publishing this bench book in the *Journal*, and thank her for making this *Journal* issue a reality.

Finally, we recognize our grant monitors at the Office of Juvenile Justice and Delinquency Prevention (OJJDP), Michael Medaris, and his predecessor, Lois Brown, for their support of this educational initiative. We are indebted to OJJDP's Missing Children Program for funding this effort to overcome a major obstacle to the recovery and return of missing and exploited children.

Jurisdiction in Child Custody and Abduction Cases: A Judge's Guide to the UCCJA, PKPA, and Hague Child Abduction Convention

Foreword

Hundreds of child custody cases are fought across state and national borders every year. Some involve child abduction. Others are the consequence of parents moving with their children to different states or countries following the breakup of their relationships. Very often courts in different states — or countries — exercise custody jurisdiction and issue conflicting orders, raising questions about which order is enforceable.

Litigating custody and pursuing appeals in two different forums can leave parents emotionally and financially exhausted. Worse, children are subjected to long periods of uncertainty and the emotional trauma of being the objects of these prolonged conflicts.

The administration of justice is greatly enhanced when judges have a clear understanding of the complex state, federal and international laws applicable to litigation pending before them. Despite its obvious importance, ongoing judicial education in every aspect of the court's jurisdiction is often difficult, if not impossible. I am sure that most judges would agree that having all of the necessary information available prior to rendering a decision from the bench would be the ideal. However, when considering whether to exercise jurisdiction in an interstate child custody or abduction case all of the necessary information is rarely presented or even available within the state. During heightened litigation, often involving *pro se* litigants, it is often difficult to frame the right questions in order to obtain the information critical to a proper determination. The availability of a handy reference book, to assist the judge in sorting through applicable statutes and ever-changing case facts is an invaluable aid.

This unique volume is the first comprehensive study of jurisdiction in child custody and abduction cases specifically designed for use by the judiciary from the bench. Comprehensive yet succinct, the bench book is a valuable resource for judges faced with deciphering the requirements of the Uniform Child Custody Jurisdiction Act (UCCJA), the federal Parental Kidnapping Prevention Act (PKPA), and the Hague Convention of the Civil Aspects of International Child Abduction (Convention), amidst burgeoning caseloads, limited resources and parties deep in the emotional throes of custody litigation.

However, in order for a bench book to be helpful it must be useable. A judge should be able to peruse it at his or her leisure for detailed understanding or, be able to flip it open, amidst arguments of counsel if need be, and locate information quickly and easily. This well-crafted bench book is designed to assist judges to do just that.

The UCCJA and the PKPA were enacted to prevent jurisdictional gridlock in child custody and abduction cases, and to facilitate interstate enforcement of custody and visitation decrees. The United States ratified the Hague Convention on the Civil Aspects of International Child Abduction (Convention), which requires the prompt return of children who have been wrongfully taken or kept abroad. Federal legislation, the International Child Abduction Remedies Act (ICARA), provides procedures for implementing the Convention in this country.

Judges have a critical role in making these laws work. Yet research conducted by the American Bar Association found that many judges have not applied these laws correctly or at all. Lack of knowledge was identified as a key

reason.[1] The Obstacles Report recommended continuing education for judges and lawyers on the UCCJA, PKPA, Hague Convention and ICARA.[2] Collaborative efforts between judges' organizations and the ABA were suggested to disseminate information about these laws to the legal community.[3] This *Journal* issue implements these recommendations. It is the product of a successful collaboration between the ABA Center on Children and the Law and the National Council of Juvenile and Family Court Judges.

Another effort is underway to improve the handling of interstate child custody and visitation cases. The National Conference of Commissioners on Uniform State Laws (NCCUSL) is in the process of revising the UCCJA. The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), as the draft bill is called, makes the UCCJA consistent with the PKPA, establishes a uniform procedure for expedited interstate enforcement of custody and visitation orders, clarifies some UCCJA provisions to better reflect the drafter's original intent, and codifies good practice.

The National Council of Juvenile and Family Court Judges and the ABA have been involved, in an advisory capacity, with the NCCUSL committee that is drafting the UCCJEA. The UCCJEA is scheduled for its second reading in July 1997. It is difficult to determine how long it will take the 50 states to enact the UCCJEA once it is available for adoption, presumably in 1998. In the interim, the imperative remains for judges to accurately and efficiently apply the existing statutes as they were intended to be used. This bench book will assist judges to fulfill this mandate.

It is a book for **all** judges, whether on the family court, the juvenile bench, or a court of general jurisdiction, who preside over **any** civil case involving child custody. The UCCJA and PKPA apply to a broad range of "custody proceedings" and not solely when custody is at issue in proceedings for divorce or separation. The book should be consulted routinely whenever custody is at issue. This book does **not** cover how judges should decide the merits of a custody dispute once it is determined they have jurisdiction.

For those judges who are already knowledgeable about the intricacies of the UCCJA, PKPA and the Hague Convention, a review of the bench book will provide solid evidence that thousands of other judges will soon join the ranks of the well-informed. The rest of us, still struggling to make sense of the UCCJA *et al*, will welcome this bench book with open arms confident that much needed help has arrived.

The authors have made a valuable contribution to the library of judicial resources that improve the courts' ability to administer justice. It is a privilege to be associated with this publication.

Janice Brice Wellington
Board of Trustees
National Council of Juvenile
and Family Court Judges

Endnotes

1. FINAL REPORT: OBSTACLES TO THE RECOVERY AND RETURN OF PARENTALLY ABDUCTED CHILDREN, eds. Linda Girdner and Patricia Hoff (Washington, D.C.: United States Department of Justice, Office of Juvenile Justice and Delinquency and Prevention 1993), 19-20. The lack of knowledge of applicable law, and lack of experience on the part of many attorneys and judges, emerged as major obstacles to the recovery and return of parentally abducted children: "Although a small cadre of judges and attorneys has expertise in this area of law, most are not familiar with it. Analysis of recent case law revealed many appellate judges were not aware or properly informed of the PKPA in cases in which it should have been controlling. In a nationwide sample, half of the judges surveyed reported that counsel rarely or never informed them of the PKPA in cases in which it was applicable. Over forty percent of the responding attorneys said that judges were unfamiliar with the PKPA and about two-thirds said that opposing counsel was unfamiliar with the Act. Familiarity with the Hague Convention appeared to be lacking to an ever greater decree according to both judges and attorneys. Respondents reported that attorneys and, particularly, judges are more informed about the UCCJA. However, survey responses indicated that many of the judges and attorneys were not routinely utilizing procedures which are mandated by the UCCJA to prevent simultaneous proceedings, such as affidavits and inter-court communications. Recent case law confirms that these and other aspects of the UCCJA are often overlooked..."

2. *Id.*

3. *Id.* at EXSUM-20.

Guide to Use

This book deals with the civil aspects of interstate and international child custody and abduction cases. A companion piece, also appearing in this journal, addresses criminal child abduction cases and should be consulted by judges trying tose cases.

Four statutes are examined in this book: the Uniform Child Custody Jurisdiction Act (UCCJA), the Parental Kidnapping Prevention Act (PKPA), the Hague Convention on the Civil Aspects of International Child Abduction (Hague Convention), and the International Child Abduction Remedies Act (ICARA). The text explains when a court has jurisdiction to make an initial custody determination and to modify an existing custody order, and when a court should decline to exercise jurisdiction. It explains the duty to enforce sister state and foreign orders, and the treaty obligation to order an abducted child promptly returned.

This text should be referred to at the **beginning** of every custody case — before addressing the merits. This is when the court must make its threshold determination of jurisdiction to make or modify custody. In an enforcement action, this is the time to review the statutory obligations of state and federal law to enforce a sister state order as well as limits on modifying an out-of-state order. In an international custody case, the court must determine at the outset whether the Hague Convention has been invoked for the return of the child because it will take precedence over other custody proceedings.

Contents

Chapter 1 presents an overview of the UCCJA, the PKPA, the Hague Convention and ICARA.

Chapter 2 identifies the "custody proceedings" to which these statutes must be applied.

Chapter 3 focuses on UCCJA § 9 pleading requirements. It also covers notice requirements, parties and appearances.

Chapter 4 explains when and how judges should communicate and cooperate with one another to avoid interjurisdictional conflict.

Chapters 5 and 6 explain the jurisdictional rules of the UCCJA and PKPA applicable to initial custody and custody modification cases, respectively. The UCCJA and PKPA treat initial custody proceedings and modification proceedings very differently, hence the two separate chapters. The focus is on what judges must consider at each stage of a custody proceeding to determine whether jurisdiction exists and, if so, whether it should be exercised.

Chapter 7 is a guide to drafting custody orders to facilitate their interstate enforcement. This chapter informs judges of provisions which can be included in court orders to safeguard against possible child abductions. Risk factors for abduction and obstacles to recovery are described.

Chapter 8 discusses the interstate duty to enforce custody determinations.

Chapter 9 focuses on interstate adoption cases, child custody cases involving a parent in the military, and custody cases involving domestic violence. Suggestions for analyzing and dealing with the complex jurisdictional issues are presented.

Chapter 10 is the place to find information on the laws applicable to international child custody, visitation and abduction cases. The UCCJA duty to recognize and enforce custody orders made by foreign courts is discussed, along

with the judge's role in deciding a case for the return of a child under the Hague Child Abduction Convention and ICARA.

Chapter 11 discusses when judges can award attorneys' fees, travel and other expenses in custody, visitation and abduction cases.

Chapter 12 describes the draft Uniform Child Custody Jurisdiction and Enforcement Act.

The appendices of this book contain reprints of the PKPA (Appendix I), the UCCJA (Appendix II), the Hague Convention (Appendix IIIA), the list of Hague party countries and effective dates (Appendix IIIB), and ICARA (Appendix IV).

A discussion of the coordination of criminal and civil proceedings can be found on pages 14-19 of the companion bench book, *Judges' Guide to Criminal Parental Kidnapping Cases*.

Chapter 1
Introduction

Summary

This chapter provides an overview of the statutes that are the subject of this book--the Uniform Child Custody Jurisdiction Act (UCCJA), the Parental Kidnapping Prevention Act (PKPA), the Hague Convention on the Civil Aspects of International Child Abduction (Hague Convention) and the International Child Abduction Remedies Act (ICARA).

CHECKLIST

1. What are the major provisions of the UCCJA?
   - Jurisdictional rules, and duties, regarding making, modifying and enforcing child custody determinations

2. What are the major provisions of the PKPA?
   - Full faith and credit to custody determinations
   - Federal Parent Locator Service
   - Fugitive Felon Act

3. What are the major provisions of the Hague Convention on the Civil Aspects of International Child Abduction?
   - Prompt return of wrongfully removed and retained children

4. What are the major provisions of the International Child Abduction Remedies Act?
   - How the Hague Convention is to be implemented by State and federal courts in the U.S.

Applicable statutes

FEDERAL

Parental Kidnapping Prevention Act
Hague Convention on the Civil Aspects of International Child Abduction
International Child Abduction Remedies Act

STATE

Uniform Child Custody Jurisdiction Act

Just imagine what a child at the center of a contested interstate or international child custody, visitation or abduction dispute wants the most. It is an end to hostility between his parents and to the litigation they pursue in courtrooms in different states or countries. In the pursuit of the ultimate prize — winning custody — parents often lose sight of the child's need to be secure in his relationships and free of the tension about the future that is fueled by competing custody proceedings in multiple forums.

Interstate child custody disputes

The Uniform Child Custody Jurisdiction Act (UCCJA) and the Parental Kidnapping Prevention Act (PKPA) are the court's tools to stop competing proceedings and to promote finality and stability in custody arrangements. These statutes govern jurisdiction to make and modify child custody determinations, and create duties to enforce those of other states and

countries. They provide answers to the complex questions judges grapple with in interstate custody cases, such as:

Does this court have jurisdiction to make an initial custody determination?

Can this court exercise jurisdiction if the child has been abducted and is no longer in this state?

Does this court have jurisdiction to modify another state's custody determination?

If the court has jurisdiction to make or modify a custody determination, should it exercise it?

If another court has jurisdiction, is it appropriate for this court to grant relief in an emergency situation? If so, what relief is appropriate?

May a court in this state proceed if there is a proceeding pending in another jurisdiction?

Must this court enforce a custody determination made by another state?

Must this court defer to the jurisdiction of a court in another country or enforce a foreign custody order?

Acts apply to 'State' courts

Both Acts establish when a 'State' court has jurisdiction to make an initial custody determination and to modify an existing order, and when a 'State' court should decline to exercise jurisdiction. The acts require 'State' courts [1] to enforce and not modify child custody determinations made by other 'State' courts, and to refrain from exercising jurisdiction when proceedings are already pending in other 'State' courts consistently with the statutes.

'State' is defined in both statutes to mean every state, the District of Columbia, the Commonwealth of Puerto Rico and U.S. territories and possessions.[2] Neither statute[3] includes 'tribal courts' or Indian reservations within the definition of the 'State.'[4]

As federal law, the PKPA automatically applies to all 'States'. The UCCJA, a state statute, has been enacted with local variation by every state, the District of Columbia and the Virgin Islands. References in this text are to the Uniform Act. Courts should refer to their state's codification of the Act.[5]

The Uniform Child Custody Jurisdiction Act

The purposes of the Act, set forth in § 1, should be reviewed by every judge faced with an interstate or international custody case. They set a tone for judicial cooperation and assistance. The purposes are particularly helpful to guide the exercise of judicial discretion. They are also useful to interpret vague, operative provisions of both Acts. Section 1 appears in its entirety in Appendix II.

In summary, the UCCJA is designed to:

- avoid jurisdictional competition and conflict with courts of other states;
- to promote cooperation with the courts of other states to the end that a custody decree is rendered in that state which can best decide the

case in the interest of the child;

- to assure that litigation concerning the custody of a child takes place in the state with which the child and his family have the closest connection;
- to discourage continuing controversies over child custody in the interest of greater stability of home environment and of secure family relationships for the child;
- to deter abductions and other unilateral removals of children undertaken to obtain custody awards;
- to avoid relitigation of sister state custody decisions of insofar as feasible; and to facilitate the enforcement of custody decrees of other states.

Section 2 makes the Act applicable to a wide range of custody proceedings. The Act applies to determinations for custody and visitation. It does not apply to proceedings for child support orders.[6]

The UCCJA distinguishes between criteria for the *existence* of jurisdiction, found in § 3, and criteria for *exercise* of jurisdiction, found in other sections. Thus, § 3 governs the question of when a state has jurisdiction to make an initial custody determination or to modify an existing order made there or in another State. It provides four alternative bases for jurisdiction (*i.e.*, "home state," "significant connection," "emergency," and "last resort").[7] Physical presence of the child is expressly eliminated as a prerequisite of jurisdiction except in emergency cases.

Even when a state has jurisdiction under § 3 to make or modify a custody order, other sections limit exercise of the jurisdiction. Thus, UCCJA § 6 prohibits a court from proceeding if another court is already exercising jurisdiction in accordance with the Act.[8] This section directs courts to communicate and cooperate[9] to decide to which is the more suitable forum to hear the case. Also, under § 14, a court having jurisdiction may modify another state's orders only when the other state has declined to exercise jurisdiction or no longer has a basis for jurisdiction.

Even when a court has jurisdiction under § 3 and is not forbidden to exercise it by § 6 or 14, the court may decline to exercise jurisdiction under the UCCJA[10] when another forum would be more convenient (§ 7) or when a petitioner comes to court with 'unclean hands' (§ 8). The courts have authority under these sections to award travel and other expenses, including attorneys fees, to the prevailing party.

Section 13 requires courts to recognize and enforce[11] initial and modification decrees made in other states substantially in accordance with the UCCJA, or under factual circumstances meeting the jurisdictional standards of the Act. Section 15 provides that once a custody determination is filed in the appropriate court, it must be treated as if it were a decree made by a court in that state. It is enforceable by any method of enforcement available under the law of that state.

Sections 19 and 20 authorize courts to assist one another in gathering evidence and ensuring the appearance of parties.[12] Sharing of information and records is also promoted in §§ 21 and 22.

Parental Kidnapping Prevention Act

Congress enacted the PKPA in 1980 based upon findings substantially similar to those in the UCCJA. In addition, Congress found that courts in different states have difficulties resolving the jurisdictional conflicts that often ensue in custody contests. One of the federal law's chief purposes is to "avoid jurisdictional competition and conflict between state courts."[13]

The PKPA controls the effect a child custody determination is to be given by sister state courts. When a state court exercises jurisdiction consistently with federal jurisdictional criteria, its custody determination is entitled to full faith and credit in sister states.[14] State court compliance with the PKPA will ensure that the resulting order is enforceable nationwide. If there is a conflict between the UCCJA and the PKPA, under the Supremacy Clause, the PKPA prevails.

The PKPA applies to all custody and visitation disputes involving courts in different states, and is not limited to parental kidnapping cases, as its name might suggest.

The PKPA has three components: (1) Full Faith and Credit to Sister State Custody Determinations; (2) Federal Parent Locator Service; and (3) Fugitive Felon Act.

Full Faith and Credit to Sister State Custody Determinations[15]

The PKPA affects the way state courts handle interstate child custody cases by requiring the appropriate authorities of every state to:

- enforce and not modify custody determinations made consistently with PKPA jurisdictional criteria, unless the original state no longer has, or has declined to exercise, jurisdiction. 28 U.S.C. 1738A(a), (c), (d), (f);
- defer to the continuing jurisdiction of a state which made a custody determination consistent with the provisions of the PKPA as long as (1) that state has jurisdiction under its own law; and (2) remains the residence of the child or any contestant. 28 U.S.C. 1738A(d);
- refrain from exercising jurisdiction while another state's court is exercising jurisdiction consistently with the PKPA provisions. 28 U.S.C. 1738A(g); and
- ensure that reasonable notice and opportunity to be heard are given to contestants, any parent whose parental rights have not been previously terminated, and any person who has physical custody of the child. 28 U.S.C. 1738A(e).

The jurisdictional criteria of the PKPA closely resemble the UCCJA. However, unlike the UCCJA § 3, they are not rules for the existence of jurisdiction. Instead, they are criteria determining when the PKPA forbids a court to exercise jurisdiction or requires a court to enforce another state's order.

There is another notable difference between UCCJA § 3 and the similar PKPA criteria. Whereas the UCCJA provides alternative bases for jurisdiction, the PKPA prioritizes "home state" over "significant connection" jurisdiction in initial custody proceedings. Every state, including a significant connection state, must grant full faith and credit to the home state's custody decree. In addition, all states are prohibited from exercising jurisdiction if there is a prior pending proceeding in the child's home

state. The original home state's jurisdiction continues after it makes an order, and is exclusive even after the child has moved away and acquired a new home state, so long as a contestant continues to reside in that state and the state has jurisdiction under its own law.

Any errors made by state courts in interpreting and applying the PKPA can be corrected by the U.S. Supreme Court on *certiorari*. The Supreme Court has held that the PKPA does not create a cause of action in federal court to determine which of two conflicting custody decrees is valid. Thompson v. Thompson, 484 U.S. 174, 108 S. Ct. 513 (1988).

Federal Parent Locator Service: locating an abducted child

The PKPA expanded the use of the Federal Parent Locator Service (FPLS) to encompass locating parents and children for purposes of making or enforcing child custody determinations and enforcing any state or federal criminal parental kidnapping law.
42 U.S.C. 651, 653, 654, 663, 94 Stat. 3571-73.
This section of the PKPA gives courts a resource for helping parents find their abducted children.

Only persons authorized in the statute may request the FPLS to locate missing children and their absconding parents. These include, *inter alia*, any court or agent of a court with jurisdiction to make or enforce a custody determination. Because parents are not "authorized persons," they must ask persons authorized in the statute to seek address information from the FPLS.

In an abduction case, the left-behind parent may petition the court to request an FPLS search to locate the abductor-parent and child. This will normally be done in conjunction with a petition for custody, which the left-behind parent may file after an abduction despite the child's absence from the state. The court's help may also be sought in connection with a modification petition and in an enforcement proceeding.

To initiate a search, the court requests the state Parent Locator Service[16] to submit the case to the FPLS to locate the abductor.
The court may make the request for location assistance by letter or by form. A sample form is set out in the endnotes.[17]

Any information the FPLS obtains about the location of the abducting parent or child is transmitted to the State Parent Locator Service which then communicates the information to the authorized person making the request. The information may be used for official purposes. It may not be disseminated to unauthorized individuals.

Initiating an FPLS search is one way that courts can help parents find their abducted children. Another way is to compel an attorney to disclose information as to a client's whereabouts when the client has absconded with the child. Courts have found an exception to the attorney-client privilege where disclosure was in the child's best interests or required for the administration of justice.[18] Courts can also admonish parents to seek location assistance from the state missing children clearinghouse, if one exists, and from the National Center for Missing and Exploited Children (800-843-5678).

Fugitive Felon Act[19]

The PKPA (18 U.S.C. 1073 note, 94 Stat. 3573) expressly declares the intent of Congress that the Fugitive Felon Act, 18 U.S.C. 1073, applies to state felony parental kidnapping cases involving interstate or international flight to avoid prosecution. This enables state prosecutors to secure F.B.I. assistance in locating parents whose whereabouts are unknown. Once located, the federal charges are normally dropped and the parent is returned to the state for prosecution under state law.

The child is not the object of a "UFAP" (Unlawful Flight to Avoid Prosecution) warrant. Only the person charged with criminal custodial interference is subject to arrest and extradition. The searching parent must rely upon civil remedies to secure the child's return.

International Child Custody and Abduction Cases[20]

UCCJA

Section 23 of the UCCJA extends the general policies of the Act to international cases. The idea underlying this section is for U.S. courts to defer to foreign courts in the same manner and under the same circumstances as they would to sister state courts. The section specifically requires courts to enforce foreign custody decrees, provided all affected persons were given notice and opportunity to be heard.

Hague Convention and ICARA

International child abduction cases may be remediable under the Hague Convention, a treaty ratified by the United States and in effect in 43 other countries.[21] In contrast to criminal extradition treaties, which apply only to the abductor-parent, this is a civil treaty. It is designed to promptly restore the child to his/her pre-removal or retention circumstances. A return decision is not a decision on the merits of custody. It is essentially a jurisdictional decision.

There need not be a custody order in effect for the Convention to apply. It is not a convention on recognition and enforcement of judgments.

The Hague Convention came into force for the United States upon enactment of federal implementing legislation, the International Child Abduction Remedies Act (ICARA), in 1988. The Convention and ICARA[22] apply to cases which seek the return of children who have been wrongfully brought to, or kept in, this country. Courts have a mandatory duty to order a child returned forthwith if the court finds the removal or retention to be wrongful and no exceptions to return are found to apply. A state court may consider the merits of the case only if return is denied *and* the court has a basis for exercising jurisdiction over the child.

Endnotes

1. The PKPA actually requires "the appropriate authorities of every state" to enforce custody determination made consistently with the Act by a court of another state. 28 USC 1738A(a).

2. 28 U.S.C. 1738A(b)(8); UCCJA § 2(10).

3. Nevada and Wisconsin have amended the UCCJA to clarify when the Indian Child Welfare Act (ICWA) governs custody proceedings. See Chapter 2 for a discussion of 'custody proceedings' covered by ICWA.

4. The UCCJA and PKPA do not on their face apply to tribal-state jurisdictional disputes. Neither Act includes "Indian tribes" or "Indian reservation" in the definition of "State." In the absence of clear statutory guidance, courts have reached different conclusions about whether these acts apply to settle jurisdictional disputes between tribal and state courts concerned with custody of the Indian children. A federal court of appeals decision held that the PKPA applies to Indian tribes. In Eastern Band of Cherokee Indians v. Larch, 872 F.2d 66 (4th Cir. 1989), the court held that the Cherokee tribe was a 'State' for purposes of the PKPA, 28 U.S.C. 1738A(b)(8), thus the Cherokee tribal court had to grant full faith and credit to a North Carolina custody order. Under the court's analysis, as 'States', tribes are subject to both the burdens and benefits of the PKPA. The Fourth Circuit's interpretation of the PKPA is consistent with the purposes of both Acts, *i.e.*, to prevent competing proceedings and duplicative custody litigation, and to ensure enforceability of custody determinations in other jurisdictions.

At least one state court has held that the UCCJA applies to Indian tribes. *See* Martinez v. Superior Court, 731 P. 21 1244 (Ariz. Ct. App. 1987). However, the more numerous state court rulings are to the contrary. *See, e.g.*, Malaterre v. Malaterre, 293 N.W.2d 139 (N.D. 1980) (A reservation is not a state within the meaning of the UCCJA); Byzewski v. Byzewski, 429 N.W.2d 139 (N.D. 1980); Desjarlait v. Desjarlait, 379 N.W. 139 (Minn. App. 1985); In re Custody of Sengstock, 477 N.W.2d 310 (Wis. App. 1991) (Where a tribe is neither a state nor a foreign country, a state court is not required to acknowledge a tribal court custody order under the UCCJA. And, because the tribe is not a state, territory, possession or commonwealth, the judgments and orders of its tribal courts are not entitled to full faith and credit under U.S. Const. art. IV, sec. 1, and 28 U.S.C. 1738, 1738A.); Harris v. Young, 473 N.W.2d 141 (S.D. 1991).

As a policy matter, state courts should apply the general principles of the UCCJA when there are competing proceedings in tribal courts. For a good example of state court restraint in deference to a prior tribal court proceeding, *see* Matter of Custody of K.K.S., 508 N.W.2d 813 (Minn. App. 1993) (The Red Lake National tribal court and the state court share authority over the case, and the state court properly dismissed the case when the tribal court exercised its jurisdiction. The tribal court did not lose jurisdiction when the non-Indian parent removed the child from the reservation without the consent of the Indian parent, and the State court did not obtain exclusive jurisdiction over the custody dispute just because the father and child had a transient presence off the reservation.). *Also see* In re Custody of Sengstsock, *supra*. Although holding that a tribe is not a "state" within the meaning of the UCCJA, and that state courts are not required to acknowledge a tribal court custody order under the UCCJA, the state court properly applied the doctrine of comity to give full force and effect to the tribal court proceedings, and the circuit court appropriately declined to exercise its jurisdiction under the UCCJA because of the custody proceedings in the San Carlos Apache Tribe Juvenile Court.

For an in-depth discussion of jurisdictional conflicts between state and tribal courts in child custody proceedings, *see* Atwood, *Fighting Over Indian Children: The Uses and Abuses of Jurisdictional Ambiguity*, 36 U.C.L.A. L. Rev. 10-51 (1989). *Also see* Vetter, Of Tribal Courts and "Territories": Is Full Faith and Credit Required?, 23 Cal. W.L. Rev. 219 (1987).

5. Alabama, Code 1975, §§ 30-3-20 to 30-3-44; Alaska, AS 25.30.010 to 25.30.910; Arizona, A.R.S. §§ 80-401 to 8-424; Arkansas, Code 1987, §§ 9-13-201 to 9-13-227; California, West's Ann.Cal.Civ.Code §§ 5150 to 5174; Colorado, C.R.S. 14-13-101 to 14-13-126; Connecticut, C.G.S.A. §§ 46b-90 to 46b-114; Delaware, 13 Del.C. §§ 1901 to 1925; District of Columbia, D.C.Code 1981, §§ 16-4501 to 16-4524; Florida, West's F.S.A. §§ 61.1302 to 61.1348; Georgia, O.C.G.A. §§ 19-9-40 to 19-9-64; Hawaii, HRS §§ 583-1 to 583-26; Idaho, I.C. §§ 32-1101 to 32-1126; Illinois, S.H.A. ch. 40, ¶¶ 2101 to 2126; Indiana, West's A.I.C. 31-1-11.6-1 to 31-1-11.6-25; Iowa, I.C.A. §§ 598A.1 to 598A.25; Kansas, K.S.A. 38-1301 to 38-1326; Kentucky, KRS 403.400 to 403.630; Louisiana, LSA-R.S. 13:1700 to 13:1724; Maine, 19 M.R.S.A. §§ 801 to 825; Maryland, Code, Family Law, §§ 9-201 to 9-224; Massachusetts, M.G.L.A. c. 209B §§ 1 to 14; Michigan, M.C.L.A. §§ 600.651 to 600.673; Mississippi, Code 1972, §§ 93-23-1 to 93-23-47; Missouri, V.A.M.S. §§ 452.440 to 452.550; Montana, MCA 40-7-101 to 40-7-125; Nebraska, R.R.S.1943, §§ 43-1201 to 43-1225; Nevada, N.R.S. 125A.010 to 125A.250; New Hampshire,

RSA 458-A:1 to 458-A:25; New Jersey, N.J.S.A. 2A:34-28 to 2A:34-52; New Mexico, NMSA 1978, §§ 40-10-1 to 40-10-24; New York, McKinney's Domestic Relations Law, §§ 75-a to 75-z; North Carolina, G.S. §§ 50A-1 to 50A-25; North Dakota, NDCC 14-14-01 to 14-14-26; Ohio, R.C. §§ 3109.21 to 3109.37; Oklahoma, 10 Okla.St.Ann. §§ 1601 to 1628; Oregon, ORS 109.700 to 109.930; Pennsylvania, 42 Pa.C.S.A. §§ 5341 to 5366; Rhode Island, Gen.Laws 1956, §§ 15-41-1 to 15-14-26; South Carolina, Code 1976, §§ 20-7-782 to 20-7-830; South Dakota, SDCL 26-5A-1 to 26-5A-26; Tennessee, T.C.A. §§ 36-6-201 to 36-6-225; Texas, V.T.C.A. Family Code §§ 11.51 to 11.75; Utah, U.C.A.1953, §§ 78-45c-1 to 78-45c-26; Vermont, 15 V.S.A. §§ 1031 to 1051; Virginia, Code 1950, §§ 20-125 to 20-146; Virgin Islands, 16 V.I.C. §§ 115 to 139; Washington, West's RCWA 26.27.010 to 26.27.910; West Virginia, Code, 48-10-1 to 48.10-26; Wisconsin, W.S.A. 822.01 to 822.25; Wyoming, W.S.1977, §§ 20-5-101 to 20-5-125.

6. *See* Chapter 2.

7. "Last resort' jurisdiction is sometimes referred to as "vacuum jurisdiction" or "default jurisdiction."

8. *See* Chapter 5.

9. *See* Chapter 4.

10. *See* Chapter 5.

11. *See* Chapter 8.

12. *See* Chapter 4.

13. Pub. L. 96-611, § 7(c)(5), Dec. 28, 1980, 28 U.S.C. 1738A, note, 94 Stat. 3569.

14. The U.S. Supreme Court, in the case of Thompson v. Thompson, 484 U.S. 174, 108 S. Ct. 513, 56 U.S.L.W. 4055, 98 L. Ed.2d 512 (1988), explained the PKPA jurisdictional scheme succinctly: " The Parental Kidnapping Prevention Act (PKPA or Act) imposes a duty on the States to enforce a child custody determination entered by a court of another State if the determination is consistent with the provisions of the Act (footnote omitted). In order for a State court's custody decree to be consistent with the provisions of the Act, the State must have jurisdiction under its own law and one of five conditions set out in § 1738A(c)(2) must be met. Briefly put, these conditions authorize the State court to enter a custody decree if the child's home is or recently has been in the State, if the child has no home state and it would be in the child's best interest for the State to assume jurisdiction, or if the child is present in the State and has been abandoned or abused. Once a State exercises jurisdiction consistently with the provisions of the Act, no other State may exercise concurrent jurisdiction over the custody dispute,
§ 1738A(g), even if it would have been empowered to take jurisdiction in the first instance[2], and all States must accord full faith and credit to the first State's ensuing custody decree. Footnote 2: The sole exception to this constraint occurs where the first State either has lost jurisdiction or has declined to exercise continuing jurisdiction. *See* § 1738A(f)]. Thompson held that the PKPA does not create an implied cause of action in federal court to determine which of two conflicting state custody decisions is valid. Enforcement of the PKPA is left to State courts, unless and until Congress establishes a right to proceed in federal court under the Act.

15. *See* Chapters 5, 6, and 8 for detailed discussion of the effect of the PKPA on initial and modification jurisdiction, and on the duty to enforce sister state custody determinations.

16. The State Parent Locator Service is administered by the state child support enforcement agency, often referred to as the "IV-D Agency." The Federal Parent Locator Service may be contacted at (202)401-9267.

17. *See* Hoff, Patricia, *Family Abduction: How to Prevent an Abduction and What to Do If Your Child Is Abducted*, 4th Ed., National Center for Missing and Exploited Children, January 1994, p. 97, for a sample form for requesting an FPLS search. The form reads as follows:

"Application having been made to me _____(judge or other authorized person), on (date) _____, I request the Federal Parent Locator Service (FPLS), through the _____(name of state) Parent Locator Service, to submit the name of _____(alleged abductor)(Social Security Number*) and _____

(missing child)(Social Security Number) to the FPLS. This information is needed to make or modify a custody or visitation order with respect to the child. I authorize this record search pursuant to 42 U.S.C. 663 and 45 CFR 303.15."

(Insert signature, title and date)

* If the alleged abductor's Social Security number is not known, include the abducting parent's name, date of birth, place of birth, father's first and last names, mother's first and maiden names, and the searching parent's Social Security number.

18. *See, e.g.*, Jafarian-Kerman v. Jafarian-Kerman, 424 S.W.2d 333, 339-40 (Mo. Ct. App. 1967); In re Jacqueline F., 391 N.E.2d 967 (N.Y. 1979); Dike v. Dike, 448 P.2d 490 (Wash. 1968); Bersani v. Bersani, 565 A.2d 1368 (Conn. Super. Ct. 1989). *Cf.* Waldmann v. Waldmann, 358 N.E.2d 521 (Ohio 1976) (attorney-client privilege did not shield the address of a client's child, but did protect disclosure of client's address).

19. A short discussion of the Fugitive Felon Act may be found in this *Journal* in JUDGES GUIDE TO PARENTAL KIDNAPPING CASES, American Prosecutors Research Institute and the National Council of Juvenile and Family Court Judges (1996), Chapter One, G.1.b.

20. *See* Chapter 10.

21. As of January 1, 1997, the Hague Convention is in effect between the United States and the following countries: Argentina, Australia (only for the Australian States and mainland Territories), Austria, Bosnia and Herzegovina, Canada, Croatia, Denmark (except the Faroe Islands and Greenland), Finland, France (for the whole of the territory of the French Republic), Germany, Greece, Ireland, Israel, Italy, Luxembourg, Former Yugoslav Republic of Macedonia, Netherlands (for the Kingdom in Europe), Norway, Portugal, Spain, Sweden, Switzerland, United Kingdom of Great Britain and Northern Ireland (extension to the Isle of Man), Bahamas, Belize, Burkina Faso, Chile, Colombia, Cyprus, Ecuador, Honduras, Hungary, Iceland, Mauritius, Mexico, Monaco, New Zealand, Panama, Poland, Romania, Saint Kitts and Nevis, Slovenia, Venezuela, and Zimbabwé. See Appendix IIIB for list of countries with effective dates.

22. *See* Chapter 10.

Chapter 2
Custody Proceedings Covered by the UCCJA and the PKPA

Summary

This chapter identifies proceedings to which the UCCJA and PKPA apply.

CHECKLIST

1. Is the custody case governed by the UCCJA and the PKPA?

- Yes, if custody rights will be determined.
- Yes, if visitation rights will be determined.
- Yes, whether the custody sought is permanent or temporary.
- Yes, if the action is for:
  - Initial custody
  - Modification of custody
  - Enforcement of custody.

2. In what kinds of cases are custody disputes likely to arise that are governed by the UCCJA and the PKPA?

- Divorce proceedings
- Separation proceedings
- Requests for protective orders in domestic violence and child abuse cases
- Paternity actions
- Dependency and neglect actions in most jurisdictions under the UCCJA
- Abuse proceedings in most jurisdictions
- Requests for custody brought after a parental kidnaping
- Termination of parental rights proceedings in most jurisdictions
- Adoption proceedings in most jurisdictions
- Guardianship proceedings

Applicable statutes

FEDERAL

PKPA 28 U.S.C. 1738A(b)(3) ["custody determination"]

STATE

UCCJA § 2(2) ["custody determination"]
UCCJA § 2(3) ["custody proceeding"]
UCCJA § 13 [Recognition of Out-of-State Custody Decrees]

Is the proceeding governed by the provisions of the UCCJA and the PKPA?[1]

The UCCJA and PKPA apply to proceedings for custody determinations. Custody determinations are defined to include custody and visitation.

The UCCJA defines "custody proceedings" in § 2(3) to include proceedings in which a custody determination is one of several issues, such as an action for divorce or separation, and includes child neglect and dependency proceedings. The PKPA does not define the term. It applies to "custody determinations."

Custody. As a general rule, the UCCJA and PKPA must be applied to any proceeding in which the custody of a child will be decided.[2]

Visitation. Proceedings to establish and modify visitation are governed by provisions of the UCCJA and the PKPA to the same extent as are other custody proceedings.[3] This includes proceedings relating to grandparent visitation rights.[4]

The UCCJA and PKPA apply to actions for temporary and permanent custody determinations.

Proceedings in which a party seeks temporary custody, rather than or prior to permanent custody, are governed by the UCCJA and the PKPA.

Temporary custody is often sought together with:

- An original action for divorce or separation, adoption, guardianship or any custody proceeding. Temporary custody orders are sought to formalize a custody arrangement prior to full or permanent resolution of the custody question.
- A petition or motion for a protective order. This is usually sought when one parent charges the other with either spouse or child abuse.

Temporary custody also may be sought where, prior to a divorce or separation, one parent abducts the child. The left-behind parent then petitions for a temporary custody order to establish legal custody. A temporary order may enable the left-behind parent to obtain law enforcement assistance to find and recover the abducted child.

The UCCJA and the PKPA apply to initial custody and modification proceedings, and establish duties to enforce custody determinations.

- **Initial custody proceedings.** The UCCJA applies to initial actions for custody and visitation, whether temporary or permanent orders are sought. Further, the PKPA affects the exercise of initial custody jurisdiction because of its priority for "home state" jurisdiction and its prohibition on simultaneous proceedings.[5]
- **Modification proceedings.** Both the UCCJA and PKPA apply to actions to modify existing child custody orders.
- **Enforcement proceedings.** The UCCJA and the PKPA establish duties to enforce child custody and visitation determinations. Specifically, § 13 of the UCCJA, "Recognition of Out-of-State Custody Decrees," requires courts to recognize and enforce custody decrees of states which assumed jurisdiction according to UCCJA provisions. Similarly, the PKPA requires enforcement of custody determinations made consistently with its provisions. 28 U.S.C. 1738A(a).

A court in any state can be asked to enforce the provisions of a custody decree. Either party to the decree may seek to have it enforced. For example, the noncustodial parent denied visitation can petition the court to have visitation rights enforced. Similarly, the custodial parent to whom the children have not been returned from a visit can also seek enforcement. Any court hearing the case must look to both UCCJA *and* PKPA provisions to determine whether the decree is entitled to enforcement. Chapter 8 suggests an analysis courts should use when considering an enforcement action.

The UCCJA and the PKPA do not apply to actions for child support or for other monetary obligations.

It is well established that child support proceedings do not fall within the purview of either the UCCJA or the PKPA.[6] The result is that a court with custody jurisdiction pursuant to the UCCJA and consistent with the PKPA must have an independent jurisdictional basis to order or modify support. Similarly, a court with jurisdiction over child support cannot make or modify a child custody determination unless it

has jurisdiction consistent with the UCCJA and PKPA.

The UCCJA and the PKPA do not apply to actions for divorce or separation.

A judge will most commonly be asked to make a custody determination in the context of an action for divorce or separation. Keep in mind that the provisions of the UCCJA and the PKPA do not apply to divorce or separation cases, only to custody questions that may be raised in conjunction with them. Therefore, the judge must apply the provisions of the UCCJA and the PKPA only to the custody portions of these actions.

Practically, the judge must determine whether the court has jurisdiction to determine custody. It is possible for the court to conclude it has jurisdiction over the divorce action but not over the issue of custody. When this happens, the judge must dismiss the custody claims, even if retaining jurisdiction to rule on the underlying marital issues.

The UCCJA and the PKPA apply to pre-decree abductions.

When a party seeks a determination of custody after the other party has kidnapped the child, the provisions of the UCCJA and the PKPA apply. The UCCJA allows the left-behind parent to petition for custody even though the child and the absconding parent are absent from the state. This may occur even before one parent has filed for divorce. The left-behind parent may request an *ex parte* temporary custody order while looking for the missing parent and child.

The UCCJA and PKPA do not apply to paternity actions.

The UCCJA and PKPA do not apply to paternity actions when the sole issue is establishment of paternity.[7] However, if a component of the action is a determination of custody or visitation rights, the UCCJA and PKPA must be applied to those issues. It is possible for a court to have jurisdiction to determine paternity, but lack jurisdiction under the UCCJA and PKPA over the custody and visitation questions.

Dependency, Neglect and Abuse Proceedings.

The general rule is that dependency and neglect proceedings fall within the parameters of the UCCJA.[8] The UCCJA definition of "custody proceeding" specifically includes child neglect and dependency proceedings. UCCJA § 2(3). Emergency jurisdiction exists when a child is physically present in the state and has been abandoned, or it is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse, or is otherwise neglected or dependent.[9] UCCJA § 3(a)(3).

However, two states, New York and New Hampshire, have excluded child protective proceedings from the definition and jurisdictional sections of their UCCJA enactments.[10] In New York, however, this decision has generated some dissatisfaction,[11] and at least one court has applied the UCCJA, despite the statute.[12]

In contrast, despite a statute specifically including neglect and dependency within its definition of "custody proceeding," G.S. § 50A-2(3), the North Carolina Court of Appeals in *In re Arends*, 364 S.E.2d 169 (N.C. Ct. App. 1988), rejected the applicability of the UCCJA to neglect and dependency proceedings. The court concluded that temporary placements of neglected children are made under the Juvenile Code. It also concluded that a valid custody determination from a sister state was binding only on the parties to it, not on the Department of Social Services.

Does the PKPA apply to dependency or neglect proceedings? There is no definition of "custody proceedings" in the PKPA that definitively answers the question. And, unlike the UCCJA, the PKPA emergency jurisdiction provision makes no reference to dependency or neglect. 28 U.S.C. 1738A(c)(2)(C). Courts are split on whether the PKPA applies to neglect and dependency proceedings.[13]

There is a good reason to apply both Acts to neglect and dependency proceedings: It prevents forum-shopping and helps avoid conflicting court determinations.

The UCCJA does not expressly include abuse proceedings in its definition of custody proceedings. However, both the UCCJA and PKPA expressly authorize emergency jurisdiction when it is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse. Therefore, abuse proceedings should be considered covered by the UCCJA and PKPA to the same extent that dependency and neglect proceedings are.

Termination of Parental Rights (TPR) Proceedings and Adoption.

Because the nexus between termination of parental rights (TPR) proceedings and dependency and neglect proceedings is apparent, it is logical to assume a TPR would be governed by provisions of the UCCJA and the PKPA.[14] Further, when termination of parental rights is sought to facilitate adoption by a step parent, the justification for applying the UCCJA appears evident; the action will alter the custody rights of a parent and, in many cases, modify provisions of an existing decree.

Not all courts considering the question have agreed with this interpretation.[15] One Indiana court held that termination of parental rights is properly determined under adoption statutes, not the UCCJA.[16] A Texas court concluded that termination of parental rights is not a child custody action and, hence, not subject to the jurisdictional provisions of the PKPA.[17] However, another ruled it is subject to the UCCJA.[18] However, the better rule is to apply the provisions of both the UCCJA and PKPA. This approach will promote stability and judicial efficiency.

Adoption, like termination of parental rights, affects custody rights. While neither the UCCJA nor the PKPA specifically states these actions are to be covered, the majority of states which have wrestled with the question have answered it in the affirmative.[19] In addition, Michigan and Montana specifically include adoption in their definitions of custody proceedings. Court decisions that reach the opposite conclusion are rare.[20] New Hampshire and New York specifically exclude adoption proceedings by statute. The recently promulgated Uniform Adoption Act (UAA) contains specific jurisdictional provisions for adoption cases. To date, the UAA has been enacted in Vermont.

Questions of whether and how to apply the UCCJA and PKPA in adoption proceedings are most dramatically illustrated in cases where a mother agrees to the adoption of a newborn infant. The prospective adoptive parents then remove the child from the state. If the natural mother then changes her mind about the adoption (or the natural father, who has not consented or been properly notified of the adoption, asserts a claim of custody), an interstate conflict will arise. The adoptive parents, reluctant to return a child they love, may attempt to validate their custody with an order from a judge in their own state. Applicability of the provisions of the UCCJA and the PKPA then become an important issue. How these statutes should be applied in these troubling adoption cases is addressed in Chapter 9.

Guardianship. Courts have generally concluded that guardianships are subject to the provisions of the UCCJA.[21]

Domestic Violence Proceedings[22]

If, in addition to other relief, a civil protection order grants temporary custody rights, the court must have jurisdiction under the UCCJA and PKPA. Emergency jurisdiction may be invoked when the victim has left the home state with the child to seek safety elsewhere.

Custody proceedings involving Indian children

The UCCJA and PKPA do not apply to custody proceedings that are expressly governed by the Indian Child Welfare Act (ICWA), 25 U.S.C. 1901-1963. ICWA covers custody proceedings involving foster care, termination of parental rights, preadoptive placements, and adoption of Indian children. 25 U.S.C. 1903. It does not apply to any child placement based on "an award, in a divorce proceeding, of custody to one of the parents." 25 U.S.C. 1903. Accordingly, ICWA is not applicable to private intrafamily custody disputes.

Whether the UCCJA and PKPA apply to custody proceedings involving Indian children that are not subject to ICWA, but in which both state and tribal courts have an interest, is a question without a simple answer. Neither statute includes Indian tribes or reservations within the definition of 'State,' raising doubts about the applicability of these statutes to settle jurisdictional disputes between state and tribal courts. Courts are split on the question. For a more complete discussion of Indian children and tribal-state conflicts, see Chapter 1, text at 1-2, and endnote 4.

Conclusion

Remember to consider the application of the UCCJA and PKPA to the following:

- Custody aspects of divorce proceedings where there are minor children.
- Custody aspects of separation proceedings where there are minor children.
- Requests for temporary custody in conjunction with an action for divorce or separation or a request for a protective order.
- Requests for custody brought after a pre-decree parental kidnapping.
- Modification of custody proceedings.
- Paternity proceedings where custody issues are involved.
- Dependency or neglect proceedings.
- Abuse proceedings.
- Termination of parental rights proceedings.
- Adoption proceedings.
- Guardianship proceedings.

Endnotes

1. *See* generally Danny R. Veilleux, Annotation, *What Types of Proceedings or Determinations are Governed by the Uniform Child Custody Jurisdiction Act (UCCJA) or the Parental Kidnaping Prevention Act (PKPA)*, 78 A.L.R. 4th 1028 (1990).

2. The comment to UCCJA § 2 states that "custody proceeding" is to be understood in a broad sense. According to the comment, the term covers habeas corpus actions, guardianship petitions, and other proceedings available under general state law to determine custody.

3. Johnson v. Johnson, No.C6-90-2207, 1991 Minn. App. LEXIS 203 (Minn. Ct. App. Mar. 5, 1991), In re Marriage of Alpert, 852 P. 2d 669 (Mont. 1993); Sharp v. Sharp, 518 N.W.2d 254 (Wis. Ct. App. 1994); State ex rel. Efaw v. Bue, 844 P.2d 278 (Or. Ct. App. 1992); Francis v. Francis, 654 N.E.2d 4 (Ind. Ct. App. 1995).

4. *See, e.g.*, In re Steven C., 486 N.W.2d 572 (Wis. Ct. App.1992); Counts v. Bracken, 494 So. 2d 1275 (La. Ct. App. 1986).

5. *See* Chapter 5, "Jurisdiction to Make an Initial Custody Determination."

6. *See, e.g.*, Carr v. Marshman, 195 Cal. Rptr. 603 (Cal. Ct. App. 1983); County of Clearwater v. Petrash, 589 P.2d 1370 (Colo. Ct. App. 1978), rev'd. on other grounds, 598 P. 2d 138 (Colo. 1979); Baggett v. Walsh, 510 So. 2d 1099 (Fla. Dist. Ct. App. 1987); Overcash v. Overcash, 466 So. 2d 1261 (Fla. Dist. Ct. App. 1985); State ex rel. Sauer v. Hellesvig, 376 N.W.2d 503 (Minn. Ct. App. 1985); In re Marriage of Harper, 764 P.2d 1283 (Mont. 1988); Muller v. Muller, 515 A.2d 1291 (N.J. Super. Ct. Ch. Div. 1986); State ex rel. Efaw v. Bue, 844 P. 2d 278 (Or. Ct. App. 1992); Johns v. Johns, 364 S.E. 2d 775 (Va. Ct. App. 1988); State ex rel. Helms v. Rasch, 698 P.2d 559 (Wash. Ct. App. 1985); Louisiana ex rel. Eaton v. Leis, 354 N.W.2d 209 (Wisc. Ct. App. 1984); Warwick v. Gluck, 751 P.2d 1042 (Kan. Ct. App. 1988).

7. *See, e.g.*, Sweany v. Meinecke, 691 S.W.2d 368 (Mo. Ct. App. 1985); Wade v. Geren, 743 P.2d 1070 (Okla. 1987); Baldwin v. Hale, 738 P.2d 1016 (Or. Ct. App. 1987).

8. *See, e.g.*, Skelton v. Sudge, 455 So. 2d 38 (Ala. Civ. App. 1984) (UCCJA applies to dependency proceedings.); In re Aisha B., 254 Cal. Rptr. 116 (Cal. Ct. App. 1988) (dependency actions covered by UCCJA); L.G. v. People, 890 P.2d 647,657 (Colo. 1995)(en banc) *Reh'g en banc denied, cert. denied*, 116 S. Ct. 82, 133 L. Ed. 2d 40 ("Since the UCCJA includes actions in dependency and neglect, and since the juvenile court may alter custodial or visitation rights pursuant to its dispositional order on a petition for dependency and neglect, the jurisdictional prerequisites of the UCCJA must be satisfied for Colorado to have jursidiction in this case." (Footnote omitted.) The court found that the PKPA does not apply to dependency and neglect proceedings and therefore does not preempt state law.); E.P. v. District Court of Garfield County, 696 P.2d 254 (Colo. 1985) (en banc) (dependency actions covered by UCCJA); In re Jason P., 549 A.2d 286 (Conn. Super. Ct. 1988) (UCCJA applied to child abuse and neglect proceedings); Farrell v. Farrell, 518 So. 2d 931 (Fla. Dist. Ct. App. 1987) (UCCJA applied to conflict arising when one state issued a child abuse order and another was asked to modify a custody order governing the same child); In re Wicks, 693 P.2d 481 (Kan. Ct. App. 1985) (UCCJA applied to Code for Care of Children proceedings); In re L.W., 486 N.W.2d 486 (Neb. 1992) (UCCJA applied to dependency proceedings, but PKPA did not); Spencer v. Spencer, No. CA 83-04-010, 1984 WL 3308 (Ohio Ct. App. Apr. 23, 1984) (UCCJA applied to neglect proceedings); State ex. Rel. Dept. Of Human Serv. v. Avinger, 720 P.2d 290 (N.M. 1986) (UCCJA applies to neglect and dependency proceedings, but PKPA does not.).

9. UCCJA §§ 2(3) and 3(a)(3). *See* Chapter 1, discussion of emergency jurisdiction.

10. *See* New Hampshire, N.H. REV. STAT. ANN. § 458A:2 (1992), and N.Y. DOM. REL. LAW. § 75-c(3) (McKinney 1988).

11. Professor Merrill Sobie has written in the 1990 "Supplementary Practice Commentaries" to the New York statute: "The exclusion of child neglect and other protective actions from § 75-c(3)'s definition of 'custody proceeding' continues to precipitate needless difficulties . . . . Further, unless § 75-c is amended the ameliorative and cooperative Uniform Child Custody Jurisdiction Act provisions cannot be used, and the prospect of simultaneous proceedings or conflicting court decrees issued in different states remains a distinct possibility." Professor Sobie noted in his 1992 "Commentaries" that the courts might apply the UCCJA provisions despite the child protective exclusion, as the court appeared to do in Vanneck v. Vanneck,

404 N.E. 2d 1278 (N.Y. 1980), where the court did not address the issue directly, but treated the case as if the UCCJA applied. "Supplementary Practice Commentaries" to N.Y. DOM. REL. LAW. § 75-c (McKinney 1988).

12. Vanneck v. Vanneck, 404 N.E.2d 1278 (N.Y. 1980).

13. Cases holding that the PKPA applies to dependency and neglect proceedings: In re Pima County, 711 P.2d 1200, 1205 (Ariz. Ct. App. 1985) (PKPA applies to dependency proceedings), *rev'd in part on other grounds*, 712 P.2d 431 (Ariz. 1986); State in Interest of D.S.K., 792 P.2d 118, 129-30 (Utah Ct. App. 1990) (PKPA applies to neglect and dependency proceedings. "Although the PKPA does not expressly refer to neglect and dependency proceedings as part of the definition of custody proceedings, both the statutory language and explicit congressional purposes of the PKPA, mandate application of the PKPA to *any* proceeding in which modification of a foreign custody decree is at issue, regardless of how those proceedings are defined by a state....Further, holding that the PKPA does not apply to neglect and dependency proceedings would allow a forum-shopping parent to avoid the PKPA by simply transporting the child to another state and alleging that the other parent has neglected the child. Such a result would be inconsistent with the purposes of the PKPA...." The court expressly rejected the reasoning of the New Mexico Supreme Court in the Avinger case (cited *infra*), which had influenced dicta in State ex rel. W.D. v. Drake, 770 P.2d 1011 (Utah Ct. App.), *cert. denied*, 789 P.2d 33 (Utah 1989). Cases holding that the PKPA does not apply to dependency and neglect proceedings: State ex.rel. Dep't. of Human Serv. v. Avinger, 720 P.2d 290 (N.M. 1986) (Because the PKPA was silent concerning dependency and neglect, it does not cover them, but the UCCJA does.); In the Interest of L.W., 486 N.W. 2d 486, 500-01(1992) (PKPA does not apply to dependency and neglect proceedings but UCCJA does); L.G. v. People, 890 P.2d 647, 661-62(Colo. 1995)(en banc)("We conclude, from the plain language of the PKPA, and from the congressional purpose behind the enactment of the PKPA, that its provisions do not apply to proceedings in dependency and neglect." The court held that the Juvenile Court had jurisdiction under the UCCJA to limit the father's visitation rights pursuant to a State-initiated petition in dependency and neglect, and was not preempted from doing so by the PKPA.).

14. *See, e.g.*, A.E. v. State, 743 P.2d 1041 (Okla. 1987) (Oklahoma applies the UCCJA to termination of parental rights proceedings); In re David C., 200 Cal. Retr. 115 (1984); In re Interest of L.C., 857 P.2d 1375 (Kan. Ct. App. 1993).

15. *See, e.g.* Williams v. Knott, 690 S.W.2d 605 (Tex. Ct. App. 1985) (a termination of parental rights proceeding is not a child custody action subject to the jurisdictional provisions of the PKPA).

16. *See* Johnson v. Capps, 415 N.E.2d 108 (Ind. Ct. App. 1981).

17. Williams v. Knott, 690 S.W.2d 605 (Tex. Ct. App. 1985).

18. White v. Blake, 859 S.W.2d 551 (Tex. Ct. App. 1993).

19. *See, e.g.*, Gainey v. Olivo, 373 S.E.2d 4 (Ga. 1988), for a discussion of cases that have resolved the issue in both the negative and affirmative. The court in Gainey concluded the better position was that the UCCJA applied to adoptions. This position makes particular sense considering the purposes of the UCCJA are as relevant and important in an adoption case as in any other custody proceeding. *See also* Adoption of Zachariah K., 8 Cal. Rptr. 2d 423 (Cal. Ct. App. 1992) (both the UCCJA and the PKPA apply to adoptions); State ex rel. Torres v. Mason, 848 P.2d 592 (Or. 1993) (en banc) (UCCJA applies to adoption proceedings); Stubbs v. Weathersby, 833 P.2d 1297 (Or. Ct. App. 1992), *aff'd*, 892 P. 2d 991 (Or. 1995) (adoption proceedings are governed by the UCCJA).

20. *See, e.g.*, Williams v. Knott, 690 S.W.2d 605 (Tex. Ct. App. 1985), where the court, in a badly-reasoned decision, upheld the termination of a father's parental rights to permit a stepparent adoption. Custody had been determined in an Oklahoma divorce decree. Approximately a year and a half after the mother moved to Texas, she sought the TPR. The court ruled a termination action is not a custody action, and, therefore, not a modification of the Oklahoma decree. This must have come as quite a shock to the father, whose rights under the Oklahoma decree officially hadn't changed and, yet, no longer existed. *See also* Myers v. Williams, No. 03A01-9111-CH-000390, 1992 WL 32636 (Tenn. Ct. App. Feb. 25, 1992) (adoption is not covered by UCCJA).

21. *See, e.g.*, Ray v. Ray, 494 So. 2d 634 (Ala. Civ. App. 1986); Elam v. Elam, 832 S.W.2d 508 (Ark. Ct. App. 1992); Brossoit v. Brossoit, 36 Cal. Rptr. 2d 919 (Cal. Ct. App. 1995); In re Guardianship of Donaldson, 223 Cal. Rptr. 707 (Cal. Ct. App. 1986); Adoption of Zachariah K., 8 Cal. Rptr. 2d 423 (Cal. Ct. App. 1992) (both UCCJA and PKPA apply); Barcus v. Barcus, 278 N.W.2d 646 (Iowa 1979); Johnson v. Melback, 612 P.2d 188 (Kan. Ct. App. 1980); Glanzner v. State, 835

S.W.2d 386 (Mo. Ct. App. 1992) (both UCCJA and PKPA apply); Piedimonte v. Nissen, 817 S.W.2d 260 (Mo. Ct. App. 1991); In re Estate of Patterson, 652 S.W.2d 252 (Mo. Ct. App. 1983); In re Guardianship of Sabrina Mae D., 835 P.2d 849 (N.M. Ct. App.) *cert. denied*, 832 P. 2d (N.M. 1992); In re Guardianship of Wonderly, 423 N.E.2d 420 (Ohio 1981); In re C.A.D., 839 P.2d 165 (Okla. 1992) (both UCCJA and PKPA apply); In re Guardianship of Walling, 727 P.2d 586 (Okla. 1986); Gribkoff v. Bedford, 711 P.2d 176 (Or. Ct. App. 1985); Coppedge v. Harding, 714 P.2d 1121 (Utah 1985); In re Cifarelli, 611 A.2d 394 (Vt. 1992); In re A.E.H., 468 N.W.2d 190 (Wis. 1991).

22. *See* Chapters 1 and 9 for discussion of jurisdictional issues that arise in domestic violence cases.

Chapter 3
Pleadings, Notice, Parties, and Appearances

Summary

This chapter focuses on UCCJA § 9 pleading requirements. Judges need the information this section requires litigants to provide in order to determine jurisdiction. This chapter also covers who is entitled to notice and opportunity to be heard, how notice may be given, and what the court can do to facilitate appearances of out-of-state parties and children.

CHECKLIST

Pleadings

1. What information must every party plead?

2. When must this information be provided to the court?

3. What should the court do if the pleading requirements have not been met? What should the court do if additional information is needed?

4. Is waiver of the pleading requirements ever appropriate?

Notice

5. What kind of notice is required?

6. How can notice be given?

7. What can the court do if a party cannot be located to be served?

8. What is the effect of lack of notice on the resulting order?

Parties

9. Who is entitled to notice and opportunity to be heard?

Appearances

10. What can the judge do to facilitate the appearance of a party and the child?

11. How should courts treat appearances to challenge jurisdiction?

Applicable statutes

FEDERAL

PKPA, 28 U.S.C. 1738A(e)

STATE

UCCJA § 4 [Notice and Opportunity to be heard]
UCCJA § 5 [Notice to Persons Outside this State]
UCCJA § 9 [Information Under Oath Submitted to the Court]
UCCJA § 10 [Additional Parties]
UCCJA § 11 [Appearance of Parties and the Child]
UCCJA § 12 [Binding Force and *Res Judicata* Effect of Custody Decree]
UCCJA § 24 [Priority]

Pleading requirements

UCCJA § 9 establishes strict pleading requirements.[1] Every party to a custody proceeding must fulfill these requirements in the first pleading or in an affidavit attached to the first pleading. The required information must be provided under oath.

What is the "first pleading"? "First pleading" is not defined in § 9 nor is it discussed in the comment to the section; however, the comment gives guidance when it discusses the reason for the pleading requirements. It is to provide the court with the information it needs to determine "its jurisdiction, the joinder of additional parties, and the identification of courts in other states which are to be contacted under various provisions of the Act." Because this information is needed in original, modification, and enforcement proceedings, the court should insist that the required information be included in or with the first pleading in these actions. Petitions for **temporary orders** should also include this information.[2]

What information must be included? To meet the requirements of the UCCJA § 9, the following information must be included under oath, either in the first pleading or in an affidavit attached to it:

- the child's present address;
- all the places the child has lived in the last five years;
- the names and current addresses of all the persons with whom the child has lived in the last five years.

In addition, the party filing the pleading must state under oath whether:

- (s)he or has participated in any capacity (party, witness, other) in any other litigation concerning the custody of the same child in this or any other state;
- (s)he has information of any custody proceeding concerning the child pending in a court of this or any other state;
- (s)he knows of any person not a party to the proceedings who has physical custody of the child or claims to have custody or visitation rights with respect to the child.

Include the dates the child(ren) lived at each address.

Note that § 9 does not mandate that the party include the dates that the child lived at each address during the past five years, but it should be required. As the court noted in Wambold v. Wambold, 651 A.2d 330, 334 (Me. 1994), while the statute may not technically require the dates, the failure to provide them (as the mother did) may give the court a misleading picture of the situation, which may impact how the court assesses jurisdiction.

What happens if this information changes? Each party has a **continuing duty** under UCCJA § 9(c) to inform the court of any custody proceeding concerning the child in this or any other state that (s)he learns about during the course of the proceedings. The failure of a party to comply with this duty deprives a court of the "opportunity to ascertain essential facts pertaining to its assumption and continuation of jurisdiction." Evans v. Evans, 623 N.Y.S. 2d 685, 688 (N.Y. App. Div. 1995).

Why does the court need this information? The required information should enable the court to determine if (1) this is an initial custody, modification, or enforcement action; (2) there is a basis for exercising or declining jurisdiction;[3] (3) there are any other proceedings pending that would affect the existence or exercise of jurisdiction;[4] (4) there are people who are not parties who should be notified of the proceedings under § 10. In addition, the information is necessary for the adverse party to know the basis being asserted for jurisdiction.[5]

What can the judge do if a party fails to meet the pleading requirements? The UCCJA does not state what a court should do if a party fails to submit the required information. Some courts have suggested the information is a requisite for jurisdiction.[6] Because failure to provide this information has been used as justification for courts to deny full faith and

credit to resulting decrees, courts should require parties to provide it. While it is better practice for courts to require this information, failing to do so should not undermine the exercise of jurisdiction if jurisdiction is otherwise supported by the record.[7]

Judges should be vigilant about pleading requirements because many litigants are not. If the court finds that the requisite information has not been provided, the court should direct the parties to amend or supplement the pleadings to conform to the statutory requirements at an early stage in the proceeding.[8]

Can the court obtain additional information? If a party reports that (s)he (1) has participated in other litigation regarding custody of the child, (2) knows of a pending proceeding custody proceeding, or (3) knows of another person who has physical custody of the child(ren) or who claims custody or visitation rights, the judge may require additional information be given under oath. UCCJA § 9(b). In addition, the judge should inquire about the adequacy and accuracy of the required information where (1) there is a discrepancy between the information submitted by one party and the information submitted by another, (2) no answer is filed or the answer does not include the requisite information or affidavit, or (3) relief is sought on an emergency or *ex parte* basis.

Are there any circumstances under which the judge may choose to waive compliance with the pleading requirements? The court can waive strict compliance with the pleading requirements if a party lacks the requisite information. This is most likely to occur when one party deliberately conceals the information from the other, such as when one party has kidnapped the child(ren), or has filed a custody proceeding in another jurisdiction without providing notice to the other. In addition, the court can waive strict compliance when providing the information would put a party or the child in danger. This may be the case when a protective order has been issued or in cases where there has been abuse, stalking or other harassing behavior. Some states codify this exception by specifically waiving the requirement of providing the current address of the child or a party under these circumstances[9] or by requiring that they be submitted only to the judge.

In the event the court permits a party to omit addresses from a pleading, the judge should state in the findings of fact that (s)he waived the requirement and give the reason for doing so. If the other party then challenges the court's jurisdiction to enter the decree on the grounds that the required information was not submitted, the reviewing court will have a complete record.

In summary, the court should require compliance with § 9 pleading requirements in all cases governed by the UCCJA. The court needs this information to determine whether it has and should exercise jurisdiction. A party's failure to provide the information could render the decree subject to attack as not entered in compliance with state law.

Notice requirements

The UCCJA § 4 and the PKPA, 28 U.S.C. § 1738A(e), both mandate reasonable notice to (1) the contestants, (2) any parent whose parental rights have not been terminated, and (3) any person who has physical custody of the child.

What kind of notice is required? According to the comment to UCCJA § 4, those in the forum state who are entitled to notice are to be notified under the general law of the state. Anyone outside the forum state is to be notified in accordance with § 5.

Notice must be given in a manner "**reasonably calculated to give actual notice**" and may include:

- Service by personal delivery outside the state in the manner prescribed for personal service within the state.[10]
- Service in the manner prescribed by

law for courts of general jurisdiction in the forum where the service is made. Service is valid if the form of service relied upon is recognized in the jurisdiction where service was made.[11]

- Any form of U.S. mail addressed to the person to be served return receipt requested. Service by mail appears to be fairly common in interstate custody cases and routinely has been upheld.[12]
- As directed by the court [including publication, if other means of notification are ineffective].[13] The UCCJA stresses the importance of actual notice but recognizes this may not be possible, particularly if a case involves parental kidnapping or other efforts by one party to deliberately hide from another or thwart service of process.

What should the court do if a party cannot be located? If methods of service other than publication have been tried unsuccessfully, the court should permit service by publication. The court should be satisfied, however, that the efforts to effect service were genuine. It can do this by requiring the party who has attempted service to document the steps taken.

In a parental kidnapping case, the left-behind parent should make a reasonable effort to effect service by a method other than publication. This helps guard against a later challenge by a party who could have been served but was not.[14] The court should resist the temptation to require the serving parent to continue efforts at service when it is apparent the other party cannot be located through reasonable efforts.[15]

Is notice adequate if sent to a party's lawyer instead of to the party? If an out-of-state party is represented by an attorney, notice sent to that attorney will generally be considered adequate.[16] But if the attorney no longer represents the party, then service on the attorney will not be deemed sufficient.[17]

If notice was lacking or inadequate, is the resulting order entitled to recognition and enforcement under the UCCJA, or full faith and credit under the PKPA?[18] An order issued in a proceeding in which notice requirements were not adhered to is not entitled to enforcement under either Act.[19] While an order may not be enforceable due to lack of notice, it does not mean that the court that issued it did not have jurisdiction. The defect in notice can be cured by giving notice in accordance with the statutes.

How much is 'reasonable' notice? The amount of notice that is actually required varies from state to state. The court should see to it that state statutory notice requirements are met. UCCJA § 5(b).

Who has standing to challenge failure to provide adequate notice? Only the party who has not been given adequate notice has standing to challenge the enforceability of an order that resulted from the allegedly defective proceedings.[20]

Can a party waive notice requirements? A party can waive defects in notice. Waiver of notice will generally be recognized if a party appears in a proceeding without challenging the notice defects.[21] Because the purpose of notice is to assure that the parties can participate in a meaningful way, lack of formal notice to a party who participates without objecting is not an obstacle to enforcing a resulting decree.

Are there special notice requirements if a parent is in the military? There are no special notice requirements for members of the military. However, in the event of a default in appearance, the moving party, in accordance with the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. § 520 (1990) (SSCRA), must sign an affidavit stating that the missing party is in the military. The court may appoint an attorney to represent the absent party, but the attorney will not have the authority to waive any right for or otherwise bind him or her. In addition, if a

judgment is issued against the absent party, he or she may apply, prior to 90 days after the end of the period of military service, to have the matter reopened if he or she has a meritorious legal defense.

The SSCRA is designed as a shield for members of the armed forces to protect them from being adversely impacted by litigation in which they cannot, because of their military duties, participate. It is not to be used as a sword to evade legal action. Therefore, a parent who has been properly notified of custody proceedings and who chooses not to participate, or one who affirmatively avoids being served, cannot use the Act as a basis for overturning a default judgment.

Parties

Who is entitled to notice and an opportunity to be heard? According to UCCJA § 4 and PKPA, 28 U.S.C. 1738A(c), "reasonable notice and opportunity to be heard" are to be given to the contestants, any parent whose parental rights have not previously been terminated, and any person who has physical custody of the child."

Both Acts define "contestant" to mean "a person, including a parent, who claims a right to custody or visitation rights with respect to a child." UCCJA § 2(l), PKPA; 28 U.S.C. 1738 A(b)(2). A contestant may be, for example, a stepparent with visitation rights, or a grandparent. If the court learns that a "person not a party to the custody proceeding has physical custody of the child or claims to have custody or visitation rights with respect to the children," the court is required by § 10 to join the person as a party and notify the person of the proceedings. Presumably the person must have a colorable claim to custody.

Among the purposes of the UCCJA is that of discouraging continuing controversies over child custody "in the interest of greater stability of home environment and of secure family relationships for the child." UCCJA § 1(a). When all who claim rights to custody or visitation are notified of the proceedings and given an opportunity to be heard, the likelihood that one of these persons will successfully challenge the resulting custody determination is reduced. This is so because UCCJA § 12 establishes the binding effect of a custody decree on all "parties" who have been served or notified according to the UCCJA or who have otherwise submitted to the jurisdiction of the court **and** who have been given an opportunity to be heard. For these parties, the decree is conclusive with respect to "all issues of law and fact decided as to the custody determination made."

Is the presence of the child required for the court to exercise jurisdiction? The child's presence in the state is only required when the court exercises emergency jurisdiction. While not required, it is valuable to have the child within the jurisdiction to facilitate compliance with, or enforcement of, a custody order.

Must a party be present for the court to proceed with custody litigation? A party need not be present for the court to determine custody. As long as a party has been given notice of the proceedings in accordance with the requirements of the UCCJA and an opportunity to be heard, the court can enter an order that is binding on the party. *See* UCCJA § 12. The weight of authority is that the court does not need personal jurisdiction over a party in order to issue a binding custody decree.[22]

Appearances

What can the judge do to facilitate the appearance of either party and the child? Although presence is not a prerequisite to jurisdiction except in emergency cases, presence may be desirable. Section 11 of the UCCJA establishes methods for bringing a party before the court. The court can:

- Order a person within the state to appear personally. If that party has physical custody of

the child, order that person to appear personally with the child.

- Order that notice to a party who is outside the state include a statement directing the party to appear personally with or without the child. Notice should declare that failure to appear may result in a decision adverse to that party.
- Require the in-state party to pay the clerk of the court the travel expenses and other necessary expenses of the out-of-state party and the child, if necessary.
- Ask the court of the other state to order the party located there to appear at the proceedings and to bring the child, if that party has physical custody. The request can state that travel and other necessary expenses will be paid. *See* UCCJA § 19.

Appearances to contest jurisdiction. Parties may object to the existence or exercise of jurisdiction in accordance with state law. This may be by special appearance, motion to dismiss for lack of jurisdiction, or by seeking a stay. The court should give the case calendar priority and handle the jurisdictional question expeditiously. UCCJA § 24.

Endnotes

1. The UCCJA pleading requirements are generally quite consistent in all states. There are, however, variations that may be relevant in individual state codes. For example, Connecticut requires the party to list his/her Social Security Number along with the other required information. Missouri requires only that the child's current address and past addresses for six months be listed. New Mexico seeks the same information for only a three year period. Minnesota and South Dakota mandate inclusion of the information only upon motion by a party or the court. New Hampshire and the Virgin Islands do not require the information if custody is not contested.

2. *See, e.g.*, People v. Beach, 240 Cal. Rptr. 50 (Ct. App. 1987).

3. *See, e.g.*, Pheasant v. McKibben, 396 S.E.2d 333, 335 (N.C. Ct. App 1990) (Information is to assist the court in deciding if it can assume jurisdiction).

4. *See, e.g.*, Evans v. Evans, 623 N.Y.S.2d 685, 688 (App. Div. 1995).

5. *See, e.g.*, Walt v. Walt, 574 So. 2d 205, 211 (Fla. Dist. Ct. App. 1991).

6. *See, e.g.*, Cook v. Court of Common Pleas of Marion County, 502 N.E.2d 245, 248 (Ohio Ct. App. 1986); Walt v. Walt, 574 So. 2d 205 (Fla. Dist. Ct. App. 1991); Prager v. Mitchell, 651 So. 2d 809 (Fla. Dist. Ct. App. 1995).

7. *See, e.g.*, Pheasant v. McKibben, 396 S.E.2d 333 (N.C. Ct. App. 1990).

8. The court in Cook v. Court of Common Pleas of Marion County, 502 N.E.2d 245, 248 (Ohio Ct. App. 1986), noted that § 9 filing is jurisdictional, but the timing of the filing is discretionary, not mandatory. "Reasonable compliance" with § 9 that allows the court to make its subject matter jurisdiction determination is sufficient. *See also* Marriage of Olive, 340 N.W. 2d 792 (Iowa Ct. App. 1983) (Filing of required information in resistance to a special appearance rather than in petition or attached affidavit was acceptable, although not preferred). *Cf.* Walt v. Walt, 574 So. 2d 205, 212-13 (Fla. Dist. Ct. App. 1991) (father who filed the affidavit on the day he testified at the final hearing did not meet the filing requirement).

9. *See, e.g.*, ARIZ. REV. STAT, ANN. sec.34-2701; CAL. CIV. CODE sec. 1150; NEV. REV. STAT. sec. 125A.010; N.Y. DOM. REL. LAW § 75.

10. For example, in Wright v. Wentzel, 749 S.W.2d 228 (Tex. Ct. App. 1988), a mother was served personally in New Hampshire on 12/22/86 with notice of a show cause hearing scheduled for 12/24/86. Because the court was concerned that notice was inadequate, the court rescheduled the hearing for 12/31/86, and the father served the mother with notice by certified mail at the address she provided him. That certified letter was returned "unclaimed." The court upheld a subsequent modification of custody because the mother had been properly notified in December by personal service and certified mail and was, therefore, obligated to keep herself informed of developments in the case, including when it was set for trial.

11. *See, e.g.*, Klien v. Klien, 533 N.Y.S. 2d 211 (N.Y. Sup. Ct. 1988) (service in Israel by an agent of an advocate was considered proper because it was acceptable in Israel).

12. *See, e.g.*, Green v. Bruenning, 690 S.W.2d 770 (Ky. Ct. App. 1985) (court found notice was properly given when summons and petition were sent by certified mail to the mother's Texas address and the return receipt was signed there by the grandmother); Welsh v. Welsh, 714 S.W.2d 640 (Mo. Ct. App. 1986) (Service by registered mail on mother in Louisiana was sufficient to allow the Missouri court to exercise jurisdiction over her); Goldstein v. Fischer, 510 A.2d 184 (Conn. 1986) (notice of action by registered mail to mother in Germany was sufficient, but the court lacked jurisdiction under UCCJA § 3); Martinez v. Reed, 490 So. 2d 303 (La. Ct. App. 1986) (notice by certified mail to prospective adoptive parents was sufficient to comply with UCCJA notice requirements); McAtee v. McAtee, 323 S.E. 2d 611 (W. Va. 1984) (Court may exercise subject matter jurisdiction without acquiring personal jurisdiction, if out-of-state party received actual notice of the proceedings by mail); Wright v. Wentzel, 749 S.W.2d 228 (Tex. Civ. App. 1988) (when a certified letter is returned as "refused" or "unclaimed," the notice is sufficient if it is apparent that the address was valid and could be located by the post office).

13. The provision regarding service by publication is bracketed to indicate that the drafters of the UCCJA intended the language to be optional.

14. *See, e.g.*, In re Felix C., 455 N.Y.S. 2d 234 (N.Y. Fam. Ct. 1982) (service on mother by publication was not adequate because the father knew the mother's actual address at the time). *Also see* Chapter 8, Enforcing Custody Determinations Under the UCCJA and PKPA.

15. *See, e.g.*, Ingram v. Ingram, 463 So. 2d 932 (La. Ct. App. 1985) (substituted service was adequate notice where the father's evasive tactics made personal service impossible).

16. *See, e.g.*, Cooley v. Cooley, 574 So. 2d 694 (Miss. 1991) (UCCJA notice requirements were met by serving out-of-state mother's attorney who subsequently notified the mother of the proceedings); Laskosky v. Laskosky, 504 So. 2d 726 (Miss. 1987); Spaulding v. Spaulding, 460 A.2d 1360 (Me. 1983) (Notice to father's attorney of modification was adequate even though father claimed he no longer considered that he was represented by the attorney. In that case, the attorney appeared at the modification hearing, represented him throughout the post-divorce proceedings, and was acting on his behalf only one week before the service of the notice of the modification hearing. In addition, the father never notified either the attorney or the court that he no longer wished to be represented by the attorney, and he left the jurisdiction with the child while proceedings were pending.).

17. *See, e.g.*, Cella v. Cella, 671 S.W.2d 764 (Ark. Ct. App. 1984) (Service on an attorney was defective where the attorney stated he no longer represented the party, did not know the party's location, and sought to be relieved as counsel. In addition, there was evidence that when the attorney was served, the party who served him knew the other party's location and, soon after, got his address.).

18. *See* Chapter 8 on enforcement, generally.

19. *See, e.g.*, In re Adoption of J.P.S., 876 S.W.2d 762 (Mo. Ct. App. 1994); Koester v. Montgomery, 886 S.W.2d 432 (Tex. Civ. App. 1994) (Because a Venezuelan court did not provide a mother with reasonable notice and opportunity to be heard, the order was not made in accordance with the UCCJA, and therefore was not entitled to be enforced.).

20. For example, a mother who had notice of proceedings that resulted in an award of custody to the stepfather lacked standing to challenge the decree on grounds the natural father was not notified. Mitchell v. Mitchell, 521 So. 2d 62 (Ala. Civ. App. 1988).

21. *See, e.g.*, In re B.R.F., 669 S.W.2d 240 (Mo. Ct. App. 1984).

22. *See* comment to § 12; Brigitte M. Bodenheimer, *The Uniform Child Custody Jurisdiction Act: A Legislative Remedy for Children Caught in the Conflict of Laws*, 22 VAND. L. REV. 1207, 1233 (1969); Bodenheimer and Neeley-Kvarme, *Jurisdiction Over Child Custody and Adoption After Shaffer and Kulko*, 12 U.C. Davis L. Rev. 229, 240 (1979), Atwood, *Fighting Over Indian Children*, 36 U.C.L.A. L. Rev. 1051, 1066-67 and n. 65-67 (1989). *Compare* Pasqualone v. Pasqualone, 406 N.E. 2d 1121 (Ohio 1980); Wasserman, *Parents, Partners and Personal Jurisdiction*, 1995 U. Ill. L. Rev. 813.;

Chapter 4
Interstate Judicial Communication, Cooperation, and Assistance

Summary

This chapter identifies when and how judges should communicate to resolve jurisdictional disputes in interstate child custody and visitation cases. It also discusses how judges can assist each other with interstate evidence gathering.

CHECKLIST

Judicial Communication

When to communicate:

1. Are proceedings pending in another state that require this court to stay its custody proceeding and communicate with the court of the other state? UCCJA § 6 (c).

2. Are proceedings pending in another state that do not require this court to stay its proceeding but do require this court to communicate with the other court?
UCCJA § 6 (c).

3. Has this court communicated with another court to determine which is the more convenient forum to exercise custody jurisdiction?
UCCJA § 7.

How to communicate:

4. What methods of communication can the court use?

- exchange case files
- conference call
- telephone call
- mail

5. In communicating with another court, has this court given the parties an opportunity to participate?

6. Has the communication been made a part of the record?

Judicial cooperation and assistance

1. What records can a judge request from a court in a distant state?

- A copy of the custody decree
- Pleadings
- Orders
- Custody evaluation
- Records or transcripts of hearings
- Exhibits
- Other pertinent documents.

2. What assistance can a judge request from the court in another state that will aid in evidence gathering?

- An evidentiary hearing
- The production of evidence
- The preparation of a custody evaluation
- An order for a party to appear

3. Have the due process rights of the parties been protected?

- Avoid *ex parte* communications
- Keep the parties involved in the process

JUDICIAL COMMUNICATION

Applicable statutes

FEDERAL

PKPA, 42 U.S.C. § 1305 note,
94 Stat. 3569 [Findings and Purposes]

STATE

UCCJA § 1 [Purposes of the Act; Construction of Provisions.]
UCCJA § 6 [Simultaneous Proceedings in Other States.]
UCCJA § 7(d), (h), (i) [Inconvenient Forum.]

Law and policy

Sections 6 and 7 of the UCCJA direct courts to communicate as a means of avoiding interstate jurisdictional gridlock and deciding which is the more appropriate forum to hear the custody case. Communication can help resolve jurisdictional issues, freeing the parties to concentrate their resources on the merits of the custody dispute.

UCCJA § 6 and § 7 are intended to be read together. The comment to § 6 explains that "all feasible means, including novel methods" are needed to avoid jurisdictional conflict. The comment states that:

> [C]ourts are expected to take an active part. . . .in seeking out information about custody proceedings concerning the same child pending in other states.

Like § 6, UCCJA § 7 stresses interstate judicial communication and cooperation. The comment states, "When there is doubt as to which is the more appropriate forum, the question may be resolved by consultation and cooperation among the courts involved."

PKPA. The PKPA does not address judicial communication. However, fulfillment of the PKPA's purposes, as well as its prohibition on simultaneous proceedings, depends upon faithful execution of the UCCJA's communication provisions.

The importance of judicial communication and cooperation was noted by the Vermont Supreme Court in Duval v. Duval, 546 A.2d 1357, 364 (Vt. 1988): "Cooperation among the different state courts that may possess jurisdiction over a custody dispute is more than a gesture of good will. Cooperation is vitally important to all purposes of the UCCJA . . . ."

This theme was echoed by the Minnesota Court of Appeals in Nazar v. Nazar, 505 N.W.2d 628, 637-638 (Minn. App. 1993):

> Finally, we encourage both Minnesota and Louisiana trial courts to adhere to the UCCJA's requirement of interstate communication and cooperation . . . .In applying the UCCJA, state courts have consistently held that in order to foster cooperation, courts have a *duty* to communicate to resolve jurisdictional issues over child custody (citations omitted). . . . At present, neither the parties, the attorneys, nor the state courts are cooperating to reach a resolution for the best interests of the children. Instead, we have the exact situation the UCCJA was enacted to prevent: two states and two parties at a jurisdictional impasse with two innocent children caught in the middle. Which state exercises jurisdiction is less important than that the courts of the involved states act together in the children's best interests. Coleman v. Coleman, 493 N.W.2d 133, 137(Minn. Ct. App. 1992). On remand we ask the courts of Minnesota and Louisiana to communicate, evaluate, and cooperate to determine the most appropriate form in which to decide the custody issue.

When should courts communicate?

Simultaneous proceedings, UCCJA § 6

UCCJA § 6(c) requires[1] judicial communication in three situations:

- When a court in which a custody

proceeding is pending (F2) learns of a prior pending proceeding concerning the same child in another state (F1), the F2 court shall stay the proceeding and communicate with the F1 court so that the issue may be litigated in the more appropriate forum. Information may be exchanged in accordance with § 19 through § 22.

- When a court has already made a custody order and subsequently learns of a pending proceeding in another state, it must immediately inform the other court of its order.
- When a court that has assumed jurisdiction learns that a proceeding was commenced subsequently in another state, it must inform the other court so that the issues may be litigated in the more appropriate forum.

Inconvenient forum, UCCJA § 7

Communication is a valuable but often overlooked tool for evaluating whether the forum is inconvenient.

Discretionary

A court that is weighing whether to decline or retain jurisdiction "may communicate with a court of another state and exchange information pertinent to the assumption of jurisdiction by either court with a view to assuring that jurisdiction will be exercised by the more appropriate court and that a forum will be available to the parties." UCCJA § 7(d). Although discretionary, the better practice suggests communication.

Mandatory

When a court dismisses or stays its proceedings on inconvenient forum grounds, the court "shall inform the court found to be the more appropriate forum of this fact . . . ." UCCJA § 7(h). When the latter court assumes jurisdiction, it "shall inform the original court of this fact." UCCJA § 7(i). The communication envisioned by these sections is more aptly characterized as notification because no consultation occurs.

Is a failure to communicate reversible error? Yes, according to the courts that consider the failure to communicate a jurisdictional defect or an abuse of discretion.[2] Other courts have noted the importance of judicial communication, while holding that failure to communicate does not constitute a jurisdictional defect.[3] The case law reflects that significant resources have been spent challenging and defending the failure of courts to communicate. This can be avoided by communicating as required by the UCCJA in the manner suggested below.

How should courts communicate?

The UCCJA commands courts to communicate with one another but does not specify how. This allows the court to select any suitable means of contacting another judge to discuss the jurisdictional issues in the case, so that a decision can be made about which court will exercise jurisdiction. It is advisable to consult with attorneys for the parties when making this decision.

Exchange case files. For informed decision-making, judges should have complete copies of the case files from both states. Courts can exchange case files under UCCJA § 21. This can be accomplished instantly by fax, or by electronic mail, where available to the sending and receiving courts. Otherwise, ordinary mail will suffice.

When communicating, the court must take care to protect the procedural due process rights of the parties. Notice about a substantive judicial communication and opportunity to participate in the discussion should be given to the parties. Ideally, the parties should receive notice in advance of the communication and have an opportunity to be heard.[4]

The due process concerns attendant to

substantive judicial communications do not apply when judges communicate about minor housekeeping matters, such as scheduling a telephone conference or calendaring a case.

Conference calls

One very effective way to communicate is via conference call—be it a multiparty call or a video conference call—with both courts and counsel for the parties participating. The conference call can be scheduled in the same manner as any hearing.

Conference call: joint hearing on custody jurisdiction

The conference call can be a forum for a joint hearing on custody jurisdiction. The courts in which competing proceedings are pending can stay their respective proceedings and jointly order submission of briefs on the jurisdictional issues. If oral argument is requested, the courts then set a date and time for the hearing to take place via conference call. Following oral argument presented simultaneously to both courts, the judges can excuse counsel and confer about which state is the more appropriate forum to exercise jurisdiction.

Once a decision is reached, the judges can sign a joint order (or separate, identical orders) specifying which court will exercise jurisdiction and which will stay or dismiss proceedings, and detail reasons for the decision. Variations on this strategy for resolving jurisdictional disputes have worked well.[5]

Telephone calls between judges: the need for a record

When a conference call is not a viable option, a regular telephone call is an appropriate means for judicial communication.[6] The substance of the communication should be made a matter of record.[7]

The best way to do this is by tape recording the conversation. A court reporter should transcribe the conversation for the record in the case.[8] The tape recording and/or the transcript should then be made available to the parties before a final decision is made as to which forum is appropriate. This gives the parties an opportunity to review the content of the communication and respond to conclusions based thereon.

Alternatively, one or more of the judges should make a contemporaneous written record of the conversation and state the basis for any agreement they reach clearly in the record.[9] This will facilitate appellate review.[10] The court should include jurisdictional facts and relevant citations to the UCCJA and PKPA in support of the decision on jurisdiction.

Letters

Another method of judicial communication is an exchange of letters between the judges in the states that have competing jurisdictional claims. This is a good choice for communicating about a case with long and involved jurisdictional facts. It has the inherent benefit of creating a record of the exchange between courts.

If communication is to be by mail, the judge should consider ordering the parties to submit letters to the court containing statements of the jurisdictional facts. The court can base its letter to the sister state court on these letters, and may send the letter(s) submitted by counsel as attachments. Any written response should be disseminated to the parties upon receipt by the court.

Communicating by letter has some drawbacks. Conventional mail is slower than telephone.[11] Letters can cross in the mail.[12]

To speed matters up, courts can request a reply by a specified date, and consider using overnight express mail services, e-mail, or fax

transmission.

Ex parte judicial communications

Because *ex parte* judicial communications may create due process problems and possible ethical concerns,[13] they should be avoided. However, there may be circumstances when *ex parte* communications are necessary, such as when a party is seeking emergency jurisdiction and time is of the essence. If this occurs, the judges should notify the parties immediately of the substance of the communication. If the conversation has been taped, the tape recording or verbatim transcript, or both, should be given to the parties. If the communication has been by mail or e-mail, the parties should be given copies. All parties should have the opportunity to review and or object to the substance of the communication.[14]

Good will

Regardless of what form the communication takes, the UCCJA mandate to communicate can only work where judges in sister states are willing to cooperate.[15] The good intentions of the judge making the call or writing the letter should be reciprocated: the judge receiving the communication should reply promptly.

Cooperation and communication between civil and criminal courts[16]

An interstate child custody or visitation dispute can have civil, as well as criminal, aspects. The court presiding over a criminal custodial interference case and the judge with jurisdiction over the civil custody determination may need to exchange information. The criminal court will invariably need a copy of the current custody determination, as violation of the decree often is an element of a custodial interference offense.

If the custody determination allows the defendant 'reasonable visitation' with the child, the criminal court should notify the civil court if it enters a 'no contact' order barring the defendant from having access to the child as part of the criminal sentence. It can do this by sending a copy of the 'no contact order' to the civil court. The civil court can then expect the aggrieved parent to file a petition to modify the custody determination to restrict the defendant's visitation rights beyond the period of the criminal sentence. If the custody determination is modified, the civil court should forward a copy of the modified order to the criminal court.

JUDICIAL COOPERATION AND ASSISTANCE

Applicable statutes

STATE

UCCJA § 17 [Certified Copies of Custody Decree]
UCCJA § 18 [Taking Testimony in Another State]
UCCJA § 19 [Hearings and Studies in Another State; Orders to Appear]
UCCJA § 20 [Assistance to Courts of Other States]
UCCJA § 21 [Preservation of Documents for Use in Other States]
UCCJA § 22 [Request for Court Records in Another State]

Requesting information from a court in another jurisdiction.

By their very nature, interstate custody disputes suggest that more than one state is the locus of information important as to (1) whether the court has jurisdiction, (2) whether it should exercise jurisdiction, and (3) how custody rights should be allocated. To address this, the UCCJA contains several provisions that can be used by the judge to ease the sharing and generating of relevant information.

The custody order. UCCJA § 17 directs the clerk of the court with jurisdiction to hear custody matters to certify and forward a copy of a custody decree to any court in another state that requests one. A judge may use this provision if in doubt about the provisions of an existing custody decree. The requesting court should be sure to ask for the original decree and any subsequent modifications to it. By mentioning possible modifications, the court will be putting the clerk's office on notice to check the file for them.

The court record. UCCJA § 21 requires a court to preserve the pleadings, orders and decrees, any record made of hearings, social studies, and other pertinent documents until the child who is the subject of those records turns 21. At the request of the court of another state, the court is to forward copies of any or all of these documents. UCCJA § 22 directs a court to request the original decree state to forward all pertinent court records when a custody proceeding involving the same child is brought before it.

Interstate evidence gathering. Section 18 of the UCCJA allows the court to direct that testimony of a person be taken in another state. The court also has the authority to prescribe the manner in which, and the terms upon which, the testimony can be taken. The Act suggests that this could be by deposition or any other available means. The court can use this provision to ensure having testimony from any witness who could otherwise not be made to appear in person or would be unavailable to appear as a witness. This provision, along with § 19 and § 20 could be very useful to a court desirous of minimizing financial hardship to a party located in a distant state whose testimony is needed.

Sections 19 and 20 further bolster evidence gathering. Section 19 authorizes a court to ask a court in another state for assistance in gathering evidence. Specifically, a court may ask the court in another state to hold an evidentiary hearing and forward a certified copy of the transcript. This provision is designed to ameliorate some of the costs associated with transporting witnesses long distances to give testimony. In essence, it allows the court to ask another court to conduct some of the proceedings in another state.

A court can also ask the court in another state to order a party to produce or give evidence in that state, and then to forward it to the requesting court. This would be particularly useful if the court wanted physical evidence or records in the possession of a person, agency, or other organization in another state. The court may also request a court in another state to order that a custody evaluation be made in that other state and forwarded to the requesting court.

Finally, the court may ask another court to order a party located in that state to appear in the proceedings and bring the child if the party has physical custody of the child. This request may indicate who will pay for the travel and other expenses incurred to comply with a possible order to appear. Section 20 authorizes a court to provide the assistance requested by a sister state court pursuant to § 19.

When should the court resort to evidence gathering under these provisions?

The court may make a request for assistance under these sections either on its own motion or at the request of a party. In practice these provisions, which were developed to ease the costs and complications of interstate litigation, appear to be seldom used.[17] This may be because courts have little experience using them and, therefore, steer clear of them.

It may also be because courts have concerns about problems that could arise in the evidence gathering process. For example, courts do not traditionally initiate information or evidence gathering. They rely on the parties to do this. Further, a court should not use these provisions

without keeping the parties apprised of the process so that any possibility of impropriety, such as *ex parte* communications with a party or a witness, is avoided.[18] To do this, parties need to be informed of a court's intention to collect information using these sections and be allowed to participate. For example, if a witness will give testimony at an evidentiary hearing in another state, the parties must be permitted to confront and cross-examine the witness. If the court requests a home study, it must be made available to the parties for scrutiny in a time frame that will allow either party to make follow-up inquiries or take steps to assure cross-examination of the person(s) who prepared it.

If the court elects to request an evidentiary hearing in another state, it should limit the scope of the hearing to particular issues. For example, the court could request that the hearing be limited to testimony relevant to jurisdiction or, if the jurisdictional question has already been decided, to the substantive custody question before it.

Because of travel costs and the difficulty of compelling witnesses in another state to attend, holding an evidentiary hearing in a sister state court has appeal. The court could, in essence, split a hearing between the two states and, in doing so, equalize the inconvenience to the parties.

On the other hand, holding two hearings has drawbacks. If the proceeding in the other state is not videotaped, the judge will be deprived of a first hand opportunity to assess, in person, the credibility of witnesses.

This would be of greater concern where substantive custody issues were at bar than where jurisdiction is at issue. The judge will also be unable to ask questions of those witnesses. As for minimizing costs, the parties are likely to be present for both proceedings and may feel compelled to hire counsel in both states. These costs can be mitigated or avoided by use of technology available to an ever-expanding number of courts such as videoconferencing or multiparty conference calls. The idea of holding a joint hearing is discussed, *supra*, at p. 4-4.

Endnotes

1. *But see* State ex. rel. Grape v. Zack, 524 N.W.2d 788 (Neb. 1994), holding, *inter alia*, that judicial communication is not mandatory under the UCCJA. The court acknowledged the body of case law to the contrary at p. 798.

2. *See, e.g.*, In re Marriage of Baisley, 749 P.2d 446 (Colo. Ct. App. 1987) *cert. denied*, 488 U.S. 917 (1988) (Colorado not obligated to recognize the tribal court's *ex parte* order because, by failing to contact the Colorado trial court where a custody action was pending, the tribal court had not rendered its order in substantial conformity with the UCCJA. The failure to communicate was a jurisdictional defect.); Mayoff v. Robin, 496 N.Y.S. 2d 54 (App. Div. 2 Dept. 1985) (New York lacked jurisdiction under the UCCJA, and even if jurisdiction had existed, the appellate court would have reversed due to the New York court's failure to defer its proceedings and communicate with the Florida court in order to determine the more appropriate forum in which to litigate the dispute); In re Adoption of Zachariah K., 8 Cal. Rptr. 423 (Ct. App. 1992) (Failure of California court to stay proceedings and communicate with Oregon court is abuse of discretion); Renno v. Evans, 580 So. 2d 945 (La. Ct. App. 1991) (Failure to communicate and exchange information was error and case remanded for communication).

3. In re Cifarelli, 611 A.2d 394 (Vt. 1992) (Failure of Vermont court to communicate with Bermuda was harmless error and does not require reversal. The same result would have been reached had communication occurred, *i.e.*, Bermuda had custody jurisdiction, despite guardianship entered by Vermont court, where child had closer connection to Bermuda.); Liska v. Liska, 902 P.2d 644, 650 (Utah Ct. App. 1995) ("The Commissioner erred by failing to make a record of her communication with the Colorado magistrate regarding the assumption of jurisdiction by the Colorado court. However, such error was harmless because the commissioner's recommendation to decline to exercise Utah's continuing jurisdiction over this case, and the trial court's decision based thereon, were inarguably correct."); Sawle v. Nicholson, 408 N.W. 2d 173 (Minn. App. 1987) (Where Minnesota was informed of proceeding pending in Wisconsin but failed to communicate with Wisconsin court, such failure to communicate was not a jurisdictional defect and does not in and of itself deprive the Minnesota court of jurisdiction. This was so even though "the preferred course is for such communication to take place..." *Id.* at 179. The court cited Snow v. Snow, 369 N.W.2d 581 (Minn. Ct. App. 1985), in reaching its decision.); Elder v. Park, 717 P.2d 1132 (N.M. Ct. App. 1986) (Failure of sister state court to communicate was not a jurisdictional defect. The New Mexico trial court made a good faith effort to communicate with the New Hampshire court, which either refused, or was unable, to respond while the New Mexico proceedings were pending. While communication may be desirable, lack of communication does not defeat jurisdiction in New Hampshire.).

4. "[A]bsent an emergency, the trial judge had a fundamental duty to notify the parties of the intended communication in advance, and to permit them to meaningfully participate in the discussion. Anything less does not comport with basic principles of due process." Yost v. Johnson, 591 A.2d 178, 182 (Del. 1991). The Delaware Supreme Court acknowledged in Yost that an emergency might necessitate an *ex parte* communication, in which case the trial judge should make a written record of the communication and thereafter provide the parties an opportunity to be heard on the issues relating to, or arising from, the communication.

5. *See, e.g.*, In re Marriage of Brown, 706 P.2d 116 (Mont. 1985); Mancusi v. Mancusi, 519 N.Y.S.2d 476 (Fam. Ct. 1987).

6. *See, e.g.*, Redding v. Redding, 495 N.E.2d 297, 299 n. 3, (Mass. 1986) ("In such cases as this it seems appropriate to use the telephone as the means of communication."); Berry v. Berry, 466 So. 2d 138, 140 (Ala. Civ. App. 1985); McCarron v. District Court, 671 P.2d 953, 955 (Colo. 1983).

7. *See, e.g.*, Allen v. Allen, 645 P.2d 300 (Haw. 1982) (The court concurred with the appellate court ruling that the substance of the judges' conversation should have been made a matter of record, but failure to do so was not prejudicial in view of the parties' pleadings and affidavits which supplied a reason for dismissal); Draper v. Roberts, 839 P.2d 165, 175 (Okla. 1992) ("Reliance solely upon oral communications between judges can cause confusion. The better rule of practice and the one we adopt today is that, without a written notification that the sister-state court yields jurisdiction - filed in the cause - Oklahoma must defer to the pending first-commenced litigation.").

8. *See, e.g.*, Smith v. Smith, 534 N.W. 2d 6 (N.D. 1995) (Court rejects mother's claims that an *ex parte* telephone communication between trial judges in California and North Dakota was improper. The UCCJA authorizes courts to communicate; discussions between judges promotes cooperation between states and can help avoid relitigation of similar issues. The judges' communication was recorded and transcribed, giving the parties an opportunity to review it and present

objections. The parties must be informed of the content of the conversation to protect their rights to fair and impartial decisionmaking. *See* Burkhalter v. Burkhalter, 634 So. 2d 761 (Fla. App. 1 Dist. 1994).).

9. *See, e.g.*, State ex rel. D.S.K. v. Kasper, 792 P.2d 118, 127 (Utah Ct. App. 1990) (Citing Redding v. Redding, 495 N.E.2d 297, 299 (Mass. 1986), the court recommended that, where judges communicate by telephone, they make a prompt written record of their conclusions and that the basis for any agreement be set forth clearly in the record); Neger v. Neger, 459 A.2d 628 (N.J. 1983) (recommending that each judge make a prompt written record of his or her conclusions and that the basis of the agreement be set forth, in at least general terms, in documents of record).

10. *See, e.g.*, Walters v. Walters, 519 So. 2d 427 (Miss. 1988) (The trial court's statement in its order, to the effect that the Montana judge did not voice any objection to Mississippi's jurisdiction, lacked the necessary clarity upon which to determine whether the Montana court declined to exercise jurisdiction on the ground that Mississippi was the more appropriate forum. The record contained no facts pertaining to the Montana court's determination. The Mississippi court never made the necessary fact-finding on the Montana court's relinquishment of jurisdiction, and the lack of clarity in the record also made it impossible to determine whether the Montana court stayed its proceedings, so as to allow the Mississippi court to proceed); In re Marriage of Panich, 672 S.W.2d 718 (Mo. Ct. App. 1984).

11. *See, e.g.*, Morgan v. Morgan, 666 P.2d 1026 (Alaska 1983) (The trial court sent a letter to a sister state court but did not receive a response until three weeks after it had already entered its order.).

12. *See, e.g.*, DiRuggiero v. Rodgers, 743 F.2d 1009 (3d Cir. 1984).

13. *See, e.g.*, State ex. rel. Grape v. Zack, 524 N.W.2d 788 (Neb. 1994); Yost v. Johnson, 591 A. 2d 178 (Del. 1991) (recognizing that an emergency might necessitate an *ex parte* communication that in other circumstances might be suspect).

14. *See, e.g.*, Smith v. Smith, *supra*, n. 8.

15. *See, e.g.*, Lofts v. Super. Ct., 682 P.2d 412 (Ariz. 1984) (en banc) (Arizona trial judge tried unsuccessfully for a week to hold a telephonic UCCJA hearing and went so far as to call the Chief Justice of the Washington State Supreme Court to ask him to urge the trial judge to respond); Elder v. Park, 717 P.2d 1132 (N.M. Ct. App. 1986) (New Mexico court made good faith effort to communicate with the New Hampshire court which either refused, or was unable, to respond while the New Mexico proceedings were pending); Duval v. Duval, 546 A.2d 1357 (Vt. 1988) (Vermont statute requires trial court to make a good faith attempt to speedily contact the other jurisdiction before taking jurisdiction over the dispute. If the court is unable to contact the other jurisdiction, then Vermont should take jurisdiction and, issue a temporary custody order, if necessary, until such time as contact is made with the other court and the jurisdictional questions are resolved.), overruled on other grounds by Shute v. Shute, 607 A.2d 890, 894 (Vt. 1992).

16. *See* this *Journal*, JUDGES GUIDE TO PARENTAL KIDNAPPING CASES, American Prosecutors Research Institute and the National Council of Juvenile and Family Court Judges (1996), Chapter One. I., "Coordination of Criminal and Civil Proceedings."

17. At a minimum, appellate decisions rarely mention their use.

18. *See, e.g.*, Osgood v. Dent, 306 S.E.2d 698 (Ga. Ct. App. 1983) (Due process rights of the father were violated when the court spoke with an attorney in Colorado about sexual abuse charges brought there against the father.).

Chapter 5
Jurisdiction to Make an Initial Custody Determination

Summary

This chapter explains the state and federal statutory scheme for the existence and exercise of jurisdiction to make an initial child custody determination. Grounds for declining jurisdiction are also discussed, including simultaneous proceedings pending in another state, inconvenient forum and "clean hands" considerations, and the federal preference for "home state" jurisdiction.

The next chapter examines jurisdiction to modify a child custody determination.

CHECKLIST

1. Is this a "custody proceeding" to which the UCCJA and PKPA apply?

2. Have the contestants filed the required address information in the first pleading or attached affidavit?

3. Is this an action for an initial custody determination, or has custody already been decided by another court (in which case statutory provisions pertaining to modification jurisdiction would apply)?

4. If the present action is for an initial custody determination, is this the home state of the child? Refer to the definitions of "home state" in UCCJA § 2(5)and in PKPA, 28 U.S.C. 1738A(b)(4), and state and federal case law interpreting that term.

5. If this is not the home state, is there a home state that could decide custody?

6. If there is no home state, does this state have significant connections jurisdiction?

7. If emergency jurisdiction is sought, is the child in the state and in need of immediate protection until a court with jurisdiction to enter permanent orders can act?

8. Is there a basis for this state to exercise last resort jurisdiction?

9. If the court has a basis under the state UCCJA law to exercise jurisdiction, is there any reason why the court should decline to do so, including:

- Have notice and opportunity to be heard been given to all custody claimants?[1] UCCJA § 4, § 5; PKPA, 28 U.S.C. 1738A(e).
- Is a proceeding pending elsewhere that would prohibit the exercise of jurisdiction? UCCJA § 6; PKPA 28 U.S.C. 1738A(g)
- Is there a conflict with the PKPA that would deprive a custody order made by this state of full faith and credit in sister states (*i.e.*, is another state the home state of the child, a later order from which would be entitled to full faith and credit in sister states)?
- Is the court an inconvenient forum? UCCJA § 7
- Does the plaintiff come to court with clean hands? Has the plaintiff abducted the child or engaged in reprehensible conduct that would warrant declining jurisdiction? UCCJA § 8

Applicable Statutes

FEDERAL

PKPA, 28 U.S.C. 1738A(a), (b), (c), (e), (g)

STATE

UCCJA § 3 [Jurisdiction]
UCCJA § 6 [Simultaneous Proceedings in other States]

UCCJA § 7 [Inconvenient Forum]
UCCJA § 8 [Jurisdiction Declined by Reason of Conduct]

Law and Policy

The law of initial child custody jurisdiction has two layers: state and federal.

First, there is the state's codification of the Uniform Child Custody Jurisdiction Act (UCCJA) which identifies four alternative bases for the exercise of jurisdiction in child custody cases.[2] These are home state jurisdiction; significant connection jurisdiction; emergency jurisdiction; and last resort (or "vacuum") jurisdiction.

Because of the possibility under the UCCJA that more than one state may have jurisdiction at the same time, the Act prohibits the simultaneous exercise of jurisdiction to prevent the issuance of conflicting custody orders by courts in different states. Judges are directed to stay proceedings and communicate with one another to determine which forum has a closer connection to the child and, therefore, should exercise jurisdiction and decide custody.

Once it is determined whether a court has jurisdiction, the UCCJA provides grounds upon which courts may decline to exercise jurisdiction, *i.e.*, "clean hands" and inconvenient forum considerations.

Superimposed on the state statutory scheme is the federal Parental Kidnapping Prevention Act (PKPA), 28 U.S.C. 1738A, which under the Supremacy Clause[3] preempts conflicting provisions of state law. State court judges need to be concerned about the effect of the PKPA on their exercise of jurisdiction because custody orders made in compliance with the PKPA are entitled to full faith and credit in all other states. If PKPA jurisdiction criteria are not met, the resulting order is not entitled to full faith and credit under federal law. While the decree may be enforced by a sister state court under the UCCJA, it is trumped by a custody order made consistently with the PKPA. The order that complies with the PKPA takes precedence and must be enforced.

The PKPA seeks to limit the exercise of initial custody jurisdiction to the home state when there is one. It does this by prioritizing home state jurisdiction over significant connection jurisdiction.[4] A custody determination made on the basis of home state jurisdiction takes precedence over one made by the court exercising significant connection jurisdiction. This means that a court that makes a custody determination based on significant connection jurisdiction must grant full faith and credit to a home state decree.[5]

The PKPA prohibits a court from exercising initial jurisdiction if a custody proceeding is pending in another state consistently with the federal jurisdictional criteria. Accordingly, if a home state court is exercising initial custody jurisdiction, no other state may do so.

Even when the exercise of jurisdiction is not prohibited (*e.g.*, where the first pending proceeding is in a significant connection state), the PKPA's preference for home state jurisdiction discourages the exercise of significant connection jurisdiction. Courts with significant connection jurisdiction under the state UCCJA should refrain from exercising jurisdiction and defer to the home state court because the home state order will be entitled under the PKPA to full faith and credit.[6]

Once a court has exercised jurisdiction consistently with the PKPA, that state retains exclusive continuing jurisdiction to modify its own orders. Modification jurisdiction is the subject of Chapter 6.

■ PRACTICE TIP

Judges should require counsel to brief the issue of whether and how the PKPA applies in all

interstate child custody cases, including proceedings for an initial custody determination. Alternatively, judges should inquire of counsel as to the applicability of the PKPA.

Does the court have initial custody jurisdiction under the UCCJA? Is the UCCJA jurisdictional basis consistent with the PKPA?

Once the court determines the case is for an initial custody determination, the next step is to review UCCJA § 3 to determine whether the court has jurisdiction to proceed. Before exercising jurisdiction, however, consider what effect, if any, the PKPA, 28 U.S.C. 1738A(a), (b), (c) and (e), would have on the exercise of jurisdiction and on the interstate enforceability of the resulting decree.

UCCJA § 3 lists four alternate bases of jurisdiction to make an initial custody determination: home state, significant connection, emergency and last resort. Parties cannot confer subject matter jurisdiction by consent.[7]

Home state jurisdiction, UCCJA § 3(a)(1); UCCJA § 2(5); effect of PKPA "home state" preference, 28 U.S.C. 1738A(c)(2)(A) and (B)

Litigants who secure initial custody determinations in the child's home state are in a win-win situation: they have complied with both the UCCJA and the PKPA's preference for "home state" jurisdiction.

Under UCCJA § 3(a)(1), a court has home state jurisdiction if "(1) this state (i) is the home state of the child at the time of the commencement of the proceeding, or (ii) had been the child's home state within six months before commencement of the proceeding and the child is absent from this state because of his removal or retention by a person claiming his custody or for other reasons, and a parent or person acting as a parent continues to live in this state."

"Home state" is defined in UCCJA § 2(5) to mean the state in which the child immediately preceding the time involved lived with his parents, a parent, or a person acting as a parent, for at least six consecutive months, and in the case of a child less than six months old the state in which the child lived from birth with any of the persons mentioned. Periods of temporary absence of any of the named persons are counted as part of the six month or other period. The PKPA definition of home state is virtually identifical. 28 U.S.C. 1738A(b)(4).

Pre-decree abductions

The child need not be physically present in the state for a court to exercise home state jurisdiction.[8] When a child is removed from the home state prior to the commencement of a custody case, UCCJA § 3(a)(1)(ii) expressly extends home state jurisdiction for an additional six months. This deprives the parent who removed the child from the state of the advantage of forum selection based on physical possession of the child in another state, and affords the parent who remains in the state an opportunity to commence a custody action in the state within those additional six months.[9] The extended home state rule can be especially helpful to left-behind parents in pre-decree abduction cases.[10]

Four commonly litigated UCCJA issues involving initial home state jurisdiction are:

- **"Temporary absences from the state."** A child must live in a state with his or her parents, a parent, or a person acting as a parent for at least six consecutive months immediately prior to the commencement of a custody proceeding for that state to qualify as a "home state." Temporary absences from the state (*e.g.*,

vacations and out-of-state visits) count toward the six-month period.

The respondent may challenge the existence of jurisdiction on grounds that an absence was not "temporary" and should not be counted as part of the six months required for home state jurisdiction. This could arise, for example, when the child and a parent move out of the state, then move back a short time later, or where a child is allowed to remain out-of-state with the other parent during the school year.

Whether an absence is "temporary" is a jurisdictional fact to be determined by the court.[11] Much hinges on this determination, as a home state court order has interstate priority under the PKPA.

■ **"Commencement of the proceeding"** Home state is determined at the commencement of proceeding. Are proceedings commenced upon filing of the action, upon service of process, or when the trial actually begins? The reporter for the UCCJA expressed the view that commencement occurs upon filing of the action, a position adopted by many courts that have considered the question.[12] Follow state law to determine when a case is deemed "commenced" in a particular state.

The court may only consider jurisdictional facts in existence at the time the proceeding is commenced to determine whether it has jurisdiction. Changes in jurisdictional facts after a proceeding has been commenced do not divest the court of jurisdiction, but may justify a decision to decline jurisdiction in favor of another court.[13] Nor may the passage of time after a proceeding is commenced be counted toward establishing a home state, or be allowed to create significant connection jurisdiction that did not exist when the proceeding was commenced.

■ **"Lived in the state."** Does "lived" in the state refer to the child's physical or legal residence?[14] The term is intended to mean the state where the child actually lived. It is not meant to refer to the child's or parent's legal residence, domicile, or citizenship.[15]

■ **Interstate adoption cases involving infants.** What state, if any, is the home state of a baby placed out-of-state with prospective adoptive parents soon after birth?[16] Is it the state where the baby is born, the state where the baby lives with the prospective adoptive parents, or neither? Is a prospective adoptive parent a "person acting as a parent" if the birth mother has revoked her consent to adoption?[17] For a discussion of these and other issues that arise in interstate adoption cases, see Chapter 9.

Significant connection jurisdiction, UCCJA § 3(a)(2); effect of PKPA, 28 U.S.C. 1738A(c)(2)(A) and (B)

Under UCCJA § 3(a)(2), a court has significant connection jurisdiction if "it is in the best interest of the child that a court of this State assume jurisdiction because (i) the child and his parents, or the child and at least one contestant, have a significant connection with this State, and (ii) there is available in this State substantial evidence concerning the child's present or future care, protection, training or personal relationships."

The child's physical presence is not a prerequisite for jurisdiction under this section.

Under the UCCJA framework, home state and significant connection are equal alternative bases for the exercise of initial custody jurisdiction. However, before exercising significant connection jurisdiction, courts must consider not only the priority for home state jurisdiction expressed in the comment to § 3,[18] but more significantly, the preemptive effect the PKPA's priority for home state jurisdiction has over significant connection jurisdiction for interstate enforcement purposes. *See* "What effect does the PKPA's home state priority have

on the exercise of UCCJA significant connection jurisdiction in a proceeding for an initial custody determination," below.

Three issues related to UCCJA significant connection jurisdiction often arise:

"Best interests." This provision does not call for a "best interests" hearing as a means of determining jurisdiction.[19] Judges must not allow parties to argue the merits of their custody case in an effort to establish significant connection jurisdiction. Only after jurisdiction is determined may substantive custody matters be considered.

Once the two prongs of the jurisdictional test are met, *i.e.*, (1) significant connection and (2) substantial evidence, there is no need to prove the exercise of jurisdiction would be in the child's best interests. This is assumed because of the child's strong ties to the state.[20]

"Significant connections:" who must have them and what are they?

Who. It is not enough for one of the parents or custody contestants to have connections with the state. The child must have significant connections with the state.[21]

Significant connection jurisdiction does not lie where the plaintiff-parent's only contacts with the state date back before the marriage and the children's contacts with the state are of short duration.[22] Nor would jurisdiction lie when a parent abducts a child to a state where only the parent, and not the child, has had a significant connection.[23]

What. What bundle of ties to a state is sufficient to constitute a "significant connection?" The court must decide this on a case-by-case basis, keeping in mind the comment: "There must be maximum, rather than minimum contact with the state."[24] Another comment explains that short-term presence in the state does not qualify as a significant connection, even though there may be an intent to establish a technical "domicile" for divorce or other purposes.

Residence in the state of relatives, particularly grandparents, with whom the child has a relationship, is a common underpinning for finding significant connection jurisdiction.[25] This, alone, would not confer jurisdiction where another state would have "maximum contacts" with the child.[26]

What constitutes "substantial evidence"? There must be available in the state substantial evidence that relates to the issue then before the court. The evidence must concern the child's present or future care, protection, training, and personal relationships. Relevant evidence includes information about the child's schooling, extra-curricular lessons and activities, medical care, psychological counseling, relatives, friends, testimony of neighbors, etc.

In an abduction case, where the child has been taken from one state to another, the court should consider evidence about what the child's future care will be if the child is returned to the original state. This deprives the abductor of an unfair advantage from forum selection. It also allows the left-behind parent to show what plans there are for the child upon his or her return.

What effect does the PKPA's home state priority have on the exercise of UCCJA significant connection jurisdiction in a proceeding for an initial custody determination?

Before enactment of the PKPA, a child custody determination made by a significant connection state was entitled to recognition and enforcement even if another state was the child's home state. Under the PKPA, full faith and credit is owed only to those custody orders made by courts exercising jurisdiction in compliance with the PKPA.[27] Because of the PKPA's home

state preference, a significant connection determination would not be entitled to enforcement in sister states under the federal act if a home state existed when the proceeding that produced the determination commenced. Only when it appears that no state would have home state jurisdiction[28] would an initial decree made by a significant connection court be entitled to full faith and credit under the PKPA.[29] It has been held to be an inherent abuse of discretion to exercise significant connection jurisdiction when a home state exists because the resulting order can be freely ignored by other states under the PKPA. In re Marriage of Harris, 883 P. 2d 785 (Kan. Ct. App. 1994).

Instances may arise when a home state court will decline to exercise jurisdiction on UCCJA grounds, *i.e.*, § 7 (inconvenient forum) or § 8 (unclean hands), and instead defer to a significant connection state court. What effect will be given to the resulting custody order? Under 28 U.S.C. 1738A(c)(1) and 1738A(c)(2)(D), the resulting order is consistent with the PKPA and therefore entitled to full faith and credit. This is so because the significant connection state has jurisdiction under its own UCCJA and another state—the home state— has declined to exercise jurisdiction on the ground that the significant connection state is a more appropriate forum, and it is in the best interest of the child that such court assumes jurisdiction. A decision to decline jurisdiction in favor of another state is consistent with the policies of the UCCJA and PKPA.

A significant connection court is prohibited from exercising jurisdiction if a custody proceeding is already pending in a home state court. 28 U.S.C. 1738A(g); UCCJA § 6(a). There is a very strong federal incentive for the significant connection court to refrain from exercising jurisdiction in favor of the home state court even when the significant connection action is commenced first. Only the decree made by the home state will be entitled to full faith and credit under 28 U.S.C. 1738A(a). Simultaneous proceedings are discussed, *infra*.

■ Practice Tips

If a parent commences a proceeding for an initial custody determination in a significant connection court pursuant to the UCCJA, the court should dismiss the proceeding in favor of a court with home state jurisdiction. This can be done *sua sponte* or on motion of a party. A review of the pleadings, affidavit, and inquiry of the parties should reveal whether a home state exists. If not, specifically ask counsel whether a home state exists.

The court should state the basis for its jurisdiction in the court order. If the court has home state jurisdiction, the order should cite UCCJA §§ 2(5) and 3(a)(1), and PKPA, 28 U.S.C. 1738A(b)(4) and (c)(2)(A). If the court has significant connection jurisdiction, having found that no home state exists, it should declare such findings, citing 28 U.S.C. 1738A(c)(2)(B)(i). The order should recite relevant jurisdictional facts.[30]

Emergency jurisdiction, UCCJA § 3(a)(3); effect of PKPA 28 U.S.C. 1738A(c)(2)(C)

A state may have emergency jurisdiction to protect a child when an emergency situation exists and the child is present in the jurisdiction. This is an independent basis for jurisdiction, and does not depend on the state having either home state or significant connection jurisdiction. UCCJA § 3(a) (3) and PKPA 28 U.S.C. 1738A(c)(2)(C). The PKPA does not prioritize home state jurisdiction over emergency jurisdiction.

Specifically, a state has emergency jurisdiction under UCCJA § 3(a)(3) if "the child is physically present in the state and (i) the child has been abandoned or (ii) it is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment

or abuse or is otherwise neglected [or dependent]."

The UCCJA does not define the terms abuse, neglect, abandonment, and dependent. While strict adherence to child abuse, neglect, dependency and abandonment laws is not required by the UCCJA,[31] these statutes and case law may be helpful in deciding whether the facts presented are serious enough to give rise to emergency jurisdiction.

The Commissioner's comment reminds the court that " . . . . this extraordinary jurisdiction is reserved for extraordinary circumstances . . . . When there is child neglect without emergency or abandonment, jurisdiction cannot be based on this paragraph." [32]

Judges must determine on a case-by-case basis whether emergency jurisdiction exists to order immediate protection for the child.[33] Absent a true emergency, a court does not have emergency jurisdiction. The petitioner should be directed to file for custody in the state that would have jurisdiction pursuant to the UCCJA and in conformity with the PKPA.

Effect of PKPA

The PKPA's criteria for emergency jurisdiction are narrower than in the UCCJA. Under the PKPA, an order based on emergency jurisdiction must receive full faith and credit only where the child has been abandoned, or subjected to or threatened with mistreatment or abuse. The UCCJA also covers emergencies involving child neglect or dependency.

The narrower scope of the PKPA's emergency jurisdiction can result in some emergency custody orders made under the UCCJA that would not be entitled to full faith and credit under the PKPA.

Although the child must be present in the state for a court to have emergency jurisdiction, evidence of the alleged emergency will often be found in another state. The court should avail itself of the UCCJA's interstate evidence gathering tools found in §§ 18, 19, and 22. As a corollary, the court that exercised emergency jurisdiction should send any information it has adduced about the emergency to the court that has jurisdiction to make permanent orders.[34]

Courts should scrutinize petitions for custody founded on alleged emergencies. The imposition of sanctions will deter frivolous claims. The court can assess litigation costs against the party making false claims of emergency, or impose fines on the petitioner. [35]

Relief

What kind of relief can the court order when exercising emergency jurisdiction? While there are no limitations found in the UCCJA,[36] it is sound practice for judges to issue temporary custody orders[37] of short duration to protect the child from the immediate emergency, and to direct the petitioner to seek relief in the court that has home state jurisdiction, or if no such state exists, then in a significant connection state.

This is the key to minimizing interstate conflicts: do only what is necessary to protect the child from the immediate emergency and send the litigants to the state with jurisdiction to make permanent custody orders.[38] In the usual case, most of the evidence needed to adjudicate custody will be available in another state, which enables the court in that state to make an informed custody determination.

The two courts asked to decide custody of the same child—the emergency jurisdiction court and the court with another basis for jurisdiction to make permanent orders— should communicate for two reasons: (1) to determine whether the court with regular UCCJA jurisdiction would

defer to the emergency jurisdiction court to enter permanent orders, and (2) to assist one another in gathering evidence, including holding hearings, ordering custody evaluations, and taking depositions.

A court in the home state or significant connection state may decline jurisdiction in favor of the state that exercised emergency jurisdiction, either on inconvenient forum grounds [39](UCCJA § 6) or based on "clean hands" considerations (UCCJA § 8). This may be particularly appropriate in cases of proved domestic violence to protect the safety of the abused parent and child.

Domestic Violence

Domestic violence cases often present as emergencies.[40] An abused parent who flees with the child to safety in another state may file for custody there based on emergency jurisdiction. It is essential for the petitioner to assert facts in support of emergency jurisdiction.

A court may find that the child's exposure to the violence placed the child is imminent danger, or that the child was threatened with or subjected to mistreatment or abuse. If these circumstances created an emergency, the court has jurisdiction to award the petitioner-parent temporary custody under UCCJA § 3(a)(3). In the normal course, that parent would then have to file in the home state for custody, or, in the alternative, ask the home state court to decline jurisdiction[41] on inconvenient forum grounds[42] in favor of the state with emergency jurisdiction. The courts in the two states should communicate to determine which forum is the more appropriate to hear the case. The home state court may decline jurisdiction and defer expressly to the court that has emergency jurisdiction.

Last resort jurisdiction, UCCJA § 3(a)(4); effect of PKPA, 28 U.S.C. 1738A(c)(2)(D)

UCCJA § 3(a)(4) provides a final basis for custody jurisdiction for children who do not have strong enough contacts with a state over sufficiently long periods to establish either home state or significant connection jurisdiction. This is frequently referred to as "last resort" jurisdiction or "vacuum" jurisdiction.

Under UCCJA § 3(a)(4), a court has jurisdiction if "(i) it appears that no other state would have jurisdiction under prerequisites substantially in accordance with paragraphs (1), (2), or (3), or another state has declined to exercise jurisdiction on the ground that this State is the more appropriate forum to determine the custody of the child, and (ii) it is in the best interest of the child that this court assume jurisdiction."

Military families who relocate frequently due to changes in duty assignments often fall into this category, as do families where one or both parents relocate repeatedly in pursuit of work, education and/or social opportunities. An orphan child who is shifted from relative to relative in different states may also lack a home state or a significant connection state. Homeless children who may move from shelter to shelter in different states may also lack a home state or a significant connection state.

Judges will get a good sense of where last resort jurisdiction lies from the information contained in the initial pleading or affidavit attached thereto about the child's living situation during the preceding five year period.

If another state would have jurisdiction under one of the UCCJA jurisdictional grounds, then it is premature for a court to assert jurisdiction under this section unless and until the other state has declined to exercise jurisdiction in favor of the last resort court.

The "best interests" requirement of § 3(a)(4) is another limitation on the existence of last resort jurisdiction. The petitioner must affirmatively show that the exercise of jurisdiction would be in the child's best interest.[43] This requirement is not met by showing that existence of jurisdiction would be in the petitioner's best interest.

What effect does the PKPA last resort jurisdiction, 28 U.S.C. 1738A(c)(2)(D), have on UCCJA last resort jurisdiction in initial custody cases?

The UCCJA and PKPA last resort provisions have the same purpose in regard to initial custody jurisdiction: to allow a court to exercise jurisdiction if no other court has jurisdiction, or if a state which does have jurisdiction has declined its exercise.

The PKPA expressly includes "continuing jurisdiction" in its list of jurisdictional grounds that take precedence over last resort jurisdiction. The effect is that a court could not exercise UCCJA last resort jurisdiction consistently with the PKPA if another state has already made a custody order and has exclusive modification jurisdiction unless the latter state declined to exercise jurisdiction.

■ Practice Tip

There is very little case law involving last resort jurisdiction.[44] To facilitate interstate enforcement of a decree made on last resort grounds, it is good practice for the court to state explicitly on the face of the order that there is neither a home state nor a significant connection state, or that such state has declined jurisdiction in favor of this state and it is in the child's best interest for the state to exercise jurisdiction. UCCJA § 3(a)(4).

Declining Initial Custody Jurisdiction

Once the court finds a state law basis under the UCCJA for the existence of jurisdiction and determines that the UCCJA basis is consistent with the PKPA's jurisdictional hierarchy, then the next inquiry must be whether there are any reasons why jurisdiction should not be exercised. The court in its discretion may refuse to exercise jurisdiction on grounds of inconvenient forum and unclean hands.[45] There is a duty to refrain from exercising jurisdiction when proceedings are simultaneously pending elsewhere. UCCJA § 6 PKPA, 28 U.S.C. 1738A(g).

Simultaneous Proceedings

Law and policy. When custody proceedings are pending in two or more courts simultaneously for an initial custody determination, only one court should exercise jurisdiction. UCCJA § 6 and PKPA, 28 U.S.C. 1738A(g) set forth rules to determine which court is permitted to proceed. Although the specific requirements of the two laws differ, judges should be faithful to their common purpose: to prevent concurrent proceedings (which exact a heavy financial and emotional toll on the child and the custody contestants) with the likelihood of conflicting custody orders being issued. When resolving which state should proceed to hear the custody case, judges should always consider the PKPA's priority for home state jurisdiction: the home state custody determination is entitled to full faith and credit in sister states.[46]

Judges should also use the UCCJA procedures for preventing concurrent custody proceedings — the stay[47] and judicial communication[48]—when proceedings are pending in more than one state.

How do judges find out about simultaneous proceedings? First, through review of the pleadings and affidavits and inquiry of the parties

(UCCJA § 9). The court should check the child custody registry, if the state has one. If there is evidence of an out-of-state proceeding, the court should contact the sister state court. If the court discovers that the exercise of jurisdiction is prohibited by either statute, the court should decline jurisdiction *sua sponte*.

The more common way for courts to learn of simultaneous proceedings is through challenges by the out-of-state party to the exercise of jurisdiction. Objections to jurisdiction take a variety of forms, ranging from motions to quash, motions to dismiss, or special appearances by the out-of-state party seeking dismissal of the local action. (Writs of mandamus and prohibition may be sought to appeal jurisdictional rulings.) Judges should hear objections to jurisdiction as expeditiously as possible in order to resolve promptly the threshold jurisdictional issue. Hearing challenges to jurisdiction before custody is adjudicated should preclude jurisdictional challenges when enforcement of the order is later sought.

Prohibitions on simultaneous proceedings: UCCJA § 6(a); PKPA, 28 U.S.C. 1738A(g)

The obligation to refrain from exercising jurisdiction is triggered when an action is pending in another state in compliance with the applicable laws. Although case law varies, the weight of authority favors the view that a proceeding is commenced and thus pending when the action is filed.[49] Some courts have held that an action is pending when served, or as of the time of the first hearing.[50] The law of the state in which the proceeding is brought controls when the action is considered pending.

UCCJA § 6(a) prohibits a court from exercising jurisdiction when another state previously began exercising jurisdiction consistently with the UCCJA. Similarly, the PKPA prohibition on simultaneous proceedings, 28 U.S.C. 1738A(g), forbids the second court in which proceedings are commenced from exercising jurisdiction when the first court in which proceedings are pending is exercising jurisdiction consistently with the PKPA.[51] When it applies, the federal act bars further proceedings in other courts. The prohibition is absolute.[52]

Because of the PKPA's preference for home state jurisdiction, a home state court is not prohibited by federal law from exercising jurisdiction when a proceeding is already pending in a significant connection state. The rationale is that the home state decree will take precedence over a decree made by a significant connection court should interstate enforcement be sought.

State law, *i.e.*, UCCJA § 6, provides the mechanism for preventing competing proceedings either through use of a stay and/or judicial communication. In the above scenario, the home state court and the significant connection state court should resolve the jurisdictional conflict before either considers the underlying custody claims. While the significant connection state is not absolutely prohibited from exercising jurisdiction by the PKPA because its proceeding was pending first, UCCJA § 6(c) requires the court, once it learns of the home state proceeding, to inform the home state court of its proceeding "to the end that the issues may be litigated in the more appropriate forum." The PKPA preference for home state jurisdiction should be reason enough for the significant connection state to dismiss its proceeding and, instead, defer to the home state court.

Restrictions on simultaneous proceedings, summarized

When does the PKPA, 28 U.S.C. 1738A(g), **forbid** a state from exercising jurisdiction? When another state is already exercising jurisdiction consistently with the PKPA at the time a custody proceeding is commenced in that state. In practice this means that a significant connection state is prohibited from exercising

jurisdiction when a home state proceeding is pending.

When does UCCJA § 6(a) **forbid** a state from exercising jurisdiction? When a proceeding is already pending in a court of another state exercising jurisdiction substantially in conformity with the Act at the time the custody petition is filed. The duty to refrain from proceeding ceases if the other state stays its proceedings because the second state is a more appropriate forum.

When does a court have a **duty to stay a proceeding and to communicate** with a sister state court under UCCJA § 6(c)?[53] When it learns during the pendency of its own proceeding that a proceeding was pending in another state before it assumed jurisdiction. The court has a duty to communicate with the court in which the first proceeding is pending to the end that the issue may be litigated in the more appropriate forum and information exchanged in accordance with UCCJA § 19 and §22.

When does a court have a **duty to communicate with another court under UCCJA § 6 (c) without the duty to stay** its own proceeding? In two instances: (1) When it has already made a custody order before learning of a pending proceeding in another court, it shall inform the sister state court of that fact. (2) When it has assumed jurisdiction before a proceeding is commenced in another state, it shall inform the other court to the end that the issues may be litigated in the more appropriate forum.

Can a court exercise emergency jurisdiction when proceedings for initial custody determination are pending in another court consistently with the UCCJA and PKPA?

The UCCJA and the PKPA do not expressly exempt courts that have emergency jurisdiction from their respective prohibitions on the exercise of jurisdiction during the pendency of a prior proper proceeding in another State. UCCJA § 6; PKPA, 28 U.S.C. 1738A(g). Nor does UCCJA § 3(a)(3), which establishes emergency jurisdiction, state that it is an exception to the § 6 prohibition on concurrent proceedings.

While there is no statutory exception for emergency jursidiction, the case law reflects that many judges have created such an exception.[54] The rationale presumably is that children in extreme emergency situations need immediate protection. While this is true, judges should have confidence in the sister state court to respond to the emergent conditions with appropriate orders. This is the best way to avoid conflicting custody orders from being made.

Toward this end, before entering any orders, the court with emergency jurisdiction should communicate with the court in which the prior proper proceeding is pending to decide which court should act. After consultation, the emergency court may stay its proceeding on the assurance that the other court intends to act promptly on the emergency allegations. Or, the first court may decline jurisdiction in favor of the emergency jurisdiction court on grounds that it is the more appropriate forum to respond to the immediate emergency as well as to decide permanent custody. Such decision might be based upon a finding of inconvenient forum or unclean hands.

If the emergency court proceeds with the case during the pendency of proceedings for an initial custody determination in the other State, it should be cognizant of the interstate conflicts that can ensue. Crucial to minimizing the potential conflict is for the emergency court to limit the relief its grants. Only temporary orders should be issued. These should be of short duration, and should direct the petitioner to seek relief in the court with the prior pending proceeding. This should either be the child's home state if one exists, or a significant connection state when there is no home state or the home state has declined jurisdiction.

■ Practice Tip

Whenever a court learns of a pending proceeding in another state, the court should promptly communicate with the other court. A court that discovers that a custody proceeding was already pending in another state when it assumed jurisdiction has a duty under the UCCJA to stay its proceedings pending the communication and resolution of the jurisdictional issue. The very fact that custody cases have been filed in two or more states is a good indication that **interstate** enforcement of a custody order may be needed at some point. This should alert judges to the importance of complying with the PKPA so that the custody order that is issued will be eligible for full faith and credit in all states.

■ Inconvenient forum, UCCJA § 7

A court that has jurisdiction consistent with the UCCJA and PKPA may decline to exercise jurisdiction on inconvenient forum grounds. A decision to decline jurisdiction on inconvenient forum grounds is guided by UCCJA § 7. The PKPA has no analogous provision. Even if a state has priority home state jurisdiction under the PKPA, it may defer to another state under UCCJA § 7, inconvenient forum.[55]

This is a useful device for both parties and the court. Parties have an opportunity to seek what amounts to a transfer of the action. Courts can control their dockets by declining to hear cases which could more easily be tried elsewhere, typically where access to evidence concerning the child is more readily available in a sister state.

The sheer length of UCCJA § 7, set forth in Appendix II, demonstrates that the drafters envisioned numerous circumstances in which a court that would have jurisdiction under that Act might appropriately defer to a sister state court better positioned to decide custody.

The court is not limited in its consideration to the factors enumerated in § 7. For instance, in declining continuing modification jurisdiction on inconvenient forum grounds, the Iowa Supreme Court, in the case of In Re Marriage of Cervetti, 497 N.W.2d 897 (Iowa 1993), considered the disparity in income between the lower-income custodial mother (who had moved to North Carolina with the children) and the higher income noncustodial father (who remained in Iowa) and concluded that it would be financially burdensome for the mother to defend against the father's allegations in Iowa. The Iowa court also noted that it would be unnecessarily disruptive to the childrens' lives if they had to be brought to Iowa for trial.[56]

If a litigant's safety is in jeopardy due to domestic violence, a court may decline jurisdiction in favor of the state in which the litigant has taken refuge. In Cline v. Cline, 433 N.E.2d 51 (Ind. App. 1982), a battered wife fled Indiana with her children to California. The father promptly obtained an *ex parte* custody order in Indiana, the "home state," and attempted to enforce it in California. The mother then filed in California alleging spousal and child abuse. The trial courts in California and Indiana communicated by telephone to resolve the jurisdictional conflict. Indiana agreed to decline jurisdiction on inconvenient forum grounds, and California agreed to hear the custody dispute.

Under UCCJA § 7, a court may consult a sister state judge prior to deciding whether to decline jurisdiction, and *shall* inform the court found to be the more appropriate forum. After a court assumes jurisdiction another court has declined, it *shall* so inform that court.

Upon a finding of inconvenient forum the court may dismiss or stay the proceeding, and award attorneys' fees and related costs where the forum was "clearly inappropriate."[57]

An order declining jurisdiction on inconvenient forum grounds should articulate reasons or factors supporting the decision, and should identify an alternative forum to hear the case.[58]

The question of whether to decline jurisdiction under § 7 is discretionary and will be upheld on appeal absent an abuse of discretion.[59]

■ Unclean hands/reprehensible conduct, UCCJA § 8(a)

A court that has jurisdiction consistent with the UCCJA and PKPA may decline to exercise it when the petitioner has wrongfully taken the child from another state or has engaged in similar reprehensible conduct if this is just and proper under the circumstances. UCCJA § 8(a). (Subsection (b), which applies to modification proceedings, is discussed in Chapter 6 on custody modification.) In initial custody cases, the decision to decline jurisdiction based on unclean hands is discretionary.

When is conduct "wrongful"? To help answer this question, the comment to § 8 gives an example of a couple that separates before custody has been determined. It is not wrongful for one spouse to take the children to another state if the other spouse does not object.

It is, however, wrongful for the spouse who remains behind to surreptitiously and without warning remove the children at some later time. The abductor-parent's conduct is described in the comment as "so objectionable that a court in the exercise of its inherent equity powers cannot in good conscience permit that party access to its jurisdiction." It is in this sense that conduct is "wrongful" within the meaning of subsection (a).

Wrongfulness does not encompass the violation of a custody order because this section only applies in connection with a proceeding to obtain an initial custody order.[60]

What conduct is "reprehensible?" UCCJA § 8(a) equates the term 'reprehensible' conduct with the wrongful taking of the child from another state.

A parent who justifiably flees for her/his safety or the child's safety does not act wrongfully, and therefore should not be deprived of a forum on "unclean hands" grounds.[61] A court might consider child abuse or spousal abuse "reprehensible conduct" if it causes the victim-parent to flee.[62]

Egregious abduction cases are the clearest cases in which UCCJA § 8(a) should be applied. Declining jurisdiction on unclean hands grounds deprives the abductor of any legal advantage occasioned by his/her abduction and forum selection.[63]

However, the "just and proper under the circumstances" language allows the court to deny a motion to decline jurisdiction on "unclean hands" grounds and, instead, to exercise jurisdiction notwithstanding the petitioner's misconduct, if doing so is in the best interest of the child.[64]

■ Practice Tip

If a court wants to send a clear signal that it will not play host to child abductors, it should routinely decline jurisdiction in such cases, absent extraordinary and very compelling circumstances.

To further inhibit misconduct by petitioners filing for initial custody determinations, judges should order them to pay the fees and expenses of other parties pursuant to § 8(c), upon declining jurisdiction under § 8(a).

There is support for this in Section 8(c) of the PKPA.[65]

Endnotes

1. Notice, opportunity to be heard, and service of process are discussed in Chapter 3 of this book. Lack of notice does not deprive a court of jurisdiction that it would otherwise have. However, notice must be afforded in accordance with the UCCJA and PKPA before the court can exercise its jurisdiction and enter a custody determination that is entitled to enforcement.

2. Some states have codified a preference for home state jurisdiction and do not treat home state and "significant connection/substantial evidence" jurisdiction as co-equal jurisdictional grounds.

3. U.S. Const. art. VI, cl. 2. For case law addressing PKPA preemption of the UCCJA *see, e.g.*, In re Custody of Thorensen, 730 P.2d 1380 (Wash. Ct. App. 1987) and Archambault v. Archambault, 555 N.E.2d 201, 208 (Mass. 1990); Alvarez v. Bressett, 602 So. 2d 433 (Ala. Civ. App. 1992); Glazner v. State Dep't. Of Soc. Serv., 835 S.W.2d 386 (Mo. Ct. App. 1992); Shute v. Shute, 607 A.2d 890 (Vt. 1992).

4. Mancusi v. Mancusi, 519 N.Y.S.2d 476 (Fam. Ct. 1987); In re Marriage of Harris, 883 P. 2d 785, 792 (Kan. Ct. App. 1994) ("It is inherently an abuse of discretion to make a custody determination that can be freely ignored by other states under the PKPA.").

5. State ex rel. Laws v. Higgins, 734 S.W.2d 274 (Mo. Ct. App. 1987); Atkins v. Atkins, 823 S.W.2d 816 (Ark. Ct. App. 1992).

6. *See, e.g.*, Brasure v. Brasure, No. CN91-10500, 1992 WL 91594 (Del. Fam. Ct. Mar. 20, 1979) (home state disregards orders of "significant connections" state, which should have stayed its proceedings when it got notice of prior action in home state); Brown v. Brown, 847 S.W. 2d 496 (Tenn. 1993).

7. *See, e.g.*, Ben-Yehoshua v. Ben-Yehoshua, 91 Cal. App. 3d 259 (Cal. Ct. App. 1979); In re Marriage of Mosier, 836 P.2d 1158, 1162 (Kan. 1992); In re Marriage of Horowitz, 159 Cal. App. 3d 377, 381 (Cal. App. 1 Dist. 984) (parties cannot confer subject matter jurisdiction on a court by consent, waiver, appearance, or estoppel, regardless of inconsistent conduct below.).

8. *See, e.g.*, Mainster v. Mainster, 466 So. 2d 1228 (Fla. Dist. Ct. App. 1985) (Virginia was home state at commencement of Virginia action despite mother's removal of child to Florida prior to filing); Ingram v. Ingram, 463 So. 2d 932 (La. Ct. App. 1985) (Left-behind mother filed in Texas, the "home state," immediately after father's removal of the child. Upon locating father and child three years later in Louisiana, mother filed in Louisiana for recognition and enforcement of Texas order and a writ of habeas corpus for return of the child. Louisiana was required to enforce the Texas order under the PKPA); Klien v. Klien, 533 N.Y.S.2d 211 (Sup. Ct. 1988) (New York retained home state status where New York was the home state at the time of father's surreptitious removal of the children to Israel, and left-behind mother commenced New York action within six months of removal); Middleton v. Middleton, 314 S.E.2d 362 (Va. 1984) (prompt filing by left-behind father in Virginia preserved Virginia's home state status when child was absent from Virginia due to removal by mother); Horlander v. Horlander, 579 N.E.2d 91 (Ind. Ct. App. 1991).

9. In Sams v. Boston, 384 S.E.2d 151 (W. Va. 1989), the court held it had home state jurisdiction in an action filed by the mother 3 ½ years after the father had abducted the children from the state, the six-month period effectively having been tolled by the father's concealment of the children. The court found that a state maintains home state status for a reasonable period following an abduction and concealment. The decision in Sams deprived the father of any legal advantage for his misconduct, and allowed the mother to litigate in a convenient forum, rather than in Florida, the state selected by the abducting parent.

10. *See, e.g.*, Meyer v. Meyer, 528 A.2d 749 (Vt. 1987); May v. May, No. 2016, 1992 Ohio App. LEXIS 54 (Ohio Ct. App., Jan. 2, 1992). *See also* Chapter 3, "Notice." When the whereabouts of the abductor-parent are unknown, the court can authorize notice by publication under UCCJA § 5 if attempts at actual notice have been futile.

11. *See, e.g.*, Jones v. Jones, 456 So. 2d 1109 (Ala. Civ. App. 1984); Hickey v. Baxter, 461 So. 2d 1364 (Fla. Dist. Ct. App. 1984); Allen v. Allen, 645 P.2d 300 (Haw. 1982); Schoeberlein v. Rohlfing, 383 N.W.2d 386 (Minn. Ct. App. 1986); Welsh v. Welsh, 714 S.W.2d 640 (Mo. Ct. App. 1986); In re Marriage of Brown, 706 P.2d 116 (Mont. 1985); In re Marriage of Lance, 690 P.2d 979 (Mont. 1984); Elder v. Park, 717 P.2d 1132 (N.M. Ct. App. 1986); Klien v. Klien, 533 N.Y.S.2d 211 (Sup. Ct. 1988); Milner v. Kilgore, 718 S.W.2d 759 (Tex. App. 1986); Horlander v. Horlander, 579 N.E.2d 91 (Ind. Ct. App. 1991); In re Schoeffel, 644 N.E. 2d 827 (Ill. Ct. App. 1994); In re Richardson, 625 N.E. 2d 1122 (Ill. Ct. App. 1993).

12. *See* Brigitte M. Bodenheimer, *Interstate Custody: Initial and Continuing Jurisdiction under the UCCJA*, 14 Fam. L.Q. 203, 213 (1981). For cases holding that proceedings are commenced upon filing of the proceeding *see, e.g.*, Lopez v. District Court, 606 P.2d 853 (Colo. 1980) (en banc); Ex Parte Lee, 445 So. 2d 287 (Ala. Civ. App. 1983) (critical date for determining home state is date of filing, not date of final judgment); Hollo v. Hollo, 474 N.E.2d 827 (Ill. App. Ct. 1985); Meyer v. Meyer, 528 A.2d 749 (Vt. 1987) (In this pre-decree abduction case, left-behind parent obtained custody order by publication. Court ruled that the action commenced, and home state was determined, on the date of filing and not, as abductor-parent argued, on the date he received actual notice); In re C.A.D., 839 P.2d 165 (Okla. 1992) (custody proceeding is commenced by filing a petition); Birnbaum v. Birnbaum, 615 So. 2d 241 (Fla. Dist. Ct. App. 1993); Shingledecker v. Shingledecker, 407 S.E.2d 589 (N.C. Ct. App. 1991).

13. Catlin v. Catlin, 494 N.W.2d 581 (N.D. 1992).

14. This issue frequently arises in cases where one family member is in the military. Chapter 9 of this book addresses custody jurisdiction issues that arise in military families. *See, e.g.*, Hart v. Hart, 327 S.E.2d 631 (N.C. Ct. App. 1985) (military father found to reside in North Carolina, where he was stationed, despite Florida driver's license, car, and voter registration); Catlin v. Catlin, 494 N.W.2d 581 (N.D. 1992); Gusman v. Gusman, 598 So. 2d 1256 (La. Ct. App. 1992); Parker v. Castillo, 610 So. 2d 239 (La. Ct. App. 1992); Bubac v. Boston, 600 So. 2d 951 (Miss. 1992); Boudwin v. Boudwin, 615 A.2d 786 (Pa. Super. Ct. 1992); Lutes v. Alexander, 421 S.E.2d 857 (Va. Ct. App. 1992).

15. *See, e.g.*, Bergstrom v. Bergstrom, 271 N.W.2d 546 (N.D. 1978) (district court was correct in construing "home state" as state of child's actual presence, not state of legal residence); Brenner v. Cavin, 295 S.E.2d 135 (Ga. Ct. App. 1982) ("home state" of a child refers to physical presence of a child within a state, not its state of legal residence); Boutros v. Boutros, 483 N.Y.S.2d 360 (App. Div. 1984) (children's Australian citizenship did not deprive New York of home state status where children lived in New York for 18 months prior to commencement of proceeding).

16. *See, e.g.*, In re Adoption of Child by T.W.C., 636 A. 2d 1083 (N.J. Super. Ct. App. Div. 1994) (New Jersey was not baby's "home state" for purposes of conferring jurisdiction over adoption proceedings, as child did not live in New Jersey for six consecutive months at commencement of proceeding. Nor did child live in New Jersey "from birth;" child was born in Connecticut to New York mother and was not present in New Jersey until he was two days old).

17. For one view, *see* Rogers v. Platt, 245 Cal. Rptr. 532, 199 Cal. App. 3d 1204 (Cal. Ct. App. 1988) (Prospective adoptive parents in Washington, D.C., to whom California birth mother had relinquished baby immediately after birth, were not "persons acting as parent" under the PKPA in that they had no colorable claim to right to custody, but merely had physical possession of the child and a desire for custody).

18. "Paragraphs (1) and (2) of subsection (a) establish the two major bases for jurisdiction. In the first place, a court in the child's home state has jurisdiction, and secondly, if there is no home state or the child and his family have equal or stronger ties with another state, a court in that state has jurisdiction."

19. State ex rel. Laws v. Higgins, 734 S.W.2d 274, 278 (Mo. Ct. App. 1987) ("The phrase 'best interest of the child' as used [in the UCCJA significant connection provision] does not refer to a choice of parent, but to a choice of a forum. The interest of the child is served when the forum has optimum access to relevant evidence about the child and family . . . . [The UCCJA significant connection provision] does not authorize consideration of the relative fitness of the parents for the best interest of the child; that is a substantive matter to be determined after jurisdiction to hear the case is established.").

20. *See, e.g.*, Schoeberlein v. Rohlfing, 383 N.W. 2d 386 (Minn. Ct. App. 1986); Bivens v. Bivens, 379 N.W. 2d 431 (Mich. Ct. App. 1985); Lee v. Meeks, 592 So. 2d 282 (Fla. Dist. Ct. App. 1991).

21. In re T.C.M., 651 S.W.2d 525 (Mo. Ct. App. 1983); Sullivan v. Sullivan, 451 N.Y.S.2d 851 (App. Div.), *aff'd.* 444 N.E.2d 980 (N.Y. 1982); Kean v. Kean, 577 So. 2d 1152 (La. Ct. App. 1991); Brown v. Brown, 847 S.W.2d 496 (Tenn. 1993).

22. *See, e.g.*, Allen v. Allen, 645 P.2d 300 (Haw. 1982); Hovar v. Hovar, 458 A.2d 972 (Pa. Super. Ct. 1983); Brown v. Brown, 847 S.W.2d 496 (Tenn. 1993).

23. *See, e.g.*, Gibson v. Gibson, 429 So. 2d 877 (La. Ct. App. 1983); Brown v. Brown, 847 S.W.2d 496 (Tenn. 1993).

24. The case of Plas v. Superior Court, 155 Cal. App. 3d 1008, 202 Cal. Rptr. 490 (Cal. Ct. App. 1984), contains a good discussion of "maximum versus minimal" contacts in determining "significant connections" jurisdiction. *See also*, Catlin v. Catlin, 494 N.W. 2d 581 (N.D. 1992).

25. *See, e.g.*, Dean v. Dean, 348 N.W.2d 725 (Mich. Ct. App. 1984); In re Guardianship of Walling, 727 P.2d 586 (Okla. 1986); Hudson v. Hudson, 670 P.2d 287 (Wash. Ct. App. 1983).

26. *See, e.g.*, Miller v. Miller, 463 So. 2d 939 (La. Ct. App. 1985); Snider v. Snider, 474 So. 2d 1374 (La. Ct. App. 1985).

27. PKPA, 28 U.S.C. 1738(A)(a): "Full faith and credit given to child custody determinations." (a) The appropriate authorities of every State shall enforce according to its terms, and shall not modify except as provided in subsection (f) of this section, any child custody determination made consistently with the provisions of this section by a court of another State."

28. Not every child has a "home state" within the meaning of the UCCJA and PKPA. *See, e.g.*, Bigelow v. Bigelow, 327 N.W. 2d 361 (Mich. Ct. App. 1982); (Children have no home state when they have lived in two different states—California and Michigan—for 4 to 5 months before a custody proceeding was commenced.).

29. 28 U.S.C. 1738A(c)(2)(B)(i). *See, e.g.*, Williams v. Williams, 609 N.E.2d 1111 (Ind. Ct. App. 1993) (Indiana lacked jurisdiction because UCCJA significant connection jurisdiction can only be used if there is no home state); Mancusi v. Mancusi, 519 N.Y.S.2d 476 (Fam. Ct. 1987); Catlin v. Catlin, 494 N.W. 2d 581 (N.D. 1992) (Where child was born in North Dakota, but moved to Turkey with parents when father stationed there, then secreted by father in New York with paternal grandparents, North Dakota can exercise jurisdiction properly under the UCCJA and PKPA because child had significant connection with North Dakota, no other state had jurisdiction, New York declined jurisdiction, and it was in the child's best interests for North Dakota to exercise jurisdiction.).

30. *See* Chapter 7, Drafting the Court Order.

31. Variations in state law exist. For instance, the emergency jurisdiction provision in Alaska (ALASKA STAT. sec. 25.30.020(a)(2) (Michie 1990)) applies only to a "child in need of aid" as defined in that state's abuse/neglect statute.

32. *See, e.g.*, Gribkoff v. Bedford, 711 P.2d 176, 178 (Or. Ct. App. 1985) (although evidence indicated child had been neglected, there was no evidence that an emergency existed at time of hearing).

33. Illustrative cases in which courts exercised emergency jurisdiction: Wenz v. Schwartze, 598 P.2d 1086 (Mont. 1979); Vorpahl v. Lee, 298 N.W.2d 222 (Wisc. Ct. App. 1980); Breneman v. Breneman, 284 N.W.2d 804 (Mich. Ct. App. 1979); Priscilla S. v. Albert B., 424 N.Y.S.2d 613 (Fam. Ct. 1980); People v. Beach, 194 Cal. App. 3d 955, 240 Cal. Rptr. 50 (Cal. Ct. App. 1987); Cole v. Superior Court, 173 Cal. App. 3d 265, 218 Cal. Rptr. 905 (Cal. Ct. App. 1985); E.P. v. District Court of Garfield County, 696 P.2d 254 (Colo. 1985) (en banc); Osgood v. Dent, 306 S.E.2d 698 (Ga. Ct. App. 1983); Stuart v. Stuart, 516 So. 2d 1277 (La. Ct. App. 1987); Farrell v. Farrell, 351 N.W.2d 219 (Mich. Ct. App. 1984); Hache v. Riley, 451 A.2d 971 (N.J. Super. Ct. Ch. Div. 1982); Severio P. v. Donald Y., 490 N.Y.S.2d 439 (Fam. Ct. 1985); Ferguson v. Ferguson, 497 N.Y.S.2d 225 (Fam. Ct. 1985); Quill v. Quill, 471 N.Y.S.2d 623 (App. Div. 1984); Carpenter v. Carpenter, 474 A.2d 1124 (Pa. Super. Ct. 1984); Silva v. Tucker, 500 A.2d 947 (R.I. 1985); In re B.J.C., 540 A.2d 1047 (Vt. 1988); Rosics v. Heath, 746 P.2d 1284 (Wyo. 1987). Illustrative cases in which emergency jurisdiction was denied; In re McKenzie, 439 So. 2d 700 (Ala. Civ. App. 1983); Mitchell v. Mitchell, 437 So. 2d 122 (Ala. Civ. App. 1982); De La Pena v. Torrone, 467 So. 2d 336 (Fla. Dist. Ct. App. 1985); Gibson v. Gibson, 429 So. 2d 877 (La Ct. App. 1983); Thompson v. Hair, 381 N.W.2d 765 (Mich. Ct. App. 1985); Schoeberlein v. Rahlfing, 383 N.W.2d 386 (Minn. Ct. App. 1986); State ex rel. Laws v. Higgins, 734 S.W.2d 274

(Mo. Ct. App. 1987); In re Marriage of Lance, 690 P.2d 979 (Mont. 1984); Pozzi v. Pozzi, 510 A.2d 123 (N.J. Super. Ct. Ch. Div. 1986); Tenenbaum v. Sprecher, 519 N.Y.S.2d 273 (App. Div. 1987); Gribkoff v. Bedford, 711 P.2d 176 (Or. Ct. App. 1985); Glynn v. Meslin, 532 A.2d 554 (R.I. 1987); Milner v. Kilgore, 718 S.W.2d 759 (Tex. Ct. App. 1986); St. Clair v. Faulkner, 305 N.W.2d 441 (Iowa 1981); Beebe v. Chavez, 602 P.2d 1279 (Kan. 1979); Rees v. Reyes, 602 A.2d 1137 (D.C. 1992); Piedimonte v. Nissen, 817 S.W.2d 260 (Mo. Ct. App. 1991); Duffy v. Reeves, 619 A.2d 1094 (R.I. 1993); In re Cifarelli, 611 A. 2d 394 (Vt. 1992).

34. *See, e.g.*, Maureen S. v. Margaret S., 592 N.Y.S.2d 55 (App. Div. 1992).

35. *See, e.g.*, Hunt v. Hurst, 785 P.2d 414, 416 (Utah 1990); Hache v. Riley, 451 A.2d 971, 975 (N.J. Super. Ct. Ch. Div. 1982); Schwander v. Schwander, 79 Cal. App. 3d 1013, 145 Cal. Rptr. 325 (Cal. Ct. App. 1978).

36. Two states have amended the UCCJA to provide that only temporary orders may be issued based on emergency jurisdiction. MASS. GEN. LAWS ANN. ch. 209B, sec. 2(a)(3) (West 1983); and TENN. CODE ANN. sec. 36-1304 (1991).

37. *See, e.g.*, In Re A.L.H., 630 A.2d 1288, 1291 (Vt. 1993) (Vermont could not issue permanent custody determination based on emergency jurisdiction unless South Carolina, the juvenile's home state, declines jurisdiction. "Virtually all courts that have addressed the issue have concluded that jurisdiction under UCCJA's emergency provision particularly in cases such as this where the abuse is reported to have occurred in another state, does not authorize courts to make permanent custody determinations. *See, e.g.*, In re Pima County, 147 Ariz. at 527-28, 711 P.2d at 1206-07. . . ; Nelson v. Nelson, 433 So.2d 1015, 1017 (Fla. Dist. Ct. App. 1983). . . ; Benda v. Benda, 236 N.J. Super. 365, 565 A.2d 1121, 1124-25 (App. Dir. 1989). . . ; Curtis v. Curtis, 789 P.2d 717, 723 (Utah App. Ct. 1990). . . .").

38. *See, e.g.*, De La Pena v. Torrone, 467 So. 2d 336 (Fla. Dist. Ct. App. 1985); Magers v. Magers, 645 P.2d 1039 (Okla. Ct. App. 1982) (court affirmed exercise of emergency jurisdiction by Oklahoma court, which granted noncustodial father temporary custody, gave him 10 days to file a "statement of intent," and 20 additional days to file a petition for modification of custody in Texas, the initial decree state with continuing jurisdiction, with custody to revert to mother if father failed to file in Texas); Garza v. Harney, 726 S.W.2d 198 (Tex. Ct. App. 1987); In re B.J.C., 540 A.2d 1047 (Vt. 1988); (UCCJA's emergency provision only confers jurisdiction for a court to enter temporary protective custody orders); In re Pima County, 711 P.2d 1200 (Ariz. Ct. App. 1985), *aff'd in part and vacated in part on other grounds*, 712 P.2d 431 (Ariz. 1986) (in dependency proceedings, as well as parental custody proceedings, exercise of emergency jurisdiction is limited to temporary orders); Shores v. Shores, 670 F. Supp. 774, 777 (E.D. Tenn. 1987) ("The PKPA does not preclude a court from assuming temporary jurisdiction in order to take protective measures on behalf of a child and to make temporary orders, including temporary custody for a limited period of time, until proper steps are taken in the original forum state to adequately protect the child. However, such an exercise of temporary jurisdiction does not encompass jurisdiction to make a permanent custody determination after another state has begun to exercise jurisdiction which is consistent with the PKPA."); In re J.T., 485 N.W.2d 70 (Wis. Ct. App. 1992); In re Cifarelli, 611 A.2d 394 (Vt. 1992); Piedimonte v. Nissen, 817 S.W.2d 260 (Mo. Ct. App. 1991).

39. *See, e.g.*, Rees v. Reyes, 602 A.2d 1137 (D.C.), *cert. denied*, 503 U.S. 991, 112 S. Ct. 1686, 118 L. Ed 2d 400 (1992)(proper for D.C. court to decline jurisdiction on inconvenient forum grounds where Virginia had exercised emergency jurisdiction to make a custody determination at the request of the mother, who had moved to Virginia with the child from D.C.).

40. *See, e.g.*, Coleman v. Coleman, 493 N.W. 2d 133 (Minn. Ct. App. 1992) (Finding that emergency jurisdiction existed in Nebraska where mother had moved with children to seek a "safe haven," court let stand a temporary custody order by a Nebraska court. The Minnesota court rejected the father's contention that the mother had abducted the children, commenting that the mother removed the children, fearing the father was a danger to her and to the childrens' physical and emotional well-being. Hence, there was not an "abduction" of the sort the UCCJA seeks to deter. While asserting that it "disfavors" unilateral and unjustifiable removal of children from the jurisdiction of the "home state," the court indicated that the mother went to Nebraska because she would have an affordable and safe place with a family there.).

41. *See, e.g.*, Cline v. Cline, 443 N.E. 2d 51 (Ind. App. 1982); Coleman v. Coleman, 493 N.W. 2d 133, 135-37 (Minn. App. 1992); Marlow v. Marlow, 471 N.Y.S. 2d 201, 202 (Sup. 1983).

42. The petitioner-parent might present evidence that resources are limited, making travel back to the original state to litigate custody financially burdensome; legal representation is available in the emergency jurisdiction state; that she/he is at risk of physical injury when in physical proximity to the respondent, and that she/he and the child have a safe place to live in the haven state.

43. Brown v. Tan, 395 So. 2d 1249 (Fla. Dist. Ct. App. 1981) (Petitioner-mother had the burden of proving that the exercise of last resort jurisdiction would be in the child's best interest, and her failure to do so resulted in the court's determination that it lacked jurisdiction under § 3(a)(4).).

44. *See, e.g.*, Pinneo v. Pinneo, 835 P.2d 1233 (Alaska 1992) (Court affirmed the exercise of last resort jurisdiction when no other state had jurisdiction when the action was commenced and the exercise of jurisdiction was in the child's best interest. The burden of proving that another state has jurisdiction falls to the party making that claim.); DePasse v. DePasse, 421 N.Y.S.2d 497 (App. Div. 1979) (New York did not have jurisdiction under UCCJA § 3(a)(4) where Maryland was child's home state and proceedings were pending there); Brown v. Tan, 395 So. 2d 1249 (Fla. Dist. Ct. App. 1981) (Florida had no UCCJA basis for jurisdiction where child had lived with father in Singapore for twelve years and was visiting mother at time she brought suit and where mother did not establish that it was in child's "best interests" for Florida court to determine custody); State ex rel. Rashid v. Drumm, 824 S.W.2d 497 (Mo. Ct. App. 1992); Catlin v. Catlin, 494 N.W.2d 581 (N.D. 1992).

45. A court cannot decline jurisdiction it does not have. Motions to dismiss on inconvenient forum or "clean hands" grounds are inapt if the court lacks jurisdiction in the first instance. Nor can a court assume jurisdiction solely on its determination that another state is an inconvenient forum.

46. *See, e.g.*, In re Marriage of Harris, 883 P.2d 785 (Kan. 1994) (for a variety of reasons, Kansas did not have jurisdiction where Georgia was the children's home state, the court noted that it would amount to an abuse of discretion for a Kansas court to make a determination that could be freely ignored under the PKPA, *i.e.*, not entitled to full faith and credit); Mancusi v. Mancusi, 519 N.Y.S.2d 476, 479-80 (Fam. Ct. 1987) ("Because of the priority afforded to home state jurisdiction under the PKPA, a state court exercising jurisdiction under the home state basis would not be prohibited from exercising its jurisdiction even though a custody proceeding involving the same parties and children was already pending in another state court which was exercising jurisdiction under the significant connection basis (28 U.S.C. 1738A(g)). In contrast, under the UCCJA, a state court is forbidden from exercising jurisdiction on any basis, if, at the time of filing the petition, a proceeding concerning the custody of the child was pending in a court of another state. Patently, under the more restrictive federal statutory scheme . . . . only the custody decree of the state that exercised jurisdiction consistent with the PKPA would be entitled to enforcement . . . . Accordingly, it is in the best interest of the children who are the subject of these proceedings to have one custody order which complies with the applicable provisions of the PKPA and the New York and Arizona UCCJA. Based on the foregoing, it is essential to determine the child's home state for custody purposes. This determination avoids the problem of conflicting state custody orders, promotes judicial economy, and furthers the intent of the Federal as well as the state statutes.").

47. *See, e,g.*, Hickey v. Baxter, 461 So. 2d 1364 (Fla. Dist. Ct. App. 1984) (once it learned of pending proceeding in Virginia, court erred in failing to stay proceedings and communicate with Virginia court); Carpenter v. Carpenter, 474 A.2d 1124 (Pa. Super. Ct. 1984) (Pennsylvania court required to stay proceedings once informed of pending proceeding in Massachusetts); Davenport v. Davenport, 588 So. 2d 697 (Fla. Dist. Ct. App. 1991); Karahalios v. Karahalios, 848 S.W.2d 457 (Ky. Ct. App. 1993); Brown v. Brown, 847 S.W.2d 496 (Tenn. 1993).

48. *See, e.g.*, Walter v. Walter, 589 N.Y.S.2d 104 (App. Div. 1992) (Before proceeding to adjudicate issue in New York New York court should have communicated with Texas court to ascertain whether Texas would exercise jurisdiction); Norsworthy v. Norsworthy, 713 S.W.2d 451 (Ark. 1986); Yost v. Johnson, 591 A.2d 178 (Del. 1991); Lutes v. Alexander, 421 S.E.2d 857 (Va. Ct. App. 1992); Nazar v. Nazar, 505 N.W.2d 628 (Minn. Ct. App. 1993). Techniques for effective judicial communication are discussed in Chapter 4.

49. Final Report: OBSTACLES TO THE RECOVERY AND RETURN OF PARENTALLY ABDUCTED CHILDREN, eds. Linda Girdner and Patricia Hoff (Washington, D.C.: U.S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention 1993) [hereinafter *Obstacles Report*], Ch. 4 n. 20 (William M. Hilton), citing the following cases: In re Janette H., 242 Cal. Rptr. 567, 571 (Ct. App. 1987); Lynch v. Lynch, 770 P.2d 1383, 1385 (Colo. Ct. App. 1989); Siegel v. Siegel, 575 So. 2d 1267, 1271 (Fla. 1991); In re Marriage of Weinstein, 408 N.E.2d 952, 957 (Ill. App. Ct. 1980); Umina v. Malbica, 538 N.E.2d 53, 57 (Mass. App. Ct. 1989); Timmings v. Timmings, 628 S.W.2d 724 (Mo. Ct. App. 1982); Loper v. Superior Court, 612 P.2d 65,

67 (Ariz. Ct. App. 1980); Lopez v. District Court, 606 P.2d 853, 855 (Colo. 1980) (en banc); In re Marriage of Brown, 706 P.2d 116, 119 (Mont. 1985); Scheafnocker v. Scheafnocker, 514 A.2d 172, 176 (Pa. Super. Ct. 1986); St. Andrie v. St. Andrie, 473 So. 2d 140, 144 (La. Ct. App. 1985); Bak v. Bak, 511 N.E.2d 625 (Mass. App. Ct. 1987); Meyer v. Meyer, 528 A.2d 749 (Vt. 1987), overruled on other grounds by Shute v. Shute, 607 A.2d 890 (Vt. 1992).

50. *Obstacles Report*, *supra* note 49, Ch. 4 n. 21 (William Hilton), citing Peterson v. Peterson, 464 A.2d 202, 205 (Me. 1983) (hearing); Etter v. Etter, 405 A.2d 760, 762-65 (Md. Ct. Spec. App. 1979) (service); Potter v. Potter, 430 N.Y.S.2d (Fam. Ct. 1980) (service).

51. For cases in which courts have addressed whether the out-of-state court was exercising jurisdiction consistently with the PKPA, *see, e.g.*, Bolger v. Bolger, 678 S.W.2d 194 (Tex. Ct. App. 1984); Norsworthy v. Norsworthy, 713 S.W.2d 451 (Ark. 1986); In re Custody of Bozarth, 538 N.E.2d 785 (Ill. App. Ct. 1989); Jordan v. Jordan, 586 A.2d 1080 (R.I. 1991); Blanton v. Blanton, 463 So. 2d 162 (Ala. 1985).

52. *See, e.g.*, Hempe v. Cape, 702 S.W.2d 152 (Mo. Ct. App. 1985).

53. Many cases have held that a stay is mandatory if there are two actions pending. *See Obstacles*, *supra* note 49, ch. 4 n.26, citing Glassman v. Maccione, 553 A.2d 195, 196 (Conn. App. Ct. 1989); Siegel v. Siegel, 548 So. 2d 266, 268 (Fla. Dist. Ct. App. 1991), *aff'd on this point*, 575 So. 2d 1267, 1269-71 (Fla. 1991); Hepner v. Hepner, 469 N.E.2d 780, 784 (Ind. Ct. App. 1984); Bowden v. Bowden, 440 A.2d 1160, 1164 (N.J. Super. Ct. App. Div. 1982); Squires v. Squires, 468 N.E.2d 73, 79 (Ohio Ct. App. 1983); Goodman v. Goodman, 556 A.2d 1379, 1387 (Pa. Super. Ct. 1989); Coppedge v. Harding, 714 P.2d 1121, 1122 (Utah 1985); Klont v. Klont, 342 N.W.2d 549, 550 (Mich. Ct. App. 1983); McDonald v. McDonald, 253 N.W.2d 678, 682 (Mich. Ct. App. 1977); Owens ex rel. Mosely v. Huffman, 481 So. 2d 231, 242 (Miss. 1985); Jennings v. Jennings, 479 N.E.2d 419, 421 (Ill. App. Ct. 1985); Porter v. Johnson, 712 S.W.2d 598, 599 (Tex. Ct. App. 1986); People v. Beach, 194 Cal. App. 3d 955, 240 Cal. Rptr. 50, 55 (Ct. App. 1987); Morgan v. Morgan, 666 P.2d 1026, 1030 (Alaska 1983). *See also* Ray v. Ray, 494 So. 2d 634 (Ala. Civ. App. 1986); In re Marriage of Nasica, 758 P.2d 240 (Kan. Ct. App. 1988); Bedingfield v. Bedingfield, 417 So. 2d 1047 (Fla. Dist. Ct. App. 1982).

54. *See, e.g.*, Shores v. Shores, 670 F. Supp. 774,777 (E.D.Tenn. 1987) ("However, the court would further point out that there is nothing in the PKPA to prevent any court from assuming temporary jurisdiction when there are allegations of neglect, abuse, mistreatment, etc., to a child. In other words, the PKPA does not preclude a court from assuming temporary jurisdiction in order to take protective measures on behalf of a child and to make temporary orders, including temporary custody for a limited period of time, until proper steps are taken in the original forum to adequately protect the child. However, such an exercise of temporary jurisdiction does not encompass jurisdiction to make a custody determination after another state has begun to exercise jurisdiction which is consistent with the PKPA.") For cases with similar analyses, see Chapter 6, text and endnote discussion: "Can a court modify a custody determination on emergency jurisdiction grounds if another state has exclusive continuing modification jurisdiction?" *Also see* discussion of emergency jurisdiction and corresponding endnotes, *supra*, Chapter 1.

55. *See, e.g.*, Brown v. Brown, 486 A.2d 1116 (Conn. 1988) (Connecticut, the child's "home state," deferred to Florida on inconvenient forum grounds where Florida was a more convenient forum).

56. *See also* Farrell v. Farrell, 351 N.W.2d 219 (Mich. Ct. App. 1984) (Michigan refused to defer to Ireland, considering that it would be less costly for the father to travel to Michigan than it would for the mother and two children to travel to Ireland).

57. *See* Chapter 11, Awarding Attorneys' Fees, Costs, and Expenses.

58. Waller v. Richardson, 757 P.2d 1036 (Alaska 1988). The trial court was held to have abused its discretion where, *sua sponte* and without an evidentiary hearing, it refused to exercise jurisdiction on forum non conveniens grounds, and made no finding as to which state would be a convenient forum.).

59. Bigelow v. Bigelow, 327 N.W.2d 361 (Mich. Ct. App. 1982). For cases holding no abuse of discretion, *see, e.g.*, Bennett v. Bennett, 506 So. 2d 1021 (Ala. Civ. App. 1987); Holloway v. Holloway, 519 So. 2d 531 (Ala. Civ. App. 1987); Kimmons v. Heldt, 667 P.2d 1245 (Alaska 1983); Zellat v. Zellat, 506 A.2d 946 (Pa. Super. Ct. 1986). For cases holding

abuse of discretion, *see, e.g.*, Horlander v. Horlander, 579 N.E.2d 91 (Ind. Ct. App. 1991) (trial court abused its discretion when it determined that Indiana was an inconvenient forum because Indiana was the "home state," the children had only been in France for two months, and the family had always lived in Indiana until the mother left for France); Waller v. Richardson, 757 P.2d 1036 (Alaska 1988); Superior Court v. Plas, 155 Cal. App. 3d 1008 (Ct. App. 1984); In re Marriage of Elblkasy, 610 N.E.2d 139 (Ill. App. Ct. 1993); Dobbs v. Dobbs, 838 S.W.2d 502 (Mo. Ct. App. 1992); Brown v. Brown, 847 S.W.2d 496 (Tenn. Ct. App. 1993); Lutes v. Alexander, 421 S.E.2d 857 (Va. Ct. App. 1992); Rogers v. Rogers. 907 P.2d 469 (Alaska 1995) (where Alaska had "home state" jurisdiction under the PKPA, court held it was an abuse of discretion for trial court to decline jurisdiction based exclusively on which party it felt would be more inconvenienced by the requisite travel to a non-local forum; the central focus of any forum non conveniens inquiry is "which forum is best in light of the child's interest"); Loper v. Superior Court, 612 P.2d 65 (Ariz. Ct. App. 1980) (court's denial of a motion to decline jurisdiction on inconvenient forum grounds without first consulting and cooperating with another state, where proceedings were also pending, was held to be an abuse of discretion).

60. *See, e.g.*, Stokes v. Stokes, 751 P.2d 1363, 1366 (Alaska 1988) (In dismissing mother's claim for custody on the basis of her reprehensible conduct in removing the child from Ohio, the court noted that "[F]or conduct to be wrongful or similarly reprehensible, it is not necessary that a child be taken in violation of an outstanding order or decree, nor is it a defense that no order or decree has been entered."); Glynn v. Meslin, 532 A.2d 554 (R.I. 1987) (pre-decree abduction held to be "wrongful" conduct under § 8); In re Marriage of Ieronimakis, 831 P.2d 172 (Wash. Ct. App. 1992) (Washington declined jurisdiction in an action filed by mother seven days after arriving there from Greece because, *inter alia*, mother took the children from Greece (where they were born), which would qualify as their home state); Horlander v. Horlander, 579 N.E.2d 91 (Ind. Ct. App. 1991); In re Carpenter, 835 S.W.2d 760 (Tex. Ct. App. 1992).

61. *See, e.g.*, Cole v. Superior Court, 173 Cal. App. 3d 265, 218 Cal. Rptr. 905, 908 (Ct. App. 1985) (husband's abuse of wife and step-daughter justifed wife's removal of other children of marriage and negated any finding that she had "unclean hands" because she took them away); In re Marriage of Thorensen, 730 P.2d 1380, 1387 (Wash. Ct. App. 1987) (court refused to apply § 8 to a battered mother, stating that "respondent's flight to protect herself and her child from physical and mental abuse counterbalanced the "unclean hands" doctrine of the Act."); In re the Marriage of Coleman 493 N.W. 2d 133 (Minn. Ct. App. 1992) (mother's flight from home state with children to safe haven state not an "abduction" within spirit of the UCCJA.

62. *See Obstacles Report, supra* n.49, at 3-51 (Recommending, *inter alia*, that states should amend UCCJA § 8 to clarify that "reprehensible conduct" includes family violence against another contestant or a child that caused the contestant to flee with the child to another state. The text suggests that courts are free to interpret "reprehensible conduct" to include family violence under current law.).

63. *See, e.g.*, Craighead v. Davis, 290 S.E.2d 358 (Ga. Ct. App. 1982) ("A noncustodial parent who illegally seizes a child or illegally detains a child at the end of a visitation period is not to be given sanctuary by our courts."); In re Marriage of Ieronimakis, 831 P.2d 172 (Wash. Ct. App. 1992); Horlander v. Horlander, 579 N.E.2d 91 (Ind. Ct. App. 1991); In re Carpenter, 835 S.W.2d 760 (Tex. Ct. App. 1992).

64. *See, e.g.*, Dean v. Dean, 348 N.W.2d 725, 728 (Mich. Ct. App. 1984) (in refusing to decline jurisdiction under § 8(a) in a pre-decree abduction case, the court noted that it "should not decline jurisdiction under the 'clean hands' principle to punish the parent at the expense of the child"); Marlow v. Marlow, 471 N.Y.S.2d 201, 206 (App. Term 1983) (New York court refused to apply § 8 for mother's wrongful conduct based, *inter alia*, on uncontroverted evidence that noncustodial father was unfit to assume custody based on his emotional instability and spouse abuse: "Notwithstanding the fact that the children are presently residing in California due to the wrongful act of their mother, this is a rare case where the policy of discouraging such misconduct is outweighed by the paramount concern -- the children's best interests."); Houtchens v. Houtchens, 488 A.2d 726 (R.I. 1985) (Court refused to apply § 8 where father's pre-decree abduction was based on his "sincere beliefs that his acts were necessary to protect the well-being of the children.").

65. See, *e.g.*, Ingram v. Ingram, 463 So .2d 932 (La. Ct. App. 1985) (Abducting parent ordered to pay travel and other expenses, including attorney's fees, and costs of appeal); Gibson v. Gibson, 429 So. 2d 877 (La. Ct. App. 1983) (father ordered to pay all appeal costs stemming from pre-decree abduction); Losey v. Losey, 412 So. 2d 639 (La. Ct. App. 1982) (trial court properly awarded mother attorney's fees of $2,500 and expenses of $1,359 where father removed children from family residence in Delaware, brought them to Louisiana, and filed for custody two weeks later.). *Also see* Chapter 11, Awarding Attorneys' Fees, Costs and Expenses.

Chapter 6
Modification Jurisdiction

Summary

This chapter explains the rules governing modification jurisdiction, focusing on the exclusive continuing jurisdiction provision of the federal Parental Kidnapping Prevention Act (PKPA), 28 U.S.C. 1738A(d).

In every interstate child custody case where modification of an existing custody decree is at issue, courts should determine the effect of the PKPA's exclusive continuing jurisdiction rule on the exercise of jurisdiction. Have counsel address the applicability of the PKPA either orally or in a brief.

CHECKLIST

1. Is this a proceeding to modify an existing custody determination?

■ Have the pleading requirements of UCCJA § 9 been met so the court can inform itself about any prior or pending custody proceedings? (A disappointed litigant may file for custody without informing the court of a prior adverse custody order from a sister state. Courts should ask on the record about any other past or pending custody proceedings concerning the child in any other court.)

2. Does the original decree state (F1) have exclusive continuing modification jurisdiction pursuant to the PKPA to which other states, including the child's new "home state," must defer? 28 U.S.C. 1738A(d).

F1 will have exclusive continuing modification jurisdiction if the following three questions are answered in the affirmative:

■ Did F1's exercise of initial jurisdiction comply with the PKPA (*e.g.*, home state priority; notice and opportunity to be heard)?
■ Does F1 have jurisdiction under its own state law (*e.g.*, UCCJA home state or significant connection jurisdiction)?
■ Does F1 remain the residence of the child or of any contestant?

3. Has judicial communication taken place between courts in the new state (F2) and F1 to determine whether F1 has jurisdiction and intends to exercise it?

4. When can F2 modify an initial custody determination made by F1? 28 U.S.C. 1738A(d), (f); UCCJA § 3.

■ If F1 has exclusive continuing modification jurisdiction, has F1 declined to exercise modification jurisdiction on inconvenient forum grounds (UCCJA § 7) or because of the petitioner's misconduct (UCCJA § 8)? If so, does F2 have modification jurisdiction under its own UCCJA § 3 ?
Is this consistent with the PKPA, 28 U.S.C. 1738A(f)?

OR

■ If F1 does *not* have exclusive continuing modification jurisdiction, does F2 have modification jurisdiction under its own UCCJA § 3? Is this consistent with the PKPA, 28 U.S.C. 1738A(f)?

5. Can a court properly exercise emergency jurisdiction if another state has exclusive continuing modification jurisdiction?

Applicable Statutes

FEDERAL

PKPA, 28 U.S.C. 1738A(a), (c)(1), (c)(2)(C), (d), (f)

STATE

UCCJA § 3(a)(1) [Home State Jurisdiction]
UCCJA § 3(a)(2) [Significant Connection Jurisdiction]
UCCJA § 3(a)(3) [Emergency Jurisdiction]
UCCJA § 14 [Modification]
UCCJA § 6 [Simultaneous Proceedings]
UCCJA § 7 [Inconvenient Forum]
UCCJA § 8 [Jurisdiction Declined by Reason of Conduct]

Law and policy

One of the goals of the drafters of the UCCJA was to confer exclusive continuing jurisdiction on the original decree state,[1] channeling all post-judgment custody litigation into that state as long as that state maintained a basis for jurisdiction under its UCCJA.[2] Contrary to legislative intent and UCCJA § 14(a), courts in numerous states construed the UCCJA to allow concurrent modification jurisdiction in the child's new home state and in the original decree state based on significant connection jurisdiction. This interpretation resulted in competing custody modification proceedings in the child's new home state[3] and in the former home state, uncertainty about which court should proceed, and confusion about which order should be recognized and enforced.

The PKPA rejected concurrent modification jurisdiction.[4] It expressly codifies a rule of exclusive continuing modification jurisdiction. 28 U.S.C. 1738A(d). As the Fourth Circuit Court of Appeals noted in Meade v. Meade, 812 F.2d 1473, 1476 (4th Cir. 1987):

> Congress designed the PKPA to remedy the defects of the UCCJA with a uniform federal statute. While under the UCCJA scheme some states profess to find *modification* jurisdiction so long as they can properly exercise *initial* jurisdiction, the PKPA prevents a second state from modifying an initial state's order except in carefully circumscribed situations. This presumption of continuing and exclusive jurisdiction discourages dissatisfied parents from seeking new custody orders from a second state. Differently stated, the statutory presumption encourages parents to concentrate their energies on presenting all evidence about their child's best interests in the courts of a single state, ordinarily the court which entered the initial custody decree.

The federal law resolves the issue of which court has jurisdiction to modify a custody determination in favor of the original decree state (F1), so long as F1 exercised jurisdiction in conformity with the PKPA, the state maintains **any** basis for jurisdiction under its own state law, and the state remains the residence of any contestant or the child.[5]

If a court has exclusive continuing modification jurisdiction under the PKPA no other state may modify its custody determination, and the resulting modification is entitled to full faith and credit in sister states.

Discussion

The PKPA has a three-prong test for exclusive continuing modification jurisdiction. The original decree state has exclusive continuing modification jurisdiction under the PKPA if:

1. a court in that state exercised jurisdiction consistently with the PKPA when it made the custody determination for which modification is sought (28 U.S.C. 1738A(a) and (d));

2. the original decree state has jurisdiction under its own state law (28 U.S.C. 1738A(c)(1)); and

3. the original decree state remains the residence of the child or of any contestant (28 U.S.C. 1738A(d)).

1. Was the original exercise of jurisdiction consistent with the PKPA (*i.e.*, was it consistent with the federal jurisdictional criteria and was the requisite notice and opportunity to be heard given)?

"Home state" priority

The original decree state's exercise of jurisdiction must have been in conformity with the PKPA's provisions. This requirement is satisfied if the initial custody determination was made by a court exercising home state jurisdiction. It would also be satisfied if a home state court declined jurisdiction in favor of a significant connection state. It would also be satisfied if a significant connection state made a custody determination and there was no home state. The original decree state's order would not be consistent with the PKPA if it was made by a court exercising significant connection jurisdiction if a home state court existed and had not declined to exercise jurisdiction.[6]

Notice and Opportunity to be Heard

The PKPA requires that reasonable notice and opportunity to be heard be given to the contestants, any parent whose parental rights have not been terminated previously, and any person who has physical custody of the child. This is substantially similar to the notice provision in UCCJA § 4.[7]

2. Does the original decree state have jurisdiction under its own state law?

Law of F1 controls when continuing jurisdiction terminates

Under the PKPA, F1's UCCJA law governs how long jurisdiction continues in that state. In contrast, under UCCJA § 14, F2 courts have applied F2's law to decide whether F1 has jurisdiction when modification is sought.

In a few states by statute or case law, the creation of a new home state ends continuing jurisdiction in F1.[8] In other states, the PKPA protects F1's exclusive continuing modification jurisdiction even after a sister state has attained home state status as long as F1 has another basis for custody jurisdiction under its own law. This usually will be significant connection jurisdiction.[9] Case law varies greatly on how long significant connection jurisdiction continues after the child has left the state.[10]

In a common scenario, F1 makes an initial custody determination based on its status as the child's home state. The child then moves with the custodial parent to another state (F2), remaining there at least six months. F2 becomes the child's new home state. However, F2 does not automatically obtain modification jurisdiction.

Even after F1 ceases to be the child's home state, F1 may continue to exercise modification jurisdiction consistently with the PKPA if it retains any other basis under its state UCCJA, the most common being significant connection jurisdiction. F1's law determines whether the child's contacts with the state are sufficient to support significant connection jurisdiction, or whether they have become so attenuated over time that the state no longer has jurisdiction consistent with the UCCJA.[11] If F1 no longer has a basis for custody jurisdiction, then F1 loses exclusive continuing modification jurisdiction.

The jurisdictional requirement may be satisfied if the child visits with the noncustodial parent in F1, or has other significant contacts

there. Under the PKPA, the child's new home state, F2, must refrain from exercising jurisdiction in deference to F1's exclusive continuing modification jurisdiction until F1's jurisdiction terminates under F1's law or F1 declines jurisdiction on inconvenient forum or misconduct grounds (discussed below).

■ **Practice tip**

The fact that the child has been living in a new state (F2) for at least six months before a modification proceeding is filed in F2 does not mean that F2—the child's new home state—may modify F1's decree. F2 must evaluate whether F1 has exclusive continuing modification jurisdiction.

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3. Does the original decree state "remain the residence" of any contestant or the child?[12]

The requirement that the original decree state remains the residence of the child or a contestant is easily satisfied where at least one parent or the child has lived continuously in that state.[13]

It also should be straightforward to conclude that the original decree state no longer has continuing modification jurisdiction if, at the time the modification proceeding is filed, none of the contestants or the child lives in that state.[14] However, if a modification proceeding is filed before all of the contestants and the child have moved out of state, jurisdiction is not defeated if the last remaining contestant leaves the state during the pendency of the proceeding.[15] In this situation, the proceeding may be ripe for dismissal on inconvenient forum grounds (UCCJA § 7) if another state has become the child's new home state or has significant connections with the child.

Other situations are less clear and turn on the court's careful evaluation of the facts. Can a custody contestant re-establish exclusive continuing jurisdiction after moving away by returning to the state? The better view is that exclusive continuing jurisdiction terminates when all contestants actually leave the state, but some courts have been willing to consider the case-specific facts. [16] The answer may depend upon a court determination as to whether the petitioner's absence was "temporary."[17]

Can a custody contestant who has moved out of state preserve continuing jurisdiction in the original decree state by maintaining a legal residence there? This may depend upon whether the contestant is a civilian or in the military.

The better view in nonmilitary cases is that a custody contestant must have continued to live in the state in a physical sense. Courts have gone both ways on the question.[18] Cases involving a parent in the military often hold that the military parent continues to live in the original decree state if s/he returns there after being stationed in another state or overseas, or maintains a legal residence or domicile there while on duty assignment elsewhere.[19]

Declining exclusive continuing modification jurisdiction

A court with exclusive continuing modification jurisdiction under the PKPA may decline to exercise it on inconvenient forum grounds (UCCJA § 7)[20] or based on the petitioner's reprehensible conduct (UCCJA § 8). The decision to retain or decline jurisdiction is discretionary and rests exclusively with F1; the jurisdictional scheme does not permit a court in F2 to substitute its judgment for F1.

If the judge decides to decline exclusive continuing modification jurisdiction, it should:

- provide reasons for the decision in its order and;
- notify the court found to be the more appropriate forum of the decision to decline jurisdiction (UCCJA § 7(h)).

Inconvenient forum[21]

A court may decline to exercise continuing modification jurisdiction pursuant to UCCJA § 7, inconvenient forum. In reviewing a motion to decline exclusive continuing modification jurisdiction based on inconvenient forum, F1 may consider, *inter alia*, the fact that another state is or recently was the child's home state, has a closer connection to the child, or has substantial evidence about the child. UCCJA § 7(c).[22] Judicial communication pursuant to UCCJA § 7(d) can be helpful to F1's inconvenient forum deliberations.

If F1 dismisses or stays proceedings on inconvenient forum grounds, the court is required to inform the court it has found to be more appropriate of this fact. UCCJA § 7(h).[23] The court can award fees and expenses upon dismissing a case on inconvenient forum grounds.[24]

Unclean hands[25]

Under UCCJA § 8(b), unless the interests of the child require, a court shall not exercise jurisdiction to modify a custody decree of another state if the petitioner has improperly removed the child or improperly retained the child after a visit. The court also has discretion to decline modification jurisdiction if the petitioner has violated any other provision of a sister state custody order. In appropriate cases a court dismissing a petition under § 8(b) may charge the petitioner with attorneys' fees and other expenses.[26]

When may F2 modify F1's custody determination?

Even if F1 lacked jurisdiction to make the original decree, F2 is prohibited by UCCJA § 14(a) from modifying it, as long as F1 has jurisdiction at the time the modification is sought. In contrast, the PKPA's bar to the modification of another state's decree applies only if F1 made its decree consistently with the federal act in the first place *and* has jurisdiction to modify it under the PKPA when the later modification is sought.

Under the PKPA, if F1 has exclusive continuing modification jurisdiction, F2 may modify F1's decree only if F1 declines jurisdiction or no longer has jurisdiction, **and** F2 must have jurisdiction under its own state law. 28 U.S.C. 1738A(f). The F2 court is then required by UCCJA § 14(b) to give due consideration to the transcript of the record[27] and other documents of previous proceedings submitted to it pursuant to UCCJA § 22.

Once a court determines that it has jurisdiction to modify a sister state custody determination, it is, nevertheless, subject to the prohibitions on simultaneous proceedings found in the PKPA, 28 U.S.C. 1738A(g) and UCCJA § 6. The pleadings should reveal whether custody proceedings are pending elsewhere. If the requisite information is not in the pleadings, the court should inquire of the parties about the possibility of parallel proceedings in sister state courts. If a court discovers that another state is properly proceeding, the court must refrain from acting. The courts should communicate to resolve which forum should proceed.

Can a court modify a custody determination on emergency jurisdiction grounds if another state has exclusive continuing modification jurisdiction?

The UCCJA and the PKPA restrictions on modifying sister state custody determinations do not make an exception for emergency jurisdiction. UCCJA 14(a); PKPA, 28 U.S.C. 1738A(a), (f). Nor does UCCJA § 3(a)(3), which establishes emergency jurisdiction, state that it is an exception to the § 14(a) prohibition on modification.

However, the case law is split on whether emergency jurisdiction is an exception to the statutory restrictions on modifying custody determinations made by courts in other states. Most courts have interpreted the statutes as

allowing an exception for emergency jurisdiction.[28] At least one court has held that the PKPA does not allow an exception for emergency jurisdiction to that statute's full faith and credit requirement.[29]

The rationale for exercising emergency jurisdiction when another state has modification jurisdiction presumably is that children in extreme emergency situations need immediate protection. While this is true, judges should have confidence that the court with continuing modification jurisdiction will respond to the emergent conditions with appropriate orders. This is the best way to avoid conflicting custody orders from being made.

However, if courts do exercise emergency jurisdiction, there are steps they can take to protect children from imminent harm while minimizing the possibility for interstate jurisdictional conflict.[30]

- First, the emergency court (F2) should ask the petitioner whether or not relief has been sought from the court with exclusive continuing modification jurisdiction (F1). If not, the court should ascertain the reasons for not proceeding there. The F2 court should communicate with the court in F1 to find out how long it would take for the matter to be heard there. The F2 court may request the F1 court to decline jurisdiction temporarily or permanently in favor of F2. Based on the communication, the F2 court may decide to stay the emergency proceeding on the assurance that the F1 court intends to act promptly on the emergency allegations.

- Where the alleged emergency is so extreme that referring the petitioner back to the court with exclusive continuing jurisdiction would imperil the child, the court should consider entering a temporary custody order for a short, limited duration. The court should direct the petitioner to file promptly for modification of the extant order in the court with continuing jurisdiction.

- The order should include express findings as to the reason for the exercise of emergency jurisdiction. The order should include a statement that the relief granted is limited in scope and duration because the petitioner must seek permanent relief in the court with exclusive continuing modification jurisdiction.
- To further speed permanent relief, the judge presiding over the emergency action should send a copy of the emergency temporary custody order to the court with exclusive continuing jurisdiction. This will allow for expeditious calendaring as soon as the petitioner files for modification of the existing order.

■ Practice Tip

Courts should beware of two potentially suspect "emergencies":

(1) The "hold-over" emergency: In one scenario, the noncustodial parent files an emergency petition at or near the end of a visitation period seeking to prevent return of the child to the custodial parent.[31] In another scenario, the custodial parent files an emergency petition just before a scheduled visit to prevent sending the child to the noncustodial parent. Is there a grave danger to the child, or is this an attempt to modify a visitation order in a more convenient forum or to delay or deny court-ordered visitation?

(2) The "disappointed litigant" emergency: In this scenario, a parent who recently and unsuccessfully sought modification of custody or visitation in the court with exclusive continuing modification jurisdiction petitions a court in the state of his/her residence alleging an emergency stemming from the same set of facts previously litigated. If condoned, this classic case of forum-shopping rewards a parent who has already had a hearing before the court with continuing modification jurisdiction. Apart from *res judicata* considerations, courts should not second guess the custody decisions made by sister state courts. Mutual respect among sister state courts will foster finality in custody litigation.

Endnotes

1. *See,* Brigitte M. Bodenheimer, *Interstate Custody: Initial Jurisdiction and Continuing Jurisdiction Under the UCCJA*, 14 Fam. L. Q. 203 (1981).

2. The PKPA seeks to achieve the same result. The PKPA thus protects the right of a decree state to exercise continuing jurisdiction and manifests a strong Congressional intent to channel custody litigation into a court having continuing jurisdiction." Mark L. V. Jennifer S., 506 N.Y.S.2d 1020, 1023 (Fam. Ct. 1986).

3. *See, e.g.*, Russell M. Coombs, *Nuts and Bolts of the PKPA*, 22 Colo. Law. 2397 (1993) (There is a common misconception that the UCCJA allows a court to modify a sister state custody order if the child has been living in the new state for at least six months when the case is filed.).

4. *See* Arbogast v. Arbogast, 327 S.E.2d 675, 679 (W. Va. 1984) (PKPA eliminates concurrent modification jurisdiction).

5. *See* Meade v. Meade, 812 F.2d 1473, 1477 (4th Cir. 1987) for an excellent explanation of the PKPA's modification provisions: "The effect of sec. 1738A(d) and sec. 1738A(f) is to limit custody jurisdiction to the first state to properly enter a custody order, so long as two sets of requirements are met. First, the PKPA defines a *federal* standard for continuing exclusive custody jurisdiction: the first state must have had proper initial custody jurisdiction when it entered its first order (according to the criteria in the Act) and it must remain "the residence of the child or any contestant" when it later modifies that order. Second, the Act incorporates a *state law* inquiry: in order to retain exclusive responsibility for modifying its prior order the first state must still have custody jurisdiction as a matter of its own custody law. Even if the federal and state criteria for continuing jurisdiction are met, the first state's courts can, if they choose, voluntarily relinquish their jurisdiction in favor of a court better situated to assess the child's needs."

6. *See, e.g.*, Shute v. Shute, 607 A.2d 890 (Vt. 1992) (Vermont cannot claim jurisdiction under the PKPA, despite initial Vermont order and father's continued residence, because at the time Vermont entered the order, Connecticut was the child's "home state.").

7. *See* Chapter 3, Pleadings, Notice, Parties, and Appearances.

8. By statute, Texas retains continuing jurisdiction over visitation, while losing custody jurisdiction, after a new "home state" is established elsewhere. Tex. Fam. Code Ann. Secs. 11.052 and 11.053(d). *See, e.g.*, Reppond v. Blake, 822 S.W.2d 759 (Tex. App. 1992) (Despite original custody order from Texas awarding mother custody of the child, where mother and child established a new "home state" in Louisiana, continuing jurisdiction of Texas court ceased.). *Cf.* Welborn-Hosler v. Hosler, 870 S.W.2d 323 (Tex. App. 1994) (Texas had continuing jurisdiction over visitation where father remained a resident, although stationed with the military in California, even after Texas no longer had custody jurisdiction by statute because child had resided in North Carolina for six months.).

9. However, significant connection jurisdiction is not the only basis upon which the original decree state may continue to exercise modification jurisdiction. *See, e.g.*, Bullard v. Bullard, 647 P.2d 294 (Haw. Ct. App. 1982) (Hawaii, the initial decree state, exercised modification jurisdiction based on "last resort" jurisdiction where neither Texas nor California, where the child lived with custodial father who was on military assignment, had jurisdiction under the UCCJA).

10.. *See, e.g.*, Kumar v. Superior Court, 652 P.2d 1003 (Cal. 1982) (California had no authority to modify the original New York decree as long as New York had continuing jurisdiction and had not declined to exercise it, even where custodial mother and child had lived in California for more than a year); In re Marriage of Leyda, 398 N.W.2d 815 (Iowa 1987) (Iowa had continuing jurisdiction even though mother and child were in Florida for more than a year and Florida lacked jurisdiction to modify the Iowa decree, even temporarily); Blankenship v. Blankenship, 534 So. 2d 320 (Ala. Civ. App. 1988); Murphy v.Woerner, 748 P.2d 749 (Alaska 1988) (Kansas retained continuing jurisdiction and Alaska was prohibited from modifying Kansas decree, where father was a Kansas resident and children spent regular summer and holiday visits in Kansas, and Kansas had denied mother's petition to decline jurisdiction in favor of Alaska); Bock v. Bock, 824 P.2d 723 (Alaska 1992) (Alaska was precluded from modifying Kentucky visitation order where Kentucky has exclusive continuing modification jurisdiction, despite mother and childrens' residence in Alaska for four years); Escudero v. Henry, 395 S.E.2d 793 (W. Va. 1990) (West Virginia retained continuing modification jurisdiction after child moved with custodial mother to Kentucky, because father remained in West Virginia, the child regularly returned there for lengthy visits, father filed several modifications

in West Virginia, and West Virginia court had long involvement with child); McDow v. McDow, 908 P.2d 1049 (Alaska 1996) (Alaska deferred to the exclusive continuing jurisdiction of Washington, where Washington issued the initial custody decree, mother still lived there, and the child had more than slight connections with Washington); Erb v. Kuwik, 596 N.Y.S.2d 285 (Fam. Ct. 1992) (New York issued initial custody order but lost jurisdiction to Massachusetts because of loss of significant connections with the child where mother and child lived in Massachusetts for six years).

11. *See, e.g.,* Greenlaw v. Smith, 869 P. 2d 1024 (Wash. 1994) (en banc) (Washington has continuing modification jurisdiction under the UCCJA and PKPA where father continued to reside in Washington, and the child continued to have more than slight contact with Washington based on his continued visitation with father. Moreover, the trial court did not abuse its discretion in denying mother's request to decline jurisdiction in favor of California, the child's home state of many years.).

12. *See* Annotation, *Child Custody: When Does State That Issued Previous Custody Determination Have Continuing Jurisdiction under Uniform Child Custody Jurisdiction Act (UCCJA) or Parental Kidnapping Prevention Act (PKPA), 28 U.S.C. § 1738A*, 83 A.L.R. 4th 742 (1991).

13. *See, e.g.*, Michalik v. Michalik, 494 N.W.2d 391 (Wis. 1993) (Wisconsin was precluded by the PKPA from exercising modification jurisdiction where Indiana originally exercised jurisdiction consistently with the PKPA and still had continuing jurisdiction based on father's continued residence and ongoing litigation there, and the fact that Indiana had not declined jurisdiction.).

14. *See, e.g.,* Dahlen v. Dahlen, 393 N.W.2d 765 (N.D. 1986) (Although North Dakota was the home state of the children when the initial custody determination was made, North Dakota lost continuing jurisdiction where no participants in the custody dispute continued to reside in the state. At the time that the father's motion to modify was filed, he had been living in Minnesota for at least 14 months and the mother and children and been living in California for over two years.).

15. *See. e.g.*, Kelly v. Warner, 460 N.E.2d 329 (Ill. App. Ct. 1983).

16. *See, e.g.*, In re Marriage of Pedowitz, 179 Cal. App. 3d 992 (Cal. Ct. App. 1986) (Evidence was insufficient to find that California retained jurisdiction over father's modification petition pursuant to the PKPA. The case was remanded for additional fact-finding as to whether father remained a resident of California during his eleven month absence in Florida (where mother had moved with their child), and whether he continued as a resident of California when he left Florida (where father failed to indicate when he returned to California).); Greenfield v. Greenfield, 599 So. 2d 1029 (Fla. Dist. Ct. App.) (court found that custody contestant can reestablish a home state once she moved out of state by returning to the state), *review denied*, 613 So. 2d 4 (Fla. 1992).

17. *See* supra Chapter 5 p. 5-3, **Temporary absences from the state.**

18. *See, e.g.*, McDougald v. Jenson, 596 F. Supp. 680 (N.D. Fla. 1984) (Florida had continuing jurisdiction under the PKPA where father intended to remain a legal resident of Florida, despite the fact that he lived for approximately 1 ½ years about 20 miles from the Florida border in Alabama and Georgia. He retained his Florida driver's license, remained a registered Florida voter, retained church membership there, regularly returned to visit his parents, and had returned to live in Florida before the court decision.), *aff'd*, 786 F.2d 1465 (11th Cir. 1986), *cert. denied* 479 U.S. 860, *reh'g denied*, 479 U.S. 1001 (1986). *Cf.* Maxie v. Fernandez, 649 F. Supp. 627 (E.D. Va. 1986) (District of Columbia did not "remain the residence" of father who had moved to New York, but then sought to reestablish his D.C. residence by making arrangements with friends and relatives to use their address for receipt of mail. Because D.C. no longer had continuing jurisdiction, Virginia was the proper jurisdiction to make the custody determination.).

19. *See, e.g.*, Mark L. v. Jennifer S., 506 N.Y.S.2d 1020 (Fam. Ct. 1986) (Petitioner-father on military assignments outside the United States continued to live and reside in New York within the meaning of the PKPA and UCCJA, because to otherwise construe these statutes would deny a member of the U.S. armed served "home state" status or protection under the PKPA and UCCJA); Hart v. Hart, 327 S.E.2d 631 (N.C. Ct. App. 1985) (Where father was on active duty with the U.S. Marine Corps, stationed at Camp Lejeune, the court found that his transfer to Okinawa did not effect his continued residence in North Carolina for "home state" purposes, despite mother's move with children to Florida); Whitfield v. Whitfield, 519 So. 2d 546 (Ala. Civ. App. 1987) (Court refused to decline jurisdiction on inconvenient forum grounds in favor of Texas, where mother and child had moved, ruling that Alabama had continuing jurisdiction over father's petition to modify visitation. Father, a military serviceman, was stationed in several states and overseas, but continued to declare Alabama as his permanent residence, maintained bank accounts in Alabama, had an Alabama driver's license, and voted by absentee ballot in that state.). For a discussion of special issues that arise when a family member is in the military, *see* Chapter 9.

20. *See, e.g.*, Bennett v. Bennett, 506 So. 2d 1021 (Ala. Civ. App. 1987) (The court need not exercise continuing jurisdiction per UCCJA or PKPA if the state has become an inconvenient forum; there was no abuse of discretion where Alabama declined to exercise continuing jurisdiction on inconvenient forum grounds and, instead, deferred to Georgia. The court found it to be in the child's interests to transfer the father's motion to modify visitation from Alabama, where he continued to reside, to Georgia, where the child had lived with her custodial mother for more than six months.).

21. *See supra* Chapter 5 for a discussion of UCCJA § 7 [Inconvenient Forum].

22. *See, e.g.*, In re Marriage of Cervetti, 497 N.W.2d 897 (Iowa 1993) (Iowa should have declined to exercise exclusive continuing modification jurisdiction in favor of North Carolina. The court noted that the district court had placed too much emphasis on Iowa's status as the decree state and too little emphasis on the role people and institutions in North Carolina now played in the children's lives.).

23. The court can direct that a custody proceeding be promptly filed in another named state. UCCJA § 7(e).

24. *See* Chapter 11, Awarding Attorneys' Fees, Costs and Expenses.

25. *See supra* Chapter 5, for a discussion of UCCJA § 8 [Jurisdiction Declined by Reason of Conduct].

26. *See* Chapter 11, Awarding Attorneys' Fees, Costs and Expenses.

27. *See, e.g.*, Howe v. Musante, 521 So. 2d 51 (Ala. Civ. App. 1988) (where father specifically asked the court to review transcripts of a California proceeding, but the court did not do so, the appellate court reversed the trial court's decision to modify the California decree.).

28. *See, e.g.*, In re J.L.H., 507 N.W.2d 641 (Neb. Ct. App. 1993) (Nebraska properly exercised emergency jurisdiction under UCCJA, but was not able to make a permanent custody determination unless Missouri, the state which had continuing jurisdiction, affirmatively declined to exercise jurisdiction.); Matter of Appeal in Pima County Juvenile Action, 711 P.2d 1200, 1206 n.6 (Ariz. Ct. App. 1985) ("We do not construe the federal act to preclude the issuance of the court's initial order making the children temporary wards of the court pending the outcome on the merits." Later in the opinion the court suggested the mechanics for protecting the children under the emergency jurisdiction provision of the UCCJA without offending the PKPA.), *aff'd in part and rev'd in part on other grounds*, 712 P.2d 431 (Ariz. 1986); E.P. v. District Court, 696 P.2d 254 (Colo. 1985) (en banc) (UCCJA § 14 does not prevent issuance of temporary orders based on emergency jurisdiction but does prohibit further proceedings in deference to the court with continuing jurisdiction, in this case, Wyoming.); Curtis v. Curtis, 574 So.2d 24 (Miss. 1990) (Chancery court had temporary emergency jurisdiction to hear complaints of father, who had abducted children from mother, alleging substantial neglect and abuse. However, court should not have continued to exercise jurisdiction once it became apparent that there was no clear and present danger, allowing state with jurisdiction to hear modification action); Trader v. Darrow, 630 A.2d 634 (Del. 1993) (Delaware only had temporary emergency jurisdiction, deferring to Maryland's continuing jurisdiction).

29. *See* Richardson v. Richardson, 644 A.2d 472, 475 (Me. 1994) (The PKPA does not create an exception for emergency jurisdiction to the full faith and credit requirement. Judicial creation of such an exception ". . . would be ignoring the express language of subsection (a), which provides for only one exception to the full faith and credit requirement. . . . Moreover, [it would] erroneously assume[] that the courts of [the state with exclusive continuing jurisdiction] would be unable or unwilling to protect [the child] from abuse.").

30. *See* Shores v. Shores, 670 F. Supp. 774 (E.D. Tenn. 1987).

31. *See, e.g.*, J.C. v. K.R., 144 Misc.2d 163, 543 N.Y.S.2d 617 (Fam. Ct. 1989) (New York Family Court lacked jurisdiction where Arizona was home state and father refused to return 3½ year old son to mother in Arizona, because father's allegation that son was not receiving proper medical attention in Arizona did not constitute an "emergency" requiring immediate court intervention under the UCCJA. The child had ongoing medical problems since birth and issues about medical treatment were properly before the Arizona courts).

Chapter 7
Drafting the Custody Order

Summary

This chapter outlines provisions that should be included in custody orders to aid interstate enforcement. When there is risk of child abduction, the court should include preventive measures in the custody order. This chapter also helps judges identify families at risk for child abduction, and suggests appropriate safeguards to put in the order.

CHECKLIST

1. What should be included in every custody order?

- Jurisdiction
  The legal basis for jurisdiction
  The factual basis for jurisdiction
- Parties
- Notice and opportunity to be heard
- Specific custody and visitation rights, with supporting facts
- Penalties for violating the provisions of the order

What optional provisions should be included in the custody order to prevent abduction?

- Supervised visitation
- Restrictions on removing the child from the state or the country
- Posting of a bond
- Limitations on access to the child's passport
- "Mirror image" order from a foreign court
- Notification of school personnel and other individuals

2. What risk factors for abduction should prompt the court to order preventive measures?

- Prior threat of or actual abduction
- Distrust due to belief abuse has occurred
- Paranoid or sociopathic parent
- End of mixed culture marriage
- Disenfranchised parents with family/social support
- Likely degree of difficulty to secure a child's return.

Applicable statutes

FEDERAL

PKPA 28 U.S.C. § 1738A

STATE

UCCJA § 3
UCCJA § 10
UCCJA § 12

What should be included in every custody order?

A well drafted custody order should inform the parties of their rights and obligations about custody of the child and contain provisions that will facilitate enforcement and deter violations. The following provisions should be included in every well structured custody order.

Statement of jurisdiction

Clearly detail the basis for exercising jurisdiction in every custody order. This simple step will facilitate interstate enforcement and reduce the chances of it being modified improperly by a sister state.

If this is the child's home state, say so and state the facts that support this conclusion. With this information in the order, another court can decide whether or not it must be enforced or

accorded full faith and credit or whether it can be modified according to provisions of the UCCJA and PKPA. This information also helps a court decide whether the jurisdictional determination is *res judicata* with respect to the parties, according to UCCJA § 12.

The Full Faith and Credit clause of Article IV of the U.S. Constitution, and its implementing statute, 28 U.S.C. 1738, forbid F2 to re-examine a jurisdictional issue decided in F1, if the law of F1 would forbid an F1 court to re-examine it and F1 provided due process.

Example 1. This court has home state jurisdiction to determine custody in accordance with PKPA, 28 U.S.C. § 1738A(c)(2)(A) and UCCJA § 3(a)(1).[1] The court finds that [name of state] is the "home state" within the meaning of UCCJA § 2(5) and PKPA, 28 U.S.C. 1738A(b)(4). The court should then set forth jurisdictional facts that support the conclusion of law, including the length of time the child has resided in the state. Example: The parties presented evidence to establish jurisdiction and the court finds that the child has lived in this state for four years and three months consecutively with his natural parents. This state is, therefore, the child's home state.

Example 2. This court has significant connection jurisdiction to determine custody in accordance with PKPA, 28 U.S.C. § 1738A(c)(2)(B) and UCCJA § 3(a)(2), the court having found that no other state has "home state" jurisdiction within the meaning of UCCJA § 2(5) and PKPA, 28 U.S.C. 1738A(b)(4) [or that the child's "home state" has deferred to this court].

The court should set forth the jurisdictional facts that support the conclusion of law, including the length of time the child has resided in the state and availability of evidence in the state. *Example:* The parties presented evidence to establish jurisdiction and the court finds that the child was born in F1 where she lived for three months with her natural parents. The parents subsequently moved to F2 (this state), where the child lived for five months prior to the time this action for custody was filed. The child continues to reside here with her mother. The father also resides here as do the child's paternal grandparents. The child, therefore, had no home state when this action was filed.

The court further finds that it was in the child's best interest for this court to assume jurisdiction because the child and her parents have significant connections with the state and there is available in this state substantial evidence concerning the child's present and future care, protection, training, and personal relationships.

In these examples, the court states a conclusion of law, *i.e.*, that it had jurisdiction pursuant to a specific section of the PKPA and UCCJA, and the court states the jurisdictional facts that support the conclusions of law.

Parties

The order should state that all persons required to be joined as parties and entitled to notification of the custody proceedings under UCCJA § 4 and § 10 were joined and properly notified. Most often the individuals included here will be grandparents claiming visitation rights pursuant to state statutes or a person who has physical custody of the child.

UCCJA § 10 requires any person, not a party to a custody proceeding, who has physical custody of the child or who claims to have custody or visitation rights with the child, be joined as a party and notified both of the joinder and the proceedings. Section 4 requires notification and opportunity to be heard be given to the contestants, any parent whose parental rights have not previously been terminated, and any person who has physical custody of the child.

These requirements exist to prevent or minimize relitigation of custody and visitation issues by people with legitimate claims. If the state recognizes grandparent visitation rights, grandparents who intend to make claims should

do so at the same time the parents' rights are being determined so these issues can be resolved at one time.[2] This is important because each time custody and visitation issues are relitigated, the child is put through the stress of new proceedings. Therefore, make sure all persons with legitimate custody claims litigate or get the opportunity to litigate them at one time.

When information showing people with custody claims were properly notified and joined is included in the order, the possibility that any of these persons could successfully collaterally attack the decree is reduced.

Example. All persons required to be joined as parties and notified under UCCJA § 10 and § 4 and § 28 U.S.C. § 1738A(e) were ordered joined and were duly notified of the proceedings and of being joined as a party.

The following persons were ordered joined as parties and were notified of the joinder. Notification was by registered mail, return receipt requested and returned on the date which follows each name (or otherwise served in accordance with UCCJA § 5).

- Maternal grandparents X/X/XX;
- Paternal grandparents X/X/XX;
- Notice and opportunity to be heard

Notice and opportunity to be heard

Both the UCCJA and PKPA require reasonable notice and opportunity to be heard be provided to contestants, parents whose rights have not been terminated and persons with physical custody of the child before making child custody determinations. These basic elements of due process are critical if a resulting order is to be recognized and enforced or given full faith and credit by courts in other jurisdictions.

In addition, UCCJA § 12 notes the *res judicata* effect of orders entered when the parties have been properly notified and given an opportunity to be heard. For these reasons, the custody order should address these issues. It should state:

- how service of process occurred
- how much notice of the proceedings the party received, and
- what opportunity the party had to be heard.

By including this information in the order, the judge enhances the probability the order will be recognized or given full faith and credit in another jurisdiction. If a party seeks to enforce the order at a later time and in a different state, the order itself demonstrates that the other party was given adequate notice and opportunity to be heard. This makes possible the enforcement court's application of *res judicata* to issues of law and fact decided by the issuing court.

Example. The party was accorded full due process in that he was served with process according to the law of this state and the law of the state where he was located (if not within the jurisdiction) and was given ample notice of the proceedings and a full opportunity to be heard.

The party was personally served with the complaint in this action pursuant to (list appropriate statutory citations, which may be § 5 of the UCCJA) with return of service dated ____ and filed with the court on ____. The party received notice of the custody hearing on ____ which was (20) days in advance of the scheduled hearing. The party was present for the hearing at which he was represented by counsel and fully participated in it.

Note, the example states both findings of fact and conclusions of law. The findings of fact support the conclusion that the party's due process rights were protected.

Specifying custody and visitation rights

Clearly state the custody and visitation rights of each party. This includes grandparents if they have been granted visitation. If custody and visitation rights are clearly established, then parties cannot allege a violation from lack of understanding. For example, if a court awards "reasonable visitation" to a parent, the question of what is "reasonable" may become the subject of post-judgment litigation. The original fact-finder is in the best position to define what 'reasonable visitation' means in concrete terms, and should do so in the court order. The decree will be easier to enforce in another jurisdiction because its terms are precise. Even when parents appear to be working together amicably, it is wise to include specific terms in case the relationship deteriorates.

The need for precision and clarity about the rights of the parents with respect to the child is greater today than ever before, as states adopt new terminology to describe the parent-child relationship that may be unfamiliar to courts in sister states. For instance, the terms "custody and visitation" have been replaced in some states by "parenting responsibilities," "parenting plans," "parental functions," "parenting time," "primary caretaker," etc. The language of parent-child relationships will continue to evolve and enforcement problems will likely result if orders are left vague. Judges can minimize enforcement problems by spelling out when and with whom the child is to be at all times. This will help a court in another jurisdiction implement the plan as it was meant to be implemented.

Restrictions on access to the child in domestic violence cases

If the case involves a battered spouse or abused child or if one party has threatened or harassed another, and as a result, the court intends to permit only supervised visitation, the court should clearly state this in the order. The order should recite the facts that support the decision to restrict visitation. The order should include specific provisions for the drop-off and pick-up of the child to prevent confrontations between the abused and abusive parent. This information will be useful to any court asked to modify the existing decree. For example, if a party seeks to modify the decree in another state, the judge in the second state would know of the abuse or harassment problem by reading the decree, which could have a significant impact on how the judge would handle the matter. Because the order shows that the issues of abuse or harassment were already litigated by the parties, the finding of fact would not be subject to challenge.

Orders for joint custody

A decision to award joint custody is a substantive one, and therefore, beyond the scope of this manual. However, when considering such an award, the judge is encouraged to consider it in terms of whether it would encourage violations, and the subsequent need for enforcement actions. For example, the judge should be reluctant to order joint custody if the parents appear unable to work cooperatively. If there is a history of, or the potential for, child abuse, spouse abuse, or parental kidnapping, the court should have reservations about the appropriateness of joint custody.[3] In addition, if the parents are not in agreement on joint custody and they do not live in geographical proximity to one another, the court should give serious thought to whether joint custody would be appropriate.[4] When these conditions are present, the likelihood of one party violating the decree increases substantially. If joint custody is ordered, the order should clearly identify residential arrangements for the child at all times.

Penalties for violating the provisions of the order

In every state, a party who violates a custody order can be held in contempt. In addition, every

state has enacted criminal custodial interference statutes, and many states have made these laws applicable to interference with visitation as well.[5] The court order should state that violating the custody or visitation provisions of the order could result in the violator being held in contempt. It should also state the violator could face criminal charges under state and federal law.

By including this information, the court puts both parties on notice of the possible consequences of violating the decree.

Example. A party who violates the provisions of this order may be held in contempt of court and punished accordingly.

Violation of the provisions of this order could subject the violator to criminal prosecution pursuant to (insert state statute) and penalties of (state the possible penalties) in accordance with (insert state statute).

What safeguards can the court include in the custody order to reduce the risk of abduction?

The court should seriously consider a party's concern that the other parent will abduct the child, particularly if threats to abduct have been made. The court should assess the level of abduction risk, the likelihood of the child being returned promptly if the child were abducted, and the harm the child would likely incur if abducted. Six profiles of abduction risk, with specific preventive measures suited to each, follows this general discussion of prevention. See pages 7-10 to 7-16.

In cases in which there is a high risk of abduction and a low likelihood of recovery, combined with a substantial negative impact on the child should an abduction occur, the court should order the most stringent and restrictive preventive measures. In cases in which there is a low risk of abduction with a high likelihood of recovery, less restrictive measures may be warranted.

Measures courts can use alone or in combination to reduce the risk of abduction include:

- supervised visitation
- removal restrictions
- bonds
- passport restrictions
- "mirror image" orders
- notifying schools of custody orders.

Supervised visitation

Some situations will warrant supervised (or "monitored") visitation orders, such as where an abduction has already occurred,[6] or threats to abduct the child have been made. The court can order that supervised visitation take place at the home of the custodial parent or at another designated location. There may be a supervised visitation center available for this purpose. The person responsible for supervising the visits may be a law enforcement officer, a social worker, a clergyman, relative, or other person designated by the court.

Example. The mother shall have supervised visitation with the child on alternating Saturdays from noon to six o'clock. Visits are restricted to father's house. Visits are to be supervised at all times by the deputy sheriff.

Restrictions on removing the child from the state or the country

When parents reside in different states or different countries or have the intention of doing so, the possibility that one parent will abduct the child to the other state or nation or refuse to return the child after a visit always exists. If the judge concludes the risk of this is more than minimal based on evidence introduced in the custody proceeding, the judge should consider enjoining the parent from removing the child from the state or nation[7] without the written consent of the other party or prior consent of the

court.

A provision in the custody order restricting the right of a parent to remove the child from the state or country will enable the other parent to prevent issuance of a passport for the minor child pursuant to federal regulations. 22 C.F.R. 51.27 See "Passport Restrictions," *infra*.

Bond requirements

If flight is a serious concern, the judge must consider ordering the parent to post a bond. The bond would be forfeited to the left-behind parent to cover enforcement and recovery costs, if the parent violated the custody decree by removing the child from state or country. Posting a substantial bond can deter removal of the child. Bonds may also be required to encourage compliance with visitation orders.[8]

Example. The father is ordered to post a cash bond in the amount of [$5000] with the court. This bond shall be subject to forfeiture to the mother in the event that the father removes the child from the country without securing advance written permission from the mother or the court.

Passport restrictions

If there is a risk one parent will remove the child from the United States, the judge should consider passport restrictions. This could be done by ordering one parent to surrender the child's passport to the other parent, or by enjoining one or both parents from applying for a passport for the child.[9]

Federal regulations governing passport applications for minors are found at 22 C.F.R. 51.27. When custody is in dispute, the regulations provide that the Department of State may deny issuance of a passport for a minor child if a custody order has been filed with the Department which (A) grants sole custody to the objecting parent; or (B) establishes joint legal custody; or (C) prohibits the child's travel without permission of both parents or the court; or (D) requires written permission of both parents or the court for important decisions. The State Department reserves the right to withhold passports for minor children until the custody conflict is resolved by an appropriate court, and may issue a passport notwithstanding the restrictions noted above if compelling humanitarian or emergency reasons exist.

The State Department will accept a court order from a state court in the U.S. as well as from a foreign court in the child's "home state" or country of habitual residence. In cases involving joint legal custody, written permission of both parents is required before a passport will be issued for a child unless the court specifies otherwise.

The clearer the court order, the easier it is for the State Department to comply with the court's intent regarding passport issuance, thereby safeguarding against the child's removal from the country.

Restricting access to passports is not fail safe in the case of children and parents with dual nationality. Foreign embassies and consulates are not required to comply with a U.S. court order forbidding the foreign national parent from obtaining a passport for himself/herself and the children, although some countries will comply voluntarily. The court should consider additional safeguards in dual citizenship cases.
For instance, the court may order the foreign parent to advise his/her consulate in writing as to any court restrictions on obtaining original or replacement passports for the parent and child, and to obtain a written acknowledgment from the consulate, addressed to the court, evidencing that the foreign parent has neither applied for nor received passports for himself/herself or the child.

Example. Surrendering passport - The father is hereby ordered to surrender the child's

passport to the mother prior to visitation with the child. The visitation schedule shall not take effect until after the passport is surrendered. The mother shall provide the father with a written receipt for the passport and is ordered to retain the passport in a secure location. The mother is also required to file an Acknowledgment of Receipt of Passport with the court, with a copy provided to the father. This Acknowledgment shall inform the court of the date the passport was surrendered.

"Mirror image" orders

The court may direct a parent who lives (or is likely to live) abroad to obtain an order from a court in the foreign country recognizing the jurisdiction of the U.S. court, and agreeing to enforce the order should that be necessary. The state court may require the parent to obtain such a "mirror image" order from a foreign court before the child is permitted to travel abroad to visit.

Example. Before the child is permitted to travel overseas to visit the mother, the mother shall obtain an order from a tribunal in [ ] [specify the country]. The order shall recognize the continuing jurisdiction of this court over child custody matters, and shall recognize an obligation to enforce the order of this court in the event the mother refuses to return the child at the end of the lawful visitation period.

Notification of school personnel and other individuals

When custody proceedings are hostile and there are restrictions on access to the child by one party, the court should consider requiring that school personnel and certain individuals be informed of the restrictions. If, for example, a mother is granted visitation only in the presence of the father, the court should consider ordering the father to notify school personnel of the court order and its restrictions. Similarly, grandparents and other relatives or child care providers should be informed of the contents of the order. If they know of the restrictions on access to the child by the mother, they are less likely to allow the mother unsupervised contact with the child. Finally, by requiring a parent to notify these people, the court may deter anyone who might assist the mother in abducting the child, because they might be subject to contempt.[10]

Example. The custodial parent is ordered to provide a copy of this order to the following individuals:

- The principal of the child's school;
- The child's teacher;
- The driver of the child's bus;
- The child's maternal and paternal grandparents;
- The child's maternal and paternal aunts and uncles;
- The child's after school day care provider.

Alternatively, the court may admonish the custodial parent to provide copies of the custody order to the noted individuals.

SAMPLE CUSTODY ORDER[11]

[Provisions to be included in every custody order]

It is ordered adjudged and decreed that:

Jurisdiction
[Home State Jurisdiction]

This court has home state jurisdiction to determine custody pursuant to the Uniform Child Custody Jurisdiction Act (UCCJA) § 3(a)(1) and consistently with the Parental Kidnapping Prevention Act (PKPA) 28 U.S.C. § 1738A(c)(2)(A). The court finds that _____ is the child's "home state" within the meaning of UCCJA § 2(5) and PKPA, 28 U.S.C. 1738A(b)(4).

The parties presented evidence to establish jurisdiction and the court finds that the child has lived in this state for four years and three months consecutively with his natural parents immediately before the commencement of this proceeding. This state is, therefore, the child's home state.

[Significant connection jurisdiction when there is no home state]

This court has jurisdiction to determine custody pursuant to UCCJA § 3(a)(2) and consistently with the PKPA, 28 U.S.C. § 1738A(c)(2)(B), the court having found that no other state has jurisdiction as the child's "home state" within the meaning of UCCJA § 2(5) and PKPA, 28 U.S.C. § 1738A(b)(4).

The parties presented evidence to establish jurisdiction. The court finds that the child was born in F1 where she resided for three months with her natural parents. The parents then moved to (this state) where the child lived for five months prior to the time this action for custody was filed. The child continues to live here with her mother. The father also resides here as do the child's paternal grandparents. The child, therefore, had no home state when this action was commenced. The court finds that it is in the child's best interest for this court to assume jurisdiction because the child and her parents have significant connections with the state and there is available in this state substantial evidence concerning the child's present and future care, protection, training, and personal relationships.

[Emergency jurisdiction][12]

The court has emergency jurisdiction pursuant to UCCJA § 3(a)(3) because the child is physically present in this state and has been [abandoned, subjected to or threatened with mistreatment or abuse, or is otherwise neglected or dependent]. [Court should set forth supporting facts.]

[Last resort (vacuum) jurisdiction]

This state has jurisdiction to make a child custody determination under UCCJA § 3(a)(4), and consistently with PKPA, 28 U.S.C. 1738A(c)(2)(D), because [it appears that no other state has jurisdiction under UCCJA § 3 or continuing jurisdiction under PKPA, 28 U.S.C. 1738A(d)] or [another state has declined to exercise jurisdiction because this State is the more appropriate forum to determine custody] and it is in the child's best interest that this court assume jurisdiction.

[Declining jurisdiction on inconvenient forum grounds]

State the basis of the court's jurisdiction. See above. Then add: The court finds that this state is an inconvenient forum under UCCJA § 7. The court further finds that [insert name of state] is a more appropriate forum to determine custody because [insert reasons, referring to factors set forth in § 7(c)]. Accordingly, this court [dismisses] [stays] this proceeding. If, however, [insert name of state] declines to exercise jurisdiction over custody of the subject child, this court shall exercise jurisdiction and determine custody. [If the forum is clearly inappropriate the court can order the petitioner to pay the costs of the proceedings, and necessary travel and other expenses, including attorneys' fees, incurred by other parties or their witnesses. Payment is to be made to the clerk of the court for remittance to the proper party.]

[Declining jurisdiction based on petitioner's unclean hands]

Declining jurisdiction to make an initial custody determination. This court declines to exercise jurisdiction to make an initial custody determination because petitioner has wrongfully taken the child from another state or has engaged in similar reprehensible conduct. [Court should describe the conduct that supports the decision to

decline jurisdiction.]

Declining modification jurisdiction. This court declines to modify a custody decree made by [insert name of State] because petitioner, unilaterally and without consent [improperly removed the child from the physical custody of the person entitled to custody][improperly retained the child after a visit or other temporary relinquishment of physical custody] [violated a provision of the custody decree]. [Court should set forth supporting facts.]

Attorneys' fees. The court orders petitioner to pay necessary travel and other expenses, including attorneys' fees, to respondent and [insert names of witnesses], incurred in connection with this proceeding.

Parties

All persons required to be joined as parties pursuant to UCCJA § 10 were ordered joined and were duly notified of the proceedings and of being joined as a party. The following persons were ordered joined as parties and were notified of the joinder. Notification was by registered mail, return receipt requested, and returned on the date which follows each name (or otherwise served in accordance with UCCJA § 5):

- Maternal grandparents X/X/XX;
- Paternal grandparents X/X/XX.

Notice and opportunity to be heard

The party was accorded full due process in that he was served with process in accordance with the law of this state (the law of the state where he was residing) and was given ample notice of the proceedings and a full opportunity to be heard.

The party was personally served with the complaint in this action pursuant to (list statutory citation, which may be § 5 of the UCCJA) with return of service dated ____ and filed with the court on ____. The party received notice of the custody hearing on ____which was (20) days in advance of the scheduled hearing. The party was present for the hearing, where he was represented by counsel.

Custody and visitation

Mother is awarded primary custody of the child and shall provide primary residence for the child. The father shall have visitation with the child at his residence every other weekend beginning (insert date). Visitation with father shall begin at 2:30 p.m. on Friday and shall end at 7:30 p.m. Sunday evening. The father shall have visitation from July 1 at 2:30 p.m. until July 31 at 7:30 p.m. Mother shall have unlimited telephone access with the child in July. The child shall alternate the following holidays with each parent:

1. New Year's Eve and Day
2. [Passover][Easter]
3. Memorial Day Weekend
4. Fourth of July Weekend
5. Labor Day Weekend
6. Thanksgiving
7. [Christmas][Chanukah]

The child shall spend holidays 1, 2, 4, and 6 with the mother in odd-numbered years and with the father in even-numbered years. The child will spend holidays 3, 5, and 7 with the mother in even-numbered years and with the father in odd-numbered years.

Parents may alter this schedule temporarily upon mutual agreement. They shall put each agreement for a temporary change in writing and shall both sign it. Note: Temporary changes are not enforceable; however, compliance with a temporary change that has been put in writing and agreed to by the parties cannot serve as the basis for a finding of contempt.

Grandparent visitation - (1) Maternal grandparents are hereby awarded visitation rights as follows. Visitation shall occur one weekend

per month beginning Saturday at 1:00 p.m. and ending Sunday at 1:00 p.m. This visit shall occur on the first weekend of the month the child would normally spend with the mother unless that weekend coincides with a holiday, in which case, it shall be the next weekend the child is scheduled to spend with the mother.

(2) Paternal grandparents are hereby awarded visitation rights as follows. Visitation shall occur one weekend per month beginning Saturday at 1:00 p.m. and ending Sunday at 1:00 p.m. This visit shall occur on the first weekend of the month that the child would normally spend with the Father unless that weekend coincides with a holiday, in which case, it shall be the next weekend the child is scheduled to spend with the father.

[Optional provisions]['Mother' should be substituted for 'father' as appropriate]

1. Restrictions on movement - The father is prohibited from removing the child from this country for any reason unless he first obtains the express written consent of the mother or receives advance permission from the court.

2. Surrender of passport - The father is hereby ordered to surrender the child's passport to the mother prior to the first visitation with the child. The visitation schedule shall not take effect until after the passport is surrendered. The mother shall provide the father with a written receipt for the passport and is ordered to retain the passport in a secure location. The mother is also required to file an Acknowledgment of Receipt of Passport with the court, with a copy provided to the father. This Acknowledgment shall inform the court of the date that the passport was surrendered. [The court may order the passport surrendered to the court, to an attorney, to the court clerk, etc., instead of to the other parent. The court may dispense with the requirement that the parent file an Acknowledgment with the court, if this is too burdensome. This paragraph would be modified accordingly.]

3. Posting of bond - The father is ordered to post a cash bond in the amount of [$5000] with the court. This bond shall be forfeited to the mother if the father removes the child from [the state] [the country] without securing advance written permission from the mother or the court.

Notify school personnel and individuals

The custodial parent is required to provide a copy of this order to the following individuals:

- The principal of the child's school;
- The child's teacher;
- The driver of the child's bus;
- The child's maternal and paternal grandparents;
- The child's maternal and paternal aunts and uncles;
- The child's after school day care provider.

Violating the terms of the order

A party who violates the provisions of this order may be held in contempt of court and punished accordingly. A violation of the provisions of this order may subject the violator to criminal prosecution under state and federal law.

RISK PROFILES OF ABDUCTION

Six profiles of abduction risk have been identified in the recent groundbreaking research on "Prevention of Parent and Family Abduction through Early Identification of Risk Factors.[13]" The profiles are descriptive of abductors and must be used with caution as a predictive device. The court should consider the reasonableness of the parent's concern about the abduction, any previous threats or actual abductions or custody violations, the degree of social support for the person who may abduct, and the person's entrenchment in the community. The court should hear evidence regarding specific planning activities, such as changing jobs, applying for passports, etc., because any planning activities

significantly increase the risk determined by the profile.

The six profiles of abduction risk, discussed below, are:

- when there has been a prior threat of or actual abduction
- when a parent is suspicious and distrustful due to belief abuse has occurred and has social support for the beliefs
- when a parent is paranoid or sociopathic
- when one or both parents are foreigners ending a mixed-culture marriage
- when the parents are disenfranchised but have family/social support.

Profile 1. When there has been a prior threat of or actual abduction.

When parents have made credible threats to abduct a child or have a history of hiding the child, withholding visitation, or snatching the child back and forth, there is obviously great distrust and a heightened risk of custody violation. This profile of abduction risk is usually combined with one or more of the other profiles, and in such instances other underlying psychological and social dynamics need to be understood and addressed. General indicators of imminent threat of flight with the child where other risk factors are also present are: (1) when a parent is unemployed, homeless and without emotional or financial ties to the area, and/or (2) when they have divulged plans to abduct and have the resources to survive in hiding or the support of extended kin and underground networks to keep themselves hidden.

There are a number of specific measures that can be taken when there is imminent threat or a history of prior abduction. The safeguards identified earlier in this chapter should be included in the order in these cases.

Profile 2. When a parent is suspicious and distrustful due to belief abuse has occurred and has social support for these beliefs.

Families that meet this criterion are characterized by one of the parents having a fixed belief that the other parent is dangerous to the child (either abusive, molesting or neglectful) without there being sufficient substantiating evidence for the court to take action on these allegations. Moreover, the parent is supported in these beliefs by an extended family or social network which can collude in a child abduction in order to "protect the child."

First, order that a prompt, careful and thorough investigation of the allegations be undertaken. During this investigative stage, precautions need to be taken to ensure that there is no ongoing abuse, or, alternatively, to protect an innocent parent from further allegations. Such precautions may include supervised visitation, especially if the child is very young, clearly frightened, or distressed and symptomatic in response to visits.

Along with the investigation, the alleging parent should be shown how to respond to the child and how to make accurate observations without confounding the evaluation process. Whenever possible, the concerned extended kin and other social support persons are also involved in this intervention. All relevant professionals involved with the family should be authorized by the parents to talk with one another so that they can support the family cohesively during the evaluation process and not incite anxiety with discrepant, premature conclusions.

As the data about the allegations and the child's symptomatic behavior are assembled by the investigating professionals (preferably with expertise in both child abuse and the dynamics of highly conflictual divorcing families), there should be a careful sifting through of the

evidence for a differential diagnosis and reasoned conclusions. All of these are to be shared in a timely manner with both parents and important supportive others.

In some rare cases, especially where there is severe psychopathology in both parents or their extended families, the child can be placed in the temporary care of a neutral third party with supervised visitation to both parents. This may help sort out who or what is fueling the extremely troubling, persistent claims of abuse.

Unsubstantiated allegations of abuse are usually not equivalent to proof of innocence of the accused. Rather, a huge degree of mistrust and anger is often the legacy of unproven accusations, which can shadow the fragmented divorced family for years, putting the child at risk for continued emotional, if not physical, abuse. A structure for rebuilding trust between parents and ensuring protection of the child needs to be put into place for the long term in these families.

This structure includes one or more of the following: (1) mandated counseling for one or both parents to ensure appropriate parenting practices where there has been poor judgment or unclear boundaries on the part of a parent; (2) appointment of a special master (coparenting coordinator and arbitrator) to help parents communicate and reality-test their distrust of one another, to monitor the situation and make necessary decisions in an ongoing way; (3) provision of long-term therapy for the child which offers a safe place for the child to sort through their realistic fears and phobias and to disclose abuse should it occur or recur; and (4) appointment of a guardian ad litem to represent the child in any ongoing litigation.

Profiles 3 and 4. When a parent is paranoid or sociopathic

These two profiles of abduction-risk require similar kinds of response by the family courts. Although only a small percentage of parents fit these profiles, these parents present the greatest potential risk of harm to the child.

In the case of the paranoid profile, parents hold markedly irrational or psychotic delusions that the other parent will definitely harm them and/or the child. Believing themselves to be betrayed and exploited by their ex-partner, these parents urgently take what they consider to be necessary measures to protect themselves and the child.

The psychotic parent does not perceive the child as a separate other person, but rather he or she is either experienced as fused with the self as a victim (in which case they take unilateral measures to rescue their offspring), or the child is viewed as part of the hated other (in which case the child can be precipitously abandoned or even destroyed). In general, the marital separation and the instigation of the custody dispute triggers an acute phase of danger, which can mount to the threat not only of abduction but also of murder/suicide.

In the case of the sociopathic parent, he or she usually has a long history of flagrant violations of the law and contempt for any authority, including that of the legal system. Relationships with other people are self-serving, exploitive, and highly manipulative. These people are also likely to hold exaggerated beliefs about their own superiority and entitlement and are highly gratified by being able to exert unilateral power and control over others. As with the paranoid personality, they are unable to perceive their children as having separate needs or rights so that their offspring are often used blatantly as instruments of revenge, punishment, or trophies in their fight with the ex-partner. The sociopathic parent believes that domestic violence and child abduction can be perpetrated with impunity.

To the extent that a parent meets either the criteria for paranoid psychosis or severe sociopathic personality disorder, traditional

therapy or mediation is an inappropriate and possibly dangerous intervention. The family court needs to have mechanisms and procedures to protect the child in cases where there is serious delusional thinking or dangerous sociopathy in one of the parents. If the disturbed person is the noncustodial parent, visitation should be supervised in a facility with high security, and the other parent should be counseled about how to devise a safety plan for themselves and the child for all other times.

Visitation with the child may need to be suspended if there are repeated violations of the visitation order; if the child is highly distressed by the contact; or if the parent uses his or her time with the child to denigrate the other parent, obtain information about the other parent's whereabouts, or transmit messages of physical harm, death threats or child abduction.

Reinstatement of access to the child may be permitted after clear conditions are met by the offending parent, and upon careful evaluation and recommendation by a designated agency (child protective or family court services). If the evaluation determines that reinstatement of parent-child contact is appropriate, any "in person" contact should typically begin with supervised visitation, preferably in the presence of a mental health professional.

If the disturbed person is the custodial or primary care person for the child, extreme care needs to be taken in order that the litigation and evaluation process does not precipitate abduction or violence. The family court may need to obtain an emergency psychiatric screening, and use emergency *ex parte* hearings that might result in the temporary removal of the child to the other parent, or to a third party, while a more comprehensive psychiatric and custody evaluation is being undertaken. In these emergency situations there needs to be some waiver of confidentiality permissible that will allow all relevant professionals to share information about the case with one another. The psychotic parent may need legal representation and an attorney for the child may also need to be appointed in any subsequent litigation.

Where there is blatant disregard of custody orders and violations of restraining orders by a sociopathic parent, the court should prosecute, fine or impose jail time to send a clear message that it will not tolerate contempt of its authority. A coparenting coordinator with arbitration powers (as stipulated by parents and ordered by the court), who is prepared to testify in court, may be needed over the longer term to monitor the family situation for any further threat of abuse or abduction. Only when these control mechanisms are in place can it be expected that counseling and therapy for the child will be beneficial.

Profile 5: When one or both parents are foreigners ending a mixed-culture marriage.

Parents who are citizens of another country (or who have dual citizenship with the U.S.) and also have strong ties to their extended family in their country of origin have long been recognized as abduction risks. The risk is especially acute at the time of parental separation and divorce, when they feel cast adrift from a mixed-culture marriage and need to return to their ethnic or religious roots for emotional support and to reconstitute a shaken self-identity. Often in reaction to being rendered helpless, or to the insult of feeling rejected and discarded by the ex-spouse, a parent may try to take unilateral action by returning with the child to their family of origin. This is a way of insisting that their cultural identity be given preeminent status in the child's upbringing.

Culturally sensitive counseling that will discern and address these underlying psychological dynamics is needed to help these parents settle their internal conflicts. They also have to be reminded of the child's need for both

parents, and how it is important to provide opportunities for the child to appreciate and integrate his or her mixed cultural and/or racial identities.

Often the parent will have idealized their own culture, childhood and family of origin, and may need to be encouraged to adopt a more realistic perspective. It may also be necessary to provide the homesick parent with alternative emotional support and financial assistance to stay in the area; or to help them make a custody plan that allows for visiting their homeland with the child, with the approval of the other parent.

If their country of origin is not a party to the Hague Convention on the Civil Aspects of International Child Abduction, the stakes are particularly high, as recovery can be difficult, if not impossible. One possible solution is for the parents to file the same custody agreement (which also specifies jurisdictional authority) in both the U.S. courts and those of the other country, to increase the likelihood the order will be enforced in both countries. A number of other controls can also be put in place as precautions (such as holding passports and posting bonds), as discussed earlier in this chapter.

Profile 6: When the parents are disenfranchised but have family/social support.

A large group of potential abductors are parents who feel disenfranchised by the judicial system. Many of these parents are economically indigent and poorly educated. They lack knowledge of custody and abduction laws and cannot afford legal representation or psychological counseling. Those who have extended family or other social, emotional and economic support in another geographical community may be abduction risks. Many parents do not access the court system, because they can't afford to, they are unaware of the need to, or they do not believe it is responsive to their values or their plight. Parents belonging to certain ethnic, religious, or cultural groups that hold views about child rearing contrary to the prevailing custody laws (emphasizing the rights of both parents regardless of gender) often prefer seeking resolution of custody disputes outside the courts, sometimes by abducting or snatching back and forth.

Parents having had a transient unmarried relationship often view the child as the property of the mother and are supported in this belief by extended family. Finally, victims of domestic violence are at risk for abducting, especially when the courts and community have failed to take the necessary steps to protect them from abuse or to hold the abuser accountable. In these cases, the violent partners may be successful in obscuring the facts about the abuse and in activating the abduction laws to regain control of their victims.[14]

Of all the profiles of risk, these disenfranchised parents have the best prognosis for an effective preventive intervention, limited only by the lack of resources in the community available to help them. First, they need legal counseling and advocacy, *i.e.*, access to information and education about custody and abduction laws, and about the rights of both parents even where there has been no marriage or sustained relationship between them. If unable to afford representation in court, they need a user-friendly court system, a cooperative clerical staff, and support persons who will accompany them through the legal process and language translation services.

Second, they need access to affordable psychological counseling services for themselves and their children that will help them manage their emotional distress and vulnerability and strengthen their parenting capacities at the time of separation and divorce. Third, they need family advocates who can help them bridge the cultural, economic and logistical chasms to other community resources, such as domestic violence

services, substance abuse monitoring and counseling, training and employment opportunities, and mental health services. Finally, important members of their informal extended social networks may need to be included in any brief intervention in order to guide their efforts to support and protect the disenfranchised family, fractured by separation and divorce, over the long-term process of abduction prevention and family restructuring.

Likelihood of return

If a child is abducted, how likely is it that the child will be promptly recovered and returned and that the court order will be promptly enforced? By considering the obstacles to the location, recovery and return of the child,[15] the court can assess the likelihood of the child being returned promptly, if abducted. Preventive measures are especially needed when, in the event of an abduction, numerous difficult obstacles exist to the prompt location, recovery, and return of the child.

Obstacles are greater when the abduction is to or from a state or country not covered by laws which would facilitate the apprehension of the abductor and the recovery of the child. If the state's criminal custodial interference statute would not apply to the case in the event of an abduction, it presents a major obstacle.

Examples: Soon after the court awards the parents joint custody, the father disappears with the child. An abduction by a joint custodial parent is not a criminal violation under the state's law. An unwed father, with no custody order, tries to locate his child. Precustodial abductions are not a criminal violation under the state's law. Because criminal custodial interference is a misdemeanor offense in this state, law enforcement makes no effort to locate the child. The courts in the state in which the child resides claims not to have jurisdiction in the criminal custodial interference case because the retention of the child after a visitation took place in another state.

If the state does not have flagging statutes[16] that mandate that birth and school records of missing children be flagged and that law enforcement be notified if an abductor requests the records, it can present an obstacle to locating the child.

If an international abduction is suspected, chances for return of the child are better if the country is a party to the Hague Convention on the Civil Aspects of International Child Abduction. However, if the application of the Hague Convention has not led to prompt returns in other cases, the seeming advantage of the Convention may be lost, presenting an additional obstacle.

If the country is not a party to the Hague Convention, the child may never be returned, although this varies somewhat depending on the country. Countries with family laws that have a strong religious base and give preferential rights to one gender over another, such as Islamic countries, are the most problematic. No abducted children have been returned from some of these countries. In other cases, for instance Jordan, returns to the U.S. have only been possible with the highest level of diplomacy and particularly heinous circumstances surrounding the abduction, such as the case in which the father murdered the mother and abducted the two children from New Jersey. He was tried in Jordan for the murder charge, and the children were returned to the U.S.

If there is no extradition treaty covering criminal custodial interference cases with a particular country or the state is unwilling to pay for extradition, the obstacles to recovering the child are great. It is also an obstacle when there is an extradition treaty, but the actual practice is not to extradite.

If the courts in the country to which the child

is likely to be abducted do not provide the left-behind parent an equal chance at custody, then the child may not be returned. For example, the courts may be hostile to American parents or may not give equal rights to women in custody disputes.

If citizenship laws in a parent's home country provide that person, and perhaps the children, with dual citizenship, the parent can obtain a passport even if a U.S. passport has been denied.

When local law enforcement agencies are not pro-active, they become obstacles to locating, recovering, and returning the child. According to research, this continues to be a problem in communities across the United States. Obstacles exist when local law enforcement delay or refuse to take missing child reports or to enter missing children and their abductors into the National Crime Information Center (NCIC), despite the mandate of the National Child Search Assistance Act. Additional obstacles exist when local law enforcement delay or refuse to proceed with investigations as to the whereabouts of parentally abducted children or to obtain Unlawful Flight to Avoid Prosecution (UFAP) warrants when felony charges exist and the abductors are suspected of having left the state. Further obstacles exist if local law enforcement avoid involvement in the civil enforcement of child custody orders, when directed to do so by the court.

Obstacles are more likely to exist when the abduction is premeditated and well-supported or when the left-behind parent has few resources. When an abduction is methodically planned and resources exist to sustain it, it becomes more difficult to locate and recover the child. The left-behind parent is handicapped if he or she cannot afford to bring an enforcement action (possibly involving attorneys in two states or countries), to hire a private investigator, or to cover travel expenses related to recovery and return. If the left-behind parent needs to take time off work due to stress and recovery efforts, financial resources and stability may be further diminished.

Potential harm to the child

Clearly it is not in the best interests of children to be abducted. However, the degree of harm that a child may experience in an abduction depends on numerous variables. These include the relationship of the child to the abducting parent, the consequences of the rupture of the relationship of the child with the left-behind parent, the degree of stability or lack thereof provided by the abducting parent, the degree of familiarity or lack thereof of the new surroundings, etc.

At the least harmful level, the abduction may be experienced as a relocation that cuts off a child's relationship with a parent who was abusive and requires the child to adjust to new peers, school, and community. The most harmful situations involve abductions by parents who are severely disturbed and abusive, including those who may kill the child and themselves. In some cases,[17] child protective services in a new state have placed abused children in foster care, not knowing that the other parent has been searching for them.

Conclusion

There are no precise predictive measures that can determine for certain that a specific parent will abduct his or her child. However, preventive measures should be granted when a risk for abduction exists. More restrictive preventive measures may be warranted when the risk for abduction is higher, when obstacles to recovering the child would be difficult to overcome, or when the conditions of the abduction are likely to be particularly harmful to the child.

Endnotes

1. The court should insert appropriate UCCJA state law citation here, and in all other places where reference is made to the Uniform Act.

2. Some states, by statute, permit grandparents to seek visitation, either in divorce or custody proceedings between parents or through independent actions. *See* Patricia Hoff et al, NATIONAL CENTER ON WOMEN AND FAMILY LAW, INTERSTATE CHILD CUSTODY DISPUTES AND PARENTAL KIDNAPPING: POLICY, PRACTICE AND LAW S2-3 to S2-4 (Supp. 1990).

3. *See* the Model Joint Custody Statute adopted by the American Bar Association in 1989, which states "[j]oint custody is inappropriate in cases in which spouse abuse, child abuse, or parental kidnapping is likely to occur."

4. *Id.* § 3(c).

5. *See* Patricia Hoff et al, NATIONAL CENTER ON WOMEN AND FAMILY LAW, INTERSTATE CHILD CUSTODY DISPUTES AND PARENTAL KIDNAPPING: POLICY, PRACTICE AND LAW S8-14 - S8-16 (Supp. 1990).

6. *See, e.g.*, Brewington v. Serrato, 336 S.E.2d 444 (N.C. Ct. App. 1985) (court upheld severe restrictions on visitation -- in custodial parent's home -- based on trial court's specific findings of fact that the non-custodial parent had previously taken the child to Texas under false pretenses and refused to return the child to North Carolina.); Frenke v. Frenke, 496 N.Y.S. 2d 521 (A.D.2 Dept. 1985) (Father's visitation to be supervised pending hearing on the issue of whether supervised or unsupervised visitation is in child's best interest in light of prior abduction and child's unwillingness to attend unsupervised visits).

7. *See, e.g.*, People v. Beach, 194 Cal. App. 3d 955, 240 Cal. Rptr. 50 (Ct. App. 1987) (threatened abduction from state sufficient for exercise of emergency jurisdiction and 'no removal from state' order); Mitchell v. Mitchell, 311 S.E.2d 456 (Ga. 1984) (restrictions on removal of children from country upheld based on findings that father would have no means of enforcing Georgia order if mother took children to United Arab Emirates, but restrictions on removal from state violated state case law); Soltanieh v. King, 826 P.2d 1076 (Utah Ct. App.1992) (risk of flight to Iran warrants order restricting father from removing child from the country.).

8. *See, e.g.*, Rayford v. Rayford, 456 So. 2d 833 (Ala. Civ. App. 1984) (trial court required noncustodial father to post $5000 bond to insure his compliance with visitation orders where the father had violated a visitation order and concealed the children for three years); Bullard v. Bullard, 647 P.2d 294 (Haw. Ct. App. 1982) (court upheld order requiring father to execute $2500 bond conditioned on the return of the child to Hawaii after visitation, while noting that bond requirements are viewed with disfavor and should only be imposed if there is substantial likelihood that the order will be violated.); Caldwell v. Fisk, 523 So. 2d 464 (Ala. Civ. App. 1988) (Trial court was justified in forfeiting father's bond due to his failure to comply with prior court orders and requiring him to post a new bond to guarantee compliance with the present orders).

9. *See, e.g.*, Mitchell v. Mitchell, 311 S.E.2d 456 (Ga. 1984) (The court enjoined both parents from procuring or applying for passports for the children without the written agreement of the other parent.); Al-Zouhayli v. Al-Zouhayli, 486 N.W.2d 10 (Minn. Ct. App. 1992) (mother directed to retain child's passport and father prohibited from applying for a replacement passport without mother's written consent. The father was a national of the U.S. and Syria and had family ties in Saudi Arabia.). Requests to prevent issuance of a passport, accompanied by a copy of the court order, should be sent to the U.S. Department of State, Office of Passport Services, 1111 19th Street, N.W., Suite 260, Washington, D.C. 20522-6705; Telephone--(202)955-0377; Fax--(202)955-0230.

10. *See, e.g.*, Commonwealth ex rel. Zaubi v. Zaubi, 423 A.2d 333 (Pa. 1981) (Grandparents cited for contempt for assisting their son in thwarting a court order); Hendershot v. Hadlan, 248 S.E.2d 273 (W. Va. 1978) (paternal grandparents held in contempt for aiding their son in violating a court order).

11. This sample order is not intended to be comprehensive. It does, however, contain examples of the types of provisions discussed above.

12. If emergency jurisdiction is founded on the child being abandoned, or threatened with or subjected to mistreatment or abuse, the order should also state that "jurisdiction is exercised consistently with PKPA, 28 U.S.C. 1738A(c)(2)(C)." An order based on emergency jurisdiction should be temporary, for a specified short period of time, and should direct the petitioner to petition for custody in a court with jurisdiction to make or modify permanent orders.

13. This section is by Dr. Janet Johnston and Dr. Linda Girdner, based on their research entitled "Prevention of Parent and Family Abduction through Early Identification of Risk Factors," funded by the Office of Juvenile Justice and Delinquency Prevention under grant number 92-MC-CX-0007, awarded to the American Bar Association Fund for Justice and Education and carried out collaboratively by the ABA Center on Children and the Law and the Wallerstein Center on the Family in Transition. Copies of the final research report will be available in 1997 through the Juvenile Justice Clearinghouse at 1-800-638-8736 or from Dr. Linda Girdner at 202-662-1722.

14. See Chapter 9 for further discussion of domestic violence.

15. This section is by Dr. Linda Girdner, based primarily on Final Report: Obstacles to the Recovery and Return of Parentally Abducted Children, eds. Linda Girdner and Patricia Hoff (Washington, D.C.: United States Department of Justice, OJJDP 1993). The work was carried out by the ABA Center on Children and the Law under cooperative agreement number 90-MC-CX-K001 awarded to the ABA Fund for Justice and Education. The Research Summary, Final Report, and Appendices are available from the Juvenile Justice Clearinghouse at 1-800-638-8736.

16. About half of the states have statutes requiring a missing child's school records and/or birth certificate be flagged. Flagging statutes aid in locating an abducted child by requiring that law enforcement be notified whenever a request for a missing child's school record or birth certificate is made.

Chapter 8
Enforcing Child Custody Determinations under the UCCJA and the PKPA

Summary

This chapter explains the duties to enforce child custody determinations made by another state consistently with the UCCJA and PKPA. (Enforcement of foreign custody decrees is the subject of Chapter 10).

CHECKLIST

The duty to enforce

1. Did the court that made the custody determination for which enforcement is sought exercise jurisdiction in accordance with the provisions of the UCCJA and PKPA?

2. Were the parties to the proceedings given notice and opportunity to be heard?

- Was service of process made in accordance with the provisions of the UCCJA?
- Did the party have actual notice of the proceedings?
- Was service by publication? Was this justified?
- Did the party have an opportunity to be heard?

3. Has the decree been modified by a court that exercised jurisdiction in accordance with the UCCJA and PKPA?

4. Is there a custody proceeding pending in another jurisdiction in compliance with the UCCJA and PKPA?

The enforcement action

5. What actions can the judge entertain for enforcement of a custody determination?

- Original action to enforce or grant full faith and credit.
- Contempt action.
- Petition for Writ of Habeas Corpus.
- Writ of Mandamus or Prohibition.

6. What can the judge do to prevent a parent from fleeing from the jurisdiction with the child before an enforcement proceeding?

- Pick up orders

7. Must the court have personal jurisdiction over the child and both contestants to enforce a custody determination?

8. What information should be filed with the court in any enforcement action?

9. Who has the burden of proof in an enforcement action?

10. What is the standard of proof in an enforcement action?

11. Must the judge enforce a punitive decree?

12. Can the judge consider the best interests of the child in an enforcement proceeding?

13. Can the judge stay enforcement of an order entitled to full faith and credit?

14. What assistance can the judge request from a judge in another state to help enforce an order?

Applicable statutes

FEDERAL

PKPA 28 U.S.C. § 1738A(a) [Full faith and credit given to custody determinations]

STATE

UCCJA § 12 [Binding Force & Res Judicata Effect of Custody Decree]
UCCJA § 13 [Recognition of Out-of-State Custody Decrees]
UCCJA § 15 [Filing & Enforcement of Custody Decree of Another State]

Duty to enforce

One of the most important functions of the UCCJA and PKPA is to establish when a court is mandated to enforce a child custody determination made by a court of another state consistently with the provisions of the statutes. The duty to enforce covers custody and visitation orders.

The UCCJA § 13 directs a state court to recognize and enforce an initial or modification decree of another state, if the court which entered the custody decree assumed jurisdiction under statutory provisions substantially in accordance with the UCCJA or the decree was made under factual circumstances meeting its jurisdictional standards, and the decree has not been modified.

Similarly, the PKPA mandates the appropriate authorities of every state to enforce according to its terms, and not modify except as provided in subsection (f) of the Act, any custody determination made consistently with its provisions by a court of another state. 28 U.S.C. 1738A(a).

Since the duty to enforce applies to "State" courts and extends to decrees made by other "States," it is important to note the definition of "State."[1] Both the UCCJA and the PKPA define "State" to mean a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a territory or possession of the United States. UCCJA § 2(10) and PKPA 28 U.S.C. § 1738A(b)(8).

The PKPA must be applied in all of the noted jurisdictions. The UCCJA has been adopted in all 50 states, the District of Columbia and the Virgins Islands, and, therefore, binds courts in those jurisdictions. UCCJA § 23 requires state courts to enforce foreign custody o5rder. See Chapter 10.

Was the decree for which enforcement is sought made in accordance with the provisions of the UCCJA and PKPA?[2]

To determine whether the court which entered the initial or modification decree had jurisdiction to do so consistently with the UCCJA and PKPA, the court can look to several sources. The most common of these include:

- The custody decree;
- The pleadings filed by the parties;
- Information gathered through communication with the judge that entered the decree;
- Testimony taken from the parties.

Looking at the custody decree

The most logical starting place is the custody decree itself. A copy of the decree should have been filed with the registry of out-of-state custody decrees,[3] if one exists in the state; with the clerk of the court;[4] or with the enforcement petition. If, however, a copy of the decree has not been filed, the court can request the clerk of the court where the decree was issued to certify and forward a copy.[5] A well written custody determination will state not only the legal basis *(i.e.*, "home state" jurisdiction) for assuming jurisdiction, but also the factual basis supporting that conclusion, *(e.g.*, the child had resided in the state with both parents for two years prior to the commencement of the proceeding).

If the custody order states that the issuing court found it had jurisdiction in accordance with the UCCJA and PKPA and gives the basis for

this finding, then there is a high probability this determination will have a *res judicata* effect. The *res judicata* effect would preclude a later court from reconsidering whether the issuing court did, in fact, have jurisdiction if both parties had been notified of the proceeding and been given an opportunity to be heard.[6]

When the issuing court fails to state the basis for its jurisdiction, the court must look elsewhere for guidance.

Looking at the pleadings filed by the parties, and in particular, the "Information Under Oath," UCCJA § 9

There are two series of pleadings that can be helpful to the court in assessing whether the issuing court exercised jurisdiction according to the jurisdictional provisions of the UCCJA and PKPA. First, there are the pleadings filed in conjunction with the enforcement action. If the pleadings filed by both parties admit jurisdiction in the issuing court, and that basis is consistent with the UCCJA and PKPA, then the court need inquire no further. However, if the parties disagree as to whether the issuing court had jurisdiction, the court must continue its inquiry.

The original pleadings filed with the court that made the decree can also be reviewed, and in particular the "Information Under Oath" required to be submitted in or with the first pleading. UCCJA § 9. The UCCJA requires courts to preserve these pleadings until the child reaches a certain age,[7] and to make them available to the court of another state upon request. These pleadings should contain all the information the original court needed to determine its custody jurisdiction. Access to this information helps the court assess whether the court that issued the decree had jurisdiction to do so in accordance with the UCCJA and PKPA.

Communicating with the issuing court

The court is not restricted to a scrutiny of documents. There is nothing in either the UCCJA or the PKPA to prevent the court before which the enforcement action is pending from communicating directly with the court that issued the decree. In fact, both Acts are premised on judicial cooperation. This allows the enforcing court to ask the decree court for assistance in ascertaining the basis for that court's exercise of jurisdiction.[8]

Taking testimony from the parties

The court may also take testimony from the parties to gain information about the decreeing court's jurisdiction. The testimony should be solicited on the record and in the presence of both parties.

Was the court's exercise of jurisdiction consistent with the provisions of the UCCJA and the PKPA?[9]

A court can exercise jurisdiction under the UCCJA and issue a custody determination that will not be entitled to enforcement under the PKPA. It is possible, for example, for a court to exercise initial jurisdiction based on significant connections when there is another state that is the child's "home state." If this occurs, the resulting decree will not be entitled to full faith and credit because of the PKPA's "home state" jurisdiction priority in initial custody cases.[10] Under the PKPA, an initial custody determination made by a court that does not have home state jurisdiction is entitled to full faith and credit only if there is no home state or the home state relinquishes jurisdiction.

Were the parties to the proceedings given notice and opportunity to be heard?

Both the UCCJA and the PKPA require that the litigants be given notice and opportunity to be

heard before a custody determination is entered.[11] Consequently, a custody decree entered by a court where these due process rights of a party were not adequately protected will not be enforceable. The basic elements of due process that must be met are proper service and notice and opportunity to be heard.[12]

The due process concepts of service of process, notice and opportunity to be heard are inextricably intertwined in the UCCJA. The purpose of the service of process is to give notice of the proceedings and the purpose of notice is to give a party an opportunity to appear and participate in the proceedings. Therefore, a failure to properly serve a party or give notice in a timely or adequate fashion so the party can participate in the proceedings can render a resulting order unenforceable.

The issue of inadequate service or notice typically will be raised by the party opposing enforcement. The judge will evaluate the adequacy of service and notice in much the same way that he or she evaluated the assumption of jurisdiction: (1) by scrutinizing the existing custody order and the pleadings filed in both the initial action and the enforcement action, (2) by communicating with the court in the other jurisdiction, or (3) by questioning the parties.

If the court order for which enforcement is sought states that the parties were given adequate notice and opportunity to be heard, or that the party challenging enforcement knowingly waived notice and submitted to the jurisdiction of the court, and if notice and opportunity to be heard were issues decided by the court, then *res judicata* would preclude relitigation of these issues. The enforcing court would be precluded from revisiting them.

If, however, the court order was silent and a party claimed he or she had been unable to participate in a hearing because of lack of notice or inadequate notice, and the evidence supported the claim, then the court could refuse to enforce the resulting custody decree.

To make this decision, the court should consider whether service of process was made in accordance with the provisions of the UCCJA for the state where the party was located and for the state where the action was filed. If the answer is 'yes' to both, then the service of process is adequate. If the answer is 'yes' only for the state where the action was filed, there may be a problem. Some courts have decided they need not enforce decrees where service of process was not made pursuant to the law where enforcement is sought.[13] However, a court faced with deciding enforcement should consider the specific wording of UCCJA § 5(a).

Is notice by publication acceptable?

Notice by publication is an option of last resort under the UCCJA as it was originally drafted.[14] The bulk of the states provide for it when other means of notice are ineffective. A judge can therefore enforce a custody determination based on notice by publication. However, this should be done only after a scrutiny of the reasons why there was no actual notice of the proceedings.

If all other means of service of process were ineffective because the party avoided process, or could not be found because he or she absconded with a child and went into hiding, then publication is appropriate. In these cases, the absconding parent has deliberately taken steps to avoid receiving notice and should not be allowed to benefit from his or her own actions.

If, however, service by publication is used in lieu of other methods of service that could have been effective with diligent effort, it is appropriate to deny enforcement.[15]

Did the party have actual notice of the proceedings?

If a person receives actual notice of the proceedings with an adequate opportunity to participate, that should satisfy the notice

provisions of the statute.[16] A refusal to enforce a determination made when a party had actual and adequate notice of a custody proceeding, but when technical service failed to fully conform to statutory requirements, would frustrate the purposes of both the UCCJA and the PKPA.

Nonetheless, a total disregard for the requirements of service of process and notice cannot conform to due process. Therefore, the judge should, upon request of a party, investigate the circumstances surrounding the actual service and notice unless *res judicata* precludes this.[17] This will require considering the amount of notice actually provided as well as the type of notice provided. State statutes and/or rules generally state what constitutes adequate notice. UCCJA § 5 recommends a minimum of [10, 20] days before a hearing in the state.[18] The amount of time can vary, but it should always include sufficient time to permit the party to be physically present, should the party so desire.

Did the party have an opportunity to be heard?

Having an opportunity to be heard, a critical element of due process, does not mean the party must actually have been heard. If a party is given adequate notice of proceedings and is present for them, but elects not to participate, his or her later argument that he or she did not have an opportunity to be heard is without merit. Indeed, if a party receives adequate notice and elects not to be present, the opportunity to be heard existed and it was the party's choice to waive it. In such a case, the requirements of due process have been met, even though the party, in fact, was not heard. The focus must be on "opportunity," not on "heard."[19]

Has the decree been modified by a court exercising jurisdiction in accordance with the UCCJA and PKPA?

If the custody determination one party seeks to have enforced has been superseded by a later decree issued by a court with jurisdiction to modify under the PKPA, then the first decree is no longer entitled to enforcement.

How can the judge determine if the decree for which enforcement is sought is the most current?

When two parties are involved in an enforcement proceeding, a judge can normally expect the party opposing enforcement to use as a defense the existence of a subsequent order.

However, when a party is seeking enforcement *ex parte*, this check is missing. Therefore, it is particularly important for the judge to determine whether the decree for which enforcement is sought is the most recent one issued by a court having jurisdiction in accordance with the UCCJA and PKPA.

To do this, the judge can contact the court that issued the order one party is trying to enforce to ask if that court is aware of any subsequent orders. In addition, the judge can take sworn testimony from the party seeking enforcement, asking whether any subsequent custody orders have been entered by any court in any jurisdiction.

If any doubt remains about the currency of the decree for which enforcement is sought, the judge should consider making any *ex parte* enforcement order conditioned on the assumption that no subsequent order has been issued. If a subsequent order is produced, enforcement should be held in abeyance pending further court review.

Is there a custody proceeding pending in another jurisdiction in compliance with the PKPA and UCCJA?

If a judge hearing an enforcement petition is informed of a pending modification proceeding in

another state, the judge should communicate with the other court to determine which action should go forward. Although the PKPA mandates interstate enforcement of the custody determination according to its terms, the state with modification jurisdiction according to the Act has the power to change the order. If a modification is imminent, the enforcing court may await the outcome of the modification proceeding before entering an order. If, on the other hand, a modification petition has been filed, but a hearing is not likely to occur soon, the court should enforce the existing order according to its terms.

The enforcement action

What actions can the judge entertain for enforcement of a custody determination?

Courts have permitted litigants wide latitude in enforcing existing custody orders. This is consistent with the comment to UCCJA § 15 that a decree, once filed in another state, is enforceable by any method available under the law of the state. Among the actions parties have filed to enforce orders are the following:

- Action to enforce or grant full faith and credit

This has been a commonly accepted action in many jurisdictions to enforce existing custody decrees.[20] This can be filed in the original decree state, or as an original action in a second state. Thus, it can be used effectively either in a state with continuing jurisdiction or in a state that can only consider enforcement of the existing decree.

- Contempt action

While a contempt action is not an enforcement action *per se*, it can be used to secure compliance with a custody decree. Typically, a contempt action is brought to punish a party for the willful violation of a court order. Generally, the contemptuous party is given the opportunity to purge the contempt by complying with the order. In this fashion, compliance is achieved.

The court always has the power to hold a party in contempt for violating one of its own orders.[21] However, there may be times when the court should refrain from doing so.[22] For example, if the court that issued the decree no longer has jurisdiction to modify it, would it make more sense for an enforcement action to be filed where the child is located? From a practical standpoint, if the court no longer has jurisdiction to modify the decree, it is likely that neither the child nor a party remains in the state. Therefore, it would be hard to enforce a finding of contempt.

Can the court hold a party in contempt of a court order issued in another state? Technically, the UCCJA would seem to permit this. Section 15 specifically provides that when a certified copy of a custody decree from another state is filed with a court, it is to be treated as a custody decree of the state. Therefore, a person who violates it can be held in contempt wherever the decree is properly is filed.

Can a contempt proceeding be brought against third parties who assist a party in violating it? If the third parties knew of the existence of the order and knowingly aided a party in violating it, they can be held in contempt.[23]

- Petition for writ of habeas corpus

A petition for a writ of habeas corpus is a common procedure used to enforce custody decrees. The procedure is recognized in every state[24] and has been widely used to enforce custody.[25]

The most significant advantage to seeking habeas relief to enforce the provisions of an existing custody order is speed. Traditionally, judges have expedited habeas proceedings. This is of particular value when interference with

visitation is alleged. The habeas proceedings should be limited to enforcement. The court should not allow it to become a proceeding for modification.[26]

When ruling on a petition for a writ of habeas corpus the judge should be sure the petition complies with state law. This routinely requires (1) the petition be filed in the lowest court of record in the jurisdiction and (2) that no application for relief has been made to, or refused by, a court superior to the one where the petition has been filed.

- Writ of mandamus or prohibition

These extraordinary writs are not available in every jurisdiction and, where they are, are strictly limited by the parameters of state law. Traditionally, these writs are filed in the appellate courts and ask the appellate courts either to order the lower court to take a particular action (*i.e.*, to exercise jurisdiction) or to prohibit a particular action (*i.e.*, to refrain from exercising jurisdiction).[27]

What can the judge do to prevent a parent from fleeing from the jurisdiction with the child before an enforcement proceeding?

A parent may be justifiably concerned about giving notice of an enforcement proceeding to a parent whose likely reaction would be to flee with the child, hide the child, or otherwise place the child at risk or imminent harm. This scenario is predicable when the child has been abducted and hidden from the searching parent. Once the abductor-parent learns that his or her whereabouts have been discovered, he or she may disappear again with the child rather than risk losing custody at an enforcement hearing. A parent who has been charged with custodial interference and faces criminal prosecution also has a strong incentive to flee.

When a petitioner-parent makes a strong showing to the court that a respondent to an enforcement action, upon receiving notice of the proceeding, is likely to flee the jurisdiction with the child, conceal the child from the petitioner or the court, or place the child in imminent danger, the court can temporarily waive notice of the enforcement action and order the immediate pick up of the child.[28]

Once the child is taken into physical (sometimes called 'protective' custody), the respondent-parent is then promptly served with notice of the enforcement hearing. The hearing should be set to take place as soon thereafter as possible, ideally within 24 to 48 hours. Pending the hearing, the court can order the child placed with the petitioner-parent, or make any other placement warranted by the circumstances.

What information should be filed with the court in any enforcement action?

The judge will want the same information in an enforcement action that he or she receives in an initial custody or modification proceeding.

This should include:

- The information required by UCCJA § 9 to be submitted under oath;[29]
- A certified copy of the custody decree for which enforcement is sought;
- The basis for the exercise of jurisdiction by the court which issued the decree, if known;
- Whether the other party was given adequate notice of the proceedings and an opportunity to be heard, if known;
- How the provisions of the existing decree have been violated.

If this information does not appear in the initial pleadings, the judge should request the parties to submit supplemental pleadings or provide the information through testimony under oath.

Who has the burden of proof in an enforcement action?

In any action to enforce a custody determination, the party seeking enforcement has the initial burden of proof. He or she must introduce (1) evidence to show the existence of a valid custody order[30] and (2) evidence to show a violation of that order. The first can be demonstrated by filing a certified copy of the custody order with the court along with an affidavit stating that no subsequent decree exists that modifies it. The second can be shown by affidavit recounting the nature of the violation. The burden then shifts to the opposing party, who can attempt to prove that the issuing court was without jurisdiction or that notice and opportunity to be heard were not given.

What is the standard of proof in an enforcement action?

The standard of proof applied in an enforcement action is determined by state law.

What kind of assistance can the judge request from a judge in another state to enforce an order?

If the enforcement action has been filed in a state where the violator and child are not located, the judge may ask a judge in the state where they are located to order the person to appear in the state where the action was filed, either alone or with the child, and that judge has the statutory authority to do so.[31]

This kind of judicial assistance gives an enforcement procedure teeth. For several reasons, many of which are economic, it may be difficult for a party to file an enforcement action where the violating party is located. When judges rely upon these provisions to compel the violator to appear in the jurisdiction where the enforcement action is pending with the child, costs to the party seeking enforcement can be reduced, and enforcement made more certain.[32] This could serve as a deterrent to violations of custody orders.

Must the judge enforce a punitive decree?

From time to time a court with jurisdiction to enter a custody decree will enter what appears to be a punitive decree. A punitive decree is one where the award of custody is based upon a desire to punish a party for wrongdoing.[33] For example, M is awarded custody of the child in F1, with visitation to F. M moves, with the consent of F, to F2. After three years, M refuses to permit the visitation as originally ordered. F then asks for custody, and the court in F1 orders the change because of M's interference with custody. The change in custody, made to punish M for her conduct, is punitive.

What should a judge do when asked to enforce a punitive decree entered by the court in F1? There is only one choice permitted by the UCCJA and the PKPA. If the court does not have jurisdiction to modify the F1 decree in accordance with the UCCJA and the PKPA, it must enforce it.[34] However, the judge can encourage the party who has been punished either to appeal the F1 decree in F1, if an appeal would still be timely, or to seek modification of the custody decree in F1.

Further, a judge asked to enforce a punitive decree should consider communicating directly with the judge that entered the determination. Perhaps, two "cooler" judicial heads can craft an order bounded by the UCCJA and the PKPA that will serve the child's best interest, free from the emotional turmoil that may drive a parent's conduct.

Judges should avoid entering punitive decrees. If the court has jurisdiction to modify an existing custody award, the only standard it should use in determining or redetermining

custody is the best interests of the child. Punishment of a parent is not an acceptable basis for changing custody.

Can the judge consider the best interests of the child in an enforcement proceeding?

The best interest of the child is a standard to be applied in awarding custody. It is not to be considered when enforcing an existing decree. Indeed, a consideration of the best interests of the child is likely to convert an enforcement proceeding into one for modification.

The enforcement proceeding should be limited to a consideration of (1) whether the state that issued the decree under consideration had jurisdiction in accordance with the UCCJA and PKPA and (2) whether the opposing party was given appropriate notice of the proceedings and an opportunity to be heard. If the answers are yes, then the decree should be enforced.[35]

Questions concerning the best interests of the child should be reserved for initial and modification custody proceedings. To permit them to intrude into enforcement proceedings would thwart the purposes of both the UCCJA and the PKPA.

Can the judge stay enforcement of an order entitled to full faith and credit?

Neither the UCCJA nor the PKPA expressly allows a court to stay its enforcement order. However, the Comment to § 15 of the UCCJA states "this does not mean that the state of enforcement may not in an emergency stay enforcement if there is danger of serious mistreatment of the child."

As an alternative to issuing a stay, the court should consider exercising emergency jurisdiction on a temporary basis to protect the child from harm.[36]

Endnotes

1. *See* Chapter 1, endnotes 3 and 4 and corresponding text for a discussion of tribal-state jurisdictional conflicts. Neither the UCCJA not the PKPA includes "Indian tribes" or "Indian reservations" in the definition of "State."' Courts are split on whether to interpret 'State" as including Indian tribes and reservations.

2. *See, e.g.*, **Arkansas:** Atkins v. Atkins, 823 S.W.2d 816 (Ark. 1992) (pursuant to the PKPA, Arkansas refused to give full faith and credit to Louisiana decree entered by a court exercising significant connection jurisdiction when Arkansas was home state); **Kentucky:** Cann v. Howard, 850 S.W. 2d 57 (Ky. Ct. App. 1993) (when Ohio had continuing jurisdiction, Kentucky could not modify an Ohio order unless Ohio declined to exercise jurisdiction); **Louisiana:** Montalvo v. Montalvo, 592 So. 2d 904 (La. Ct. App. 1991) (court upheld F's petition for writ of habeas corpus to enforce Virginia decree and awarded sanctions and attorney's fees against M); **Massachusetts:** Giambrone v. Giambrone, 586 N.E.2d 23 (Mass. App. Ct. 1992)(the custody orders of a court that lacked subject matter jurisdiction are not entitled to full faith and credit pursuant to the PKPA); **Missouri:** Glanzner v. State Dep't. of Soc. Serv., 835 S.W.2d 386 (Mo. Ct. App. 1992) (Missouri refused to enforce a California decree by a court with "significant connection" jurisdiction when Missouri was the child's "home state." The PKPA preempts the UCCJA.); **Ohio:** In re McClurg, 605 N.E.2d 418 (Ohio Ct. App. 1992) (full faith and credit given to determination entered by court exercising jurisdiction in accordance with the UCCJA and the PKPA).

3. *See* UCCJA § 16. [Registry of Out-of-State Custody Decrees and Proceedings.]

4. *See* UCCJA § 15. [Filing and Enforcement of Custody Decree of Another State.]

5. UCCJA § 17. [Certified Copies of Custody Decree.] The Clerk of the [District Court, Family Court] of this State, at the request of the court of another state or at the request of any person who is affected by or has a legitimate interest in a custody decree, shall certify and forward a copy of the decree to that court or person.

6. UCCJA § 12 establishes the *res judicata* effect of the custody decree on all parties to the custody proceeding who were properly notified and given an opportunity to be heard.

7. UCCJA § 21 mandates the preservation of these documents "until the child reaches [18, 21] years of age. The brackets indicate that state legislatures are free to select which ever number seems most appropriate.

8. Several Sections of the UCCJA, including § 6, § 7, § 19, and § 20, promote interjudicial communications. While none address communications in this particular context, there is no reason to believe that such communications would be inappropriate, and, indeed, the purposes of both the UCCJA and the PKPA stress cooperation between courts and the exchange of information and mutual assistance between courts.

9. *See* Chapter 5 for a more detailed discussion of jurisdiction to make an initial custody determination. *See* Chapter 6 for the PKPA and UCCJA on modification jurisdiction.

10. Indeed, the PKPA was drafted, in part, to remedy the problem that commonly arose when one state had significant connections to the child, another was the child's home state, and both exercised initial jurisdiction under the UCCJA and issued conflicting custody decrees. By prioritizing home state jurisdiction for initial custody cases, the PKPA seeks to limit the exercise of initial jurisdiction to the home state. *See* Chapter 5.

11. UCCJA §§ 4 and 5 [Notice to Persons Outside this State; Submission to Jurisdiction.]; PKPA, 28 U.S.C. 1738A(e). *See* Chapter 3 for a discussion of service of process, notice and opportunity to be heard.

12. UCCJA § 12.

13. *See, e.g.*, Rusher v. Rice, 573 So. 2d 182 (Fla. Dist. Ct. App. 1991); Fortson v. Fortson, 421 S.E.2d 106 (Ga. Ct. App. 1992).

14. *See* Comment to UCCJA § 5: "[N]otice by publication in lieu of other means of notification is not included because of its doubtful constitutionality....Paragraph (4) of subsection (a) lists notice by publication in brackets for the benefit of those states which desire to use published notices **in addition to** the modes of notification provided in this section when these modes prove ineffective to impart actual knowledge."

15. *See, e.g.*, In re Felix C., 455 N.Y.S.2d 234, 116 Misc. 2d 300 (Fam. Ct. 1982) (service by publication was held insufficient to meet due process requirements when the father knew the mother's actual address but made no effort to serve her except by publication. The resulting decree was not entitled to enforcement pursuant to the UCCJA or the PKPA.).

16. The Comment to § 5 states: "If at all possible, actual notice should be received by the affected persons; but efforts to impart notice in a manner reasonably calculated to give actual notice are sufficient when a person who may perhaps conceal his whereabouts, cannot be reached."

17. The importance of notice and opportunity to be heard in the initial custody proceeding is so important to the enforcement action that the judge making the custody determination should always include a section in the order addressing them. The order should clearly state (1) how service was effected, (2) what proof of service was provided to the court, (3) what kind of notice the party had of the proceedings, (4) why that notice was adequate, (5) what opportunity that party had to be heard and to participate in the proceedings, and (6) why that opportunity was adequate. Both facts and conclusions of law should be clearly stated. For more on drafting the custody order, *see* Chapter 7.

18. The brackets indicate that the actual number is left to the discretion of each state legislature.

19. *See, e.g.*, Jordan v. Jordan, 586 A.2d 1080 (R.I. 1991) (father was served in a Florida proceeding, filed a general appearance, answered pleadings, conducted discovery and participated in a lengthy trial. He then purposely skipped the last day of the hearing, removing the children from the jurisdiction of the court. The court concluded he had been given a reasonable opportunity to be heard.).

20. Motions to enforce or to grant full faith and credit have been used to request enforcement of custody decrees in many states. *See, e.g.*, **Alabama** - Wheeler v. Buck, 452 So. 2d 864 (Ala.Civ.App. 1984), *Ex parte* Lee, 445 So.2d 287 (Ala. Civ. App. 1983), Mitchell v. Mitchell,437 So .2d 122 (Ala. Civ. App. 1982); **California** - Worth v. Superior Court, 255 Cal.Rptr. 304 (Cal.App. 1989), In re Marriage of Malak, 227 Cal. Rptr. 841 (Cal.App. 1986); **Florida** - Mondy v. Mondy, 428 So. 2d 235 (Fla. 1983), Baggett v. Walsh, 510 So. 2d 1099 (Fla. Dist. Ct. App. 1987), Sommer v. Sommer, 508 So. 2d 773 (Fla. App. 1987), Findley v. Findley, 441 So. 2d 1166 (Fla. App. 1983), Strahl v. Strahl, 431 So. 2d 729 (Fla. App. 1983), Bonis v. Bonis, 420 So. 2d 104 (Fla. App. 1982); **Indiana** - In re Marriage of Hudson, 434 N.E.2d 107 (Ind.App. 1982); **Maine** - Spaulding v. Spaulding, 460 A.2d 1360 (Me. 1983); **Michigan** - Loyd v. Loyd, 452 N.W.2d 910 (Mich. App. 1990), Klont v. Klont, 342 N.W.2d 549 (Mich. App. 1983); **Mississippi** - Laskosky v. Laskosky, 504 So.2d 726 (Miss. 1987); **New Jersey** - Neger v. Neger, 459 A.2d 628 (N.J. 1982); **New York** - Ricky D.C. v. Carol C., 528 N.Y.S.2d 786 (Fam. Ct. 1988), Caronna v. Caronna, 535 N.Y.S.2d 312 (Fam. Ct. 1988); **New Mexico** - Elder v. Park, 717 P.2d 1132 (N.M. App.1986); **Ohio** - Auberry v. Auberry, C.A. No. 13666, 1989 Ohio App. LEXIS 501 (9th Dist.); **Oregon** - Dagan v. Dagan, 798 P.2d 253 (Or. App. 1990); **Pennsylvania** - Grun v. Grun, 496 A.2d 1183 (Pa. Super. Ct. 1985); **Tennessee** - Gayhart v. Gayhart, (Tenn. Ct. App. 9/9/85) (Western Section at Jacksonville) (Slip Op.); **Washington** -In re Custody of Thorensen, 730 P.2d 1380 (Wash. Ct. App. 1983), Hudson v. Hudson, 670 P.2d 287 (Wash. Ct. App. 1983), In re Marriage of Corrie, 648 P.2d 501 (Wash. Ct. App. 1982); **West Virginia** -Arbogast v. Arbogast, 327 S.E.2d 675 (W. Va. 1984).

21. *See, e.g.*, Dobbins v. Maner, 517 So. 2d 619 (Ala. Civ. App. 1987) (the court had jurisdiction to find a mother in contempt for violating the visitation provisions of an Alabama custody decree even though she and her son had relocated to Tennessee); Willis v. Willis, 495 N.E.2d 478 (Ohio Com. Pleas 1985) (the Ohio court still had jurisdiction to rule on a contempt motion even though the mother and children had moved to West Virginia); Marquiss v. Marquiss, 837 P.2d 25 (Wyo. 1992) (F filed for contempt against mother living in Texas with child in order to enforce visitation rights granted in Wyoming. Because Wyoming had continuing jurisdiction, it was the proper place to determine contempt).

22. *See, e.g.*, Kirylik v. Kirylik, 357 S.E.2d 449 (S.C. 1987) (The court recognized that it had the inherent power to enforce compliance with its own custody order, but that it also had the discretion not to. While the father remained in South Carolina, the mother had moved to Delaware with the child, where she eventually sought a modification of the existing decree. Because she had filed the existing decree in Delaware, it was to be treated like a decree of that state; therefore, the father could seek contempt there.).

23. *See, e.g.*, Zaubi v.Zaubi, 423 A.2d 333 (Pa. 1980) (Contempt action successfully brought against grandparents who assisted their son in hiding the location of his children from the court. They were given the opportunity to purge themselves of the contempt by producing the missing children. The children's father produced the children, freeing the grandparents from the contempt sanctions.); Henderson v. Handlan, 248 S.E. 2d 273 (W. Va. 1978) (Contempt action successfully brought against the parents of a kidnapping parent who aided their son in interfering with the decision of the court. The grandparents had actual knowledge of the court order and they acted in concert with a party to the order the father to thwart it.).

24. James A. Albert & Gregory A. Brodek, *Habeas Corpus - A Better Remedy in Visitation and Denial Cases*, 41 Me. L. Rev. 239, 259-60 nn. 74-75 (1989).

25. The following are among the states where habeas corpus proceedings have been used to enforce custody: **California** - Schwander v. Schwander, 145 Cal. Rptr. 325 (Cal. Ct. App. 1978) (court granted petition for warrant in lieu of habeas corpus and command for arrest to enforce custody decree); Rogers v. Platt, 245 Cal. Rptr. 532 (Cal. Ct. App. 1988); **Florida** - Walt v. Walt, 574 So.2d 205 (Fla. Dist. Ct. App. 1991); **Georgia** - Brenner v. Calvin, 295 S.E.2d 135 (Ga. App. 1982); **Iowa** - In re Marriage of Leyda, 398 N.W.2d 815 (Iowa 1987); **Louisiana** - Montalvo v. Montalvo, 592 So. 2d 904 (La. Ct. App. 1991); **Mississippi** - Bubac v. Boston, 600 So. 2d 951 (Miss. 1992); **Missouri** - In re B.R.F., 669 S.W.2d 240 (Mo. Ct. App. 1984); **Montana** - In re Peterson, 661 P.2d 40 (Mont. 1983); **Nebraska** - Mace v. Mace, 341 N.W.2d 307 (Neb. 1983); **Pennsylvania** - Adriance v. Adriance, 478 A.2d 16 (Pa. Super. Ct. 1984); **Tennessee** - State ex rel. Cooper v. Hamilton, 688 S.W.2d 821 (Tenn. 1985); **Texas** - Rush v. Stansbury, 668 S.W.2d 690 (Tex. 1984); **West Virginia** - *see, e.g.*, Lemley v. Barr, 343 S.E.2d 101 (W. Va. 1986).

26. *See, e.g.* , Barcus v. Barcus, 278 N.W. 2d (Iowa 1979)(court appropriately refused to permit a habeas corpus enforcement proceeding to become a forum for one parent to seek modification of the existing decree).

27. For a more extensive discussion of the use of these writs in child custody enforcement proceedings, see Volenik, "Legal Procedures for the Enforcement of Child Custody Determinations and the Recovery and Return of Parentally Abducted Children" included as an Appendix to Chapter 6 in Final Report: Obstacles to the Recovery and Return of Parentally Abducted Children, eds. Linda Girdner and Patricia Hoff (Washington, D.C.: United States Department of Justice, OJJDP 1993).

28. California recognizes a procedure similar to the one described in the text. It is referred to as a "warrant in lieu of a writ of habeas corpus."

29. UCCJA § 9 requires the child's present address and the places the child has lived within the last five years; the names and present addresses of the persons with whom the child has lived for the past five years; whether the party has participated as a party, witness, or in any other capacity in any other litigation concerning the custody of the child in this or any other state; whether the party knows of any custody proceeding concerning the child pending in this or any other state; whether the party knows of any person not a party to the proceedings who has physical custody of the child or who claims to have custody or visitation rights with respect to the child.

30. *See, e.g.*, Wheeler v. Buck, 452 So. 2d 864 (Ala. Civ. App. 1984). (The person seeking enforcement of the custody order has the burden of proof, which can be met by introducing into evidence a properly authenticated copy of the judgment.)

31. Section 19 of the UCCJA authorizes a court to request this form of assistance from the court in another state; § 20 authorizes a court to provide this assistance when requested to do so by the court of another state.

32. A review of case law suggests that these provisions are little used, probably because attorneys do not ask judges to request the assistance of other courts.

33. "Foreign decrees are punitive only if a sister state changes or awards custody, without regard to the best interest of the child, solely to punish one parent for disregarding its authority." Spaulding v. Spaulding, 460 A.2d 1360, 1367 (Me. 1983)

34. Note that the court in Arbogast v. Arbogast, 327 S.E.2d 675, 683 (W.Va. 1984) correctly stated that "the PKPA makes no distinction between punitive decrees and other court orders."

35. *See, e.g.* Wheeler v. Buck, 452 So.2d 864 (Ala.Civ.App. 1984)(Inquiry in an enforcement action is limited to examining subject matter jurisdiction and provision of due process. Issues relating to the circumstances of the child should not be investigated. Note, however, that the Alabama court did permit a scrutiny of whether the judgment was punitive. Because no such exception appears in either the UCCJA or the PKPA, the court was wrong to permit this.); Ricky D.C. v. Carol A.C., 528 N.Y.S.2d 786 (Fam.Ct. 1988)(The court enforced a Tennessee order despite concern about whether it was in the child's best interest because there was insufficient evidence presented to show the order was not entitled to full faith and credit.); State ex rel Butler v. Morgan, 578 P.2d 814 (Or.App. 1978) (The court refused to permit the inquiry in a habeas corpus proceeding to focus on the circumstances of the children. It kept the focus on the question of whether the mother was legally entitled to assert custody pursuant to an Arizona decree.)

36. See, e.g., In re Custody of Cox, 536 N.E.2d 520 (Ind. App. 1989), in which a temporary order was used to delay implementing an enforcement order where the potential harm to the children did not amount to a 'danger of serious mistreatment.' The lower court's modification of a Kentucky custody decree was reversed because Kentucky had continuing jurisdiction. However, instead of ordering immediate enforcement of the Kentucky decree, the court issued a temporary order permitting the children to remain temporarily with their father in Indiana. The court was concerned that returning the children to their mother in April would mean pulling them out of school, where they had been since September. The father was directed to file a modification action in Kentucky within 30 days. A failure to do so would result in the expiration of the temporary order and a return of the children to their mother.

Chapter 9
Handling Interstate Child Custody Cases Involving Adoption, Parents in the Military, and Domestic Violence

Summary

This chapter suggests approaches for handling the complex jurisdictional issues that arise in interstate child custody cases involving adoptions, parents in the military, and domestic violence.

CHECKLISTS

Interstate Adoption Cases

1. Do the UCCJA and the PKPA apply to adoption proceedings?

2. Do the UCCJA and the PKPA apply to revocation of consent proceedings?

3. How do the UCCJA and the PKPA affect the determination of jurisdiction in adoption cases?

- Is there a home state?
- Significant connection jurisdiction--what if more than one state has it?
- Who has standing?

4. Does the Interstate Compact on the Placement of Children (ICPC) affect jurisdiction in interstate pre-adoptive placements?

Cases Involving a Parent in the Military

5. Can home state jurisdiction be based upon a member of the military's domicile?

6. Can a state exercise continuing jurisdiction based upon domicile rather than presence?

Cases Involving Domestic Violence

1. What should the court do when determining whether it has and should exercise jurisdiction?

- Grant requests to keep address information in the affidavit or pleading confidential when safety is a concern.
- Communicate with other judges to avoid simultaneous proceedings and conflicting orders.
- If the home state, proceed so that the order is given full faith and credit nationwide, unless a concern for safety makes the home state an inconvenient forum for the victim.
- Check if state law permits emergency jurisdiction when a parent flees domestic violence with the children.

2. What should the court include in the court order to prevent abduction and enhance prompt recovery?

- State the basis for jurisdiction and that violation may result in civil or criminal penalties
- Provide that a bond be posted by the abuser and, in the event of an abduction, forfeited to the victim parent.
- Specify visitation provisions, including safe pick-up and drop-off points.
- Specify that the children may not leave a specified geographical area (or the United States) with the abuser.

3. What should the court inform the parties, particularly *pro se* litigants, to do if an abduction occurs?

- File an action to enforce order.
- Keep several certified copies of the custody order and related laws, and up-to-date photographs of the children.
- Contact the state's missing children clearinghouse and the National Center for Missing and Exploited Children (800/843-5678) if the children are abducted.

- Contact the State Department (202/636-

7000) in the event of an international abduction and find out whether the Hague Convention applies.

- Inform the school or day care facility not to release the child(ren)'s address.

4. What admonitions should the court give victims and their attorneys?

- A victim who relocates with the children, without the court's permission, may be in violation of criminal custodial interference laws.
- Lawyers risk malpractice and ethical sanctions if they counsel clients to abduct their child(ren), fail to seek preventive measures, or fail to contact sister courts regarding pending proceedings.

Interstate Adoptions

Applicable statutes:

FEDERAL

28 U.S.C. 1738A(b)(2) [Definition of "contestant"]
28 U.S.C. 1738A(b)(6) [Definition of "person acting as parent"]

STATE

UCCJA § 2(2) [Definition of "contestant"]
UCCJA § 2(9) [Definition of "person acting as parent"]

Applicability of the UCCJA and the PKPA

Do the UCCJA and the PKPA apply to adoption proceedings? When an adoption case is before the court, the judge must decide whether to apply the jurisdictional requirements of the UCCJA and the PKPA to the proceedings.

- **General rule**. The general rule is that, because adoption involves a custody determination, it is covered by the provisions of the UCCJA and the PKPA. The general rule has been adopted in many states, either through statutory language or case law.[1]
- **Minority rule**. The minority rule is that adoptions are not covered by the provisions of the UCCJA.[2]

Reasons for following the general rule:

- The comment to UCCJA § 2 states that "'custody proceeding' is to be understood in a broad sense."
- An adoption, with its potential for terminating a natural parent's custodial rights, fits within the UCCJA definition of "custody proceeding" as one "in which a custody determination is one of several issues, such as an action for divorce or separation, and includes an initial decree and a modification decree."
- Applying the UCCJA to adoption proceedings can promote the purposes of the UCCJA by (1) preventing jurisdictional conflict, (2) promoting interstate cooperation, and (3) discouraging continuing conflict in order to promote stability of home environment.
- The drafter and reporter for the UCCJA, Brigitte M. Bodenheimer, along with Neeley-Kvarme, has written that the UCCJA should be applied to adoption proceedings.[3]

Do the UCCJA and the PKPA apply to revocation of consent proceedings? Revocation of consent to adoption is inextricably interwoven with adoption and should not be viewed as a distinctly separate proceeding. Therefore, to the extent adoption is governed by the UCCJA and the PKPA, revocation of consent should be also. The logic behind this was clearly articulated by the court in Adoption of Zachariah K., 8 [Cal. Rptr.] 423, 428 (Ct. App. 1992):

> [i]f the UCCJA and the PKPA are not applicable to proceedings to determine whether or not consent to adoption should be withdrawn, the abuses which the [Acts] seek to prevent are perpetuated, and [their]

salutory [sic] purposes are not realized.

In the Zachariah case, the birth mother turned her child over to an adoptive couple from Oregon less than two days after the child's birth. The couple took the child to Oregon where they were appointed guardians by the Oregon courts, and where they filed a petition for adoption. Nearly three months after the child's birth, the mother filed her revocation of consent in California. The lower court in California did not apply the UCCJA and the PKPA to the proceeding and exercised jurisdiction. The result was just what the UCCJA and the PKPA are intended to prevent - two conflicting custody orders.

Jurisdiction

In interstate adoptions, a common dilemma for the court is determining which state has and should exercise jurisdiction when the child was born in one state but taken to a second state shortly after birth. Courts are frequently asked to determine if there is a home state or if jurisdiction will rest on significant connections. Analysis in these cases requires looking at the definition of "home state," that in the case of a child less than 6 months old, is "the state in which the child lived from birth" with a parent, parents, or a person acting as a parent.

Is there a home state? In recent cases, courts have been reluctant to find a "home state" for a child less than 6 months old who was removed from the birth state within a short period of time following birth.[4] The brevity of the period before removal is important in these cases. If the child remained with a parent in the birth state for several months before being placed for adoption, courts are more likely to find that the birth state is the "home state" and that any absence resulting from the child being taken to another state by adoptive parents is temporary.

Typically, the court can look at the mother's intention. If she signed a consent to adoption and turned the child over to the adoptive couple within days of the child's birth, the logical conclusion is that her deliberate intention was not to live with the child.[5] If, on the other hand, she lived with the child for several months before consenting to an adoption, a court could conclude that she exhibited a deliberate manifestation of her intention to share a common place with the child,[6] and that any subsequent absence was temporary. In the first instance, the birth state would not be the child's home state. In the second, it would be.

The court must also consider whether the state to which the child is moved by the adoptive parents is the child's home state. If the child is under six months old, it cannot be the home state because the child did not live there since birth.[7] If the child is older than six months and did not live in that state for six consecutive months prior to the commencement of the proceedings, the state cannot be the child's home state.

Significant connection jurisdiction. When there is no "home state," the court must identify an alternative basis for jurisdiction. Most commonly, that will be significant connection jurisdiction. It is possible that the child and at least one contestant will have significant connections to more than one state. For example, a court could find that the child and the natural parent have a significant connection to the state where the child was born. It could also find that the child and the adoptive parents have a significant connection to the state in which the child has lived with the adoptive parents.[8]

What happens if more than one state has connections sufficient to support initial child custody jurisdiction? If two states have jurisdiction to enter a custody determination based on significant connections, neither the UCCJA nor the PKPA requires a court to weigh one state's connections against the other's. Instead, both Acts address this possibility by prohibiting a state from exercising jurisdiction

when another is already exercising jurisdiction consistently with the provisions of the PKPA. In this situation, first in time prevails. Of course, the courts can communicate and decide which court should hear the case.

Remember that the first in time rule applies only if both states are exercising jurisdiction in accordance with the jurisdictional prerequisites of the PKPA. If one state is the child's home state, it is not required to defer to a state already exercising jurisdiction based on significant connections because that state is not exercising jurisdiction according to the PKPA.[9]

Do the prospective adoptive parents have standing to pursue the adoption? Whenever an interstate adoption dispute occurs, the question of whether the prospective adoptive parents have standing to pursue the adoption may be raised. The UCCJA and the PKPA do not address standing as a separate question, which is determined by the state substantive law.

However, courts that are grappling with the issue may look to the UCCJA and PKPA's definitions of "contestant" and "person acting as a parent" for guidance . Both acts define "contestant" as a person, including a parent, who claims a right to custody[10] or visitation of a child. And both Acts define a "person acting as a parent"[11] as someone other than a parent who has physical custody of a child and who has either been awarded custody by a court or claims a right to custody.

Does the Interstate Compact on the Placement of Children govern jurisdiction in adoption proceedings?

Many interstate pre-adoption placements are handled pursuant to the Interstate Compact on the Placement of Children. Because the provisions of Article V(a) of the Compact speak in terms of jurisdiction, they are of concern:

> The sending agency shall retain jurisdiction over the child sufficient to determine all matters in relation to the custody, supervision, care, treatment and disposition of the child which it would have had if the child had remained in the sending agency's state, until the child is adopted, reaches majority, becomes self-supporting or is discharged with the concurrence of the appropriate authority in the receiving state. Such jurisdiction shall also include the power to effect or cause the return of the child or its transfer to another location and custody pursuant to law.

While, arguably, this suggests that the sending agency retains jurisdiction, court decisions place sensible limitations on that interpretation. One court concluded that the ICPC does not empower courts to exercise jurisdiction. Those decisions must be made pursuant to the UCCJA and the PKPA.[12] Most importantly, the PKPA preempts state law on custody jurisdiction matters.[13] Therefore, the ICPC could not take precedence over any conflicting provisions in the PKPA. Jurisdiction will be determined, then, by looking to the PKPA and the UCCJA.

Hard cases attract media attention.

In recent years there have been a spate of adoption cases that have grabbed the public's attention. The Baby Jessica[14] case was just one of the most notable. It is difficult to forget the image that goes hand in hand with that case - that of two-year-old Jessica being taken from the arms of the only parents she had ever known to be turned over to her natural parents who were strangers to her. The DeBoers, the adoptive parents, decried a system that would traumatize a child in that way. But during the publicity that followed the case and the outcry that the child's best interests were subjugated to the "rights" of the natural parents, little was made of the role that the DeBoers played in creating the trauma.

Like most adoptive parents who are faced with revocation of consent by a natural parent or claims by a natural father who was not a party to

the consent, the DeBoers learned early that the adoption would be challenged. "Baby Jessica" was born on February 8, 1991. On February 10, her mother relinquished her parental rights and signed a release of custody form. Fifteen days later, the DeBoers filed a petition for adoption in the Iowa courts and were granted custody of the child during the pendency of the proceedings. Only nine days later, the natural mother filed a motion to revoke her consent, and six days later the natural father, who learned late that he was a father, filed an affidavit of paternity. Fifteen days later, he sought to intervene in the adoption proceedings.

So within a month of the child's birth, the DeBoers knew that their claim to custody was in trouble. In December, 1991, the court denied the DeBoers' petition to adopt. By that time, Baby Jessica was nearly 11 months old. Naturally, the DeBoers appealed, buying more time with the child they loved and delaying Baby Jessica's reunion with her natural parents through the appeals process in Iowa and up to a final decision on December 3, 1992 which terminated the DeBoer's rights as temporary guardians. Baby Jessica was now nearly 22 months old. But the DeBoers persisted, pushing their claims in the Michigan courts, resorting to the forum shopping that the UCCJA and the PKPA were designed to control. That bought them an additional six months time with Jessica. But they were delaying the inevitable.

In the end, the court applied the PKPA, which resulted in the child's return to her natural parents. Had they not, had they succumbed to the public pressure to keep Jessica with the only parents she had known, they would have undermined the purposes of the UCCJA and the PKPA and encouraged all people involved in custody disputes involving young children to delay returning children at all costs in the interests of gaining an advantage based on "possession." In the long run, that could well have resulted in more trauma to more children.

Cases involving a parent in the military

Applicable statutes

FEDERAL

PKPA, 28 U.S.C. 1738A(d) [Continuing jurisdiction]

STATE

UCCJA § 3(a)(1) [Home state jurisdiction]

A parent in the military services is entitled to the protections of the Soldiers' and Sailors' Civil Relief Act of 1940,[15] even in custody disputes.[16] In addition, military service generates jurisdictional questions that are unlikely to arise in standard custody disputes. These arise both when the judge is asked to determine initial jurisdiction and in actions to modify existing decrees. Typically, the questions revolve around whether jurisdiction exists in a military person's state of "domicile" if that person is no longer physically present there because of military duty elsewhere.

Can home state jurisdiction be based upon a member of the military's domicile? If a court is asked to exercise home state jurisdiction to make an initial custody determination, can it do so under the UCCJA and the PKPA if the child has not lived in the state for over six months but the state is a parent's legal domicile?

Because members of the military maintain a domicile that can be different from where they are stationed, this issue may come before the court. However, both the UCCJA and the PKPA define home state as the state where the child lived with parents, a parent, or a person acting as a parent for at least 6 consecutive months immediately preceding the time involved. The emphasis is on the place the child actually lived rather than the legal domicile of its parents. Consequently, domicile should not be used as a

basis for "home state" jurisdiction to make an initial custody determination.[17] Families that move frequently as duty assignments are changed may not have a "home state." Jurisdiction to determine custody or visitation may be founded on significant connection jurisdiction, or more likely on "last resort" jurisdiction. See chapter 1, "Jurisdiction to Make an Initial Custody Determination."

Can a state exercise continuing jurisdiction based upon domicile rather than residence? According to the PKPA, a state has continuing jurisdiction as long as it has jurisdiction under its own law and the state remains the residence of the child or of any contestant.[18] If a member of the military is domiciled in the state that determined custody, does the state have continuing jurisdiction even though that person is stationed elsewhere and the child is no longer present in the state? Some courts have interpreted residence to mean domicile in these cases. Under this interpretation, a court that has jurisdiction under its own law can exercise continuing jurisdiction as long as a party who is a member of the military continues to be domiciled in the state.[19]

Cases Involving Domestic Violence [20]

Applicable Statutes

FEDERAL

PKPA 28 U.S.C. §1738A
ICARA 42 U.S.C. § 11601-11610
Missing Children Act, 28 U.S.C. § 534
Missing Children Assistance Act, 42 U.S.C. § 5771 et seq.
National Child Search Assistance Act, 42 U.S.C. §§ 5779 and 5780
International Parental Kidnapping Crime Act, 18 U.S.C. § 1204

STATE

UCCJA § 3 [Jurisdiction]
UCCJA § 7 [Inconvenient forum]
UCCJA § 8 [Unclean hands]
UCCJA § 9 [Pleading requirements]
UCCJA § 15 [Filing and Enforcement of Custody Decree]
UCCJA § 18-22 [Interstate Evidence gathering]

Introduction

The issue of domestic violence is raised most often in child custody cases in relation to the merits of the case, which is beyond the scope of this publication. However, spouse abuse also can have a bearing on jurisdictional and procedural aspects of a custody case. Furthermore, families with histories of abuse present risks for abduction, necessitating that preventive measures be considered.

Domestic violence occurs in most of the families engaged in bitter custody battles and parental abductions.[21] Many batterers abduct their children, or retain them after a visitation, as a way to coerce victims into returning or to "teach them a lesson." Tragically, some abusers, upon realizing the relationship with their former spouse or partner is over, kill the children and themselves. Victims, on the other hand, sometimes violate state criminal custodial interference laws by secretly relocating with the children to flee abuse.

A knowledgeable family court judge can do a great deal to enhance the safety of abuse victims, protect children from the damaging effects of domestic violence, and prevent abductions in these families.

Jurisdiction

Custody orders issued in compliance with the federal Parental Kidnapping Prevention Act (PKPA) (28 U.S.C. § 1738A) are entitled to full faith and credit in other states. Therefore, to increase the likelihood of enforcement nationwide, proceed in the state with "home state" jurisdiction. This can be particularly

important in cases involving spouse abuse, because relocation may be advisable for safety reasons. Furthermore, the custody provisions of orders of protection may not be currently entitled to full faith and credit under the Violence Against Women Act, except under prescribed circumstances, but they are enforceable interstate if they are issued in compliance with the PKPA.

Emergency jurisdiction in child custody proceedings under UCCJA § 3(a)(3) generally applies only if the parent fled with the child to another jurisdiction because the *child* was at risk of harm. Some states have extended emergency jurisdiction to circumstances involving a parent who flees with the children to escape domestic violence.

Increasingly, studies have shown that children are harmed emotionally, and often physically, when one parent abuses the other.

A custody order issued on the basis of emergency jurisdiction is meant to be temporary until the state with proper jurisdiction can act. The emergency order may be enforceable until it is superseded by an order that is entitled to full faith and credit under the PKPA (such as an order issued by the "home state" or by the state with exclusive continuing modification jurisdiction).[22]

If returning to the jurisdiction will place the victim at risk for further abuse, a court may decline jurisdiction on the basis of inconvenient forum, pursuant to the UCCJA § 7. A court can also decline jurisdiction if it determines that the plaintiff has unclean hands or has engaged in reprehensible conduct. UCCJA §18-22 provide the authority for obtaining evidence from other state courts, including obtaining testimony and conducting social studies or hearings.

Example 1. A custodial mother moves with her children to an undisclosed address in F2 to avoid the continued abuse from the violent father. He brings an action in F1 (the home state) to modify the existing order, asking for joint custody. The mother files for sole custody in F2, asking it to take emergency jurisdiction. The father cross-files claiming that the mother has "unclean hands," having left the home state to impede his court-ordered visitation with the children. The judge in F2 is aware that in his state emergency jurisdiction only applies if flight was to protect a child from imminent danger.

To clarify jurisdiction and avoid simultaneous proceedings, pursuant to UCCJA §§ 6-7, the judge in F2 contacts the court in F1. F1 has continuing modification jurisdiction, but can relinquish jurisdiction to F2. The judges, with counsel present, discuss the options, balancing several considerations, including the home state's responsibility for continuing modification, the allegation of unclean hands, the abuse allegations, the evidence of domestic violence and the need for safety, and the relative inconvenience of each forum to the contestants.

The court in F1 decides to decline jurisdiction on inconvenient forum grounds because the victim parent would be put at too great a risk in having to return there. The court in F2 accepts jurisdiction and states the facts of the declination and acceptance of jurisdiction in the order.

The major facts influencing the decision were the better protection and services provided to domestic violence victims in the second state. The mother had *pro bono* legal representation provided through a program of the local bar for domestic violence victims. The courthouse had many safety features, including metal detectors and the presence of deputies. Similar programs and safety features did not exist in the community in the home state. Considering the potential for violence in this case, the judges decided that the F1 was an inconvenient forum.

The court in F2 arranges for the transcripts from previous proceedings, new evidence and social studies in F1 to be sent for the hearing, pursuant to UCCJA §§18-22. The court's order

does not have to be temporary, as would be the case with emergency jurisdiction, because the court in F2 now has jurisdiction. The court's order is, consequently, entitled to full faith and credit.

Example 2. An abusive ex-husband refuses to relinquish a child to the mother in F1 (the home state) after an agreed upon visitation in F2 with him and the paternal grandparents. The abuser files for custody in F2, claiming that the court has jurisdiction due to the child's significant connections in F2 and enrollment in school. After learning from the judge in F1 that the mother has an order of protection granting her temporary custody of the child, the judge in F2 determines that the father's attempt to deprive the mother of custody constitutes reprehensible conduct.

The court in F2 refuses to exercise jurisdiction based on UCCJA § 8. In addition, the court declines jurisdiction on significant connections grounds in favor of the court in F1 with home state jurisdiction. The court in F2 also recognizes that interstate enforcement of a custody order is more likely if the order is issued in compliance with the PKPA by the home state.

Confidentiality

UCCJA § 9 requires parties to provide information under oath to the court about where the child has lived over the past five years,[23] the names and current addresses of everyone the child has lived with during those five years, as well as other information. If a party could be at risk of harm by the other party knowing this information, the court should order that the address information in the affidavit or pleading be sealed, sequestered, or impounded, so that it is available to the court, but not to the other party. State enactments of the UCCJA vary slightly.

Some states provide for specific court rules or laws that ensure confidentiality of information in cases involving domestic violence. Even courts in states that do not have specific laws to protect the confidentiality of identifying information may honor such requests upon sufficient showing.

Preventive Measures

When domestic violence is a factor in the determination of the custody or visitation arrangements, the facts regarding the abuse or harassment should be included in the order. The order needs to be especially well crafted, reducing any possible areas of control, maneuvering or manipulation by the abuser. Measures to prevent an abduction and to enhance prompt recovery in the event of an abduction are particularly important in cases involving domestic violence.[24]

Due to economic abuse, battered spouses often do not have the financial resources to pursue enforcement actions in other states. Access to bond money that has been forfeited by the abductor may be the only means of financing the enforcement action and other costs of recovering a child.

The order should specifically state that the children are not allowed to leave a specified geographical area with the abuser. It also should state that the abuser is restricted from taking the children outside of the United States. Visitation provisions should be very specific with a priority given to the safety of the victim and the child. If the victim does not want her address known, then pick-up and drop-off should be at another location. If an abduction is likely, supervised visitations should be ordered. Supervision should not be by someone, such as members of the abuser's family, who might aid and abet in an abduction.

Supervised visitation centers, which can also be used as safe pick-up and drop-off points,

should be used where available. Parents who kill their children and then commit suicide most frequently are estranged or divorced husbands with a history of abusive and controlling behaviors. Although this is a very small percentage of parents, awareness of this potential is critical in considering restrictive measures for preventing abductions.

Preventive Information

The court can play an important role in enhancing the likelihood of the order being enforced promptly and the child recovered by educating the parties about actions that should be taken in the event of an abduction. Simply hearing this information in court may deter parties from abducting. Many abuse victims are *pro se* and, thus, would not have the benefit of hearing this information from their attorneys. Others may be represented by attorneys who are unfamiliar with some of this information.

The court can remind the parties to keep several certified copies of the custody order. If the parents lives in another jurisdiction, a certified copy of the order should be filed in that jurisdiction, pursuant to UCCJA § 15.

The parties should be informed about and have copies of the Missing Children Act (28 U.S.C. § 534), the Missing Children's Assistance Act (42 U.S.C. § 5771), and the National Child Search Assistance Act (42 U.S.C. §§ 5779 and 5780) that mandate law enforcement to enter missing children on the National Crime Information Center (NCIC) computer.

The parties should be advised that an enforcement action should be brought in the state in which the abducted child is found. In the event of an abduction, particularly if the whereabouts of the child are not known, a parent should contact the state's missing children clearinghouse, if one exists, and the National Center for Missing and Exploited Children at 800/843-5678.

The custodial parent who is a victim of abuse should be told to inform the school or day care not to release information about the child's address to anyone else and that she should be notified immediately if anyone, including the abuser, attempts to take the children from school or day care without receiving advance written permission directly from her.

Parents should be advised to keep up-to-date photographs of the children and, when appropriate, talk to them about safety planning.

The court should consider safety in the determination of custody and visitation. If the parent is able to live safely within the jurisdiction, she will not need to flee for safety to another jurisdiction. The court should encourage her to develop a safety plan for herself but, at the same time, let her know that if she is considering leaving the area with the children or hiding from the abductor, she should know that she may be in violation of criminal custodial interference laws. As of 1995, 14 states and the federal International Parental Kidnapping Crime Act of 1993 (18 U.S.C. § 1204) allow fleeing domestic violence to be used as a defense to charges of criminal custodial interference. The laws vary and in some states, the victim is required to notify law enforcement officials and/or file for custody.

Reminders to Attorneys

The court may need to remind counsel that attorneys have been unsuccessful defendants in cases involving malpractice and other ethical proceedings for action or lack of action relating to abductions. These include counseling ones' client to abduct the child from the other parent,[25] not seeking preventive measures on behalf of a client who repeatedly requested them,[26] not promptly contacting sister state courts regarding proceedings pending in multiple states,[27] and

refusing to disclose the whereabouts of children abducted by a parent in contempt of a custody order,[28] thus enabling the parent to obstruct justice.

Endnotes

1. By statute, some states like Montana and Michigan bring adoptions within the parameters of the UCCJA. Other states do so through case law. *See, e.g.*, **California** - Rogers v. Platt, 245 Cal. Rptr. 532 (Ct. App. 1988); **Colorado** - Denver Dep't. of Soc. Serv. v. Dist. Ct., 742 P.2d 339 (Colo. 1987); **Georgia** - Gainey v. Olivo, 373 S.E.2d 4 (Ga. 1988) **Illinois** - Noga v. Noga, 443 N.E.2d 1142 (Ill. App. Ct. 1982); **Kansas** - In re Adoption of Baby Girl B., 867 P.2d 1074 (Kan. Ct. App. 1994); **Missouri** - Matter of T.C.M., 651 S.W.2d 525 (Mo. Ct. App. 1983); **New Jersey** - E.E.B. v. D.A., 446 A.2d 871 (N.J. 1982); **Oregon** - Torres v. Mason, 848 P.2d 592 (Or. 1993); **Pennsylvania** - In re Adoption of B.E.W.G., 549 A.2d 1286, 1290 (Pa. Super. Ct. 1988), *appeal denied*, 558 A.2d 871; **West Virginia** - Lemley v. Barr, 343 S.E.2d 101 (W. Va. 1986); **Wisconsin** - In re Steven C., 486 N.W.2d 572 (Wis. Ct. App. 1992).

2. Support for the minority view rule comes largely from legislatures. By statute, both New Hampshire, N.H.Rev.Stat.Ann. sec. 458-A2(3), and New York, Dom. Rel. L. sec. 75-a(3), exclude adoption from the coverage of the UCCJA. Note the recently promulgated Uniform Adoption Act (UAA) contains specific jurisdictional provisions applicable to interstate adoptions. To date only Vermont has adopted the UAA.

3. ["Jurisdiction Over Child Custody and Adoption After Shaffer and Kulko," 12 U.C. Davis L. Rev. 229 (1979)]. *See also* Gainey v. Olivo, 373 S.E.2d 4, 6 (Ga. 1988).

4. *But see,* Martinez v. Reed, 623 F. Supp. 1050 (E.D. La. 1985) (Louisiana had home state jurisdiction even though child was removed a few days after birth and taken to Alabama.).

5. *See, e.g.*, Adoption of Zachariah K., 8 Cal. Rptr. 2d 423 (Cal. Ct. App. 1992); In re Adoption of Child by T.W.C., 636 A.2d 1083 (N.J. Super. Ct. App. Div. 1994) (Neither New York nor Connecticut could be home state to a child born in Connecticut to a New York mother who left the Connecticut hospital after two days and went to a New York restaurant where she turned the child over to a couple from New Jersey. New Jersey could not be the child's "home state" because the child had not lived there for six months with the adoptive parents, nor had he lived there since birth).

6. *See, e.g.*, J.D.S. v. Superior Court, 893 P.2d 749 (Ariz. Ct. App. 1994).

7. In re Adoption of Zachariah K.; In re Adoption of Child by T.W.C., *supra*, n. 5.

8. In re Adoption of Zachariah K., 8 Cal. Rptr. 2d 423 (Cal. Ct. App. 1992) (Court found that Oregon had significant connection jurisdiction to determine custody of a child brought to the state by adoptive parents but recognized that California, where the child was born, might also have significant connections to the child).

9. *See, e.g.*, J.D.S. v. Superior Court, 893 P.2d 749 (Ariz. Ct. App. 1994). There the Arizona court noted that Arizona was not obligated to defer to the Florida proceeding which was pending when the Arizona action was filed because Arizona was the child's home state. Florida had, at most, significant connections to the child. Deference would only be required if Florida had been exercising jurisdiction substantially in conformity with the UCCJA. The court neglected to mention the importance of conformity to the PKPA which prioritizes "home state." This would have bolstered its conclusion that no deference to the Florida proceeding was required.

10. In re Clausen, 502 N.W.2d 649 (Mich. 1993), popularly known as the "Baby Jessica" case, the Michigan Supreme Court rejected the adoptive parents' efforts to relitigate the child custody question after they had consistently lost in the Iowa courts. Not only did the Michigan courts lack jurisdiction to hear the case, but the adoptive parents lacked standing to bring the action in Michigan. In the proceedings in Iowa, the Michigan parents had a colorable or legal claim to custody that was based on the Iowa mother's release of custody by which she relinquished her parental rights to the child. In the course of the Iowa proceedings, however, that legal claim was lost by the adoptive parents when the courts terminated their rights as temporary guardians of the child. Without that colorable claim to custody, the couple lacked standing to seek custody in the Michigan courts.

11. *See, e.g.*, Rogers v. Platt, 245 Cal. Rptr. 532 (Cal. Ct. App. 1988), a case in which a mother released her child to a couple from Washington, D.C. who hoped to adopt him. Before the mother consented to the adoption, she changed her mind. Consequently, the couple never had a legally recognized basis for claiming custody and therefore could not qualify as "persons acting as parents."

12. J.D.S. v Superior Court, 893 P.2d 749, 755 (Ariz. Ct. App. 1994).

13. In re Adoption of Zachariah K., 8 Cal. Rptr. 423, 431 (Cal Ct. App. 1992).

14. In re Clausen, 502 N.W.2d 649 (Mich.1993).

15. 50 App. U.S.C. 520 (1994).

16. *See* Chapter 4, *infra*.

17. *See, e.g.*, Gasman v. Gasman, 598 So. 2d 1256 (La. Ct. App. 1992) (The father, a member of the Coast Guard, was stationed in Virginia where he and his wife and children were living at the time the couple separated. After a separation of more than six months, the father filed for divorce and custody in Louisiana, the father's legal domicile and the place where the parties were married and lived together for several years. The trial court rejected his contention that Virginia was not the children's home state because they were only living there temporarily; the appellate court found no manifest error in the court's finding. While the court reached the right result in this case, its reasoning was curious. It spoke at length about a child's domicile being separate from the father's, or being that of the custodial parent. In addition, it neglected to mention the impact of the PKPA, which would have clearly favored a finding that Louisiana should not exercise jurisdiction.); Maccabe v. Maccabe, 600 So. 2d 1181 (Fla. Dist. Ct. App. 1992) (Even if Florida was the children's legal domicile, it would not be their home state if they had not lived their for the statutorily defined period.); Boudwin v. Boudwin, 615 A.2d 786 (Pa. Super. Ct. 1992) (Parents, both members of the military, were stationed in the Phillippines where their child was born. In September, 1988, the parents separated and signed an agreement by which they agreed to share custody of their son on a six month rotating basis. In September, 1988, the mother moved to Virginia with the child. In 1990, because of the deteriorating conditions in the Phillippines, the parties agreed that the child would stay with the mother until the father left the islands. In the interim, the father filed for divorce in Pennsylvania, his domicile, and raised the issue of custody. The Pennsylvania court granted the divorce, stated it would retain jurisdiction over all matters properly raised, but did not determine custody. After the father left the military in 1991, he returned to Pennsylvania. Not long after, the mother instituted a custody action in Virginia, and the father followed shortly by filing in Pennsylvania. The Pennsylvania court concluded that Virginia was the child's home state.). *But see* Hart v. Hart, 327 S.E. 2d 631 (N.C. App. 1985) (Father was in the military, stationed in North Carolina. He was sent to Okinawa and the mother and children moved to Florida. When father returned to North Carolina, he filed there for custody. Mother filed the next day in Florida. The North Carolina court held that it had "home state" and "significant connection" jurisdiction. The court reasoned that father was on active duty with the Marine Corps stationed at Camp LeJeune, and his transfer to Okinawa did not effect his continued residence in North Carolina for "home state" purposes.).

18. 28 U.S.C. 1738A(d).

19. *See, e.g.*, Rohlfs v. Rohlfs, 666 So. 2d 568 (Fla. Dist Ct. App. 1996) (Parties, both Marine Corps officers, divorced in Florida in 1991 and the mother was awarded primary residential custody. In August, 1992 the father was transferred to California and in August, 1993 the mother was transferred to Virginia. In April, 1994, the mother filed a motion in Florida to set summer vacation and in July, the father filed a motion in California to change custody. The court decided that Florida had continuing jurisdiction because the mother continued to reside there even though she was temporarily absent from the state on military assignment. Evidence of her continued residence was found in the fact that her car was registered in Florida, she had a Florida driver's license, she was registered to vote there, her children were enrolled in the Florida prepaid college plan, she planned to retire there, and she regarded Florida as her home.); Welborn-Hosler v. Hosler, 870 S.W.2d 323 (Tex. App. 1994) (Parents were divorced in Texas in 1989. Subsequently the father joined the Armed forces and was stationed in California, but maintained his Texas residency. The mother moved with the child to North Carolina where she sought modification of the visitation portion of the decree. Later the father filed a motion in Texas to enforce the visitation provisions of the original decree. The court concluded that Texas had continuing jurisdiction because the father continued to reside there while stationed in California.). *Accord* Whitfield v. Whitfield, 519 So. 2d 546 (Ala. Civ. App. 1987) (Father, a military serviceman, was stationed in several states and overseas, but continued to declare Alabama as his permanent residence and maintained bank accounts in Alabama, had an Alabama license, and voted by absentee ballot in Alabama. The court held that Alabama, the

original decree state, had continuing jurisdiction over visitation, rejecting the mother's contention that jurisdiction should have been declined on inconvenient forum grounds in favor of Texas, where she had moved.); Mark L. Jennifer S., 506 N.Y.S.2d 1020 (Fam. Ct. 1986) (Petitioner-father absent from New York on military assignment outside the country continues to reside in New York within the meaning of the PKPA and UCCJA. To otherwise construe the state would deny a member of the U.S. armed services "home state" status or protection under the UCCJA and PKPA.).

20. Other resources on this topic include: International Child Abductions: A Guide to Applying the Hague Convention, with forms (ABA SECTION OF FAMILY LAW, GLORIA F. DEHART ed., 2d ed. 1993); DAVID FINKELHOR et al.,, U.S. Dep't of Justice, Missing, Abducted, Runaway and Thrownaway Children in America (1990); BETH FRERKING, *Killer Dads: Why Fathers Turn on Their Families,* Newhouse News Service (1996); Office of Juv. Justice and Delinquency Prevention, U.S. Dep't of Justice, Final Report, OBSTACLES TO THE RECOVERY AND RETURN OF PARENTALLY ABDUCTED CHILDREN (LINDA K. GIRDNER & PATRICIA M. HOFF eds.,1994); Patricia M. Hoff, *Parental Kidnapping: Prevention and Remedies* (pts. I & II), 13 Juv. & Child Welfare L. Rep. 173 (1995), (pts. III & IV), 14 Juv. & Child Welfare L. Rep. 12 (1995); Patricia M. Hoff, National Center for Missing and Exploited Children, FAMILY ABDUCTION: HOW TO PREVENT AN ABDUCTION AND WHAT TO DO IF YOUR CHILD IS ABDUCTED, (4th ed. 1994); EVA J. KLAIN, AMERICAN PROSECUTORS RESEARCH INSTITUTE, DOMESTIC VIOLENCE AND CHILD ABUSE: CHANGING LEGAL RESPONSES TO RELATED VIOLENCE (1995); Joan Zorza, *Recognizing and Protecting the Privacy and Confidentiality Needs of Battered Women*, 29 FAM. L. Q. 273 (1995).

21. Research on parental abduction has consistently shown a high incidence of domestic violence, ranging from about one-half to two-thirds of the cases. These rates, however, do not appear to be significantly higher than those of litigants in high conflict custody cases. For more information, *see* GEOFFREY L. GREIF and REBECCA HEGAR, WHEN PARENTS KIDNAP: THE FAMILIES BEHIND THE HEADLINES (1993); Office of Juv. Justice and Delinquency Prevention, U.S. Dep't. Of Justice, Final Report, OBSTACLES TO THE RECOVERY AND RETURN OF PARENTALLY ABDUCTED CHILDREN (Linda K. Girdner & Patricia M. Hoff, eds., 1994); and Janet R. Johnston and Linda K. Girdner, PREVENTION OF PARENT AND FAMILY ABDUCTION THROUGH EARLY IDENTIFICATION OF RISK FACTORS, forthcoming 1997.

22. *See* Chapter 5 for a more detailed explanation of emergency jurisdiction.

23. The length of time may vary. Check the state statute.

24. *See* Chapter 7 for preventive measures.

25. *See, e.g.*, Attorney Grievance Commission of Maryland v. Leonard J. Kerpelman, 420 A. 2d 940 (Md. 1980).

26. *See, e.g.*, Shehade v. Gerson, 500 N.E. 2d 510 (Ill. Ct. App. 1987).

27. *See,e.g.*, Soderlund v. Alton, 467 N.W. 2d 144 (Wisc. Ct. App. 1991).

28. *See,e.g.*, Bersani v. Bersani, 565 A. 2d 1368 (Conn. Super Ct. 1989). *Also see* Chapter 1, endnote 13, *supra*.

Chapter 10.
International Child Custody and Abduction Cases

Summary

This chapter will familiarize judges in the U.S. with the state and federal law applicable to international child custody, visitation and abduction disputes. These laws are UCCJA § 23, the Hague Convention on the Civil Aspects of International Child Abduction (Hague Convention), and the International Child Abduction Remedies Act (ICARA).

When a custody order from a foreign country is presented for recognition and enforcement, UCCJA § 23 controls. If notice and opportunity to be heard were given to all affected persons, state courts are to enforce foreign custody decrees.

When a petition is filed seeking the prompt return of a child to another country based on allegations that the child's removal or retention was wrongful, the Hague Convention and ICARA govern. If the child's removal or retention is wrongful within the meaning of the Convention, and no exceptions to return are proved, a court in the U.S. must order the child's return forthwith. A return order is not a decision on the merits of custody.

CHECKLIST

UCCJA cases

1. In an action brought under UCCJA § 23 to enforce a custody determination made by a court in another country, were all affected persons given reasonable notice and opportunity to be heard before the custody order was made? If so, the UCCJA directs the state court to enforce the foreign order.

2. Have UCCJA § 1, § 6, § 7, § 8, or § 14(a) been considered in deciding whether to exercise jurisdiction or to defer to a foreign court?

- Would the purposes of the UCCJA be served or undermined if the state court exercises jurisdiction over a child who is the subject of a foreign custody proceeding or order? UCCJA §1

- Are proceedings pending in a foreign court simultaneous with the state court proceedings? Is the foreign court better situated to decide custody, *e.g.*, because it is the child's home state? UCCJA § 6

- Has a foreign court previously decided custody? Does it have continuing modification jurisdiction to which the state court should defer? UCCJA § 14

- Is the foreign court a more convenient forum? UCCJA § 7

- Does the petitioner have "unclean hands," or has the petitioner engaged in reprehensible conduct that would warrant declining jurisdiction? UCCJA § 8

3. Has a court received notice that a child has been wrongfully taken to, or retained in, the United States under Article 3 of the Hague Convention? If so, the court shall not decide the custody case (l) until the court hearing the Convention case decides not to order the child's return or (2) unless a Hague petition is not filed within a reasonable time. Art. 16, Hague Convention.

Hague Convention cases for return of a child to a foreign country

1. Is the child covered by the Hague Convention?

- Is the child under the age of 16? Art. 4.

■ Was the child habitually resident in a Contracting State (listed in Appendix IIIB) immediately before any breach of custody or access rights? Art. 4
■ Did the removal or retention occur after the Convention entered into force in both Contracting States? Art. 35

2. Was the removal or retention wrongful within the meaning of the Convention? Arts. 3, 5.

■ Was there a breach of "custody rights," which includes the right to determine the child's place of residence? (Custody rights may arise by court order, operation of law, or agreement.)
■ Were the custody rights actually exercised, jointly or alone, or would they have been exercised but for the removal or retention?

3. Has the defendant proved one of the few narrow exceptions to return found in Articles 12, 13 and 20? If so, the court is not required to order the child returned.

■ Has a year or more elapsed between the time of the wrongful removal or retention and the commencement of the proceeding? If so, is the child now settled in its new environment? Art. 12
■ Did the petitioner acquiesce or consent to the removal or retention, or was the petitioner not actually exercising custody at the time of the alleged wrongful removal or retention? Art. 13(a)
■ Is there a grave risk that returning the child would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation? Art. 13(b)
■ Is a child mature enough for the court to consider his/her objections to being returned? Art.13
■ Would return violate fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms? Art. 20

The court has a treaty obligation to order the child returned if the removal or retention was wrongful and no exception applies.

4. If the petitioner prevails and asks for court costs, attorneys' fees and travel expenses, has the respondent shown that such an order would be clearly inappropriate? If not, the petitioner is entitled to the award under ICARA, 42 U.S.C. § 11607(b).

Applicable statutes

FEDERAL[1]

The Hague Convention on the Civil Aspects of International Child Abduction ("Hague Convention," "Convention")

The International Child Abduction Remedies Act, 42 U.S.C. §§ 11601-11610 ("ICARA")

STATE

UCCJA § 23

Law, Policy and Practice, UCCJA § 23

The drafters of the UCCJA extended its application to international cases. The comment explains the rationale: "The basic policies of avoiding jurisdictional conflict and multiple litigation are as strong if not stronger when children are moved back and forth from one country to another by feuding relatives." UCCJA § 23 gives courts the statutory authority to resolve international jurisdiction disputes in much the same way they resolve interstate jurisdictional conflicts.

Enforcing foreign custody decrees in the U.S.

UCCJA § 23 makes the provisions of the Act relating to recognition and enforcement of custody decrees of other states applicable to "custody decrees and decrees involving legal institutions similar in nature to custody

institutions rendered by appropriate authorities of other nations if reasonable notice and opportunity to be heard were given to all affected persons." The comment notes that the foreign tribunal must have had jurisdiction under its own law rather than under UCCJA § 3.

Jurisdiction to make a custody determination

In addition to the specific duty to recognize and enforce foreign custody decrees, § 23 also extends the general policies of the Act to the international area.

The comment to § 23 states that the substance of § 1 (*e.g.*, avoiding jurisdictional conflict, multiple litigation, and unilateral removals or retentions of children) and the principles underlying provisions like § 6 (simultaneous proceedings), § 7 (inconvenient forum), § 8 (unclean hands) and § 14(a) (restrictions on modification) are to be followed when some of the persons involved are in a foreign country or a foreign custody proceeding is pending.

It takes self restraint for a court to defer jurisdiction to a foreign court, especially when the child is in the United States. But this is precisely what § 23 envisions.

The case of Superior Court v. Plas, 155 Cal. App. 3d 1008 (Cal. App. 1984), is a good example. In Plas, a mother filed for custody in California only four months after arriving from France with her child. The child was born and raised in France, and lived there until shortly before the California hearing. The appeals court held that California lacked jurisdiction to hear the mother's custody action. Even if the court had jurisdiction, the court abused its discretion in refusing to decline jurisdiction on inconvenient forum grounds. The court should have stayed proceedings pending a determination by the court in France. The court said, "The exercise of jurisdiction in the instant case flies into the face of the...purposes of the Act, both ignoring the fact that the family had much closer connection to France and circumventing totally the stated purposes of discouraging forum shopping and deterring the unilateral removal of children." *Id.* at 498.

Case law applying UCCJA § 23

Many courts conform to the letter and spirit of the UCCJA, even where the result is that a child in the United States is returned to another country pursuant to a foreign decree.[2] However, provincialism surfaces occasionally despite UCCJA § 23, keeping the case (and the child) in the United States even when a foreign country has a closer connection to the family.[3]

A state-by-state list of cases[4] involving the international application of the UCCJA is compiled in endnote 4.

Widespread adoption

Section 23 has been adopted with little variation in all but four states: Missouri, New Mexico, Ohio and South Dakota. Indiana has undermined its § 23 considerably by giving its courts broad latitude to modify foreign custody orders.[5]

Nonreciprocal

Where § 23 is in effect, state courts are required to recognize and enforce a foreign country's custody order even if the foreign court has no reciprocal duty to enforce a U.S. custody order. The Hague Convention, discussed below, fills the gap by giving parents in the U.S. a legal means to secure the return of their children from countries that are parties to the treaty.

PKPA does not apply to foreign custody determinations

The PKPA does not expressly apply to foreign custody orders. Nevertheless, the policies it has in common with the UCCJA

(*e.g.*, limiting custody litigation usually to the child's "home state," and deterring unilateral removal and retention of children) are served by state court compliance with § 23.

Hague proceedings take precedence over custody proceedings

Under Article 16 of the Hague Convention, a court that receives notice that a child has been wrongfully removed or retained in this country shall not decide the custody case (l) until the court hearing the Convention case determines not to order the child's return; or (2) unless a Hague petition is not filed within a reasonable time.

The Hague Convention on the Civil Aspects of International Child Abduction and the International Child Abduction Remedies Act

Basic principles judges need to know

The Hague Convention took effect in the United States in 1988 upon enactment of ICARA, the federal implementing statute. The text of the Convention appears in Appendix IIIA and the list of party countries with effective dates is in Appendix IIIB. ICARA is reprinted in Appendix IV.

Unique remedy

The Convention creates a unique remedy which allows parents in contracting states (*i.e.*, countries that have ratified or acceded to the Convention) to obtain the prompt return of children who have been removed from their country of habitual residence and wrongfully taken to, or kept in, another contracting state when "rights of custody" have been breached. Custody rights are defined under the law of the child's country of habitual residence. They may arise by court order, agreement, or operation of law, and may be exercised jointly or alone. A parent does not need a custody order to invoke the Convention. This makes the remedy available in pre-decree abduction and retention cases.

The Convention establishes a more limited remedy to help parents exercise "access" (visitation) rights when their children are in contracting states. The remedy in Article 21 for interference with access rights does not include the right to have the child ordered returned, which is available only when custody rights have been breached.

Duty to order a child returned

The Hague Convention creates a treaty obligation to order a child returned forthwith if the removal or retention of the child is found to be wrongful within the meaning of Article 3. The duty to return is absolute unless the respondent establishes one of the limited exceptions provided for in Articles 12, 13 or 20. Even then, the court retains discretion to order the child returned.

Not a "best interests" hearing

The Hague Convention does not provide a forum for litigating the merits of a custody dispute. Its purpose is to promptly restore the status quo that existed before the child was wrongfully removed or retained. The Convention and ICARA state that decisions to return a child are not on the merits of custody.

The Convention leaves the responsibility for deciding custody and visitation issues to courts in the child's country of habitual residence if the child is ordered returned.

Under this framework, children who are ordered returned to the U.S. under the Convention may then have custody adjudicated by the state court which has jurisdiction under the UCCJA.

Expeditious proceedings

The court should never allow a Convention

case to develop into a custody trial. This is key to reaching decisions quickly as the Convention urges. Article 11 compels courts to "act expeditiously in proceedings for return of children."[6] If a decision is not reached within six weeks, the U.S. Central Authority[7] is authorized to ask the court for an explanation for the delay.

Relaxed evidence rules

The Convention relaxes certain evidentiary rules as a way of speeding up return proceedings. Under Article 30, any application submitted to the Central Authority or petition submitted to a court, along with any documents or information appended thereto, are admissible in court. Under Article 23, no legalization or similar formalities may be required. (However, authentication of private documents may be required.) These provisions are reiterated in ICARA, 42 U.S.C. § 11605. Prompt disposition of a Convention case is also facilitated by the requirement that return petitions filed in a court in this country must be in English.

Applicable legal precedent

ICARA creates concurrent jurisdiction in state and federal courts over Hague Convention cases. 42 U.S.C. § 11603(a). The petitioner elects the forum by filing the petition for return either in state or federal court.

Legal research for useful case precedent should cover state and federal case law. Foreign case law is also relevant given the uniformity of the Convention in all contracting states.[8]

♦ Practice Tip

For information about Hague Convention cases worldwide, check William Hilton at http://www.hiltonhouse.com.

"Provisional remedies"

The court is authorized by ICARA, 42 § 11604, to take or cause to be taken measures to protect the well-being of the child and to prevent the child from being abducted or concealed before the final disposition of the case. A court can order the child removed from the physical custody of the alleged abductor and taken into protective custody in accordance with state law.

THE CASE FOR RETURN

Article 12's right to return

Under Article 12, a court must order a child returned forthwith if the child has been wrongfully removed or retained in terms of Article 3 and less than one year has elapsed from the date of the wrongful removal or retention to the date of the commencement of proceedings. The petitioner must establish by a preponderance of the evidence that the child has been wrongfully removed or retained under the Convention. 42 U.S.C. § 11603(e)(1)(A).

Wrongful removal or retention

Under Article 3, a removal or retention is wrongful where:

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

What are "custody rights?"

"Custody rights" are defined in Article 5(a)

to mean "rights relating to the care of the person of the child, and, in particular, the right to determine the child's place of residence." Custody rights are defined by the law of the child's habitual residence. They may arise by operation of law, court order, or agreement of the parties. Article 3.

Because custody rights may arise by operation of law in the country of habitual residence and need not be conferred by court order, a person whose child is abducted prior to the entry of a custody order may invoke the Convention for the child's return. This is not a Convention for the recognition and enforcement of judgments; it is a Convention to restore the child to the situation that existed before the abduction or retention.

What is the child's country of "habitual residence" and why does it matter?

It is essential to determine the child's country of "habitual residence." The Convention only applies if the child was "habitually resident" in a Contracting State immediately before the alleged breach of custody or access rights. Article 4. Second, the law of the child's country of habitual residence governs whether the removal or retention is "wrongful," *i.e.*, whether there was a breach of "custody rights."

The Convention does not define "habitual residence." There is no fixed period of time that a child must live in a country for it to be considered the child's "habitual residence." In this respect, "habitual residence" differs from "home state" in the UCCJA and PKPA, which means the state where the child lived for at least six months immediately before commencement of the proceeding.

Many cases have interpreted the term "habitual residence."[9] The Third Circuit Court of Appeals' description of "habitual residence" in Feder v. Evans-Feder, 63 F.3d 217 (3rd Cir. 1995) builds upon the excellent analyses in Friedrich v. Friedrich, 983 F.2d 1396 (6th Cir. 1993) and In re Bates, No. CA 122-89, High Court of Justice, Family Div'l Ct. Royal Courts of Justice, United Kingdom (1989). The court in Feder said:

> ...a child's habitual residence is the place where he or she has been physically present for an amount of time sufficient for acclimatization and which has a "degree of settled purpose" from the child's perspective. We further believe that a determination of whether any particular place satisfies this standard must focus on the child and consists of an analysis of the child's circumstances in that place and the parents' present, shared intentions regarding their child's presence there.

"Actually exercised"

In the scheme of the Convention it is presumed that the person who has custody actually exercised it, or would have but for the alleged wrongful removal or retention. Article 13 places on the alleged abductor the burden of proving the nonexercise of custody rights by the applicant as an exception to the return obligation. See defenses, below.

The Sixth Circuit Court of Appeals produced a simple working definition of "actually exercised" in its review of the Friedrich case. [10] The court said:

> If a person has valid custody rights to a child under the law of the country of the child's habitual residence, that person cannot fail to "exercise" those custody rights under the Hague Convention short of acts that constitute clear and unequivocal abandonment of the child.

DEFENSES TO RETURN

Once a petitioner establishes that the removal

or retention was wrongful, the child must be returned forthwith unless the respondent establishes one of the exceptions to return. It is important to point out, however, that a defense once proved does not absolutely preclude a court from ordering the child returned. The court has discretion to order the child's return anyway.

■ Article 12

The court is not obligated to order the return of a child when return proceedings pursuant to the Convention are commenced a year or more after the alleged removal or retention and it is demonstrated that the child is "settled in its new environment." ICARA defines "commencement of the proceedings" to mean with respect to a child located in the United States, the filing of a petition for return or access. 42 U.S.C. 11603(f)(3). The court must determine whether the child is "settled in its new environment" based upon the particular facts of the case.[11] The Convention does not define this phrase.

The respondent must establish this defense by a preponderance of the evidence. 42 U.S.C. § 11603(e)(2)(B).

Article 13(a): nonexercise of custody rights/acquiescence or consent

The court may deny an application for return of a child if the person having the care of the child was not actually exercising custody rights at the time of the removal or retention, or had consented to or acquiesced in the removal or retention. Whether the applicant consented to or acquiesced in the removal or retention requires a detailed analysis of the facts.[12]

Questions about consent tend to arise when temporary removals turn into de facto permanent changes in custody. For instance, one parent may consent to the other parent taking the child on a temporary visit to that parent's home country. If the parent decides not to return , the left-behind parent will claim she or he did not consent to the permanent change of residence. Evidence of return airline tickets, school registrations, employment, etc. will help the court ferret out the true intentions of the parents.

A question can arise about whether a left-behind parent acquiesces in a wrongful retention by allowing the abductor-parent to keep the child while trying to work out a settlement of the underlying conflict. The better view is that negotiations for the child's return between the left-behind parent and the alleged abductor-parent should not be viewed as acquiescence on the part of the left-behind parent to the removal or retention. This would discourage amicable resolutions which ought to be encouraged.

The respondent must establish an Art. 13(a) defense by a preponderance of the evidence. 42 U.S.C. § 11603(e)(2)(B).

Article 13(b): grave risk of harm / intolerable situation

A court may refuse to order the return of a child where the respondent proves, by clear and convincing evidence (42 U.S.C. § 11603(2)(A)), that there is a grave risk that return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

♦ Practice tip

A HAGUE CASE IS NOT A CUSTODY CASE!

The most predictable point at which a court can get sidetracked into substantive custody issues is when the person objecting to return argues an Article 13(b) defense. It is a common defense strategy to try to convince the court that return would not be in the child's best interests. Expert testimony and other evidence may be

offered. The respondent should not be permitted to try the underlying custody case under the guise of proving a defense. The merits of custody are not to be considered until it is determined that the child is not to be returned. Article 16.

There is ample case authority for the proposition that courts should interpret "grave risk" restrictively. [13]

A concise, thoughtful analysis of what constitutes "grave risk" is found in Friedrich v. Friedrich, 78 F.3d 1060 (6th Cir. 1996). According to Friedrich, evidence that a child will suffer adjustment problems if returned to the country of habitual residence is not enough to establish a "grave risk" of psychological harm that would defeat the Convention's return remedy. The court's rationale is persuasive: the abducting parent should not be permitted to profit from the very situation he or she created by wrongfully removing or retaining the child in the first place.[14]

Specifically, the court held:

> We believe that a grave risk of harm for purposes of the convention can exist in only two situations. First, there is a grave risk of harm when return of the child puts the child in imminent danger prior to the resolution of the custody dispute - *e.g.*, returning the child to a zone of war, famine, or disease. Second, there is a grave risk of harm in cases of serious abuse or neglect, or extraordinary emotional dependence, when the court in the country of habitual residence, for whatever reason, may be incapable or unwilling to give the child adequate protection.
> *Id.* at 2604.

■ Views of the mature child

The court may deny return if a child objects to being returned and has attained an age and decree of maturity at which it is appropriate to take account of his or her views.[15] This defense must be proved by a preponderance of the evidence. 42 U.S.C. § 11603(e)(2)(B). Like the others, this defense is discretionary.

The discretionary aspect of Article 13 is especially important because of the potential for brainwashing of the child by the alleged abductor or older sibling. A child's objection to being returned should be given little weight if the court believes that the child's preference is the product of such undue influence.

■ Article 20

Article 20 states: "The return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms."

As all other exceptions, Article 20 is to be restrictively applied. According to the State Department Legal Analysis, it may be invoked "on the rare occasion that return of a child would utterly shock the conscience of the court or offend all notions of due process." 51 Fed.Reg.10510. It is not be used as a vehicle for litigating custody on the merits or for passing judgment on the political system of the country from which the child was removed. *Id.*

Custody order no defense to return

Under Article 17, a court cannot refuse to return a child solely on the basis of a court order awarding custody to the alleged wrongdoer. The court may, however, take into account the reasons underlying an existing custody decree when it applies the Convention.

THE RETURN ORDER

Once the court determines that the child's removal or retention was wrongful and that no exceptions apply, Article 12 provides that the

court "shall order the return of the child forthwith."

An order for the return of a child envisions returning the child to the parent seeking his or her return in the country of habitual residence. If the petitioner has moved from the country of habitual residence, normally the child will be returned to the petitioner anyway, rather than the country of habitual residence.

The court may order the child returned to the country of habitual residence, but allow the abducting parent to accompany the child home. Although the court cannot order the abductor-parent to return to the habitual residence with the child (the Convention mandates only the child's return), nothing in the Convention prohibits the court from allowing it. This may be an appropriate solution where the court is persuaded that the child would be at risk of harm if returned to the applicant-parent. There is some precedent for having the applicant-parent provide transportation and housing for the respondent-parent who wishes to return with the child.[16]

Attorneys' fees

Under Article 26, upon ordering the return of a child or issuing an order concerning rights of access, the court may direct the person who removed or retained the child, or who prevented the exercise of rights of access, to pay necessary expenses incurred by or on behalf of the applicant to secure the child's return, including costs incurred or payments made for locating the child, costs of legal fees, and those of returning the child.

ICARA's fee-shifting provision is stronger than Article 26 when a court orders a child returned.[17] Under ICARA, 42 U.S.C. § 11607:

> Any court ordering the return of a child pursuant to an action brought under § 4 shall order the respondent to pay necessary expenses incurred by or on behalf of the petitioner, including court costs, legal fees, foster home or other care during the course of proceedings in the action, and transportation costs related to the return of the child, unless the respondent establishes that such order would be clearly inappropriate.

The rationale for mandatory fee awards "unless clearly inappropriate" is to compensate the parent from whom the child was wrongfully removed or retained, and to deter others from engaging in the proscribed conduct.

ACCESS CASES

Article 5(b) defines "access rights" as including "the right to take a child for a limited period of time to a place other than the child's habitual residence." A parent whose access rights are infringed is not entitled under Article 21 of the Convention to the child's return, but may petition a court "to organize or protect these rights and secure respect for the conditions to which their exercise may be subject." A court in the U.S. would need jurisdiction under the UCCJA before it could make or modify an order of visitation.

There may be situations where noncustodial parents would be deemed to have "custody rights," the breach of which would give rise to an action for return. For instance, if a custody order gives the noncustodial parent a right to be consulted before a child is taken out of the country, that parent could be said to have a right to determine the child's residence. Since the return remedy is available for a breach of custody but not access rights, noncustodial parents will seek to frame their rights in terms of custody rather than access, which may be justified by the facts.

Section 23 of the UCCJA may provide a better remedy than the Convention when there has been a violation of court-ordered visitation rights. A state court in the United States could

order the custodial parent to comply with the prescribed visitation period in a foreign order by sending the child to the parent who is abroad. This remedy is potentially broader and more meaningful than the Convention, since the Convention does not include the right to order a child sent overseas to visit with the noncustodial parent.

♦ Practice tip

As good as the Hague Convention remedy is for recovering abducted children from foreign countries, it is no substitute for preventing abductions in the first place. When counsel demonstrate a likelihood of international child abduction, judges should include safeguards in the custody order.

These include restrictions on leaving the U.S. without written consent of the other parent or court permission; restrictions on applying for or receiving original or duplicate passports for a child; mandatory surrender of all passports (U.S. and foreign) before visitation rights may be exercised; requirement of a bond to guarantee the child's return from abroad; securing a "mirror image" order from a court in the foreign national parent's country as a prerequisite to exercise of custody or visitation rights. See Chapter 7 for a discussion of risk factors for child abduction and preventive measures that the court can incorporate into the custody order.

Judicial safeguards are of added importance when an abduction to a non-Hague country is foreseeable, particularly where it is shown that the custody law of the foreign country does not give both parents a fair hearing or consider the child's best interests.

Endnotes

1. The full text of the Hague Convention and ICARA appear in Appendices III and IV, respectively.

2. Courts, for the most part, have given deference to foreign court orders as the UCCJA intends. *See, e.g.*, Vause v. Vause, 409 N.W.2d 412 (Wis. Ct. App. 1987) (Wisconsin court recognized and enforced a West German order where mother had actual notice of the West German proceedings); In re Marriage of Malak, 182 Cal. App. 3d 1018 (Ct. App. 1986) (California was obligated to recognize and enforce a Lebanese custody order in favor of father pursuant to UCCJA § 23, where mother had reasonable notice and opportunity to be heard, the factual circumstances under which the Lebanese decrees were made satisfied the jurisdictional requirements of the UCCJA, and no evidence was presented that father would automatically get custody in Lebanon); Woodhouse v. District Court, 587 P.2d 1199 (Colo. 1978) (Where father filed for change of custody after abducting child from England, lower court's assumption of "significant connection" jurisdiction was improper in light of the international application of the UCCJA, the English court's retention of continuing jurisdiction, and the absence of a true emergency situation; the Colorado Supreme Court granted a writ of habeas corpus enforcing the English custody order, which gave mother custody); Miller v. Superior Court, 587 P.2d 723 (Cal. 1978) (Australian father obtained enforcement under California's UCCJA of an Australian decree granting him custody of his two children after mother abducted them to California. Court rejected mother's objections that she was not given reasonable notice and opportunity to be heard in the Australian proceedings, and that the Australian custody order should be denied enforcement because its purpose was to punish her for removing the children from Australia. The court noted that the mother still had the full right to be heard on the custody issue in Australia, because the custody award in favor of father was temporary.)

3. *See, e.g.*, Farrell v. Farrell, 351 N.W.2d 219 (Mich. Ct. App. 1984) (Michigan's exercise of significant connection jurisdiction, which resulted in an award of custody to the mother with limited visitation rights to the father living in Ireland, upheld despite the fact that Ireland was the home state of the three children who had been abducted from that country by their mother. Michigan was not required to recognize and enforce the Irish custody order obtained by father after the abduction because the mother had not been given notice and an opportunity to be heard. There was no abuse of discretion in failing to find Michigan an inconvenient forum.). The Farrell case sends the wrong message. By rewarding the abductor-mother with a friendly forum, the court actually encourages unilateral removals of children and forum-shopping.

4. Cases applying UCCJA § 23, by state:

Arizona
Tiscornia v. Tiscornia, 742 P.2d 1362 (Ariz. Ct. App. 1987)(France; deferred jurisdiction).

California
Miller v. Superior Court, 587 P.2d 723 (Cal. 1978)(Australian custody order enforced)
Ben-Yehoshua v. Ben-Yehoshua, 154 Cal. Rptr. 80 (Cal. Ct. App. 1979) (California lacked jurisdiction when it awarded mother custody; Israel had jurisdiction; Israel father's appearance in California proceeding did not confer subject matter jurisdiction, which was otherwise lacking under UCCJA).
In re Marriage of Malak, 182 Cal. App. 3d 1018 (Ct. App. 1986) (Lebanese custody order enforced under UCCJA § 23).
Superior Court v. Plas, 155 Cal. App. 3d 1008 (Ct.App.) (France, not California, had custody jurisdiction; California's exercise of jurisdiction circumvented the stated purpose of discouraging forum shopping and deterring the unilateral removal of children).
In re Stephanie M., 867 P.2d 706(Cal. 1994)(California properly exercised jurisdiction under the UCCJA, and there was no abuse of discretion in the California court's failure to decline jurisdiction on inconvenient forum grounds in favor of Mexico, where dependent child's grandmother lived), *cert. denied*, 115 S. Ct. 277 (1994).

Colorado
Woodhouse v. District Court, 587 P.2d 1199 (Colo. 1978) (Colorado enforced U.K. custody order).

Connecticut
Goldstein v. Fischer, 510 A.2d 184 (Conn. 1986) (Germany, not Connecticut, had custody jurisdiction, where child was only in state for four months).
Hurtado v. Hurtado, 541 A.2d 873 (Conn. App. Ct. 1988) (Connecticut retained modification jurisdiction despite custodial father's removal of children to Columbia, South America).

Florida
Al-Fassi v. Al-Fassi, 433 So. 2d 664 (Fla. Dist. Ct. App. 1983) (Florida not required to recognize and enforce Bahamian custody order, and even if recognition was required, Florida could modify because all parties had left Bahamas), *rev.den.* 446 So. 2d 99 (Fla. 1984);
Suarez Ortega v. Pujals de Suarez, 465 So. 2d 607 (Fla. App. 1985) (Florida clearly lacked jurisdiction under UCCJA § 23 where Mexico was child's home).
Sterzinger v. Efron, 550 So. 2d 475 (Fla. Dist. Ct. App. 1988) (Florida was prohibited from exercising jurisdiction to domesticate a West German judgment, where a proceeding concerning custody was pending in Puerto Rico in substantial conformity with the UCCJA).
Dixson v. Cantrell, 564 So. 2d 1138 (Fla. App. 1 Dist. 1990) (Florida recognized Dutch decree).
Brown v. Tan, 395 So. 2d 1249 (Fla. Dist. Ct. App. 1981)(Child ordered returned to father in Singapore, rejecting mother's arguments that Florida had jurisdiction. The court noted its abhorrence of wrongful detention of children).

Georgia
Mitchell v. Mitchell, 311 S.E.2d 456 (Ga. 1984) (Georgia court upheld imposition of safeguards to prohibit removal of children from the U.S., where evidence showed that if Lebanese mother removed children to the United Arab Emirates, the courts there would provide no relief and father could not enforce his joint custody rights).

Illinois
In re Marriage of Alush, 527 N.E.2d 66 (Ill. App. Ct.) (Illinois court bound to recognize and enforce Israeli decree once it was filed in accordance with UCCJA).
In re Marriage of Agathos, 550 N.E.2d 1161 (Ill.App. Ct. 1990) (Greek order must be registered and party given opportunity to object).
In re Marriage of Silvestri-Gagliardoni, 542 N.E.2d 106 (Ill. App. Ct. 1989) (Illinois enforced Italian decree; Illinois lacked jurisdiction) .

Indiana
Horlander v. Horlander, 579 N.E.2d 91 (Ind. Ct. App. 1991)
(Indiana court had "home state" jurisdiction, France did not. Trial court abused its discretion by declining jurisdiction on inconvenient forum grounds in favor of France, where mother commenced proceeding two months after abducting children from Indiana).

Kansas
In re Marriage of Nasica, 758 P.2d 240 (Kan. Ct. App. 1988) (Kansas' exercise of jurisdiction permissible where father failed to prove that prior pending proceeding in France was in substantial conformity with UCCJA).

Louisiana
Gay v. Morrison, 511 So. 2d 1173 (La. Ct. App.)
(Louisiana enforceds Brazilian visitation rights confirmed in New York order because Brazil was a "state" within the meaning of the UCCJA and had most significant connections with the children), *writ denied*, 515 So. 2d 1008 (La. 1987).

Maryland
Hosain v. Malik, 671 A.2d 988 (Md. Ct. Spec. App. 1996) (Maryland granted comity to Pakistani custody order awarding custody to father. In making the order, the best interests of the child (based on the culture, customs and mores of Pakistan and the religion of the parties) was considered under Pakistani law, and that law is not so contrary to Maryland public policy as to undermine confidence in the outcome of the trial. The fact that the Pakistani custody order was based on "Hazanit" -- complex Islamic rules of maternal and paternal preference, depending on the age and sex of the child -- does not mean that Pakistani law is so repugnant to Maryland law that comity should be denied, since the Hazanit is not the only factor used to determine the best interest of the child.).

Massachusetts
Bak v. Bak, 511 N.E.2d 625 (Mass. App. Ct.1987) (Probate judge did not abuse discretion in refusing to defer to West German courts where Massachusetts has jurisdiction based on "home state" and significant connection jurisdiction).
Custody of a Minor (No. 3), 468 N.E.2d 251 (Mass. 1984) (Massachusetts obliged to enforce Australian custody order which was made in substantial conformity with the UCCJA, was not punitive, was made with notice to mother, and took into consideration child's best interests).

Michigan
Farrell v. Farrell, 351 N.W.2d 219 (Mich. Ct. App. 1984) (Michigan not obligated to recognize and enforce Irish order made without notice to mother or opportunity to be heard; Michigan exercised significant connection jurisdiction).
Klont v. Klont, 342 N.W.2d 549 (Mich. Ct. App. 1983) (Michigan recognized and enforced West German order).

Mississippi
Laskosky v. Laskosky, 504 So. 2d 726 (Miss. 1987) (Mississippi enforced valid temporary Canadian custody order pursuant to UCCJA § 23).

New Jersey
MC v. MC, 521 A.2d 381 (N.J. Super. Ct. Ch. Div. 1986) (two cases involving Irish custody orders were consolidated with mixed results: New Jersey enforced one but not the other).
Schmidt v. Schmidt, 548 A.2d 195 (N.J.Super.Ct. App. Div. 1988) (UCCJA required enforcement of valid foreign decrees, but New Jersey not bound to enforce West German *ex parte* custody orders; denial of father's motion to transfer case to Germany on inconvenient forum grounds not an abuse of discretion, as it wawithin the court's discretion to apply the Act's general jurisdictional provisions to international cases.).

New York
Braunstein v. Braunstein, 497 N.Y.S.2d 58 (App Div. 2 Dept. 1985) (New York court enforced, and refuses father's request to modify, Swedish custody order).
Klien v. Klien, 533 N.Y.S.2d 211 (Sup. Ct. 1988) (New York refused to decline jurisdiction on inconvenient forum grounds in favor of Israel, where father abducted children from their "home state" of New York and Israel was not a "state" under the inconvenient forum provision of the UCCJA).
Lotte V. v. Leo V., 491 N.Y.S.2d 581 58, 128 Misc. 2d 896 (Fam. Ct. 1985) (Switzerland was not a "state" within meaning of UCCJA prohibition on simultaneous proceedings, leaving New York free to exercise jurisdiction notwithstanding pending custody proceeding in Switzerland).
Evans v. Evans, 447 N.Y.S.2d 200 (Sup .Ct. 1982) (New York lacks modification jurisdiction and defers to Israel which issued a custody decree based on jurisdictional principles similar to those of the UCCJA).
L.H. v. Youth Welfare Office of Wiesbaden, Germany, 568 N.Y.S.2d 852, 150 Misc. 2d 490(Fam. Ct.)(New York deferred to Germany's jurisdiction).

Pennsylvania
Commonwealth ex rel. Taylor v. Taylor, 480 A.2d 1188(Pa. Super. Ct. 1984) (Pennsylvania lost modification jurisdiction and Bermuda could validly modify the Pennsylvania order consistent with the UCCJA).
Hovav v. Hovav, 458 A.2d 972 (Pa. Super. Ct. 1983) (Pennsylvania lacked jurisdiction to modify Israeli decree).
Zaubi v. Zaubi, 423 A.2d 333 (Pa. Super Ct. 1980) (Pennsylvania must enforce and cannot modify, except as provided by statute, Danish decree, where father had notice an opportunity to be heard in the Danish proceeding. The father "evaded the jurisdiction of the Danish court, flouted its decree, and relitigated in a 'friendlier' forum the very issues which the Danish court had decided against him," precisely what the UCCJA was intended to prevent.).
Taylor v. Taylor, 420 A.2d 570 (Pa. Super. Ct. 1980) (Pennsylvania enforced, and could not modify, Canadian custody order), *cert. denied*, 454 U.S. 1151 (1982).

Tennessee
Falco Adkins v. Falco Antapara, 850 S.W. 2d 148 (Tenn. Ct. App. 1992) (where Panama and Tennessee entered conflicting custody orders, dismissal of Tennessee proceeding was affirmed where Panama was "home state" of children, Tennessee lacked jurisdiction, and even if it had jurisdiction, it was an inconvenient forum. There was no evidence that Panama would not afford due process or that it would not follow the principles of the UCCJA. Tennessee cannot exercise jurisdiction, but it would enforce the order of a country acting in accordance with the principles of the UCCJA.).

Texas
Garza v. Harrey, 726 S.W.2d 198 (Tex. App. 1987) (Texas bound by UCCJA to recognize and enforce Mexican decree, but short term temporary emergency relief allowed until steps were taken in Mexico to protect the child).

Vermont
In re Cifarelli, 611 A.2d 394 (Vt. 1992) (Vermont deferred to Bermuda. Although Vermont had emergency jurisdiction when it entered the initial guardianship, Vermont lacked continuing jurisdiction and was an inconvenient forum. Bermuda, where child

lived for over a year, is the only forum with evidence of the child's best interests.).

Virginia
Middleton v. Middleton, 314 S.E.2d 362 (Va. 1984) (In Middleton, Virginia abused its discretion in refusing to find England a more appropriate forum. Modification jurisdiction shifted from Virginia to England, which had been the childrens' "home state" for seven years. In Lyons, Virginia not required to recognize and enforce a U.K. order obtained by the mother who had abducted child from Virginia, the child's "home state.").

Washington
In re Marriage of Ieronimakis, 831 P.2d 172 (Wash. Ct. App. 1992) (Washington applied the general principles of the UCCJA to conclude that Greece, not Washington, was the childrens' home state and the proper place to decide custody. Washington also should not exercise jurisdiction based on inconvenient forum and unclean hands, because the mother wrongfully removed the children from Greece. The Washington court received written assurances from Greece that it provided equal rights for women and that custody determinations are based on the best interests of the child.).

Wisconsin
Vause v. Vause, 409 N.W.2d 412 (Wis. App. 1987)(Wisconsin recognized and enforced German order.)

5. "Except as provided in § 25 of this chapter "at the beginning of the second sentence of § 23 Section 25 (IC 31-1-11.6-25 provides: "(a) Notwithstanding § 3, § 7, and § 8 of this chapter, a court of this state has jurisdiction to make a child custody and support determination by modification decree if: (1) the child is a citizen of the United States; (2) a determination concerning the custody of the child has been made by a court in another nation; (3) the child is physically present in this a state; and (4) there is a reasonable probability that the child will be moved outside of the United States if a determination concerning the custody of the child made by a court in another nation is given effect in the United States..."

6. Zajaczkowski v. Zajaczkowska, 932 F. Supp. 128 (D. Md. 1996) (return petition treated as an application for a writ of habeas corpus, based in part on the court's analysis that ordinary federal rules of civil procedure would be at odds with the Convention and ICARA's premium on expedited decision-making); Walton v. Walton, 925 F. Supp. 453 (S.D. Miss. 1996) (court ruled on return petition thirty days after it was filed); Navarro v. Bullock, 15 Fam. L. Rep. (BNA) 1576 (Cal. Super. Ct. Sept. 1, 1989) (court ruled on return petition eight days after it was filed).

7. The State Department is designated as the U.S. Central Authority (CA). The 'CA' can be reached in Washington, D.C. at (202)636-7000. Its duties are set forth in Article 7 of the Convention.

8. *See* Air France v. Saks, 470 U.S. 392 (1985) (When a treaty is involved the use of foreign decisions is proper authority in the U.S. Courts.).

9. *See, e.g.*, Friedrich v. Friedrich, 983 F.2d 1396 (6th Cir. 1993) (habitual residence determined by focusing on the child, looking back in time, not forward to the future intentions of only one of the parents. Once established, "habitual residence" may be altered only by a change in geography, which must occur before the questionable removal and the passage of time, not by changes in parental affection and responsibility); In re Bates, No. CA 122-89, High Court of Justice, Family Div'l Ct. Royal Courts of Justice, United Kingdom (1989) ("There must be a degree of settled purpose. The purpose may be one or there may be several. It may be specific or general. All that the law requires is that there is a settled purpose. That is not to say that the propositus intends to stay where he is indefinitely. Indeed, his purpose while settled may be for a limited period. Education, business or profession, employment, health, family or merely love of the place spring to mind as common reasons for a choice of regular abode, and there may well be many others. All that is necessary is that the purpose of living where one does has a sufficient degree of continuity to be properly described as settled."); Feder v. Evans-Feder, 63 F.3d 217 (3d Cir. 1995). Also *see* Rydder v. Rydder, 49 F.3d 369 (8th Cir. 1995) (there is no real distinction between habitual and ordinary residence); In re Ponath, 829 F. Supp. 363, 367-68 (D. Utah 1993) (concept of habitual residence must encompass some element of voluntariness and purposeful design which can be characterized as settled purpose; coerced stay in a country does not make that country the habitual residence); Levesque v. Levesque, 816 F. Supp. 662, 666 (D. Kan. 1993) (the intent is for the concept of habitual residence to remain fluid and fact based, without becoming rigid); Brooke v. Willis, 907 F. Supp. 57 (S.D.N.Y. 1995) (habitual residence determined more by a state of being than a particular time period; settled purpose may be attainable even in a singleday).

10. Friedrich v. Friedrich, 78 F.3d 1060 (6th Cir. 1996).

11. For cases interpreting "settled in its new environment," *see, e.g.*, David S. v. Zamira S., 151 Misc. 2d 630, 574 N.Y.S.2d 429(Fam. Ct. 1991) (children were not so settled that they could not be uprooted and returned to Canada); In re Coffield, 644 N.E.2d 662 (Ohio Ct. App. 1994) (child had not developed the connections to the community that would normally be expected of a 5-year old after 3 years in the new community).

12. *See, e.g.*, In re Ponath, 829 F. Supp. 363 (D.C. Utah 1993) (father found to have acquiesced); Currier v. Currier, 845 F. Supp. 916 (D.C. N.H. 1994) (mother found not to have acquiesced); Wanninger v. Wanninger, 850 F. Supp. 78)(D.Mass. 1994) (father consented to initial removal but found not to have acquiesced in mother's retention of children); Levesque v. Levesque, 816 F. Supp. 662 (D.Kan. 1993) (insufficient evidence to establish mother's acquiescence in father's removal of children from Germany); David S. v. Zamira S., 151 Misc. 2d 630, 574 N.Y.S. 429 (Fam. Ct. 1991) (father's delay in commencing proceeding did not amount to acquiescence); In re A, 1 AER 929 (Ct. of App. 1992)(the English Court of Appeal found the father had acquiesced in mother's unilateral removal of the children based on a letter he wrote to her following the removal, his three-month delay in filing a return application, and his failure to tell mother he wanted the children back).

13. *See, e.g.*, Friedrich v. Friedrich, 78 F.3d 1060 (6th Cir. 1996); Thomson v. Thomson, 119 D.L.R.4th 253 (Can. 1994)(Supreme Court of Canada held that the exception applies only to harm "that also amounts to an intolerable situation."); Tahan v. Duquette, 613 A.2d 486 (N.J. Super. Ct. 1992) ("grave risk" hearing should be focused on the country to which the child would be returned and whether there is such internal strife or unrest there as to pose a risk of harm. Although the court may not delve into the merits of the custody dispute, the court may evaluate the surrounding to which the child would be returned and the basic personal qualities of those located there); In re Coffield, 644 N.E.2d 662 (Ohio Ct. App. 1994) (scope of inquiry under the Article 13(b) grave risk exception is extremely narrow and should focus on the environment in which the child would reside if returned; evidence of psychological tests of child and father, past lifestyle of mother, and evidence of the possible harm the child would suffer if separated from his father all deemed irrelevant to the Art. 13 (b) inquiry); Nun-Escudero v. Tice- Menley, 58 F.3d 374 (8th Cir. 1995) (mother's claims of alleged physical, sexual and emotional abuse were too general to warrant exception to return); Rydder v. Rydder, 49 F.3d 369 (8th Cir. 1995) (there must be specific evidence of potential harm; separation of the child from its parent not sufficient).

14. *See also* Navarro v. Bullock, 15 FLR 1576 (BNA)(Cal. Super. Ct. 1989) ("To retain the children in the United States guarantees that the mother will continue to frustrate the custodial and visitation rights of the father . . . . To allow this to happen would be to allow mother to profit from her own wrong . . . . ").

15. *See, e.g.*, Sheikh v. Cahill, 546 N.Y.S.2d 517, 145 Misc. 2d 171 (Sup. Ct. 1989) (nine-year old child ordered returned to mother in England despite his expressed desire to remain with father in New York, which probably was influenced by father's favorable treatment during summer visit. The child was neither old enough nor mature enough to take his views into account.).

16. *See, e.g.*, Korwin v. Korwin (District Court of Horgen (Switzerland) Feb. 13, 1992) (Father submitted a sworn statement declaring his willingness to provide housing and to bear the costs if mother were to return to the United States while custody proceedings were pending. She was ordered to return the child to Michigan after she wrongfully withheld the child in Switzerland.) The case is on file at the ABA Center on Children and the Law.

17. *See, e.g.*, Grimer v. Grimer, 1993 LEXIS 19616 (D.C. Kan 1993) (mother awarded costs and fees in conjunction with return order); Viragh v. Foldes, 612 N.E.2d 241 (Mass. 1993) (father denied attorneys fees in association with his unsuccessful petition for children's return).

Chapter 11
Awarding Attorney Fees, Costs, and Expenses

Summary

Courts can send a strong message condemning forum shopping and parental kidnapping by awarding attorneys' fees, court costs, and travel and other expenses, to prevailing parties in interstate custody, visitation, and enforcement cases. This chapter outlines the statutory authority in the UCCJA and PKPA for making such awards.

Analogous provisions are contained in the Hague Convention and ICARA. These are discussed in Chapter 10.

CHECKLIST

1. When does the UCCJA authorize a court to award fees, costs, and expenses?

2. Under what circumstances does the PKPA encourage courts to award fees, costs, and expenses?

Applicable Statutes

FEDERAL

PKPA, Pub. L. No. 96-611, § 8(c), Dec. 28, 1980, 94 Stat. 3569

STATE

UCCJA § 7 [Inconvenient Forum]
UCCJA § 8 [Jurisdiction Declined by Reason of Conduct]
UCCJA § 15 [Filing and Enforcement of Custody Decree of Another State]

When does the UCCJA authorize a court to award attorneys' fees, costs and expenses? The UCCJA provides express authority for the court to make awards when the court concludes that it is clearly an inappropriate forum for the litigation (§ 7(g)); when the court dismisses a petition because of the reprehensible conduct of the petitioner (§ 8(c)); and when a person violates the custody decree of another state, making it necessary for the party entitled to custody to enforce the decree (§ 15(b)).

Inconvenient Forum, § 7(g)

A court with jurisdiction to make an initial custody determination, or to modify an existing decree in another state, is authorized by UCCJA § 7(a) to decline to exercise its jurisdiction if it finds that it is an inconvenient forum and that a court of another state is a more appropriate forum. If it appears to the court that is "clearly an inappropriate forum," under UCCJA § 7(g) the court may require the party who commenced the proceedings to pay, in addition to the costs of the proceedings, necessary travel and other expenses, including attorneys' fees, incurred by other parties or their witnesses. The UCCJA directs that payment be made to the clerk of court for remittance to the proper party.

When is a forum clearly inappropriate? According to the comment to UCCJA § 7(g), the purpose of allowing the court the discretion to award attorneys' fees, costs, and expenses is to serve as a deterrent against frivolous jurisdiction claims. It is to apply when a party chooses a seriously inappropriate forum in light of the jurisdictional requirements of the Act.

Courts, however, have been inconsistent in making awards under this section. For example, awards have been made in cases in which the court stated another state would be a more appropriate forum to determine the child's needs, rather than a clearly inappropriate one.[1] Other courts have allowed awards because a parent

"clearly" sought relief in the wrong forum.[2] Still others have reversed awards of fees specifically because the forum in which the action was brought was not "clearly inappropriate."[3]

In making awards under UCCJA § 7, a court should only do so if it finds that the forum is clearly inappropriate, not just inconvenient.[4] When doing so, it should state this clearly in the order and state the basis for its conclusion.

Unclean hands, § 8

The UCCJA gives the court discretion to decline to exercise jurisdiction to make an initial custody determination (§ 8(a)), or to modify a sister state decree (§ 8(b)), when the petitioner has wrongfully removed or retained the child or has engaged in similar reprehensible conduct. Upon dismissing a petition based on misconduct, the court in appropriate cases may charge the petitioner with necessary travel and other expenses, including attorneys' fees, incurred by other parties or their witnesses. UCCJA § 8(c). The rationale for awarding the prevailing party attorneys fees and expenses is to add a financial deterrent to child stealing and similar reprehensible conduct.[5]

What reprehensible conduct will justify an award of attorneys' fees, travel, and other expenses under § 8? Under UCCJA § 8, reprehensible conduct includes wrongfully taking a child from another state,[6] improperly removing a child from the physical custody of a person entitled to custody, or improperly retaining the child after a visit or other temporary stay,[7] or violating another provision of a custody order.[8]

Enforcement actions, § 15(b)

Under UCCJA § 15(b), the court can order the party who violated an out-of-state custody decree to pay the necessary travel and other expenses, including attorneys' fees, incurred by the party who brought the enforcement action and is entitled to custody. Witness expenses can also be assessed.[9] A party will not be entitled to fees and costs under this provision if the court concludes that the existing court order was not violated.[10]

Under what circumstances does the PKPA encourage courts to award fees, costs, and expenses?

Under Section 8(c) of the PKPA, awards may be made to the prevailing party in initial, modification, or enforcement proceedings.

The PKPA "encourages" state court to make awards to the person entitled to custody or visitation pursuant to a custody determination which is consistent with the provisions of 1738A **in any case** (emphasis added) in which a contestant has either wrongfully removed the child from the physical custody of a person entitled to custody or visitation, or wrongfully retained the child after a visit or other temporary relinquishment of custody, or the court determines it is appropriate.

The federal statute suggests that necessary travel expenses, attorneys' fees, costs of private investigators, witnesses fees and other expenses be awarded to the person entitled to custody or visitation.

Can the court order an award of fees, costs and expenses in the absence of a proper request by a party? A party must request an award before the court can so order. Further the party must identify the statutory basis for the request. For example, if a party requests reimbursement under UCCJA § 7, (inconvenient forum), and the court declines to exercise jurisdiction based upon reprehensible conduct, the court may feel justified in denying the request.[11] Because the PKPA encourages awards of costs and fees "if the court determines it is appropriate," courts have greater latitude in

making awards pursuant to that Act and are encouraged to do so.

What documentation should the court require before making an award? Expenses should be documented in detail. The court should hold requests for attorneys' fees to the same standard it applies when requests for fees are made under other statutes. This may mean requiring evidence of the reasonableness of the fee request[12] and documentation of time spent on the case. The court order should include findings of fact that show the period of time during which the fees were incurred, the hourly rate found to be reasonable and the number of hours reasonably expended on the case.[13]

With regard to travel and other expenses, the party who incurred the expenses should provide the court with a detailed accounting of all relevant expenditures. This could include lodging, all transportation, telephone bills, psychiatric evaluations, and lost wages.[14]

Endnotes

1. *See, e.g.*, Shaw v. Shaw, 735 P.2d 96 (Wash. Ct. App. 1987) (New York was the more appropriate forum to determine the child's needs according to the court; however, the child had no home state and was physically present, along with the mother and father, in Washington when the custody action was filed there); Benson v. Benson, 497 A.2d 64 (Conn. App. Ct. 1985) (The court said it was an inappropriate forum and lacked jurisdiction to modify the decree despite the fact that it had issued the original custody order and the father continued to reside there. In upholding the award of attorney fees, the court also noted that it relied on other statutes that authorized fees in domestic cases.).

2. *See, e.g.*, Via v. Johnson, 521 So. 2d 1324 (Ala. Civ. App. 1987) (After the court in Indiana, which entered the original decree, denied a mother's counterclaim for modification and contempt but granted the father's motion for change in custody, the mother filed for modification of the Indiana decree in Alabama. The court said she "clearly" filed in the wrong court and remanded the case for consideration of the appropriateness of the father's request for attorney fees.).

3. *See, e.g.*, Wulff v. Peralta, 850 P.2d 216 (Idaho Ct. App. 1993) (The court reversed an award of attorney fees to a father because Idaho, although not the appropriate forum, was not a "clearly inappropriate forum."); Hempe v. Cape, 702 S.W.2d 152 (Mo. Ct. App. 1985) (travel costs and fees were not awarded because Missouri was not "clearly" an inappropriate forum).

4. *See, e.g.*, Albert v. Phillips, 602 A.2d 104 (Del. Fam. Ct. 1991) (a finding that a forum is inconvenient for a custody petition does not automatically entitle the opposing party to an award of attorney fees and costs).

5. *See* Comment to UCCJA § 8(c).

6. UCCJA § 8(a).

7. UCCJA § 8(b).

8. UCCJA § 8(b).

9. Arbogast v. Arbogast, 327 S.E. 2d 675 (W. Va. 1984); Lee v. DeShaney, 457 N.E. 2d 604 (Ind. Ct. App. 1983); Crippen v. Crippen, 508 So. 2d 1339 (Fla Dist Ct. App. 1987).

10. Kimmons v. Heldt, 667 P. 2d 1245 (Alaska 1983); Brewington v. Serrato, 336 S.E.2d 444 (N.C. Ct. App. 1985).

11. *See, e.g.*, In re Marriage of Mintle, 294 N.W.2d 564 (Iowa 1980) (mother was not entitled to fees and costs that she requested under UCCJA § 7's inconvenient forum provisions when the court dismissed the father's petition on other grounds).

12. *See, e.g.*, Walker v. Luckey, 474 So. 2d 608 (Miss. 1985) (no evidence of the reasonableness of attorney fees was presented to the court).

13. *See, e.g.*, Rohlfs v. Rohlfs, 666 So. 2d 568 (Fla. Dist. Ct. App. 1996) (case remanded so the court could enter these findings).

14. *See, e.g.*, Thomas v. Thomas, 537 P.2d 1095 (Colo. Ct. App. 1975).

Chapter 12
On the Horizon: The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA)

Background

The National Conference of Commissioners on Uniform State Laws, which promulgated the Uniform Child Custody Jurisdiction Act (UCCJA) in 1968, is working on a revision to that act. The draft act is called the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA).

The drafting committee, composed of commissioners from eight states, is chaired by The Honorable Marian P. Opala, Supreme Court of Oklahoma. Professor Robert Spector of the University of Oklahoma College of Law serves as the reporter. Observers and advisors from numerous organizations, including the National Council of Juvenile and Family Court Judges (NCJFCJ), the American Bar Association (ABA), and the ABA Center of Children and the Law, also have taken part in the drafting process.

The UCCJEA was read for the first time in July 1996. The second reading is scheduled for July 1997. If the UCCJEA is approved at that time, it should be available for state adoption early in 1998. The UCCJA will remain in effect until such time as a state enacts the UCCJEA.

The UCCJEA amends the UCCJA to bring it into conformity with two federal statutes, the Parental Kidnapping Prevention Act (PKPA) and the Violence Against Women Act. The UCCJEA also clarifies numerous sections of the UCCJA that have been the subject of conflicting case law over the years. The major innovation of the UCCJEA is its uniform, streamlined process for interstate enforcement of child custody and visitation determinations.

Uniform enforcement statute

Currently states have a duty under both the UCCJA and PKPA to enforce sister state custody determinations entered in accordance with the provisions of those acts. However, neither act deals with mechanisms for enforcement. As a result, enforcement procedures vary from state to state.

The Obstacles Report[1] identified numerous complications caused by lack of uniformity in enforcement procedures: increased costs of enforcement, decreased certainty of outcome, and potentially long delays in implementing custody and visitation rights.

Proposed Article 3 of the UCCJEA ("Enforcement") addresses these problems by creating a swift remedy modeled on habeas corpus. The drafting committee refers to it as the "turbo habeas" remedy. The enforcing court's inquiry is limited to the issue of whether the decree court had jurisdiction in compliance with applicable law, and whether the respondent had notice and opportunity to be heard.

Two special features of Article 3 are noteworthy: the warrant to take physical custody of the child, and a role for prosecutors in civil enforcement of custody and visitation.

When notice of an enforcement proceeding would create a risk of serious immediate physical harm to the child, or of the child's imminent removal from the jurisdiction, the UCCJEA authorizes the court to waive notice of an enforcement proceeding temporarily and direct that a child be taken into physical custody. Immediately after the child is taken into physical custody, the respondent is to receive notice of the proceedings.

The statute authorizes prosecutors (or other public officials the state may designate) to assist in the location and return of abducted children, and the enforcement of child custody and visitation orders. A companion provision authorizes law enforcement officers to assist the prosecutor in carrying out the designated tasks.

These sections of the draft statute are modeled on California law, which has been in effect for two decades. They were recommended by the Obstacles Report[2] and incorporated into the uniform enforcement statute developed by the Obstacles Project.[3]

Changes to the UCCJA

Important changes to the UCCJA are proposed, some of which are highlighted here.

The UCCJEA prioritizes "home state" jurisdiction along the same lines as the PKPA. This should eliminate the problem of concurrent jurisdiction which endures despite the UCCJA drafters' intent.

The UCCJEA codifies a rule of exclusive continuing jurisdiction in the decree state akin to the analogous PKPA provision. This should stop courts from modifying sister state orders so long as the original decree state has jurisdiction.

The emergency jurisdiction provision of the UCCJA is revamped to make clear not only when jurisdiction exists, but also the nature of relief that can be granted. A court exercising emergency jurisdiction may enter only temporary orders of short duration, and shall require the person to seek permanent relief in the court with jurisdiction under the non-emergency provisions of the act. Under the draft UCCJEA, a court has emergency jurisdiction to make a custody determination when a parent flees for safety with his or her children.

The UCCJEA modernizes the sections in the UCCJA which call for judicial communication, taking into account case law and changes in technology. The draft provision calls for meaningful participation by parties, and requires that a record be made of judicial communications.

Become informed

Copies of the draft Uniform Child Custody Jurisdiction and Enforcement Act may be obtained from the National Conference of Commissioners on Uniform State Laws, 676 St. Claire Street, Suite 1700, Chicago, Illinois 60611, (312)915-0195. A copy of the draft UCCJEA is also available on the Internet at: www.law.upenn.edu/library/ulc/ulc.htm.

Comments on the draft act may be submitted directly to the drafting committee for its consideration prior to the final reading in July. Alternatively, comments may be sent to the NCJFCJ's advisor to the drafting committee.[4]

Endnotes

1. FINAL REPORT, OBSTACLES TO THE RECOVERY AND RETURN OF PARENTALLY ABDUCTED Children, Linda Girdner and Patricia Hoff, eds. (Washington, D.C.: Justice Department, Office of Juvenile Justice and Delinquency Prevention (1993)(hereinafter *Obstacles Report*), Chapter 6, "An Act to Expedite Enforcement of Child Custody Determinations"

2. *See, Obstacles Report*, EXSUM-10: "Recommendation: States should adopt speedy enforcement procedures which will provide for nationally consistent, cost-effective enforcement of custody orders. These procedures should mandate a role for law enforcement officers and prosecutors in the civil enforcement of child custody orders."

3. *See, Obstacles Report*, Chapter 6, "An Act to Expedite Enforcement of Child Custody Determinations," Title II, The Role of Prosecutor and Law Enforcement in the Civil Enforcement of Child Custody Determinations.

4. The Honorable Martin A. Herman, J.S.C., Gloucester County, New Jersey, attended the October 1996 and February 1997 drafting committee meeting as a representative of the National Council of Juvenile and Family Court Judges.

Appendices

Appendix I

PUBLIC LAW 96-611--DEC. 28, 1980 94 STAT. 3566
Public Law 96-611 96th Congress

An Act

To amend title XVIII of the Social Security Act to provide for medicare coverage of Pneumococcal vaccine and its administration.

Dec. 28, 1980
[H.R. 8406]

SEC. 2. The amendments made by this Act shall take effect on, and apply to services furnished on or after, July 1, 1981.
94 STAT. 3567

Effective date.
42 USC 13951
note.

SHORT TITLE

SEC. 6. Sections 6 to 10 of this Act may be cited as the "Parental Kidnaping Prevention Act of 1980".
94 STAT. 3568

FINDINGS AND PURPOSES

42 USC 1305
note.

SEC. 7. (a) The Congress finds that —

(1) there is a large and growing number of cases annually involving disputes between persons claiming rights of custody and visitation of children under the laws and in the courts, of different States, the District of Columbia, the Commonwealth of Puerto Rico, and the territories and possessions of the United States;

(2) the laws and practices by which the courts of those jurisdictions determine their jurisdiction to decide such disputes, and the effect to be given the decisions of such disputes by the courts of other jurisdictions are often inconsistent and conflicting;

(3) those characteristics of the law and practice in such cases, along with the limits imposed by a Federal system on the authority of each such jurisdiction to conduct investigations and take other actions outside its own boundaries, contribute to a tendency of parties involved in such disputes to frequently resort to the seizure, restraint, concealment, and interstate transportation of children, the disregard of court orders, excessive relitigation of cases, obtaining

of conflicting orders by the courts of various jurisdictions, and interstate travel and communication that is so expensive and time consuming as to disrupt their occupations and commercial activities; and

(4) among the results of those conditions and activities are the failure of the courts of jurisdictions to give full faith and credit to the judicial proceedings of the other jurisdictions, the deprivation of rights of liberty and property without due process of law, burdens on commerce among such jurisdictions and with foreign nations, and harm to the welfare of children and their parents and other custodians.

94 STAT. 3569

(b) For those reasons it is necessary to establish a national system for locating parents and children who travel from one such jurisdiction to another and are concealed in connection with such disputes, and to establish national standards under which the courts of such jurisdictions will determine their jurisdiction to decide such disputes and the effect to be given by each jurisdiction to such decisions by the courts of other such jurisdictions.

National system of locating parents, establishment.

(c) The general purposes of sections 6 to 10 of this Act are to —

(1) promote cooperation between State courts to the end that a determination of custody and visitation is rendered in the State which can best decide the case in the interest of the child;

(2) promote and expand the exchange of information and other forms of mutual assistance between States which are concerned with the same child;

(3) facilitate the enforcement of custody and visitation decrees of sister States;

(4) discourage continuing interstate controversies over child custody in the interest of greater stability of home environment and of secure family relationships for the child;

(5) avoid jurisdictional competition and conflict between State courts in matters of child custody and visitation which have in the past resulted in the shifting of children from State to State with harmful effects on their well-being; and

(6) deter interstate abductions and other unilateral removals of children undertaken to obtain custody and visitation awards.

FULL FAITH AND CREDIT GIVEN TO CHILD CUSTODY DETERMINATIONS

SEC. 8. (a) Chapter 115 of title 28, United States Code, is amended by adding immediately after section 1738 the following new section:

28 USC 1731 *et seq.*

"_1738A. Full faith and credit given to child custody determinations

28 USC 1738A.

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

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

Definitions.

"(1) 'child' means a person under the age of eighteen;

"(2) 'contestant' means a person, including a parent, who claims a right of custody or visitation of a child;

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

94 STAT. 3570

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

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

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

"(7) 'physical custody' means actual possession and control of a child; and

"(8) 'State' means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a territory or possession of the United States.

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

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

"(2) one of the following conditions is met:

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

"(B)(I) it appears that no other State would have jurisdiction under subparagraph (A), and (ii) it is in the best interest of the child that a court of such State assume jurisdiction because (I) the child and his parents, or the child and at least one contestant, have a significant connection with such State other than mere physical presence in such State, and (II) there is available in such State substantial evidence concerning the child's present or future care, protection, and personal relationships;

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

"(D)(I) it appears that no other State would have jurisdiction under subparagraph (A), (B), (C), or (E), or another State has declined to exercise jurisdiction on the ground that the State whose jurisdiction is in issue is the more appropriate forum to determine the

custody of the child, and (ii) it is in the best interest of the child that such court assume jurisdiction; or

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

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

94 STAT. 3571

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

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

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

"(2) the court of the other State no longer has jurisdiction to modify such determination.

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

(b) The table of sections at the beginning of chapter 115 of title 28, United States Code, is amended by inserting after the item relating to section 1738 the following new item:

28 USC 1738A note. *Ante*, p. 3569.

"1738A. Full faith and credit given to child custody determinations.".

(c) In furtherance of the purposes of section 1738A of title 28, United States Code, as added by subsection (a) of this section, State courts are encouraged to —

(1) afford priority to proceedings for custody determinations; and

(2) award to the person entitled to custody or visitation pursuant to a custody determination which is consistent with the provisions of such section 1738A, necessary travel expenses, fees, costs of private investigations, witness fees or expenses, and other expenses incurred in connection with such custody determination in any case in which —

Ante, p. 3569.

(A) a contestant has, without the consent of the person entitled to custody or visitation pursuant to a custody determination which is consistent with the provisions of such section 1738A, (I) wrongfully removed the child from the physical custody of such person, or (ii) wrongfully

retained the child after a visit or other temporary relinquishment of physical custody; or

(B) the court determines it is appropriate.

USE OF FEDERAL PARENT LOCATOR SERVICE IN CONNECTION WITH THE ENFORCEMENT OR DETERMINATION OF CHILD CUSTODY AND IN CASES OF PARENTAL KIDNAPING OF A CHILD

SEC. 9. (a) Section 454 of the Social Security Act is amended —
42 USC 654.

(1) by striking out "and" at the end of Paragraph (15);

(2) by striking out the period at the end of paragraph (16) and inserting in lieu thereof "; and"; and

(3) by inserting after paragraph (16) the following new paragraph:

"(17) In the case of a State which has in effect an agreement with the Secretary entered into pursuant to section 463 for the use of the Parent Locator Service established under section 453, to accept and transmit to the Secretary requests for information authorized under the provisions of the agreement to be furnished by such Service to authorize persons, and to impose and collect (in accordance with regulations of the Secretary) a fee sufficient to cover the costs to the State and to the Secretary incurred by reason of such requests, to transmit to the Secretary from time to time (in accordance with such regulations) so much of the fees collected as are attributable to such costs to the Secretary so incurred, and during the period that such agreement is in effect, otherwise to comply with such agreement and regulations of the Secretary with respect thereto.".

94 STAT. 3572

(b) Part D of title IV of the Social Security Act is amended by adding at the end thereof the following new section:
42 USC 651.

"USE OF FEDERAL PARENT LOCATOR SERVICE IN CONNECTION WITH THE ENFORCEMENT OR DETERMINATION OF CHILD CUSTODY AND IN CASES OF PARENTAL KIDNAPING OF A CHILD

"SEC. 463. (a) The Secretary shall enter into an agreement with any State which is able and willing to do so, under which the services of the Parent Locator Service established under section 453 shall be made available to such State for the purpose of determining the whereabouts of any absent parent or child when such information is to be used to locate such parent or child for the purpose of —
42 USC 663.

"(1) enforcing any State or Federal law with respect to the unlawful taking or restraint of a child; or

"(2) making or enforcing a child custody determination.

"(b) An agreement entered into under this section shall provide that the State agency described in section 454 will, under procedures prescribed by the Secretary in regulations, receive and transmit to the Secretary requests from authorized persons for information as to (or useful in determining) the whereabouts of any absent parent or child when such information is to be used to locate such parent or child for the purpose of —
42 USC 654.

"1) enforcing any State or Federal law with respect to the unlawful taking or restraint of a child; or

"(2) making or enforcing a child custody determination.

"(c) Information authorized to be provided by the Secretary under this section shall be subject to the same conditions with respect to disclosure as information authorized to be provided under section 453, and a request for information by the Secretary under this section shall be considered to be a request for information under section 453 which is authorized to be provided under such section. Only information as to the most recent address and place of employment of any absent parent or child shall be provided under this section.
42 USC 653.

"(d) For purposes of this section —
Definitions.

"(1) the term 'custody determination' means a judgment, decree, or other order of a court providing for the custody or visitation of a child, and includes permanent and temporary orders, and initial orders and modification;

"(2) the term 'authorized person' means —

"(A) any agent or attorney of State having an agreement under this section, who has the duty or authority under the law of such State to enforce a child custody determination;

"(B) any court having jurisdiction to make or enforce such a child custody determination, or any agent of such court; and

"(C) any agent or attorney of the United States, or of a State having an agreement under this section, who has the duty or authority to investigate, enforce, or bring a prosecution with respect to the unlawful taking or restraint of a child.".
94 STAT. 3573

(c) Section 455(a) of such Act is amended by adding after paragraph (3) the following: "except that no amount shall be paid to any State on account of amounts expended to carry out an agreement which it has entered into pursuant to section 463.".
42 USC 655.
Ante, p. 3572.
Effective date.
42 USC 663

Ante, p. 3569.
note.

(d) No agreement entered into under section 463 of the Social Security Act shall become effective before the date on which section 1738A of title 28, United States Code (as added by this title) becomes effective.

PARENTAL KIDNAPING

SEC. 10. (a) In view of the findings of the Congress and the purposes of sections 6 to 10 of this Act set forth in section 302, the Congress hereby expressly declares its intent that section 1073 of title 18, United States Code, apply to cases involving parental kidnaping and interstate or international flight to avoid prosecution under applicable State felony statutes.

(b) The Attorney General of the United States, not later than 120 days after the date of enactment of this section (and once every 6 months during the 3-year period following such 120-

day period), shall submit a report to Congress with respect to steps taken to comply with the intent of the Congress set forth in subsection (a). Each such report shall include —

(1) data relating to the number of applications for complaints under section 1073 of title 18, United States Code, in cases involving parental kidnaping;

(2) data relating to the number of complaints issued in such cases; and

(3) such other information as may assist in describing the activities of the Department of Justice in conformance with such intent.

Approved December 28, 1980.

LEGISLATIVE HISTORY:
CONGRESSIONAL RECORD, Vol. 126 (1980):

Dec. 5, considered and passed House.

Dec. 13, considered and passed Senate, amended; House agreed to Senate amendments.

APPENDIX II

UNIFORM CHILD CUSTODY JURISDICTION ACT

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

Approved and Recommended for Enactment in All the States

at its

Annual Conference
Meeting in its Seventy-Seventh Year
at Philadelphia, Pennsylvania
July 22-August 1, 1968

With

Prefatory Note and Comments

Approved by the American Bar Association at its
Meeting at Philadelphia, Pennsylvania
August 7, 1968

The Committee which acted for the National Conference of Commissioners on Uniform State Laws in preparing the Uniform Child Custody Jurisdiction Act was as follows:

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Copies of all Uniform Acts and other printed matter issued by the Conference may be obtained from

National Conference of Commissioners
on Uniform State Laws
1155 East Sixtieth Street
Chicago, Illinois 60637

Uniform Child Custody Jurisdiction Act
Preparatory Note

There are growing public concern over the fact that thousands of children are shifted from state to state and from one family to another every year while their parents or other persons battle over their custody in the courts of several states. Children of separated parents may live with their mother, for example, but one day the father snatches them and brings them to another state where he petitions a court to award him custody while the mother starts custody proceedings in her state; or in the case of illness of the mother the children may be cared for by grandparents in a third state, and all three parties may fight over the right to keep the children in several states. These and many similar situations constantly arise in our mobile society where family members often are scattered all over the United States and at times over other countries. A young child may have been moved to another state repeatedly before the case goes to court.

When a decree has been rendered awarding custody to one of the parties, this is by no means the end of the child's migrations. It is well known that those who lose a court battle over custody are often unwilling to accept the judgment of the court. They will remove the child in an unguarded moment or fail to return him after a visit and will seek their luck in the court of a distant state where they hope to find — and often do find — a more sympathetic ear for their plea for custody. The party deprived of the child may then resort to similar tactics to recover the child and this "game" may continue for years, with the child thrown back and forth from state to state, never coming to rest in one single home and in one community.

The harm done to children by these experiences can hardly be over-estimated. It does not require an expert in the behavioral sciences to know that a child, especially during his early years and the years of growth, needs security and stability of environment and a continuity of affection. A child who has never been given the chance to develop a sense of belonging and whose personal attachments when beginning to form are cruelly disrupted, may well be crippled for life, to his own lasting detriment and the detriment of society.

This unfortunate state of affairs has been aided and facilitated rather than discouraged by the law. There is no statutory law in this area and the judicial law is so unsettled that it seems to offer nothing but a "quicksand foundation" to stand on. See Leflar, American Conflicts Law 585 (1968). See also Clark, Domestic Relations 320 (1968). There is no certainty as to which state has jurisdiction when persons seeking custody of a child approach the courts of several states simultaneously or successively. There is no certainty as to whether a custody decree rendered in one state is entitled to recognition and enforcement in another; nor as to when one state may alter a custody decree of a sister state.

The judicial trend has been toward permitting custody claimants to sue in the courts of almost any state, no matter how fleeting the contact of the child and family was with the particular state, with little regard to any conflict of law rules. See Leflar, American Conflicts Law 585-6 (1968) and Leflar, 1967 Annual Survey of American Law, Conflict of Laws 26 (1968). Also, since the United States Supreme Court has never settled the question whether the full faith and credit clause of the Constitution applies to custody decrees, many states have felt free to modify

custody decrees of sister states almost at random although the theory usually is that there has been a change of circumstances requiring a custody award to a different person. Compare *People ex rel. Halvey v. Halvey,* 330 U.S. 610, 67 S. Ct. 903, 91 L. Ed. 1133 (1947) and see Comment, Ford v. Ford: Full Faith and Credit To Child Custody Decrees? 73 Yale L. J. 134 (1963). Generally speaking, there has been a tendency to over-emphasize the need for fluidity and modifiability of custody decrees at the expense of the equal (if not greater) need, from the standpoint of the child, for stability of custody decisions once made. Compare Clark, Domestic Relations 326 (1968).

Under this state of the law the courts of the various states have acted in isolation and at times in competition with each other, often with disastrous consequences. A court of one state may have awarded custody to the mother while another state decreed simultaneously that the child must go to the father. See *Stout v. Pate,* 209 Ga. 786, 75 S.E. 2d 748 (1953) and *Stout v. Pate,* 120 Cal. App. 2d 699, 261 P. 2d 788 (1933), *cert. denied* in both cases 347 U.S. 968, 74 S. Ct. 744, 776, 98 L. Ed. 1109, 1110 (1954); *Moniz v. Moniz,* 142 Cal. App. 2d 527, 298 P. 2d 710 (1956; and *Sharpe v. Sharpe,* 77 Ill. App. 2d 295, 222 N.E. 2d 340 (1966). In situations like this the litigants do not know which court to obey. They may face punishment for contempt of court and perhaps criminal charges for child stealing in one state when complying with the decree of the other. Also, a custody decree made in one state one year is often overturned in another jurisdiction the next year or some years later and the child is handed over to another family, to be repeated as long as the feud continues. See *Com. ex rel. Thomas v. Gillard,* 203 Pa. Super. 95, 198 A. 2d 377 (1964); *In Re Guardianship of Rogers,* 100 Ariz. 269, 413 P. 2d 774 (1966); *Berlin v. Berlin,* 239 Md. 52, 210 A. 2d 38d (1963); *Berlin v. Berlin,* 21 N.Y. 2d 371, 236 N.E. 2d 109 (1967), *cert. denied* 37 L.W. 3123 (1968) ; and *Batchelor v. Fulcher,* 415 S. W. 2d 828 (Ky. 1967).

In this confused legal situation the person who has possession of the ch ild has an enormous tactical advantage. Physical presence of the child opens the doors of many courts to the petitions and often assures him of a decision in his favor. It is not surprising then that custody claimants tend to take the law into their own hands, that they resort to self-help in the form of child stealing, kidnapping, or various other schemes to gain possession of the child. The irony is that persons who are good, law-abiding citizens are often driven into these tactics against their inclinations, and that lawyers who are reluctant to advise the use of maneuver of doubtful legality may place their clients at a decided disadvantage.

To remedy this intolerable state of affairs where self-help and the rule of "seize-and-run" prevail rather than the orderly processes of the law, uniform legislation has been urged in recent years to bring about a fair measure of interstate stability in custody awards. See Ratner, Child Custody in a Federal System, 62 Mich. L. Rev. 795 (1964); Ratner, Legislative Resolution of the Interstate Child Custody Problem: A Reply to Professor Currie and a Proposed Uniform Act, 38 S. Cal. L. Rev. 183 (1963), and Ehrenzweig, The Interstate Child and Uniform Legislation: A Plea for Extra-Litigious Proceedings, 64 Mich. L. Rev. 1 (1965). In drafting this Act, the National Conference of Commissioners has drawn heavily on the work of these authors and has consulted with other leading authorities in the field. The American Bar Association has taken an active part in furthering the project.

The Act is designed to bring some semblence of order into the existing chaos. It limits custody jurisdiction to the state where the child has his home or where there are other strong contacts with the child and his family. See Section 3. It provides for the recognition and enforcement of out-of-state custody decrees in many instances. See Sections 13 and 15. Jurisdiction to modify decrees of other states is limited by giving a jurisdictional preference to the prior court under certain conditions. See Section 14. Access to a court may be denied to

petitioners who have engaged in child snatching or similar practices. See Section 8. Also, the Act opens up direct lines of communication between courts of different states to prevent jurisdictional conflict and bring about interstate judicial assistance in custody cases.

The Act stresses the importance of the personal appearance before the court of nonresidents who claim custody, and of the child himself, and provides for the payment of travel expenses for this purpose. See Section 11. Further provisions insure that the judge receives necessary out-of-state information with the assistance of courts in other states. See Sections 17 through 22.

Underlying the entire Act is the idea that to avoid the jurisdictional conflicts and confusion which have done serious harm to innumerable children, a court in one state must assume major responsibility to determine who is to have custody of a particular child, that this court must reach out for the help of courts in other states in order to arrive at a fully-informed judgment which transcends state lines and considers all claimants, residents and nonresidents, on an equal basis and from the standpoint of the welfare of the child. If this can be achieved, it will be less important *which* court exercises jurisdiction but that courts of the several states involved act in partnership to bring about the best possible solution for a child's future.

The Act is not a reciprocal law. It can be put into full operation by each individual state regardless of enactment of other states. But its full benefits will not be reaped until a large number of states have enacted it, and until the courts, perhaps sided by regional or national conferences, have come to develop a new, truly " inter-state" approach to child custody litigation. The general policies of the Act and some of its specific provisions apply to international custody cases.

Uniform Child Custody Jurisdiction Act

SECTION 1. [*Purposes of Act; Construction of Provisions.*]
(a) The general purposes of this Act are to:

(1) avoid jurisdictional competition and conflict with courts of other states in matters of child custody which have in the past resulted in the shifting of children from state to state with harmful effects on their well-being ;

(2) promote cooperation with the courts of other states to the end that a custody decree is rendered in that state which can best decide the case in the interest of the child

(3) assure that litigation concerning the custody of a child take place ordinarily in the state with which the child and his family have the closest connection and where significant evidence concerning his care, protection, training, and personal relationships is most readily available, and that court of this state decline the exercise of jurisdiction when the child and his family have a closer connection with another state;

(4) discourage continuing controversies over child custody in the interest of greater stability of home environment and of secure family relationships for the child

(5) deter abductions and other unilateral removals of children undertaken to obtain custody awards;

(6) avoid re-litigation of custody decisions of other states in this state insofar as feasible

(7) facilitate the enforcement of custody decrees of other states;

(8) promote and expand the exchange of information and other forms of mutual assistance between the courts of this state and those of other states concerned with the same child, and

(9) make uniform the law of those ststes which enact it.

(b) This Act shall be construed to promote the general purposes stated in this section.

Comment

Because this uniform law breaks new ground not previously covered by legislation, its purposes are stated in some detail. Each section must be read and applied with these purposes in mind.

SECTION 2. [*Definitions.*] As used in this Act:

(1) "contestant" means a person, including a parent, who claims a right to custody or visitation rights with respect to a child;

(2) "custody determination" means a court decision and court orders and instructions providing for the custody of a child, including visitation rights; it does not include a decision relating to child support or any other monetary obligation of any person;

(3) "custody proceeding" includes proceedings in which a custody determination is one of several issues, such as an action for divorce or separation and includes child neglect and dependency proceedings;

(4) "decree" or "custody decree" means a custody determination contained in a judicial decree or order made in a custody proceeding, and includes an initial decree and a modification decree;

(5) "home state" means the state in which the child immediately preceding the time involved lived with his parents, a parent, or a person acting as parent, for at least 6 consecutive months and in the case of a child less than 6 months old the state in which the child lived from birth with any of the persons mentioned. Periods of temporary absence of any of the named persons are counted as part of the 6-month or other period;

(6) "initial decree" means the first custody decree concerning a particular child;

(7) "modification decree" mesns a custody decree which modifies or replaces a prior decree, whether made by the court which rendered the prior decree or by another court;

(8) "physical custody" means actual possession and control of a child;

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

(10) "state" means any state, territory, or possession of the United States, the Commonwesth of Puerto Rico, and the District of Columbia.

Comment

Subsection (3) indicates that "custody proceeding" is to be understood in a broad sense. The term covers habeas corpus actions, guardianship petitions, and other proceedings available under general state law to determine custody. See Clark, Domestic Relations 576-582 (1968).

Other definitions are explained, if necessary, in the comments to the sections which use the terms defined.

SECTION 3. [*Jurisdiction.*]

(a) A court of this State which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if:

(1) this State (i) is the home state of the child at the time of commencement of the proceeding, or (ii) had been the child's home state within 6 months before commencement of the proceeding and the child is absent from this State because of his removal or retention by a person claiming his custody or for other reasons, and a parent or person acting as parent continues to live in this State; or

(2) it is in the best interest of the child that a court of this State assume jurisdiction because (i) the child and his parents, or the child and at least one contestant, have a significant connection with this State, and (ii) there is available in this State substantial evidence concerning the child's present or future care, protection, training, and personal relationships; or

(3) the child is physically present in this State and (i) the child has been abandoned or (ii) it is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse or is otherwise neglected [or dependent]; or

(4) (I) it appears that no other state would have jurisdiction under prerequisites substantially in accordance with paragraphs (1), (2), or (3), or another state has declined to exercise jurisdiction on the ground that this State is the more appropriate forum to determine the custody of the child, and (ii) it is in the best interest of the child that this court assume jurisdiction.

(b) Except under paragraphs (3) and (4) of subsection (a) physical presence in this State of the child, or of the child and one of the contestants, is not alone sufficient to confer jurisdiction on a court of this State to make a child custody determination.

(c) Physical presence of the child, while desirable, is not a prerequisite for jurisdiction to determine his custody.

Comment

Paragraphs (1) and (2) of subsection (a) establish the two major bases for jurisdiction. In the first place, a court in the child's home state has jurisdiction, and secondly, if there is no home state or the child and his family have equal or stronger ties with another state, a court in that state has jurisdiction. If this alternative test produces concurrent jurisdiction in more than one state, the mechanisms provided in sections 6 and 7 are used to assure that only one state makes the custody decision.

"Home State" is defined in section 2(5). A 6-month period has been selected in order to have a definite and certain test which is at the same time based on a reasonable assumption of fact. See Ratner, Child Custody in a Federal System, 62 Mich. L. Rev. 795, 818 (1964) who explains:

> "Most American children are integrated into an American community after living there six months; consequently this period of residence would seem to provide a reasonable

criterion for identifying the established home."

Subparagraph (ii) of paragraph (1) extends the home state rule for an additional six-month period in order to permit suit in the home state after the child's departure. The main objective is to protect a parent who has been left by his spouse taking the child along. The provision makes clear that the stay-at-home parent, if he acts promptly, may start proceedings in his own state if he desires, without the necessity of attempting to base jurisdiction on paragraph (2). This changes the law in those states which required presence of the child as a condition for jurisdiction and consequently forced the person left behind to follow the departed person to another state, perhaps to several states in succession. See also subsection (c).

Paragraph (2) comes into play either when the home state test cannot be met or as an alternative to that test. The first situation arises, for example, when a family has moved frequently and there is no state where the child has lived for 6 months prior to suit, or if the child has recently been removed from his home state and the person who was left behind has also moved away. See paragraph (1), last clause. A typical example of alternative jurisdiction is the case in which the stay-at-home parent chooses to follow the departed spouse to state 2 (where the child has lived for several months with the other parent) and start proceedings there. Whether the departed parent also has access to a court in state 2, depends on the strength of the family ties in that State and on the applicability of the clean hands provision of section 8. If state 2, for example, was the state of the matrimonial home where the entire family lived for two years before moving to the "home state" for 6 months, and the wife returned to state 2 with the child with the consent of the husband, state 2 might well have jurisdiction upon petition of the wife. The same may be true if the wife returned to her parents in her former home state where the child had spent several months every year before. Compare *Willmore v. Willmore*, 273, Minn. 537, 143 N.W. 2d 630 (1966), *cert. denied* 385 US. 898 (1966). While jurisdiction may exist in two states in these instances, it will not be exercised in both states. See sections 6 and 7.

Paragraph (2) of subsection (a) is supplemented by subsection (b) which is designed to discourage unilateral removal of children to other states and to guard generally against too liberal an interpretation of paragraph (2). Short-term presence in the state is not enough even though there may be an intent to stay longer, perhaps an intent to establish a technical "domicile" for divorce or other purposes.

Paragraph (2) perhaps more than any other provision of the Act requires that it be interpreted in the spirit of the legislative purposes expressed in section 1. The paragraph was phrased in general terms in order to be flexible enough to cover many fact situations too diverse to lend themselves to exact description. But its purpose is to limit jurisdiction rather than to proliferate it. The first clause of the paragraph is important: jurisdiction exists only if it is in the child's interest, not merely the interest or convenience of the feuding parties, to determine custody in a particular state. The interest of the child is served when the forum has optimum access to relevant evidence about the child and family. There must be maximum rather than minimum contact with the state. The submission of the parties to a forum, perhaps for purposes of divorce, is not sufficient without additional factors establishing closer ties with the state. Divorce jurisdiction does not necessarily include custody jurisdiction. See Clark, Domestic Relations 578 (1968).

Paragraph (3) of subsection (a) retains and reaffirms *parens patriae* juriadiction, usually exercised by a juvenile court, which a state must assume when a child is in a situation requiring immediate protection. The jurisdiction exists when a child has been abandoned and in emergency cases of child neglect. Presence of the child in the state is the only prerequisite. This extraordinary jurisdiction is reserved for extraordinary circumstances. See Application of Lang, 9

App. Div. 2d 401, 193 N.Y.S. 2d 763 (1959). When there is child neglect without emergency or abandonment, jurisdiction cannot be based on this paragraph.

Paragraph (4) of subsection (a) provides a final basis for jurisdiction which is subsidiary in nature. It is to be resorted to only if no other state could, or would, assume jurisdiction under the other criteria of this section.

Subsection (c) makes it clear that presence of the child is not a jurisdictional requirement. Subsequent sections are designed to assure the appearance of the child before the court.

This section governs jurisdiction to make an initial decree as well as a modification decree. Both terms are defined in section 2. Jurisdiction to modify an initial or modification decree of another state is subject to additional restrictions contained in sections 8(b) and 14(a).

SECTION 4. [*Notice and Opportunity to be Heard.*] Before making a decree under this Act, reasonable notice and opportunity to be heard shall be given to the contestants, any parent whose parental rights have not been previously terminated, and any person who has physical custody of the child. If any of these persons is outside this State, notice and opportunity to be heard shall be given pursuant to section 5.

Comment

This section lists the persons who must be notified and given an opportunity to be heard to satisfy due process requirements. As to persons in the forum state, the general law of the state applies; others are notified in accordance with section 5. Strict compliance with sections 4 and 6 is essential for the validity of a custody decree within the state and its recognition and enforcement in other states under sections 12, 13, and 15. See Restatement of the Law Second, Conflict of Laws, Proposed Official Draft sec. 69 (1967); and compare *Armstrong v. Manzo*, 380 U.S. 545, S. Ct. 1187, 14 L. Ed. 2d 62 (1965).

SECTION 5. [*Notice to Persons Outside this State, Submission to Jurisdiction.*

a) Notice required for the exercise of jurisdiction over a person outside this State shall be given in a manner reasonably calculated to give actual notice, and may be:

(1) by personal delivery outside this State in the manner prescribed for service of process within this State;

(2) in the manner prescribed by the law of the place in which the service is made for service of process in that place in an action in any of its courts of general jurisdiction;

(3) by any form of mail addressed to the person to be served and requesting a receipt; or

(4) as directed by the court [including publication, if other means of notification are ineffective].

(b) Notice under this section shall be served, mailed, or delivered, [or last published] at least [10, 20] days before any hearing in this State.

(c) Proof of service outside this Sate may be made by affidavit of the individual who made the service, or in the manner prescribed by law of this State, the order pursuant to which the service

is made, or the law of the place in which the service is made. If service is made by mail, proof may be a receipt signed by the addressee or other evidence of delivery to the addressee.

(d) Notice is not required if a person submits to the jurisdiction of the court.

Comment

Section 2.01 of the Uniform Interstate and International Procedure Act has been followed to a large extent. See 9B U.L.A. 315 (1966). If at all possible, actual notice should be received by the affected persons; but efforts to impart notice in a manner reasonably calculated to give actual notice are sufficient when a person who may perhaps conceal his whereabouts, cannot be reached. See Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865, (1950) and Schroeder v. City of New York, 371 U.S. 208, 83 S. Ct. 279, 9 L. Ed. 2d 233 (1962).

Notice by publication in lieu of other means of notification is not included because of its doubtful constitutionality. See *Mullane v. Central Hanover Bank and Trust Co., supra;* and see Hazard, A General Theory of State-Court Jurisdiction, 1963 Supreme Court Rev. 241, 277, 286-87. Paragraph (4) of subsection (a) lists notice by publication in brackets for the benefit of those states which desire to use published notices *in addition* to the modes of notification provided in this section when these modes prove ineffective to impart actual notice.

The provisions of this section, and paragraphs (2) and (4) of subsection (a) in particular, are subject to the caveat that notice and opportunity to be heard must always meet due process requirements as they exist at the time of the proceeding.

SECTION 6. [*Simultaneous Proceedings in Other States.*]

(a) A court of this State shall not exercise its jurisdiction under this Act if at the time of filing the petition a proceeding concerning the custody of the child was pending in a court of another state exercising jurisdiction substantially in conformity with this Act, unless the proceeding is stayed by the court of the other state because this State is a more appropriate forum or for other reasons.

(b) Before hearing the petition in a custody proceeding the court shall examine the pleadings and other information supplied by the parties under section 9 and shall consult the child custody registry established under section 16 concerning the pendency of proceedings with respect to the child in other states. If the court has reason to believe that proceedings may be pending in another state it shall direct its inquiry to the state court administrator or other appropriate official of the other state.

(c) If the court is informed during the course of the proceeding that a proceeding concerning the custody of the child was pending in another state before the court assumed jurisdiction it shall stay the proceeding and communicate with the court in which the other proceeding is pending to the end that the issue may be litigated in the more appropriate forum and that information be exchanged in accordance with sections 19 through 22. If a court of this state has made a custody decree before being informed of a pending pro-

ceeding in a court of another state it shall immediately inform that court of the fact. If the court is informed that a proceeding was commenced in another state after it assumed jurisdiction it shall likewise inform the other court to the end that the issues may be litigated in the more appropriate forum.

Comment

Because of the havoc wreaked by simultaneous and competitive jurisdiction which has been described in the Prefatory Note, this section seeks to avoid jurisdictional conflict with all feasible means, including novel methods. Courts are expected to take an active part under this section in seeking out information about custody proceedings concerning the same child pending in other states. In a proper case jurisdiction is yielded to the other state either under this section or under section 7. Both sections must be read together.

When the courts of more than one state have jurisdiction under sections 3 or 14, priority in time determines which court will proceed with the action, but the application of the inconvenient forum principle of section 7 may result in the handling of the case by the other court.

While jurisdiction need not be yielded under subsection (a) if the other court would not have jurisdiction under the criteria of this Act, the policy against simultaneous custody proceedings is so strong that it might in a particular situation be appropriate to leave the case to the other court even under such circumstances. See subsection (3) and section 7.

Once a custody decree has been rendered in one state, jurisdiction is determined by sections 8 and 14.

SECTION 7. [*Inconvenient Forum.*]

(a) A court which has jurisdiction under this Act to make an initial or modification decree may decline to exercise its jurisdiction any time before making a decree if it finds that it is an inconvenient forum to make a custody determination under the circumstances of the case and that a court of another state is a more appropriate forum.

(b) A finding of inconvenient forum may be made upon the court's own motion or upon motion of a party or a guardian litem or other representative of the child.

(c) In determining if it is an inconvenient forum, the court shall consider if it is in the interest of the child that another state assume jurisdiction. For this purpose it may take into account the following factors, among others:

(1) another state is or recently was the child's home state;

(2) if another state has a closer connection with the child and his family or with the child and one or more of the contestants;

(3) if substantial evidence concerning the child's present or future care, protection, training, and personal relationships is more readily available in another state;

(4) if the parties have agreed on another forum which is no less appropriate; and

(5) if the exercise of jurisdiction by a court of this state would contravene any of the purposes stated in section 1.

(d) Before determining whether to decline or retain jurisdiction the court may communicate with a court of another state and exchange information pertinent to the assumption of jurisdiction by either court with a view to assuring that jurisdiction will be exercised by the more appropriate court and that a forum will be available to the parties.

(e) If the court finds that it is an inconvenient forum and that a court of another state is a more appropriate forum, it may dismiss the proceeding, or it may stay the proceedings upon condition that a custody proceeding be promptly commenced in another named state or upon any other conditions which may be just and proper, including the condition that a moving party stipulate his consent and submission to the jurisdiction of the other forum.

(f) The court may decline to exercise its jurisdiction under this Act if a custody determination is incidental to an action for divorce or another proceeding while retaining jurisdiction over the divorce or other proceeding.

(g) If it appears to the court that it is clearly an inappropriate forum it may require the party who commenced the proceedings to pay, in addition to the costs of the proceedings in this State, necessary travel and other expenses, including attorneys' fees, incurred by other parties or their witnesses. Payment is to be made to the clerk of the court for remittance to the proper party.

(h) Upon dismissal or stay of proceedings under this section the court shall inform the court found to be the more appropriate forum of this fact, or if the court which would have jurisdiction in the other state is not certainly known, shall transmit the information to the court administrator or other appropriate official for forwarding to the appropriate court.

(i) Any communication received from another state informing this State of a finding of inconvenient forum because a court of this State is the more appropriate forum shall be filed, in the custody registry of the appropriate court. Upon assuming jurisdiction the court of this State shall inform the original court of this fact.

Comment

The purpose of this provision is to encourage judicial restraint in exercising jurisdiction whenever another state appears to be in a better position to determine custody of a child. It serves as a second check on jurisdiction once the test of sections 3 or 14 has been met.

The section is a particular application of the inconvenient forum principle, recognized in most states by judicial law, adapted to the special needs of child custody case. The terminology used follows section 84 of the Restatement of the Law Second, Conflict of Laws, Proposed Official Draft (1967). Judicial restrictions or exceptions to the inconvenient forum rule made in some states do not apply to this statutory scheme which is limited to child custody case.

Like section 6, this section stresses interstate judicial communication and cooperation. When there is doubt a to which is the more appropriate forum, the question may be resolved by consultation and cooperation among the courts involved.

Paragraphs (1) through (5) of subsection (c) specify some, but not all, considerations which enter into a court determination of inconvenient forum. Factors customarily listed for purposes of the general principle of the inconvenient forum (such as convenience of the parties and hardship to the defendant) are also pertinent, but may under the circumstances be of secondary importance because the child who is not a party is the central figure in the proceedings.

Part of subsection (e) is derived from Wis. Stat. Ann., sec. 262.19 (1).

Subsection (f) makes it clear that a court may divide a case, that is, dismiss part of it and retain the rest. See section 1.05 of the Uniform Interstate and International Procedure Act. When the custody issue comes up in a divorce proceeding, courts may have frequent occasion to decline jurisdiction as to that issue (assuming that custody jurisdiction exists under sections 3 or 14).

Subsection (g) is an adaptation of Wis. Stat. Ann., sec. 262.20. Its purpose is to serve as a deterrent against "frivolous jurisdiction claims," as G.W. Foster states in the Revision Notes to the Wisconsin provision. It applies when the forum chosen is seriously inappropriate considering the jurisdictional requirements of the Act.

SECTION 8. [*Jurisdiction Declined by Reason of Conduct.*]

(a) If the petitioner for an initial decree has wrongfully taken the child from another state or has engaged in similar reprehensible conduct the court may decline to exercise jurisdiction if this is just and proper under the circumstances.

(b) Unless required in the interest of the child, the court shall not exercise its jurisdiction to modify a custody decree of another state if the petitioner, without consent of the person entitled to custody, has improperly removed the child from the physical custody of the person entitled to custody or has improperly retained the child after a visit or other temporary relinquishment of physical custody. If the petitioner has violated any other provision of a custody decree of another state the court may decline to exercise its jurisdiction if this is just and proper under the circumstances.

(c) In appropriate cases a court dismissing a petition under this section may charge the petitioner with necessary travel and other expenses, including attorneys' fees, incurred by other parties or their witnesses.

Comment

This section incorporates the "clean hands doctrine," as named by Ehrenzweig, Interstate Recognition of Custody Decrees, 51 Mich. L. Rev. 346 (1953). Under this doctrine courts refuse to assume jurisdiction to re-examine an out-of-state custody decree when the petitioner has abducted the child or has engaged in some other objectionable scheme to gain or retain physical custody of the child in violation of the decree. See Fain, Custody of Children, The California Family Lawyer I, 539, 516 (1961); Ex Parte Mullins, 26 Wash. 2d 119, 174 P. 2d 790 (1946); Crocker v. Crocker, 122 Colo. 49, 219 P. 2d (1950); and Leathers v. Leathers, 162 Cal. App. 2d 768, 328 P. 2d 853 (1958). But when adherence to this rule would lead to punishment of the parent at the expense of the well-being of the child, it is often not applied. See Smith v. Smith, 135 Cal. App. 2d 100, 286 P. 2d 1009 (1955) and In re Guardianship of Rodgers, 100 Ariz. 269, 413 P. 2d 744 (1966).

Subsection (a) extends the clean hands principle to cases in which a custody decree has not yet been rendered in any state. For example, if upon a de facto separation the wife returned to her own home with the children without objection by her husband and lived there for two years without hearing from him, and the husband without warning forcibly removes the children one night and brings them to another state, a court in that state although it has jurisdiction after 6 months may decline to hear the husband's custody petition. "Wrongfully" taking under this subsection does not mean that a "right" has been violated-both husband and wife as a rule have a right to custody until a court determination is made-but that one party's conduct is so objectionable that a court in the exercise of its inherent equity powers cannot in good conscience permit that party access to its jurisdiction.

Subsection (b) does not come into operation unless the court has power under section 14 to modify the custody decree of another state. It is a codification of the clean hands rule, except that it differentiates between (1) a taking or retention of the child and (2) other violations of custody decrees. In the case of illegal removal or retention refusal of jurisdiction is mandatory unless the harm done to the child by a denial of jurisdiction outweighs the parental misconduct. Compare Smith v. Smith and In Re Guardianship of Rodgers, *supra*; and see In Re Walter, 228 Cal. App. 2d 217, 39 Cal. Rpts. 243 (1964) where the court assumed jurisdiction after both parents had been found guilty of misconduct. The qualifying word "improperly" is added to exclude cases in which a child is withheld because of illness or other emergency or in which there are other special justifying circumstances.

The most common violation of the second category is the removal of the child from the state by the parent who has the right to custody, thereby frustrating the exercise of visitation rights of the other parent. The second sentence of subsection 16 (b) makes refusal of jurisdiction entirely discretionary in this situation because it depends on the circumstances whether noncompliance with the court order is serious enough to warrant the drastic sanction of denial of jurisdiction.

Subsection (c) adds a financial deterrent to child stealing and similar reprehensible conduct.

SECTION 9. [*Information under Oath to be Submitted to the Court.*]

(a) Every party in a custody proceeding in his first pleading or in an affidavit attached to that pleading shall give information under oath as to the child's present address, the places where the child has lived within the last 5 years, and the names and present addresses of the persons with whom the child has lived during that period. In this pleading or affidavit every party shall further declare under oath whether:

(1) he has participated (as a party, witness, or in any other capacity) in any other litigation concerning the custody of the same child in this or any other state;

(2) he has information of any custody proceeding concerning the child pending in a court of this or any other state; and

(3) he knows of any person not a party to the proceedings who has physical custody of the child or claims to have custody or visitation rights with respect to the child.

(b) If the declaration as to any of the above items is in the affirmative the declarant shall give additional information under

oath as required by the court. The court may examine the parties under oath as to details of the information furnished and as to other matters pertinent to the court's jurisdiction and the disposition of the case.

(c) Each party has a continuing duty to inform the court of any custody proceeding concerning the child in this or any other state of which he obtained information during this proceeding.

Comment

It is important for the court to receive the information listed and other pertinent facts as early as possible for purposes of determining its jurisdiction, the joinder of additional parties, and the identification of courts in other states which are to be contacted under various provisions of the Act. Information as to custody litigation and other pertinent facts occurring in other countries may also be elicited under this section in combination with section 23.

SECTION 10. [*Additional Parties.*] If the court learns from information furnished by the parties pursuant to section 9 or from other sources that a person not a party to the custody proceeding has physical custody of the child or claims to have custody or visitation rights with respect to the child, it shall order that person to be joined as a party and to be duly notified of the pendency of the proceeding and of his joinder as a party. If the person joined is a party is outside the State he shall be served with process or otherwise notified in accordance with section 6.

Comment

The purpose of this section is to prevent relitigations of the custody issue when these would be for the benefit of third claimants rather than the child. If the immediate controversy, for example, is between the parents, but relatives inside or outside the state also claim custody or have physical custody which may lead to a future claim to the child, they must be brought into the proceedings. The courts are given an active role here as under other sections of the Act to seek out the necessary information from formal or informal sources.

SECTION 11. [*Appearance of Parties and the Child.*]

[(a) The court may order any party to the proceeding who is in this State to appear personally before the court. If that party has physical custody of the child the court may order that he appear personally with the child.]

(b) If a party to the proceeding whose presence is desired by the court is outside this State with or without the child the court must order that the notice given under section 5 include a statement directing that party to appear personally with or without the child and declaring that failure to appear may result in a decision adverse to that party.

(c) If a party to the proceeding who is outside this State is directed to appear under subsection (b) or desires to appear personally before the court with or without the child, the court may

require another party to pay to the clerk of the court travel and other necessary expenses of the party so appearing and of the child if this is just and proper under the circumstances.

Comment

Since custody proceeding is concerned with the past and future care of the child by one of the parties, it is of vital importance in most cases that the judge has an opportunity to see and hear the contestants and the child. Subsection (b) authorizes the court to order the appearance of these persons it they are in the state. It is placed in brackets because states which have such a provision — not only in their juvenile court laws — may wish to omit it. Subsection (b) relates to the appearance of persons who are outside the state and provides one method of bringing them before the court; sections 19(b) and 20(b) provide another. Subsection (c) helps to finance travel to the court which may be close to one of the parties and distant from another; it may be used to equalize the expense if this is appropriate under the circumstances.

SECTION 12. [*Binding Force and Res Judicata Effect of Custody Decree.*] A custody decree rendered by a court of the State which had jurisdiction under section 3 binds all parties who have been served in this State or notified in accordance with section 6 or who have submitted to the jurisdiction of the court, and who have been given an opportunity to be heard. As to these parties the custody decree is conclusive as to all issues of law and fact decided and as to the custody determination made unless and until that determination is modified pursuant to law, including the provisions of this Act.

Comment

This section deals with the intra-state validity of custody decrees which provides the basis for their interstate recognition and enforcement. The two prerequisites are (1) jurisdiction under section 3 of this Act and (2) strict compliance with due process mandates of notice and opportunity to be heard. There is no requirement for technical personal jurisdiction, on the traditional theory that custody determinations, as distinguished from support actions (see section 2(2) *supra*), are proceedings in rem or proceedings affecting status. See Restatement of the Law Second, Conflict of Laws, Proposed Official Draft, sections 69 and 78 (1967); and James Civil Procedure 613 (1965). For a different theory reaching the same result, see Hazard, A General Theory of State Court Jurisdiction, 1965 Supreme Court Review 241. The section is not at variance with May v. Anderson, 345 U.S. 528, 73 S. Ct. 840, 87 L. Ed. 1221 (1953), which relates to interstate recognition rather than in-state validity of custody decrees. See Ehrenzweig and Louisell, Jurisdiction in a Nutshell 76 (2d ed. 1968); and compare Reese, Full Faith and Credit to Foreign Equity Decrees, (42 Iowa L. Rev. 183, 195 (1957). On May v. Anderson, *supra,* see comment to section 13.

Since a custody decree is normally subject to modification in the interest of the child, it does not have absolute finality, but as long as it has not been modified, it is as binding as a final judgment. Compare Restatement of the Law Second, Conflict of Laws, Proposed Official Draft, section 109 (1967).

SECTION 13. [*Recognition of Out-of-State Custody Decree.*]
The courts of this State shall recognize and enforce an initial or modification decree of a court of another state which had assumed jurisdiction under statutory provisions substantially in accordance with this Act or which was made under factual circumstances meeting the jurisdictional standards of the Act, so long as this decree has not been modified in accordance with jurisdictional standards substantially similar to those of this Act.

Comment

This section and sections 14 and 15 are the key provisions which guarantee a great measure of security and stability of environment to the "interstate child" by discouraging relitigations in other states. See Section 1, and see Ratner, Child Custody in a Federal System, 62 Mich. L. Rev. 186, 828 (1964).

Although the full faith and credit clause may perhaps not require the recognition of out-of-state custody decrees, the states are free to recognize and enforce them. See Restatement of the Law Second, Conflict of Laws, Proposed Official Draft, section 109 (1967), and see the Prefatory Note, *supra*. This section declares as a matter of state law, that custody decrees of sister states will be recognized and enforced. Recognition and enforcement is mandatory if the state in which the decree was rendered 1) has adopted this Act, 2) has statutory jurisdictional requirements substantially like this Act, or 3) would have had jurisdiction under the facts of the case if this Act had been in law in the state. Compare Comment, Ford v. Ford: Full Faith and Credit to Child Custody Decrees? 73 Yale L.J. 134, 148 (1963).

"Jurisdiction" or "jurisdictional standards" under this section refers to the requirements of section 3 in the case of initial decrees and to the requirements of sections 3 and 14 in the case of modification decrees. The section leaves open the possibility of discretionary recognition of custody decrees of other states beyond the enumerated situations of mandatory acceptance. For the recognition of custody decrees of other nations, see section 23.

Recognition is accorded to a decree which is valid and binding under section 12. This means, for example, that a court in the state where the father resides will recognize and enforce a custody decree rendered in the home state where the child lives with the mother if the father was duly notified and given enough time to appear in the proceedings. Personal jurisdiction over the father is not required. See comment to section 12. This is in accord with a common interpretation of the inconclusive decision in May v. Anderson, 345 U.S. 528, 13 S. Ct. 840, 97 L. Ed 1221 (1953). See Restatement of the Law Second, Conflict of Laws, Proposed Official Draft, section 79 and comment thereto, p. 298 (1967). Under this interpretation a state is permitted to recognize a custody decree of another state regardless of lack of personal jurisdiction, as long as due process requirements of notice and opportunity to be heard have been met. See Justice Frankfurter's concurring opinion in May v. Anderson; and compare Clark, Domestic Relations 323-26 (1968), Goodrich, Conflict of Laws 274 (4th ed. by Scoles, 1964); Stumberg, Principles of Conflict of Laws 325 (3rd ed. 1963); and Comment, The Puzzle of Jurisdiction in Child Custody Actions, 39 U. Colo. L. Rev. 541 (1966). The Act emphasizes the need for the personal appearance of the contestant rather than any technical requirement for personal jurisdiction.

The mandate of this section could cause problems if the prior decree is a punitive or disciplinary measure. See Ehrenzweig, Inter-state Recognition of Custody Decrees, 51 Mich. L. Rev. 346, 370 (1963). If, for example, a court grants custody to the mother and after 5 years of continuous life with the mother the child is awarded to the father by the same court for the sole

reason that the mother who had moved to another state upon remarriage had not lived up to the visitation requirements of the decree, courts in other states may be reluctant to recognize the changed decree. See Berlin v. Berlin, 21 N.Y. 2d 371, 371 235 N.E. 2d 109 (1967); and Stout v. Pate, 120 Cal. App. 2d 699, 261 P. 2d 788 (1953); Compare Moniz v. Moniz, 142 Cal. App. 2d 627, 298 P. 2d 710 (1956). Disciplinary decrees of this type can be avoided under this Act by enforcing the visitation provisions of the decree directly in another state. See Section 15. If the original plan for visitation does not fit the new conditions, a petition for modification of the visiting arrangements would be filed in a court which has jurisdiction, that is, in many cases the original court. See section 14.

SECTION 14. [*Modification of Custody Decree of Another State.*]

(a) If a court of another state has made a custody decree, a court of this State shall not modify that decree unless (1) it appears to the court of this State that the court which rendered the decree does not now have jurisdiction under jurisdictional prerequisites substantially in accordance with this Act or has declined to assume jurisdiction to modify the decree and (2) the court of this State has jurisdiction.

(b) If a court of this State is authorized under subsection (a) and section 8 to modify a custody decree of another state it shall give due consideration to the transcript of the record and other documents of all previous proceedings submitted to it in accordance with section 22.

Comment

Courts which render a custody decree normally retain continuing jurisdiction to modify the decree under local law. Courts in other states have in the past often assumed jurisdiction to modify the out-of-state decree themselves without regard to the preexisting jurisdiction of the other state. See People ex rel. Halvey v. Halvey, 330 U.S. 610, 67 S. Ct. 903, 91 L. Ed. 1133 (1947). In order to achieve greater stability of custody arrangements and avoid forum shopping, subsection (a) declares that other states will defer to the continuing jurisdiction of the court of another state as long as that state has jurisdiction under the standards of this Act. In other words, all petitions for modification are to be addressed to the prior state if that state has sufficient contact with the case to satisfy section 3. The fact that the court had previously considered the case may be one factor favoring its continued jurisdiction. If, however, all the persons involved have moved away or the contact with the state has otherwise become slight, modification jurisdiction would shift elsewhere. Compare Ratner, Child Custody in a Federal System, 62 Mich. L. Rev. 795, 821-2(1964).

For example, if custody was awarded to the father in state 1 where he continued to live with the children for two years and thereafter his wife kept the children in state 2 for 6-1/2 months (3-1/2 months beyond her visitation privileges) with or without permission of the husband, state 1 has preferred jurisdiction to modify the decree despite the fact that state 2 has in the meantime become the "home state" of the child. If, however, the father also moved away from state 1, that state loses modification jurisdiction interstate, whether or not its jurisdiction continues under local law. See Clark, Domestic Relations 322-23 (1968). Also, if the father in the same case continued to live in state 1, but let his wife keep the children for several years without asserting his custody rights and without visits of the children in state 1, modification jurisdiction of state 1 would cease.

Compare *Brengle v. Hurst*, 408 S. W. 2d 418 (Ky. 1966). The situation would be different if the children had been abducted and their whereabouts could not be discovered by the legal custodian for several years. The abductor would be denied access to the court of another state under section 8(h) and state 1 would have modification jurisdiction in any event under section 3(a) (4). Compare *Crocker v. Crocker*, 122 Colo. 49, 219 P. 2d 311 (1950).

The prior court has jurisdiction to modify under this section even though its original assumption of jurisdiction did not meet the standards of this Act, as long as it would have jurisdiction *now*, that is, at the time of the petition for modification.

If the state of the prior decree declines to resume jurisdiction to modify the decree, another state with jurisdiction under section.3 can proceed with the case. That is not so if the prior court dismissed the petition on its merits.

Respect for the continuing jurisdiction of another state under this section will serve the purpose of this Act only if the prior court will assume a corresponding obligation to make no changes in the existing custody arrangement which are not required for the good of the child. If the court overturns its own decree in order to discipline a mother or father, with whom the child had lived for years, for failure to comply with an order of the court, the objective of greater stability of custody decrees is not achieved. See Comment to section 13 last paragraph, and cases there cited. See also *Sharpe v. Sharpe*, 11 Ill. App. 295 222 N.E. 2d 340 (1966). Under section 15 of this Act an order of a court contained in a custody decree can be directly enforced in another state.

Under subsection (b) transcripts of prior proceedings if received under section 22 are to be considered by the modifying court. The purpose is to give the judge the opportunity to be as fully informed as possible before making a custody decision. "One court will seldom have so much of the story that another's inquiry is unimportant" says Paulsen, Appointment of a Guardian in the Conflict of Laws, 45 Iowa L. Rev. 212, 226 (1960). See also Ehrenzweig, the Interstate Child and Uniform Legislation: A Plea for Extra-Litigious Proceedings, 64 Mich. L. Rev. 1, 6-7 (1965); and Ratner, Legislative Resolution of the Interstate Custody Problem: A Reply to Professor Currie and a Proposed Uniform Act, 38 S. Cal. L. Rev. 183, 202 (1965). How much consideration is "due" this transcript, whether or under what conditions it is received in evidence, are matters of local, internal law which are not affected by this interstate act.

SECTION 15. [*Filing and Enforcement of Custody Decree of Another State.*]

(a) A certified copy of a custody decree of another state may be filed in the office of the clerk of any [District Court, Family Court] of this State. The clerk shall treat the decree in the same manner as a custody decree of the [District Court, Family Court] of this State. A custody decree so filed has the same effect and shall be enforced in like manner as a custody decree rendered by a court of this State.

(b) A person violating a custody decree of another state which makes it necessary to enforce the decree in this State may be required to pay necessary travel and other expenses, including attorneys' fees, incurred by the party entitled to the custody or his witnesses.

Comment

Out-of-state custody decrees which are required to be recognized are enforced by other states. See section 13. Subsection (a) provides a simplified and speedy method of enforcement. It is derived from section 2 of the Uniform Enforcement of Foreign Judgments Act of 1964, 9A U.L.A. 486 (1965). A certified copy of the decree is filed in the appropriate court, and the decree thereupon becomes in effect a decree of the state of filing and is enforceable by any method of enforcement available under the law of that state.

The authority to enforce an out-of-state decree does not include the power to modify it. If modification is desired, the petition must be directed to the court which has jurisdiction to modify under section 14. This does not mean that the state of enforcement may not in an emergency stay enforcement it there is danger of serious mistreatment of the child. See Ratner, Child Custody in a Federal System, 62 Mich. L. Rev. 795, 832-33 (1961).

The right to custody for periods of visitation and other provisions of a custody decree are enforceable in other states in the same manner as the primary right to custody. If visitation privileges provided in the decree have become impractical upon moving to another state, the remedy against automatic enforcement in another state is a petition in the proper court to modify visitation arrangements to fit the new conditions.

Subsection (b) makes it clear that the financial burden of enforcement of a custody decree may be shifted to the wrongdoer. Compare 2 Armstrong, California Family Law 328 (1966 Suppl.), and *Crocker v. Crocker*, 195; F. 2d 236 (1952).

SECTION 16. [*Registry of Out-of-State Custody Decrees and Proceedings.*] The clerk of each [District Court, Family Court] shall maintain a registry in which he shall enter the following:

(1) certified copies of custody decrees of other states received for filing;

(2) communications as to the pendency of custody proceedings in other states;

(3) communications concerning a finding of inconvenient forum by a court of another state; and

(4) other communications or documents concerning custody proceedings in another state which may affect the jurisdiction of a court of this State or the disposition to be made by it in a custody proceeding.

Comment

The purpose of this section is to gather all information concerning out-of-state custody cases which reaches a court in one designated place. The term "registry" is derived from section 35 of the Uniform Reciprocal Enforcement of Support Act of 1938, 9C U.L.A. 61 (1967 Suppl.) Another term may be used if desired without affecting the uniformity of the Act. The information in the registry is usually incomplete since it contains only those documents which have been specifically requested or which have otherwise found their way to the state. It is therefore necessary in most cases for the court to seek additional information elsewhere.

SECTION 17. [*Certified Copies of Custody Decree.*] The Clerk of the [District Court, Family Court] of this State, at the request of the court of another state or at the request of any person who is affected by or has a legitimate interest in a custody decree, shall certify and forward a copy of the decree to that court or person.

SECTION 18. [*Taking Testimony in Another State.*] In addition to other procedural devices available to a party, any party to the proceeding or a guardian ad litem or other representative of the child may adduce testimony of witnesses, including parties and the child, by deposition or otherwise, in another state. The court on its own motion may direct that the testimony of a person be taken in another state and may prescribe the manner in which and the terms upon which the testimony shall be taken.

Comment

Sections 18 to 22 are derived from sections 3.01 and 3.02 of the Uniform Interstate and International Procedure Act, 9B U.L.A. 305, 321, 326 (1966); from ideas underlying the Uniform Reciprocal Enforcement of Support Act; and from Ehrenzweig, the Interstate Child and Uniform Legislation: A Plea for Extra-litigious Proceedings, 64 Mich. L. Rev. 1 (1965). They are designed to fill the partial vacuum which inevitably exists in cases involving an "interstate child" since part of the essential information about the child and his relationship to other person is always in another state. Even though jurisdiction is assumed under sections 3 and 7 in the state where much (or most) of the pertinent facts are readily available, some important evidence will unavoidably be elsewhere.

Section 18 is derived from portions of section 3.01 of the Uniform Interstate and International Procedure Act, 9B U.L.A. 305, 321. The first sentence relaters to depositions, written interrogatories and other discovery devices which may be used by parties or representatives of the child. The procedural rules of the state where the device is used are applicable under this sentence. The second sentence empowers the court itself to initiate the gathering of out-of-state evidence which is often not supplied by the parties in order to give the court a complete picture of the child's situation, especially as it relates to a custody claimant who lives in another state.

SECTION 19. [*Hearings and Studies in Another State, Orders to Appear.*]

(a) A court of this State may request the appropriate court of another state to hold a hearing to adduce evidence, to order a party to produce or give evidence under other procedures of that state, or to have social studies made with respect to the custody of a child involved in proceedings pending in the court of this State, and to forward to the court of this state certified copies of the transcript of the record of the hearing, the evidence otherwise adduced, or any social studies prepared in compliance with the request. The cost of the services may be assessed against the parties or, if necessary, ordered paid by the [County, State].

(b) A court of this State may request the appropriate court of another state to order a party to custody proceedings pending in the court of this State to appear in the proceedings, and if that party has physical custody of the child, to appear with the child. The request may state that travel and other necessary expenses of the party and of the child whose appearance is desired will be assessed against another party or will otherwise be paid.

Comment

Section 19 relates to assistance sought by a court of the forum state from a court of another state. See comment to section 18. Subsection (a) covers any kind of evidentiary procedure available under the law of the assisting state which may aid the court in the requesting state, including custody investigations (social studies) if authorized by the law of the other state. Under what conditions reports of social studies and other evidence collected under this subsection are admissible in the requesting state, is a matter of internal state law not covered in this interstate statute. Subsection (b) serves to bring parties and the child before the requesting court, backed up by the assisting court's contempt powers. See section 11.

SECTION 20. [*Assistance to Courts of Other States.*]

(a) Upon request of the court of another state the courts of this State which are competent to hear custody matters may order a person in this State to appear at a hearing to adduce evidence or to produce or give evidence under other procedures available in this State [or may order social studies to be made for use in a custody proceeding in another state]. A certified copy of the transcript of the record of the hearing or the evidence otherwise adduced [and any social studies prepared] shall be forwarded by the clerk of the court to the requesting court.

(b) A person within this State may voluntarily give his testimony or statement in this State for use in a custody proceeding outside this state.

(c) Upon request of the court of another state a competent court of this State may order a person in this State to appear alone or with the child in a custody proceeding in another state. The court may condition compliance with the request upon assurance by the other state that state travel and other necessary expenses will be advanced or reimbursed.

Comment

Section 20 is the counterpart of section 19. It empowers local courts to give help to out-of-state courts in custody cases. See comments to sections 18 and 19. The references to social studies have been placed in brackets so that states without authorization to make social studies outside of juvenile court proceedings may omit them if they wish. Subsection (b) reaffirms the existing freedom of persons within the United States to give evidence for use in proceedings elsewhere. It is derived from section 3.02 (b) of the Interstate and International Procedure Act, 9B U.L.A. 327 (1966).

SECTION 21. [*Preservation of Documents for Use in Other States.*] In any custody proceeding in this State the court shall preserve the pleadings, orders and decrees, any record that have been made of its hearings, social studies, and other pertinent documents until the child reaches [18, 21] years of age. Upon appropriate request of the court of another state the court shall forward to the other court certified copies of any or all of such documents.

Comment

See comments to sections 18 and 19. Documents are to be preserved until the child is old enough that further custody disputes are unlikely. A lower figure than the ones suggested in the brackets may be inserted.

SECTION 22. [*Request for Court Records of Another State.*] If a custody decree has been rendered in another state concerning a child involved in a custody proceeding pending in a court of this State, the court of this State upon taking jurisdiction of the case shall request of the court of the other state a certified copy of the transcript of any court record and other documents mentioned in section 21.

Comment

This is the counterpart of section 21. See comments to sections 18, 19, and 14(b).

SECTION 23. [*International Application.*] The general policies of this Act extend to the international area. The provisions of this Act relating to the recognition and enforcement of custody decrees of other states apply to custody decrees and decrees involving legal institutions similar in nature to custody institutions rendered by appropriate authorities of other nations if reasonable notice and opportunity to be heard were given to all affected persons.

Comment

Not all the provisions of the Act lend themselves to direct application in international custody disputes; but the basic policies of avoiding jurisdictional conflict and multiple litigation are as strong if not stronger when children are moved back and forth from one country to another by feuding relatives. Compare Application of Lang, 8 App. Div. 2d 401, 183 N.Y.S. 2d 763 (1959) and Swindle v. Bradley, 240 Ark. 803, 403 S.W. 2d 63 (1966).

The first sentence makes the general policies of the Act applicable to international cases. That means that the substance of section 1 and the principles underlying provisions like sections 6, 7, 8, and 14(a), are to be followed when some of the persons involved are in a foreign country or a foreign custody proceeding is pending.

The second sentence declares that custody decrees rendered in other nations by appropriate authorities (which may be judicial or administrative tribunals) are recognized and enforced in this country. The only prerequisite is that reasonable notice and opportunity to be heard was given to the persons affected. It is also to be understood that the foreign tribunals had

jurisdiction under its own law rather than under section 3 of this Act. Compare Restatement of the Law Second, Conflict of Laws, Proposed Official Draft, section 10, 92, 98, and 109(2) (1967). Compare also Goodrich, Conflict of Laws 390-93 (4th ed., Scolee, 1964).

[**SECTION 24**. [*Priority.*] Upon the request of a party to a custody proceeding which raises a question of existence or exercise of jurisdiction under this Act the case shall be given calendar priority and handled expeditiously.]

Comment

Judicial time spent in determining which court has or should exercise jurisdiction often prolongs the period of uncertainty and turmoil in a child's life more than is necessary. The need for speedy adjudication exists, of course, with respect to all aspects of child custody litigation. The priority requirement is limited to jurisdictional questions because an all encompassing priority would be beyond the scope of this Act. Since some states may have or wish to adopt a statutory provision or court rule of wider scope, the section is placed in brackets and may be omitted.

SECTION 24. [*Severability.*] If any provision of this Act or the application thereof to any person or circumstance is held invalid, its invalidity does not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

SECTION 26. [*Short Title.*] This Act may be cited as the Uniform Child Custody Jurisdiction Act.

SECTION 27. [*Repeal.*] The following acts and parts of acts are repealed:

(1)

(2)

(3)

SECTION 28. [*Time of Taking Effect.*] This Act shall take effect. . . . .

CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

The States signatory to the present Convention,
Firmly convinced that the interests of children are of paramount importance in matters relating to their custody,
Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access,
Have resolved to conclude a Convention to this effect, and have agreed upon the following provisions –

CHAPTER I–SCOPE OF THE CONVENTION

Article 1

The objects of the present Convention are –
a to secure the prompt return of children wrongfully removed to or retained in any contracting State; and

b to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.

Article 2

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

Article 3

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

a it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

b at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

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

Article 4

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

Article 5

For the purposes of this Convention–
a 'rights of custody' shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;

b 'rights of access' shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.

CHAPTER II – CENTRAL AUTHORITIES

Article 6

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

Article 7

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

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

a to discover the whereabouts of a child who has been wrongfully removed or retained;

b to prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures;

c to secure the voluntary return of the child or to bring about an amicable resolution of the issues;

d to exchange, where desirable, information relating to the social background of the child;

e to provide information of a general character as to the law of their State in connection with the application of the Convention;

f to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, in a proper case, to make arrangements for organizing or securing the effective exercise of rights of access;

g where the circumstances so require, to provide or facilitate the provision of legal aid and advice, including the participation of legal counsel and advisers;

h to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child;

i to keep each other informed with respect to the operation of this Convention and, as far as possible, to eliminate any obstacles to its application.

CHAPTER III--RETURN OF CHILDREN

Article 8

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

a information concerning the identity of the applicant, of the child and of the person alleged to have removed or retained the child;
b where available, the date of birth of the child;
c the grounds on which the applicant's claim for return of the child is based;
d all available information relating to the whereabouts of the child and the identity of the person with whom the child is presumed to be.
The application may be accompanied or supplemented by --
e an authenticated copy of any relevant decision or agreement;
f a certificate or an affidavit emanating from a Central Authority, or other competent authority of the State of the child's habitual residence, or from a qualified person, concerning the relevant law of that State;
g any other relevant document.

Article 9
If the Central Authority which receives an application referred to in Article 8 has reason to believe that the child is in another Contracting State, it shall directly and without delay transmit the application to the Central Authority of that Contracting State and inform the requesting Central Authority, or the applicant, as the case may be.

Article 10
The Central Authority of the State where the child is shall take or cause to be taken all appropriate measures in order to obtain the voluntary return of the child.

Article 11

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

Article 12
Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.
The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new en-vironment.
Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.

Article 13
Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that --
a the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or
b there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.
The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.
In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.

Article 14
In ascertaining whether there has been a wrongful removal or retention within the meaning of Article 3, the judicial or administrative authorities of the requested State may take notice directly of the law of, and of judicial or administrative decisions, formally recognized or not in the State of the habitual residence of the child, without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable.

Article 15
The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention, where such a decision or determination may be obtained in that State. The Central Authorities of the Contracting States shall so far as practicable assist applicants to obtain such a decision or determination.

Article 16
After receiving notice of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of the Contracting State to which the child has

been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under this Convention is not lodged within a reasonable time following receipt of the notice.

Article 17

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

Article 18

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

Article 19

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

Article 20

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

CHAPTER IV–RIGHTS OF ACCESS

Article 21

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

The Central Authorities are bound by the obligations of co-operation which are set forth in Article 7 to promote the peaceful enjoyment of access rights and the fulfillment of any conditions to which the exercise of those rights may be subject.

The Central Authorities shall take steps to remove, as far as possible, all obstacles to the exercise of such rights.

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

CHAPTER V–GENERAL PROVISIONS

Article 22

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

Article 23

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

Article 24

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

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

Article 25

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

Article 26

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

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

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

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

Article 27

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

Article 28

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

Article 29

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

Article 30

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

Article 31

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

a any reference to habitual residence in that State shall be construed as referring to habitual residence in a territorial unit of that State;

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

Article 32

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

Article 33

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

Article 34

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

Article 35

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

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

Article 36

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

CHAPTER VI–FINAL CLAUSES

Article 37

The Convention shall be open for signature by the States which were Members of the Hague Conference on Private International Law at the time of its Fourteenth Session.
It shall be ratified, accepted or approved and the instruments of ratification, acceptance or approval shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

Article 38

Any other State may accede to the Convention.
The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.
The Convention shall enter into force for a State acceding to it on the first day of the third calendar month after the deposit of its instrument of accession.
The accession will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession. Such a declaration will also have to be made by any Member State ratifying, accepting or approving the Convention after an accession. Such declaration shall be deposited at the Ministry of Foreign Affairs of the Kingdom of the Netherlands; this Ministry shall forward, through diplomatic channels, a certified copy to each of the Contracting States.
The Convention will enter into force as between the acceding State and the State that has declared its acceptance of the accession on the first day of the third calendar month after the deposit of the declaration of acceptance.

Article 39

Any State may, at the time of signature, ratification, acceptance, approval or accession, declare that the Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect at the time the Convention enters into force for that State.
Such declaration, as well as any subsequent extension, shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

Article 40

If a Contracting State has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in this Convention, it may at the time of signature, ratification, acceptance, approval or accession

declare that this Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time. Any such declaration shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands and shall state expressly the territorial units to which the Convention applies.

Article 41

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

Article 42

Any State may, not later than the time of ratification, acceptance, approval or accession, or at the time of making a declaration in terms of Article 39 or 40, make one or both of the reservations provided for in Article 24 and Article 26, third paragraph. No other reservation shall be permitted.

Any State may at any time withdraw a reservation it has made. The withdrawal shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands.
The reservation shall cease to have effect on the first day of the third calendar month after the notification referred to in the preceding paragraph.

Article 43

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

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

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

Article 44

The Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 43 even for States which subsequently have ratified, accepted, approved it or acceded to it.
If there has been no denunciation, it shall be renewed tacitly every five years.
Any denunciation shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands at least six months before the expiry of the five year period. It may be limited to certain of the territories or territorial units to which the Convention applies.
The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other Contracting States.

Article 45

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

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

2. the accessions referred to in Article 38;

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

4. the extensions referred to in Article 39;

5. the declarations referred to in Articles 38 and 40;

6. the reservations referred to in Article 24 and Article 26, third paragraph, and the withdrawals referred to in Article 42;

7. the denunciations referred to in Article 44.

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

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

BILLING CODE 4710-08-C

APPENDIX IIIB

HAGUE CONVENTION OF 25 OCTOBER 1980 ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

Party Countries and Effective Dates with U.S.

ARGENTINA	1 June 1991	ITALY	1 May 1995
AUSTRALIA	1 July 1988	LUXEMBOURG	1 July 1988
AUSTRIA	1 October 1988	FMR. YUGOSLAV REP.	
BAHAMAS	1 January 1994	of MACEDONIA	1 December 1991
BELIZE	1 September 1989	MAURITIUS	1 October 1993
BOSNIA & HERZ.	1 December 1991	MEXICO	1 October 1991
BURKINA FASO	1 August 1992	MONACO	1 June 1993
CANADA	1 July 1988	NETHERLANDS	1 September 1990
CHILE	1 May 1994	NEW ZEALAND	1 October 1991
COLOMBIA	1 March 1996	NORWAY	1 April 1989
CROATIA	1 December 1991	PANAMA	1 June 1994
CYPRUS	1 February 1995	POLAND	1 November 1992
DENMARK	1 July 1991	PORTUGAL	1 July 1988
ECUADOR	1 April 1992	ROMANIA	1 June 1993
FINLAND	1 August 1994	SLOVENIA	1 April 1995
FRANCE	1 July 1988	SPAIN	1 July 1988
GERMANY	1 December 1990	ST. KITTS and NEVIS	1 June 1995
GREECE	1 June 1993	SWEDEN	1 June 1989
HONDURAS	1 March 1994	SWITZERLAND	1 July 1988
HUNGARY	1 July 1986	UNITED KINGDOM	1 July 1988
ICELAND	1 December 1996	VENEZUELA	1 January 1997
IRELAND	1 October 1991	ZIMBABWE	1 August 1995
ISRAEL	1 December 1991		

NOTE: Convention does not apply to abductions occurring prior to the effective date. For an update on party countries added after 1/1/97, call the U.S. Central Authority, Office of Children's Issues at the U.S. Department of State at (202) 736-7000.

APPENDIX IV

Public Law 100-300
100th Congress
[H.R. 3971, 29 Apr 1988]

42 USC 11601 et seq

An Act

INTERNATIONAL CHILD ABDUCTION REMEDIES ACT (ICARA)

To establish procedures to implement the Convention on the Civil Aspects of International Child Abduction, done at The Hague on October 25, 1990, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "International Child Abduction Remedies Act."

SEC. 2. FINDINGS AND DECLARATIONS [42 USC 11601]

(a) Findings. The Congress makes the following findings:

(1) The international abduction or wrongful retention of children is harmful to their well-being.

(2) Persons should not be permitted to obtain custody of children by virtue of their wrongful removal or retention.

(3) International abductions and retentions of children are increasing, and only concerted cooperation pursuant to an international agreement can effectively combat this problem.

(4) The Convention on the Civil Aspects of International Child Abduction, done at The Hague on October 25, 1980, establishes legal rights and procedures for the prompt return of children who have been wrongfully removed or retained, as well as for securing the exercise of visitation rights. Children who are wrongfully removed or retained within the meaning of the Convention are to be promptly returned unless one of the narrow exceptions set forth in the Convention applies. The Convention provides a sound treaty framework to help resolve the problem of international abduction and reunion of children and will deter such wrongful removals and reunions.

(b) DECLARATIONS -- The Congress makes the following declarations:

(1) It is the purpose of this Act to establish procedures for the implementation of the Convention in the United States.

(2) The provisions of this Act are in addition to and not in lieu of the provisions of the Convention.

(3) In enacting this Act the Congress recognizes:

(A) the international character of the Convention; and

(B) the need for uniform international interpretation of the Convention.

(4) The Convention and this Act empower courts in the United States to determine only rights under the Convention and not the merits of any underlying child custody claims.

SEC. 3. DEFINITIONS. [42 USC 11602]

For the purposes of this Act:

(1) the term "applicant" means any person who, pursuant to the Convention, files an application with the United States Central Authority or a Central Authority of any other party to the Convention for the return of a child alleged to have been wrongfully removed or retained or for arrangements for organizing or securing the effective exercise of rights of access pursuant to the Convention;

(2) the term "Convention" means the Convention on the Civil Aspects of International Child Abduction, done at The Hague on October 25, 1980;

(3) the term "Parent Locator Service" means the service established by the Secretary of Health and Human Services under section 453 of the Social Security Act (42 U.S.C. 653);

(4) the term "Petitioner" means any person who, in accordance with this Act, files a petition in court seeking relief under the Convention;

(5) the term "person" includes any individual, institution, or other legal entity or other legal entity of body;

(6) the term "respondent" means any person against whose interests a petition is filed in court, in accordance with this Act, which seeks relief under the Convention;

(7) the term "rights of access" means visitation rights;

(8) the term "State" means any of the several States, the District of Columbia, and any commonwealth, territory, or possession of the United States; and

(9) the term "United States Central Authority" means the agency of the Federal Government designated by the President under section 7(a).

SEC. 4. JUDICIAL REMEDIES. [42 USC 11603]

(a) JURISDICTION OF THE COURTS -- The courts of the States and the United States district courts shall have concurrent original jurisdiction of actions arising under the Convention.

(b) PETITIONS -- Any person seeking to initiate judicial proceedings under the Convention for the return of a child or for arrangements for organizing or securing the effective exercise of rights of access to a child may do so by commencing a civil action by filing a petition

for the relief sought in any court which has jurisdiction of such action and which is authorized to exercise its jurisdiction in the place where the child is located at the time the petition is filed.

(c) NOTICE -- Notice of an action brought under subsection (b) shall be given in accordance with the applicable law governing notice in interstate child custody proceedings.

(d) DETERMINATION OF CASE -- The court in which an action is brought under subsection (b) shall decide the case in accordance with the Convention.

(e) BURDENS OF PROOF -- (1) A petitioner in an action brought under subsection (b) shall establish by a preponderance of the evidence:

(A) in the case of an action for the return of a child, that the child has been wrongfully removed or retained within the meaning of the Convention; and

(B) in the case of an action for arrangements for organizing or securing the effective exercise of rights of access, that the petitioner has such rights.

(2) In the case of an action for the return of a child, a respondent who opposes the return of the child has the burden of establishing:

(A) by clear and convincing evidence that one of the exceptions set forth in article 13b or 20 of the Convention applies; and

(B) by a preponderance of the evidence that any other exception set forth in article 12 or 13 of the Convention applies.

(f) APPLICATION OF THE CONVENTION -- For purposes of any action brought under this Act:

(1) the term "authorities," as used in article 15 of the Convention to refer to the authorities of the state of the habitual residence of a child, includes courts and appropriate government agencies;

(2) the terms "wrongful removal or retention" and "wrongfully removed or retained," as used in the Convention include a removal or retention of a child before the entry of a custody order regarding that child; and

(3) the term "commencement of proceedings" as used in article 12 of the Convention, means, with respect to the return of a child located in the United States, the filing of a petition in accordance with subsection (b) of this section.

(g) FULL FAITH AND CREDIT -- Full faith and credit shall be accorded by the courts of the States and the courts of the United States to the judgment of any other such court ordering or denying the return of a child, pursuant to the Convention, in an action brought under this Act.

(h) REMEDIES UNDER THE CONVENTION NOT EXCLUSIVE -- The remedies established by the Convention and this Act shall be in addition to remedies available under other laws or international agreements.

SEC. 5. PROVISIONAL REMEDIES. [42 USC 11604]

(a) AUTHORITY OF COURTS -- In furtherance of the objectives of article 7(b) and other provisions of the Convention, and subject to the provisions of subsection (b) of this section, any court exercising jurisdiction of an action brought under section 4(b) of this Act may take or cause to be taken measures under Federal or State law, as appropriate, to protect the well-being of the child involved or to prevent the further removal or concealment before the final disposition of the petition.

(b) LIMITATION ON AUTHORITY -- No court exercising jurisdiction of an action brought under section 4(b) may, under subsection (a) of this section, order a child removed from a person having physical control of the child unless the applicable requirements of State law are satisfied.

SEC. 6. ADMISSIBILITY OF DOCUMENTS. [42 USC 11605]

With respect to any application to the United States Central Authority, of any petition to a court under section 4, which seeks relief under the Convention, or any other documents or information included with such application or petition or provided after such submission which relates to the application or petition, as the case may be, no authentication of such application, petition, document, or information shall be required in order for the application, petition, document, or information to be admissible in court.

SEC. 7. UNITED STATES CENTRAL AUTHORITY. [42 USC 11606]

(a) DESIGNATION -- The President shall designate a Federal agency to serve as the Central Authority for the United States under the Convention.

(b) FUNCTIONS -- The functions of the United States Central Authority are those ascribed to the Central Authority by the Convention and this Act.

(c) REGULATORY AUTHORITY -- The United States Central Authority is authorized to issue such regulations as may be necessary to carry out its functions under the Convention and this Act.

(d) OBTAINING INFORMATION FROM PARENT LOCATOR SERVICE -- The United States Central Authority may, to the extent authorized by the Social Security Act, obtain information from the Parent Locator Service.

SEC. 7. COST AND FEES. [42 USC 11607]

(a) ADMINISTRATIVE COSTS -- No department, agency, or instrumentality of the Federal Government or of any State or local government may impose on an applicant any fee in relation to the administrative processing of applications submitted under the Convention.

(b) COSTS INCURRED IN CIVIL ACTIONS -- (I) Petitioners may be required to bear the costs of legal counsel or advisors, court costs incurred in connection with their petitions, and travel costs for the return of the child involved and any accompanying persons, except as provided in paragraphs (2) and (3).

(2) Subject to paragraph (3), legal fees or court costs incurred in connection with an action brought under section 4 shall be borne by the petitioner unless they are covered by payments from Federal, State, or local legal assistance or other programs.

(3) Any court ordering the return of a child pursuant to an action brought under section 4 shall order the respondent to pay necessary expenses incurred by or on behalf of the petitioner, including court costs, legal fees, foster home or other care during the course of proceedings in the action, and transportation costs related to the return of the child, unless the respondent establishes that such order would be clearly inappropriate.

SEC. 9. COLLECTION, MAINTENANCE, AND DISSEMINATION OF INFORMATION. [42 USC 11608]

(a) IN GENERAL -- In performing its functions under the Convention, the United States Central Authority may, under such conditions as the Central Authority prescribes by regulation, but subject to subsection (c), receive from or transmit to any department, agency, or instrumentality of the Federal Government or of any State or foreign government, and receive from or transmit to any applicant, petitioner, or respondent, information necessary to locate a child or for the purpose of otherwise implementing the Convention with respect to a child, except that the United States Central Authority:

(1) may receive such information from a Federal or State department, agency, or instrumentality only pursuant to applicable Federal and State statutes; and

(2) may transmit any information received under this subsection notwithstanding any provision of law other than this Act.

(b) REQUESTS FOR INFORMATION -- Requests for information under this section shall be submitted in such manner and form as the United States Central Authority may prescribe by regulation and shall be accompanied or supported by such documents as the United States Central Authority may require.

(c) RESPONSIBILITY OF GOVERNMENT ENTITIES -- Whenever any department, agency, or instrumental of the United States or of any State receives a request from the United States Central Authority for information authorized to be provided to such Central Authority under subsection (a), the head of such department, agency, or instrumentality shall promptly cause a search to be made of the sites and records maintained by such department, agency, or instrumentality in order to determine whether the information requested is contained in any such files or records. If such search discloses the information requested, the head of such department,

agency, or instrumentality shall immediately transmit such information to the United States Central Authority, except that any such information the disclosure of which:

(1) would adversely affect the national security interests of the United States or the law enforcement interests of United States or of any State; or

(2) would be prohibited by section 9 of title 13, United States enforcement Code; shall not be transmitted to the Central Authority. The head of such department, agency, or instrumentality shall, immediately upon completion of the requested search, notify the Central Authority of the results of the search, and whether an exception set forth in paragraph (1) or (2) applies. In the event that the United States Central Authority receives information and the appropriate Federal or State department, agency, or instrumentality thereafter notifies the Central Authority that an exception set forth in paragraph (1) or (2) applies to that information, the Central Authority may not disclose that information under subsection (a).

(d) INFORMATION AVAILABLE FROM PARENT LOCATOR SERVICE -- To the extent that information which the United States Central Authority is authorized to obtain under the provisions of subsection (c) can be obtained through the Parent Locator Service, the United States Central Authority shall first seek to obtain such information from the Parent Locator Service, before requesting such information directly under the provisions of subsection (c) of this section.

(e) RECORD KEEPING -- The United States Central Authority shall maintain appropriate records concerning its activities and the disposition of cases brought to its attention.

SEC. 10. INTERAGENCY COORDINATING GROUP. [42 USC 11609]

The Secretary of State, the Secretary of Health and Human Services, and the Attorney General shall designate Federal employees and may, from time to time, designate private citizens to serve on an interagency coordinating group to monitor the operation of the Convention and to provide advice on its implementation to the United States Central Authority and other Federal agencies. This group shall meet from time to time at the request of the United States Central Authority. The agency in which the United States Central Authority is located is authorized to reimburse such private citizens for travel and other expenses incurred in participating at meetings of the interagency coordinating group at rates not to exceed those authorized under subchapter 1 of chapter 57 of title 5, United States Code, for employees of agencies.

SEC. 11. AGREEMENT FOR USE OF PARENT LOCATOR SERVICE IN DETERMINING WHEREABOUTS OF PARENT OR CHILD.

Section 463 of the Social Security Act (42 U.S.C. 663) is amended:

(1) by striking "under this section" in subsection (b) and inserting "under subsection (a)",

(2) by striking "under this section" where it first appears in subsection (c) and inserting "under subsection (a), (b), or (e)"; and

(3) by adding at the end the following new subsection:

"(e) The Secretary shall enter into an agreement with the Central Authority designated by the President in accordance with section 7 of the International Child Abduction Remedies Act, under which the services of the Parent Locator Service established under section 453 shall be made available to such Central Authority upon its request for the purpose of locating any parent or child on behalf of an applicant to such Central Authority within the meaning of section 3(1) of that Act. The Parent Locator Service shall charge no fees for services requested pursuant to this subsection.".

SEC. 12. AUTHORIZATION OF APPROPRIATIONS. [42 USC 11610]

There are authorized to be appropriated for each fiscal year such sums as may be necessary to carry out the purposes of the Convention and this Act.

Approved April 29 1988.

LEGISLATIVE HISTORY-H.R. 3971:
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Judges' Guide to Criminal Parental Kidnapping Cases

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Acknowledgments

We are proud to introduce the *Judges' Guide to Criminal Parental Kidnapping Cases*, an invaluable benchbook for criminal judges presiding over parental kidnapping cases. The crime has traumatic effects on the children torn from their homes and their parents, families and friends. This authoritative benchbook is a valuable resource that no courtroom or judge's chambers should be without.

The benchbook is the culmination of years of hard work by the American Prosecutors Research Institute's National Center for Prosecution of Child Abuse and the National Council of Juvenile and Family Court Judges. We are also pleased to bring it to you as a companion volume to *Jurisdiction in Child Custody and Abduction Cases: A Judge's Guide to the UCCJA, PKPA and Hague Child Abduction Convention*, produced by the American Bar Association's Center on Children and the Law. In a continuing effort to improve the coordination of proceedings and enhance communication among professionals, this volume contains a section on *Coordination of Criminal and Civil Proceedings*, authored by Gloria de Hart, Esq.

Many people devoted long hours to producing this resource. Special appreciation goes to Patricia Ann Kelly, Mark L. Ells, Daniel Armagh, Susan S. Kreston, Michelle Avery, Dyanne Greer and Christine Murphy. The advisory committee—a group of dedicated professionals who shared information, advice and encouragement—also deserves special recognition.

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Judges' Guide to Criminal Parental Kidnapping Cases

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CHAPTER ONE

OVERVIEW OF PARENTAL KIDNAPPING

Often ignored as a "domestic" matter, parental kidnapping affects hundreds of thousands of children every year. The *National Incidence Studies on Missing, Abducted, Runaway and Thrownaway Children in America* (NISMART) revealed the yearly toll may be as many as 354,100 children.[1] Yet only a small fraction of these cases come before the criminal court. Increased attention to the negative consequences of parental kidnapping on children and its connection to other forms of family violence has resulted in legislative improvements to statutes, greater criminal justice intervention, increased penalties for convicted offenders and generally a more serious approach to parental kidnapping.

Despite such advances, parental kidnapping remains a complex and low-priority area of criminal law. Conflicting civil custody orders and the involvement of courts from several jurisdictions frequently complicate parental kidnapping cases. An understanding of psychological, social and legal implications and knowledge of civil statutes are essential to well-reasoned judicial decisions. This benchbook is designed to assist criminal court judges by providing a detailed guide to each phase of a parental kidnapping case. Chapter I offers an overview of the dynamics of parental kidnapping, with a special section on coordination of criminal and civil proceedings. Chapter II discusses commonly encountered pre-trial and trial issues, while Chapter III identifies sentencing options and factors to consider in determining appropriate sentences.

A. PARENTAL KIDNAPPING DEFINITIONS

Formulating a single definition of criminal parental kidnapping is difficult, as each state uses its own statutory definition and one definition cannot encompass all possible scenarios. In general, any "taking, retention or concealment of a child or children by a parent or other family member, or his or her agent, in derogation of the custody or visitation rights of another parent, family member or legal custodian"[2] is considered parental kidnapping.

State criminal statutes variously refer to similar conduct as *custodial interference*, *child abduction*, *parental abduction*, *child stealing*, *child snatching* and *parental kidnapping*, while many research studies currently use the term *family abduction*. This benchbook uses *parental kidnapping* because it reflects the seriousness of the criminal act and is often used in federal and state criminal statutes. Other important terms include "abducting parent" or "abductor," which may include family members other than parents, and "left-behind parent," referring to the searching parent or a person or agency having legal custody of the child.

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1. FINKELHOR ET AL., NATIONAL INCIDENCE STUDIES ON MISSING, ABDUCTED, RUNAWAY, AND THROWNAWAY CHILDREN IN AMERICA (Office of Juvenile Justice & Delinquency Prevention 1990) [hereinafter NISMART].

2. *See* OBSTACLES TO THE RECOVERY AND RETURN OF PARENTALLY ABDUCTED CHILDREN, FINAL REPORT (Girdner & Hoff eds., Office of Juvenile Justice & Delinquency Prevention 1994) [hereinafter OBSTACLES].

B. NATURE AND SCOPE OF PARENTAL KIDNAPPING

The serious nature of parental kidnapping is documented in many research studies.[3] NISMART—the most comprehensive study of its kind—divided cases into "broad scope" and "policy focal" categories. The broad scope category abductions were defined as situations in which a family member (including anyone with a romantic or sexual involvement with a parent) took a child in violation of a custody agreement or decree or failed to return a child at the end of a legally sanctioned or agreed upon visit, with the child being away at least overnight. Over 354,100 incidents fell into this category.[4]

The second category—policy focal abductions—included three additional aggravating factors: the abductor attempted to conceal the taking or whereabouts of the child to prevent the other parent from having contact with the child; the child was transported out of state; or there was evidence that the abductor intended to keep the child indefinitely or permanently alter custody. Many of the 163,100 cases[5] that fell into this category came to the attention of the criminal justice system.

C. IMPACT OF KIDNAPPING ON THE CHILD

Serious consequences often result for the children kidnapped by a family member. NISMART revealed that while most abductions last from two days to one week, ten percent involve withholding the child for a month or longer. Many children suffer from inadequate schooling, poor nutrition and unstable lifestyles. They may be abandoned or neglected by the abductor. If the child's whereabouts are being concealed, the parent may be providing inadequate care, including medical care and schooling. Many abducted children are exposed to violent and dangerous environments or neglected as a consequence of parents' substance abuse or involvement in crime.[6]

As significant as the physical dangers of parental kidnapping is the psychological impact on the child. Constant belittling of the other parent by the abducting parent may result in the child

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3. Johnston, *Identifying Risk Factors: The Interview Study, Final Report of Stage I, Part B, in* PREVENTION OF PARENT OR FAMILY ABDUCTION THROUGH EARLY IDENTIFICATION OF RISK FACTORS (ABA Center on Children and the Law & The Center for the Family in Transition 1994) [hereinafter RISK FACTORS]; HEGAR & GREIF, WHEN PARENTS KIDNAP: THE FAMILIES BEHIND THE HEADLINES (Free Press 1993) [hereinafter HEGAR & GREIF, WHEN PARENTS KIDNAP]; OBSTACLES, *supra* note 2.

4. *See* Appendix P, National Incidence Studies on Missing, Abducted, Runaway and Thrownaway Children in America, Executive Summary.

5. Family abduction had the highest incidence of any policy focal category in NISMART—higher than runaways, stranger abductions, thrownaways and otherwise missing children.

6. RISK FACTORS, *supra* note 3 at 55. *See also* Greif & Hegar, *Impact on Children of Abduction by a Parent: A Review of the Literature*, 62 AMER. J. ORTHOPSYCHIATRY 599 (1992) [hereinafter Greif & Hegar, *Impact*]; HATCHER, BARTON & BROOKS, FAMILIES OF MISSING CHILDREN, FINAL REPORT (Office of Juvenile Justice & Delinquency Prevention 1992); Huntington, Parental Kidnapping: A New Form of Child Abuse (March 1984) (unpublished manuscript), *reprinted in* INVESTIGATION AND PROSECUTION OF PARENTAL ABDUCTION (American Prosecutors Research Institute 1995) [hereinafter Huntington].

developing a negative image of the left-behind parent. The abducting parent may scare the child with the possibility of being placed in a foster home or institution if they are discovered, tell the child the left-behind parent does not love her or him anymore or has a new family and does not want the child around or teach the child to fear police officers and other authority figures. Some children may even be told the other parent has died. Kidnapping under such circumstances often destroys a child's sense of trust.

Many factors influence how a child responds during an abduction, including the circumstances surrounding the kidnapping itself. These include the type of experiences the child had during the kidnapping, contact with the searching parent during the abduction, length of the abduction, amount of time that has lapsed since recovery, interparental hostility and the child's relationship with both parents.[7] Other factors may include behavior of the abducting parent prior to the kidnapping, circumstances of the initial abduction, communication to the child about the left-behind parent and abducting parent, living conditions during the abduction[8] and the child's age.

Return to the custodial parent does not signal an end to the psychological consequences for the child. He or she may have a fear of re-abduction, guilt over not having contacted the left-behind parent, and a loss of trust which may lead to emotional consequences (such as fear of abandonment, extreme grief and depression) and physical ailments (such as headaches, stomach aches, ulcers, insomnia or nightmares). Many children exhibit regression in emotional and behavioral functioning upon return.[9]

D. IMPACT OF KIDNAPPING ON THE LEFT-BEHIND PARENT

Left-behind parents experience frustration both with the court system for not being able to resolve the custody dispute and with law enforcement agencies unable to locate and return the child. These parents often feel out of control and unable to cope. Like the abducted child, they lose their sense of security and trust in others. Social science research has identified and reliably measured an elevated level of emotional distress experienced by families of missing children.[10]

The financial burden of searching for a child adds to the pressures placed on left-behind parents. Feelings of inadequacy and helplessness compound a grieving process that is never complete as long as the child remains missing. They also may feel anger and guilt over not preventing the abduction. Revenge may be contemplated. Left-behind parents unable to cope

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7. Greif & Hegar, *Impact*, *supra* note 6.

8. HATCHER, BARTON & BROOKS, REUNIFICATION OF MISSING CHILDREN PROJECT: FINAL REPORT (Office of Juvenile Justice & Delinquency Prevention 1992) [hereinafter HATCHER].

9. Huntington, *supra* note 6.

10. RISK FACTORS, *supra* note 3 at 4 (citing Hatcher, Barton & Brooks, FAMILIES OF MISSING CHILDREN, FINAL REPORT (Office of Juvenile Justice & Delinquency Prevention 1992)). *See also* Janvier et al., *Parental Kidnapping: A Survey of Left-Behind Parents*, 41 JUV. & FAM. CT. J. 1 (1990).

with the stresses are vulnerable to alcohol abuse and often alienate friends—frequently their primary support system—by spending all their time and energy on the child's recovery.[11]

After recovery, left-behind parents experience similar concerns as the abducted child, fearing re-abduction or transfer of custody to the abductor. They have their own expectations of reunification and may not give enough significance to the child's anxieties or adjustment difficulties. It is in this atmosphere of anxiety and insecurity that the child must try to adapt.[12]

E. ABDUCTING PARENTS' MOTIVATIONS

While some parents act to protect a child from abuse, many who abduct do not have the best interests of the child at heart. They may be acting out of personal frustration, anger or revenge, without regard for the impact on the child. Some abductors attempt to use the abduction as a means to force reconciliation, especially when there is a history of violence in the relationship. Many motivations behind parental kidnapping are related to custody—disenchantment or frustration with civil court proceedings or dissatisfaction with custody, visitation or support arrangements. Not all cases involve active disputes however—in forty-three percent of the cases in the NISMART study, the parents shared custody or visitation in some form and the child lived with the abductor at least part of the time before the kidnapping.

Poorly enforced visitation rights may prompt dissatisfied parents to take matters into their own hands, or they may no longer have the energy or financial resources to continue a legal battle. Other circumstances leading to abduction may include the development of a new relationship, relocation to a new community or change in finances that results in the parent now wishing to have the child reside with him or her without pursuing the appropriate court proceedings. Additionally, emotional instability may lead the parent to rely too heavily on the child for support.[13]

F. FAMILY VIOLENCE

Abductions often occur as an outgrowth of marital dysfunction that can include abuse of a parent or child. In some circumstances the abused spouse flees with a child to avoid further abuse. In others, a non-abused parent who believes the child is being sexually or physically abused may resort to a life on the run or underground to protect the child from the abusive parent. In one study, 20 percent of women who abducted their children and six percent of male abductors identified flight to avoid family violence as their reason for abducting.[14]

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11. Huntington, *supra* note 6.

12. HATCHER, *supra* note 8 at app. B.

13. Huntington, *supra* note 6.

14. Hegar & Greif, *Abduction of Children by Their Parents: A Survey of the Problem*, 36 Soc. Work 421 (1991) [hereinafter Hegar & Greif, *Survey*].

Battered women are often spurred into action when the violence extends to their children.[15] The children may be directly abused or indirectly receive injuries during a physically violent episode. Even if children are not abused themselves, witnessing violence against a parent has detrimental effects, including behavioral and emotional problems.[16]

The abducting parent is not always the battered victim in cases involving domestic violence. A majority of abducting parents were reportedly abusive in their relationship with the left-behind parent, with three-quarters of abducting fathers having a history of abuse compared to one-quarter of abducting mothers.[17] Abduction becomes another attempt by the abuser to control, intimidate or harass the battered parent attempting to leave the relationship. Some batterers threaten that the abused parent "will never see her children again" if she continues to seek a divorce or separation. A batterer may also refuse to return the children after visitation as a form of harassment or a means of continued interaction with the abused parent. Whenever child abuse or domestic violence is alleged, it is important to evaluate each situation on a case-by-case basis, and formulate responses that recognize the dynamics of both family violence and parental kidnapping.[18]

G. LEGAL CONTEXT

1. The Criminal Nature of Parental Kidnapping

Traditionally, child custody issues have been handled in civil court. Some parents who are unhappy with the ruling of the civil or family court remove their children from the jurisdiction of

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15. One-third of abductors are allegedly abusive toward their children according to Greif & Hegar's WHEN PARENTS KIDNAP, *supra* note 3 at 137. In one out of five families interviewed for the RISK FACTORS study, sexual abuse allegedly committed by a parent (typically the father) motivated the abducting parent to flee. Research also revealed that women who abduct are more likely to allege abuse and fathers are more likely to take children when they are the abuser. RISK FACTORS, *supra* note 3 at 59.

16. *See* THE IMPACT OF DOMESTIC VIOLENCE ON CHILDREN: A REPORT TO THE PRESIDENT OF THE AMERICAN BAR ASSOCIATION (ABA Center on Children and the Law 1994); JAFFE ET AL., CHILDREN OF BATTERED WOMEN 39 (1990); Rosenbaum & O'Leary, *Children: The Unintended Victims of Marital Violence*, 51 AM. J. ORTHOPSYCHIATRY 692 (1981).

17. Hegar & Greif, *Survey*, *supra* note 14 at 424. In the RISK FACTORS study, 18 percent of abductor parents and 34.5 percent of left-behind parents alleged the other parent had engaged in some form of abuse. One-half of these allegations were later substantiated by police investigation or official records. RISK FACTORS, *supra* note 3 at 47 & 52.

18. For more information on family violence and parental kidnapping, see KLAIN, PARENTAL KIDNAPPING, DOMESTIC VIOLENCE AND CHILD ABUSE: CHANGING LEGAL RESPONSES TO RELATED VIOLENCE (American Prosecutors Research Institute 1995). *See also* Jackson, From the Frying Pan to the Fire: Family Violence and the Parental Abductions of Children (June 1994) (unpublished manuscript), *reprinted in* INVESTIGATION AND PROSECUTION OF PARENTAL ABDUCTION at Appendix C (American Prosecutors Research Institute 1995); Rollin, *Family Violence Considerations With Regard to Parental Abduction Policies*, *in* OBSTACLES TO THE RECOVERY AND RETURN OF PARENTALLY ABDUCTED CHILDREN ch. 3, at 46 (Girdner & Hoff eds., Office of Juvenile Justice and Delinquency Prevention 1992); Hart, *Parental Abduction and Domestic Violence*, *in* PROSECUTING DOMESTIC VIOLENCE CRIMES: A TRAINING GUIDE (Pennsylvania Coalition Against Domestic Violence 1993); Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 VAND. L. REV. 1041 (1991).

the court. Given the profound impact such kidnapping can have on a child, it is appropriate that the criminal system become involved. The criminal court is often the last point of intervention.

Criminal involvement in parental kidnapping cases serves many community interests. It clearly establishes that abducting parents are solely responsible for their behavior. Successful resolutions educate the community about parental kidnapping, lead to public identification of offenders, underscore that such behavior is unacceptable and, it is hoped, deter others from committing similar crimes. A criminal conviction results in a criminal record and may affect future custody proceedings, allowing for proper placement and protection of the child to prevent further abuse or manipulation of the civil court system.

As part of the criminal sentence, the court can order restitution for victims and choose from various sentencing options to provide the most effective incentive for the abductor to refrain from further illegal action.[19] In some cases, incarceration of the abductor may be the only means of protecting children from repeated abductions.

a. State Criminal Statutes

Despite the interstate nature of many parental kidnapping cases, criminal remedies generally remain only in state courts. By enacting criminal statutes, state legislatures have recognized that parental kidnapping places children at risk and undermines the justice system. The purpose behind criminal parental kidnapping statutes is twofold: to punish the act of removing or withholding a child from a lawful custodian and to deter other abductions.

Although there are significant differences among statutes, most states have raised parental kidnapping to a felony offense, especially if the child is concealed or taken out of state. The essential elements that must be established by the prosecution vary among jurisdictions.[20] Generally, the defendant must have knowingly taken, detained or concealed a minor child with no lawful right to do so, in violation of a lawful court order, and with the intent to detain or conceal the child from the person or agency having lawful charge of the child. Some statutes do not require a custody order and cover pre-decree situations, while others prohibit visitation interference or abduction by unmarried parents.[21]

b. Federal Statutes

Although parental kidnapping is primarily a state offense, federal involvement is authorized under several statutes, including the Fugitive Felon Act[22] which enables the Federal

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19. See Chapter III, *Sentencing Issues* for a detailed examination of sentencing alternatives and factors to consider in determining an appropriate sentence.

20. See Appendix A for a complete compilation of criminal parental kidnapping statutes.

21. *See* Appendix C (Statutes Prohibiting Violation of Joint Custody Orders); Appendix F (Statutes Covering Pre-decree Abductions); Appendix G (Statutes Prohibiting Interference with Visitation).

22. 18 U.S.C. § 1073 (1995).

Bureau of Investigation to investigate out-of-state parental kidnapping cases and assist in the location and apprehension of fugitives from state justice. The Act, along with Section 10 of the Parental Kidnapping Prevention Act, allows a prosecutor who has filed felony parental kidnapping charges to request a federal Unlawful Flight to Avoid Prosecution (UFAP) charge against the parent.[23]

The International Parental Kidnapping Crime Act of 1993 (IPKCA)[24] makes *international* parental kidnapping a federal felony offense and imposes criminal fines and/or a prison term on anyone who removes a child from the United States or unlawfully retains a visiting child in a foreign country. In enacting the legislation, Congress expressed the intent that nothing in the new Act be construed as superseding the Hague Convention on the Civil Aspects of International Child Abduction and that the Hague Convention remedies for return of a child held outside the United States remain the preferred procedures.[25] When the case is also appropriate for criminal intervention, prosecution can proceed under IPKCA or the applicable state kidnapping or parental kidnapping statute.[26]

2. The Civil Aspects of Parental Kidnapping

While every parent has an inherent, constitutionally protected right to custody of his or her child,[27] civil court orders can define and limit those rights. The Uniform Child Custody Jurisdiction Act (UCCJA) (Appendix L) and Parental Kidnapping Prevention Act (PKPA) (Appendix M) govern jurisdiction for the determination of child custody. The Acts were designed to discourage child kidnappings and "forum-shopping" by abductors seeking more favorable custody decrees. They also mandate enforcement of valid custody and visitation orders between states.[28]

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23. *See Commonwealth v. Beals*, 541 N.E.2d 1011 (Mass. 1989) (federal criminal warrant issued); *Commonwealth v. Stewart*, 543 A.2d 572 (Pa. Super. Ct.), *aff'd*, 544 A.2d 1384 (1988) (FBI arrested defendant); *State v. Rome*, 426 N.W.2d 19 (S.D. 1988) (FBI assistance provided); *People v. Tippett*, 733 P.2d 1183 (Colo. 1987) (en banc) (FBI issued UFAP warrant); *State v. Wengatz*, 471 N.E.2d 185 (Ohio Ct. App. 1984) (FBI provided surveillance for two weeks when defendant left state).

24. 18 U.S.C. § 1204 (1993).

25. For a detailed examination of Hague Convention procedures, see Hoff & Volenik, JURISDICTION IN CHILD CUSTODY AND ABDUCTION CASES: A JUDGE'S GUIDE TO THE UCCJA, PKPA AND HAGUE CHILD ABDUCTION CONVENTION (ABA Center on Children & the Law 1996) [hereinafter ABA, JURISDICTION].

26. A specific provision on international kidnapping is not required to proceed under a state statute, although some states directly address the issue. *See, e.g.*, N.J. REV. STAT. § 2C:13-4(a) (1990) (raising international parental kidnapping to second degree crime punishable by imprisonment for 5 to 10 years, $100,000 fine and restitution for expenses incurred in recovering child); OHIO REV. CODE ANN. § 2919.23(D)(2) (1991) (if child is kept or harbored in foreign country, violation is felony of fourth degree).

27. *Santosky v. Kramer*, 455 U.S. 745 (1982).

28. The following section provides a basic overview of the UCCJA and PKPA, two very important statutes to the understanding of parental kidnapping proceedings. For a comprehensive examination of these statutes, see the companion to this benchbook, JURISDICTION IN CHILD CUSTODY AND ABDUCTION CASES: A JUDGE'S GUIDE TO

a. Uniform Child Custody Jurisdiction Act

The Uniform Child Custody Jurisdiction Act (UCCJA)[29] affects every interstate proceeding in which custody is an issue. It governs which state has jurisdiction to determine or modify custody and contains provisions designed to prevent simultaneous proceedings. Under the UCCJA, courts are required to recognize and enforce custody decrees of sister states and are limited in their ability to modify those decrees. The UCCJA also allows a judge to refuse to hear a motion to modify a custody order if the petitioner has abducted the child and to order the abductor to pay all reasonable costs incurred by the searching parent in locating and recovering the child, including attorney's fees.

If simultaneous proceedings are discovered in separate states, Section 6 of the UCCJA requires a stay of the proceedings and authorizes communication between judges to resolve the jurisdictional issue.[30] To discourage simultaneous proceedings, the UCCJA also requires a petitioner for custody to file an affidavit listing all past and present custody proceedings and prior addresses of the parties and child.[31]

To be enforceable, a civil custody order must have been entered by a court with subject matter jurisdiction. A custody order issued without subject matter jurisdiction is void. In child custody cases, subject matter jurisdiction is determined by the application of state jurisdiction statutes and the UCCJA. The PKPA's provisions must also be complied with in order for other states to accord the custody decree full faith and credit. As a federal statute, the PKPA governs if there is a conflict with the UCCJA.

While there are four bases for jurisdiction under the UCCJA, subject matter jurisdiction in the vast majority of cases is determined by "home state" or "significant connections/substantial evidence" analysis. The other two bases, "emergency" and "last resort," are not often applied.[32]

A court has home state jurisdiction if the child has resided in the state with one or both of his parents for at least six consecutive months preceding commencement of the proceeding. If the child is wrongfully removed from the state, jurisdiction of the home state is extended to one year. Home state jurisdiction does not automatically expire after six months. Once an order is made in

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THE UCCJA, PKPA AND HAGUE CHILD ABDUCTION CONVENTION, *supra* note 25.

29. *See* Appendix L.

30. *See Melligner v. Melligner*, 764 S.W.2d 52, 54 (Ark. Ct. App. 1989); *In re Aisha B.*, 206 Cal. App. 3d 1030, 254 Cal. Rptr. 116 (Cal. Ct. App. 1988); *Matter of Pima County Juvenile Action*, 711 P.2d 1200, 1207 (Ariz. Ct. App. 1985).

31. UCCJA § 9.

32. Hilton, *Jurisdictional Conflicts in Interstate Child Custody and Parental Abduction Cases, in* OBSTACLES TO THE RECOVERY AND RETURN OF PARENTALLY ABDUCTED CHILDREN ch. 4B (Girdner & Hoff eds., Office of Juvenile Justice and Delinquency Prevention 1994) [hereinafter Hilton, *Jurisdictional Conflicts*]; *see also* Elrod & Walker, *Child Custody and Visitation: UCCJA*, 27 FAM. L.Q. 567 (1994); Annotation, *Validity, Construction and Application of Uniform Child Custody Jurisdiction Act*, 96 A.L.R.3d 968 (1994).

conformity with the UCCJA and PKPA, the state issuing the order retains jurisdiction so long as it (a) remains the residence of one of the parties or the child, and (b) continues to have jurisdiction under its own laws.[33]

"Significant connections/substantial evidence" jurisdiction allows a court to assume jurisdiction if it would be in the child's best interest because the child and either one or both parents have significant contacts with the state and there is substantial evidence in the state regarding the child's care, protection, schooling and personal relationships.

A court may exercise "emergency" jurisdiction if the child is present in the state and has been abandoned, neglected, mistreated or abused. "Emergency" jurisdiction is clearly intended to allow a court to exercise jurisdiction for purposes of protecting a child only until the court having proper jurisdiction can act. Emergency jurisdiction may be applicable in cases involving family violence.[34]

Under "last resort" jurisdiction, a court may exercise jurisdiction if no other court could properly exercise jurisdiction under any of the other three bases. It also applies if one state declines jurisdiction because the other state is more appropriate and it serves the child's best interest for that court to assume jurisdiction. Except in emergency cases, the child need not be present in a state for it to exercise jurisdiction because the child's presence alone does not confer jurisdiction.

In addition to requiring subject matter jurisdiction, the UCCJA also mandates notice and an opportunity to be heard for an order to be valid. If a court permits enforcement of an *ex parte* order, a hearing must generally be held within a brief time.[35]

b. Parental Kidnapping Prevention Act

The Parental Kidnapping Prevention Act of 1980 (PKPA)[36] creates an obligation on each state to administer the "full faith and credit" clause of the United States Constitution by enforcing child custody decrees entered by a sister state. Intended to remedy the limitations of the Uniform Child Custody Jurisdiction Act, the PKPA establishes standards for determining which state court can properly exercise jurisdiction in accordance with its provisions.

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33. 28 U.S.C. § 1738A; Hilton, *Jurisdictional Conflicts*, *supra* note 32. *See Kumar v. Superior Court*, 652 P.2d 1003 (Cal. Ct. App. 1982) (if court of one state issues custody decree, second state cannot modify that decree unless the initial court order does not satisfy jurisdictional prerequisites in accord with UCCJA or first state declines jurisdiction to modify).

34. *See Coleman v. Coleman*, 493 N.W.2d 133 (Minn. Ct. App. 1992) (mother who left home state with children to seek safety from emotional and physical abuse did not "abduct" children under UCCJA when receiving state properly exercised emergency jurisdiction). *See also* Hilton, *Jurisdictional Conflicts*, *supra* note 32.

35. Hilton, *Jurisdictional Conflicts*, *supra* note 32.

36. 28 U.S.C. § 1738A.

A state must have jurisdiction under its own version of the UCCJA for a custody order issued by that state to be valid. However, for the order to be honored by other states under federal law, the PKPA jurisdictional requirements must also be satisfied. When two states claim jurisdiction over a single matter, one based on "home state" and the other on "significant connections/substantial evidence" jurisdiction, the PKPA resolves the conflict. A state exercising "home state" jurisdiction has primacy over all other states, which are prohibited from conducting simultaneous proceedings on that matter. Only when a "home state" relinquishes jurisdiction does the new state become the child's legal home.

However, the PKPA does not clearly express a method to resolve conflicting state court custody orders when two courts ignore the PKPA or differ on its application. The United States Supreme Court in *Thompson v. Thompson*[37] ruled the PKPA does not confer an implied cause of action in federal court to determine the validity of two conflicting state custody decrees.

c. Indian Child Welfare Act

One of the most challenging types of parental kidnapping cases involves the taking of a child to or from a Native American Reservation in violation of a valid custody order. The Indian Child Welfare Act of 1978 (ICWA)[38] governs the placement of Native American children under certain circumstances and extends full faith and credit to public acts, records and judicial proceedings of Native American tribes. ICWA applies in a parental kidnapping case if the child's custody was decided in "child custody proceedings" as defined in the Act. This definition specifically *excludes* an award of custody granted in a divorce proceeding, including paternity, but includes status offenses, adoption, voluntary placement, emergency custody and involuntary foster care and termination.

The provisions of the Act are **mandatory** and allow no discretion—any order issued in violation of the Act is invalid. Under *Mississippi Band of Choctaw Indians v. Holyfield*,[39] the right of the tribe to determine custody of children who reside on the reservation is superior to the rights of the parents. If it is determined ICWA is not applicable, the tribe is bound under the state's UCCJA and the federal PKPA.[40]

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37. 484 U.S. 174 (1988). *See* Volenik, *Legal Procedures for the Enforcement of Child Custody Determinations and the Recovery and Return of Parentally Abducted Children, in* OBSTACLES TO THE RECOVERY AND RETURN OF PARENTALLY ABDUCTED CHILDREN ch. 6, app. A (Girdner & Hoff eds., Office of Juvenile Justice and Delinquency Prevention 1994).

38. 25 U.S.C. §§ 1901-1923. *See* Appendix N.

39. 490 U.S. 30 (1989).

40. *See also* Atwood, *Fighting Over Indian Children: The Uses and Abuses of Jurisdictional Ambiguity*, 36 U.C.L.A. L. REV. 1051 (1989).

d. Hague Convention on the Civil Aspects of International Child Abduction

Language barriers, different cultural norms and legal systems, and a tendency to protect a country's own citizens present substantial obstacles in international custody disputes. Generally, the abducting parent is a citizen of the receiving country and may seek a more favorable custody decree through that country's court system. Conflicting foreign custody decrees complicate case resolution because a country's laws and court orders are not enforceable outside its jurisdiction.

The Hague Convention on the Civil Aspects of International Child Abduction is intended to deter such problems.[41] Under Article 1, the Convention's goals are to "secure the prompt return of children wrongfully removed to or retained in any Contracting State" and "ensure that rights of custody and of access under the law of one Contracting State are effectively respected in other Contracting States."

The Convention applies only in those countries that are parties to the treaty and only to abductions or wrongful retentions that occurred on or after its entry into force in the ratifying country. As of January 1997, the Hague Convention is in force in 44 countries including the United States (see Appendix A, page 44, for full listing of signatories to the Convention). The Hague Convention is purely a civil remedy and does not carry criminal penalties. It may be invoked even when a custody decree has not been entered, although the left-behind parent must have been exercising "rights of custody" at the time of the abduction and cannot have consented to the retention or removal. In the United States, procedures for use of the Convention are found in the International Child Abduction Remedies Act.[42]

H. POLICY AND PRACTICE CONSIDERATIONS FOR JUDGES

1. The Judicial Role

Criminal court judges have important responsibilities which, together with the breadth of their authority and the influence it carries, provide a special opportunity to have a positive effect on the lives of missing or recovered children and their families. Judges are in a unique position to help prevent abduction, not only in fashioning appropriate custody decrees but also in their handling of criminal parental kidnapping cases. As with other forms of family violence, abduction is an assertion of power by one parent over the other.[43] Judges who are educated about the

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41. Hague Convention on the Civil Aspects of International Child Abduction, *opened for signature* Oct. 25, 1980, S. TREATY DOC. No. 11, 99th Cong., 1st Sess. (1985), *reprinted in* 19 ILM 1501 (1980) (entered into force for the United States July 1, 1988).

42. 42 U.S.C. §§ 11601-11610 (1988).

43. Judicial Roundtable Discussion on Sentencing and Custody After an Abduction, American Prosecutors Research Institute & National Council of Juvenile and Family Court Judges, February 27, 1994, Boston, MA [hereinafter Judicial Roundtable, Boston].

dynamics of parental kidnapping can influence parental behavior through appropriate civil custody decisions or through their thoughtful handling of criminal cases through the sentencing phase.[44]

Judges can also play a role in demonstrating that the justice system *can* be sensitive to socioeconomic, ethnic and cultural differences among families, especially when cases involve foreign nationals or international parental kidnapping. Cultural values influence not only whether a crime victim seeks assistance from the justice system, but also how the victim perceives whether the system works on his or her behalf. Gender bias is a related issue in the administration of justice. Judges can play an important role in ensuring that treatment of all parties in court is equal.

When a case draws substantial public and media attention, judges can use their position to build public awareness of parental kidnapping laws and procedures or assist the media by explaining the criminal process and the importance of protecting children from this type of crime.[45] While judges cannot comment on specific cases or disclose information about parties or matters before them, they can provide clear, informative statements about general issues through press releases or media interviews.

2. Appointment of Guardians ad Litem

A special concern in parental kidnapping cases is the lack of representation for the missing or recovered child. Some states provide for the appointment of independent counsel or guardians ad litem in civil custody and criminal proceedings.[46] Appointing a guardian is sometimes difficult in parental kidnapping cases because most statutes designate the left-behind parent as victim, making the child ineligible.

The child's interests may not be effectively advocated without a neutral party to represent the child. Such representation would be especially appropriate at sentencing, a decision that directly affects the defendant's interaction with the child. A guardian or the department of social services would also be able to assist with appropriate placement of the child when necessary. Some jurisdictions rely on Court Appointed Special Advocate (CASA) or similar programs to provide independent advocacy on behalf of the child. Judges should endeavor to appoint a guardian or CASA volunteer whenever possible and especially when one is requested.[47]

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44. Judicial Roundtable Discussion on Sentencing and Custody After an Abduction, American Prosecutors Research Institute & National Council of Juvenile and Family Court Judges, April 16, 1994, Reno, NV [hereinafter Judicial Roundtable, Reno]. Judges should always be mindful of applicable codes of conduct in handling parental kidnapping cases. MODEL CODE OF JUDICIAL CONDUCT (American Bar Association 1990).

45. Individual state rules of conduct also may govern media relations. *See, e.g.*, Rule 1:2-2 Media Coverage; Rules of General Application; Rules Governing the Courts of the State of New Jersey.

46. *See, e.g.*, ALASKA STAT. § 12.45.046(a) (1994) (allowing appointment of guardian *ad litem* in criminal proceedings); Ky. Rev. Stat. Ann. § 26A.140 (1992) (same).

47. Judicial Roundtable, Boston, *supra* note 43.

I. COORDINATION OF CRIMINAL AND CIVIL PROCEEDINGS

Effective coordination among courts will encourage obedience to court orders, minimize trauma to children and conserve the courts' resources. Sharing appropriate information is permissible and constitutes best judicial practice. Courts willing to find ways to coordinate proceedings will find their work load ultimately reduced. Their decisions will be enhanced in terms of community perception and fairness to the parties before them.

Almost every violation of a right to custody or visitation involves both a civil case and at least a factual basis for a criminal case. Depending on state statutes, a criminal case may be brought for failure to obey a custody and visitation order or violation of a parental right established by operation of law. The abduction may simultaneously provide a basis for criminal prosecution and potentially subject the violator to civil or criminal contempt. With the potential for both civil and criminal culpability, the potential for confusion and inconsistency increases as courts act independently or wait for each other to act. The lack of coordination and information sharing among other judges and interested parties frustrates many judges handling custody cases after an abduction.

Numerous individuals and agencies may have an interest in the results of both the civil custody and criminal cases—the child, parents, guardians or relatives, court support personnel and child welfare officials—and their cooperation is essential to achieving satisfactory decisions. The court may be the only institution in a position to develop optimal solutions. Judges can appropriately take the leading role in assuring that coordination occurs. By unifying or coordinating proceedings, judges can help prevent future abductions, consolidate supervision of the case once all proceedings are complete and fashion appropriate remedies and sanctions.

1. Sources of Conflict

In civil custody cases, jurisdiction is established by the Uniform Child Custody Jurisdiction Act (UCCJA) and Parental Kidnapping Prevention Act (PKPA). If these statutes are followed, jurisdiction exists in only one state. However, courts of general jurisdiction sitting in custody cases are rarely given the time or resources to carefully consider all aspects of custody cases, resulting in decisions a parent may find unfair and uninformed.

In criminal cases, state law and constitutional principles establish jurisdiction and venue. In parental kidnapping cases they may properly exist in a state other than the one in which civil custody jurisdiction exists. Jurisdiction for criminal prosecution may depend on the law of the state where the proceedings take place, the law of the state where the abduction took place, the law of the state where the custody order was violated or the law of the state where the effect of the offense was felt.[48] Adding to the confusion, jurisdiction may also exist in a foreign country.

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48. *See, e.g.*, CAL. PENAL CODE § 279(e) (1992) (violations of custodial interference statute punishable "whether the intent to commit the offense is formed within or without the state, if the child was a resident of California or present in California at the time of the taking, if the child thereafter is found in California, or if one of the parents, or a person granted access to the minor child by court order, is a resident of California at the time of the alleged violation . . . by a person who was not resident of or present in California at the time of the alleged offense"); Appendix E (Statutes Identifying Appropriate Venue). *See also Rios v. State*, 733 P.2d 242 (Wyo. 1987) (state had

Although the criminal court does not have jurisdiction over the custody matter and cannot change the civil order, its sentence can profoundly alter the exercise of custody rights through conditions of probation or incarceration of the defendant. There is nothing in the UCCJA to prohibit this exercise of power over the defendant through criminal sentencing. Likewise, the civil court cannot override the terms of a probation order or other criminal sanction. Conflicts between civil and criminal orders can therefore lead to additional problems.

2. Possible Means of Coordinating Proceedings

a. Civil Court Powers and Procedures

Conflict can be prevented or ameliorated by the civil court before which a custody issue is pending. Its first duty is to determine that it is in fact the appropriate court to hear the case through scrupulous adherence to the jurisdictional standards and procedures set out in the UCCJA and PKPA.[49] Once the civil court has properly assumed jurisdiction, the objective should be to resolve the custody issue in the way most likely to avoid future problems and serve the best interests of the child.

After a contested hearing or review of the terms of a settlement, the court should attempt to ensure that the parties feel their concerns were heard and the court is available in the future. Any subsequent order issued should clearly state the custodial rights and duties of the parents so as to avoid possible conflict over ambiguities and provide a sound basis for contempt sanctions or criminal proceedings.

Despite precautions taken in the initial hearing, one parent may take or retain the child after visitation and then initiate proceedings in a different court. In other cases, a parent may take the child before divorce or other legal proceedings begin and initiate a case in another locality, state or country to find a more sympathetic forum. To identify such cases, a court should insist on detailed information on the child, the other parent and the child's past residences (as required by the UCCJA), and use all available resources to verify information.[50]

Section 6 of the UCCJA contains a powerful authorization for coordination by mandating direct communication with other courts by the court in which a petition for custody has been filed or before which a proceeding regarding jurisdiction is pending. While this section is aimed at resolving conflicts between civil courts, there is nothing that limits its use to custody cases. The court conducting criminal proceedings may not be exercising jurisdiction "in conformity with" the UCCJA, and thus a stay of the civil proceedings may not be required. However, the criminal proceedings may have an impact on the exercise of custody and visitation rights and jurisdictional consequences through the terms of any criminal sentence imposed.

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jurisdiction to prosecute for failing or refusing to return child, even though at time of commission of crime neither father nor child had ever been in state, because failure had its effect in state).

49. *See* ABA, JURISDICTION, *supra* note 25.

50. *See* UCCJA §§ 3, 9.

Communications concerning issues other than jurisdiction are neither sanctioned nor prohibited and can be conducted through court services, probation officers or prosecutors' offices. Parties to the custody dispute also have a duty to keep the courts informed. Direct communication between the courts is limited only by standards of judicial and professional ethics and requirements of due process. Since a judge must remain neutral and avoid becoming a witness, some judges routinely invite attorneys and possibly the parties and a court reporter into chambers when they call other judges.[51] This practice encourages more informed judgments on how to proceed since all parties and counsel are present or involved in the communications.

Once the civil court is aware of other proceedings, documents and transcripts should be exchanged. It is of utmost importance that the terms of any existing custody order be provided. Any findings or probation orders issued by the criminal court also should be available to the civil court. If communication is initiated early enough in the proceedings, conflict between probation and custody orders can be avoided. While rules of court or applicable statute may limit the use of some materials, sharing of information will facilitate proceedings in both courts.

If the court finds that the party petitioning for an initial decree or seeking modification of an existing decree has engaged in wrongful conduct, the court may refuse to exercise its jurisdiction pursuant to UCCJA Section 8. Regardless of wrongful conduct, the section permits exercise of initial jurisdiction if it is "just and proper under the circumstances" and modification jurisdiction if it is "required in the best interest of the child."

To prevent violations of custody orders and abductions to change jurisdiction, exceptions to mandatory declination of jurisdiction set out in UCCJA Section 8 must be interpreted very narrowly. First, the court must have custody jurisdiction before it may exercise it. While the UCCJA provides concurrent initial jurisdiction, the PKPA does not. Second, the court must be wary of rewarding wrongful conduct.[52] The petitioned court should assume jurisdiction over a case only if the initial court does not continue to have jurisdiction and there is no other appropriate court to assume it.[53]

While Section 8 permits the court to award costs when it declines jurisdiction, the UCCJA is silent on other measures a court can take when it finds wrongful conduct. Section 7, addressing inconvenient forum, provides some guidance on imposition of conditions, transfer of jurisdiction and communication with the second court. While this is helpful, it is not sufficient when the conduct is wrongful and may continue. Even without explicit authorization such as that found in

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51. Judicial Roundtable, Reno, *supra* note 44.

52. The Uniform Law Commissioners are making changes to the UCCJA and developing a uniform enforcement statute. Changes in these sections may provide more limitations on a court's ability to assume jurisdiction either concurrently (as in PKPA) or as a result of wrongful conduct.

53. If the case involves a child taken from another country, however, the court must consider first whether the Hague Abduction Convention applies and whether it requires return of the child to his or her habitual residence. The court in the country of the child's habitual residence will decide which court properly has jurisdiction. The United States Central Authority in the United States State Department can provide information and assist with communication and negotiations involving the Convention.

California,[54] a court of general jurisdiction has the power to act to prevent further wrongful conduct. The court can refer the case to the local prosecutor, inform the court and prosecutor in the state from which the child was taken, communicate with the appropriate court to determine jurisdiction over the custody issue, return the child to the parent with custody, or place the child under the protection of the local child protection services until appropriate arrangements can be made.

b. Criminal Court Powers and Procedures

When a case is brought before a criminal court, the prosecutor has already reviewed the case and should have detailed information about existing orders and the pendency of civil actions. It is easier for the criminal court to initiate coordination with a civil court having jurisdiction over custody because the criminal court has the services of the probation department available for investigation as well as access to all court services and child welfare agencies. Direct communication may be initiated as with the civil court. Although the prosecutor cannot act directly in civil cases other than in California, the criminal court may be able to pursue other avenues to ensure appropriate civil action if no action is already pending.

The criminal court has plenary power over the defendant and, if the defendant is convicted, the ability to alter visitation and custody rights at least on a temporary basis. If the criminal court is sitting in a state that does not have civil jurisdiction over custody under the UCCJA, the terms of an existing custody order are not directly affected by the probation order, nor can the criminal court prevent the issuance of a custody order. The criminal court can ensure that the civil court is aware of the criminal case and the terms or proposed terms of the sentence or probation order.

The criminal court may wish to ensure that conditions of probation are consistent with the civil court's custody decision. If the civil court has already considered custody in light of the defendant's behavior, the criminal court may condition probation on conformance to it. If the criminal case is completed while the civil case is pending, findings in the criminal case as well as transcripts and probation reports should be made available to the civil court.

The criminal court and prosecutor must also consider the effect of pending criminal proceedings on securing return of the child. Some countries have denied or threatened to deny the return of abducted children under the Hague Abduction Convention unless pending criminal charges are dropped. This reluctance is based on a belief that contact between the child and offending parent will not be possible if the parent faces criminal charges in the United States. Resolving these conflicts, especially when the prosecutor and court are convinced that the case is so egregious that criminal protection is necessary, depends on communication with foreign courts and other authorities. Coordination with the local civil court is essential. However, if the result of persisting in the criminal case is loss of the child, particularly when extradition of the offending parent would be unlikely, civil resolution of international cases may be the only realistic option.

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54. *See* CAL. FAM. CODE §§ 3130-3133 (1995).

c. Consolidated Jurisdiction or Proceedings

"Consolidated jurisdiction" allows the civil court (and same judge) to hear the criminal case, or provides for a family court system in which every case involving a child is heard by that court system and all cases involving a child are heard by the same judge. While expressing some support for this concept, judges have also remarked on possible evidentiary and due process problems of any such system.[55]

One challenge raised by a consolidated system is the potential for conflict between the traditional goal of the family courts to reunify the family and the goal of the criminal courts to punish criminal behavior. In child custody cases, the goal is to serve the best interest of the child by providing a stable environment. One way to help achieve that goal is by making informed, sound orders and insisting on obedience to them.

d. Prosecutors in the Civil System

California has developed a system through which the criminal prosecutor may use either criminal and civil proceedings or both to resolve cases of custodial interference and obtain return of the child.

The Prosecutor. California prosecutors have statutory authority to use both civil and criminal proceedings to locate and when necessary return to the court an abducted child and the parent with whom the child is located. Criminal statutes cover all cases of wrongful conduct—those arising without custody orders as well as those with orders.[56] California prosecutors also have the power to enforce custody and visitation orders when there has been a violation.[57] While this authority does not assure perfect coordination of criminal and civil proceedings, it greatly reduces related problems.

A wrongful removal or retention of a child may come to the attention of the district attorney's office through a complaint by a parent, notification from police or another prosecutor, a request under the Hague Convention or a request of a court. After appropriate investigation, the prosecutor has discretion and authority to file a civil action to establish a temporary custody order (using UCCJA emergency jurisdiction if appropriate), request an order from another jurisdiction, or enforce an existing order. This may include obtaining an order picking up the child for return to the lawful custodian or the local or out-of-state court (usually through a civil warrant in lieu of a writ of habeas corpus).

Although the state law is mandatory, the prosecutor's involvement in civil or criminal cases is discretionary based on an evaluation of wrongful conduct. In all cases, the prosecutor acts on behalf of the court and does not represent the parent. When the prosecutor is not directly

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55. Judicial Roundtable, Boston, *supra* note 43; Judicial Roundtable, Reno, *supra* note 44.

56. CAL. PENAL CODE §§ 277, 278, 278.5, 279. *See* CAL. FAM. CODE §§ 7601-7611.

57. *See* CAL. FAM. CODE §§ 3130-3133 (1995).

involved in the civil case, the civil court with jurisdiction is kept informed of proceedings in the criminal case by the prosecutor's staff or court services officers.

The Court. In refusing jurisdiction over a civil custody action, the California civil court has responsibility (and specific authority) for taking custody of the child because the child has been wrongfully taken from another jurisdiction in violation of established custody rights.[58] Thus, when confronted with an abducted child, the civil court is required to notify the victim parent, the out-of-state court or the prosecutor, and has the power to assume custody of the child. Under the UCCJA, the civil court may also communicate with the court with jurisdiction over custody to ensure resolution of the conflict. A criminal court presented with conflicting orders must determine which is valid and take action based on this determination.[59]

Applicability in Other States. Judicial leadership can establish many of the benefits of the California system even if it is not possible to enact similar legislation or implement it completely. For coordination to function successfully, the criminal law should cover all cases of custodial interference whether the right is established by order or by operation of law. It should also include explicit authority for the prosecutor to use civil and criminal methods of dealing with wrongful conduct.

e. Sources of Coordination Assistance

In addition to direct communication among courts, each court can maximize satisfactory coordination and information exchange between criminal and civil courts, agencies, institutions and professionals in the community. One option is to assign a "case manager" to maintain communication and exchange information.[60] The case manager could be the prosecutor in the criminal case (as in Utah); an appointed court officer (as in New Jersey); or the child's guardian ad litem (as in Colorado). Other possibilities include agencies like Michigan's Friend of the Court, probation officers, family or court services or other designated court personnel.

Necessity for cooperation and coordination does not end when the criminal or civil order is entered. On-going supervision may be necessary, whether through the probation department or family counseling services or by the designated case manager. At the very least, family members should have a contact person so that new conflicts can be avoided if possible at an early stage.

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58. CAL. FAM. CODE § 3408 (c) & (d) (provisions added to UCCJA § 8 jurisdiction declined by reason of conduct).

59. CAL. PENAL CODE § 279 (b).

60. See Judicial Roundtable, Reno, *supra* note 44.

CHAPTER TWO
PRETRIAL AND TRIAL ISSUES

A. PRETRIAL PROCEEDINGS

This chapter addresses common pretrial proceedings and issues likely to arise in parental kidnapping cases. Pretrial proceedings, hearings and motions will vary depending on local practice, rules of court and state law.

1. EXTRADITION

Extradition in parental kidnapping cases does not vary greatly from extradition in other criminal cases. Once a governor has issued an extradition warrant, a court reviewing a request for a writ of habeas corpus looks at four issues: (1) whether the extradition documents are valid on their face; (2) whether the petitioner has been charged with a crime in the demanding state; (3) whether the petitioner is the person named in the request; and (4) whether the petitioner is a fugitive.[1]

The receiving state must extradite a defendant against whom a properly certified indictment has been filed and cannot inquire into the sufficiency of that indictment. In *California v. Superior Court of California, San Bernardino County (Smolin)*,[2] the California court could not refuse to deliver a father and grandfather charged with kidnapping based on its determination that the defendants were not substantially charged under Louisiana law and the subsequent California order had established the father as the custodian of the children.

In *People ex. rel. Kuzner v. NYPD*,[3] however, the court ruled that when extradition is sought on the basis of an affidavit and not on an indictment, the affidavit needs to be closely scrutinized to determine whether the alleged facts constitute a crime in the demanding state. Holding that the affidavits in the case did not prove the child was removed from the demanding state without the left-behind parent's consent, the court sustained the issuance of the writ of habeas corpus.

2. ARRAIGNMENT AND BAIL HEARINGS

Coordination of civil and criminal proceedings is important even as early as arraignment.[4] Related issues include custody and visitation. When custody orders conflict, the left-behind

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1. *State ex rel. Gilpin & Armell v. Stokes*, 483 N.E.2d 179 (Ohio Ct. App. 1984). *See State ex rel. Partin v. Jensen*, 279 N.W.2d 120 (Neb. 1979) (applying same analysis); *Cronauer v. State*, 322 S.E.2d 862 (W. Va. 1984) (applying similar analysis); *see also Wray v. State*, 624 S.W.2d 573 (Tex. Crim. App. 1981) (holding neither habeas corpus court nor court of criminal appeals authorized to overturn findings of assistant district attorney, governor of demanding state and governor of holding state that petitioner had been charged with crime in demanding state).

2. 482 U.S. 400 (1987). *See also Puerto Rico v. Branstad*, 107 S. Ct. 2802 (1987) (federal courts have authority under Extradition Clause to compel performance by asylum state of mandatory, ministerial duty to deliver up fugitives on proper demand).

3. 102 N.Y.S.2d 614 (Sup. Ct. 1950).

4. Contempt proceedings in family court for violation of a custody order may affect criminal prosecution. See Section C.5 of this chapter for an analysis of double jeopardy considerations.

parent's civil attorney (or the prosecutor when permitted by statute) may petition the civil court to determine which court has jurisdiction.[5] If the defendant is entitled to visitation under a valid custody order, consider ordering supervised visitation or no contact as a condition of release when appropriate.

Child abuse offenses such as parental kidnapping often call for high bail to both insure defendant's presence and obedience to court orders, when permitted. While too often seen as innocuous because the child is with a parent, parental kidnapping can have serious physical and psychological effects on children. If the child has not been located, the prosecutor may request the court to order return of the child as a condition of release or reduction in bail. High bail may also be appropriate if there is evidence of likely flight. Early voluntary return of the child to the lawful custodian is one factor possibly justifying low bail or release of the defendant on his or her own recognizance.

3. CONDITIONS OF RELEASE

Conditions of release should be designed to prevent the defendant from engaging in objectionable conduct. The defendant's connection to the community, employment status and prior history of compliance with court orders should all be considered in setting conditions. Since the defendant stands accused of violating a court order or withholding the child at least once, there already may be a potential flight risk. Consider ordering surrender of the defendant's and child's passports pending final disposition.

The defendant should be required to abide by family or domestic court orders that do not conflict with the conditions of release imposed. A "no unsupervised contact" order with the child should be considered, especially if the abduction was lengthy, the child was removed from the state or other factors indicate the child needs additional protection.[6] Supervision should be conducted by an appropriate professional.

A "no contact" order with the left-behind parent also may be appropriate. Consider ordering the defendant to avoid locations where the child will normally be—e.g, school or at home. If the child is still missing, consider making disclosure of the child's whereabouts and return to the legal custodian a precondition to release.[7] If the defendant violates the conditions placed on release, especially a no contact order, pretrial release should be revoked. When permitted by law, the bond should secure both the defendant's obedience to these conditions as well as the defendant's appearance in court.

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5. *See* Chapter I, Section I, *Coordination of Criminal and Civil Proceedings.*

6. *See State v. Kane*, 625 A.2d 1361 (R.I. 1993) (trial judge did not abuse discretion in imposing no contact order as condition of bail).

7. *See* CAL. PENAL CODE § 279 (b) (1992) ("when a person is arrested for an alleged violation [of this section] the court shall, at the time of arraignment, impose the condition that the child shall be returned to the person or public agency having lawful charge of the child, and the court shall specify the date by which the child shall be returned"). *See also Baltimore City Dept. of Social Serv. v. Bouknight*, 493 U.S. 549 (1990) (custodial parent may not rely on Fifth Amendment to avoid disclosing whereabouts of missing child in contempt proceeding).

B. CASE EVALUATION

1. ELEMENTS OF THE OFFENSE

Although statutes vary in the essential elements, most require that a defendant knowingly took, detained or concealed a minor child with no lawful right to do so, in violation of a lawful court order, and with the intent to detain or conceal the child from the person or agency having lawful charge of the child.[8] The following are elements found in parental kidnapping statutes.

a. Intent to Deprive of Custody or Visitation Rights

While all jurisdictions require proof of intent to deprive the other parent of custody or visitation rights to sustain a conviction, some require proof only of general intent while others require proof of specific intent to detain or conceal the child from the lawful custodian.[9] When the intent was formed (at the time of the taking or later) may affect jurisdiction, and statutory provisions (including defenses) may bear on the issue of intent.[10] Many circumstances indicate intention to conceal or detain.[11] Intent also can be inferred from stated or observed motivations and family issues arising prior to the abduction.

b. Knowledge of Lack of Legal Right to Take the Child

The defendant must abduct the child *knowingly* or *knowing or having reason to know he had no legal right to do so.* If parental kidnapping is a specific intent crime, knowledge of a custody order or pending custody proceeding generally suffices to show the defendant acted

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8. Appendix A contains the text of each state's criminal parental kidnapping statute and the federal international parental kidnapping statute.

9. *See State v. Kracker*, 599 P.2d 250 (Ariz. Ct. App. 1979); *People v. Johnson*, 199 Cal. Rptr. 231 (Cal. Ct. App. 1984); *People v. Howard*, 686 P.2d 644 (Cal. 1984); *State v. Holtcamp*, 614 S.W.2d 389 (Tenn. Crim. App. 1980).

10. ALA. CODE § 13A-6-45 (1983) (person does not commit custodial interference if sole intent was to assume lawful custody or control of child); W. VA. CODE § 61-2-14d (1984) (mere failure to return child after authorized custody or visitation without intent to deprive other parent of custody or visitation does not constitute offense).

11. *People v. Rodriguez*, 523 N.E.2d 185 (Ill. App. Ct. 1988) (evidence defendant changed own and daughter's name often and moved seven times sufficient to support jury's finding she intended to conceal child). *See also Costlow v. State*, 543 So. 2d 1259 (Fla. Dist. Ct. App. 1989) (even though father did not falsify name and showed child to stranger, six week absence evidenced intent to conceal child from mother). *But see State v. Wengatz*, 471 N.E.2d 185 (Ohio Ct. App. 1984) (mother with restricted visitation rights who took two children to Florida for two-week "vacation" did not show requisite specific intent to withhold children from father).

knowingly.[12] Actual service of the court order is not required.[13] In many jurisdictions, oral notification to the defendant that the order existed shows knowledge. It may suffice to show the defendant knew he or she was removing the child from the custody of one who appears to have lawful custody.[14]

c. Taking or Withholding from Lawful Custody

The child must have been abducted from a person having lawful custody. Generally, lawful custody is held by a parent, although in some circumstances it may be other relatives, an appointed guardian, social services or a juvenile court. Violation of an order granting an agency or other state authority physical custody of the children would constitute a taking "from a lawful custodian."[15] If there is no custody action formally before a civil court—such as an action to determine paternity, petition for guardianship, dissolution, juvenile dependency action or writ of habeas corpus—a non-parent third party probably does not have standing to assert a right of custody or visitation.[16] Temporary delegation to a third party (e.g., babysitter or school) does not affect custody rights, although if the delegation is long-term or permanent, underlying legal rights need to be explored.[17] A custodial parent may have made arrangements for another individual to

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12. *See State v. Sanders*, 628 P.2d 1134 (N.M. Ct. App. 1981) ("knowing" in statute means parent was actually aware of court's custody orders or in exercise of reasonable diligence should have been aware). *See generally State v. Britzke*, 324 N.W.2d 289 (Wis. Ct. App. 1982), *aff'd*, 329 N.W.2d 207 (1983) (state needs only to prove knowledge of custody order not knowledge of its effect); *Commonwealth v. Stewart*, 543 A.2d 572 (Pa. Super. Ct.), *aff'd*, 544 A.2d 1384 (1988) (mere knowledge of order absent proper service of notice of custody hearing insufficient to deprive defendant of defense at criminal trial); *People v. Lawrow*, 447 N.Y.S.2d 213 (1982) (burden on prosecution to show defendant had knowledge of order when she violated it); *People v. Hyatt*, 96 Cal. Rptr. 156 (Ct. App. 1971) (custodial parent's testimony that defendant in court when order issued shows knowledge).

13. *See In re Imperial Insurance Company*, 203 Cal. Rptr. 664 (Cal. Ct. App. 1984) (order can be enforced against party having knowledge of order although it was not served at all); *State v. Ohrt*, 862 P.2d 140 (Wash. Ct. App. 1993) (affirming conviction of father who avoided service of orders but knew of them).

14. *State v. McLaughlin*, 611 P.2d 92 (Ariz. 1980).

15. *See generally, State v. Gambone*, 763 P.2d 188 (Or. Ct. App. 1988) (DSS's custody rights effective once children are in protective custody and continue until expedited detention hearing); *State v. Whiting*, 671 P.2d 1158 (N.M. Ct. App. 1983) (although granted physical custody, defendant-mother shared custody with court to extent order forbade removal of children from court's jurisdiction and mother could be held liable for violation of order); *Adoption of Matthew B.*, 284 Cal. Rptr. 18 (Ct. App. 1991) (right of parents to contract with each other as to the custody and control of their children is subject to control of the court). *But see Barber v. Superior Court*, 2 Cal. Rptr. 2d 403 (Ct. App. 1991) (court order placing children in physical custody of mother under supervision of CPS and forbidding removal from state without CPS authorization not sufficient because statute intended to protect persons or agencies with physical custody or visitation rights, not merely supervisory rights); *State v. Sanders*, 628 P.2d 1134 (N.M. Ct. App. 1981) (oral order granting custody to DHS insufficient to deprive father of custody rights when there was no notice of judgment and written order was entered two days after father left state with children).

16. *See also* Uniform Parentage Act, NAT'L CONFERENCE OF COMM'RS ON UNIFORM STATE LAWS (1973) (Appendix O).

17. *See People v. Bormann*, 85 Cal. Rptr. 638 (Cal. Ct. App. 1970) (family from whom child was taken was not "in lawful charge" because child was put in their care without mother's knowledge).

care for the child—e.g, when the parent serves in the armed services.[18]

d. Length of Deprivation of Custody

Several states require that a certain time elapse before a violation is recognized or that evidence show the defendant intended to hold or conceal the child permanently or for a protracted period.[19] In some cases, the abduction need not last the specified period if the intent was to withhold the child for that period. For instance, evidence the abducting parent moved all his furniture to another location, arranged for living quarters or made other provisions for a long-term stay may indicate intent to deprive the other parent of custody for a prolonged period.[20]

2. AGGRAVATING CIRCUMSTANCES

Some statutes address the issues of parental kidnapping committed with violence or the threat of violence, previous threats of abduction or abduction or interference with visitation to harass the abused spouse further.[21] Some states raise the initial charge to a higher grade felony when the abduction is committed while armed with a deadly weapon or results in serious bodily harm.[22] Ohio includes previous conviction for child stealing, kidnapping or abduction of a minor as an aggravating factor, and Tennessee permits prosecution under harsher "aggravated kidnapping" or "especially aggravated kidnapping" statutes if any of the listed aggravating factors is present.[23]

3. KIDNAPPING OR FALSE IMPRISONMENT

Occasionally a parent may be charged with false imprisonment or kidnapping instead of or in addition to parental kidnapping. A threshold question is whether the statutes in fact describe the same conduct. When general and limited statutes prohibit the same conduct, the case

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18. *Robertson v. Robertson*, 164 P.2d 52 (Cal. Ct. App. 1945) (custodial contest is between two parents, not noncustodial parent and grandparent in whose care the child was left); *Booth v. Booth*, 159 P.2d 93 (Cal. Ct. App. 1945) (same).

19. *See People v. Obertance*, 432 N.Y.S.2d 475 (Crim. Ct. 1980) (father's removal of daughters during school year for eight days without consent of mother sufficient to show removal for "protracted period" within meaning of statute). *See also* R.I. GEN. LAWS § 11-26-1.2 (1989) (requires intent to deprive other parent of custody for period greater than 15 days); S.C. CODE ANN. § 16-17-495 (1990) (permits inference that abductor intended to violate statute if kept child in excess of 72 hours); Appendix B, Statutes Requiring Intent to Deprive for Protracted Period.

20. *See State v. Dirks*, 581 P.2d 85 (Or. Ct. App. 1978) (evidence that mother not informed of defendant's plan to return children and children thought they would return in approximately two months sufficient to show defendant intended to hold them for protracted period).

21. *See, e.g.*, WASH. REV. CODE § 9A.40.060 (1994) (prohibiting retention or concealment of child after visitation in other state with intent to intimidate or harass custodial parent).

22. *See, e.g.*, IND. CODE § 35-42-3-4 (1990).

23. OHIO REV. CODE ANN. § 2905.04 (1985); TENN. CODE ANN. § 39-13-306 (1990). Several states also specify aggravating circumstances that should be considered during sentencing. *See* Chapter III, *Sentencing Issues*.

generally should proceed under the more specific statute.[24] Not all courts agree. In *State v. Alladin*,[25] the court ruled a parent can be charged with kidnapping his own child from the person to whom custody has been legally awarded despite existence of a specific custodial interference statute. In *State v. Viramontes*,[26] the court upheld a father's conviction for kidnapping his child since he was motivated by a desire to abandon the infant rather than take exclusive possession in a custody dispute.

Prosecution for a higher grade felony may depend on the person's parental status. Custodial interference committed by "a person other than a parent or agent of a parent of the person taken" is sometimes a higher grade offense.[27] A person whose rights have been terminated may also be subject to prosecution.[28] In some cases it may be possible to prosecute for both custodial interference and kidnapping. The court in *People v. Campos*[29] found the defendant, who was not related to the child, could be convicted of both kidnapping and child stealing (custodial interference) because the conduct was an offense against both the child and his mother.

4. AGENT OR ACCOMPLICE LIABILITY

Since many parental kidnappings require the cooperation or involvement of third parties, some states have recognized the liability of these individuals.[30] Third parties may be criminally liable under theories of conspiracy, aiding and abetting or accomplice liability. Accomplice liability may not exist if the parent whom the alleged accomplice is assisting is incapable of

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24. *See State v. Thomas*, 668 P.2d 1294 (Wash. Ct. App. 1983) (defendant should have been charged under more specific custodial interference statute rather than general unlawful restraint statute); *State v. Badalich*, 479 So. 2d 197 (Fla. Dist. Ct. App. 1985) (natural father could not be charged with false imprisonment but was properly charged with interference with lawful custody). *But see State v. Teynor*, 414 N.W.2d 76 (Wis. Ct. App. 1987) (defendant could be convicted of false imprisonment of own children when temporary custody order had been entered in favor of mother); *People v. Rios*, 222 Cal. Rptr. 913 (Ct. App. 1986) (parent can be charged with false imprisonment of own child).

25. 408 N.W.2d 642 (Minn. Ct. App. 1987) (defendant barricaded daughter in room and used her as shield and hostage after attempting to murder his wife).

26. 788 P.2d 67 (Ariz. 1990). *See also Simmons v. Iowa*, 454 N.W.2d 866 (Iowa 1990) (mother convicted of first-degree kidnapping); *State v. Sammons*, 656 S.W.2d 862 (Tenn. Crim. App. 1982) (parent can be charged under traditional kidnapping statute); *State v. Holtcamp*, 614 S.W.2d 389 (Tenn. Crim. App. 1980) (same); *State v. Kracker*, 599 P.2d 250 (Ariz. Ct. App. 1979) (same); *McNeely v. State*, 391 N.E.2d 838 (Ind. Ct. App. 1979) (same); *People v. Hyatt*, 96 Cal. Rptr. 156 (Ct. App. 1971) (same).

27. ARIZ. REV. STAT. § 13-1302(C) (1990).

28. *See State v. Wilhite*, 772 P.2d 582 (Ariz. Ct. App. 1989) (father whose parental rights had been terminated no longer "parent" and therefore ineligible for modification of custodial interference charge to lesser grade). *See also* 18 U.S.C. § 1201(h) (1994) ("parent" does not include person whose parental rights have been terminated by final court order) (superseding *United States v. Sheek*, 990 F.2d 150 (4th Cir. 1993) (mother whose parental rights had been terminated could not be prosecuted under federal kidnapping statute for armed abduction of her two children because her status as their biological mother not affected)).

29. 182 Cal. Rptr. 698 (Ct. App. 1982).

30. *See* Appendix H, Statutes Addressing Third Party Criminal Liability.

violating the statute (e.g., no court order exists and the alleged abducting parent has custody rights to the child),[31] although some courts have found agents liable despite a parent's right to custody.[32] Third parties also may be criminally liable under general kidnapping statutes—a charge that may not be applicable to parents by virtue of statutory language and legislative intent.[33] Some statutes only prohibit custodial interference by a parent, while others apply to any relative who takes a child in violation of another's custody rights.[34]

5. DEFENSES

In addition to usual defenses in criminal cases (e.g., insanity or diminished capacity, identification), many statutes specify affirmative or complete defenses to parental kidnapping charges. Some are unique, such as the complete defense that the left-behind parent failed to report the denial of visitation or custody to law enforcement within 90 days of the offense,[35] while others are more common. The following sections discuss defenses frequently offered in parental kidnapping cases.

a. Protection of Child or Flight from Domestic Violence

The necessity defense is usually raised based on the defendant's allegations of child sexual or physical abuse or domestic violence. Some states have codified "protection of child" or "flight from domestic violence" defenses in their parental kidnapping statutes.[36] Others recognize a general necessity defense that can be raised in any criminal case. While states have different criteria, generally the defenses are either affirmative (i.e., the defendant must raise the defense in pleadings) or complete, and most require an objective, reasonable belief in the "immediate and actual threat" of danger.[37]

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31. *See State v. Walker*, 241 S.E.2d 89 (N.C. Ct. App. 1978); *State v. Stocksdale*, 350 A.2d 539 (N.J. Super. Ct. Law Div. 1975).

32. *See People v. Carrillo*, 208 Cal. Rptr. 684 (Cal. Ct. App. 1984); *State v. Ohrt*, 826 P.2d 140 (Wash. 1993); *State v. Donahue*, 680 P.2d 191 (Ariz. 1984).

33. *Crump v. State*, 625 P.2d 857 (Alaska 1981) (defendant acting as agent of parent without custody can be convicted of both kidnapping and conspiracy to kidnap); *Lythgoe v. State*, 626 P.2d 1082 (Alaska 1980) (relying on legislative history to exempt parents from conspiracy to kidnap charges as they are exempted from kidnapping charges).

34. MD. CODE ANN., FAM. LAW § 9-301 (1984) (relative includes parents, grandparents, siblings, aunts, uncles or anyone who had lawful custody before the abduction).

35. S.D. CODIFIED LAWS ANN. § 22-19-11 (1980).

36. *See* Appendix I, Statutory Protection of Child Defenses; Appendix J, Statutory Flight from Domestic Violence Defenses.

37. *See State v. McCoy*, 421 N.W.2d 107 (Wis. 1988) (imposing reasonable person standard). Montana absolves an abductor from criminal liability if he or she acted "with reasonable cause." MONT. CODE ANN. § 45-5-633 (1987).

A typical affirmative defense requires the offender's reasonable belief the abduction was necessary to preserve the child from danger.[38] Several states have more expansive "protection of child" defenses that include a good faith and reasonable belief the child will suffer immediate or substantial emotional or mental harm.[39]

Similar to the "protection of child" defense, a "flight from domestic violence" defense is available in some states to family violence victims who flee from imminent physical or sexual harm to themselves. Most "flight from domestic violence" defenses apply when the fleeing parent has a reasonable belief she is in danger from the child's other parent.

While a general necessity defense may be valid in certain situations—especially those involving credible allegations of family violence—it is very limited in nature. Because necessity is an affirmative defense, the defendant must prove by a preponderance of the evidence there was no reasonable, legal alternative to violating the law—that there was no opportunity both to refuse to do the criminal act and to avoid the threatened harm.[40] There must be an objectively reasonable belief an emergency justifying the act existed, and a determination that of all choices available to the defendant, commission of the crime was the *only* viable and reasonable option. A subjective belief by the defendant is generally insufficient to justify the abduction.[41] Despite these threshold requirements, several courts have ruled the defendant must be given an opportunity to present evidence of a necessity defense to the jury.[42]

In some jurisdictions "good cause" may be a defense analogous to necessity.[43] Statutory language governs whether good cause is considered a defense that must be proved by a preponderance of the evidence or an element of the crime charged.

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38. COLO. REV. STAT. § 18-3-304(3) (1986).

39. *See* CAL. PENAL CODE § 277 (1992); MICH. COMP. LAWS § 750.350a(5) (1986); MINN. STAT. ANN. § 609.26 subd. 2(1) (1991).

40. *United States v. Bailey*, 444 U.S. 394 (1980). *See also Gerlach v. State*, 699 P.2d 358 (Alaska Ct. App. 1985) (mother who abducted child not entitled to argue necessity because it was reasonably foreseeable that father's alleged abusive behavior toward child would be eliminated through adequate remedies at law); *People v. Grever*, 259 Cal. Rptr. 469 (Super. Ct. 1989) (jury's rejection of necessity defense supported by evidence defendant did not report to authorities after taking child and voluntary return was inconsistent with claim child was taken to prevent imminent harm).

41. *State v. McCoy*, 421 N.W.2d 107 (Wis. 1988) (applicable standard is "what a person of ordinary intelligence and prudence would have done in the position of the defendant under the circumstances existing at the time of the alleged offense").

42. *State v. Rome*, 426 N.W.2d 19 (S.D. 1988) (reversible error for trial court to refuse presentation of evidence relating to necessity defense); *State v. Boettcher*, 443 N.W.2d 1 (S.D. 1989) (reasonableness of defendant's fear child was sexually abused by grandfather and reasonableness of her actions in abducting child were for jury, not court, to decide).

43. *People v. McGirr*, 243 Cal. Rptr. 793 (Ct. App. 1988) ("good cause" has acquired reasonable certainty by established usage, interpretation and settled common sense meaning); *People v. Dewberry*, 10 Cal. Rptr. 2d 800 (1992) (absence of good cause is element of the offense).

b. Consent or Cooperation of the Child

The child's consent to the kidnapping or cooperation with the defendant-parent is rarely a valid defense.[44] Evidence the minor child wanted to go with the defendant or cooperated in some way is irrelevant to the issue of guilt.[45] The child's desire to be with the defendant, especially if the child has formed an attachment to the abducting parent during the abduction, relates more to the underlying custody dispute and may have some significance in fashioning an appropriate sentence.

c. Failure to Pay Child Support

Child support and visitation are two separate and distinct rights. Failure to pay child support does not justify withholding the children from the errant parent:

> [B]oth the legislature and the courts have recognized the two independent rights of child support and visitation, both accruing to the benefit of the child . . . . Once it is recognized that visitation by the natural parent is as much a right of the child as it is of the parent, then logically it should be safeguarded as an independent right of the child, and not permitted to be made contingent upon the proper exercise of some other duty or obligation of the parent.[46]

d. Reconciliation

Since reconciliation of the parties cancels an interlocutory decree, timing of an abduction in relation to the reconciliation may become an issue. If the parties disagree about reconciliation, the spouse claiming reconciliation must prove it by "clear and cogent proof."[47] Reconciliation of the parties has no effect on a protective order, which must be altered by the court.

e. Mistake of Fact or Law

Mistake of *fact* may be raised by a defendant who claims a mistaken belief that he or she had the right to take the child. Under such circumstances the defendant is entitled to an instruction only if there is evidence to support a reasonable inference that the claimed belief was

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44. *See* ALASKA STAT. § 11.51.125(d)(3) (1978); WASH. REV. CODE § 9A.40.080(3) (1989).

45. *See State v. Johnson*, 567 N.E.2d 266 (Ohio 1991) (acquiescence of minor in defendant's plan not a defense); *People v. Grever*, 259 Cal. Rptr. 469 (Super. Ct. 1989); *People v. Campos*, 182 Cal. Rptr. 698 (Ct. App. 1982) (child stealing prohibition "designed to protect parents against the anxiety and grief which necessarily follow from the taking of their children"); *State v. Randall*, 193 N.W.2d 766 (Neb. 1972) (consent of child is immaterial and does not constitute a defense).

46. *Camacho v. Camacho*, 218 Cal. Rptr. 810, 813 (Ct. App. 1985).

47. *People v. Howard*, 686 P.2d 644 (Cal. 1984).

honest and held in good faith.[48] Consider evidence of defendant's concealment of the child or other surreptitious behavior in deciding the validity of a claim of mistake of fact.

A defendant who asserts a mistake of *law* defense must show both reliance on the law and the reasonableness of that reliance. While mistake of law is limited to situations in which a person in good faith attempts to determine the lawfulness of an act, mistake of law is generally not a defense as everyone is presumed to know the law.[49] Mistake of law, although not a defense to a general intent crime, may be raised in specific intent crimes on a limited basis.

f. Invalidity of Court Order

Unless there is a factual issue regarding this defense for the jury to decide, determine the validity or sufficiency of the order before trial.[50]

g. Voluntary Return of the Child

Several statutes state that voluntary return of the child to the lawful custodian before arrest or issuance of a warrant is a defense and may negate the offense entirely.[51] Disclosing the location of the child to the parent or law enforcement after apprehension is not generally considered a voluntary return.[52]

h. Defendant's Motivation for Taking the Child

Unlike other criminal trials, an alleged abductor's motive for taking the child is legally irrelevant[53] unless the court has determined it is relevant to a defense such as necessity. If admissible, evidence should be strictly limited to the facts relevant to establish the defense. An alleged abductor's state of mind may also be relevant if it goes to his or her knowledge of the pertinent court orders and an intent to deprive or deny the other parent of custody rights pursuant

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48. *See People v. Vineberg*, 177 Cal. Rptr. 819 (Ct. App. 1981); *see also Bennett v. Commonwealth*, 380 S.E.2d 17 (Va. Ct. App. 1989)(reasonableness of defendant's belief children's father was dead is question of fact for jury); *People v. Johnson*, 199 Cal. Rptr. 231 (Ct. App. 1984) (defendant not mistaken about interpretation of statute but rather was unaware of custody order, mistake of fact negated specific intent required by statute).

49. *See State v. Britzke*, 324 N.W.2d 289 (Wis. Ct. App. 1982) (failure to know one's conduct is criminally punishable is not a defense). *See also State v. Patten*, 353 N.W.2d 30 (N.D. 1984); *People v. Howard*, 686 P.2d 644 (Cal. 1984).

50. See Section D.2.a of this chapter.

51. *See, e.g.*, KY. REV. STAT. ANN. § 509.070 (1984) (creating defense that person taken from lawful custody was returned by defendant voluntarily and before arrest or issuance of warrant); MONT. CODE ANN. § 45-5-304 (1987) (if offender left state, no offense committed if child voluntarily returned prior to arrest; if offender still in state, voluntary return of child prior to arraignment negates offense).

52. *See State v. Andow*, 386 N.W.2d 230 (Minn. 1986) (recovery of child within 14 days through capture of offender not a defense even though statutory charge was to be dismissed if child is voluntarily returned).

53. *See State v. Kracker*, 599 P.2d 250 (Ariz. Ct. App. 1979) (motivation to help, not hurt the child is irrelevant).

to civil court orders. If evidence of motive is presented, a jury instruction can clarify that motive is not an element of the offense and cannot constitute a defense to the charges.

C. PRETRIAL ISSUES

1. JURISDICTION AND VENUE CONSIDERATIONS

As a rule, states can only enforce violations that occur within their territorial boundaries and defendants cannot be prosecuted for conduct outside the state.[54] In out-of-state abductions, extraterritorial jurisdiction may exist if the effect of the offense is felt in the state.[55] Where the intent to deprive was formed may also affect jurisdiction. Some states have addressed jurisdictional issues in their parental kidnapping statutes.[56] Cases involving abductions from Native American reservations or international abductions require knowledge of specialized statutes.[57]

Some states define appropriate venues for prosecution.[58] Venue may be shared between jurisdictions. Answers to the following questions may assist in determining which venue is most appropriate for trial:

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54. *State v. McCormick*, 273 N.W.2d 624 (Minn. 1978) (court lacked jurisdiction to prosecute because conduct proscribed by statute, i.e., detaining child outside Minnesota, must necessarily occur outside territorial boundaries of state); *People v. Gerchberg*, 181 Cal. Rptr. 505 (Dist. Ct. App. 1982) (court lacked jurisdiction to prosecute because defendant did not form intent to detain children until they were with him in New York); *State v. Cochran*, 538 P.2d 791 (Idaho 1975) (Idaho did not have jurisdiction because crime occurred at end of visitation period in Montana); *People v. Bormann*, 85 Cal. Rptr. 638 (Ct. App. 1970) (California did not have jurisdiction to prosecute defendant for "taking" which occurred in Mexico). *But see People v. Caruso*, 519 N.E.2d 440 (Ill. 1987) (defendant's failure to fulfill affirmative duty in Illinois to abide by terms of Illinois court order and return children to mother properly subjected him to prosecution in Illinois).

55. *See Rios v. State*, 733 P.2d 242 (Wyo. 1987) (state had jurisdiction to prosecute for failing or refusing to return child, even though at time of commission of crime neither father nor child had ever been in state, because failure had its effect in state); *State v. Doyle*, 828 P.2d 1316 (Idaho 1992) (Idaho had jurisdiction over offense even though defendant not in Idaho before or after refusing to return child to her mother).

56. *See, e.g.*, CAL. PENAL CODE § 279(e) (1992). Violations of the custodial interference statute are punishable in California "whether the intent to commit the offense is formed within or without the state, if the child was a resident of California or present in California at the time of the taking, if the child thereafter is found in California, or if one of the parents, or a person granted access to the minor child by court order, is a resident of California at the time of the alleged violation . . . by a person who was not resident of or present in California at the time of the alleged offense."

57. *See* Appendix N, Indian Child Welfare Act; Appendix A, International Parental Kidnapping Crime Act; Hague Convention on the Civil Aspects of International Child Abduction, *opened for signature* Oct. 25, 1980, S. TREATY DOC. No. 11, 99th Cong., 1st Sess. (1985), *reprinted in* 19 ILM 1501 (1980) (entered into force for the United States July 1, 1988). *See also* JURISDICTION IN CHILD CUSTODY AND ABDUCTION CASES: A JUDGE'S GUIDE TO THE UCCJA, PKPA AND HAGUE CHILD ABDUCTION CONVENTION (ABA Center on Children & the Law, in press 1996) [hereinafter ABA, JURISDICTION].

58. *See* Appendix E.

- ❑ Where do the parties live?
- ❑ Where did the offense occur?
- ❑ Which court issued the custody order?
- ❑ Where does the child live?
- ❑ Where was the child recovered?
- ❑ Is there a residency requirement?

Also consider which jurisdiction has authority to determine or modify custody orders under the Uniform Child Custody Jurisdiction Act and Parental Kidnapping Prevention Act.

2. STATUTES OF LIMITATION: PARENTAL KIDNAPPING AS A CONTINUOUS OFFENSE

Application of the statute of limitations will depend on whether the abduction is considered a continuous offense in the jurisdiction. If the parental abduction statute prohibits retention, detention or concealment of a child, the offense is continuous. If it merely requires a taking or enticing away, the offense occurs at the time of the taking and may not be continuous.[59] The abduction statute itself may state whether the offense is considered continuous.[60] Absent explicit statutory provisions, relevant legislative history can clarify legislative intent.[61] Generally, the statute does not begin to run until the interference with custody has ceased.[62]

3. SPECIFICITY OF THE CHARGING INSTRUMENT

The charging instrument may be challenged for lack of specificity—absence of the correct date on the indictment or the correct number of counts filed.[63] Because parental kidnapping generally is considered continuous,[64] the dates of the offense may span a greater length of time.[65] However, if the statute only prohibits a taking, the date of the abduction may be the date of offense.

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59. *People v. Bormann*, 85 Cal. Rptr. 638 (Ct. App. 1970).

60. *See* Appendix D, Statutes Identifying Abduction as Continuous Offense.

61. *See People v. Harvey*, 435 N.W.2d 456 (Mich. Ct. App. 1989).

62. *State v. Rose*, 706 P.2d 583 (Or. Ct. App. 1985). *See also People v. Irwin*, 202 Cal. Rptr. 475 (Ct. App. 1984); *People v. Hyatt*, 96 Cal. Rptr. 156 (Ct. App. 1971). *But see State v. White*, 189 N.E.2d 160 (Ohio Ct. App. 1962).

63. *State v. Dirks*, 581 P.2d 85 (Or. Ct. App. 1978) (error for trial court to sentence defendant for two counts of custodial interference because taking of two children constituted only single offense against mother).

64. See Section C.2 of this chapter.

65. "On or about" language may suffice when exact dates cannot be determined with absolute certainty. *See People v. Love*, 251 Cal. Rptr. 6 (Ct. App. 1988) (finding sufficient probable cause at preliminary hearing even though failure to return children occurred in 1974 and information read 1977-1986 because detention and concealment continued over time).

4. CONFLICT OF LAWS

Conflict of laws issues may arise when a case involves both civil and criminal issues or federal and state laws, as in the case of international abductions. Inconsistencies between the laws of different states regarding custody may arise, although application of the Uniform Child Custody Jurisdiction Act and Parental Kidnapping Prevention Act should reconcile any differences.

5. DOUBLE JEOPARDY CONSIDERATIONS

Criminal prosecution may be barred by double jeopardy if the defendant is found to be in criminal contempt while the criminal prosecution is pending.[66] However, the court in *People v. Doherty*[67] held prosecution for criminal child abduction is not barred by double jeopardy principles when the civil and criminal proceedings were simultaneous, the father actively participated in both proceedings, and many of the continuances and other scheduling problems were attributable to the father's actions.

Some courts have rejected double jeopardy arguments on other grounds. In *People v. Derner*,[68] the court distinguished civil and criminal contempt by looking at the purpose of the sentence—that is, "criminal contempt punishes whereas civil contempt coerces."[69] In *State v. Kimbler*,[70] the court stated that even if the previous contempt had been criminal, it would not bar the child stealing count with which the defendant was charged. The court distinguished the civil court's inherent power to punish disobedience of court orders, for which it is sufficient to prove the court order was violated regardless of the purpose of the violation, from a criminal charge for which intent must be proved.[71]

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66. *See People v. Rodriguez*, 514 N.E.2d 1033 (Ill. App. Ct. 1987) (prior contempt charge bars prosecution on double jeopardy grounds); *State v. Hope*, 449 So. 2d 633 (La. Ct. App. 1984) (prosecution of father previously found in criminal contempt for violation of visitation order based on same incident barred by double jeopardy); *People v. Howard*, 686 P.2d 644 (Cal. 1984) (prosecution barred); In re *Marriage of D'Attomo*, 570 N.E.2d 796 (Ill. App. Ct. 1991) (holding father in criminal contempt after he negotiated plea for felony charge violates double jeopardy principles).

67. 518 N.E.2d 1303 (Ill. App. Ct. 1988).

68. 227 Cal. Rptr. 344 (Ct. App. 1986).

69. *Id.* at 346.

70. 509 N.E.2d 99 (Ohio Ct. App. 1986). *See also Blockburger v. United States*, 284 U.S. 299, 304 (1932); *United States v. Dixon*, 113 S. Ct. 2849 (1993).

71. *See also People v. Doherty*, 518 N.E.2d 1303 (Ill. App. Ct. 1988) (criminal prosecution not barred when father held in civil rather than criminal contempt with unconditional right to purge that contempt and criminal indictment preceded civil contempt); *People v. Batey*, 228 Cal. Rptr. 787 (Ct. App. 1986) ("civil-coercive contempt," although punitive, poses no double jeopardy bar to prosecution for penal code violations arising from same conduct); *State v. Sammons*, 656 S.W.2d 862 (Tenn. Crim. App. 1982) (contempt citations for kidnapping own child did not bar subsequent prosecution under double jeopardy principles).

6. EVALUATING DISCOVERY REQUESTS

Evaluate discovery requests as in other criminal cases. Consider conducting *in camera* reviews of requests for information to ensure relevance and protect the child. The following are potential motions that may come before the court.

a. Discovery by the Defense

A common defense discovery request is identifying information about the custodial parent and child, if recovered. Evaluate the child's danger of re-abduction. If the risk is high, preclude the defense from obtaining information on the child or custodial parent's current location. Discovery requirements can be met by having the prosecution make the child and custodial parent available under appropriate conditions for required interviews or other court ordered or legislatively mandated needs. If the risk of re-abduction is low, the release of such information should be determined on a case-by-case basis.

b. Discovery by the Prosecution

In addition to usual motions for disclosure of witnesses and other information, the prosecution may request a protective order sealing discovery. Again, evaluate risks to the child in granting or denying such motions. The prosecution may also request juvenile court or social service records. Both sides should present arguments based on statutes and case law as they apply in the jurisdiction.

7. EVALUATING PRETRIAL MOTIONS

a. Motions *in Limine*

Many of the complicated legal issues raised in parental kidnapping cases are resolved through motions prior to trial. Motions *in limine* may address potential defenses, including necessity, failure to pay child support or the child's cooperation with the abduction, or appropriate subject areas during voir dire. Motions *in limine* are frequently used in parental kidnapping cases to limit the evidence presented at trial to the criminal action. Divorce and custody issues, for instance, should be litigated in a separate civil forum. As with all motions, the court can take them under advisement and request supporting documents or memoranda of law.

b. Other Motions

Some motions commonly submitted in child abuse prosecutions, such as motions to compel testing for DNA evidence, HIV or other sexually transmitted diseases, may not arise in parental kidnapping cases. Other than the motions *in limine* and discovery-related motions discussed previously, the following are additional motions that may come before the court.

Continuance Motion. Due to the nature of parental kidnapping cases, expedited proceedings and early resolution may assist the child in recovering from the effects of the abduction, and may allow the family court to work more quickly in determining custody and visitation issues which may be affected by the verdict and sentence. Continuances therefore should be avoided whenever possible.

Severance Motion. Motions to sever should be handled under applicable rule and case law.[72] Generally, consolidated proceedings benefit the child victim and family, as well as other witnesses, allowing them to minimize court appearances and proceed with reunification. A consolidated trial also saves court costs and resources.

Motion to Appoint Guardian ad Litem. While some state statutes provide for appointment of guardians ad litem for the child in criminal proceedings,[73] the court in its discretion may consider a request even without statutory authorization. Alternatively, the court can rely on a Court Appointed Special Advocate or similar program if one exists in the jurisdiction.

Motion for Temporary Restraining Order. Either side may petition for a temporary restraining order, especially when domestic violence is alleged or when there is a high risk of re-abduction or danger to the welfare of the child. Many TRO's or protective orders automatically include custody provisions, and domestic court proceedings may already address the issues. Coordination of all civil and criminal proceedings can prevent conflicts and miscommunication.[74]

Motion to Preclude Defendant's Spouse from Testifying Based on Marital Privilege. Each jurisdiction will have rules regarding applicability of the marital privilege. Some states have negated the privilege in criminal cases or specifically in parental kidnapping cases.[75]

D. TRIAL ISSUES

1. JURY SELECTION

Like most procedural aspects of parental kidnapping cases, jury selection does not vary substantially from other criminal cases. Depending on jurisdictional rules, voir dire can be conducted by counsel or the court. Some judges use prepared questionnaires. The following sample questions relate specifically to parental kidnapping issues:

- ❑ Have you or anyone close to you ever been involved in a divorce or custody dispute? A parental kidnapping?
- ❑ Do you have children of another parent living with you?
- ❑ Do you and the other parent currently follow the terms of any court order or agreement affecting the custody of your children?
- ❑ Do you believe you were treated fairly during the proceedings in which your custody order was made or modified?

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72. *See, e.g., State v. Dirks*, 581 P.2d 85 (Or. Ct. App. 1978) (defendant's taking of two children constituted only single offense against mother's right of custody).

73. *See, e.g.*, 18 U.S.C. § 3509(h) (1990); ALASKA STAT. § 12.45.046(a) (1994); FLA. STAT. ANN. § 914.17 (1988); TENN. CODE ANN. § 37-1-610 (1985).

74. *See* Chapter I, Section I, *Coordination of Criminal and Civil Proceedings.*

75. ALASKA STAT. § 11.51.125(c) (1978) (in prosecution for failure to permit visitation with a minor, "existing provisions of law prohibiting the disclosure of confidential communications between husband and wife do not apply, and both husband and wife are competent to testify for or against each other as to all relevant matters, if a court order has awarded custody to one spouse and visitation to the other").

- ❑ Have you had a disagreement with the other parent concerning terms of the custody order?
- ❑ Will you be able to judge this case fairly even if you believe the defendant is a better parent than the left-behind, victim parent?
- ❑ Will you be able to judge this case fairly even if you believe an order granting custody to the left-behind parent was a mistake by the court that issued the order?
- ❑ Do you believe civil courts have the right to decide the "best interests of the child"?
- ❑ Do you believe civil courts are the appropriate place to resolve disputes, especially when it comes to the welfare of children?
- ❑ Have you ever known a child who was kidnapped by a parent?
- ❑ Have you ever known an adult who kidnapped his or her own child?
- ❑ What are your feelings about how the criminal justice system deals with persons accused of harming their children?
- ❑ Have you read or heard about this case in the news? If so, what do you recall about it? Will that influence your ability to serve as a juror on this case?
- ❑ Do you believe a kidnapping by a family member is less traumatic to the child? To the left-behind parent?
- ❑ Have you seen any movies or shows about parental kidnapping? What were your reactions?

2. STATUS OF CUSTODY

The following issues may be raised regarding the status of custody in the case. The discussion of each is not intended to address the merits of any argument presented before the court, but merely to alert judges to issues that commonly surface.

a. Sufficiency and Validity of Court Order

Some states do not require a court order to be issued before criminal charges are pursued.[76] If a court order is required, it must be valid and issued by the court with subject matter jurisdiction. The parties must also be given notice and opportunity to be heard.[77] Subject matter jurisdiction in child custody cases is determined by applying state jurisdiction statutes, the Uniform Child Custody Jurisdiction Act (UCCJA) and the Parental Kidnapping Prevention Act (PKPA). As a federal statute, the PKPA governs when there is a conflict between the UCCJA and PKPA.[78]

Case law and statutes may also address sufficiency of an order. While a valid, enforceable custody decree stipulating custody and visitation rights of the parents will normally be sufficient to establish legal custody, other types of orders may require additional scrutiny. Amended orders

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76. *See People v. Morel*, 566 N.Y.S.2d 653 (App. Div. 1991).

77. *See State v. McLaughlin*, 611 P.2d 92 (Ariz. 1980) (defendant may attack a decree or judgment made by a court without proper jurisdiction).

78. See Chapter I, Section B for a discussion of these statutes. *See California v. Superior Court of California*, 482 U.S. 400 (1987). *See also* ABA, JURISDICTION, *supra* note 57.

granting temporary custody may be sufficient,[79] but *ex parte* orders that were never served may not.[80] Private stipulations between the parents or orders that do not prohibit removal from the state if the statute so requires may not be sufficient.[81]

b. Knowledge of the Custody Order

The defendant's lack of knowledge of a custody order will be an issue only if the criminal statute requires a court order granting custody to the left-behind parent. While actual service of an order is not required, the defendant's *knowledge* of the court order is, and the prosecution bears the burden of proving the defendant had that knowledge.[82]

c. Visitation Violations

In some states denial of visitation is a violation of the criminal statute.[83] When one parent has full legal and physical custody of the child, the other parent is usually awarded visitation rights. The parent with custody generally cannot deny visitation to the non-custodial parent. Enforcement is greatly simplified when visitation rights are well-defined in the court order. In many cases, however, the order will simply state a parent has "reasonable" visitation,[84] creating ambiguity about whether a violation occurred.

Retaining a child for several hours after court-ordered visitation may not seem particularly grievous, indicating a need for civil rather than criminal remedies. However, if this incident is part of a pattern of increasing frequency or if there is a history of violence, the offending parent may

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79. *State v. Britzke*, 324 N.W.2d 289 (Wis. 1982), *aff'd*, 329 N.W.2d 207 (Wis. 1983).

80. *People v. Johnson*, 199 Cal. Rptr. 231 (Cal. Ct. App. 1984).

81. *See Cook v. State*, 547 N.E.2d 1118 (Ind. Ct. App. 1989).

82. *People v. Lawrow*, 447 N.Y.S.2d 213 (Dist. Ct. 1982). *See also State v. Smith*, 764 P.2d 997 (Utah Ct. App. 1988) (defendant with no knowledge of court order regarding custody or visitation of child under 16 had not committed offense of custodial interference); *In re Imperial Insurance Company*, 203 Cal. Rptr. 664 (Ct. App 1984) (presence of party's attorney [or the party] in court when order made sufficient to establish party had knowledge); *State v. Ohrt*, 862 P.2d 140 (Wash. Ct. App. 1993) (failure to serve father with temporary restraining order irrelevant to defendant's guilt); *People v. Rodriguez*, 523 N.E.2d 185 (Ill. App. Ct. 1988).

83. *See, e.g.*, MONT. CODE ANN. § 45-5-631 (1987) ("[a] person who has legal custody of a minor child commits the offense of visitation interference if he knowingly or purposely prevents, obstructs, or frustrates the visitation rights of a person entitled to visitation under an existing court order"). *See also People v. Lortz*, 187 Cal. Rptr. 89 (Ct. App. 1982) (mother's visitation rights violated when defendant permanently moved out of state with child without notifying mother for four and one-half months and left child out of state when returned to surrender himself).

84. *See, e.g., Brassell v. State*, 385 S.E.2d 665 (Ga. 1989) (father who kept child beyond express period in divorce decree did not violate order because had "right of reasonable visitation, which shall include, but not be limited to" specified periods).

be using the child to exert control over or harass the other parent.[85] While most states do not specify the length of retention that constitutes an offense, some provide time-related defenses.[86]

d. Pre-decree Abductions

Pre-decree abductions usually occur as a "pre-emptive strike" by a parent who fears the family court might rule in favor of the other parent. Some states require the existence of a court order to invoke the criminal statute. Others explicitly cover pre-decree abductions.[87] Some courts have ruled parents with equal rights of custody violate the statute if they take total or exclusive custody in violation of the rights of the other parent.[88] Others have ruled that abducting parents who share equal custody do not violate the statute.[89]

e. Joint Custody

Increasingly, courts order joint custody aimed at allowing children to experience the companionship of both parents while the parents share equal legal control over major decisions affecting the child's life. Some jurisdictions include joint custody arrangements within the

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85. *See* WASH. REV. CODE § 9A.40.060 (1994) (prohibiting interference with authorized visitation "with intent to intimidate or harass").

86. IDAHO CODE § 18-4506 (1987) (providing statutory defense if "child is returned within twenty-four hours after expiration of an authorized visitation privilege"); ARK. CODE ANN. § 5-26-501 (1985) (applies only to cases "in which a contempt citation has been issued by the court which issued the visitation order or decree, and such visitation has been ignored or evaded by the person cited for a period of ninety (90) days"). *But see People v. Lortz*, 187 Cal. Rptr. 89 (Ct. App. 1982) (not necessary to first obtain family court finding that visitation order had been violated before criminal charge could be filed).

87. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-1305 (1994); N.M. STAT. ANN. § 2C:13-4 (1990); *see* Appendix H, Statutes Addressing Agent/Accomplice Liability. *See also People v. Morel*, 566 N.Y.S.2d 653 (App. Div. 1991) (proof that court order awarding physical custody of child to another existed at time defendant took child not required).

88. *See State v. Donahue*, 680 P.2d 191 (Ariz. Ct. App. 1984) (parent only has co-equal right of custody and violates statute by taking total custody to exclusion of other parent); *State v. Todd*, 509 A.2d 1112 (Del. Super. Ct. 1986) (absent valid custody order to contrary, defendant had no legal right to take child into exclusive physical and de facto legal custody to exclusion of other parent); *State v. Grooms*, 702 P.2d 260 (Ariz. Ct. App. 1985) (rejecting defendant's argument there must be some judicial act determining custody before he could be liable for custodial interference).

89. *See People v. McDonald*, 554 N.Y.S.2d 394 (1990) (parent who abducts children prior to court proceeding cannot be convicted of parental kidnapping); *Commonwealth v. Beals*, 541 N.E.2d 1011 (Mass. 1989) (same); *Commonwealth v. Stewart*, 543 A.2d at 572 (Pa. Super. Ct.), *aff'd*, 544 A.2d 1384 (1988) (same); *Armendariz v. People*, 711 P.2d 1268 (Colo. 1986) (father shared equal right to custody when no court action had been taken to limit legal or physical custody rights even though parents separated and child lived with mother); *State v. LaCaze*, 630 P.2d 436 (Wash. 1981) (defendant could not be convicted of kidnapping own son if no evidence that his parental rights had been limited by court order was presented); *State v. Al-Turck*, 552 P.2d 1375 (Kan. 1976) (in absence of order giving exclusive custody to mother, father's exercise of right to custody by picking up child two days before scheduled hearing and flying to foreign country could not be basis for prosecution).

prohibition of the state statute.[90] In *State v. West*,[91] the court held joint custody means parents have equal rights and responsibilities toward their children, and neither parent can remove children without infringing on the rights of the other.

f. Paternity Issues

Often the mother of a child born outside of marriage is the sole lawful custodian of the child for purposes of the custodial interference statute until paternity is established and custody is determined by a court.[92] Due process and equal protection arguments may be presented in cases when the mother is presumed to be the legal custodian. This argument has been successful in some appellate courts[93] but unsuccessful in others.[94] The level of involvement by both parents in the child's life may be the determining factor.[95]

Natural fathers can be *alleged* when there is only a biological connection or *presumed* as a result of a subsequent or attempted marriage or if he openly claims the child as his own and takes him into his home. However, absent a court order, an alleged natural father does not have the

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90. *See, e.g.*, WIS. STAT. § 948.31(1)(b) (1993) ("[t]he fact that joint legal custody has been awarded to both parents by a court does not preclude a court from finding that one parent has committed a violation"); *see also* Appendix C, Statutes Prohibiting Violation of Joint Custody Orders.

91. 688 P.2d 406 (Or. Ct. App. 1984). *See also People v. Irwin*, 202 Cal. Rptr. 475 (Ct. App. 1984) (rejecting defendant's argument that his enjoyment of "joint legal custody" exempts him from prosecution); *State v. Todd*, 509 A.2d 1112 (Del. Super. Ct. 1986) (joint custodian has no right to take exclusive custody absent valid custody order to the contrary); *People v. Harrison*, 402 N.E.2d 822 (Ill. App. Ct. 1980) (defendant could be found guilty of child abduction despite joint custody agreement in divorce decree).

92. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-1302 (1994); WIS. STAT. § 948.31 (1993).

93. *People v. Morrison*, 584 N.E.2d 509 (Ill. App. Ct. 1991) (statute creating presumption of maternal custody, while not unconstitutional on its face, was unconstitutional as applied because both parents had lived with the child and provided emotional and financial support).

94. *State v. Hill*, 283 N.W.2d 451 (Wis. Ct. App. 1979) (in finding that presumption does not deny equal protection and due process to fathers, court relied on state's duty to protect rights of children to live in safe and secure environment).

95. 720 ILL. COMP. STAT. § 5/10-5 (1989) (notwithstanding legal presumption, "mother commits child abduction when she intentionally conceals or removes a child, whom she has abandoned or relinquished custody of, from an unadjudicated father who has provided sole ongoing care and custody of the child in her absence"). *See also People v. Morrison*, 584 N.E.2d 509 (Ill. App. Ct. 1991) (while statute not facially unconstitutional simply because treats unwed mothers and fathers differently, unconstitutional as applied because both parents lived with child and provided financial and emotional support).

same rights of custody as a mother.[96] A presumed natural father who abducts a child may have custody rights equal to those of the natural mother.[97]

3. EVIDENTIARY ISSUES

a. Hearsay Evidence and Out-of-Court Statements

Unlike some child sexual abuse cases in which the victim's out-of-court statements are pivotal, parental kidnapping cases do not generally turn on such admissibility questions. Out-of-court statements are nonetheless often important to prove elements of the offense or corroborate crucial testimony.[98] Familiarity with rules on non-hearsay,[99] "firmly rooted" exceptions,[100] and residual exceptions[101] is necessary.

b. Admissibility of Uncharged or Prior Acts

If appropriate under local rules and case law, evidence of prior instances in which the defendant failed to return the children may be admissible to show the defendant's knowledge of

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96. *See People v. Carrillo*, 208 Cal. Rptr. 684 (Ct. App. 1984) (nonpresumed father did not have equal rights to child's natural mother as result of failure to establish parental relationship with child); *People v. Reynolds*, 429 N.W.2d 662 (Mich. 1988) (father could be charged because did not have equal rights with natural mother); *People v. Shephard*, 525 N.E.2d 1102 (Ill. App. Ct. 1988) (defendant's paternity not adjudged at time of taking and trial court's adjudication of paternity for purposes of aggravated kidnapping charge did not shield him from conviction for child abduction).

97. *State v. Badalich*, 479 So. 2d 197 (Fla. Dist. Ct. App. 1985) (natural father could not be charged with false imprisonment of child for having taken child out of the state without consent of the mother). The Uniform Parentage Act may provide guidance in cases in which the status of children is uncertain. NAT'L CONFERENCE OF COMM'RS ON UNIFORM STATE LAWS, UNIFORM PARENTAGE ACT (1973) (Appendix O).

98. *See generally* MYERS, 1 & 2 EVIDENCE IN CHILD ABUSE AND NEGLECT CASES (1992 & Supp.).

99. Statements or actions not intended as an assertion or offered for a purpose other than proving the truth of their content are not hearsay. *See* FED. R. EVID. 801. Comparable state rules may apply.

100. Federal Rule of Evidence 803 lists 23 exceptions to the hearsay rule for which the availability of the declarant is immaterial. Included among the "firmly rooted" exceptions that courts have found to be inherently reliable are excited utterances or "spontaneous declarations," FED. R. EVID. 803(2), and "present sense impressions," FED. R. EVID. 803(1) (statements describing or explaining event or condition made while declarant was perceiving event or condition, or immediately thereafter); FED. R. EVID. 803(4) (statements made for purposes of medical diagnosis or treatment).

101. Federal Rules of Evidence 803(24) and 804(b)(5) and a number of state codes define more open-ended "residual" exceptions that allow statements not specifically enumerated in other exceptions if they have "equivalent circumstantial guarantees of trustworthiness." *See, e.g.*, LA. CODE CIV. PROC. ANN. art. 804(D) (1989); ME. REV. STAT. ANN. tit. 35-A § 1311(2) (1993); MONT. CODE ANN. § 803(24) (1990); NEB. REV. STAT. § 51.075(1) (1971); N.C. GEN. STAT. § 8C-1 RULE 803(24) (1983); OKLA. STAT. ANN. tit. 12 § 2803(24) (1978); OR. REV. STAT. § 40.460(25)(a) (1991); WIS. STAT. § 908.03(24) (1990).

the order, absence of mistake of law or fact, or intent to deprive.[102] Notice of intent to use such acts should be provided by the prosecution in advance of trial.

c. Expert Testimony

Expert testimony about behavioral or psychological issues may be offered in parental kidnapping cases on a variety of subjects, including the psychological effects of abduction and their potential long-term physical manifestations. If expert testimony is presented, apply the usual procedures for qualifying an expert. Legal requirements for admission of psychological or behavioral expert testimony differ among jurisdictions. Be sure the expert testimony is relevant to the criminal charge and not only to the underlying custody dispute.

d. Admissibility of Character Evidence

In some instances the character of the left-behind parent may be relevant and may be admissible if the defense involves necessity or child endangerment. Jurisdictional rules govern admissibility of such evidence. During the trial, previously litigated custody and visitation issues may be raised, especially if the issue of necessity arises. Generally the evidence allowed should be only that which is clearly relevant to determining the criminal fact at issue. On-going animosity between the parents must have relevance to a disputed, legally allowable fact in order to be admissible. Consider requesting briefs from the parties to determine these issues, especially if the relevance appears attenuated.

E. JURY INSTRUCTIONS

Jury instructions should define the elements of the offense and any affirmative defenses. If appropriate to the facts, instructions should also address flight of the defendant, expert testimony, use of prior statements only as rehabilitative evidence, character evidence and proper use of prior acts evidence.[103]

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102. *See State v. White*, 189 N.E.2d 160 (Ohio Ct. App. 1962) (evidence of prior acts of sexual abuse admissible as tending to show motive for abduction). *But see State v. Myers*, 742 P.2d 180 (Wash. Ct. App. 1987) (prior incidents of custodial misconduct irrelevant to prove intent to abduct). *See generally* Myers, *Uncharged Misconduct Evidence in Child Abuse Litigation*, 1988 UTAH L. REV. 479 (1988).

103. For examples of standard jury instructions from various states, see Appendix Q.

CHAPTER THREE

SENTENCING ISSUES

A. OVERVIEW OF SENTENCING

Like other crimes involving family members, parental kidnapping cases present dilemmas for judges attempting to determine an appropriate punishment for the convicted offender while achieving justice for victims and their families. In weighing sentencing options based on the circumstances of case, judges must levy sentences that serve justice, prevent similar crimes by the same individual and serve as a public deterrent.

Fundamental to the sentencing decision is an analysis of aggravating and mitigating factors. To modify behavior, consequences must be swift and appropriate. Like any sentence, the facts surrounding the parental kidnapping will have the greatest impact on the sentence.[1] All relevant factors—such as the number and seriousness of violations, severity of the crime, extent of violence used during the kidnapping, duration of the kidnapping, number of children affected, psychological effects on the children and the financial impact on the searching or reunified family—should be considered to achieve a just result.

Although the abducted child is the person placed at greatest risk, it is often the left-behind parent who is legally defined as the victim. Since the left-behind parent may wish to be heard during the sentencing phase of criminal proceedings, a victim impact statement should be considered, especially if the court is fashioning an alternative sentence.[2] In determining a just disposition of a particular case, the child's well-being also should be considered, as should the defendant's continuing role in the child's life.[3] Judges generally do not seek a recovered child's input at sentencing because it may be damaging to ask a child if his or her parent should go to prison, especially if the child developed an attachment to the abducting parent.[4] The court should remember that a child needs demonstrable evidence that the offending parent, not the child, is at fault.

B. SENTENCING OPTIONS

1. Generally

The purpose of sentencing in parental kidnapping cases is to punish criminal conduct, ensure the continuing safety of the child, prevent re-abduction and, whenever possible, minimize further trauma to the child and left-behind parent. The sentencing decision also affects the offender's criminal record[5] in future criminal actions even in jurisdictions without determinate or presumptive sentencing.

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1. Judicial Roundtable Discussion on Sentencing and Custody After an Abduction, American Prosecutors Research Institute & National Council of Juvenile and Family Court Judges, February 27, 1994, Boston, MA [hereinafter Judicial Roundtable, Boston].

2. *Id.*

3. *Id.*

4. *Id.*

5. *State v. Patten*, 380 N.W.2d 346 (N.D. 1986) (rejecting defendant's request that felony conviction be reduced to misdemeanor based on time served rather than actual length of sentence).

While a strict prison sentence is desirable when compelled by the circumstances of a parental kidnapping case,[6] the court can also consider an alternative such as deferred or suspended sentence, probation, restitution or community service.[7] The sentence should be no greater than that deserved for the offense and should be the least severe measure necessary to achieve the purpose for which the sentence is imposed.[8]

A variety of options are available to the court. Prison time should generally be considered in cases involving previous abductions, threats against the child or left-behind parent, or acts of abuse or neglect during the abduction. Deferred sentencing is available to judges who wish to emphasize the criminal nature of the offender's acts but do not feel a strict sentence is appropriate at the time of sentencing. Alternative sentences are most appropriate in cases when the child was voluntarily returned, was well cared-for during the abduction, and the abducting parent proffered reasonable justification for the abduction.

Certain conditions should be imposed in most cases of parental kidnapping, including compliance with all civil court orders regarding custody or visitation and monitored or supervised contact with the child by an appropriate agency (e.g., probation department or social services). Similarly, restitution to the left-behind parent emphasizes that the abducting parent must take responsibility for the consequences of the abduction. If permissible in the jurisdiction, input from the left-behind parent and counseling professionals should be considered. In addition, awareness of on-going civil or domestic relations proceedings or court orders is critical to avoid imposition of conflicting orders.[9]

2. Deferred Sentence

If sufficient mitigating factors exist, the conviction is a first offense *and* the risk for re-abduction is low, a deferred sentence may be appropriate. The availability of deferred sentencing is dependent on state statute.[10] Placing the offender on probation but deferring imposition of sentence accomplishes the goal of supervising the offender and providing necessary services while allowing for the possibility that the conviction will be dismissed pending successful completion of

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6. Parental kidnapping is a form of family violence that should be treated as a serious criminal violation. *See United States v. Lonczak*, 993 F.2d 180 (9th Cir. 1993) (child stealing statute describes conduct that presents serious potential risk to another and is therefore crime of violence under US Sentencing Guidelines).

7. *See, e.g.*, TENN. CODE ANN. § 40-35-104 (1995).

8. *See State v. Musumeci*, 355 A.2d 434 (N.H. 1976) (kidnapping statute does not violate constitutional guarantee against cruel and unusual punishment because it does not require a mandatory minimum sentence); *State v. Swiney*, 137 N.W.2d 808 (Neb. 1965) (in absence of showing of abuse of discretion, appellate court would not disturb sentence imposed within limits prescribed by statute).

9. *See* Chapter I, Section I, *Coordination of Criminal and Civil Proceedings.*

10. *See, e.g.*, MICH. COMP. LAWS § 750.350a (1986); N.M. STAT. ANN. §§ 31-20-3 to 20-11 (1985). Michigan sets forth conditions for a deferred sentence within its parental abduction statute. For a first offense, the court may defer further proceedings and place the defendant on probation. If the defendant violates conditions of probation, the court may then enter a judgment of guilt. However, if the defendant successfully completes the terms of probation, he or she is discharged and proceedings are dismissed.

probation. If the offender fails to abide by the terms of probation,[11] the sentence originally contemplated can be imposed, ensuring a conviction will appear on the offender's record. Depending on the jurisdiction, a conviction dismissed under this provision may not be considered a prior offense should the defendant re-abduct.

3. Suspended Sentence

If probation is deemed appropriate, the court may choose to suspend the offender's sentence and impose conditions of probation.[12] The length of a suspended sentenced should be given serious consideration. A substantial sentence may be warranted to ensure the offender has sufficient incentive to follow future court orders concerning custody.[13] Similarly, the portion of the sentence suspended should be weighed against other factors such as a previous criminal record.[14]

4. Conditions of Probation

The conditions attached to the defendant's probation should reflect the severity and circumstances of the offense. Given the nature of parental kidnapping and the need to monitor future contact with the child and left-behind parent, unsupervised probation is inappropriate. Under certain circumstances, supervised probation with special conditions can benefit both the defendant and recovered child. Supervised probation would be acceptable in cases when the risk of re-abduction is minimal, the offender has a need for and desire to participate in probation services and the civil court is considering reunification with the child (either visitation or shared custody). The civil court's intent should be weighed against the mitigating and aggravating factors of the criminal act. It is possible that the civil court is unaware of the factors currently presented to the criminal court judge.[15]

In fashioning probation conditions, judges should remember that such conditions generally are authorized only "for protection of the public or reformation of the offender." For example, a requirement that the offender refrain from seeking modification in custody might be considered excessive.[16] Options to consider include requiring the offender to participate in a domestic

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11. *See People v. Cheek*, 734 P.2d 654 (Colo. Ct. App. 1986) (defendant ordered to pay restitution as condition of sentence deferral).

12. *State v. Chapman*, 739 P.2d 310 (Idaho 1987) (upholding imposition of suspended ten-year sentence because defendant did not pose threat to society at large or ex-wife and child, who had sought restitution, and he could not provide restitution or support if in prison).

13. *Sandelin v. State*, 766 P.2d 1184 (Alaska Ct. App. 1989).

14. *State v. Holtcamp*, 614 S.W.2d 389 (Tenn. Crim. App. 1980) (trial judge did not abuse discretion in suspending only 60 days of 90-day sentence because defendant had previous convictions for shoplifting, disorderly conduct and writing a bad check).

15. *See* Chapter I, Section I, *Coordination of Criminal and Civil Proceedings.*

16. *See State v. Donovan*, 770 P.2d 581 (Or. 1988) (ordering that defendant take no steps to modify existing custody order deemed excessive).

violence or batterers' program, attend mediation sessions regarding custody *if appropriate* or receive counseling. Unless the defendant's conduct was particularly egregious, time in local custody may not be as important as conditions that order restitution to the custodial parent[17] and compliance with all family court orders, including any no-contact orders.[18]

a. Supervision

Without supervised probation there is no way to enforce the special conditions established. An offender who has never before violated a court order regarding visitation or custody, has no history of domestic violence and has not previously attempted to abduct the child is generally a better risk for community supervision. However, circumstances surrounding the kidnapping (e.g., use of violence) may offset these factors. An extended probation term would enable probation officials to monitor the offender and allow the custodial parent and child to rebuild their lives.

b. Compliance with Court Orders

Parental kidnapping cases often involve multiple courts and multiple orders addressing visitation, custody and child support. Criminal judges can make compliance with both domestic and criminal court orders a condition of probation. If the orders conflict, the offender should be instructed to notify the probation officer and/or attorney so appropriate modifications can be sought. If the offender fails to comply with the family court's order, this violates probation, which may then be revoked. When orders for custody, visitation and child support do not exist, the criminal court can exercise its control over the defendant's behavior through conditions of probation until a family court determines custody. Extra care should be taken if the offender threatens the child or left-behind parent or insists on contact or visitation despite orders to the contrary.

c. Contact with the Child

Terms of probation should specify whether contact with the child is to be allowed. The court should have access to the existing domestic relations orders and should refer to these orders in the imposed terms of probation. With the domestic relations order in mind, the criminal court can mandate no contact or supervised contact or delineate special circumstances under which the defendant may visit with the child. If orders for custody, visitation and child support are not in effect, orders restricting the defendant's contact until the family court acts may be imposed or the court can leave conditions of contact up to the probation officer working with therapists for the offender, child and custodial family. In most circumstances, unless opposed by the child's therapist, continuing contact between the offender and child should be considered. However, if there is a history of abuse directed toward the child or if violence was used during or after the kidnapping, continued contact is not appropriate.

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17. *Commonwealth v. Harner*, 617 A.2d 702 (1992).

18. *See State v. Alladin*, 408 N.W.2d 642 (Minn. Ct. App. 1987) (condition of probation that defendant refrain from any contact with ex-wife or minor children except by mail without ex-wife's permission).

d. Counseling

Therapy services may be appropriate in some parental kidnapping cases but should be tailored to the needs of the offender and circumstances of the case. Substance abuse counseling, anger management, sex offender counseling or parenting classes may be warranted. Judges should seek consultation with community experts for input on issues such as substance abuse, family abuse and mental health in fashioning sentences appropriate to the crime.[19] If the offender is having difficulty handling the divorce or separation, individual counseling may be appropriate. Although family counseling may seem beneficial in some cases, it is beyond the power of the criminal court to compel a non-party (i.e., the custodial parent) to participate in court-ordered therapy. The decision to enter family therapy should be left to the custodial parent and counselors working with the child.[20]

e. Participation in a Mediation Program

Because kidnapping cases generally involve families in which one adult dominates the other, mediation of the custody dispute is rarely appropriate. Mediation is especially inappropriate when one parent has battered the other.[21] However, if the kidnapping was spontaneous, no aggravating circumstances exist and neither parent is placed at a disadvantage as a result of a power imbalance, mediation may resolve on-going custody issues.

5. Restitution or Fine

Restitution to a left-behind parent reinforces the need for the convicted abductor to take responsibility for his or her criminal behavior. Although a parent can never be "repaid" for the time a child has been missing, there are often many expenses incurred by the left-behind parent that should be paid by the defendant, including out-of-pocket financial losses resulting from the defendant's violation of the statute. Reasonable expenses may include the cost of counseling for the abducted child and other family members, transportation costs of recovering and returning the child to the home state, fees for private investigators hired to locate the missing child, attorney's fees and possible medical bills for a complete physical evaluation of the recovered child.[22]

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19. Judicial Roundtable, Boston, *supra* note 1.

20. *Id.*

21. *See* Germane et al., *Mandatory Custody Mediation and Joint Custody Orders in California: The Danger for Victims of Domestic Violence*, 1 BERKELEY WOMEN'S L.J. 175 (1985); Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 V AND. L. REV. 1041 (1991).

22. *VanNess v. State*, 605 N.E.2d 777 (Ind. Ct. App. 1992) (mother filed detailed list of expenses with trial court, including attorney fees and income lost while searching for daughter, cost of items taken with daughter and expenses incurred in retrieving daughter); *State v. Halsen*, 757 P.2d 531 (Wash. 1988) (parent can recover reasonable travel, telephone, loss of earning, attorney fee and other expenses incurred in locating and recovering child); *People v. Cheek*, 734 P.2d 654 (Colo. Ct. App. 1986) (defendant ordered to pay restitution for custodial parent's defense of custody petition in second state because expenses were direct result of defendant's conduct). *But see People v. Harrison*, 402 N.E.2d 822 (Ill. App. Ct. 1980) (victim parent granted restitution for telephone and travel expenses but not undocumented lost wages or attorney's retainer).

Some jurisdictions have legislated the recovery of reasonable expenses.[23] Under these provisions, restitution might include extradition expenses or the cost of the child's temporary placement in a foster home while the left-behind parent arranges for transportation. To be "incurred" under restitution statutes, the victim must be obligated to pay the expenses, and evidence of a causal connection must exist.[24] Restitution may take precedence over child support, which can be scheduled to accrue while restitution is being paid. Some judges believe parents easily rationalize their failure to pay child support but cannot do the same with restitution.[25] If the victim is eligible for expenses under a victim compensation statute, the offender can be ordered to contribute to this fund.

Depending on the offender's financial status, another alternative financial penalty involves imposition of a fine, which may be suspended if the offender donates an equal amount of money to an organization addressing parental kidnapping issues or an agency offering counseling for recovered children and their families.[26] A donation to the latter type of agency would allow indigent families to receive counseling for their children which they could not otherwise afford. As a matter of policy, the court should order restitution rather than a fine when the financial resources of the defendant are limited.[27] Fines consume probation officers' time and often remain unpaid.

6. Community Service

Community service is often a component of a criminal sentence, especially in nonviolent crimes. Many organizations and agencies that provide services to recovered children and their families and the families of still-missing children may welcome assistance, although some victims may not wish to be served by an abductor. Consider ordering the offender to perform community service with appropriate programs that might sensitize him or her to the damage parental kidnapping inflicts on children and left-behind parents, perhaps without direct contact with victims.

7. Jail Time

Although probation may provide an adequate sentence, the court also should consider an appropriate period of incarceration[28] as a deterrent to future abductions. Confinement emphasizes

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23. *See* Appendix K, Statutes Allowing Recovery of Expenses; *Vanness v. State*, 605 N.E.2d 777 (Ind. Ct. App. 1992) (defendant properly ordered to pay restitution under authority of statute that specifically authorizes imposition of reasonable costs incurred as result of taking of a child).

24. *State v. Vinyard*, 751 P.2d 339 (Wash. Ct. App. 1988).

25. Judicial Roundtable, Boston, *supra* note 1.

26. *Cf. State v. Vinyard*, 751 P.2d 339 (Wash. Ct. App. 1988) (expenses incurred by nonprofit organization for which left-behind parent not liable cannot be included in restitution).

27. Criminal Parental Kidnapping Act, § 5 Penalties (ABA Center on Children & the Law 1996).

28. *See State v. Holtcamp*, 614 S.W.2d at 389 (upholding 30 days as not excessive). *But see State v. Lewis*, 1995 Tenn. Crim. App. LEXIS 203 (court improperly determined number of days to be served in confinement based on

the seriousness of the offense and provides an effective deterrent to others likely to commit similar offenses. Jail time may be especially appropriate if the defendant has a prior record or is only minimally cooperative with the court. If the offender is paying child support, restitution or another financial obligation to the custodial parent, the use of weekend jail time or work furlough should be considered.

8. Halfway House or Work Release

If the financial resources of the offender are limited, an alternative sentence that allows continued payment of child support or restitution should be considered. A halfway house or work release program can provide adequate supervision of the offender while allowing job training or continued employment to pay restitution. Another option may be a weekend work patrol, during which the defendant stays at a designated location at his or her own expense and provides two days of labor or community service. If substance abuse is a problem, drug testing during work furlough time also should be imposed. Job training or placement, often available in work furlough programs, may be of great benefit to the offender. If work furlough is reasonable, order some probation supervision during the offender's time out of custody to avoid unapproved contact with the child. If possible, allow the offender to continue counseling during periods of work furlough.

9. Prison

Imposition of prison time may be appropriate if the offender has a history of previous abductions,[29] threats against the child or left-behind parent, acts of abuse or neglect during the abduction, use of violence during the abduction, previous unsuccessful attempts at probation supervision or a lengthy record of arrests or convictions. Defendants who were offered services for underlying problems (e.g., substance abuse, violence, etc.) but either declined to participate or failed to complete programs may be inappropriate for probation supervision. A prison sentence is appropriate if the child's location is unknown.[30]

C. FACTORS THAT INFLUENCE SENTENCING

Sentencing a convicted parental kidnapping defendant should not differ from sentencing in other criminal cases, although additional factors may need to be evaluated. What may be considered a mitigating factor in one case may be an aggravating factor in another, or jurisdictions may legislate mitigating and aggravating (or enhancement) factors to be taken into consideration

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number of days defendant illegally held child).

29. *State v. Sammons*, 656 S.W.2d 862 (Tenn. Crim. App. 1982) (ten-year prison sentence not excessive when defendant repeatedly kidnapped child).

30. *Baltimore City Dept. of Social Serv. v. Bouknight*, 493 U.S. 549 (1990) (parent who is sole custodian of child pursuant to court decree cannot invoke Fifth Amendment privilege in resisting order to produce child); *State v. Sandelin*, 766 P.2d 1184 (Alaska Ct. App. 1989) (sentence not excessive based on several factors, one being that defendant refused to give information regarding location of children). *But see State v. Grooms*, 702 P.2d 260 (Ariz. Ct. App. 1985) (aggravating sentence based on defendant's refusal to disclose child's location violated Fifth Amendment right to remain silent).

by the sentencing court. Judges in some states are limited in their consideration of mitigating or aggravating factors by sentencing guidelines, which set forth the factors courts should follow if departing from those guidelines.[31]

Several states specify aggravating circumstances under which kidnapping is treated more severely.[32] Illinois imposes a more severe sentence for abductions committed under the following circumstances:

> (1) the defendant abused or neglected the child following the concealment, detention or removal of the child; or
>
> (2) the defendant inflicted or threatened to inflict physical harm on a parent or lawful custodian of the child or on the child with intent to cause such parent or lawful custodian to discontinue criminal prosecution of the defendant . . .; or
>
> (3) the defendant demanded payment in exchange for return of the child or demanded that he or she be relieved of the financial or legal obligation to support the child in exchange for return of the child; or
>
> (4) the defendant has previously been convicted of child abduction; or
>
> (5) the defendant committed the abduction while armed with a deadly weapon or the taking of the child resulted in serious bodily injury to another.[33]

The increase in penalty should correspond to the increase in danger or threat of danger to the left-behind parent or child. Some factors—such as substance abuse—should not be aggravating or mitigating factors but should be considered in fashioning conditions of probation.[34]

1. Information Checklist

The following questions establish important information for use in determining an appropriate sentence:

- ❑ How long was the child missing?
- ❑ How was the abduction accomplished?
  - ❑ What degree of premeditation or planning was involved?
  - ❑ Was violence used?
- ❑ Is there a history of violence in the family?

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31. *See, e.g.*, WASH. REV. CODE § 9.94A.390 (1994).

32. *See, e.g.*, WASH REV. CODE § 9A.40.060 (1994) (prohibiting retention or concealment of child after visitation in other state with intent to intimidate or harass custodial parent); IND. CODE § 35-42-3-4 (1990) (raising initial charge to higher grade felony when abduction is committed while armed with deadly weapon or results in serious bodily harm); TENN. CODE ANN. § 39-13-306 (1990) (allowing prosecution under harsher statutes).

33. 720 ILL. COMP. STAT. § 5/10-5(d) (1989).

34. Judicial Roundtable Discussion on Sentencing and Custody After an Abduction, American Prosecutors Research Institute & National Council of Juvenile & Family Court Judges, April 16, 1994, Reno, NV [hereinafter Judicial Roundtable, Reno].

- ❑ Domestic violence?
- ❑ Child abuse?
- ❑ Stalking?
- ❑ Was the abductor a victim of family violence?
- ❑ Did the abductor have a reasonable, subjective fear for the safety of the child or him/herself?

❑ Did the abductor use the parental kidnapping to harass, intimidate or manipulate the other parent (e.g., for a reduction in child support or to force a reconciliation)?

❑ Did the kidnapping violate a court order?

❑ Were there chronic violations of custody arrangements and/or orders prior to the kidnapping?

❑ Did the court that issued the original custody order lack subject matter jurisdiction, or was the order deficient in any other way?

❑ What were the circumstances during the child's absence?

- ❑ Did the defendant provide appropriate care during the abduction?
- ❑ Did the child receive adequate schooling while in the abductor's care?
- ❑ Did the child receive adequate medical care while with the abductor?
- ❑ Did the defendant tell the child lies about the other parent?
- ❑ Did the abductor tell the child lies to distance him/her from family members?
- ❑ Did the defendant force the child to lie?
- ❑ Did the defendant change the child's identity (name or appearance)?
- ❑ Did the defendant move the child from place to place?
- ❑ Was the child taken out of state?

❑ Was the defendant apprehended or did he/she voluntarily return the child?

❑ Did the defendant cooperate with law enforcement?

❑ Does the defendant have a criminal history?

❑ Does the defendant have a satisfactory history of probation performance?

❑ Does the defendant exhibit sincere remorse for his/her actions?

❑ Does the defendant realize he/she acted improperly and endangered the physical and mental health of the child?

- ❑ Is the risk of re-abduction significantly reduced by this realization?

❑ What continuing role, if any, will the defendant play in the life of the child?

Answers to these questions enable the court to analyze the factors presented in the next sections. The list is not exhaustive, and additional considerations may be warranted.

2. Defendant's Criminal Record

Lack of a criminal record or positive history of probation performance is usually considered a mitigating factor, while existence of a record, especially if violence or weapons were used in previous crimes, should be weighted toward a stricter sentence. Special consideration also should be given to offenses that were committed while under court supervision (civil or criminal), as previous disregard for the court's authority affects a defendant's supervision potential and amenability to counseling or treatment.

3. Defendant's Motivation for the Kidnapping

In assessing the abducting parent's motivation, the court should examine whether the allegations of the abducting parent are rationalizations for inappropriate behavior and whether he or she appropriately sought relief in court. Judges should consider whether dissatisfaction with the prior custody arrangement is parent or child-oriented (e.g., does the abducting parent claim the custodial parent's new boyfriend is drug-addicted or does he or she complain of too little time with the child).[35] A defendant who abducted the child with the intent to manipulate or hurt the left-behind parent rather than to better the child's living conditions should be treated more seriously. Parents' motivations range from frustration with the civil court system and disappointment with custody orders to vindictiveness and manipulation or fear for their own or the child's safety.

4. Family Violence

Domestic violence always presents multiple problems for the court. Not only is it likely to emerge as an issue at trial, either as a defense or an enhancement factor in charging, but it may also impact sentencing.[36] Even if the defendant's flight from domestic violence (or necessity) defense failed, the court can consider violence within the family as a mitigating factor. In exercising their discretion to impose a sentence beyond the usual range, judges in Washington state may consider that the defendant or her children "suffered a continuing pattern of physical or sexual abuse by the victim of the offense and the offense is a response to that abuse."[37] Conversely, a defendant with a history of violence against the left-behind parent or the child should be evaluated for risk to reoffend and appropriateness of continuing unsupervised contact with the child.

5. Remorse or Cooperative Attitude Toward Other Parent

Remorse for the abduction and concern for the victim's mental and physical health upon reunification can be considered mitigating factors, demonstrating the defendant's willingness to accept responsibility for harm to the child victim as well as the pain caused to the left-behind parent.[38] If the defendant shows no remorse for his or her actions, blames the left-behind parent or disregards the harm caused to the child, the court may want to consider this an aggravating

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35. Judicial Roundtable, Boston, *supra* note 1.

36. *See* KLAIN, PARENTAL KIDNAPPING, DOMESTIC VIOLENCE AND CHILD ABUSE: CHANGING LEGAL RESPONSES TO RELATED VIOLENCE (American Prosecutors Research Institute 1995); Jackson, *From the Frying Pan to the Fire: Family Violence and the Parental Abductions of Children* (June 1994) (unpublished manuscript), *reprinted in* INVESTIGATION AND PROSECUTION OF PARENTAL ABDUCTION Appendix C (APRI 1995); Rollin, *Family Violence Considerations with Regard to Parental Abduction Policies, in* OBSTACLES TO THE RECOVERY AND RETURN OF PARENTALLY ABDUCTED CHILDREN ch. 3, at 46 (Girdner & Hoff eds., Office of Juvenile Justice & Delinquency Prevention 1994); Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 VAND. L. REV. 1041 (1991).

37. WASH. REV. CODE § 9.94A.390 (1994).

38. *State v. Anderson*, 857 S.E.2d 571, 574 (Tenn. Crim. App. 1992) (defendant's credibility and willingness to accept responsibility for his offense are circumstances relevant to determining his rehabilitation potential).

factor. If an abducting parent continues to be hostile to the left-behind parent or refuses to cooperate in a parenting or mediation plan, he or she may be at risk to reoffend. Participation in mediation, however, should not be required in cases of domestic violence. The court may wish to consider conditions that protect the left-behind parent from possible harassment or unwanted contact by the defendant, especially if there is a history of violence.

6. Evidence of Premeditation

Evidence the defendant plotted the kidnapping in advance should be considered an aggravating factor. However, premeditation as part of a safety plan to escape a violent relationship should not be considered an aggravating factor. The court should assess the sophistication of the abduction and intricacy of the concealment (e.g., use of false identification or disguises). Lack of premeditation—demonstrating impulsiveness rather than maliciousness—can be a mitigating circumstance.

7. Knowledge or Disregard of a Court Order

If the defendant was aware of a custody or visitation order or pending proceeding and willfully chose to disregard the order, the court should consider this an indication of the defendant's unwillingness to respect the court's sentencing orders. A defendant who has a history of violating court orders is generally a poor risk for community supervision under criminal court order.

8. Defendant's History of Violations of Court Orders

Chronic violations of court orders, including those unconnected with the custody dispute, indicate a defendant's inappropriateness for probation. Since a parental kidnapping offense may itself involve a violation of a court order, the court may be hesitant to trust the offender's ability to abide by probation conditions.

9. Prior Abductions or Threats to Abduct

A history of prior threats and attempted or successful abductions of the child demonstrates the defendant's pattern of interaction with the left-behind parent and child. Repeated kidnapping justifies a lengthier sentence.[39] A defendant who has previously abducted a child is obviously at greater risk for re-offense. Several states include previous conviction for child stealing, kidnapping or abduction of a minor as an aggravating factor in charging.[40] Others mandate a prison term or enhanced sentence for a subsequent kidnapping by the same defendant, even if it does not involve the same victim.[41]

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39. *State v. Sammons*, 656 S.W.2d 862 (Tenn. Crim. App. 1982) (ten-year prison sentence not excessive when defendant repeatedly kidnapped child).

40. OHIO REV. CODE ANN. § 2905.04(C)(1)(a) (1985).

41. 720 ILL. COMP. STAT. § 5/10-5(d) (1989) ("It shall be a factor in aggravation for which a court may impose a more severe sentence . . . if upon sentencing the court finds evidence . . . (4) that the defendant has previously been convicted of child abduction.").

10. Manner in Which the Child was Abducted

The offender's use or threats of violence against the child or left-behind parent should be considered an aggravating factor. The parental kidnapping statute or sentencing guidelines may provide authority for an enhanced sentence, especially if the defendant threatened or inflicted harm on the lawful custodian, committed the abduction while armed with a deadly weapon or seriously injured another during the taking.[42]

11. Behavior Toward the Child During the Kidnapping

The defendant's treatment of the child during the kidnapping may mitigate or aggravate the sentence. Certain behaviors indicate the defendant had no real concern for the child's well-being. The court should consider emotional trauma suffered by the child, including lies told by the defendant or lies the child was forced to tell, as well as physical or sexual abuse or neglect. A defendant who lies to the child about the left-behind parent demonstrates lack of concern for the child, who may be devastated by believing the other parent is dead or no longer loves the child. Some children may be physically or sexually abused by the abductor, the abductor's friends or other individuals during the kidnapping. Consider the abductor's responsibility for either perpetrating these actions or allowing them to occur without protecting the child.[43]

A child who is kept isolated from friends and family may suffer considerably and have difficulty reintegrating to home and community. If a child was forced to adopt a different identity, he or she may suffer psychological consequences such as an inability to form attachments to others.[44] Some defendants warn the child not to talk to police, causing the child to distrust authority. Others threaten the children with physical harm to themselves, the left-behind parent or other loved ones if the child reveals their location or identity. The court should also consider whether the child was placed with strangers, forced to move frequently or often left unattended. However, a child who was treated well and developed a close relationship with the parent during the period of abduction may experience separation from the abducting parent as another loss.

12. Child's Medical, Educational and Shelter Needs

The quality of the offender's care of the child, including schooling, provision of necessary medical care and frequency of relocation, should be considered. Poor living conditions during a parental kidnapping may demonstrate lack of concern for the child's well-being and should be considered a serious aggravating circumstance. Neglect and physical, sexual or emotional abuse are additional criminal behavior to be seriously considered. If the child has special needs such as a chronic medical condition, the abductor's willingness to disregard the additional danger posed to the child should be considered an aggravation. A defendant who has met the child's basic needs during the abduction may be entitled to some consideration in mitigation, but simply providing basic necessities for which the abductor was obligated anyway should not outweigh the detrimental effects of the kidnapping.

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42. 720 ILL. COMP. STAT. § 5/10-5(d) (1989).

43. Judicial Roundtable, Boston, *supra* note 1.

44. Hegar & Greif, *Abduction of Children by Their Parents: A Survey of the Problem*, 36 SOC. WORK 421 (1991).

13. Child Taken Out of State

Most states recognize the peril of taking a child out of state by raising parental kidnapping to a felony. A child taken out of state loses contact with family, friends, schoolmates and pets, and frequently is placed in unfamiliar or dangerous conditions. Such damaging effects are exacerbated when the child is taken to a foreign country, especially if the child does not speak the language or have any ties to the culture. The child's abduction to another country should be used as an aggravating factor, as should the distance the child was taken. Conversely, if the offender kept the child in the same community and the left-behind parent knew the child's whereabouts, a sentence aimed at resolving the custody dispute may be preferable (e.g., counseling or mediation).

14. Duration of the Detention, Concealment or Abduction

A lengthy abduction can indicate the offender's complete disregard for the child's welfare, including lack of a secure and stable lifestyle, consistent schooling and contact with the other parent, family and friends. Frequent but shorter abductions are harmful to the child but also suggest the offender does not respect the court's authority and may be attempting to manipulate or harass the other parent.

15. Defendant's Cooperation with Law Enforcement

A defendant's concern for the well-being of the child may be demonstrated by his or her willingness to cooperate with law enforcement prior to or upon apprehension.[45] The abducting parent may have responded favorably to an early request from law enforcement to return the child or reported to authorities upon reaching safety in cases of domestic violence. A parent who is uncooperative with law enforcement once arrested, however, may continue to be uncooperative with authorities, making him or her unsuitable for probation supervision.

16. Voluntary Return of the Child

The defendant's early, voluntary return of the child should mitigate a strict sentence,[46] while apprehension by law enforcement without voluntary return should be considered an aggravating circumstance. Indiana's interference with custody statute states that "a court may consider as a mitigating circumstance the accused person's return of the [child] in accordance with the child custody order within seven (7) days after the removal."[47] Although return of the child may mitigate the sentence, other aggravating circumstances can outweigh this factor, especially if the child was in danger during the kidnapping.

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45. *State v. Sandelin*, 766 P.2d 1184 (Alaska Ct. App. 1989) (five years with three years suspended not excessive because defendant refused to cooperate with authorities upon apprehension).

46. *State v. Grooms*, 702 P.2d 260 (Ariz. Ct. App. 1985) (fact that child's whereabouts were unknown could have been found to be an aggravating factor but not fact that appellant refused to divulge that information).

47. IND. CODE § 35-42-3-4 (1990).

17. Risk of Re-abduction

A parent who disregards court orders or generally displays an uncooperative attitude is more likely to re-abduct. Combinations of other factors also appear to increase the risk of parental kidnapping. Parents who abduct, generally do not value the role of the other parent in the child's life. Research on risk factors for abduction identified six risk profile of abductors.[48] These are summarized in the companion civil bench book on pages 711-715. The six profiles include the parent who:

1) Has abducted before or makes credible threats to abduct;
2) Is suspicious that child abuse has occurred and has a strong support network;
3) Is paranoid;
4) Is sociopathic;
5) Has strong attachments to another culture;
6) May be disenfranchised (including victims of domestic violence, parents without meaningful access to the courts, and those holding values about parental rights in and responsibilities for children that differ from prevailing legal norms).[49]

Social validation from a strong family network can also support the abductor's view that the parental kidnapping was not an illegal act.[48] Other warning signs include extreme dissatisfaction with the court system, custody arrangement or divorce decree; difficulties related to employment or mounting financial debt; and a change in residence to more temporary housing or other behavior indicating the possibility of a quick departure.[49]

Additional risk factors include lack of remorse, on-going anger, family members' negative influence over the abductor's behavior, criminal activity[50] and the child's inability to assess danger of re-abduction or protect him or herself. The risk of re-abduction is greater when an abductor continues to reject the authority of the court and refuses to accept responsibility for having endangered the child.[51] Such factors should be considered especially relevant if the court is deciding between community supervision and incarceration.

The court can analyze the defendant's motivation for the abduction to assess risk, although a guilty verdict generally reveals the court's or jury's finding that the defendant's justification was

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48. Johnston, *Identifying Risk Factors: The Interview Study, Final Report of Stage I, Part B,* in PREVENTION OF PARENT OR FAMILY ABDUCTION THROUGH EARLY IDENTIFICATION OF RISK FACTORS at 6 (ABA Center on Children and the Law & The Center for the Family in Transition 1994) [hereinafter Risk Factors]: Final report pending.

49. *Id.* at 6.

50. Over one-quarter of abductors and a little less than one-fifth of left-behind parents had criminal records. The criminal records were based on convictions rather than arrest records. *Id.* at 85.

51. Judicial Roundtable, Reno, *supra* note 34.

not reasonable or legitimate. If the court determines the abductor was motivated by a concern for the child's welfare, the sentence can be designed to prevent re-abduction.[52]

D. RELEASE PENDING APPEAL

After a guilty verdict or plea, the defendant may argue for release pending appeal. Such a motion should be denied if there is any danger of violence toward the left-behind parent or possibility of another kidnapping. The defendant should not be given the opportunity to re-offend or flee. If the offender is released, consider conditions such as an appearance bond to ensure the defendant's appearance once the appeal is complete, regular supervision through the probation department and, most important, restrictions on contact with the left-behind parent, witnesses and recovered child.

E. CONCLUSION

The ultimate objective of criminal justice intervention in parental kidnapping cases is to secure the well-being of children, protect parents' rights to custody and appropriately punish parents who disregard custody orders. Increased knowledge of the criminal and civil issues surrounding parental abduction will improve the response of the justice system and lessen the trauma suffered by victims of this crime. Informed professionals can resolve cases quickly and successfully. Consistent application of the criminal law also will improve intervention efforts.

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52. *See* JURISDICTION IN CHILD CUSTODY AND ABDUCTION CASES: A JUDGE'S GUIDE TO THE UCCJA, PKPA AND HAGUE CHILD ABDUCTION CONVENTION (ABA Center on Children & the Law 1996).

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LIST OF APPENDICES

Appendix A

Criminal Parental Kidnapping Statutes*

Alabama	ALA. CODE § 13A-6-45 (1983).
Alaska	ALASKA STAT. § 11.41.320 (1978). ALASKA STAT. § 11.41.330 (1978). ALASKA STAT. § 11.41.370 (1978). ALASKA STAT. § 11.51.125 (1978).
Arizona	ARIZ. REV. STAT. ANN. § 13-1302 (1994). ARIZ. REV. STAT. ANN. § 13-1305 (1994).
Arkansas	ARK. CODE ANN. § 5-26-501 (1985). ARK. CODE ANN. § 5-26-502 (1987).
California	CAL. PENAL CODE § 277 (1992). CAL. PENAL CODE § 278 (1984). CAL. PENAL CODE § 278.5 (1989). CAL. PENAL CODE § 279 (1992).
Colorado	COLO. REV. STAT. § 18-3-304 (1986).
Connecticut	CONN. GEN. STAT. § 53a-97 (1992). CONN. GEN. STAT. § 53a-98 (1981).
Delaware	DEL. CODE ANN. tit. 11, § 785 (1989).
District of Columbia	D.C. CODE ANN. § 16-1021 (1989). D.C. CODE ANN. § 16-1022 (1989). D.C. CODE ANN. § 16-1023 (1989). D.C. CODE ANN. § 16-1024 (1989).
Florida	FLA. STAT. ch. 787.03 (1994). FLA. STAT. ch. 787.04 (1988).
Georgia	GA. CODE ANN. § 16-5-45 (1987).
Hawaii	HAW. REV. STAT. § 707-726 (1994). HAW. REV. STAT. § 707-727 (1994).
Idaho	IDAHO CODE § 18-4506 (1987).
Illinois	720 ILL. COMP. STAT. § 5/10-5 (1992). 720 ILL. COMP. STAT. § 5/10-5.5 (1993). 720 ILL. COMP. STAT. § 5/10-7 (1992).
Indiana	IND. CODE § 35-42-3-4 (1990).

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* While traditional kidnapping statutes may on occasion also apply in cases of parental abduction, this compilation contains only parental kidnapping statutes unless otherwise specified. The citation year indicates the year of passage or latest amendment. This compilation is current through July 31, 1995.

Iowa	IOWA CODE § 710.6 (1986).
Kansas	KAN. STAT. ANN. § 21-3422 (1993). KAN. STAT. ANN. § 21-3422a (1993).
Kentucky	KY. REV. STAT. ANN. § 509.070 (1984).
Louisiana	LA. REV. STAT. ANN. § 14:45 (1980). LA. REV. STAT. ANN. § 14:45.1 (1981).
Maine	ME. REV. STAT. ANN. tit. 17-A, § 303 (1981).
Maryland	MD. CODE ANN., FAM. LAW § 9-301 (1995). MD. CODE ANN., FAM. LAW § 9-304 (1995). MD. CODE ANN., FAM. LAW § 9-305 (1995). MD. CODE ANN., FAM. LAW § 9-306 (1984). MD. CODE ANN., FAM. LAW § 9-307 (1984).
Massachusetts	MASS. GEN. L. ch. 265, § 26A (1983). MASS. GEN. L. ch. 265, § 27A (1979).
Michigan	MICH. COMP. LAWS § 750.350a (1986).
Minnesota	MINN. STAT. § 609.26 (1991).
Mississippi	MISS. CODE ANN. § 97-3-51 (1984).
Missouri	MO. REV. STAT. § 565.149 (1988). MO. REV. STAT. § 565.150 (1988). MO. REV. STAT. § 565.153 (1988). MO. REV. STAT. § 565.156 (1988). MO. REV. STAT. § 565.160 (1988). MO. REV. STAT. § 565.163 (1988). MO. REV. STAT. § 565.165 (1988). MO. REV. STAT. § 565.167 (1988). MO. REV. STAT. § 565.169 (1988).
Montana	MONT. CODE ANN. § 45-5-304 (1995). MONT. CODE ANN. § 45-5-631 (1987). MONT. CODE ANN. § 45-5-632 (1987). MONT. CODE ANN. § 45-5-633 (1987).
Nebraska	NEB. REV. STAT. § 28-316 (1977).
Nevada	NEV. REV. STAT. § 200.357 (1991). NEV. REV. STAT. § 200.359 (1993).
New Hampshire	N.H. REV. STAT. ANN. § 633:4 (1983).
New Jersey	N.J. REV. STAT. § 2C:13-4 (1990). N.J. REV. STAT. § 2A:34-31.1 (1990).
New Mexico	N.M. STAT. ANN. § 30-4-4 (1989).

New York	N.Y. PENAL LAW § 135.45 (1965). N.Y. PENAL LAW § 135.50 (1981).
North Carolina	N.C. GEN. STAT. § 14-320.1 (1993).
North Dakota	N.D. CENT. CODE § 14-14-22.1 (1979).
Ohio	OHIO REV. CODE ANN. § 2905.04 (1985). OHIO REV. CODE ANN. § 2919.23 (1991).
Oklahoma	OKLA. STAT. ANN. tit. 43, § 527 (1994).
Oregon	OR. REV. STAT. § 163.245 (1987). OR. REV. STAT. § 163.257 (1987).
Pennsylvania	18 PA. CONS. STAT. § 2904 (1984). 18 PA. CONS. STAT. § 2909 (1990).
Rhode Island	R.I. GEN. LAWS § 11-26-1.1 (1989). R.I. GEN. LAWS § 11-26-1.2 (1989).
South Carolina	S.C. CODE ANN. § 16-17-495 (1990).
South Dakota	S.D. CODIFIED LAWS ANN. § 22-19-9 (1985). S.D. CODIFIED LAWS ANN. § 22-19-10 (1985). S.D. CODIFIED LAWS ANN. § 22-19-11 (1980). S.D. CODIFIED LAWS ANN. § 22-19-12 (1981).
Tennessee	TENN. CODE ANN. § 39-13-306 (1990).
Texas	TEX. PENAL CODE ANN. § 25.03 (1993). TEX. PENAL CODE ANN. § 25.031 (1993).
Utah	UTAH CODE ANN. § 76-5-303 (1984).
Vermont	VT. STAT. ANN. tit. 13, § 2451 (1979).
Virginia	VA. CODE ANN. § 18.2-49.1 (1994). VA. CODE ANN. § 18.2-50 (1994).
Washington	WASH. REV. CODE § 9A.40.010 (1975). WASH. REV. CODE § 9A.40.060 (1994). WASH. REV. CODE § 9A.40.070 (1989). WASH. REV. CODE § 9A.40.080 (1989).
West Virginia	W. VA. CODE § 61-2-14d (1984). W. VA. CODE § 61-2-14e (1984).
Wisconsin	WIS. STAT. § 948.31 (1993).
Wyoming	WYO. STAT. § 6-2-204 (1984).
United States	18 U.S.C. § 1204 (1993).

ALABAMA

ALA. CODE § 13A-6-45 (1983).
Interference with custody.

(a) A person commits the crime of interference with custody if he knowingly takes or entices:

(1) Any child under the age of 18 from the lawful custody of its parent, guardian or other lawful custodian, or

(2) Any committed person from the lawful custody of its parent, guardian or other lawful custodian. "Committed person" means, in addition to anyone committed under judicial warrant, any neglected, dependent or delinquent child, mentally defective or insane person or any other incompetent person entrusted to another's custody by authority of law.

(b) A person does not commit a crime under this section if the actor's sole purpose is to assume lawful control of the child. The burden of injecting the issue is on the defendant, but this does not shift the burden of proof.

(c) Interference with custody is a Class C felony.

ALASKA

ALASKA STAT. § 11.41.320 (1978).
Custodial interference in the first degree.

(a) A person commits the crime of custodial interference in the first degree if the person violates AS 11.41.330 and causes the victim to be removed from the state.

(b) Custodial interference in the first degree is a class C felony.

ALASKA STAT. § 11.41.330 (1978).
Custodial interference in the second degree.

(a) A person commits the crime of custodial interference in the second degree if, being a relative of a child under 18 years of age or a relative of an incompetent person and knowing that the person has no legal right to do so, the person takes, entices, or keeps that child or incompetent person from a lawful custodian with intent to hold the child or incompetent person for a protracted period.

(b) Custodial interference in the second degree is a class A misdemeanor.

ALASKA STAT. § 11.41.370 (1978).
Definitions.

In AS 11.41.300 — 11.41.370, unless the context requires otherwise,

(1) "lawful custodian" means a parent, guardian, or other person responsible by authority of the law for the care, custody, or control of another;

(2) "relative" means a parent, stepparent, ancestor, descendant, sibling, uncle, or aunt, including a relative of the same degree through marriage or adoption;

(3) "restrain" means to restrict a person's movements unlawfully and without consent, so as to interfere substantially with the person's liberty by moving the person from one place to another or by confining the person either in the place where the restriction commences or in a place to which the person has been moved; a restraint is "without consent" if it is accomplished

(A) by acquiescence of the restrained person, if the restrained person is under 16 years of age or is incompetent and the restrained person's lawful custodian has not acquiesced in the movement or confinement; or

(B) by force, threat, or deception.

ALASKA STAT. § 11.51.125 (1978).
Failure to permit visitation with a minor.

(a) A custodian commits the offense of failure to permit visitation with a minor if the custodian intentionally, and without just excuse, fails to permit visitation with a child under 18 years of age in the custodian's custody in substantial conformance with a court order that is specific as to when the custodian must permit another to have visitation with that child.

(b) The custodian may not be charged under this section with more than one offense in respect to what is, under the court order, a single continuous period of visitation.

(c) In a prosecution under this section, existing provisions of law prohibiting the disclosure of confidential communications between husband and wife do not apply, and both husband and wife are competent to testify for or against each other as to all relevant matters, if a court order has awarded custody to one spouse and visitation to the other.

(d) As used in this section,

(1) "court order" means a decree, judgment, or order issued by a court of competent jurisdiction;

(2) "custodian" means a natural person who has been awarded custody, either temporary or permanent, of a child under 18 years of age;

(3) "just excuse" includes illness of the child which makes it dangerous to the health of the child for visitation to take place in conformance with the court order; "just excuse" does not include the wish of the child not to have visitation with the person entitled to it.

(e) Failure to permit visitation with a minor is a violation.

ARIZONA

ARIZ. REV. STAT. ANN. § 13-1302 (1994).
Custodial interference; child born out of wedlock; classification.

A. A person commits custodial interference if, knowing or having reason to know that he has no legal right to do so, such person knowingly takes, entices or keeps from lawful custody any child who is less than eighteen years of age or incompetent and who is entrusted by authority of law to the custody of another person or institution.

B. If a child is born out of wedlock, the mother is the legal custodian of the child for the purposes of this section until paternity is established and custody or access is determined by a court.

C. If committed by a parent or agent of a parent of the person taken, enticed or kept, custodial interference is a class 6 felony unless the person taken, enticed or kept from lawful custody is returned voluntarily by the defendant without physical injury prior to arrest in which case it is a class 1 misdemeanor. If committed by a person other than a parent or agent of a parent of the person taken, custodial interference is a class 3 felony.

ARIZ. REV. STAT. ANN. § 13-1305 (1994).
Access interference; classification; definitions.

A. A person commits access interference if, knowing or having reason to know that he has no legal right to do so, the person knowingly takes, entices or keeps from specified access any person who is the subject of an access order.

B. A law enforcement officer who responds to a call concerning access interference may demand that the person who is alleged to have committed the access interference turn over the person who is the subject of an access order to the person who is entitled to access pursuant to the access order if all of the following apply:

1. The person who is entitled to access presents the officer with a certified copy of the order or orders that are alleged to have been violated and no subsequent order amending access is presented.

2. The access alleged to have been interfered with is personal access and not access conducted telephonically or other nonpersonal access.

3. The officer observes that any provision of the access order is being violated by the person who is alleged to have committed access interference.

C. Access interference is a class 3 misdemeanor. A law enforcement officer shall issue a notice to appear and complaint to or arrest a person who is alleged to have committed access interference if the provisions of subsection B, paragraphs 1, 2 and 3 of this section are met and the person does not voluntarily comply with the order. A person arrested for a violation of this section is eligible for release pursuant to section 13-3903.

D. The enforcement of this section is not limited by the availability of other remedies for access interference.

E. For the purposes of this section:

1. "Access order" means a court order that is issued pursuant to title 25 and that allows a person to have direct access to a child or incompetent person.

2. "Specified access" means a specific time, day or place that has been designated pursuant to an access order.

ARKANSAS

ARK. CODE ANN. § 5-26-501 (1985).
Interference with visitation.

(a) A person commits the offense of interference with visitation if, knowing that he or she has no lawful right to do so, he or she takes, entices, or keeps any minor from any person entitled by a court decree or order to the right of visitation with the minor.

(b) Interference with visitation is a Class D felony if the minor is taken, enticed, or kept without the State of Arkansas. Otherwise, it is a Class A misdemeanor.

(c) The provisions of this section shall apply only to those cases in which a contempt citation has been issued by the court which issued the visitation order or decree, and such citation has been ignored or evaded by the person cited for a period of ninety (90) days.

ARK. CODE ANN. § 5-26-502 (1987).
Interference with custody.

(a) A person commits the offense of interference with custody if, knowing that he or she has no lawful right to do so, he or she takes, entices, or keeps any minor from any person entitled by a court decree or order to the right of custody of the minor.

(b) Interference with custody is a Class D felony if the minor is taken, enticed, or kept without the State of Arkansas. Otherwise, it is a Class A misdemeanor.

(c)(1) In every case prior to serving a warrant for arrest on a person charged with the offense of interference with custody, the police officer or other law enforcement officer shall inform the Department of Human Services of the circumstances of any minor named in the information or indictment as having been taken, enticed, or kept from the custodian in a manner constituting interference with custody.

(2) A representative of the Department of Human Services shall be present with the arresting officer to take the minor into temporary custody of the Department of Human Services pending further proceedings by a court of competent jurisdiction.

(d)(1) A court of competent jurisdiction shall determine the immediate custodial placement of all these minors pursuant to a petition brought by the Department of Human Services or an agency thereof to determine if there is probable cause to believe the minor may be removed from the jurisdiction of the court, may be abandoned, or may be without the immediate care or support of one lawfully entitled to custody.

(2) The court shall immediately give custody to the lawful custodian if it finds that the lawful custodian is present before the court.

(e)(1) The petitioner shall comply with the requirements of § 9-27-334 [repealed] with regard to the giving of a notice and setting of hearings.

(2) The petitioner shall be immune from liability with respect to any conduct undertaken pursuant to this section unless it is determined the petitioner acted with actual malice.

CALIFORNIA

CAL. PENAL CODE § 277 (1992).
Person with right to custody maliciously taking, detaining, concealing or enticing away without good cause with intent to deprive person or agency with custody right; penalties; report of action for good cause and filing request for custody.

In the absence of a court order determining rights of custody or visitation to a minor child, every person having a right of custody of the child who maliciously takes, detains, conceals, or entices away that child within or without the state, without good cause, and with the intent to deprive the custody right of another person or a public agency also having a custody right to that child, shall be punished by imprisonment in the county jail for a period of not more than one year, a fine of one thousand dollars ($1,000), or both, or by imprisonment in the state prison for 16 months, or two or three years, a fine of not more than ten thousand dollars ($10,000), or both.

A subsequently obtained court order for custody or visitation shall not affect the application of this section.

As used in this section, "good cause" means a good faith and reasonable belief that the taking, detaining, concealing, or enticing away of the child is necessary to protect the child from immediate bodily injury or emotional harm. "Good cause" also includes the good faith and reasonable belief by a person with a right of custody of the child who has been the victim of domestic violence by another person with a right of custody of the child, that the child, if left with the other person, will suffer immediate bodily injury or emotional harm. The person who takes, detains, or conceals the child shall file a report with the district attorney's office of his or her action, and shall file a request for custody, within a reasonable time in the jurisdiction where the child had been living, setting forth the basis for the immediate bodily injury or emotional harm to the child. The address of the parent, or a person who has been granted access to the minor child by a court order, who takes, detains, or conceals the child, with good cause, shall remain confidential until released by court order.

As used in this section:

(a) "Domestic violence" means abuse perpetrated against any of the following persons:

(1) A spouse, former spouse, cohabitant, former cohabitant, any other adult person related by consanguinity or affinity within the second degree, or a person with whom the respondent has had a dating or engagement relationship.

(2) A person who is the parent of a child and the presumption applies that the male parent is the father of any child of the female parent pursuant to the Uniform Parentage Act (Part 3 (commencing with Section 7600) of Division 12 of the Family Code).

(b) "Emotional harm" includes having a parent who has committed domestic violence against the parent who is taking and concealing the child.

CAL. PENAL CODE § 278 (1984).
Unlawful detention, concealment, etc.; punishment.

Every person, not having a right of custody, who maliciously takes, detains, conceals, or entices away, any minor child with intent to detain or conceal that child from a person, guardian, or public agency having the lawful charge of the child shall be punished by imprisonment in the state prison for two, three or four years, a fine of not more than ten thousand dollars ($10,000), or both, or imprisonment in a county jail for a period of not more than one year, a fine of not more than one thousand dollars ($1,000), or both.

CAL. PENAL CODE § 278.5 (1989).
Deprivation by person with right to physical custody or visitation of same rights of other person; punishment.

Every person who has a right to physical custody of or visitation with a child pursuant to an order, judgment, or decree of any court which grants another person, guardian, or public agency right to physical custody of or visitation with that child, and who within or without the state detains, conceals, takes, or entices away that child with the intent to deprive the other person of that right to custody or visitation shall be punished by imprisonment in the state prison for 16 months, or two or three years, a fine of not more than ten thousand dollars ($10,000), or both; or by imprisonment in a county jail for a period of not more than one year, a fine of not more than one thousand dollars ($1,000), or both.

CAL. PENAL CODE § 279 (1992).
Protective custody; return to lawful charge; resolution of conflicting custodial orders; order; enforcement; appeal; expenses; jurisdiction.

(a) A peace officer investigating a report of a violation of Section 277, 278, or 278.5 may take a minor child into protective custody if it reasonably appears to the officer that any person unlawfully will flee the jurisdictional territory with the minor child.

(b) A child who has been detained or concealed shall be returned to the person, guardian, or public agency having lawful charge of the child, or to the court in which a custody proceeding is pending, or to the probation department of the juvenile court in the county in which the victim resides. Notwithstanding any other provision of law, when a person is arrested for an alleged violation of Section 277, 278, or 278.5 the court shall, at the time of the arraignment, impose the condition that the child shall be returned to the person or public agency having lawful charge of the child, and the court shall specify the date by which the child shall be returned. If conflicting custodial orders exist within this state, or between this state and a foreign state, the court shall set a hearing within five court days to determine which court has jurisdiction under the laws of this state, if the conflicting custodial orders are within this state, or if the conflict exists between this state and a foreign state, the court shall determine which state has subject matter jurisdiction to issue a custodial order under the laws of this state, the Uniform Child Custody Jurisdiction Act (Part 3 (commencing with Section 3400) of Division 8 of the Family Code), or federal law, if applicable. At the conclusion of the hearing, the court shall enter an order as to which custody order is valid and is to be enforced. If the child has not been returned at the conclusion of the hearing, the court shall set a date within a reasonable time by which the child shall be returned to the person or agency having lawful charge of the child, and order the defendant to comply by this date, or to show cause on that date why he or she has not returned the child as directed. The court shall only enforce its order, or any subsequent orders for the return of the child, under subdivision (a) of Section 1219 of the Code of Civil Procedure, to ensure that the child is promptly placed with the person or agency having lawful charge of the child. An order adverse to either the prosecution or defense is reviewable by a writ of mandate or prohibition addressed to the appropriate court.

(c) The offenses enumerated in Sections 277, 278, and 278.5 are continuous in nature, and continue for so long as the minor child is concealed or detained.

(d) Any expenses incurred in returning the child shall be reimbursed as provided in Section 3134 of the Family Code. Those expenses, and costs reasonably incurred by the victim, shall be assessed against any defendant convicted of a violation of Section 277, 278, or 278.5.

(e) Pursuant to Sections 27 and 778, violation of Section 277, 278, or 278.5 is punishable in California, whether the intent to commit the offense is formed within or without the state, if the child was a resident of California or present in California at the time of the taking, if the child thereafter is found in California, or if one of the parents, or a person granted access to the minor child by a court order, is a resident of California at the time of the alleged violation of Section 277, 278, or 278.5 by a person who was not a resident of or present in California at the time of the alleged offense.

(f) For purposes of Sections 277, 278, and 278.5:

(1) "A person having a right of custody" means the legal guardian of the child, a person who has a parent and child relationship with the child pursuant to Section 3010 of the Family Code, or a person or an agency that has been granted custody of the child pursuant to a court order.

(2) A "right of custody" means the right to physical custody of the child. In the absence of a court order to the contrary, a parent loses his or her right of custody of the child to the other parent if the parent having the right of custody is dead, is unable or refuses to take the custody, or has abandoned his or her family.

COLORADO

COLO. REV. STAT. § 18-3-304 (1986).
Violation of custody.

(1) Any person, including a natural or foster parent, who, knowing that he has no privilege to do so or heedless in that regard, takes or entices any child under the age of eighteen years from the custody of his parents, guardian, or other lawful custodian commits a class 5 felony.

(2) Any parent or other person who violates an order of any district or juvenile court of this state, granting the custody of a child under the age of eighteen years to any person, agency, or institution, with the intent to deprive the lawful custodian of the custody of a child under the age of eighteen years, commits a class 5 felony.

(3) It shall be an affirmative defense either that the offender reasonably believed that his conduct was necessary to preserve the child from danger to his welfare, or that the child, being at the time more than fourteen years old, was taken away at his own instigation without enticement and without purpose to commit a criminal offense with or against the child.

(4) Any criminal action charged pursuant to this section may be tried in either the county where the act is committed or in which the court issuing the orders granting custody is located, if such court is within this state.

CONNECTICUT

CONN. GEN. STAT. § 53a-97 (1992).
Custodial interference in the first degree: Class D felony.

(a) A person is guilty of custodial interference in the first degree when he commits custodial interference in the second degree as provided in section 53a-98: (1) Under circumstances which expose the child or person taken or enticed from lawful custody or the child held after a request by the lawful custodian for his return to a risk that his safety will be endangered or his health materially impaired; or (2) by taking or enticing the child or person out of this state.

(b) Custodial interference in the first degree is a class D felony.

CONN. GEN. STAT. § 53a-98 (1981).
Custodial interference in the second degree: Class A misdemeanor.

(a) A person is guilty of custodial interference in the second degree when: (1) Being a relative of a child who is less than sixteen years old and intending to hold such child permanently or for a protracted period and knowing that he has no legal right to do so, he takes or entices such child from his lawful custodian; (2) knowing that he has no legal right to do so, he takes or entices from lawful custody any incompetent person or any person entrusted by authority of law to the custody of another person or institution; or (3) knowing that he has no legal right to do so, he holds, keeps or otherwise refuses to return a child who is less than sixteen years old to such child's lawful custodian after a request by such custodian for the return of such child.

(b) Custodial interference in the second degree is a class A misdemeanor.

DELAWARE

DEL. CODE ANN. tit. 11, § 785 (1989).
Interference with custody; class G felony; class A misdemeanor [Amendment effective with respect to crimes committed June 30, 1990, or thereafter].

A person is guilty of interference with custody when:

(1) Being a relative of a child less than 16 years old, intending to hold the child permanently or for a prolonged period and knowing that he has no legal right to do so, he takes or entices the child from his lawful custodian; or

(2) Knowing that he has no legal right to do so, he takes or entices from lawful custody any incompetent person or other person entrusted by authority of law to the custody of another person or an institution.

Interference with custody is a class A misdemeanor except that if the person who interferes with the custody of a child thereafter causes the removal of said child from Delaware, it is a class G felony.

DISTRICT OF COLUMBIA

D.C. CODE ANN. § 16-1021 (1989).
Definitions.

For the purposes of this subchapter, the term:

(1) "Child" means a person under the age of 16 years of age.

(2) "District" means the District of Columbia.

(3) "Lawful custodian" means a person who is authorized to have custody by an order of the Superior Court of the District of Columbia or a court of competent jurisdiction of any state, or a person designated by the lawful custodian temporarily to care for the child.

(4) "Relative" means a parent, other ancestor, brother, sister, uncle, or aunt, or 1 [one] who has been lawful custodian at some prior time.

D.C. CODE ANN. § 16-1022 (1989).
Prohibited acts.

(a) No parent, or any person acting pursuant to directions from the parent, may intentionally conceal a child from the child's other parent.

(b) No relative, or any person acting pursuant to directions from the relative, who knows that another person is the lawful custodian of a child may:

(1) Abduct, take, or carry away a child with the intent to prevent a lawful custodian from exercising rights to custody of the child;

(2) Abduct, take, or carry away a child from a person with whom the relative has joint custody pursuant to an order, judgment, or decree of any court, with the intent to prevent a lawful custodian from exercising rights to custody to the child;

(3) Having obtained actual physical control of a child for a limited period of time in the exercise of the right to visit with or to be visited by the child or the right of limited custody of the child, pursuant to an order, judgment, or decree of any court, which grants custody of the child to another or jointly with the relative, with intent to harbor, secrete, detain, or conceal the child or to deprive a lawful custodian of the physical custody of the child, keep the child for more than 48 hours after a lawful custodian demands that the child be returned or makes all reasonable efforts to communicate a demand for the child's return;

(4) Having custody of a child pursuant to an order, judgment, or decree of any court, which grants another person limited rights to custody of the child or the right to visit with or to be visited by the child, conceal, harbor, secrete, or detain the child with intent to deprive the other person of the right of limited custody or visitation;

(5) Conceal, harbor, secrete, or detain the child knowing that physical custody of the child was obtained or retained by another in violation of this subsection with the intent to prevent a lawful custodian from exercising rights to custody to the child;

(6) Act as an aider and abettor, conspirator, or accessory to any of the actions forbidden by this section;

(7) After being served with process in an action affecting the family but prior to the issuance of a temporary or final order determining custody rights to a child, take or entice the child outside of the District for the purpose of depriving a lawful custodian of physical custody of the child; or

(8) After issuance of a temporary or final order specifying joint custody rights, take or entice a child from the other joint custodian in violation of the custody order.

D.C. CODE ANN. § 16-1023 (1989).
Defense to prosecution; continuous offenses; expenses; jurisdiction.

(a) No person violates this subchapter if the action:

(1) Is taken to protect the child from imminent physical harm;

(2) Is taken by a parent fleeing from imminent physical harm to the parent;

(3) Is consented to by the other parent; or

(4) Is otherwise authorized by law.

(b) If a person violates § 16-1022 of this subchapter, the person may file a petition in the Superior Court of the District of Columbia that:

(1) States that at the time the act was done, a failure to do the act would have resulted in a clear and present danger to the health, safety, or welfare of the child; and

(2) Seeks to establish custody, to transfer custody, or to revise or to clarify the existing custody order; except that if the Superior Court of the District of Columbia does not have jurisdiction over the custody issue, the person shall seek to establish, transfer, revise, or clarify custody in a court of competent jurisdiction.

(c) If a petition is filed as provided in subsection (b) of this section within 5 days of the action taken, exclusive of Saturdays, Sundays, and legal holidays, a finding by the court that, at the time the act was done, a failure to do the act would have resulted in a clear and present danger to the health, safety, or welfare of the child is a complete defense to prosecution under this subchapter.

(d) A law enforcement officer may take a child into protective custody if it reasonably appears to the officer that any person is in violation of this subchapter and unlawfully will flee the District with the child.

(e) A child who has been detained or concealed shall be returned by a law enforcement officer to the lawful custodian or placed in the custody of another entity authorized by law.

(f) The offenses prohibited by this subchapter are continuous in nature and continue for so long as the child is concealed, harbored, secreted, detained, or otherwise unlawfully physically removed from the lawful custodian.

(g) Any expenses incurred by the District in returning the child shall be reimbursed to the District by any person convicted of a violation of this subchapter. Those expenses and costs reasonably incurred by the lawful custodian and child victim as a result of a violation of this subchapter shall be assessed by the court against any person convicted of the violation.

(h) Any violation of this subchapter is punishable in the District, whether the intent to commit the offense is formed within or without the District, if the child was a resident of the District, present in the District at the time of the taking, or is later found in the District.

D.C. CODE ANN. § 16-1024 (1989).
Penalties.

(a) A person who violates any provision of § 16-1022 and who takes the child to a place within the District, or detains or conceals the child within the District of Columbia is guilty of a misdemeanor and on conviction is subject to fine not exceeding $250 or performance of community service not exceeding 240 hours, or both.

(b) A person who violates any provision of § 16-1022 and who takes the child to a place outside the District or detains or conceals the child outside the District shall be punished as follows:

(1) If the child is out of the custody of the lawful custodian for not more than 30 days, the person is guilty of a felony and on conviction is subject to a fine not exceeding $1,000 or imprisonment for 6 months, or both, except that if the person releases the child without injury in a safe place prior to arrest, the person is guilty of a misdemeanor and on conviction is subject to a fine not exceeding $250, or performance of community service not exceeding 240 hours, or imprisonment not exceeding 30 days, or a combination of all three.

(2) If the child is out of the custody of the lawful custodian for more than 30 days, the person is guilty of a felony and on conviction is subject to a fine not exceeding $5,000 or imprisonment for 1 year, or both, except that if the person releases the child without injury in a safe place prior to arrest, the person is guilty of a misdemeanor and, on conviction, is subject to a fine not exceeding $500 or imprisonment not exceeding 60 days, or both.

FLORIDA

FLA. STAT. ch. 787.03 (1994).
Interference with custody.

(1) Whoever, without lawful authority, knowingly or recklessly takes or entices, or aids, abets, hires, or otherwise procures another to take or entice, any child 17 years of age or under or any incompetent person from the custody of his parent, his guardian, a public agency having the lawful charge of the child or incompetent person, or any other lawful custodian commits the offense of interference with custody and shall be guilty of a felony of the third degree, punishable as provided in § 775.082, § 775.083, or § 775.084.

(2) In the absence of a court order determining rights to custody or visitation with any child 17 years of age or under or with any incompetent person, any parent of the child or incompetent person, whether natural or adoptive, stepparent, legal guardian, or relative of such child or incompetent person who has custody thereof and who takes, detains, conceals, or entices away that child or incompetent person within or without the state, with malicious intent to deprive another person of his right to custody of the child or incompetent person, shall be guilty of a felony of the third degree, punishable as provided in § 775.082, § 775.083, or § 775.084.

(3) A subsequently obtained court order for custody or visitation shall not affect application of this section.

(4) It is a defense that:

(a) The defendant reasonably believes that his action was necessary to preserve the child or the incompetent person from danger to his welfare.

(b) The child or incompetent person was taken away at his own instigation without enticement and without purpose to commit a criminal offense with or against the child or incompetent person.

(5) Proof that a child was 17 years of age or under creates the presumption that the defendant knew the child's age or acted in reckless disregard thereof.

(6) This section shall not apply in cases where a spouse who is the victim of any act of domestic violence or who has reasonable cause to believe he or she is about to become the victim of any act of domestic violence, as defined in § 741.28, or believes that his or her action was necessary to preserve the child or the incompetent person from danger to his welfare seeks shelter from such acts or possible acts and takes with him or her any child 17 years of age or younger.

FLA. STAT. ch. 787.04 (1988).
Felony to remove minors from state or to conceal minors contrary to state agency or court order.

(1) It is unlawful for any person, in violation of a court order, to lead, take, entice, or remove a minor beyond the limits of this state, or to conceal the location of a minor, with personal knowledge of the order.

(2) It is unlawful for any person, with criminal intent, to lead, take, entice, or remove a minor beyond the limits of this state, or to conceal the location of a minor, during the pendency of any action or proceeding affecting custody of the minor, after having received notice as required by law of the pendency of the action or proceeding, without the permission of the court in which the action or proceeding is pending.

(3) It is unlawful for any person, with criminal intent, to lead, take, entice, or remove a minor beyond the limits of this state, or to conceal the location of a minor, during the pendency of a dependency proceeding affecting such a minor or during the pendency of any investigation, action, or proceeding concerning the alleged abuse or neglect of such minor, after having received notice of the pendency of such investigation, action, or proceeding and without the permission of the state agency or court in which the investigation, action, or proceeding is pending.

(4) It is unlawful for any person, who has carried beyond the limits of this state any minor whose custody is involved in any action or proceeding pending in this state pursuant to the order of the court in which the action or proceeding is pending or pursuant to the permission of the court, thereafter, to fail to produce the minor in the court or deliver the minor to the person designated by the court.

(5) It is a defense under this section that a person who leads, takes, entices, or removes a minor beyond the limits of the state reasonably believes that his action was necessary to protect the minor from child abuse as defined in § 827.04.

(6) Any person who violates this section is guilty of a felony of the third degree, punishable as provided in § 775.082, § 775.083, or § 775.084.

GEORGIA

GA. CODE ANN. § 16-5-45 (1987).
Interference with custody.

(a) As used in this Code section, the term:

(1) "Committed person" means any child or other person whose custody is entrusted to another individual by authority of law.

(2) "Child" means any individual who is under the age of 17 years or any individual who is under the age of 18 years who is alleged to be a deprived child as such is defined in Code Section 15-11-2, relating to juvenile proceedings.

(3) "Lawful custody" means that custody inherent in the natural parents, that custody awarded by proper authority as provided in Code Section 15-11-17, or that custody awarded to a parent, guardian, or other person by a court of competent jurisdiction.

(b)(1) A person commits the offense of interference with custody when without lawful authority to do so the person:

(A) Knowingly or recklessly takes or entices any child or committed person away from the individual who has lawful custody of such child or committed person;

(B) Knowingly harbors any child or committed person who has absconded; or

(C) Intentionally and willfully retains possession within this state of the child or committed person upon the expiration of a lawful period of visitation with the child or committed person.

(2) A person convicted of the offense of interference with custody shall be punished as follows:

(A) Upon conviction of the first offense, the defendant shall be guilty of a misdemeanor and shall be fined not less than $200.00 nor more than $500.00 or shall be imprisoned for not less than one month nor more than five months, or both fined and imprisoned;

(B) Upon conviction of the second offense, the defendant shall be guilty of a misdemeanor and shall be fined not less than $400.00 nor more than $1,000.00 or shall be imprisoned for not less than three months nor more than 12 months, or both fined and imprisoned; and

(C) Upon the conviction of the third and subsequent offense, the defendant shall be guilty of a felony and shall be punished by imprisonment for not less than one nor more than five years.

(c)(1) A person commits the offense of interstate interference with custody when without lawful authority to do so the person knowingly or recklessly takes or entices any minor or committed person away from the individual who has lawful custody of such minor or committed person and in so doing brings such minor or committed person into this state or removes such minor or committed person from this state.

(2) A person also commits the offense of interstate interference with custody when the person removes a minor or committed person from this state in the lawful exercise of a visitation right and, upon the expiration of the period of lawful visitation, intentionally retains possession of the minor or committed person in another state for the purpose of keeping the minor or committed person away from the individual having lawful custody of

the minor or committed person. The offense is deemed to be committed in the county to which the minor or committed person was to have returned upon expiration of the period of lawful visitation.

(3) A person convicted of the offense of interstate interference with custody shall be guilty of a felony and shall be imprisoned for not less than one year nor more than five years.

HAWAII

HAW. REV. STAT. § 707-726 (1994).
Custodial interference in the first degree.

(1) A person commits the offense of custodial interference in the first degree if:

(a) A relative of a minor:

(i) Intentionally or knowingly violates a court order issued pursuant to chapter 586, or the person intentionally or knowingly takes, entices, conceals, or detains the minor from any other person who has a right to custody pursuant to a court order, judgment, or decree; and

(ii) Removes minor from the State; or

(b) The relative intentionally or knowingly takes, entices, conceals, or detains a child less than eleven years old from that child's lawful custodian, knowing that the relative had no right to do so.

(2) Custodial interference in the first degree is a class C felony.

HAW. REV. STAT. § 707-727 (1994).
Custodial interference in the second degree.

(1) A person commits the offense of custodial interference in the second degree if:

(a) The person intentionally or knowingly takes, entices, conceals, or detains a minor knowing that the person has no right to do so; or

(b) The person intentionally or knowingly takes, entices, conceals, or detains from lawful custody any incompetent person, or other person entrusted by authority of law to the custody of another person or an institution.

(2) Custodial interference in the second degree is a misdemeanor, if the minor or incompetent person is taken, enticed, concealed, or detained within the State. If the minor or incompetent person is taken, enticed, concealed, or detained outside of the state under this section, custodial interference in the second degree is a class C felony.

IDAHO

IDAHO CODE § 18-4506 (1987).
Child custody interference defined — Defenses — Punishment.

1. A person commits child custody interference if the person, whether a parent or other, or agent of that person, intentionally and without lawful authority:

(a) Takes, entices away, keeps or withholds any minor child from a parent or another person or institution having custody, joint custody, visitation or other parental rights, whether such rights arise from temporary or permanent custody order, or from the equal custodial rights of each parent in the absence of a custody order; or

(b) Takes, entices away, keeps or withholds a minor child from a parent after commencement of an action relating to child visitation or custody but prior to the issuance of an order determining custody or visitation rights.

2. It shall be an affirmative defense to a violation of the provisions of subsection 1. of this section that:

(a) The action is taken to protect the child from imminent physical harm;

(b) The action is taken by a parent fleeing from imminent physical harm to himself;

(c) The action is consented to by the lawful custodian of the child; or

(d) The child is returned within twenty-four (24) hours after expiration of an authorized visitation privilege.

3. A violation of the provisions of subsection 1. of this section shall be a felony, unless the defendant did not take the child outside the state, and the child was voluntarily returned unharmed prior to the defendant's arrest in which case the violation shall be reduced to a misdemeanor.

4. Any reasonable expenses incurred by a lawful custodian in locating or attempting to locate a child taken in violation of the provisions of subsection 1. of this section may be assessed against the defendant at the court's discretion in accordance with chapter 53, title 19, Idaho Code.

ILLINOIS

720 ILL. COMP. STAT. § 5/10-5 (1992).
Child Abduction.

(a) For purposes of this Section, the following terms shall have the following meanings:

(1) "Child" means a person under the age of 18 or an institutionalized severely or profoundly mentally retarded person at the time the alleged violation occurred; and

(2) "Detains" means taking or retaining physical custody of a child, whether or not the child resists or objects; and

(3) "Lawful custodian" means a person or persons granted legal custody of a child or entitled to physical possession of a child pursuant to a court order. It is presumed that, when the parties have never been married to each other, the mother has legal custody of the child unless a valid court order states otherwise. If an adjudication of paternity has been completed and the father has been assigned support obligations or visitation rights, such a paternity order should, for the purposes of this Section, be considered a valid court order granting custody to the mother.

(b) A person commits child abduction when he or she:

(1) Intentionally violates any terms of a valid court order granting sole or joint custody, care or possession to another, by concealing or detaining the child or removing the child from the jurisdiction of the court; or

(2) Intentionally violates a court order prohibiting the person from concealing or detaining the child or removing the child from the jurisdiction of the court; or

(3) Intentionally conceals, detains or removes the child without the consent of the mother or lawful custodian of the child if the person is a putative father and either: (A) the paternity of the child has not been legally established or (B) the paternity of the child has been legally established but no orders relating to custody have been entered. However, notwithstanding the presumption created by paragraph (3) of subsection (a), a mother commits child abduction when she intentionally conceals or removes a child, whom she has abandoned or relinquished custody of, from an unadjudicated father who has provided sole ongoing care and custody of the child in her absence; or

(4) Intentionally conceals or removes the child from a parent after filing a petition or being served with process in an action affecting marriage or paternity but prior to the issuance of a temporary or final order determining custody; or

(5) At the expiration of visitation rights outside the State, intentionally fails or refuses to return or impedes the return of the child to the lawful custodian in Illinois; or

(6) Being a parent of the child, and where the parents of such child are or have been married and there has been no court order of custody, conceals the child for 15 days, and fails to make reasonable attempts within the 15 day period to notify the other parent as to the specific whereabouts of the child, including a means by which to contact such child, or to arrange reasonable visitation or contact with the child. It is not a violation of this Section for a person fleeing domestic violence to take the child with him or her to housing provided by a domestic violence program; or

(7) Being a parent of the child, and where the parents of the child are or have been married and there has been no court order of custody, conceals, detains, or removes the child with physical force or threat of physical force; or

(8) Conceals, detains, or removes the child for payment or promise of payment at the instruction of a person who has no legal right to custody; or

(9) Retains in this State for 30 days a child removed from another state without the consent of the lawful custodian or in violation of a valid court order of custody; or

(10) Intentionally lures or attempts to lure a child under the age of 16 into a motor vehicle, building, housetrailer, or dwelling place without the consent of the parent or lawful custodian of the child for other than a lawful purpose.

For the purposes of this subsection (b), paragraph (10), the luring or attempted luring of a child under the age of 16 into a motor vehicle, building, housetrailer, or dwelling place without the consent of the parent or lawful custodian of the child shall be prima facie evidence of other than a lawful purpose.

(c) It shall be an affirmative defense that:

(1) The person had custody of the child pursuant to a court order granting legal custody or visitation rights which existed at the time of the alleged violation; or

(2) The person had physical custody of the child pursuant to a court order granting legal custody or visitation rights and failed to return the child as a result of circumstances beyond his or her control, and the person notified and disclosed to the other parent or legal custodian the specific whereabouts of the child and a means by which such child can be contacted or made a reasonable attempt to notify the other parent or lawful custodian of the child of such circumstances and make such disclosure within 24 hours after the visitation period had expired and returned the child as soon as possible; or

(3) The person was fleeing an incidence or pattern of domestic violence; or

(4) The person lured or attempted to lure a child under the age of 16 into a motor vehicle, building, housetrailer, or dwelling place for a lawful purpose in prosecutions under subsection (b), paragraph (10).

(d) A person convicted of child abduction under this Section is guilty of a Class 4 felony. It shall be a factor in aggravation for which a court may impose a more severe sentence under Section 5-8-1 of the Unified Code of Corrections [730 ILCS 5/5-8-1], if upon sentencing the court finds evidence of any of the following aggravating factors:

(1) that the defendant abused or neglected the child following the concealment, detention or removal of the child; or

(2) that the defendant inflicted or threatened to inflict physical harm on a parent or lawful custodian of the child or on the child with intent to cause such parent or lawful custodian to discontinue criminal prosecution of the defendant under this Section; or

(3) that the defendant demanded payment in exchange for return of the child or demanded that he or she be relieved of the financial or legal obligation to support the child in exchange for return of the child; or

(4) that the defendant has previously been convicted of child abduction; or

(5) that the defendant committed the abduction while armed with a deadly weapon or the taking of the child resulted in serious bodily injury to another.

(e) The court may order the child to be returned to the parent or lawful custodian from whom the child was concealed, detained or removed. In addition to any sentence imposed, the court may assess any reasonable expense incurred in searching for or returning the child against any person convicted of violating this Section.

(f) Nothing contained in this Section shall be construed to limit the court's contempt power.

(g) Every law enforcement officer investigating an alleged incident of child abduction shall make a written police report of any bona fide allegation and the disposition of such investigation. Every police report completed pursuant to this Section shall be compiled and recorded within the meaning of Section 5.1 of "An Act in relation to criminal identification and investigation", approved July 2, 1931, as now or hereafter amended [20 ILCS 2630/5.1].

(h) Whenever a law enforcement officer has reasons to believe a child abduction has occurred, he shall provide the lawful custodian a summary of her or his rights under this Act, including the procedures and relief available to her or him.

(i) If during the course of an investigation under this Section the child is found in the physical custody of the defendant or another, the law enforcement officer shall return the child to the parent or lawful custodian from whom the child was concealed, detained or removed, unless there is good cause for the law enforcement officer or the Department of Children and Family Services to retain temporary protective custody of the child pursuant to the Abused and Neglected Child Reporting Act as now or hereafter amended [320 ILCS 5/1 et. seq.].

720 ILL. COMP. STAT. § 5/10-5.5 (1993).
Unlawful visitation interference.

(a) As used in this Section, the terms "child", "detain", and "lawful custodian" shall have the meanings ascribed to them in Section 10-5 of this Code.

(b) Every person who, in violation of the visitation provisions of a court order relating to child custody, detains or conceals a child with the intent to deprive another person of his or her rights to visitation shall be guilty of unlawful visitation interference.

(c) A person committing unlawful visitation interference is guilty of a petty offense. However, any person violating this Section after 2 prior convictions of unlawful visitation interference is guilty of a Class A misdemeanor.

(d) Any law enforcement officer who has probable cause to believe that a person has committed or is committing an act in violation of this Section shall issue to that person a notice to appear.

(e) The notice shall:

(1) be in writing;

(2) state the name of the person and his address, if known;

(3) set forth the nature of the offense;

(4) be signed by the officer issuing the notice; and

(5) request the person to appear before a court at a certain time and place.

(f) Upon failure of the person to appear, a summons or warrant of arrest may be issued.

(g) It is an affirmative defense that:

(1) a person or lawful custodian committed the act to protect the child from imminent physical harm, provided that the defendant's belief that there was physical harm imminent was reasonable and that the defendant's conduct in withholding visitation rights was a reasonable response to the harm believed imminent;

(2) the act was committed with the mutual consent of all parties having a right to custody and visitation of the child; or

(3) the act was otherwise authorized by law.

(h) A person convicted of unlawful visitation interference shall not be subject to a civil contempt citation for the same conduct for violating visitation provisions of a court order issued under the Illinois Marriage and Dissolution of Marriage Act.

720 ILL. COMP. STAT. § 5/10-7 (1992).
Aiding and abetting child abduction.

(a) A person violates this Section when:

(i) Before or during the commission of a child abduction as defined in Section 10-5 [720 ILCS 5/10-5] and with the intent to promote or facilitate such offense, he or she intentionally aids or abets another in the planning or commission of child abduction, unless before the commission of the offense he or she makes proper effort to prevent the commission of the offense; or

(ii) With the intent to prevent the apprehension of a person known to have committed the offense of child abduction, or with the intent to obstruct or prevent efforts to locate the child victim of a child abduction, he or she knowingly destroys, alters, conceals or disguises physical evidence or furnishes false information.

(b) Sentence. A person who violates this Section commits a Class 4 felony.

INDIANA

IND. CODE § 35-42-3-4 (1990).
Interference with Custody.

(a) A person who knowingly or intentionally:

(1) Removes another person who is less than eighteen (18) years of age to a place outside Indiana when the removal violates a child custody order of a court; or

(2) Removes another person who is less than eighteen (18) years of age to a place outside Indiana and violates a child custody order of a court by failing to return the other person to Indiana;

commits interference with custody, a Class D felony. However, the offense is a Class C felony if the other person is less than fourteen (14) years of age and is not the person's child, and a Class B felony if the offense is committed while armed with a deadly weapon or results in serious bodily injury to another person.

(b) A person who with the intent to deprive another person of custody or visitation rights:

(1) Knowingly or intentionally takes and conceals; or

(2) Knowingly or intentionally detains and conceals;

a person who is less than eighteen (18) years of age commits interference with custody, a Class C misdemeanor. However, the offense is a Class B misdemeanor if the taking and concealment, or the detention and concealment, is in violation of a court order.

(c) With respect to a violation of this section, a court may consider as a mitigating circumstance the accused person's return of the other person in accordance with the child custody order within seven (7) days after the removal.

(d) The offenses described in this section continue as long as the child is concealed or detained, or both.

(e) If a person is convicted of an offense under this section, a court may impose against the defendant reasonable costs incurred by a parent or guardian of the child because of the taking, detention, or concealment of the child.

IOWA

IOWA CODE § 710.6 (1986).
Violating custodial order.

A relative of a child who, acting in violation of an order of any court which fixes, permanently or temporarily, the custody or physical care of the child in another, takes and conceals the child, within or outside the state, from the person having lawful custody or physical care, commits a class "D" felony.

A parent of a child living apart from the other parent who conceals that child or causes that child's whereabouts to be unknown to a parent with visitation rights or parental time in violation of a court order granting visitation rights or parental time and without the other parent's consent, commits a serious misdemeanor.

KANSAS

KAN. STAT. ANN. § 21-3422 (1993).
Interference with parental custody.

(a) Interference with parental custody is leading, taking, carrying away, decoying or enticing away any child under the age of 16 years, with the intent to detain or conceal such child from its parent, guardian, or other person having the lawful charge of such child.

(b) It is not a defense to a prosecution under this section that the defendant is a parent entitled to joint custody of the child either on the basis of a court order or by virtue of the absence of a court order.

(c) Interference with parental custody is a class A person misdemeanor if the perpetrator is a parent entitled to joint custody of the child either on the basis of a court order or by virtue of the absence of a court order. Interference with parental custody is a severity level 10, person felony in all other cases.

KAN. STAT. ANN. § 21-3422a (1993).
Aggravated interference with parental custody.

(a) Aggravated interference with parental custody is:

(1) Hiring someone to commit the crime of interference with parental custody, as defined by K.S.A. 21-3422 and amendments thereto; or

(2) the commission of interference with parental custody, as defined by K.S.A. 21-3422 and amendments thereto, by a person who:

(A) Has previously been convicted of the crime;

(B) commits the crime for hire;

(C) takes the child outside the state without the consent of either the person having custody or the court;

(D) after lawfully taking the child outside the state while exercising visitation or custody rights, refuses to return the child at the expiration of the rights;

(E) at the expiration of visitation or custody rights outside the state, refuses to return or impedes the return of the child; or

(F) detains or conceals the child in an unknown place, whether inside or outside the state.

(b) Aggravated interference with parental custody is a severity level 7, person felony.

(c) This section shall be a part of and supplemental to the Kansas criminal code.

KENTUCKY

KY. REV. STAT. ANN. § 509.070 (1984).
Custodial interference.

(1) A person is guilty of custodial interference when, knowing that he has no legal right to do so, he takes, entices or keeps from lawful custody any mentally disabled or other person entrusted by authority of law to the custody of another person or to an institution.

(2) It is a defense to custodial inference that the person taken from lawful custody was returned by the defendant voluntarily and before arrest or the issuance of a warrant for arrest.

(3) Custodial interference is a Class D felony unless the person taken from lawful custody is returned voluntarily by the defendant.

LOUISIANA

LA. REV. STAT. ANN. § 14:45 (1980).
Simple kidnapping.

A. Simple kidnapping is:

(1) The intentional and forcible seizing and carrying of any person from one place to another without his consent; or

(2) The intentional taking, enticing or decoying away, for an unlawful purpose, of any child not his own and under the age of fourteen years, without the consent of its parent or the person charged with its custody; or

(3) The intentional taking, enticing or decoying away, without the consent of the proper authority, of any person who has been lawfully committed to any orphan, insane, feeble-minded or other similar institution.

(4) The intentional taking, enticing or decoying away and removing from the state, by any parent of his or her child, from the custody of any person to whom custody has been awarded by any court of competent jurisdiction of any state, without the consent of the legal custodian, with intent to defeat the jurisdiction of the said court over the custody of the child.

(5) The taking, enticing or decoying away and removing from the state, by any person, other than the parent, of a child temporarily placed in his custody by any court of competent jurisdiction in the state, with intent to defeat the jurisdiction of said court over the custody of the child.

B. Whoever commits the crime of simple kidnapping shall be fined not more than five thousand dollars, imprisoned with or without hard labor for not more than five years, or both.

LA. REV. STAT. ANN. § 14:45.1 (1981).
Interference with the custody of a child.

A. Interference with the custody of a child is the intentional taking, enticing, or decoying away of a minor child by a parent not having a right of custody, with intent to detain or conceal such child from a parent having a right of custody pursuant to a court order or from a person entrusted with the care of the child by a parent having custody pursuant to a court order.

It shall be an affirmative defense that the offender reasonably believed his actions were necessary to protect the welfare of the child.

B. Whoever commits the crime of interference with the custody of a child shall be fined not more than five hundred dollars or be imprisoned for not more than six months, or both. Costs of returning a child to the jurisdiction of the court shall be assessed against any defendant convicted of a violation of this Section, as court costs as provided by the Louisiana Code of Criminal Procedure.

MAINE

ME. REV. STAT. ANN. tit. 17-A, § 303 (1981).
Criminal restraint by parent.

1. A person is guilty of criminal restraint by parent if, being the parent of a child under the age of 16, and knowing he has no legal right to do so, he:

   A. Takes, retains or entices the child from the custody of his other parent, guardian or other lawful custodian with the intent to remove the child from the State or to secrete him and hold him in a place where he is not likely to be found; or

   B. Takes, retains or entices the child from the custody of his other parent, guardian or other lawful custodian, whose custodial authority was established by a court of this State, in the state in which the child is residing with his legal custodian with the intent to remove the child from that state or to secrete him and hold him in a place where he is not likely to be found.

2. Consent by the person taken, enticed or retained is not a defense under this section.

3. A law enforcement officer shall not be held liable for taking physical custody of a child whom he reasonably believes has been taken, retained or enticed in violation of this section and for delivering the child to a person whom he reasonably believes is the child's lawful custodian or to any other suitable person.

   For purposes of this subsection, "reasonable belief a child has been taken, retained or enticed in violation of this section" includes, but is not limited to, a determination by a law enforcement officer, based on his review of the terms of a certified copy of the most recent court decree granting custody of the child, that the parent who is exercising control over the child is not the person authorized to have custody under terms of the decree.

4. A law enforcement officer may arrest without a warrant any person who he has probable cause to believe has violated or is violating this section.

5. Criminal restraint by parent is a Class C crime.

MARYLAND

MD. CODE ANN., FAM. LAW § 9-301 (1995).
Definitions.

(a) *In general.* — In this subtitle the following words have the meanings indicated.

(b) *Lawful custodian.* —

(1) "Lawful custodian" means a person who is authorized to have custody of and exercise control over a child who is under the age of 16 years.

(2) "Lawful custodian" includes a person who is authorized to have custody by an order of a court of competent jurisdiction in this State or any other state.

(c) *Relative.* — "Relative" means:

(1) a parent;
(2) a grandparent or other ancestor;
(3) a brother;
(4) a sister;
(5) an aunt;
(6) an uncle; or
(7) an individual who was a lawful custodian before the commission of an act that violates § 9-304 or § 9-305 of this subtitle.

MD. CODE ANN., FAM. LAW § 9-304 (1995).
Prohibited acts—In this State.

If a child is under the age of 16 years, a relative who knows that another person is the lawful custodian of the child may not:

(1) abduct, take, or carry away the child from the lawful custodian to a place within this State;

(2) having acquired lawful possession of the child, detain the child within this State for more than 48 hours after the lawful custodian demands that the child be returned;

(3) harbor or hide the child within this State, knowing that possession of the child was obtained by another relative in violation of this section; or

(4) act as an accessory to an act prohibited by this section.

MD. CODE ANN., FAM. LAW § 9-305 (1995).
Same—Outside of this State.

If a child is under the age of 16 years, a relative who knows that another person is the lawful custodian of the child may not:

(1) abduct, take, or carry away the child from the lawful custodian to a place outside of this State;

(2) having acquired lawful possession of the child, detain the child outside of this State for more than 48 hours after the lawful custodian demands that the child be returned;

(3) harbor or hide the child outside of this State knowing that possession of the child was obtained by another relative in violation of this section; or

(4) act as an accessory to an act prohibited by this section.

MD. CODE ANN., FAM. LAW § 9-306 (1984).
Clear and present danger to child.

(a) *Petition.* — If an individual violates the provisions of § 9-304 or § 9-305 of this subtitle, the individual may file in an equity court a petition that:

(1) states that, at the time the act was done, a failure to do the act would have resulted in a clear and present danger to the health, safety, or welfare of the child; and

(2) seeks to revise, amend, or clarify the custody order.

(b) *Defense.* — If a petition is filed as provided in subsection (a) of this section within 96 hours of the act, a finding by the court that, at the time the act was done, a failure to do the act would have resulted in a clear and present danger to the health, safety, or welfare of the child is a complete defense to any action brought for a violation of § 9-304 or § 9-305 of this subtitle.

MD. CODE ANN., FAM. LAW § 9-307 (1984).
Penalties.

(a) *Violation of § 9-304.* — A person who violates any provision of § 9-304 of this subtitle is guilty of a misdemeanor and on conviction is subject to a fine not exceeding $250 or imprisonment not exceeding 30 days.

(b) *Violation of § 9-305. — Not more than 30 days.* — If the child is out of the custody of the lawful custodian for not more than 30 days, a person who violates any provision of § 9-305 of this subtitle is guilty of a felony and on conviction is subject to a fine not exceeding $250 or imprisonment not exceeding 30 days, or both.

(c) *Same — More than 30 days.* — If the child is out of the custody of the lawful custodian for more than 30 days, a person who violates any provision of § 9-305 of this subtitle is guilty of a felony and on conviction is subject to a fine not exceeding $1,000 or imprisonment not exceeding 1 year, or both.

MASSACHUSETTS

MASS. GEN. L. ch. 265, § 26A (1983).
Custodial Interference by Relatives.

Whoever, being a relative of a child less than eighteen years old, without lawful authority, holds or intends to hold such a child permanently or for a protracted period, or takes or entices such a child from his lawful custodian, or takes or entices from lawful custody any incompetent person or other person entrusted by authority of law to the custody of another person or institution shall be punished by imprisonment in the house of correction for not more than one year or by a fine of up to one thousand dollars, or both. Whoever commits any offense described in this section by taking or holding said child outside the commonwealth or under circumstances which expose the person taken or enticed from lawful custody to a risk which endangers his safety shall be punished by a fine of not more than five thousand dollars, or by imprisonment in the state prison for not more than five years, or by both such fine and imprisonment.

MASS. GEN. L. ch. 265, § 27A (1979).
Venue in Cases of Custodial Interference by Relatives.

A crime described in section twenty-six A may be tried in the county where committed or in a county in or to which the person so taken or enticed is held, carried to, or brought.

MICHIGAN

MICH. COMP. LAWS § 750.350a (1986).
Detention or concealment by adoptive or natural parents; penalty; restitution; probation; defense.

(1) An adoptive or natural parent of a child shall not take that child, or retain that child for more than 24 hours, with the intent to detain or conceal the child from any other parent or legal guardian of the child who has custody or visitation rights pursuant to a lawful court order at the time of the taking or retention, or from the person or persons who have adopted the child, or from any other person having lawful charge of the child at the time of the taking or retention.

(2) A person who violates subsection (1) is guilty of a felony, punishable by imprisonment for not more than 1 year and 1 day, or a fine of not more than $2,000.00, or both.

(3) A person who violates this section, upon conviction, in addition to any other punishment, may be ordered to make restitution to the other parent, legal guardian, the person or persons who have adopted the child, or any other person having lawful charge of the child for any financial expense incurred as a result of attempting to locate and having the child returned.

(4) When a person who has not been convicted previously of a violation of section 349, 350, or this section, or under any statute of the United States or of any state related to kidnapping, pleads guilty to, or is found guilty of, a violation of this section, the court, without entering a judgment of guilt and with the consent of the accused, may defer further proceedings and place the person on probation with lawful terms and conditions. Upon a violation of a term or condition of probation, the court may enter an adjudication of guilt and proceed as otherwise provided. Upon fulfillment of the terms and conditions of probation, the court shall discharge the individual and dismiss the proceedings against the person. Discharge and dismissal under this subsection shall be without adjudication of guilt and is not a conviction for purposes of disqualifications or disabilities imposed by law upon conviction of a crime, including any additional penalties imposed for second or subsequent convictions. The department of state police shall retain a nonpublic record of an arrest and discharge and dismissal under this section. This record shall be furnished to a court or police agency upon request for the purpose of showing that a defendant in a criminal action has already availed himself or herself of this section.

(5) It shall be a complete defense under this section if an adoptive or natural parent proves that his or her actions were taken for the purpose of protecting the child from an immediate and actual threat of physical or mental harm, abuse, or neglect.

MINNESOTA

MINN. STAT. § 609.26 (1991).
Depriving another of custodial or parental rights.

Subdivision 1. Prohibited acts. Whoever intentionally does any of the following acts may be charged with a felony and, upon conviction, may be sentenced as provided in subdivision 6:

(1) conceals a minor child from the child's parent where the action manifests an intent substantially to deprive that parent of parental rights or conceals a minor child from another person having the right to visitation or custody where the action manifests an intent to substantially deprive that person of rights to visitation or custody;

(2) takes, obtains, retains, or fails to return a minor child in violation of a court order which has transferred legal custody under chapter 260 to the commissioner of human services, a child placing agency, or the county welfare board;

(3) takes, obtains, retains, or fails to return a minor child from or to the parent in violation of a court order, where the action manifests an intent substantially to deprive that parent of rights to visitation or custody;

(4) takes, obtains, retains, or fails to return a minor child from or to a parent after commencement of an action relating to child visitation or custody but prior to the issuance of an order determining custody or visitation rights, where the action manifests an intent substantially to deprive that parent of parental rights; or

(5) retains a child in this state with the knowledge that the child was removed from another state in violation of any of the above provisions.

Subd. 2. Defenses. It is an affirmative defense if a person charged under subdivision 1 proves that:

(1) the person reasonably believed the action taken was necessary to protect the child from physical or sexual assault or substantial emotional harm;

(2) the person reasonably believed the action taken was necessary to protect the person taking the action from physical or sexual assault;

(3) the action taken is consented to by the parent, stepparent, or legal custodian seeking prosecution, but consent to custody or specific visitation is not consent to the action of failing to return or concealing a minor child; or

(4) the action taken is otherwise authorized by a court order issued prior to the violation of subdivision 1.

The defenses provided in this subdivision are in addition to and do not limit other defenses available under this chapter or chapter 611.

Subd. 3. Venue. A person who violates this section may be prosecuted and tried either in the county in which the child was taken, concealed, or detained or in the county of lawful residence of the child.

Subd. 4. Return of child; costs. A child who has been concealed, obtained, or retained in violation of this section shall be returned to the person having lawful custody of the child or shall be taken into custody pursuant to section 260.165, subdivision 1, paragraph (c), clause (2). In addition to any sentence imposed, the court may assess any expense incurred in returning the child against any person convicted of violating this section. The court may direct the appropriate county welfare agency to provide counseling services to a child who has been returned pursuant to this subdivision.

Subd. 5. Dismissal of charge. A felony charge brought under this section shall be dismissed if:

(a) the person voluntarily returns the child within 48 hours after taking, detaining, or failing to return the child in violation of this section; or

(b)(1) the person taking the action and the child have not left the state of Minnesota; and (2) within a period of seven days after taking the action, (i) a motion or proceeding under chapter 518, 518A, 518B, or 518C is commenced by the person taking the action, or (ii) the attorney representing the person taking the action has consented to service of process by the party whose rights are being deprived, for any motion or action pursuant to chapter 518, 518A, 518B, or 518C.

Clause (a) does not apply if the person returns the child as a result of being located by law enforcement authorities.

This subdivision does not prohibit the filing of felony charges or an offense report before the expiration of the 48 hours.

Subd. 6. Penalty. Except as otherwise provided in subdivision 5, whoever violates this section may be sentenced as follows:

(1) to imprisonment for not more than two years or to payment of a fine of not more than $4,000, or both; or

(2) to imprisonment for not more than four years or to payment of a fine of not more than $8,000, or both, if the court finds that:

(i) the defendant committed the violation while possessing a dangerous weapon or caused substantial bodily harm to effect the taking;

(ii) the defendant abused or neglected the child during the concealment, detention, or removal of the child;

(iii) the defendant inflicted or threatened to inflict physical harm on a parent or lawful custodian of the child or on the child with intent to cause the parent or lawful custodian to discontinue criminal prosecution;

(iv) the defendant demanded payment in exchange for return of the child or demanded to be relieved of the financial or legal obligation to support the child in exchange for return of the child; or

(v) the defendant has previously been convicted under this section or a similar statute of another jurisdiction.

Subd. 7. Reporting of deprivation of parental rights. Any violation of this section shall be reported pursuant to section 626.556, subdivision 3a.

MISSISSIPPI

MISS. CODE ANN. § 97-3-51 (1984).

Interstate removal of child under age fourteen by noncustodial parent or relative.

(1) For the purposes of this section, the following terms shall have the meanings herein ascribed unless the context otherwise clearly requires:

(a) "Child" means a person under the age of fourteen (14) years at the time a violation of this section is alleged to have occurred.

(b) "Court order" means an order, decree or judgment of any court of this state which is competent to decide child custody matters.

(2) It shall be unlawful for any noncustodial parent or relative with intent to violate a court order awarding custody of a child to another to remove the child from this state.

(3) Any person convicted of a violation of subsection (2) of this section shall be guilty of a felony and may be punished by a fine of not more than two thousand dollars ($2,000.00), or by imprisonment in the state penitentiary for a term not to exceed three (3) years, or by both such fine and imprisonment.

(4) The provisions of this section shall not be construed to repeal, modify or amend any other criminal statute of this state.

MISSOURI

MO. REV. STAT. § 565.149 (1988).
Definitions.

As used in sections 565.149 to 565.169, the following words and phrases mean:

(1) "Child", a person under seventeen years of age;

(2) "Legal custody", the right to the care, custody and control of a child;

(3) "Parent", either a biological parent or a parent by adoption;

(4) "Person having a right of custody", a parent or legal guardian of the child.

MO. REV. STAT. § 565.150 (1988).
Interference with custody — penalty.

1. A person commits the crime of interference with custody if, knowing that he has no legal right to do so, he takes or entices from legal custody any person entrusted by order of a court to the custody of another person or institution.
2. Interference with custody is a class A misdemeanor unless the person taken or enticed away from legal custody is removed from this state, detained in another state or concealed, in which case it is a class D felony.

MO. REV. STAT. § 565.153 (1988).
Parental kidnapping — penalty.

1. In the absence of a court order determining rights of custody or visitation to a child, a person having a right of custody of the child commits the crime of parental kidnapping if he removes, takes, detains, conceals, or entices away that child within or without the state, without good cause, and with the intent to deprive the custody right of another person or a public agency also having a custody right to that child.
2. Parental kidnapping is a class D felony.
3. A subsequently obtained court order for custody or visitation shall not affect the application of this section.

MO. STAT. ANN. § 565.156 (1988).
Child abduction — penalty.

1. A person commits the crime of child abduction if he or she:

(1) Intentionally takes, detains, entices, conceals or removes a child from a parent after being served with process in an action affecting marriage or paternity but prior to the issuance of a temporary or final order determining custody;

(2) At the expiration of visitation rights outside the state, intentionally fails or refuses to return or impedes the return of the child to the legal custodian in Missouri;

(3) Conceals, detains, or removes the child for payment or promise of payment at the instruction of a person who has no legal right to custody;

(4) Retains in this state for thirty days a child removed from another state without the consent of the legal custodian or in violation of a valid court order of custody; or

(5) Having legal custody of the child pursuant to a valid court order, removes, takes, detains, conceals or entices away that child within or without the state, without good cause, and with the intent to deprive the custody or visitation rights of another person, without obtaining written consent as is provided under section 452.377, RSMo.

2. Child abduction is a class D felony.

MO. REV. STAT. § 565.160 (1988).
Defenses to parental kidnapping and child abduction.

It shall be an absolute defense to the crimes of parental kidnapping and child abduction that:

(1) The person had custody of the child pursuant to a valid court order granting legal custody or visitation rights which existed at the time of the alleged violation, except that this defense is not available to persons charged with child abduction under subdivision (5) of subsection 1 of section 565.156;

(2) The person had physical custody of the child pursuant to a court order granting legal custody or visitation rights and failed to return the child as a result of circumstances beyond his or her control, and the person notified or made a reasonable attempt to notify the other parent or legal custodian of the child of such circumstances within twenty-four hours after the visitation period had expired and returned the child as soon as possible; or

(3) The person was fleeing an incident or pattern of domestic violence.

MO. REV. STAT. § 565.163 (1988).
Venue.

Persons accused of committing the crime of interference with custody, parental kidnapping or child abduction shall be prosecuted by the prosecuting attorney or circuit attorney:

(1) In the county in which the child was taken or enticed away from legal custody;

(2) In any county in which the child who was taken or enticed away from legal custody was taken or held by the defendant;

(3) The county in which lawful custody of the child taken or enticed away was granted; or

(4) The county in which the defendant is found.

MO. REV. STAT. § 565.165 (1988).
Assisting in child abduction or parental kidnapping — penalty.

1. A person commits the crime of assisting in child abduction or parental kidnapping if he:

(1) Before or during the commission of a child abduction or parental kidnapping as defined in section 565.153 or 565.156 and with the intent to promote or facilitate such offense, intentionally assists another in the planning or commission of child abduction or parental kidnapping, unless before the commission of the offense he makes proper efforts to prevent the commission of the offense; or

(2) With the intent to prevent the apprehension of a person known to have committed the offense of child abduction or parental kidnapping, or with the intent to obstruct or prevent efforts to locate the child victim of a child abduction, knowingly destroys, alters, conceals or disguises physical evidence or furnishes false information.

2. Assisting in child abduction or parental kidnapping is a class A misdemeanor.

MO. REV. STAT. § 565.167 (1988).
Custody of child—peace officer to take child into protective custody—when.

1. A peace officer investigating a report of a violation of section 565.150, or section 565.153 or 565.156, may take the child into temporary protective custody if it reasonably appears to the officer that any person unlawfully will flee the jurisdictional territory with the child.

2. If during the course of an investigation under section 565.150, or section 565.153 or 565.156, the child is found in the physical custody of the defendant or another, the law enforcement officer shall return the child to the parent or legal custodian from whom the child was concealed, detained or removed, unless there is good cause for the law enforcement officer to retain temporary protective custody of the child pursuant to section 210.125, RSMo.

MO. REV. STAT. § 565.169 (1988).
Restitution, expenses of custodial parent granted, when.

Upon conviction or guilty plea of a person under section 565.150, or section 565.153 or 565.156, the court may, in addition to or in lieu of any sentence or fine imposed, assess as restitution against the defendant and in favor of the legal custodian or parent any reasonable expenses incurred by the legal custodian or parent in searching for or returning the child.

MONTANA

MONT. CODE ANN. § 45-5-304 (1995).
Custodial interference.

(1) A person commits the offense of custodial interference if, knowing that the person has no legal right to do so, the person:

(a) takes, entices, or withholds from lawful custody any child, incompetent person, or other person entrusted by authority of law to the custody of another person or institution;

(b) prior to the entry of a court order determining custodial rights, takes, entices, or withholds any child from the other parent when the action manifests a purpose to substantially deprive that parent of parental rights; or

(c) is one of two persons who has joint custody of a child under a court order and takes, entices, or withholds the child from the other when the action manifests a purpose to substantially deprive the other parent of parental rights.

(2) A person convicted of the offense of custodial interference shall be imprisoned in the state prison for any term not to exceed 10 years or be fined an amount not to exceed $50,000, or both.

(3) With respect to the first alleged commission of the offense only, a person who has not left the state does not commit an offense under this section if the person voluntarily returns the child, incompetent person, or other person to lawful custody prior to arraignment. With respect to the first alleged commission of the offense only, a person who has left the state does not commit an offense under this section if the person voluntarily returns the child, incompetent person, or other person to lawful custody prior to arrest.

MONT. CODE ANN. § 45-5-631 (1987).
Visitation interference.

(1) A person who has legal custody of a minor child commits the offense of visitation interference if he knowingly or purposely prevents, obstructs, or frustrates the visitation rights of a person entitled to visitation under an existing court order.

(2) A person convicted of the offense of visitation interference shall be fined an amount not to exceed $500 or be imprisoned in the county jail for a term not to exceed 5 days, or both.

MONT. CODE ANN. § 45-5-632 (1987).
Aggravated visitation interference.

(1) A person who commits the offense of visitation interference by changing the residence of the minor child over whom he has legal custody to another state without giving written notice as required in 40-4-217 or without written consent of the person entitled to visitation pursuant to an existing court order commits the offense of aggravated visitation interference.

(2) A person convicted of the offense of aggravated visitation interference shall be fined an amount not to exceed $1,000 or be imprisoned in the state prison for a term not to exceed 18 months, or both.

MONT. CODE ANN. § 45-5-633 (1987).
Defenses to visitation interference and aggravated visitation interference.

(1) A person does not commit the offense of visitation interference or aggravated visitation interference if he acts:

(a) with the consent of the person entitled to visitation;

(b) under an existing court order; or

(c) with reasonable cause.

(2) Return of the child prior to arrest is a defense only with respect to the first commission of visitation interference or aggravated visitation interference.

NEBRASKA

NEB. REV. STAT. § 28-316 (1977).
Violation of custody; penalty.

(1) Any person, including a natural or foster parent, who, knowing that he has no legal right to do so or, heedless in that regard, takes or entices any child under the age of eighteen years from the custody of its parent having legal custody, guardian, or other lawful custodian commits the offense of violation of custody.

(2) Except as provided in subsection (3) of this section, violation of custody is a Class II misdemeanor.

(3) Violation of custody in contravention of an order of any district or juvenile court of this state granting the custody of a child under the age of eighteen years to any person, agency, or institution, with the intent to deprive the lawful custodian of the custody of such child, is a Class IV felony.

NEVADA

NEV. REV. STAT. § 200.357 (1991).
Law enforcement officer required to take child into protective custody if child in danger of being removed from jurisdiction.

A law enforcement officer who is conducting an investigation or making an arrest concerning the abduction of a child shall take the child into protective custody if he reasonably believes that the child is in danger of being removed from the jurisdiction.

NEV. REV. STAT. § 200.359 (1993).
Detention, concealment or removal of child from person having lawful custody or from jurisdiction of court: Penalties; exceptions; limitation on issuance of arrest warrant; restitution.

1. Except as otherwise provided in subsection 6, every person having a limited right of custody to a child by operation of law or pursuant to an order, judgment or decree of any court, including a judgment or decree which grants another person rights to custody or visitation of the child, or any parent having no right of custody to the child, who:

(a) In violation of an order, judgment or decree of any court willfully detains, conceals or removes the child from a parent, guardian or other person having lawful custody or a right of visitation of the child; or

(b) In the case of an order, judgment or decree of any court that does not specify when the right to physical custody or visitation is to be exercised, removes the child from the jurisdiction of the court without the consent of either the court or all persons who have the right to custody or visitation, shall be punished by imprisonment in the state prison for not less than 1 year nor more than 6 years, or by a fine of not less than $1,000 nor more than $5,000, or by both fine and imprisonment.

2. A parent who has joint legal custody of a child pursuant to NRS 125.465 shall not willfully conceal or remove the child from the custody of the other parent with the specific intent to deprive the other parent of the parent and child relationship.

3. If the mother of a child has primary physical custody pursuant to subsection 2 of NRS 126.031, the father of the child shall not willfully conceal or remove the child from the physical custody of the mother. If the father of a child has primary physical custody pursuant to subsection 2 of NRS 126.031, the mother of the child shall not willfully conceal or remove the child from the physical custody of the father. A person who violates this subsection shall be punished as provided in subsection 1.

4. Before an arrest warrant may be issued for a violation of this section, the court must find that:

   (a) This is the home state of the child, as defined in subsection 5 of NRS 125A.040; and

   (b) There is cause to believe that the entry of a court order in a civil proceeding brought pursuant to chapter 125 or 125A of NRS will not be effective to enforce the rights of the parties and would not be in the best interests of the child.

5. Upon conviction for a violation of this section, the court shall order the defendant to provide restitution for any expenses incurred in locating or recovering the child.

6. The prosecuting attorney may recommend to the judge that the defendant be sentenced as for a misdemeanor and the judge may impose such a sentence if he finds that:

   (a) The defendant has no prior conviction for this offense and the child has suffered no substantial harm as a result of the offense; or

   (b) The interests of justice require that the defendant be punished as for a misdemeanor.

7. A person who aids or abets any other person to violate this section shall be punished as provided in subsection 1.

8. This section does not apply to a person who detains, conceals or removes a child to protect the child from the imminent danger of abuse or neglect or to protect himself from imminent physical harm, and reported the detention, concealment or removal to a law enforcement agency or an agency which provides protective services within 24 hours after detaining, concealing or removing the child, or as soon as the circumstances allowed. As used in this subsection:

   (a) "Abuse or neglect" has the meaning ascribed to it in paragraph (a) of subsection 3 of NRS 200.508.

   (b) "Agency which provides protective services" has the meaning ascribed to it in NRS 432B.030.

NEW HAMPSHIRE

N.H. REV. STAT. ANN. § 633:4 (1983).
Interference with Custody.

I. A person is guilty of a class B felony if:

   (a) He knowingly takes from this state or entices away from this state any child under the age of 18, or causes any such child to be taken from this state or enticed away from this state, with the intent to detain or conceal such child from a parent, guardian or other person having lawful charge of such child; and

   (b) He does not have a right of custody with respect to such child.

II. A person is guilty of a misdemeanor if:

   (a) He knowingly takes, entices away, detains or conceals any child under the age of 18, or causes any such child to be taken, enticed away, detained or concealed, with the intent to detain or conceal such child from a parent, guardian or other person having lawful charge of such child; and

   (b) He does not have a right of custody with respect to such child.

III. It shall be an affirmative defense to a charge under paragraph I or II that the person so charged was acting in good faith to protect the child from real and imminent physical danger. Evidence of good faith shall include but shall not be limited to the filing of a nonfrivolous petition documenting such danger and seeking to modify the custody decree in a court of competent jurisdiction within this state. Such petition must be filed within 72 hours of termination of visitation rights.

IV. The affirmative defense set forth in paragraph III shall not be available if the person charged with the offense has left this state with the child.

NEW JERSEY

N.J. REV. STAT. § 2C:13-4 (1990).
Interference with custody.

a. Custody of children. A person, including a parent, guardian or other lawful custodian, is guilty of interference with custody if he:

(1) Takes or detains a minor child with the purpose of concealing the minor child and thereby depriving the child's other parent of custody or visitation of the minor child; or

(2) After being served with process or having actual knowledge of an action affecting marriage or custody but prior to the issuance of a temporary or final order determining custody and visitation rights to a minor child, takes, detains, entices or conceals the child within or outside the State for the purpose of depriving the child's other parent of custody or visitation, or to evade the jurisdiction of the courts of this State;

(3) After being served with process or having actual knowledge of an action affecting the protective services needs of a child pursuant to Title 9 of the Revised Statutes in an action affecting custody, but prior to the issuance of a temporary or final order determining custody rights of a minor child, takes, detains, entices or conceals the child within or outside the State for the purpose of evading the jurisdiction of the courts of this State; or

(4) After the issuance of a temporary or final order specifying custody, visitation or joint custody rights, takes, detains, entices or conceals a minor child from the other parent in violation of the custody or visitation order.

Interference with custody is a crime of the third degree but the presumption of non-imprisonment set forth in subsection e. of N.J.S. 2C:44-1 for a first offense of a crime of the third degree shall not apply. However, if the child is taken, detained, enticed or concealed outside the United States, interference with custody is a crime of the second degree.

b. Custody of committed persons. A person is guilty of a crime of the fourth degree if he knowingly takes or entices any committed person away from lawful custody when he is not privileged to do so. "Committed person" means, in addition to anyone committed under judicial warrant, any orphan, neglected or delinquent child, mentally defective or insane person, or other dependent or incompetent person entrusted to another's custody by or through a recognized social agency or otherwise by authority of law.

c. It is an affirmative defense to a prosecution under subsection a. of this section, which must be proved by clear and convincing evidence, that:

(1) The actor reasonably believed that the action was necessary to preserve the child from imminent danger to his welfare. However, no defense shall be available pursuant to this subsection if the actor does not, as soon as reasonably practicable but in no event more than 24 hours after taking a child under his protection, give notice of the child's location to the police department of the municipality where the child resided, the office of the county prosecutor in the county where the child resided, or the Division of Youth and Family Services in the Department of Human Services;

(2) The actor reasonably believed that the taking or detaining of the minor child was consented to by the other parent, or by an authorized State agency; or

(3) The child, being at the time of the taking or concealment not less than 14 years old, was taken away at his own volition and without purpose to commit a criminal offense with or against the child.

d. It is an affirmative defense to a prosecution under subsection a. of this section that a parent having the right of custody reasonably believed he was fleeing from imminent physical danger from the other parent, provided that the parent having custody, as soon as reasonably practicable:

(1) Gives notice of the child's location to the police department of the municipality where the child resided, the office of the county prosecutor in the county where the child resided, or the Division of Youth and Family Services in the Department of Human Services; or

(2) Commences an action affecting custody in an appropriate court.

e. The offenses enumerated in this section are continuous in nature and continue for so long as the child is concealed or detained.

f. (1) In addition to any other disposition provided by law, a person convicted under subsection a. of this section shall make restitution of all reasonable expenses and costs, including reasonable counsel fees, incurred by the other parent in securing the child's return.

(2) In imposing sentence under subsection a. of this section the court shall consider, in addition to the factors enumerated in chapter 44 of Title 2C of the New Jersey Statutes:

(a) Whether the person returned the child voluntarily; and

(b) The length of time the child was concealed or detained.

g. As used in this section, "Parent" means a parent, guardian or other lawful custodian of a minor child.

N.J. REV. STAT. § 2A:34-31.1 (1990).
Protective custody of child to prevent flight or concealment.

After the issuance of any temporary or permanent order determining custody or visitation of a minor child, a law enforcement officer having reasonable cause to believe that a person is likely to flee the State with the child or otherwise by flight or concealment evade the jurisdiction of the courts of this State may take a child into protective custody and return the child to the parent having lawful custody, or to a court in which a custody hearing concerning the child is pending.

NEW MEXICO

N.M. STAT. ANN. § 30-4-4 (1989).
Custodial interference; penalties.

A. As used in this section:

(1) "child" means an individual who has not reached his eighteenth birthday;

(2) "custody determination" means a judgment or order of a court of competent jurisdiction providing for the custody of a child, including visitation rights;

(3) "person" means any individual or legal entity, whether incorporated or unincorporated, including the United States, the state of New Mexico or any subdivision thereof;

(4) "physical custody" means actual possession and control of a child; and

(5) "right to custody" means the right to physical custody or visitation of a child arising from:
(a) a parent-child relationship between the child and a natural or adoptive parent absent a custody determination; or

(b) a custody determination.

B. Custodial interference consists of any person, having a right to custody of a child, maliciously taking, detaining, concealing or enticing away or failing to return that child without good cause and with the intent to deprive permanently or for a protracted time another person also having a right to custody of that child of his right to custody. Whoever commits custodial interference is guilty of a fourth degree felony.

C. Unlawful interference with custody consists of any person, not having a right to custody, maliciously taking, detaining, concealing or enticing away or failing to return any child with the intent to detain or conceal permanently or for a protracted time that child from any person having a right to custody of that child. Whoever commits unlawful interference with custody is guilty of a fourth degree felony.

D. Violation of Subsection B or C of this section is unlawful and is a fourth degree felony.

E. A peace officer investigating a report of a violation of this section may take a child into protective custody if it reasonably appears to the officer that any person will flee with the child in violation of Subsection B or C of this section. The child shall be placed with the person whose right to custody of the child is being enforced, if available and appropriate, and, if not, in any of the community-based shelter care facilities as provided for in Section 32-1-25.1 NMSA 1978.

F. Upon recovery of a child a hearing by the civil court currently having jurisdiction or the court to which the custody proceeding is assigned, shall be expeditiously held to determine continued custody.

G. A felony charge brought under this section may be dismissed if the person voluntarily returns the child within fourteen days after taking, detaining or failing to return the child in violation of this section.
H. The offenses enumerated in this section are continuous in nature and continue for so long as the child is concealed or detained.
I. Any defendant convicted of violating the provisions of this section may be assessed the following expenses and costs by the court, with payments to be assigned to the respective person or agency:
   (1) any expenses and costs reasonably incurred by the person having a right to custody of the child in seeking return of that child; and
   (2) any expenses and costs reasonably incurred for the care of the child while in the custody of the human services department.
J. Violation of the provisions of this section is punishable in New Mexico, whether the intent to commit the offense is formed within or outside the state, if the child was present in New Mexico at the time of the taking.

NEW YORK

N.Y. PENAL LAW § 135.45 (1965).
Custodial interference in the second degree.

A person is guilty of custodial interference in the second degree when:

1. Being a relative of a child less than sixteen years old, intending to hold such child permanently or for a protracted period, and knowing that he has no legal right to do so, he takes or entices such child from his lawful custodian; or
2. Knowing that he has no legal right to do so, he takes or entices from lawful custody any incompetent person or other person entrusted by authority of law to the custody of another person or institution.

Custodial interference in the second degree is a class A misdemeanor.

N.Y. PENAL LAW § 135.50 (1981).
Custodial interference in the first degree.

A person is guilty of custodial interference in the first degree when he commits the crime of custodial interference in the second degree:

1. With intent to permanently remove the victim from this state, he removes such person from the state; or
2. Under circumstances which expose the victim to a risk that his safety will be endangered or his health materially impaired.

It shall be an affirmative defense to a prosecution under subdivision one of this section that the victim had been abandoned or that the taking was necessary in an emergency to protect the victim because he has been subjected to or threatened with mistreatment or abuse. Custodial interference in the first degree is a class E felony.

NORTH CAROLINA

N.C. GEN. STAT. § 14-320.1 (1993).
Transporting child outside the State with intent to violate custody order.

When any federal court or state court in the United States shall have awarded custody of a child under the age of 16 years, it shall be a felony for any person with the intent to violate the court order to take or transport, or cause to be taken or transported, any such child from any point within this State to any point outside the limits of this State or to keep any such child outside the limits of this State. Such crime shall be punishable as a Class I felony. Provided that keeping a child outside the limits of the State in violation of a court order for a period in excess of 72 hours shall be prima facie evidence that the person charged intended to violate the order at the time of the taking.

NORTH DAKOTA

N.D. CENT. CODE § 14-14-22.1 (1979).
Removal of child from state in violation of custody decree — Penalty.

Any person who intentionally removes, causes the removal of, or detains his or her own child under the age of eighteen years outside North Dakota with the intent to deny another person's rights under an existing custody decree is guilty of a class C felony. Detaining the child outside North Dakota in violation of the custody decree for more than seventy-two hours is prima facie evidence that the person charged intended to violate the custody decree at the time of removal.

OHIO

OHIO REV. CODE ANN. § 2905.04 (1985).
Child stealing.

(A) No person, by any means and with purpose to withhold a minor from the legal custody of his parent, guardian, or custodian, shall remove the minor from the place where he is found.

(B) It is an affirmative defense to a charge under this section that the actor reasonably believed that his conduct was necessary to preserve the minor's health or welfare.

(C) Whoever violates this section is guilty of child stealing.

(1) If the offender is a natural or adoptive parent, or a stepparent of the minor, but not entitled to legal custody of the minor when the offense is committed, child stealing is a misdemeanor of the first degree unless:

(a) The offender removes the child from this state or the offender previously has been convicted of child stealing or of kidnapping or abduction involving a minor, in which case child stealing is a felony of the fourth degree;

(b) Physical harm is done to the minor, in which case child stealing is a felony of the second degree.

(2) If the offender is not a natural or adoptive parent, or a stepparent of the minor, child stealing is an aggravated felony of the second degree, unless physical harm is done to the minor, in which case child stealing is an aggravated felony of the first degree.

OHIO REV. CODE ANN. § 2919.23 (1991).
Interference with custody.

(A) No person, knowing he is without privilege to do so or being reckless in that regard, shall entice, take, keep, or harbor any of the following persons from his parent, guardian, or custodian:

(1) A child under the age of eighteen, or a mentally or physically handicapped child under the age of twenty-one;

(2) A person committed by law to an institution for delinquent, unruly, neglected, abused, or dependent children;

(3) A person committed by law to an institution for the mentally ill or mentally retarded.

(B) No person shall aid, abet, induce, cause, or encourage a child or a ward of the juvenile court who has been committed to the custody of any person, department, or public or private institution to leave the custody of that person, department, or institution without legal consent.

(C) It is an affirmative defense to a charge of enticing or taking under division (A)(1) of this section, that the actor reasonably believed that his conduct was necessary to preserve the child's health or safety. It is an affirmative defense to a charge of keeping or harboring under division (A) of this section, that the actor in good faith gave notice to law enforcement or judicial authorities within a reasonable time after the child or committed person came under his shelter, protection, or influence.

(D)(1) Whoever violates this section is guilty of interference with custody.

(2) If the child who is the subject of a violation of division (A)(1) of this section is not kept or harbored in a foreign country, a violation of division (A)(1) of this section is a misdemeanor of the third degree. If the child who is the subject of a violation of division (A)(1) of this section is kept or harbored in a foreign country, a violation of division (A)(1) of this section is a felony of the fourth degree.

(3) A violation of division (A)(2) or (3) of this section is a misdemeanor of the third degree.

(4) A violation of division (B) of this section is a misdemeanor of the first degree. Each day of violation of division (B) of this section is a separate offense.

OKLAHOMA

OKLA. STAT. ANN. tit. 43, § 527 (1994).
Violations-Defenses.

A. Any parent or other person who violates an order of any court of this state, granting the custody of the child under the age of eighteen (18) years, to any person, agency or institution, with the intent to deprive the lawful custodian of the custody of a child under the age of eighteen (18) years, shall be guilty of a felony punishable by imprisonment in the State Penitentiary for a period of not more than five (5) years or by a fine not exceeding Five Thousand Dollars ($5,000.00) or by both such fine and imprisonment.

B. It shall be an affirmative defense either:

1. That the offender reasonably believes that the act was necessary to preserve the child from physical, mental or emotional danger to his welfare; or

2. That the child, being at the time more than fourteen (14) years old, was taken away at his own instigation without enticement and without purpose to commit a criminal offense with or against the child and that the offender had a reasonable belief that if not taken, the child would run away to a location unknown to either the custodial or noncustodial parent or would otherwise cause serious harm to himself. Provided, however, that such defenses shall not apply if the offender committed said act within thirty (30) days of an order of the district court relating to custody of the minor or unless the offender, within seventy-two (72) hours of the taking of the child:

   a. notifies the Department of Human Services of such removal and of the location of the child, and

   b. files an action for modification of the custody order with the court having proper jurisdiction of the case.

   Upon receipt of such notification, the Department of Human Services shall immediately notify the local law enforcement agency nearest to the current location of the child of the taking and where the child is located.

C. If a child is removed from the custody of his lawful custodian, pursuant to the provisions of this section, any law enforcement officer may take such child into custody without a court order, and unless there is a specific court order directing a peace officer to take the child into custody and release or return the child to his lawful custodian, such child shall be held in protective custody until the right of custody is determined by the court having proper jurisdiction of the matter.

OREGON

OR. REV. STAT. § 163.245 (1987).
Custodial interference in the second degree.

(1) A person commits the crime of custodial interference in the second degree if, knowing or having reason to know that the person has no legal right to do so, the person takes, entices or keeps another person from the other person's lawful custodian or in violation of a valid joint custody order with intent to hold the other person permanently or for a protracted period.

(2) Expenses incurred by a lawful custodial parent or a parent enforcing a valid joint custody order in locating and regaining physical custody of the person taken, enticed or kept in violation of this section are "pecuniary damages" for the purposes of restitution under ORS 137.103 to 137.109.

(3) Custodial interference in the second degree is a Class C felony.

OR. REV. STAT. § 163.257 (1987).
Custodial interference in the first degree.

(1) A person commits the crime of custodial interference in the first degree if the person violates ORS 163.245 and:

(a) Causes the person taken, enticed or kept from the lawful custodian or in violation of a valid joint custody order to be removed from the state; or

(b) Exposes that person to a substantial risk of illness or physical injury.

(2) Expenses incurred by a lawful custodial parent or a parent enforcing a valid joint custody order in locating and regaining physical custody of the person taken, enticed or kept in violation of this section are "pecuniary damages" for purposes of restitution under ORS 137.103 to 137.109.

(3) Custodial interference in the first degree is a Class B felony.

PENNSYLVANIA

18 PA. CONS. STAT. § 2904 (1984).
Interference with custody of children.

(a) Offense defined.— A person commits an offense if he knowingly or recklessly takes or entices any child under the age of 18 years from the custody if its parent, guardian or other lawful custodian, when he has no privilege to do so.

(b) Defenses.— It is a defense that:

(1) the actor believed that his action was necessary to preserve the child from danger to its welfare; or

(2) the child, being at the time not less than 14 years old, was taken away at its own instigation without enticement and without purpose to commit a criminal offense with or against the child; or

(3) the actor is the child's parent or guardian or other lawful custodian and is not acting contrary to an order entered by a court of competent jurisdiction.

(c) Grading.— The offense is a felony of the third degree unless:

(1) the actor, not being a parent or person in equivalent relation to the child, acted with knowledge that his conduct would cause serious alarm for the safety of the child, or in reckless disregard of a likelihood of causing such alarm. In such cases, the offense shall be a felony of the second degree; or

(2) the actor acted with good cause for a period of time not in excess of 24 hours; and

(i) the victim child is the subject of a valid order of custody issued by a court of the Commonwealth;

(ii) the actor has been given either partial custody or visitation rights under said order; and

(iii) the actor is a resident of this Commonwealth and does not remove the child from the Commonwealth.

In such cases, the offense shall be a misdemeanor of the second degree.

18 PA. CONS. STAT. § 2909 (1990).
Concealment of whereabouts of a child.

(a) Offense Defined.— A person who removes a child from the child's known place of residence with the intent to conceal the child's whereabouts from the child's parent or guardian, unless concealment is authorized by court order or is a reasonable response to domestic violence or child abuse, commits a felony of the third degree. For purposes of this subsection, the term "removes" includes personally removing the child from the child's known place of residence, causing the child to be removed from the child's known place of residence, preventing the child from returning or being returned to the child's known place of residence and, when the child's parent or guardian has a reasonable expectation that the person will return the child, failing to return the child to the child's known place of residence.

(b) Application.— A person may be convicted under subsection (a) if either of the following apply:

(1) The acts that initiated the concealment occurred in this Commonwealth.

(2) The offender or the parent or guardian from whom the child is being concealed resides in this Commonwealth.

RHODE ISLAND

R.I. GEN. LAWS § 11-26-1.1 (1989).
Childsnatching.

Any person who intentionally removes, causes the removal of, or detains any child under the age of eighteen (18) years whether within or without the state of Rhode Island with intent to deny another person's right of custody under an existing decree or order of Rhode Island family court shall be guilty of a felony, and upon conviction thereof shall be punished by imprisonment for a term not more than two (2) years or a fine of not more than ten thousand dollars ($10,000) or both.

It shall be an affirmative defense that:

(1) The person at the time of the alleged violation had lawful custody of the child pursuant to a court order granting legal custody or visitation rights; or

(2) The person had physical custody of the child pursuant to a court order granting legal custody or visitation rights and failed to return the child as a result of circumstances beyond his or her control, and the person notified and disclosed to the other parent or legal custodian the specific whereabouts of the child and a means by which such child can be contacted or made a reasonable attempt to notify the other parent or lawful custodian of the child of such circumstances and made such disclosure within twenty-four (24) hours after the visitation period had expired and returned the child as soon as possible; or

(3) The person was fleeing an incidence or pattern of domestic violence.

R.I. GEN. LAWS § 11-26-1.2 (1989).
Abduction of child prior to court order.

Any parent, or any person acting pursuant to directions from the parent, who shall, after being served with process in an action affecting the family but prior to the issuance of a temporary or final order determining custody of a minor child, take or entice a child away from the family unit whether within or without the state of Rhode Island, for the purpose of depriving the other parent of physical custody of such child for a period greater than fifteen (15) days, shall be guilty of a felony and upon conviction thereof shall be punished by imprisonment for a term up to two (2) years or a fine of not more than ten thousand dollars ($10,000) or both.

No person shall be deemed to have violated this section if such action

(a) Is taken to protect the child from imminent physical harm;
(b) Is taken by a parent fleeing from imminent physical harm to himself or herself;
(c) Is consented to by both parents; or
(d) Is otherwise authorized by law.

SOUTH CAROLINA

S.C. CODE ANN. § 16-17-495 (1990).
Transporting child under sixteen years of age outside State with intent to violate a custody order.
When any court of competent jurisdiction in this State has awarded custody of a child under the age of sixteen years, it is a felony for a person with the intent to violate the court order to take or transport, or cause to be taken or transported, the child from any point within this State to any point outside the limits of this State or to keep the child outside the limits of this State. This crime is punishable by a fine in the discretion of the court or by imprisonment for not more than three years, or both. It is permissible to infer that a person keeping a child outside the limits of the State in violation of a court order for a period in excess of seventy-two hours intended to violate the order at the time of taking. If the person violating the provisions of this section returns the child to the jurisdiction of the court issuing the order within seven days after removing the child from this State, the person is guilty of a misdemeanor and, upon conviction, must be punished as provided in this section.

SOUTH DAKOTA

S.D. CODIFIED LAWS ANN. § 22-19-9 (1985).
Taking, enticing away or keeping of unmarried minor child by parent.

Any parent who takes, entices away or keeps his unmarried minor child from the custody or visitation of the other parent, or any other person having lawful custody or right of visitation, in violation of a custody or visitation determination entitled to enforcement by the courts of this state, without prior consent is guilty of a Class 1 misdemeanor. A subsequent violation of this section is a Class 6 felony.

S.D. CODIFIED LAWS ANN. § 22-19-10 (1985).
Removal of child from state.

Any parent who violates § 22-19-9 and causes the unmarried minor child taken, enticed or kept from his lawful custodian to be removed from the state is guilty of a Class 5 felony.

S.D. CODIFIED LAWS ANN. § 22-19-11 (1980).
Failure to report offense as complete defense.

It is a complete defense to a prosecution for a violation of §§ 22-19-9 and 22-19-10 that the person having lawful custody or right of visitation failed to report the offense to law enforcement authorities within ninety days of the offense.

S.D. CODIFIED LAWS ANN. § 22-19-12 (1981).
Expense of child's return charged to party.

The state or any other unit of government incurring financial expense for the return of the child may charge that cost against the person extradited if he is found to be guilty of a violation of § 22-19-10. Such expense may be charged against the person filing the charge if the person extradited is found to be not guilty of a violation of § 22-19-10.

TENNESSEE

TENN. CODE ANN. § 39-13-306 (1990).
Custodial interference.

(a) It is the offense of custodial interference for a natural or adoptive parent, stepparent, grandparent, brother, sister, aunt, uncle, niece, or nephew of a child younger than eighteen (18) years of age or an individual adjudged to be incompetent to knowingly detain or move the child or individual adjudged to be incompetent from the vicinity where the child or person adjudged to be incompetent is found when the person knows that the detention or moving of the child or person adjudged to be incompetent violates a temporary or permanent judgment or court order regarding the child's or incompetent's custody or care.

(b) It is a defense to custodial interference that the individual detained or moved in contravention of the order of custody or care was returned by the defendant voluntarily and before arrest or the issuance of a warrant for arrest.

(c) If an aggravating factor found in § 39-13-304 or § 39-13-305 is present, except for the factor found in § 39-13-305(a)(2), the offense may be prosecuted under § 39-13-304 or § 39-13-305, but otherwise prosecution shall be under this section.**

** TENN. CODE ANN. § 39-13-304 (1990) provides that aggravated kidnapping is false imprisonment committed (1) to facilitate the commission of any felony or flight thereafter; (2) to interfere with the performance of any governmental function; (3) with the intent to inflict serious bodily injury on or to terrorize the victim or another; (4) where the victim suffers bodily harm; or (5) while the defendant is in possession of a deadly weapon or threatens the use of a deadly weapon. TENN. CODE ANN. § 39-13-305 (1990) defines especially aggravated kidnapping as false imprisonment (1) accomplished with a deadly weapon or by display of any article used or fashioned to lead the victim to reasonably believe it to be a deadly weapon; (2) where the victim was under the age of thirteen (13) at the time of the removal or confinement [does not apply under § 39-13-306]; (3) committed to hold the victim for ransom or reward, or as a shield or hostage; or (4) where the victim suffers serious bodily injury.

(d) Custodial interference shall be a Class E felony unless the person taken from lawful custody is returned voluntarily by the defendant, in which case custodial interference is a Class A misdemeanor.

TEXAS

TEX. PENAL CODE ANN. § 25.03 (1993). (Effective September 1, 1994)
Interference with Child Custody.

(a) A person commits an offense if he takes or retains a child younger than 18 years when he:

(1) knows that his taking or retention violates the express terms of a judgment or order of a court disposing of the child's custody; or

(2) has not been awarded custody of the child by a court of competent jurisdiction, knows that a suit for divorce or a civil suit or application for habeas corpus to dispose of the child's custody has been filed, and takes the child out of the geographic area of the counties composing the judicial district if the court is a district court or the county if the court is a statutory county court, without the permission of the court and with the intent to deprive the court of authority over the child.

(b) *A noncustodial parent commits an offense if, with the intent to interfere with the lawful custody of a child younger than 18 years, he knowingly entices or persuades the child to leave the custody of the custodial parent, guardian, or person standing in the stead of the custodial parent or guardian of the child.

(c) It is a defense to prosection under Subsection (a)(2) of this section that the actor returned the child to the geographic area of the counties composing the judicial district if the court is a district court or the county if the court is a statutory county court, within three days after the date of the commission of the offense.

(d) An offense under this section is a state jail felony.

TEX. PENAL CODE ANN. § 25.031 (1993). (Effective September 1, 1994)
Agreement to Abduct From Custody.

(a) A person commits an offense if the person agrees, for remuneration or the promise of remuneration, to abduct a child younger than 18 years of age by force, threat of force, misrepresentation, stealth, or unlawful entry, knowing that the child is under the care and control of a person having custody or physical possession of the child under a court order or under the care and control of another person who is exercising care and control with the consent of a person having custody or physical possession under a court order.

(b) An offense under this section is a state jail felony.

UTAH

UTAH CODE ANN. § 76-5-303 (1984).
Custodial Interference.

(1) A person, whether a parent or other, is guilty of custodial interference if, without good cause, the actor takes, entices, conceals, or detains a child under the age of 16 from its parent, guardian, or other lawful custodian:

(a) Knowing the actor has no legal right to do so; and

(b) With intent to hold the child for a period substantially longer than the visitation or custody period previously awarded by a court of competent jurisdiction.

(2) A person, whether a parent or other, is guilty of custodial interference if, having actual physical custody of a child under the age of 16 pursuant to a judicial award of any court of competent jurisdiction which grants to another person visitation or custody rights, and without good cause the actor conceals or detains the child with intent to deprive the other person of lawful visitation or custody rights.

(3) Custodial interference is a class A misdemeanor unless the child is removed and taken from one state to another, in which case it is a felony of the third degree.

VERMONT

VT. STAT. ANN. tit. 13, § 2451 (1979).
Custodial interference.

(a) A person commits custodial interference by taking, enticing or keeping a child from the child's lawful custodian, knowingly, without a legal right to do so, when the person is a relative of the child and the child is less than eighteen years old.

(b) A person who commits custodial interference shall be imprisoned not more than five years or fined not more than $5,000.00, or both.

(c) It shall be a defense to a charge of keeping a child from the child's lawful custodian that the person charged with the offense was acting in good faith to protect the child from real and imminent physical danger. Evidence of good faith shall include, but is not limited to, the filing of a non-frivolous petition documenting that danger and seeking to modify the custodial decree in a Vermont court of competent jurisdiction. This petition must be filed within 72 hours of the termination of visitation rights. This defense shall not be available if the person charged with the offense has left the state with the child.

VIRGINIA

VA. CODE ANN. § 18.2-49.1 (1994).
Violation of court order regarding custody and visitation; penalty.

A. Any person who knowingly, wrongfully and intentionally withholds a child from the child's custodial parent in a clear and significant violation of a court order respecting the custody or visitation of such child, provided such child is withheld outside of the Commonwealth, shall be guilty of a Class 6 felony.

B. Any person who knowingly, wrongfully and intentionally engages in conduct which constitutes a clear and significant violation of a court order respecting the custody or visitation of a child shall be guilty of a Class 4 misdemeanor upon conviction of a first offense. A second conviction for a violation of this section within twelve months of a first conviction shall be a Class 3 misdemeanor, and a third conviction occurring within twenty-four months of the first conviction shall be a Class 2 misdemeanor.

VA. CODE ANN. § 18.2-50 (1975).
Disclosure of information and assistance to law enforcement officers required.

Whenever it is brought to the attention of the members of the immediate family of any person that such person has been abducted, or that threats or attempts have been made to abduct any such person, such members shall make immediate report thereof to the police or other law enforcement officers of the county, city or town where such person resides, and shall render all such possible assistance to such officers in the capture and conviction of the persons guilty of the alleged offense. Any person violating any of the provisions of this section shall be guilty of a Class 2 misdemeanor.

WASHINGTON

WASH. REV. CODE § 9A.40.010 (1975).
Definitions.

The following definitions apply in this chapter:

(1) "Restrain" means to restrict a person's movements without consent and without legal authority in a manner which interferes substantially with his liberty. Restraint is "without consent" if it is accomplished by (a) physical force, intimidation, or deception, or (b) any means including acquiescence of the victim, if he is a child less than sixteen years old or an incompetent person and if the parent, guardian, or other person or institution having lawful control or custody of him has not acquiesced.

(2) "Abduct" means to restrain a person by either (a) secreting or holding him in a place where he is not likely to be found, or (b) using or threatening to use deadly force;

(3) "Relative" means an ancestor, descendant, or sibling, including a relative of the same degree through marriage or adoption, or a spouse.

WASH. REV. CODE § 9A.40.060 (1994).
Custodial interference in the first degree.

(1) A relative of a child under the age of eighteen or of an incompetent person is guilty of custodial interference in the first degree if, with the intent to deny access to the child or incompetent person by a parent, guardian, institution, agency, or other person having a lawful right to physical custody of such person, the relative takes, entices, retains, detains, or conceals the child or incompetent person from a parent, guardian, institution, agency, or other person having a lawful right to physical custody of such person and:

(a) Intends to hold the child or incompetent person permanently or for a protracted period; or

(b) Exposes the child or incompetent person to a substantial risk of illness or physical injury; or

(c) Causes the child or incompetent person to be removed from the state of usual residence; or

(d) Retains, detains, or conceals the child or incompetent person in another state after expiration of any authorized visitation period with intent to intimidate or harass a parent, guardian, institution, agency, or other person having lawful right to physical custody or to prevent a parent, guardian, institution, agency, or other person with lawful right to physical custody from regaining custody.

(2) A parent of a child is guilty of custodial interference in the first degree if the parent takes, entices, retains, detains, or conceals the child, with the intent to deny access, from the other parent having the lawful right to time with the child pursuant to a court-ordered parenting plan, and:

(a) Intends to hold the child permanently or for a protracted period; or

(b) Exposes the child to substantial risk or illness or physical injury; or

(c) Causes the child to be removed from the state of usual residence.

(3) A parent or other person acting under the directions of the parent is guilty of custodial interference in the first degree if the parent or other person intentionally takes, entices, retains, or conceals a child, under the age of eighteen years and for whom no lawful custody order or parenting plan has been entered by a court of competent jurisdiction, from the other parent with intent to deprive the other parent from access to the child permanently or for a protracted period.

(4) Custodial interference in the first degree is a class C felony.

WASH. REV. CODE § 9A.40.070 (1989).
Custodial interference in the second degree.

(1) A relative of a person is guilty of custodial interference in the second degree if, with the intent to deny access to such person by a parent, guardian, institution, agency, or other person having a lawful right to physical custody of such person, the relative takes, entices, retains, detains, or conceals the person from a parent, guardian, institution, agency, or other person having a lawful right to physical custody of such person. This subsection shall not apply to a parent's noncompliance with a court-ordered parenting plan.

(2) A parent of a child is guilty of custodial interference in the second degree if:

(a) The parent takes, entices, retains, detains, or conceals the child, with the intent to deny access, from the other parent having the lawful right to time with the child pursuant to a court-ordered parenting plan; or

(b) the parent has not complied with the residential provisions of a court-ordered parenting plan after a finding of contempt under RCW 26.09.160(3); or

(c) if the court finds that the parent has engaged in a pattern of willful violations of the court-ordered residential provisions.

(3) Nothing in (b) of this subsection prohibits conviction of custodial interference in the second degree under (a) or (c) of this subsection in absence of findings of contempt.

(4) The first conviction of custodial interference in the second degree is a gross misdemeanor. The second or subsequent conviction of custodial interference in the second degree is a class C felony.

WASH. REV. CODE § 9A.40.080 (1989).
Custodial interference—Assessment of costs—Defense—Consent defense, restricted.

(1) Any reasonable expenses incurred in locating or returning a child or incompetent person shall be assessed against a defendant convicted under RCW 9A.40.060 or 9A.40.070.

(2) In any prosecution of custodial interference in the first or second degree, it is a complete defense, if established by the defendant by a preponderance of the evidence, that:

(a) The defendant's purpose was to protect the child, incompetent person, or himself or herself from imminent physical harm, that the belief in the existence of the imminent physical harm was reasonable, and that the defendant sought the assistance of the police, sheriff's office, protective agencies, or the court of any state before committing the acts giving rise to the charges or within a reasonable time thereafter;

(b) The complainant had, prior to the defendant committing the acts giving rise to the crime, for a protracted period of time, failed to exercise his or her rights to physical custody or access to the child under a court-ordered parenting plan or order granting visitation rights, provided that such failure was not the direct result of the defendant's denial of access to such person;

(c) The acts giving rise to the charges were consented to by the complainant; or

(d) The offender, after providing or making a good faith effort to provide notice to the person entitled to access to the child, failed to provide access to the child due to reasons that a reasonable person would believe were directly related to the welfare of the child, and allowed access to the child in accordance with the court order within a reasonable period of time. The burden of proof that the denial of access was reasonable is upon the person denying access to the child.

(3) Consent of a child less than sixteen years of age or of an incompetent person does not constitute a defense to an action under RCW 9A.40.060 or 9A.40.070.

WEST VIRGINIA

W. VA. CODE § 61-2-14d (1984).
Concealment or removal of minor child from custodian or from person entitled to visitation; penalties; defenses.

(a) Any person who conceals, takes or removes a minor child in violation of any court order and with the intent to deprive another person of lawful custody or visitation rights shall be guilty of a felony, and upon conviction thereof, shall be imprisoned in the penitentiary not less than one nor more than five years, or in the discretion of the court, shall be imprisoned in the county jail not more than one year or fined not more than one thousand dollars, or both fined and imprisoned.

(b) Any person who violates this section and in so doing removes the minor child from this State or conceals the minor child in another state shall be guilty of a felony, and, upon conviction thereof, shall be imprisoned in the penitentiary not less than one nor more than five years or fined not more than one thousand dollars, or both fined and imprisoned.

(c) It shall be a defense under this section that the accused reasonably believed such action was necessary to preserve the welfare of the minor child. The mere failure to return a minor child at the expiration of any lawful custody or visitation period without the intent to deprive another person of lawful custody or visitation rights shall not constitute an offense under this section.

W. VA. CODE § 61-2-14e (1984).
One aiding or abetting in offense under § 61-2-14, § 61-2-14a, § 61-2-14c, § 61-2-14d guilty as principal; venue.

If any person in any way knowingly aid or abet any other person in the commission of any offense described in section fourteen, fourteen-a, fourteen-c or fourteen-d [§§ 61-2-14, 61-2-14a, 61-2-14c, or 61-14d] of this article, either as accessory before or an accessory after the fact, such person so aiding and abetting shall be guilty as a principal in the commission of such offense and shall be punished in the same manner and to the same extent as is provided in said sections for the person who committed the offense. The venue of any offense committed in violation of the provisions of this section shall be as provided in section seven [§ 61-11-7], article eleven of this chapter.

WISCONSIN

WIS. STAT. § 948.31 (1993).
Interference with custody by parent or others.

(1)(a) In this subsection, "legal custodian of a child" means:

1. A parent or other person having legal custody of the child under an order or judgment in an action for divorce, legal separation, annulment, child custody, paternity, guardianship or habeas corpus.
2. The department of health and social services or any person, county department under § 46.215, 46.22 or 46.23 or licensed child welfare agency, if custody of the child has been transferred under ch. 48 to that department, person or agency.

(b) Except as provided under ch. 48, whoever intentionally causes a child to leave, takes a child away or withholds a child for more than 12 hours beyond the court-approved period of physical placement or visitation period from a legal custodian with intent to deprive the custodian of his or her custody rights without the consent of the custodian is guilty of a Class C felony. This paragraph is not applicable if the court has entered an order authorizing the person to so take or withhold the child. The fact that joint legal custody has been awarded to both parents by a court does not preclude a court from finding that one parent has committed a violation of this paragraph.

(2) Whoever causes a child to leave, takes a child away or withholds a child for more than 12 hours from the child's parents, or the child's mother in the case of a nonmarital child where parents do not subsequently intermarry under § 767.60, without the consent of the parents or the mother, is guilty of a Class E felony. This subsection is not applicable if legal custody has been granted by court order to the person taking or withholding the child.

(3) Any parent, or any person acting pursuant to directions from the parent, who does any of the following is guilty of a Class C felony:

(a) Intentionally conceals a child from the child's other parent.

(b) After being served with process in an action affecting the family but prior to the issuance of a temporary or final order determining child custody rights, takes the child or causes the child to leave with intent to deprive the other parent of physical custody as defined in § 822.02(9).

(c) After issuance of a temporary or final order specifying joint legal custody rights and periods of physical placement, takes a child from or causes a child to leave the other parent in violation of the order or withholds a child for more than 12 hours beyond the court-approved period of physical placement or visitation period.

(4)(a) It is an affirmative defense to prosecution for violation of this section if the action:

1. Is taken by a parent or by a person authorized by a parent to protect his or her child in a situation in which the parent or authorized person reasonably believes that there is a threat of physical harm or sexual assault to the child;
2. Is taken by a parent fleeing in a situation in which the parent reasonably believes that there is a threat of physical harm or sexual assault to himself or herself;
3. Is consented to by the other parent or any other person or agency having legal custody of the child; or
4. Is otherwise authorized by law.

(b) A defendant who raises an affirmative defense has the burden of proving the defense by a preponderance of the evidence.

(5) The venue of an action under this section is prescribed in § 971.19(8).

(6) In addition to any other penalties provided for violation of this section, a court may order a violator to pay restitution, regardless of whether the violator is placed on probation under § 973.09, to provide reimbursement for any reasonable expenses incurred by any person or any governmental entity in locating and returning the child.

Any such amounts paid by the violator shall be paid to the person or governmental entity which incurred the expense on a prorated basis. Upon the application of any interested party, the court shall hold an evidentiary hearing to determine the amount of reasonable expenses.

WYOMING

WYO. STAT. § 6-2-204 (1984).
Interference with custody; presumption of knowledge of child's age; affirmative defenses; penalties.

(a) A person is guilty of interference with custody if, having no privilege to do so, he knowingly:

(i) Takes or entices a minor from the custody of the minor's parent, guardian or other lawful custodian; or

(ii) Fails or refuses to return a minor to the person entitled to custody.

(b) Proof that the child was under the age of majority gives rise to an inference that the person knew the child's age.

(c) It is an affirmative defense to a prosecution under this section that:

(i) The action was necessary to preserve the child from an immediate danger to his welfare; or

(ii) The child was not less than fourteen (14) years old and the child was taken away or was not returned:

(A) At his own instigation; and

(B) Without intent to commit a criminal offense with or against the child.

(d) Interference with custody is a felony punishable by imprisonment for not more than five (5) years if:

(i) The defendant is not a parent or person in equivalent relation to the child; or

(ii) The defendant knowingly conceals and harbors the child or refuses to reveal the location of the child to the parent, guardian or lawful custodian.

(e) Interference with custody which is not punishable under subsection (d) of this section is a felony punishable by imprisonment for not more than one (1) year and one (1) day.

UNITED STATES

18 U.S.C. § 1204 (1993).
International parental kidnapping.

(a) Whoever removes a child from the United States or retains a child (who has been in the United States) outside the United States with intent to obstruct the lawful exercise of parental rights shall be fined under this title or imprisoned not more than 3 years, or both.

(b) As used in this section—

(1) the term "child" means a person who has not attained the age of 16 years; and

(2) the term "parental rights", with respect to a child, means the right to physical custody of the child—

(A) whether joint or sole (and includes visiting rights); and

(B) whether arising by operation of law, court order, or legally binding agreement of the parties.

(c) It shall be an affirmative defense under this section that—

(1) the defendant acted within the provisions of a valid court order granting the defendant legal custody or visitation rights and that order was obtained pursuant to the Uniform Child Custody Jurisdiction Act and was in effect at the time of the offense;

(2) the defendant was fleeing an incidence or pattern of domestic violence;

(3) the defendant had physical custody of the child pursuant to a court order granting legal custody or visitation rights and failed to return the child as a result of circumstances beyond the defendant's control, and the defendant notified or made reasonable attempts to notify the other parent or lawful custodian of the child of such circumstances within 24 hours after the visitation period had expired and returned the child as soon as possible.

(d) This section does not detract from The Hague Convention on the Civil Aspects of International Parental Child Abduction, done at The Hague on October 25, 1980.

HAGUE CONVENTION OF 25 OCTOBER 1980 ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION
Party Countries and Effective Dates With U.S.

Note: Convention does not apply to abductions occurring prior to effective date.

Argentina	1 June 1991
Australia	1 July 1988
Austria	1 October 1988
Bahamas	1 January 1994
Belize	1 November 1989
Bosnia & Herz.	1 December 1991
Burkino Faso	1 November 1992
Canada	1 July 1988
Chile	1 July 1994
Columbia	1 June 1996
Croatia	1 December 1991
Cyprus	1 March 1995
Denmark	1 July 1991
Ecuador	1 April 1992
Finland	1 August 1994
France	1 July 1988
Germany	1 June 1993
Greece	1 June 1993
Honduras	1 June 1994
Hungary	1 July 1988
Iceland	1 December 1996
Ireland	1 October 1991
Israel	1 December 1991
Italy	1 May 1995
Luxembourg	1 July 1988
Fmr Yougslav Rep of Macedonia	1 December 1991
Mauritius	1 October 1991
Mexico	1 October 1991
Monaco	1 June 1993
Netherlands	1 September 1990
New Zealand	1 October 1991
Norway	1 April 1989
Panama	1 June 1994
Poland	1 November 1992
Portugal	1 July 1988
Romania	1 June 1993
Slovenia	1 April 1995
Spain	1 July 1988
St. Kitts & Nevis	1 June 1988
Sweden	1 June 1989
Switzerland	1 July 1988
United Kingdom	1 July 1988
Venezuela	1 January 1997
Zimbabwe	1 August 1995

Appendix B

Statutes Requiring Intent to Deprive for Protracted Period

ALASKA	ALASKA STAT. § 11.41.330 (1978).
CONNECTICUT	CONN. GEN. STAT. § 53a-98 (1981).
DELAWARE	DEL. CODE ANN. tit. 11, § 785 (1989).
MASSACHUSETTS	MASS. GEN. L. ch. 265, § 26A (1983).
NEW MEXICO	N.M. STAT. ANN. § 30-4-4 (1989).
NEW YORK	N.Y. PENAL LAW § 135.45 (1965).
OREGON	OR. REV. STAT. § 163.245 (1987).
UTAH	UTAH CODE ANN. § 76-5-303(1)(b) (1984).
WASHINGTON	WASH. REV. CODE § 9A.40.060 (1994).

Citation year indicates year of passage or latest amendment.
This compilation is current through July 31, 1995.

Appendix C

Statutes Prohibiting Violation of Joint Custody Orders

DISTRICT OF COLUMBIA	D.C. CODE ANN. § 16-1022 (1989).
IDAHO	IDAHO CODE § 18-4506 (1987).
ILLINOIS	720 ILL. COMP. STAT. § 5/10-5 (1992).
KANSAS	KAN. STAT. ANN. § 21-3422 (1993).
MONTANA	MONT. CODE ANN. § 45-5-304 (1995).
NEVADA	NEV. REV. STAT. § 200.359 (1993).
NEW JERSEY	N.J. REV. STAT. § 2C:13-4 (1990).
OREGON	OR. REV. STAT. § 163.245 (1987). OR. REV. STAT. § 163.257 (1987).
WISCONSIN	WIS. STAT. § 948.31 (1993).
UNITED STATES	18 U.S.C. § 1204 (1993).

Citation year indicates year of passage or latest amendment.
This compilation is current through July 31, 1995.

Appendix D

Statutes Identifying Abduction as Continuous Offense

CALIFORNIA	CAL. PENAL CODE § 279 (1992).
DISTRICT OF COLUMBIA	D.C. CODE ANN. § 16-1023 (1989).
INDIANA	IND. CODE § 35-42-3-4(d) (1990).
NEW JERSEY	N.J. REV. STAT. § 2C:13-4(e) (1990).
NEW MEXICO	N.M. STAT. ANN. § 30-4-4(H) (1989).
OHIO	OHIO REV. CODE ANN. § 2919.23(D)(4) (1991).

Citation year indicates year of passage or latest amendment.
This compilation is current through July 31, 1995.

Appendix E

Statutes Identifying Appropriate Venues

CALIFORNIA	CAL. PENAL CODE § 279(e) (1992). CAL. PENAL CODE § 784.5 (1985).
COLORADO	COLO. REV. STAT. § 18-3-304(4) (1986).
DISTRICT OF COLUMBIA	D.C. CODE ANN. § 16-1023(h) (1989).
MASSACHUSETTS	MASS. GEN. L. ch. 265, § 27A (1979).
MINNESOTA	MINN. STAT. § 609.26 subd. 3 (1991).
MISSOURI	MO. REV. STAT. § 565.163 (1988).
NEW MEXICO	N.M. STAT. ANN. § 30-4-4(J) (1989).
WEST VIRGINIA	W. VA. CODE § 61-2-14e (1984).
WISCONSIN	WIS. STAT. § 948.31(5) (1993).

Citation year indicates year of passage or latest amendment.
This compilation is current through July 31, 1995.

Appendix F

Statutes Covering Pre-decree Abductions

CALIFORNIA	CAL. PENAL CODE § 277 (1992).
DISTRICT OF COLUMBIA	D.C. CODE ANN. § 16-1022 (1989).
FLORIDA	FLA. STAT. ch. 787.03 (1994). FLA. STAT. ch. 787.04 (1988).
GEORGIA	GA. CODE ANN. § 16-5-45 (1987).
IDAHO	IDAHO CODE § 18-4506 (1987).
ILLINOIS	720 ILL. COMP. STAT. § 5/10-5 (1992).
INDIANA	IND. CODE § 35-42-3-4 (1990).
KANSAS	KAN. STAT. ANN. § 21-3422 (1993).
MINNESOTA	MINN. STAT. § 609.26 (1991).
MISSOURI	MO. REV. STAT. § 565.153 (1988).
MONTANA	MONT. CODE ANN. § 45-5-304 (1995).
NEW JERSEY	N.J. REV. STAT. § 2C:13-4 (1990).
NEW MEXICO	N.M. STAT. ANN. § 30-4-4 (1989).
RHODE ISLAND	R.I. GEN. LAWS § 11-26-1.2 (1989).
TEXAS	TEX. PENAL CODE ANN. § 25.03 (1993).

Citation year indicates year of passage or latest amendment.
This compilation is current through July 31, 1995.

Appendix G

Statutes Prohibiting Interference with Visitation

ALASKA	ALASKA STAT. § 11.51.125 (1978).
ARIZONA	ARIZ. REV. STAT. ANN. § 13-1305 (1994).
ARKANSAS	ARK. CODE ANN. § 5-26-501 (1985).
CALIFORNIA	CAL. PENAL CODE § 277 (1992). CAL. PENAL CODE § 278.5 (1989).
DISTRICT OF COLUMBIA	D.C. CODE ANN. § 16-1022 (1989).
FLORIDA	FLA. STAT. ch. 787.03 (1994).
IDAHO	IDAHO CODE § 18-4506 (1987).
ILLINOIS	ILL. COMP. STAT. § 5/10-5.5 (1993).
INDIANA	IND. CODE § 35-42-3-4(b) (1990).
IOWA	IOWA CODE § 710.6 (1986).
MICHIGAN	MICH. COMP. LAWS § 750.350a (1983).
MISSOURI	MO. STAT. REV. § 565.156 (1988).
MONTANA	MONT. CODE ANN. § 45-5-631 (1987). MONT. CODE ANN. § 45-5-632 (1987). MONT. CODE ANN. § 45-5-633 (1987).
NEVADA	NEV. REV. STAT. § 200.359 (1993).
NEW JERSEY	N.J. REV. STAT. § 2C:13-4 (1990).
NEW MEXICO	N.M. STAT. ANN. § 30-4-4 (1989).
SOUTH DAKOTA	S.D. CODIFIED LAWS ANN. § 22-19-9 (1985).
UTAH	UTAH CODE ANN. § 76-5-303 (1984).
WASHINGTON	WASH. REV. CODE § 9A.40.060 (1994).
WISCONSIN	WIS. STAT. § 948.31 (1993).
WEST VIRGINIA	W. VA. CODE § 61-2-14d (1984).
UNITED STATES	18 U.S.C. § 1204 (1993).

Citation year indicates year of passage or latest amendment.
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Appendix H

Statutes Addressing Agent/Accomplice Liability

ARIZONA	ARIZ. REV. STAT. ANN. § 13-1302 (1994).
DISTRICT OF COLUMBIA	D.C. CODE ANN. § 16-1022 (1989).
FLORIDA	FLA. STAT. ch. 787.03 (1994).
IDAHO	IDAHO CODE § 18-4506 (1987).
ILLINOIS	720 ILL. COMP. STAT. § 5/10-5 (1992). 720 ILL. COMP. STAT. § 5/10-7 (1992).
KANSAS	KAN. STAT. ANN. § 21-3422a (1993).
MARYLAND	MD. CODE ANN., FAM. LAW § 9-301 (1995). MD. CODE ANN., FAM. LAW § 9-304 (1995). MD. CODE ANN., FAM. LAW § 9-305 (1995).
MISSOURI	MO. REV. STAT. § 565.156 (1988). MO. REV. STAT. § 565.165 (1988).
NEVADA	NEV. REV. STAT. § 200.359 (1993).
OHIO	OHIO REV. CODE ANN. § 2905.04 (1985).
RHODE ISLAND	R.I. GEN. LAWS § 11-26-1.2 (1989).
TEXAS	TEX. PENAL CODE ANN. § 25.031 (1993).
VIRGINIA	VA. CODE ANN. § 18.2-50 (1975).
WASHINGTON	WASH. REV. CODE § 9A.40.060 (1994).
WEST VIRGINIA	W. VA. CODE § 61-2-14e (1984).
WYOMING	WYO. STAT. § 6-2-204 (1984).

Citation year indicates year of passage or latest amendment.
This compilation is current through July 31, 1995.

Appendix I

Statutory Protection of Child Defenses

CALIFORNIA	CAL. PENAL CODE § 277 (1992).
COLORADO	COLO. REV. STAT. § 18-3-304 (1986).
DISTRICT OF COLUMBIA	D.C. CODE ANN. § 16-1023 (1989).
FLORIDA	FLA. STAT. ch. 787.03 (1994). FLA. STAT. ch. 787.04 (1988).
IDAHO	IDAHO CODE § 18-4506 (1987).
LOUISIANA	LA. REV. STAT. ANN. § 14:45.1 (1981).
MARYLAND	MD. CODE ANN., FAM. LAW § 9-306 (1984).
MICHIGAN	MICH. COMP. LAWS § 750.350a (1986).
MINNESOTA	MINN. STAT. § 609.26 (1991).
NEVADA	NEV. REV. STAT. § 200.359 (1993).
NEW HAMPSHIRE	N.H. REV. STAT. ANN. § 633:4 (1983).
NEW JERSEY	N.J. REV. STAT. § 2C:13-4 (1990).
NEW YORK	N.Y. PENAL LAW § 135.50 (1981).
OHIO	OHIO REV. CODE ANN. § 2905.04 (1985). OHIO REV. CODE ANN. § 2919.23 (1991).
OKLAHOMA	OKLA. STAT. ANN. tit. 43, § 527 (1994).
PENNSYLVANIA	18 PA. CONS. STAT. § 2904 (1984). 18 PA. CONS. STAT. § 2909 (1990).
RHODE ISLAND	R.I. GEN. LAWS § 11-26-1.2 (1989).
VERMONT	VT. STAT. ANN. tit. 13, § 2451 (1979).
WASHINGTON	WASH. REV. CODE § 9A.40.080 (1989).
WEST VIRGINIA	W. VA. CODE § 61-2-14d (1984).
WISCONSIN	WIS. STAT. § 948.31 (1993).
WYOMING	WYO. STAT. § 6.2.204 (1984).

Citation year indicates year of passage or latest amendment.
This compilation is current through July 31, 1995.

Appendix J

Statutory Flight from Domestic Violence Defenses

CALIFORNIA	CAL. PENAL CODE § 277 (1992).
DISTRICT OF COLUMBIA	D.C. CODE ANN. § 16-1023 (1989).
FLORIDA	FLA. STAT. ch. 787.03(6) (1994).
IDAHO	IDAHO CODE § 18-4506 (1987).
ILLINOIS	720 ILL. COMP. STAT. § 5/10-5 (1992).
MINNESOTA	MINN. STAT. § 609.26 (1991).
MISSOURI	MO. REV. STAT. § 565.160 (1988).
NEVADA	NEV. REV. STAT. § 200.359 (1993).
NEW JERSEY	N.J. REV. STAT. § 2C:13-4(d) (1990).
OKLAHOMA	OKLA. STAT. ANN. tit. 43, § 527 (1994).
PENNSYLVANIA	18 PA. CONS. STAT. § 2909 (1990)
RHODE ISLAND	R.I. GEN. LAWS § 11-26-1.1 (1989). R.I. GEN. LAWS § 11-26-1.2 (1989).
WASHINGTON	WASH. REV. CODE § 9A.40.060 (1994). WASH. REV. CODE § 9A.40.080 (1989).
WISCONSIN	WIS. STAT. § 948.31 (1993).
UNITED STATES	18 U.S.C. § 1204 (1993).

Citation year indicates year of passage or latest amendment.
This compilation is current through July 31, 1995.

Appendix K

Statutes Allowing Recovery of Expenses

CALIFORNIA	CAL. PENAL CODE § 279(d) (1992).
DISTRICT OF COLUMBIA	D.C. CODE ANN. § 16-1023(g) (1989).
IDAHO	IDAHO CODE § 18-4506(4) (1987).
ILLINOIS	720 ILL. COMP. STAT. § 5/10-5(e) (1992).
INDIANA	IND. CODE § 35-42-3-4(e) (1990).
LOUISIANA	LA. REV. STAT. ANN. § 14:45.1(B) (1981).
MICHIGAN	MICH. COMP. LAWS § 750.350a(3) (1986).
MINNESOTA	MINN. STAT. § 609.26 subd. 4 (1991).
MISSOURI	MO. REV. STAT. § 565.169 (1988).
NEVADA	NEV. REV. STAT. § 200.359(5) (1993).
NEW JERSEY	N.J. REV. STAT. § 2C:13-4 (1990).
NEW MEXICO	N.M. STAT. ANN. § 30-4-4(I) (1989).
OREGON	OR. REV. STAT. § 163.245(2) (1987). OR. REV. STAT. § 163.257(2) (1987).
SOUTH DAKOTA	S.D. CODIFIED LAWS ANN. § 22-19-12 (1981).
WASHINGTON	WASH. REV. CODE § 9A.40.080(1) (1989).
WISCONSIN	WIS. STAT. § 948.31(6) (1993).

Citation year indicates year of passage or latest amendment.
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Appendix L

UNIFORM CHILD CUSTODY JURISDICTION ACT

The Committee which acted for the National Conference of Commissioners on Uniform State Laws in preparing the Uniform Child Custody Jurisdiction Act was as follows:

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Copies of all Uniform Acts and other printed matter issued by the Conference may be obtained from

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS
1155 East Sixtieth Street
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UNIFORM CHILD CUSTODY JURISDICTION ACT

PREFATORY NOTE

There is growing public concern over the fact that thousands of children are shifted from state to state and from one family to another every year while their parents or other persons battle over their custody in the courts of several states. Children of separated parents may live with their mother, for example, but one day the father snatches them and brings them to another state where he petitions a court to award him custody while the mother starts custody proceedings in her state; or in the case of illness of the mother the children may be cared for by grandparents in a third state, and all three parties may fight over the right to keep the children in several states. These and many similar situations constantly arise in our mobile society where family members often are scattered all over the United States and at times over other countries. A young child may have been moved to another state repeatedly before the case goes to court. When a decree has been rendered awarding custody to one of the parties, this is by no means the end of the child's migrations. It is well known that those who lose a court battle over custody are often unwilling to accept the judgment of the court. They will remove the child in an unguarded moment or fail to return him after a visit and will seek their luck in the court of a distant state where they hope to find—and often do find—a more sympathetic ear for their plea for custody. The party deprived of the child may then resort to similar tactics to recover the child and this "game" may continue for years, with the child thrown back and forth from state to state, never coming to rest in one single home and in one community.

The harm done to children by these experiences can hardly be overestimated. It does not require an expert in the behavioral sciences to know that a child, especially during his early years and the years of growth, needs security and stability of environment and a continuity of affection. A child who has never been given the chance to develop a sense of belonging and whose personal attachments when beginning to form are cruelly disrupted, may well be crippled for life, to his own lasting detriment and the detriment of society.

This unfortunate state of affairs has been aided and facilitated rather than discouraged by the law. There is no statutory law in this area and the judicial law is so unsettled that it seems to offer nothing but a "quicksand foundation" to stand on. See Leflar, American Conflicts Law 585 (1968). See also Clark, Domestic Relations 320 (1968). There is no certainty as to which state has jurisdiction when persons seeking custody of a child approach the courts of several states simultaneously or successively. There is no certainty as to whether a custody decree rendered in one state is entitled to recognition and enforcement in another; nor as to when one state may alter a custody decree of a sister state.

The judicial trend has been toward permitting custody claimants to sue in the courts of almost any state, no matter how fleeting the contact of the child and family was with the particular state, with little regard to any conflict of law rules.

See Leflar, American Conflicts Law 585-6 (1968) and Leflar, 1967 Annual Survey of American Law, Conflict Laws 26 (1968). Also, since the United States Supreme Court has never settled the question whether the full faith and credit clause of the Constitution applies to custody decrees, many states have felt free to modify custody decrees of sister states almost at random although the theory usually is that there has been a change of circumstances requiring a custody award to a different person. Compare *People ex rel. Halvey v. Halvey*, 330 U.S. 610, 67 S. Ct. 903, 91 L. Ed. 1133 (1947); and see Comment, Ford v. Ford: Full Faith and Credit To Child Custody Decrees? 73 Yale L.J. 134 (1963). Generally speaking, there has been a tendency to over-emphasize the need for fluidity and modifiability of custody

decrees at the expense of the equal (if not greater) need, from the standpoint of the child, for stability of custody decisions once made. Compare Clark, Domestic Relations 326 (1968).

Under this state of law the courts of the various states have acted in isolation and at times in competition with each other; often with disastrous consequences. A court of one state may have awarded custody to the mother while another state decreed simultaneously that the child must go to the father. See *Stout v. Pate*, 209 Ga. 786, 75 S.E.2d 748 (1953) and *Stout v. Pate*, 120 Cal. App. 2d 699, 261 P.2d 788 (1953), cert. denied in both cases 347 U.S. 968, 74 S. Ct. 744, 776, 98 L. Ed. 1109, 1110 (1954); *Moniz v. Moniz*, 142 Cal. App. 2d 527, 298 P.2d 710 (1956); and *Sharpe v. Sharpe*, 77 Ill. App. 2d 295, 222 N.E.2d 340 (1966). In situations like this the litigants do not know which court to obey. They may face punishment for contempt of court and perhaps criminal charges for child stealing in one state when complying with the decree of the other. Also, a custody decree made in one state one year is often overturned in another jurisdiction the next year or some years later and the child is handed over to another family, to be repeated as long as the feud continues. See *Com. ex rel. Thomas v. Gillard*, 203 Pa. Super. 95, 198 A.2d 377 (1964); *In Re Guardianship of Rodgers*, 100 Ariz. 269, 413 P.2d 774 (1966); *Berlin v. Berlin*, 239 Md. 52, 210 A.2d 380 (1965); *Berlin v. Berlin*, 21 N.Y.2d 371, 235 N.E.2d 109 (1967), cert. denied 37 L.W. 3123 (1968); and *Batchelor v. Fulcher*, 415 S.W.2d 828 (Ky. 1967).

In this confused legal situation the person who has possession of the child has an enormous tactical advantage. Physical presence of the child opens the doors of many courts to the petitions and often assures him of a decision in his favor. It is not surprising then that custody claimants tend to take the law into their own hands, that they resort to self-help in the form of child stealing, kidnapping, or various other schemes to gain possession of the child. The irony is that persons who are good, law-abiding citizens are often driven into these tactics against their inclinations; and that lawyers who are reluctant to advise the use of maneuver of doubtful legality may place their clients at a decided disadvantage.

To remedy this intolerable state of affairs where self-help and the rule of "seize and run" prevail rather than the orderly processes of the law, uniform legislation has been urged in recent years to bring about a fair measure of interstate stability in custody awards. See Ratner, Child Custody in a Federal System, 62 Mich. L. Rev. 795 (1964); Ratner, Legislative Resolution of the Interstate Child Custody Problem:

A Reply to Professor Currie and a Proposed Uniform Act, 38 S. Cal. L. Rev. 183 (1965); and Ehrenzweig, The Interstate Child and Uniform Legislation: A Plea for Extra-Litigious Proceedings, 64 Mich. L. Rev. 1 (1965). In drafting this Act, the National Conference of Commissioners has drawn heavily on the work of these authors and has consulted with other leading authorities in the field. The American Bar Association has taken an active part in furthering the project.

The Act is designed to bring some semblance of order into the existing chaos. It limits custody jurisdiction to the state where the child has his home or where there are other strong contacts with the child and his family. See Section 3. It provides for the recognition and enforcement of out-of-state custody decrees in many instances. See Sections 13 and 15. Jurisdiction to modify decrees of other states is limited by giving a jurisdictional preference to the prior court under certain conditions. See Section 14. Access to a court may be denied to petitioners who have engaged in child snatching or similar practices. See Section 8. Also, the Act opens up direct lines of communication between courts of different states to prevent jurisdictional conflict and bring about interstate judicial assistance in custody cases.

The Act stresses the importance of the personal appearance before the court of non-residents who claim custody, and of the child himself, and provides for the payment of travel expenses for this purpose.

See Section 11. Further provisions insure that the judge receives necessary out-of-state information with the assistance of courts in other states. See Sections 17 through 22.

Underlying the entire Act is the idea that to avoid the jurisdictional conflicts and confusions which have done serious harm to innumerable children, a court in one state must assume major responsibility to determine who is to have custody of a particular child; that this court must reach out for the help of courts in other states in order to arrive at a fully informed judgment which transcends state lines and considers all claimants, residents and nonresidents, on an equal basis and from the standpoint of the welfare of the child. If this can be achieved, it will be less important *which* court exercises jurisdiction but that courts of the several states involved act in partnership to bring about the best possible solution for a child's future.

The Act is not a reciprocal law. It can be put into full operation by each individual state regardless of enactment of other states. But its full benefits will not be reaped until a large number of states have enacted it, and until the courts, perhaps aided by regional or national conferences, have come to develop a new, truly "inter-state" approach to child custody litigation. The general policies of the Act and some of its specific provisions apply to international custody cases.

SECTION 1. [*Purposes of Act; Construction of Provisions.*]

(a) The general purposes of this Act are to:

(1) avoid jurisdictional competition and conflict with courts of other states in matters of child custody which have in the past resulted in the shifting of children from state to state with harmful effects on their well-being;

(2) promote cooperation with the courts of other states to the end that a custody decree is rendered in that state which can best decide the case in the interest of the child;

(3) assure that litigation concerning the custody of a child take place ordinarily in the state with which the child and his family have the closest connection and where significant evidence concerning his care, protection, training, and personal relationships is most readily available, and that courts of this state decline the exercise of jurisdiction when the child and his family have a closer connection with another state;

(4) discourage continuing controversies over child custody in the interest of greater stability of home environment and of secure family relationships for the child;

(5) deter abductions and other unilateral removals of children undertaken to obtain custody awards;

(6) avoid re-litigation of custody decisions of other states in this state insofar as feasible;

(7) facilitate the enforcement of custody decrees of other states;

(8) promote and expand the exchange of information and other forms of mutual assistance between the courts of this state and those of other states concerned with the same child; and

(9) make uniform the law of those states which enact it.

(b) This Act shall be construed to promote the general purposes stated in this section.

COMMENT

Because this uniform law breaks new ground not previously covered by legislation, its purposes are stated in some detail. Each section must be read and applied with these purposes in mind.

SECTION 2. [*Definitions.*]

As used in this Act:

(1) "contestant" means a person, including a parent, who claims a right to custody or visitation rights with respect to a child;

(2) "custody determination" means a court decision and court orders and instructions providing for the custody of a child, including visitation rights; it does not include a decision relating to child support or any other monetary obligation of any person;

(3) "custody proceeding" includes proceedings in which a custody determination is one of several issues, such as an action for divorce or separation, and includes child neglect and dependency proceedings;

(4) "decree" or "custody decree" means a custody determination contained in a judicial decree or order made in a custody proceeding, and includes an initial decree and a modification decree;

(5) "home state" means the state in which the child immediately preceding the time involved lived with his parents, a parent, or a person acting as parent, for at least 6 consecutive months, and in the case of a child less than 6 months old the state in which the child lived from birth with any of the persons mentioned. Periods of temporary absence of any of the named persons are counted as part of the 6-month or other period;

(6) "initial decree" means the first custody decree concerning a particular child;

(7) "modification decree" means a custody decree which modifies or replaces a prior decree, whether made by the court which rendered the prior decree or by another court;

(8) "physical custody" means actual possession and control of a child;

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

(10) "state" means any state, territory, or possession of the United States, the Commonwealth of Puerto Rico, and the District of Columbia.

COMMENT

Subsection (3) indicated that "custody proceeding" is to be understood in a broad sense. The term covers habeas corpus actions, guardianship petitions, and other proceedings available under general state law to determine custody. See Clark, Domestic Relations 576-582 (1968).

Other definitions are explained, if necessary, in the comments to the sections which use the terms defined.

SECTION 3. [*Jurisdiction.*]

(a) A court of this State which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if:

(1) this State (i) is the home state of the child at the time of commencement of the proceeding, or (ii) had been the child's home state within 6 months before commencement of the proceeding and the child is absent from this State because of his removal or retention by a person claiming his custody or for other reasons, and a parent or person acting as parent continues to live in this State; or

(2) it is in the best interest of the child that a court of this State assume jurisdiction because (i) this child and his parents, or the child and at least one contestant, have a significant connection with this State, and (ii) there is available in this State substantial evidence concerning the child's present or future care, protection, training, and personal relationships; or

(3) the child is physically present in this State and (i) the child has been abandoned or (ii) it is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse or is otherwise neglected [or dependent]; or

(4) (i) it appears that no other state would have jurisdiction under prerequisites substantially in accordance with paragraphs (1), (2), or (3), or another state has declined to exercise jurisdiction on the ground that this State is the more appropriate forum to determine the custody of the child, and (ii) it is in the best interest of the child that this court assume jurisdiction.

(b) Except under paragraphs (3) and (4) of subsection (a), physical presence in this State of the child, or of the child and one of the contestants, is not alone sufficient to confer jurisdiction on a court of this State to make a child custody determination.

(c) Physical presence of the child, while desirable, is not a prerequisite for jurisdiction to determine his custody.

COMMENT

Paragraphs (1) and (2) of subsection (a) establish the two major bases for jurisdiction. In the first place, a court in the child's home state has jurisdiction and secondly, if there is no home state or the child and his family have equal or stronger ties with another state, a court in that state has jurisdiction. If this alternative test produces concurrent jurisdiction in more than one state, the mechanisms provided in sections 6 and 7 are used to assure that only one state makes the custody decision.

"Home state" is defined in section 2(b). A 6-month period has been selected in order to have a definite and certain test which is at the same time based on a reasonable assumption of fact. See Ratner, Child Custody in a Federal System, 62 Mich. L. Rev. 796, 818 (1964) who explains:

> "Most American children are integrated into an American community after living there six months; consequently this period of residence would seem to provide a reasonable criterion for identifying the established home."

Subparagraph (ii) of paragraph (1) extends the home state rule for an additional six-month period in order to permit suit in the home state after the child's departure. The main objective is to protect a parent who has been left by his spouse taking

the child along. The provision makes clear that the stay-at-home parent, if he acts promptly, may start proceedings in his own state if he desires, without the necessity of attempting to base jurisdiction on paragraph (2). This changes the law in those states which required presence of the child as a condition for jurisdiction and consequently forced the person left behind to follow the departed person to another state, perhaps to several states in succession. See also subsection (c).

Paragraph (2) comes into play either when the home state test cannot be met or as an alternative to that test. The first situation arises, for example, when a family has moved frequently and there is no state where the child has lived for 6 months prior to suit, or if the child has recently been removed from his home state and the person who was left behind has also moved away. See paragraph (1), last clause. A typical example of alternative jurisdiction is the case in which the stay-at-home parent chooses to follow the departed spouse to state 2 (where the child has lived for several months with the other parent) and starts proceedings there. Whether the departed parent also has access to a court in state 2, depends on the strength of the family ties in that state and on the applicability of the clean hands provision of section 8. If state 2, for example, was the state of the matrimonial home where the entire family lived for two years before moving to the "home state" for 6 months, and the wife returned to state 2 with the child with the consent of the husband, state 2 might well have jurisdiction upon petition of the wife. The same may be true if the wife returned to her parents in her former home state where the child had spent several months every year before. Compare Willmore v. Willmore, 273 Minn. 537, 143 N.W.2d 630 (1966), cert. denied 385 U.S. 898 (1966). While jurisdiction may exist in two states in these instances, it will not be *exercised* in both. See sections 6 and 7.

Paragraph (2) of subsection (a) is supplemented by subsection (b) which is designed to discourage unilateral removal of children to other states and to guard generally against too liberal an interpretation of paragraph (2). Short-term presence in the state is not enough even though there may be an intent to stay longer, perhaps an intent to establish a technical "domicile" for divorce or other purposes.

Paragraph (2) perhaps more than any other provision of the Act requires that it be interpreted in the spirit of the legislative purposes expressed in section 1. The paragraph was phrased in general terms in order to be flexible enough to cover many fact situations too diverse to lend themselves to exact description. But its purpose is to limit jurisdiction rather than to proliferate it. The first clause of the paragraph is important: jurisdiction exists only if it is in the *child's* interest, not merely the interest or convenience of the feuding parties, to determine custody in a particular state. The interest of the child is served when the forum has optimum access to relevant evidence about the child and family. There must be maximum rather than minimum contact with the state. The submission of the parties to a forum, perhaps for purposes of divorce, is not sufficient without additional factors establishing closer ties with the state. Divorce jurisdiction does not necessarily include custody jurisdiction. See Clark, Domestic Relations 578 (1968).

Paragraph (3) of subsection (a) retains and reaffirms *parens patriae* jurisdiction, usually exercised by a juvenile court, which a state must assume when a child is in a situation requiring immediate protection. This jurisdiction exists when a child has been abandoned and in emergency cases of child neglect. Presence of the child in the state is the only prerequisite. This extraordinary jurisdiction is reserved for extraordinary circumstances. See Application of Lang, 9 App. Div. 2d 401, 193 N.Y.S. 2d 763 (1959). When there is child neglect without emergency or abandonment, jurisdiction cannot be based on this paragraph.

Paragraph (4) of subsection (a) provides a final basis for jurisdiction which is subsidiary in nature. It is to be resorted to only if no other state could, or would, assume jurisdiction under the other criteria of this section.

Subsection (c) makes it clear that presence of the child is not a jurisdictional requirement. Subsequent sections are designed to assure the appearance of the child before the court.

This section governs jurisdiction to make an initial decree as well as a modification decree. Both terms are defined in section 2. Jurisdiction to modify an initial or modification decree of another state is subject to additional restrictions contained in sections 8(b) and 14(a).

SECTION 4. [*Notice and Opportunity to be Heard.*]

Before making a decree under this Act, reasonable notice and opportunity to be heard shall be given to the contestants, any parent whose parental rights have not been previously terminated, and any person who has physical custody of the child. If any of these persons is outside this State, notice and opportunity to be heard shall be given pursuant to section 5.

COMMENT

This section lists the persons who must be notified and given an opportunity to be heard to satisfy due process requirements. As to persons in the forum state, the general law of the state applies; others are notified in accordance with section 5. Strict compliance with sections 4 and 5 is essential for the validity of a custody decree within the state and its recognition and enforcement in other states under section 12, 13, and 15. See Restatement of the Law Second, Conflict of Laws, Proposed Official Draft sec. 69 (1967); and compare Armstrong v. Manzo, 380 U.S. 545, 85 S. Ct. 1187, 14 L. Ed. 2d 62 (1965).

SECTION 5. [*Notice to Persons Outside this State; Submission to Jurisdiction.*]

(a) Notice required for the exercise of jurisdiction over a person outside this State shall be given in a manner reasonably calculated to give actual notice, and may be:

(1) by personal delivery outside this State in the manner prescribed for service of process within this State;

(2) in the manner prescribed by the law of the place in which the service is made for service of process in that place in an action in any of its courts of general jurisdiction;

(3) by any form of mail addressed to the person to be served and requesting a receipt; or

(4) as directed by the court [including publications, if other means of notification are ineffective].

(b) Notice under this section shall be served, mailed, or delivered, [or last published] at least [10, 20] days before any hearing in this State.

(c) Proof of service outside this State may be made by affidavit of the individual who made the service, or in the manner prescribed by the law of the place in which the service is made. If service is made by mail, proof may be by a receipt signed by the addressee or other evidence of delivery to the addressee.

(d) Notice is not required if a person submits to the jurisdiction of the court.

COMMENT

Section 2.01 of the Uniform Interstate and International Procedure Act has been followed to a large extent. See 9B U.L.A. 315 (1966). If at all possible, actual notice should be received by the affected persons; but efforts to impart notice in a manner reasonably calculated to give actual notice are sufficient when a person, who may perhaps conceal his whereabouts, cannot be reached. See Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950) and Schroeder v. City of New York, 371 U.S. 208, 83 S. Ct. 279, 9 L. Ed. 2d 255 (1962).

Notice by publication in lieu of other means of notification is not included because of its doubtful constitutionality. See Mullane v. Central Hanover Bank and Trust Co., *supra;* and see Hazard, A General Theory of State-Court Jurisdiction, 1965 Supreme Court Rev. 241, 277, 286-87. Paragraph (4) of subsection (a) lists notice by publication in brackets for the benefit of those states which desire to use published notices *in addition to* the modes of notification provided in this section when these modes prove ineffective to impart actual notice.

The provisions of this section, and paragraphs (2) and (4) of subsection (a) in particular, are subject to the caveat that notice and opportunity to be heard must always meet due process requirements as they exist at the time of the proceeding.

SECTION 6. [*Simultaneous Proceedings in Other States.*]

(a) A court of this State shall not exercise its jurisdiction under this Act if at the time of filing the petition a proceeding concerning the custody of the child was pending in a court of another state exercising jurisdiction substantially in conformity with this Act, unless the proceeding is stayed by the court of the other state because this State is a more appropriate forum or for other reasons.

(b) Before hearing the petition in a custody proceeding the court shall examine the pleadings and other information supplied by the parties under section 9 and shall consult the child custody registry established under section 16 concerning the pendency of proceedings with respect to the child in other states. If the court has reason to believe that proceedings may be pending in another state it shall direct an inquiry to the state court administrator or other appropriate official of the other state.

(c) If the court is informed during the course of the proceeding that a proceeding concerning the custody of the child was pending in another state before the court assumed jurisdiction it shall stay the proceeding and communicate with the court in which the other proceeding is pending to the end that the issue may be litigated in the more appropriate forum and that information be exchanged in accordance with sections 19 through 22. If a court of this state has made a custody decree before being informed of a pending proceeding in a court of another state it shall immediately inform that court of the fact. If the court is informed that a proceeding was commenced in another state after it assumed jurisdiction it shall likewise inform the other court to the end that the issues may be litigated in the more appropriate forum.

COMMENT

Because of the havoc wreaked by simultaneous and competitive jurisdiction which has been described in the Prefatory Note, this section seeks to avoid jurisdictional conflict with all feasible means, including novel methods. Courts are expected to take an active part under this section in seeking out information about custody proceedings concerning the same child pending in other states. In a proper case jurisdiction is yielded to the other state either under this section or under section 7. Both sections must be read together.

When the courts of more than one state have jurisdiction under sections 3 or 14, priority in time determines which court will proceed with the action, but the application of the inconvenient forum principle of section 7 may result in the handling of the case by the other court.

While jurisdiction need not be yielded under subsection (a) if the other court would not have jurisdiction under the criteria of this Act, the policy against simultaneous custody proceedings is so strong that it might in a particular situation be appropriate to leave the case to the other court even under such circumstances. See subsection (3) and section 7.

Once a custody decree has been rendered in one state, jurisdiction is determined by sections 8 and 14.

SECTION 7. [*Inconvenient Forum.*]

(a) A court which has jurisdiction under this Act to make an initial or modification decree may decline to exercise its jurisdiction any time before making a decree if it finds that it is an inconvenient forum to make a custody determination under the circumstances of the case and that a court of another state is a more appropriate forum.

(b) A finding of inconvenient forum may be made upon the court's own motion or upon motion of a party or a guardian ad litem or other representative of the child.

(c) In determining if it is an inconvenient forum, the court shall consider if it is in the interest of the child that another state assume jurisdiction. For this purpose it may take into account the following factors, among others:

(1) if another state is or recently was the child's home state;

(2) if another state has a closer connection with the child and his family or with the child and one or more of the contestants;

(3) if substantial evidence concerning the child's present or future care, protection, training, and personal relationships is more readily available in another state;

(4) if the parties have agreed on another forum which is no less appropriate; and

(5) if the exercise of jurisdiction by a court of this state would contravene any of the purposes stated in section 1.

(d) Before determining whether to decline or retain jurisdiction the court may communicate with a court of another state and exchange information pertinent to the assumption of jurisdiction by either court with a view to assuring that jurisdiction will be exercised by the more appropriate court and that a forum will be available to the parties.

(e) If the court finds that it is an inconvenient forum and that a court of another state is a more appropriate forum, it may dismiss the proceedings, or it may stay the proceedings upon condition that a custody proceeding be promptly commenced in another named state or upon any other conditions which may be just and proper, including the condition that a moving party stipulate his consent and submission to the jurisdiction of the other forum.

(f) The court may decline to exercise its jurisdiction under this Act if a custody determination is incidental to an action for divorce or another proceeding while retaining jurisdiction over the divorce or other proceeding.

(g) If it appears to the court that it is clearly an inappropriate forum it may require the party who commenced the proceedings to pay, in addition to the costs of the proceedings in this State, necessary travel and other expenses, including attorneys' fees, incurred by other parties or their witnesses. Payment is to be made to the clerk of the court for remittance to the proper party.

(h) Upon dismissal or stay of proceedings under this section the court shall inform the court found to be the more appropriate forum of this fact, of [sic] if the court which would have jurisdiction in the other state

is not certainly known, shall transmit the information to the court administrator or other appropriate official for forwarding to the appropriate court.

(i) Any communication received from another state informing this State of a finding of inconvenient forum because a court of this State is the more appropriate forum shall be filed in the custody registry of the appropriate court. Upon assuming jurisdiction the court of this State shall inform the original court of this fact.

COMMENT

The purpose of this provision is to encourage judicial restraint in exercising jurisdiction whenever another state appears to be in a better position to determine custody of a child. It serves as a second check on jurisdiction once the test of section 3 or 14 has been met.

The section is a particular application of the inconvenient forum principle, recognized in most states by judicial law, adapted to the special needs of child custody cases. The terminology used follows section 84 of the Restatement of the Law Second, Conflict of Laws, Proposed Official Draft (1967). Judicial restrictions or exceptions to the inconvenient forum rule made in some states do not apply to this statutory scheme which is limited to child custody cases.

Like section 6, this section stresses interstate judicial communication and cooperation. When there is doubt as to which is the more appropriate forum, the question may be resolved by consultation and cooperation among the courts involved.

Paragraphs (1) through (5) of subsection (c) specify some, but not all, considerations which enter into a court determination of inconvenient forum. Factors customarily listed for purposes of the general principle of the inconvenient forum (such as convenience of the parties and hardship to the defendant) are also pertinent, but may under the circumstances be of secondary importance because the child who is not a party is the central figure in the proceedings.

Part of subsection (e) is derived from Wis. Stat. Ann., sec. 262.19 (1).

Subsection (f) makes it clear that a court may divide a case, that is, dismiss part of it and retain the rest. See section 1.05 of the Uniform Interstate and International Procedure Act. When the custody issue comes up in a divorce proceeding, courts may have frequent occasion to decline jurisdiction as to that issue (assuming that custody jurisdiction exists under section 3 or 14).

Subsection (g) is an adaptation of Wis. Stat. Ann., sec. 262.20. Its purpose is to serve as a deterrent against "frivolous jurisdiction claims," as G.W. Foster states in the Revision Notes to the Wisconsin provision. It applies when the forum chosen is seriously inappropriate considering the jurisdictional requirements of the Act.

SECTION 8. [*Jurisdiction Declined by Reason of Conduct.*]

(a) If the petitioner for an initial decree has wrongfully taken the child from another state or has engaged in similar reprehensible conduct the court may decline to exercise jurisdiction if this is just and proper under the circumstances.

(b) Unless required in the interest of the child, the court shall not exercise its jurisdiction to modify a custody decree of another state if the petitioner, without consent of the person entitled to custody, has improperly removed the child from the physical custody of the person entitled to custody or has improperly retained the child after a visit or other temporary relinquishment of physical custody. If the petitioner has violated any other provision of a custody decree of another state the court may decline to exercise its jurisdiction if this is just and proper under the circumstances.

(c) In appropriate cases a court dismissing a petition under this section may charge the petitioner with necessary travel and other expenses, including attorneys' fees, incurred by other parties or their witnesses.

COMMENT

This section incorporates the "clean hands doctrine," so named by Ehrenzweig, Interstate Recognition of Custody Decrees, 51 Mich. L. Rev. 345 (1953). Under this doctrine courts refuse to assume jurisdiction to reexamine an out-of-state custody decree when the petitioner has abducted the child or has engaged in some other objectionable scheme to gain or retain physical custody of the child in violation of the decree. See Fain, Custody of Children, The California Family Lawyer I, 539, 546 (1961); Ex Parte Mullins, 26 Wash. 2d 419, 174 P.2d 790 (1946); Crocker v. Crocker, 122 Colo. 49, 219 P.2d 311 (1950); and Leathers v. Leathers, 162 Cal. App. 2d 768, 328 P.2d 853 (1958). But when adherence to this rule would lead to

punishment of the parent at the expense of the well-being of the child, it is often not applied. See Smith v. Smith, 135 Cal. App. 2d 100, 286 P.2d 1009 (1955) and In re Guardianship of Rodgers, 100 Ariz. 269, 413 P.2d 744 (1966).

Subsection (a) extends the clean hands principle to cases in which a custody decree has not yet been rendered in any state. For example, if upon a de facto separation the wife returned to her own home with the children without objection by her husband and lived there for two years without hearing from him, and the husband without warning forcibly removes the children one night and brings them to another state, a court in that state although it has jurisdiction after 6 months may decline to hear the husband's custody petition. "Wrongfully" taking under this subsection does not mean that a "right" has been violated—both husband and wife as a rule have a right to custody until a court determination is made—but that one party's conduct is so objectionable that a court in the exercise of its inherent equity powers cannot in good conscience permit that party access to its jurisdiction.

Subsection (b) does not come into operation unless the court has power under section 14 to modify the custody decree of another state. It is a codification of the clean hands rule, except that it differentiates between (1) a taking or retention of the child and (2) other violations of custody decrees. In the case of illegal removal or retention refusal of jurisdiction is mandatory unless the harm done to the child by a denial of jurisdiction outweighs the parental misconduct. Compare Smith v. Smith and In re Guardianship of Rodgers, *supra;* and see In re Walter, 223 Cal. App. 2d 217, 39 Cal. Rptr. 243 (1964) where the court assumed jurisdiction after both parents had been guilty of misconduct. The qualifying word "improperly" is added to exclude cases in which a child is withheld because of illness or other emergency or in which there are other special justifying circumstances.

The most common violation of the second category is the removal of the child from the state by the parent who has the right to custody, thereby frustrating the exercise of visitation rights of the other parent. The second sentence of subsection (b) makes refusal of jurisdiction entirely discretionary in this situation because it depends on the circumstances whether non-compliance with the court order is serious enough to warrant the drastic sanction of denial of jurisdiction.

Subsection (c) adds a financial deterrent to child stealing and similar reprehensible conduct.

SECTION 9. [*Information under Oath to be Submitted to the Court.*]

(a) Every party in a custody proceeding in this first pleading or in an affidavit attached to that pleading shall give information under oath as to the child's present address, the places where the child has lived within the last 5 years, and the names and present addresses of the persons with whom the child has lived during that period. In this pleading or affidavit every party shall further declare under oath whether:

(1) he has participated (as a party, witness, or in any other capacity) in any other litigation concerning the custody of the same child in this or any other state;

(2) he has information of any custody proceeding concerning the child pending in a court of this or any other state; and

(3) he knows of any person not a party to the proceedings who has physical custody of the child or claims to have custody or visitation rights with respect to the child.

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

(c) Each party has a continuing duty to inform the court of any custody proceeding concerning the child in this or any other state of which he obtained information during this proceeding.

COMMENT

It is important for the court to receive the information listed and other pertinent facts as early as possible for purposes of determining its jurisdiction, the joinder of additional parties, and the identification of courts in other states which are to be contacted under various provisions of the Act. Information as to custody litigation and other pertinent facts occurring in other countries may also be elicited under this section in combination with section 23.

SECTION 10. [*Additional Parties.*]

If the court learns from information furnished by the parties pursuant to section 9 or from other sources that a person not a party to the custody proceeding has physical custody of the child or claims to have custody or visitation rights with respect to the child, it shall order that person to be joined as a party and to

be duly notified of the pendency of the proceeding and of his joinder as a party. If the person joined as a party is outside this State he shall be served with process or otherwise notified in accordance with section 5.

COMMENT

The purpose of this section is to prevent re-litigations of the custody issue when these would be for the benefit of third claimants rather than the child. If the immediate controversy, for example, is between the parents, but relatives inside or outside the state also claim custody or have physical custody which may lead to a future claim to the child, they must be brought into the proceedings. The courts are given an active role here as under sections of the Act to seek out the necessary information from formal or informal sources.

SECTION 11. [*Appearance of Parties and the Child.*]

[(a) The court may order any party to the proceeding who is in this State to appear personally before the court. If that party has physical custody of the child the court may order that he appear personally with the child.]

(b) If a party to the proceeding whose presence is desired by the court is outside this State with or without the child the court may order that the notice given under section 5 include a statement directing that party to appear personally with or without the child and declaring that failure to appear may result in a decision adverse to that party.

(c) If a party to the proceeding who is outside this State is directed to appear under subsection (b) or desires to appear personally before the court with or without the child, the court may require another party to pay to the clerk of the court travel and other necessary expenses of the party so appearing and of the child if this is just and proper under the circumstances.

COMMENT

Since a custody proceeding is concerned with the past and future care of the child by one of the parties, it is of vital importance in most cases that the judge has an opportunity to see and hear the contestants and the child. Subsection (a) authorizes the court to order the appearance of these persons if they are in the state. It is placed in brackets because states which have such a provision—not only in their juvenile court laws—may wish to omit it. Subsection (b) relates to the appearance of persons who are outside the state and provides one method of bringing them before the court; sections 19(b) and 20(b) provide another. Subsection (c) helps to finance travel to the court which may be close to one of the parties and distant from another; it may be used to equalize the expense if this is appropriate under the circumstances.

SECTION 12. [*Binding Force and Res Judicata Effect of Custody Decree.*]

A custody decree rendered by a court of this State which had jurisdiction under section 3 binds all parties who have been served in this State or notified in accordance with section 5 or who have submitted to the jurisdiction of the court, and who have been given an opportunity to be heard. As to these parties the custody decree is conclusive as to all issues of law and fact decided and as to the custody determination made unless and until that determination is modified pursuant to law, including the provisions of this Act.

COMMENT

This section deals with intra-state validity of custody decrees which provides the basis for their interstate recognition and enforcement. The two prerequisites are (1) jurisdiction under section 3 of this Act and (2) strict compliance with due process mandates of notice and opportunity to be heard. There is no requirement for technical personal jurisdiction, on the traditional theory that custody determinations, as distinguished from support actions (see section 2(2) *supra*), are proceedings in rem or proceedings affecting status. See Restatement of the Law Second, Conflict of Laws, Proposed Official Draft, sections 69 and 79 (1967); and James, Civil Procedure 613 (1965). For a different theory reaching the same result, see Hazard, A General Theory of State-Court Jurisdiction, 1965 Supreme Court Review 241. The section is not at variance with May v. Anderson, 345 U.S. 528, 73 S. Ct. 840, 97 L. Ed. 1221 (1953), which relates to interstate recognition rather than in-state validity of custody decrees. See Ehrenzweig and Louisell, Jurisdiction in a Nutshell 76 (2d ed. 1968); and compare

Reese, Full Faith and Credit to Foreign Equity Decrees, 42 Iowa L.Rev.183, 195 (1957). On May v. Anderson, *supra*, see comment to section 13.

Since a custody decree is normally subject to modification in the interest of the child, it does not have absolute finality, but as long as it has not been modified, it is as binding as a final judgment. Compare Restatement of the Law Second, Conflict of Laws, Proposed Official Draft, section 109 (1957).

SECTION 13. [*Recognition of Out-of-State Custody Decrees.*]

The courts of this State shall recognize and enforce an initial or modification decree of a court of another state which had assumed jurisdiction under statutory provisions substantially in accordance with this Act or which was made under factual circumstances meeting the jurisdictional standards of the Act, so long as this decree has not been modified in accordance with jurisdictional standards substantially similar to those of this Act.

COMMENT

This section and sections 14 and 15 are the key provisions which guarantee a great measure of security and stability of environment to the "interstate child" by discouraging relitigations in other states. See Section 1, and see Ratner, Child Custody in a Federal System, 62 Mich. L. Rev. 795, 828 (1964).

Although the full faith credit clause may perhaps not require the recognition of out-of-state custody decrees, the states are free to recognize and enforce them. See Restatement of the Law Second, Conflict of Laws, Proposed Official Draft, section 109 (1967), and see the Prefatory Note, *supra.* This section declares as a matter of state law, that custody decrees of sister states will be recognized and enforced. Recognition and enforcement is mandatory if the state in which the prior decree was rendered 1) has adopted this Act, 2) has statutory jurisdictional requirements substantially like this Act, or 3) would have had jurisdiction under the facts of the case if this Act had been the law in the state. Compare Comment, Ford v. Ford: Full Faith and Credit to Child Custody Decrees? 73 Yale L.J. 134, 148 (1963).

"Jurisdiction" or "jurisdictional standards" under this section refers to the requirements of section 3 in the case of initial decrees and to the requirements of sections 3 and 14 in the case of modification decrees. The section leaves open the possibility of discretionary recognition of custody decrees of other states beyond the enumerated situations of mandatory acceptance. For the recognition of custody decrees of other nations, see section 23.

Recognition is accorded to a decree which is valid and binding under section 12. This means, for example, that a court in the state where the father resides will recognize and enforce a custody decree rendered in the home state where the child lives with the mother if the father was duly notified and given enough time to appear in the proceedings. Personal jurisdiction over the father is not required. See comment to section 12. This is in accord with a common interpretation of the inconclusive decision in *May v. Anderson*, 345 U.S. 528, 73 S. Ct. 840, 97 L.Ed. 1221 (1953). See Restatement of the Law Second, Conflict of Laws, Proposed Official Draft, section 79 and comment thereto, p. 298 (1967). Under this interpretation a state is permitted to recognize a custody decree of another state regardless of lack of personal jurisdiction, as long as due process requirements of notice and opportunity to be heard have been met. See Justice Frankfurter's concurring opinion in May v. Anderson; and compare Clark, Domestic Relations 323-26 (1968); Goodrich, Conflict of Laws 274 (4th ed. by Scoles, 1964); Stumberg, Principles of Conflict of Laws 325 (3rd ed. 1963); and Comment, The Puzzle of Jurisdiction in Child Custody Actions, 38 U. Colo. L. Rev. 541 (1966). The Act emphasizes the need for the personal appearance of the contestants rather than any technical requirement for personal jurisdiction.

The mandate of this section could cause problems if the prior decree is a punitive or disciplinary measure. See Ehrenzweig, Inter-state Recognition of Custody Decrees, 51 Mich. L. Rev. 345, 370 (1953). If, for example, a court grants custody to the mother and after 5 years' of continuous life with the mother the child is awarded to the father by the same court for the sole reason that the mother who had moved to another state upon remarriage had not lived up to the visitation requirements of the decree, courts in other states may be reluctant to recognize the changed decree. See Berlin v. Berlin, 21 N.Y.2d 371, 235 N.E.2d 109 (1967); and Stout v. Pate, 120 Cal. App. 2d 699, 261 P.2d 788 (1953); Compare Moniz v. Moniz, 142 Cal. App. 2d 527, 298 P.2d 710 (1956). Disciplinary decrees of this type can be avoided under this Act by enforcing the visitation provisions of the decree directly in another state. See Section 15. If the original plan for visitation does not fit the new conditions, a petition for modification of the visiting arrangements would be filed in a court which has jurisdiction, that is, in many cases the original court. See section 14.

SECTION 14. [*Modification of Custody Decree of Another State.*]

(a) If a court of another state has made a custody decree, a court of this State shall not modify that decree unless (1) it appears to the court of this State that the court which rendered the decree does not now have

jurisdiction under jurisdictional prerequisites substantially in accordance with this Act or has declined to assume jurisdiction to modify the decree and (2) the court of this State has jurisdiction.
(b) If a court of this State is authorized under subsection (a) and section 8 to modify a custody decree of another state it shall give due consideration to the transcript of the record and other documents of all previous proceedings submitted to it in accordance with section 22.

COMMENT

Courts which render a custody decree normally retain continuing jurisdiction to modify the decree under local law. Courts in other states have in the past often assumed jurisdiction to modify the out-of-state decree themselves without regard to the preexisting jurisdiction of the other state. See People ex rel. Halvey v. Halvey, 330 U.S. 610, 67 S. Ct. 903, 91 L.Ed. 1133 (1947). In order to achieve greater stability of custody arrangements and avoid forum shopping, subsection (a) declares that other states will defer to the continuing jurisdiction of the court of another state as long as that state has jurisdiction under the standards of this Act. In other words, all petitions for modifications are to be addressed to the prior state if that state has sufficient contact with the case to satisfy section 3. The fact that the court had previously considered the case may be one factor favoring its continued jurisdiction. If, however, all the persons involved have moved away or the contact with the state has otherwise become slight, modification jurisdiction would shift elsewhere. Compare Ratner, Child Custody in a Federal System, 62 Mich. L. Rev. 795, 821-2 (1964).

For example, if custody was awarded to the father in state 1 where he continued to live with the children for two years and thereafter his wife kept the children in state 2 for 6 1/2 months (3 1/2 months beyond her visitation privileges) with or without permission of the husband, state 1 has preferred jurisdiction to modify the decree despite the fact that state 2 has in the meantime become the "home state" of the child. If, however, the father also moved away from state 1, the state loses modification jurisdiction interstate, whether or not its jurisdiction continues under local law. See Clark, Domestic Relations 322-23 (1968). Also, if the father in the same case continued to live in state 1, but let his wife keep the children for several years, without asserting his custody rights and without visits of the children in state 1, modification jurisdiction of state 1 would cease. Compare Brengle v. Hurst, 408 S.W.2d 418 (Ky. 1966). The situation would be different if the children had been abducted and their whereabouts could not be discovered by the legal custodian for several years. The abductor would be denied access to the court of another state under section 8(b) and state 1 would have modification jurisdiction in any event under section 3(a)(4). Compare Crocker v. Crocker, 122 Colo. 49, 219 P.2d 311 (1950).

The prior court has jurisdiction to modify under this section even though its original assumption of jurisdiction did not meet the standards of this Act, as long as it would have jurisdiction *now*, that is, at the time of the petition for modification.

If the state of the prior decree declines to assume jurisdiction to modify the decree, another state with jurisdiction under section 3 can proceed with the case. That is not so if the prior court dismissed the petition on its merits.

Respect for the continuing jurisdiction of another state under this section will serve the purposes of this Act only if the prior court will assume a corresponding obligation to make no changes in the existing custody arrangement which are not required for the good of the child. If the court overturns its own decree in order to discipline a mother or father, with whom the child had lived for years, for failure to comply with an order of the court, the objective of greater stability of custody decrees is not achieved. See Comment to section 13 last paragraph, and cases there cited. See also Sharpe v. Sharpe, 77 Ill. App. 295, 222 N.E.2d 340 (1966). Under section 15 of this Act an order of a court contained in a custody decree can be directly enforced in another state.

Under subsection (b) transcripts of prior proceedings if received under section 22 are to be considered by the modifying court. The purpose is to give the judge the opportunity to be as fully informed as possible before making a custody decision. "One court will seldom have so much of the story that another's inquiry in unimportant" says Paulsen, Appointment of a Guardian in the Conflict of Laws, 45 Iowa L. Rev. 212, 226 (1960). See also Ehrenzweig, the Interstate Child and Uniform Legislation: A Plea for Extra-litigious Proceedings, 64 Mich. L. Rev. 1, 6-7 (1965); and Ratner, Legislative Resolution of the Interstate Custody Problem: A Reply to Professor Currie and a Proposed Uniform Act, 38 S. Cal. L. Rev. 183, 202 (1965). How much consideration is "due" this transcript, whether or under what conditions it is received in evidence, are matters of local, internal law which are not affected by this interstate act.

SECTION 15. [*Filing and Enforcement of Custody Decree of Another State.*]
(a) A certified copy of a custody decree of another state may be filed in the office of the clerk of any [District Court, Family Court] of this State. The clerk shall treat the decree in the same manner as a custody decree of the [District Court, Family Court] of this State. A custody decree so filed has the same effect and shall be enforced in like manner as a custody decree rendered by a court of this State.
(b) A person violating a custody decree of another state which makes it necessary to enforce the decree in

this State may be required to pay necessary travel and other expenses, including attorneys' fees, incurred by the party entitled to the custody or his witnesses.

COMMENT

Out-of-state custody decrees which are required to be recognized are enforced by other states. See section 13. Subsection (a) provides a simplified and speedy method of enforcement. It is derived from section 2 of the Uniform Enforcement of Foreign Judgments Act of 1954, 9A U.L.A. 486 (1955). A certified copy of the decree is filed in the appropriate court, and the decree thereupon becomes in effect a decree of the state of filing and is enforceable by any method of enforcement available under the law of that state.

The authority to enforce an out-of-state decree does not include the power to modify it. If modification is desired, the petition must be directed to the court which has jurisdiction to modify under section 14. This does not mean that the state of enforcement may not in an emergency stay enforcement if there is danger of serious mistreatment of the child. See Ratner, Child Custody in a Federal System, 62 Mich. L. Rev. 796, 832-33 (1964).

The right to custody for periods of visitation and other provisions of a custody decree are enforceable in other states in the same manner as the primary right to custody. If visitation privileges provided in the decree have become impractical upon moving to another state, the remedy against automatic enforcement in another state is a petition in the proper court to modify visitation arrangements to fit the new conditions.

Subsection (b) makes it clear that the financial burden of enforcement of a custody decree may be shifted to the wrongdoer. Compare 2 Armstrong, California Family Law 328 (1966 Suppl.), and *Crocker v. Crocker*, 195 F.2d 236 (1952).

SECTION 16. [*Registry of Out-of-State Custody Decrees and Proceedings.*]
The clerk of each [District Court, Family Court] shall maintain a registry in which he shall enter the following:

(1) certified copies of custody decrees of other states received for filing;

(2) communications as to the pendency of custody proceedings in other states;

(3) communications concerning a finding of inconvenient forum by a court of another state; and

(4) other communications or documents concerning custody proceedings in another state which may affect the jurisdiction of a court of this State or the disposition to be made by it in a custody proceeding.

COMMENT

The purpose of this section is to gather all information concerning out-of-state custody cases which reaches a court in one designated place. The term "registry" is derived from section 35 of the Uniform Reciprocal Enforcement of Support Act of 1958, 9C U.L.A. 61 (1967 Suppl.). Another term may be used if desired without affecting the uniformity of the Act. The information in the registry is usually incomplete since it contains only those documents which have been specifically requested or which have otherwise found their way to the state. It is therefore necessary in most cases for the court to seek additional information elsewhere.

SECTION 17. [*Certified Copies of Custody Decree.*]
The Clerk of the [District Court, Family Court] of this State, at the request of the court of another state or at the request of any person who is affected by or has a legitimate interest in a custody decree, shall certify and forward a copy of the decree to that court or person.

SECTION 18. [*Taking Testimony in Another State.*]
In addition to other procedural devices available to a party, any party to the proceeding or a guardian ad litem or other representative of the child may adduce testimony of witnesses, including parties and the child, by deposition or otherwise, in another state. The court on its own motion may direct that the testimony of a person be taken in another state and may prescribe the manner in which and the terms upon which the testimony shall be taken.

COMMENT

Sections 18 to 22 are derived from sections 3.01 and 3.02 of the Uniform Interstate and International Procedure Act, 9B U.L.A. 305, 321, 326 (1966); from ideas underlying the Uniform Reciprocal Enforcement of Support Act; and from Ehrenzweig, the Interstate Child and Uniform Legislation: A Plea for Extralitigious Proceedings, 64 Mich. L. Rev. 1 (1965). They are designed to fill the partial vacuum which inevitably exists in cases involving an "interstate child" since part of the essential information about the child and his relationship to other persons is always in another state. Even though jurisdiction is assumed under sections 3 and 7 in the state where much (or most) of the pertinent facts are readily available, some important evidence will unavoidably be elsewhere.

Section 18 is derived from portions of section 3.01 of the Uniform Interstate and International Procedure Act, 9B U.L.A. 305, 321. The first sentence relates to depositions, written interrogatories and other discovery devices which may be used by parties or representatives of the child. The procedural rules of the state where the device is used are applicable under this sentence. The second sentence empowers the court itself to initiate the gathering of out-of-state evidence which is often not supplied by the parties in order to give the court a complete picture of the child's situation, especially as it relates to a custody claimant who lives in another state.

SECTION 19. [*Hearings and Studies in Another State; Orders to Appear.*]

(a) A court of this State may request the appropriate court of another state to hold a hearing to adduce evidence, to order a party to produce or give evidence under other procedures of that state, or to have social studies made with respect to the custody of a child involved in proceedings pending in the court of this State; and to forward to the court of this State certified copies of the transcript of record of the hearing, the evidence otherwise adduced, or any social studies prepared in compliance with the request. The cost of the services may be assessed against the parties or, if necessary, ordered paid by the [County, State].

(b) A court of this State may request the appropriate court of another state to order a party to custody proceedings pending in the court of this State to appear in the proceedings, and if that party has physical custody of the child, to appear with the child. The request may state that travel and other necessary expenses of the party and of the child whose appearance is desired will be assessed against another party or will otherwise be paid.

COMMENT

Section 19 relates to assistance sought by a court of the forum state from a court of another state. See comment to section 18. Subsection (a) covers any kind of evidentiary procedure available under the law of the assisting state which may aid the court in the requesting state, including custody investigations (social studies) if authorized by the law of the other state. Under what conditions reports of social studies and other evidence collected under this subsection are admissible in the requesting state, is a matter of internal state law not covered in this interstate statute. Subsection (b) serves to bring parties and the child before the requesting court, backed up by the assisting court's contempt powers. See section 11.

SECTION 20. [*Assistance to Courts of Other States.*]

(a) Upon request of the court of another state the courts of this State which are competent to hear custody matters may order a person in this State to appear at a hearing to adduce evidence or to produce or give evidence under other procedures available in this State [or may order social studies to be made for use in a custody proceeding in another state]. A certified copy of the transcript of the record of the hearing or the evidence otherwise adduced [and any social studies prepared] shall be forwarded by the clerk of the court to the requesting court.

(b) A person within this State may voluntarily give his testimony or statement in this State for use in a custody proceeding outside this state.

(c) Upon request of the court of another state a competent court of this State may order a person in this State to appear alone or with the child in a custody proceeding in another state. The court may condition compliance with the request upon assurance by the other state that state travel and other necessary expenses will be advanced or reimbursed.

COMMENT

Section 20 is the counterpart of section 19. It empowers local courts to give help to out-of-state courts in custody cases. See comments to sections 18 and 19. The references to social studies have been placed in brackets so that states without authorization to make social studies outside of juvenile court proceedings may omit them if they wish. Subsection (b) reaffirms the existing freedom of persons within the United States to give evidence for use in proceedings elsewhere. It is derived from section 3.02 (b) of the Interstate and International Procedure Act, 9B U.L.A. 327 (1966).

SECTION 21. [*Preservation of Documents for Use in Other States.*]

In any custody proceeding in this State the court shall preserve the pleadings, orders and decrees, any record that has been made of its hearings, social studies, and other pertinent documents until the child reaches [18, 21] years of age. Upon appropriate request of the court of another state the court shall forward to the other court certified copies of any or all of such documents.

COMMENT

See comments to sections 18 and 19. Documents are to be preserved until the child is old enough that further custody disputes are unlikely. A lower figure than the ones suggested in the brackets may be inserted.

SECTION 22. [*Request for Court Records of Another State.*]

If a custody decree has been rendered in another state concerning a child involved in a custody proceeding pending in a court of this State, the court of this State upon taking jurisdiction of the case shall request of the court of the other state a certified copy of the transcript of any court record and other documents mentioned in section 21.

COMMENT

This is the counterpart of section 21. See comments to sections 18, 19 and 14(b).

SECTION 23. [*International Application.*]

The general policies of this Act extend to the international area. The provisions of this Act relating to the recognition and enforcement of custody decrees of other states apply to custody decrees and decrees involving legal institutions similar in nature to custody institutions rendered by appropriate authorities of other nations if reasonable notice and opportunity to be heard were given to all affected persons.

COMMENT

Not all provisions of the Act lend themselves to direct application in international custody disputes; but the basic policies of avoiding jurisdictional conflict and multiple litigation are as strong if not stronger when children are moved back and forth from one country to another by feuding relatives. Compare Application of Lang, 9 App. Div. 2d 401, 193 N.Y.S. 2d 763 (1959) and Swindle v. Bradley, 240 Ark. 903, 403 S.W.2d 63 (1966).

The first sentence makes the general policies of the Act applicable to international cases. This means that the substance of section 1 and the principles underlying provisions like sections 6, 7, 8 and 14(a), are to be followed when some of the persons involved are in a foreign country or a foreign custody proceeding is pending.

The second sentence declares that custody decrees rendered in other nations by appropriate authorities (which may be judicial or administrative tribunals) are recognized and enforced in this country. The only prerequisite is that reasonable notice and opportunity to be heard was given to the persons affected. It is also to be understood that the foreign tribunal had jurisdiction under its own law rather than under section 3 of this Act. Compare Restatement of the Law Second, Conflict of Laws, Proposed Official Draft, sections 10, 92, 96 and 109(b) (1967). Compare also Goodrich, Conflict of Laws 390-93 (4th ed., Scoles, 1964).

[SECTION 24. [*Priority.*]
Upon the request of a party to a custody proceeding which raises a question of existence or exercise of jurisdiction under this Act the case shall be given calendar priority and handled expeditiously.]

COMMENT

Judicial time spent in determining which court has or should exercise jurisdiction often prolongs the period of uncertainty and turmoil in a child's life more than is necessary. The need for speedy adjudication exists, of course, with respect to all aspects of child custody litigation. The priority requirement is limited to jurisdictional questions because an all encompassing priority would be beyond the scope of this Act. Since some states may have or wish to adopt a statutory provision or court rule of wider scope, this section is placed in brackets and may be omitted.

SECTION 25. [*Severability.*]
If any provision of this Act or the application thereof to any person or circumstance is held invalid, its invalidity does not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

SECTION 26. [*Short Title.*]
This Act may be cited as the Uniform Child Custody Jurisdiction Act.

SECTION 27. [*Repeal.*]
The following acts and parts of acts are repealed:
(1)
(2)
(3)

SECTION 28. [*Time of Taking Effect.*]
This Act shall take effect. . . . .

State Adoptations of the
Uniform Child Custody Jurisdiction Act

ALABAMA	ALA. CODE §§ 30-3-20 to -44 (1980).
ALASKA	ALASKA STAT. §§ 25.30.010 to .910 (1977).
ARIZONA	ARIZ. REV. STAT. ANN. §§ 8-401 to -424 (1978).
ARKANSAS	ARK. CODE ANN. §§ 34-2701 to -2726 (1981).
CALIFORNIA	CAL. FAM. CODE §§ 3401 to 3425 (1990).
COLORADO	COLO. REV. STAT. §§ 14-13-101 to -126 (1993).
CONNECTICUT	CONN. GEN. STAT. §§ 46b-90 to -114 (1978).
DELAWARE	DEL. CODE ANN. tit. 13, §§ 1901 to 1925 (1981).
DISTRICT OF COLUMBIA	D.C. CODE ANN. tit. 16, §§ 4501 to 4524 (1983).
FLORIDA	FLA. STAT. ANN. §§ 61.1302 to .1348 (1977).
GEORGIA	GA. CODE ANN. §§ 19-9-40 to -64 (1978).
HAWAII	HAWAII REV. STAT. tit. 31, §§ 583-1 to -26 (1973).
IDAHO	IDAHO CODE §§ 32-1101 to -1126 (1982).
ILLINOIS	ILL. COMP. STAT. ANN. ch. 40, §§ 2101 to 2126 (1984).
INDIANA	IND. CODE §§ 31-1-11.6-1 to -24 (1994).
IOWA	IOWA CODE §§ 598A.1 to .25 (1983).
KANSAS	KAN. STAT. ANN. §§ 38-1301 to -1326 (1979).
KENTUCKY	KY. REV. STAT. ANN. §§ 403.400 to .630 (1980).
LOUISIANA	LA. REV. STAT. ANN. §§ 13:1700 to :1724 (1978).
MAINE	ME. REV. STAT. ANN. tit. 19, §§ 801 to 825 (1979).
MARYLAND	MD. CODE ANN., FAM. LAW §§ 9-201 to -224 (1984).
MASSACHUSETTS	MASS. GEN. L. ch. 209B, §§ 1 to 14 (1983).
MICHIGAN	MICH. COMP. STAT. ANN. §§ 27A.651 to .673 (1975).
MINNESOTA	MINN. STAT. §§ 518A.01 to .25 (1977).
MISSISSIPPI	MISS. CODE ANN. §§ 93-23-1 to 93-23-47 (1982).
MISSOURI	MO. REV. STAT. §§ 452.440 to .550 (1978).
MONTANA	MONT. CODE ANN. §§ 40-7-101 to -125 (1977).
NEBRASKA	NEB. REV. STAT. §§ 43-1201 to -1255 (1979).
NEVADA	NEV. REV. STAT. §§ 125A.010 to .250 (1993).
NEW HAMPSHIRE	N.H. REV. STAT. ANN. §§ 458A:1 to :25 (1979).
NEW JERSEY	N.J. STAT. ANN. §§ 2A:34-28 to -52 (1990).
NEW MEXICO	N.M. STAT. ANN. §§ 40-10-1 to -24 (1989).
NEW YORK	N.Y. DOM. REL. LAW §§ 75-a to -z (1978).
NORTH CAROLINA	N.C. GEN. STAT. §§ 50A-1 to -25 (1979).
NORTH DAKOTA	N.D. CENT. CODE §§ 14-14-01 to -26 (1969).
OHIO	OHIO REV. CODE ANN. §§ 3109.21 to .37 (1980).
OKLAHOMA	OKLA. STAT. tit. 43, §§ 501 to 527 (1990).
OREGON	OR. REV. STAT. §§ 109.700 to .930 (1973).
PENNSYLVANIA	PA. STAT. ANN. tit. 23, §§ 5341 to 5366 (1990).
RHODE ISLAND	R.I. GEN. LAWS §§ 15-14-1 to -26 (1989).
SOUTH CAROLINA	S.C. Code Ann. §§ 20-7-782 to 830 (1981).
SOUTH DAKOTA	S.D. CODIFIED LAWS ANN. §§ 26-5A-1 to -26 (1986).
TENNESSEE	TENN. CODE ANN. §§ 36-6-201 to -225 (1979).
TEXAS	TEX. FAM. CODE ANN. §§ 11.51 to 11.75 (1983).
UTAH	Utah Code Ann. §§ 78-45c-1 to -26 (1990).
VERMONT	VT. STAT. ANN. tit. 15, §§ 1031 to 1051 (1979).
VIRGIN ISLANDS	V.I. CODE ANN. tit. 16, §§ 115 to 139 (1982).
VIRGINIA	VA. CODE ANN. §§ 20-125 to -146 (1979).
WASHINGTON	WA. REV. CODE ANN. §§ 26.27.010 to 26.27.910 (1979).
WEST VIRGINIA	W. VA. CODE §§ 48-10-1 to 48-10-26 (1981).
WISCONSIN	WIS. STAT. §§ 822.01 to .25 (1987).
WYOMING	WYO. STAT. §§ 20-5-101 to -125 (1977).

Note: Consult relevant case law for each state's application of its UCCJA.
Citation indicates year of passage or latest amendment.
This compilation is current through July 31, 1994.

Appendix M

PARENTAL KIDNAPPING PREVENTION ACT

94 Stat. 3566 (1980).
96th Congress
Public Law 96-611

An Act

* * *

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a)(1) section 1861(s) of the Social Security Act is amended—

Sec. 2. The amendments made by this Act shall take effect on, and apply to services furnished on or after, July 1, 1981.

SHORT TITLE

Sec. 6. Sections 6 to 10 of this Act may be cited as the "Parental Kidnapping Prevention Act of 1980".

FINDINGS AND PURPOSES

Sec. 7. (a) The Congress finds that—

(1) there is a large and growing number of cases annually involving disputes between persons claiming rights of custody and visitation of children under the laws, and in the courts, of different states, the District of Columbia, the Commonwealth of Puerto Rico, and the territories and possessions of the United States;

(2) the laws and practices by which the courts of those jurisdictions determine their jurisdiction to decide such disputes, and the effect to be given the decisions of such disputes by the courts of other jurisdictions, are often inconsistent and conflicting;

(3) those characteristics of the law and practice in such cases, along with the limits imposed by a Federal system on the authority of each jurisdiction to conduct investigations and take other actions outside its own boundaries, contribute to a tendency of parties involved in such disputes to frequently resort to the seizure, restraint, concealment, and interstate transportation of children, the disregard of court orders, excessive relitigation of cases, obtaining of conflicting orders by the courts of various jurisdictions, and interstate travel and communication that is so expensive and time consuming as to disrupt their occupations and commercial activities; and

(4) among the results of those conditions and activities are the failure of the courts of such jurisdictions to give full faith and credit to the judicial proceedings of the other jurisdictions, the deprivation of rights of liberty and property without due process of law, burdens on commerce among such jurisdictions and with foreign nations, and harm to the welfare of children and their parents and other custodians.

(b) For those reasons it is necessary to establish a national system for locating parents and children who travel from one such jurisdiction to another and are concealed in connection with such disputes, and to establish national standards under which the courts of such jurisdictions will determine their jurisdiction to decide such disputes and the effect to be given by each such jurisdiction to such decisions by the courts of other such jurisdictions.

(c) The general purposes of sections 6 to 10 of this Act are to—

(1) promote cooperation between State courts to the end that a determination of custody and visitation is rendered in the State which can best decide the case in the interest of the child;

(2) promote and expand the exchange of information and other forms of mutual assistance between States which are concerned with the same child;

(3) facilitate the enforcement of custody and visitation decrees of sister States;

(4) discourage continuing interstate controversies over child custody in the interest of greater stability of home environment and of secure family relationships for the child;

(5) avoid jurisdictional competition and conflict between State courts in matters of child custody and visitation which have in the past resulted in the shifting of children from State to State with harmful effects on their well-being; and

(6) deter interstate abductions and other unilateral removals of children undertaken to obtain custody and visitation awards.

FULL FAITH AND CREDIT GIVEN TO CHILD CUSTODY DETERMINATIONS

Sec. 8. (a) Chapter 115 of title 28, United States Code, is amended by adding immediately after section 1738 the following new section:

"§ 1738A. Full faith and credit given to child custody determinations

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

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

"(1) 'child' means a person under the age of eighteen;

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

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

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

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

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

"(7) 'physical custody' means actual possession and control of a child; and

"(8) 'State' means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a territory or possession of the United States.

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

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

"(2) one of the following conditions is met:

"(A) such State (i) is the home State of the child on the date of the commencement of the proceeding, or (ii) had been the child's home State within six months before the date of the

commencement of the proceeding and the child is absent from such State because of his removal or retention by a contestant or for other reasons, and a contestant continues to live in such State;

"(B)(i) it appears that no other State would have jurisdiction under subparagraph (A), and (ii) it is in the best interest of the child that a court of such State assume jurisdiction because (I) the child and his parents, or the child and at least one contestant, have a significant connection with such State other than mere physical presence in such State, and (II) there is available in such State substantial evidence concerning the child's present or future care, protection, training, and personal relationships;

"(C) the child is physically present in such State and (i) the child has been abandoned, or (ii) it is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse;

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

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

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

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

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

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

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

"(g) A court of a State shall not exercise jurisdiction in any proceeding for a custody determination commenced during the pendency of a proceeding in a court of another State where such court of provisions of this section to make a custody determination.".

(b) The table of sections at the beginning of chapter 115 of title 28, United States Code, is amended by inserting after the item relating to section 1738 the following new item:

"1738A. Full faith and credit given to child custody determinations.".

(c) In furtherance of the purposes of section 1738A of title 28, United States Code, as added by subsection (a) of this section, State courts are encouraged to—

(1) afford priority to proceedings for custody determinations; and

(2) award to the person entitled to custody or visitation pursuant to a custody determination which is consistent with the provisions of such section 1738A, necessary travel expenses, attorney's fees, costs of private investigations, witness fees or expenses, and other expenses incurred in connection with such custody determination in any case in which—

(A) a contestant has, without the consent of the person entitled to custody or visitation pursuant to a custody determination which is consistent with the provisions of such section 1738A, (i) wrongfully removed the child from the physical custody of such person, or (ii) wrongfully retained the child after a visit or other temporary relinquishment of physical custody; or

(B) the court determines it is appropriate.

USE OF FEDERAL PARENT LOCATOR SERVICE IN CONNECTION WITH THE ENFORCEMENT OR DETERMINATION OF CHILD CUSTODY AND IN CASES OF PARENTAL KIDNAPPING OF A CHILD

Sec. 9. (a) Section 454 of the Social Security Act is amended—

(1) by striking out "and" at the end of paragraph (15),

(2) by striking out the period at the end of paragraph (16) and inserting in lieu thereof "; and"; and

(3) by inserting after paragraph (16) the following new paragraph:

"(17) in the case of a State which has in effect an agreement with the Secretary entered into pursuant to section 463 for the use of the Parent Locator Service established under section 453, to accept and transmit to the Secretary requests for information authorized under the provisions of the agreement to be furnished by such Service to authorized persons, and to impose and collect (in accordance with regulations of the Secretary) a fee sufficient to cover the costs to the State and to the Secretary incurred by reason of such requests to transmit to the Secretary from time to time (in accordance with such regulations) so much of the fees collected as are attributable to such costs to the Secretary so incurred, and during the period that such agreement is in effect, otherwise to comply with such agreement and regulations of the Secretary with respect thereto.".

(b) Part D of title IV of the Social Security Act is amended by adding at the end thereof the following new section:

"USE OF FEDERAL PARENT LOCATOR SERVICE IN CONNECTION WITH THE ENFORCEMENT OR DETERMINATION OF CHILD CUSTODY AND IN CASES OF PARENTAL KIDNAPPING OF A CHILD

"Sec. 463. (a) The Secretary shall enter into an agreement with any State which is able and willing to do so, under which the services of the Parent Locator Service established under section 453 shall be made available to such State for the purpose of determining the whereabouts of any absent parent or child when such information is to be used to locate such parent or child for the purpose of—

"(1) enforcing any State or Federal law with respect to the unlawful taking or restraint of a child; or

"(2) making or enforcing a child custody determination.

"(b) An agreement entered into under this section shall provide that the State agency described in section 454 will, under procedures prescribed by the Secretary in regulations, receive and transmit to the Secretary requests from authorized persons for information as to (or useful in determining) the whereabouts of any absent parent or child when such information is to be used to locate such parent or child for the purposes of—

"(1) enforcing any State or Federal law with respect to the unlawful taking or restraint of a child; or

"(2) making or enforcing a child custody determination.

"(c) Information authorized to be provided by the Secretary under this section shall be subject to the same conditions with respect to disclosure as information authorized to be provided under section 453, and a request for information by the Secretary under this section shall be considered to be a request for information under section 453 which is authorized to be provided under such section. Only information as to the most recent address and place of employment of any absent parent or child shall be provided under this section.

"(d) For purposes of this section—

"(1) the term 'custody determination' means a judgment, decree, or other order of a court providing for the custody or visitation of a child, and includes permanent and temporary orders, and initial orders and modification;

"(2) the term 'authorized person' means—

"(A) any agent or attorney of any State having an agreement under this section, who has the duty or authority under the law of such State to enforce a child custody determination;

"(B) any court having jurisdiction to make or enforce such a child custody determination, or any agent of such court, and

"(C) any agent or attorney of the United States, or of a State having an agreement under this section, who has the duty or authority to investigate, enforce, or bring a prosecution with respect to the unlawful taking or restraint of a child.".

(c) Section 455(a) of such Act is amended by adding after paragraph (3) the following: "except that no amount shall be paid to any State on account of amounts expended to carry out an agreement which it has entered into pursuant to section 463.".

(d) No agreement entered into under section 463 of the Social Security Act shall become effective before the date on which section 1739A of title 28, United States Code (as added by this title) becomes effective.

PARENTAL KIDNAPPING

Sec. 10. (a) In view of the findings of the Congress and the purposes of sections 6 to 10 of this Act set forth in section 302, the Congress hereby expressly declares its intent that section 1073 of title 18, United States Code, apply to cases involving parental kidnapping and interstate or international flight to avoid prosecution under applicable State felony statutes.

(b) The Attorney General of the United States, not later than 120 days after the date of the enactment of this section, (and once every six months during the 3-year period following such 120-day period) shall submit a report to the Congress with respect to steps taken to comply with the intent of the Congress set forth in subsection (a). Each such report shall include—

(1) date relating to the number of applications for complaints under section 1073 of title 18, United States Code, in cases involving parental kidnapping;

(2) date relating to the number of complaints issued in such cases; and

(3) such other information as may assist in describing the activities of the Department of Justice in conformance with such intent.

Appendix N

INDIAN CHILD WELFARE ACT

25 U.S.C. §§ 1901-1923 (1978).

§ 1901. Congressional findings

Recognizing the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people, the Congress finds—

(1) that clause 3, section 8, article I of the United States Constitution provides that "The Congress shall have Power * * * To regulate Commerce * * * with Indian tribes" and, through this and other constitutional authority, Congress has plenary power over Indian affairs;

(2) that Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources;

(3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe;

(4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and

(5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.

§ 1902. Congressional declaration of policy

The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.

§ 1903. Definitions

For the purposes of this chapter, except as may be specifically provided otherwise, the term—

(1) "child custody proceeding" shall mean and include—

(i) "foster care placement" which shall mean any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated;

(ii) "termination of parental rights" which shall mean any action resulting in the termination of the parent-child relationship;

(iii) "preadoptive placement" which shall mean the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement; and

(iv) "adoptive placement" which shall mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.

Such term or terms shall not include a placement based upon an act which, if committed by an adult, would be deemed a crime or upon an award, in a divorce proceeding, of custody to one of the parents.

(2) "extended family member" shall be as defined by the law or custom of the Indian child's tribe or, in the absence of such law or custom, shall be a person who has reached the age of eighteen and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent;

(3) "Indian" means any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation as defined in section 1606 of Title 43;

(4) "Indian child" means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe;

(5) "Indian child's tribe" means (a) the Indian tribe in which an Indian child is a member or eligible for membership or (b), in the case of an Indian child who is a member of or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has the more significant contacts;

(6) "Indian custodian" means any Indian person who has legal custody of an Indian child under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such child;

(7) "Indian organization" means any group, association, partnership, corporation, or other legal entity owned or controlled by Indians, or a majority of whose members are Indians;

(8) "Indian tribe" means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village as defined in section 1602(c) of Title 43;

(9) "parent" means any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the unwed father where paternity has not been acknowledged or

established;

(10) "reservation" means Indian country as defined in section 1151 of Title 18 and any lands, not covered under such section, title to which is either held by the United States in trust for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to a restriction by the United States against alienation;

(11) "Secretary" means the Secretary of the Interior; and

(12) "tribal court" means a court with jurisdiction over child custody proceedings and which is either a Court of Indian Offenses, a court established and operated under the code or custom of an Indian tribe, or any other administrative body of a tribe which is vested with authority over child custody proceedings.

§ 1911. Indian tribe jurisdiction over Indian child custody proceedings

(a) Exclusive jurisdiction

An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

(b) Transfer of proceedings; declination by tribal court

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: Provided, That such transfer shall be subject to declination by the tribal court of such tribe.

(c) State court proceedings; intervention

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding.

(d) Full faith and credit to public acts, records, and judicial proceedings of Indian tribes

The United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.

§ 1912. Pending court proceedings

(a) Notice; time for commencement of proceedings; additional time for preparation

In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary: Provided, That the parent or Indian custodian or the tribe shall, upon request, be granted up to twenty additional days to prepare for such proceeding.

(b) Appointment of counsel

In any case in which the court determines indigency, the parent or Indian custodian shall have the right to court-appointed counsel in any removal, placement, or termination proceeding. The court may, in its discretion, appoint counsel for the child upon a finding that such appointment is in the best interest of the child.

Where State law makes no provision for appointment of counsel in such proceedings, the court shall promptly notify the Secretary upon appointment of counsel, and the Secretary, upon certification of the presiding judge, shall pay reasonable fees and expenses out of funds which may be appropriated pursuant to section 13 of this title.

(c) Examination of reports or other documents

Each party to a foster care placement or termination of parental rights proceeding under State law involving an Indian child shall have the right to examine all reports or other documents filed with the court upon which any decision with respect to such action may be based.

(d) Remedial services and rehabilitative programs; preventive measures

Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.

(e) Foster care placement orders; evidence; determination of damage to child

No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

(f) Parental rights termination orders; evidence; determination of damage to child

No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

§ 1913. Parental rights, voluntary termination

(a) Consent; record; certification matters; invalid consents

Where any parent or Indian custodian voluntarily consents to a foster care placement or to termination of parental rights, such consent shall not be valid unless executed in writing and recorded before a judge of a court of competent jurisdiction and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian. The court shall also certify that either the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood. Any consent given prior to, or within ten days after, birth of the Indian child shall not be valid.

(b) Foster care placement; withdrawal of consent

Any parent or Indian custodian may withdraw consent to a foster care placement under State law at any time and, upon such withdrawal, the child shall be returned to the parent or Indian custodian.

(c) Voluntary termination of parental rights or adoptive placement; withdrawal of consent; return of custody

In any voluntary proceeding for termination of parental rights to, or adoptive placement of, an Indian child, the consent of the parent may be withdrawn for any reason at any time prior to the entry of a final decree of termination or adoption, as the case may be, and the child shall be returned to the parent.

(d) Collateral attack; vacation of decree and return of custody; limitations

After the entry of a final decree of adoption of an Indian child in any State court, the parent may withdraw consent thereto upon the grounds that consent was obtained through fraud or duress and may petition the court to vacate such decree. Upon a finding that such consent was obtained through fraud or duress, the court shall vacate such decree and return the child to the parent. No adoption which has been effective for at least two years may be invalidated under the provisions of this subsection unless otherwise permitted under State law.

§ 1914. Petition to court of competent jurisdiction to invalidate action upon showing of certain violations

Any Indian child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child was

removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 1911, 1912, and 1913 of this title.

§ 1915. Placement of Indian children

(a) Adoptive placements; preferences

In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families.

(b) Foster care or preadoptive placements; criteria; preferences

Any child accepted for foster care or preadoptive placement shall be placed in the least restrictive setting which most approximates a family and in which his special needs, if any, may be met. The child shall also be placed within reasonable proximity to his or her home, taking into account any special needs of the child.
In any foster care or preadoptive placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with—

(i) a member of the Indian child's extended family;

(ii) a foster home licensed, approved, or specified by the Indian child's tribe;

(iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or

(iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

(c) Tribal resolution for different order of preference; personal preference considered; anonymity in application of preferences

In the case of a placement under subsection (a) or (b) of this section, if the Indian child's tribe shall establish a different order of preference by resolution, the agency or court effecting the placement shall follow such order so long as the placement is the least restrictive setting appropriate to the particular needs of the child, as provided in subsection (b) of this section. Where appropriate, the preference of the Indian child or parent shall be considered: Provided, That where a consenting parent evidences a desire for anonymity, the court or agency shall give weight to such desire in applying the preferences.

(d) Social and cultural standards applicable

The standards to be applied in meeting the preference requirements of this section shall be the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties.

(e) Record of placement; availability

A record of each such placement, under State law, of an Indian child shall be maintained by the State in which the placement was made, evidencing the efforts to comply with the order of preference specified in this section. Such record shall be made available at any time upon the request of the Secretary or the Indian child's tribe.

§ 1916. Return of custody

(a) Petition; best interests of child

Notwithstanding State law to the contrary, whenever a final decree of adoption of an Indian child has been vacated or set aside or the adoptive parents voluntarily consent to the termination of their parental rights to the child, a biological parent or prior Indian custodian may petition for return of custody and the court shall grant such petition unless there is a showing, in a proceeding subject to the provisions of section 1912 of this title, that such return of custody is not in the best interests of the child.

(b) Removal from foster care home; placement procedure

Whenever an Indian child is removed from a foster care home or institution for the purpose of further foster care, preadoptive, or adoptive placement, such placement shall be in accordance with the provisions of this chapter, except in the case where an Indian child is being returned to the parent or Indian custodian from whose custody the child was originally removed.

§ 1917. Tribal affiliation information and other information for protection of rights from tribal relationship; application of subject of adoptive placement; disclosure by court

Upon application by an Indian individual who has reached the age of eighteen and who was the subject of an adoptive placement, the court which entered the final decree shall inform such individual of the tribal affiliation, if any, of the individual's biological parents and provide such other information as may be necessary to protect any rights flowing from the individual's tribal relationship.

§ 1918. Reassumption of jurisdiction over child custody proceedings

(a) Petition; suitable plan; approval by Secretary

Any Indian tribe which became subject to State jurisdiction pursuant to the provisions of the Act of August 15, 1953 (67 Stat. 588), as amended by Title IV of the Act of April 11, 1968 (82 Stat. 73, 78), or pursuant to any other Federal law, may reassume jurisdiction over child custody proceedings. Before any Indian tribe may reassume jurisdiction over Indian child custody proceedings, such tribe shall present to the Secretary for approval a petition to reassume such jurisdiction which includes a suitable plan to exercise such jurisdiction.

(b) Criteria applicable to consideration by Secretary; partial retrocession

(1) In considering the petition and feasibility of the plan of a tribe under subsection (a) of this section, the Secretary may consider, among other things:

(i) whether or not the tribe maintains a membership roll or alternative provision for clearly identifying the persons who will be affected by the reassumption of jurisdiction by the tribe;

(ii) the size of the reservation or former reservation area which will be affected by retrocession and reassumption of jurisdiction by the tribe;

(iii) the population base of the tribe, or distribution of the population in homogeneous communities or geographic areas; and

(iv) the feasibility of the plan in cases of multitribal occupation of a single reservation or geographic area.

(2) In those cases where the Secretary determines that the jurisdictional provisions of section 1911(a) of this title are not feasible, he is authorized to accept partial retrocession which will enable tribes to exercise referral jurisdiction as provided in section 1911(b) of this title, or, where appropriate, will allow them to exercise exclusive jurisdiction as provided in section 1911(a) of this title over limited community or geographic areas without regard for the reservation status of the area affected.

(c) Approval of petition; publication in Federal Register; notice; reassumption period; correction of causes for disapproval

If the Secretary approves any petition under subsection (a) of this section, the Secretary shall publish notice of such approval in the Federal Register and shall notify the affected State or States of such approval. The Indian tribe concerned shall reassume jurisdiction sixty days after publication in the Federal Register of notice of approval. If the Secretary disapproves any petition under subsection (a) of this section, the Secretary shall provide such technical assistance as may be necessary to enable the tribe to correct any deficiency which the Secretary identified as a cause for disapproval.

(d) Pending actions or proceedings unaffected

Assumption of jurisdiction under this section shall not affect any action or proceeding over which a court has already assumed jurisdiction, except as may be provided pursuant to any agreement under section 1919 of this title.

§ 1919. Agreements between States and Indian tribes

(a) Subject coverage

States and Indian tribes are authorized to enter into agreements with each other respecting care and custody of Indian children and jurisdiction over child custody proceedings, including agreements which may provide for orderly transfer of jurisdiction on a case-by-case basis and agreements which provide for concurrent jurisdiction between States and Indian tribes.

(b) Revocation; notice; actions or proceedings unaffected

Such agreements may be revoked by either party upon one hundred and eighty days' written notice to the other party. Such revocation shall not affect any action or proceeding over which a court has already assumed jurisdiction, unless the agreement provides otherwise.

§ 1920. Improper removal of child from custody; declination of jurisdiction; forthwith return of child: danger exception

Where any petitioner in an Indian child custody proceeding before a State court has improperly removed the child from custody of the parent or Indian custodian or has improperly retained custody after a visit or other temporary relinquishment of custody, the court shall decline jurisdiction over such petition and shall forthwith return the child to his parent or Indian custodian unless returning the child to his parent or custodian would subject the child to a substantial and immediate danger or threat of such danger.

§ 1921. Higher State or Federal standard applicable to protect rights of parent or Indian custodian of Indian child

In any case where State or Federal law applicable to a child custody proceeding under State or Federal law provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child than the rights provided under this subchapter, the State or Federal court shall apply the State or Federal standard.

§ 1922. Emergency removal or placement of child; termination; appropriate action

Nothing in this subchapter shall be construed to prevent the emergency removal of an Indian child who is a resident of or is domiciled on a reservation, but temporarily located off the reservation, from his parent or Indian custodian or the emergency placement of such child in a foster home or institution, under applicable State law, in order to prevent imminent physical damage or harm to the child. The State authority, official, or agency involved shall insure that the emergency removal or placement terminates immediately when such removal or placement is no longer necessary to prevent imminent physical damage or harm to the child and shall expeditiously initiate a child custody proceeding subject to the provisions of this subchapter, transfer the child to the jurisdiction of the appropriate Indian tribe, or restore the child to the parent or Indian custodian, as may be appropriate.

§ 1923. Effective date

None of the provisions of this subchapter, except sections 1911(a), 1918, and 1919 of this title, shall affect a proceeding under State law for foster care placement, termination of parental rights, preadoptive placement, or adoptive placement which was initiated or completed prior to one hundred and eighty days after November 8, 1978, but shall apply to any subsequent proceeding in the same matter or subsequent proceedings affecting the custody or placement of the same child.

Appendix O

UNIFORM PARENTAGE ACT

§ 1. [Parental and Child Relationship Defined]

As used in this Act, "parent and child relationship" means the legal relationship existing between a child and his natural or adoptive parents incident to which the law confers or imposes rights, privileges, duties, and obligations. It includes the mother and child relationship and the father and child relationship.

§ 2. [Relationship Not Dependent on Marriage]

The parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents.

§ 3. [How Parent and Child Relationship Established]

The parent and child relationship between a child and

(1) the natural mother may be established by proof of her having given birth to the child, or under this Act;

(2) the natural father may be established under this Act;

(3) an adoptive parent may be established by proof of adoption or under the [Revised Uniform Adoption Act].

§ 4. [Presumption of Paternity]

(a) A man is presumed to be the natural father of a child if:

(1) he and the child's natural mother are or have been married to each other and the child is born during the marriage, or within 300 days after the marriage is terminated by death, annulment, declaration of invalidity, or divorce, or after a decree of separation is entered by a court;

(2) before the child's birth, he and the child's natural mother have attempted to marry each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and,

(i) if the attempted marriage could be declared invalid only by a court, the child is born during the attempted marriage, or within 300 days after its termination by death, annulment, declaration of invalidity, or divorce; or

(ii) if the attempted marriage is invalid without court order, the child is born within 300 days after the termination of cohabitation;

(3) after the child's birth, he and the child's natural mother have married, or attempted to marry, each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and

(i) he has acknowledged his paternity of the child in a writing filed with the [appropriate court or Vital Statistics Bureau].

(ii) with his consent, he is named as the child's father on the child's birth certificate, or

(iii) he is obligated to support the child under a written voluntary promise or by court order;

(4) while the child is under the age of majority, he receives the child into his home and openly holds out the child as his natural child; or

(5) he acknowledges his paternity of the child in a writing filed with the [appropriate court or Vital Statistics Bureau], which shall promptly inform the mother of the filing of the acknowledgement, and she does not dispute the acknowledgement within a reasonable time after being informed thereof, in a writing filed with the [appropriate court or Vital Statistics Bureau]. If another man is presumed under this section to be the child's father, acknowledgement may be effected only with the written consent of the presumed father or after the presumption has been rebutted.

(b) A presumption under this section may be rebutted in an appropriate action only by clear and convincing evidence. If two or more presumptions arise which conflict with each other, the presumption which on the facts is founded on the weightier considerations of policy and logic controls. The presumption is rebutted by a court decree establishing paternity of the child by another man.

§ 5. [Artificial Insemination]

(a) If, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived. The husband's consent must be in writing and signed by him and his wife. The physician shall certify their signatures and the date of the insemination, and file the husband's consent with the [State Department of Health], where it shall be kept confidential and in a sealed file. However, the physician's failure to do so does not affect the father and child relationship. All papers and records pertaining to the insemination, whether part of the permanent record of a court or of a file held by the supervising physician or elsewhere, are subject to inspection only upon an order of the court for good cause shown.

(b) The donor of semen provided to a licensed physician for use in artificial insemination of a married woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived.

§ 6. [Determination of Father and Child Relationship; Who May Bring Action; When Action May Be Brought]

(a) A Child, his natural mother, or a man presumed to be his father under Paragraph (1), (2), or (3) of Section 4(a), may bring an action

(1) at any time for the purpose of declaring the existence of the father and child relationship presumed under Paragraph (1), (2), or (3) of Section 4(a); or

(2) for the purpose of declaring the non-existence of the father and child relationship presumed under Paragraph (1), (2), or (3) of Section 4(a) only if the action is brought within a reasonable time after obtaining knowledge of relevant facts, but in no event later than [five] years after the child's birth. After the presumption has been rebutted, paternity of the child by another man may be determined in the same action, if he has been made a party.

(b) Any interested party may bring an action at any time for the purpose of determining the existence or non-existence of the father and child relationship presumed under Paragraph (4) or (5) of Section 4(a).

(c) An action to determine the existence of the father and child relationship with respect to a child who has no presumed father under Section 4 may be brought by the child, the mother or personal representative of the child, the [appropriate state agency], the personal representative or a parent of the mother if the mother has died, a man alleged or alleging himself to be the father, or the personal representative or a parent of the alleged father if the alleged father has died or is a minor.

(d) Regardless of its terms, an agreement, other than an agreement approved by the court in accordance with Section 13(b), between an alleged or presumed father and the mother or child, does not bar an action under this section.

(e) If an action under this section is brought before the birth of the child, all proceedings shall be stayed until after the birth, except service of process and the taking of depositions to perpetuate testimony.

§ 7. [Statute of Limitations]

An action to determine the existence of the father and child relationship as to a child who has no presumed father under Section 4 may not be brought later than [three] years after the birth of the child, or later than [three] years after the effective date of this Act, whichever is later. However, an action brought by or on behalf of a child whose paternity has not been determined is not barred until [three] years after the child reaches the age of majority. Sections 6 and 7 do not extend the time within which a right of inheritance or a right to a succession may be asserted beyond the time provided by law relating to distribution and closing of decedents' estates or to the determination of heirship, or otherwise.

§ 8. [Jurisdiction; Venue]

(a) [Without limiting the jurisdiction of any other court,] [The] [appropriate] court has jurisdiction of an action brought under this Act. [The action may be joined with an action for divorce, annulment, separate maintenance or support.]

(b) A person who has sexual intercourse in this State thereby submits to the jurisdiction of the courts as to an action brought under this Act with respect to a child who may have been conceived by that act of intercourse. In addition to any other method provided by [rule or] statute, including [cross reference to "long arm statute"], personal jurisdiction may be acquired by [personal service of summons outside this State or by registered mail with proof of actual receipt] [service in accordance with (citation to "long arm statute")].

(c) The action may be brought in the county in which the child or the alleged father resides or is found or, if the father is deceased, in which proceedings for probate of his estate have been or could be commenced.

§ 9. [Parties]

The child shall be made a party to the action. If he is a minor he shall be represented by his general guardian or a guardian ad litem appointed by the court. The child's mother or father may not represent the child as guardian or otherwise. The court may appoint the [appropriate state agency] as guardian ad litem for the child. The natural mother, each man presumed to be the natural father under Section 4, and each man alleged to be the natural father, shall be made parties or, if not subject to the jurisdiction of the court, shall be given notice of the action in a manner prescribed by the court and an opportunity to be heard. The court may align the parties.

§ 10. [Pre-Trial Proceedings]

(a) As soon as practicable after an action to declare the existence or nonexistence of the father and child relationship has been brought, an informal hearing shall be held. [The court may order that the hearing be held before a referee.] The public shall be barred from the hearing. A record of the proceeding or any portion thereof shall be kept if any party requests, or the court orders. Rules of evidence need not be observed.

(b) Upon refusal of any witness, including a party, to testify under oath or produce evidence, the court may order him to testify under oath and produce evidence concerning all relevant facts. If the refusal is upon the ground that his testimony or evidence might tend to incriminate him, the court may grant him immunity

from all criminal liability on account of the testimony or evidence he is required to produce. An order granting immunity bars prosecution of the witness for any offense shown in whole or in part by testimony or evidence he is required to produce, except for perjury committed in his testimony. The refusal of a witness, who has been granted immunity, to obey an order to testify or produce evidence is a civil contempt of the court.

(c) Testimony of a physician concerning the medical circumstances of the pregnancy and the condition and characteristics of the child upon birth is not privileged.

§ 11. [Blood Tests]

(a) The court may, and upon request of a party shall, require the child, mother, or alleged father to submit to blood tests. The tests shall be performed by an expert qualified as an examiner of blood types, appointed by the court.

(b) The court, upon reasonable request by a party, shall order that independent tests be performed by other experts qualified as examiner of blood types.

(c) In all cases, the court shall determine the number and qualification of the experts.

§ 12. [Evidence Relating to Paternity]

Evidence relating to paternity may include:

(1) evidence of sexual intercourse between the mother and alleged father at any possible time of conception;

(2) an expert's opinion concerning the statistical probability of the alleged father's paternity based upon the duration of the mother's pregnancy;

(3) blood test results, weighted in accordance with evidence, if available, of the statistical probability of the alleged father's paternity;

(4) medical or anthropological evidence relating to the alleged father's paternity of the child based on tests performed by experts. If a man has been identified as a possible father of the child, the court may, and upon request of a party shall, require the child, the mother, and the man to submit to appropriate tests; and

(5) all other evidence relevant to the issue of paternity of the child.

§ 13. [Pre-Trial Recommendations]

(a) On the basis of the information produced at the pre-trial hearing, the judge [or referee] conducting the hearing shall evaluate the probability of determining the existence or non-existence of the father and child relationship in a trial and whether a judicial declaration of the relationship would be in the best interest of the child. On the basis of the evaluation, an appropriate recommendation for settlement shall be made to the parties, which may include any of the following:

(1) that the action be dismissed with or without prejudice;

(2) that the matter be compromised by an agreement among the alleged father, the mother, and the child, in which the father and child relationship is not determined but in which a defined economic obligation is undertaken by the alleged father in favor of the child and, if appropriate, in favor of the mother, subject to approval by the judge [or referee] conducting the hearing. In reviewing the obligation undertaken by the alleged father in a compromise agreement, the judge [or referee] conducting the hearing shall consider the best interest of the child, in the light of the factor enumerated in Section 15(e), discounted by the improbability, as it appears top him, of establishing the alleged father's paternity or nonpaternity of the child in a trial of the action. In the best interest of the child, the court may order that the alleged father's identity be kept confidential. In that case, the court may designate a person or agency to receive from the alleged father and disburse on behalf of the child all amounts paid by the alleged father in fulfillment of obligations imposed on him; and

(3) that the alleged father voluntarily acknowledge his paternity of the child.

(b) If the parties accept a recommendation made in accordance with Subsection (a), judgment shall be entered accordingly.

(c) If a party refuses to accept a recommendation made under Subsection (a) and blood tests have not been taken, the court shall require the parties to submit to blood tests, if practicable. Thereafter the judge [or referee] shall make an appropriate final recommendation. If a party refuses to accept the final recommendation, the action shall be set for trial.

(d) The guardian ad litem may accept or refuse to accept a recommendation under this Section.

(e) The informal hearing may be terminated and the action set for trial if the judge [or referee] conducting the hearing finds unlikely that all parties would accept a recommendation he might make under Subsection (a) or (c).

§ 14. [Civil Action; Jury]

(a) An action under this Act is a civil action governed by the rules of civil procedure. The mother of the child and the alleged father are competent to testify and may be compelled to testify. Subsections (b) and (c) of Section 10 and Sections 11 and 12 apply.

(b) Testimony relating to sexual access to the mother by an unidentified man at any time or by an unidentified man at the a time other than the probable time of conception of the child is inadmissible in evidence, unless offered by the mother.

(c) In an action against an alleged father,evidence offered by him with respect to a man who is not subject to the jurisdiction of the court concerning his sexual intercourse with the mother at or about the probable time of conception of the child is admissible in evidence only if he has undergone and made available to the court blood tests the results of which do not exclude the possibility of his paternity of the child. A man who is identified and is subject to the jurisdiction of the court shall be made a defendant in the action.

[(d) The trial shall be by the court without a jury.]

§ 15. [Judgment or Order]

(a) The judgment or order of the court determining the existence or nonexistence of the parent and child relationship is determinative for all purposes.

(b) If the judgment or order of the court is at variance with the child's birth certificate, the court shall order that [an amended birth registration be made] [a new birth certificate be issued] under Section 23.

(c) The judgment or order may contain any other provision directed against the appropriate party to the proceeding, concerning the duty of support, the custody and guardianship of the child, visitation privileges with the child, the furnishing of bond or other security for the payment of the judgment, or any other matter in the best interest of the child. The judgment or order may direct the father to pay the reasonable expenses of the mother's pregnancy and confinement.

(d) Support judgments or orders ordinarily shall be for periodic payments which may vary in amount. In the best interest of the child, a lump sum payment or the purchase of an annuity may be ordered in lieu of periodic payments of support. The court may limit the father's liability for past support of the child to the proportion of the expenses already incurred that the court deems just.

(e) In determining the amount to be paid by a parent for support of the child and the period during which the duty of support is owed, a court enforcing the obligation of support shall consider all relevant facts including

(1) the needs of the child;

(2) the standard of living and circumstances of the parents;

(3) the relative financial means of the parent;

(4) the earning ability of the parent;

(5) the need and capacity of the child for education, including higher education;

(6) the age of the child;
(7) the financial resources and the earning ability of the child;
(8) the responsibility of the parents for the support of others; and
(9) the value of services contributed by the custodial parent.

§ 16. [Costs]

The Court may order reasonable fees of counsel, experts, and the child's guardian ad litem, and other costs of the action and pre-trial proceedings, including blood tests, to be paid by the parties in proportions and at times determined by the court. The court may order the proportion of any indigent party to be paid by [appropriate public authority].

§ 17. [Enforcement of Judgment or Order]

(a) If existence of the father and child relationship is declared, or paternity or a duty of support has been acknowledged or adjudicated under this Act or under prior law, the obligation of the father may be enforced in the same or other proceedings by the mother, the child, the public authority that has furnished or may furnish the reasonable expenses of pregnancy, confinement, education, support, or funeral, or by any other person, including a private agency, to the extent he has furnished or is furnishing these expenses.

(b) The court may order support payments to be made to the mother, the clerk of the court, or a person, corporation, or agency designated to administer them for the benefit of the child under the supervision of the court.

(c) Willful failure to obey the judgment or order of the court is a civil contempt of the court. All remedies for the enforcement of judgments apply.

§ 18. [Modification of Judgment or Order]

The court has continuing jurisdiction to modify or revoke a judgment or order

(1) for future education and support, and

(2) with respect to matters listed in Subsections (c) and (d) of Section 15 and Section 17(b), except that a court entering a judgment or order for the payment of a lump sum or the purchase of an annuity under Section 15(d) may specify that the judgment or order may not be modified or revoked.

§ 19. [Right to Counsel; Free Transcript on Appeal]

(a) At the pre-trial hearing and in further proceedings, any party may be represented by counsel. The court shall appoint counsel for a party who is financially unable to obtain counsel.

(b) If a party is financially unable to pay the cost of a transcript, the court shall furnish on request a transcript for purposes of appeal.

§ 20. [Hearings and Records; Confidentiality]

Notwithstanding any other law concerning public hearings and records, any hearing or trial held under this Act shall be held in closed court without admittance of any person other than those necessary to the action or proceeding. All papers and records, other than the final judgment, pertaining to the action or proceeding, whether part of the permanent record of the court or of a file in the [appropriate state agency] or elsewhere, are subject to inspection only upon consent of the court and all interested persons, or in exceptional cases only

upon an order of the court for good cause shown.

§ 21. [Action to Declare Mother and Child Relationship]

Any interested party may bring an action to determine the existence or nonexistence of a mother and child relationship. Insofar as practicable, the provisions of this Act applicable to the father and child relationship apply.

§ 22. [Promise to Render Support]

(a) Any promise in writing to furnish support for a child, growing out of a supposed or alleged father and child relationship, does not require consideration and is enforceable according to its terms, subject to Section 6(d).

(b) In the best interest of the child or the mother, the court may, and upon the promisor's request shall, order the promise to be kept in confidence and designate a person or agency to receive and disburse on behalf of the child all amounts paid in performance of the promise.

§ 23. [Birth Records]

(a) Upon order of a court of this State or upon request of a court of another state, the [registrar of births] shall prepare [an amended birth registration] [a new certificate of birth] consistent with the findings of the court [and shall substitute the new certificate for the original certificate of birth].

(b) The fact that the father and child relationship was declared after the child's birth shall not be ascertainable from the [amended birth registration] [new certificate] but the actual place and date of birth shall be shown.

(c) The evidence upon which the [amended birth registration] [new certificate] was made and the original birth certificate shall be kept in a sealed and confidential file and be subject to inspection only upon consent of the court and all interested persons, or in exceptional cases only upon an order of the court for good cause shown.

§ 24. [When Notice of Adoption Proceeding Required]

If a mother relinquishes or proposes to relinquish for adoption a child who has (1) a presumed father under Section 4(a), (2) a father whose relationship to the child has been determined by a court, or (3) a father as to whom the child is a legitimate child under prior law of this State or under the law of another jurisdiction, the father shall be given notice of the adoption proceeding and have the rights provided under [the appropriate State statute] [the Revised Uniform Adoption Act], unless the father's relationship to the child has been previously terminated or determined by a court not to exist.

§ 25. [Proceeding to Terminate Parental Rights]

(a) If a mother relinquishes or proposes to relinquish for adoption a child who does not have (1) a presumed father under Section 4(a), (2) a father whose relationship to the child has been determined by a court, or (3) a father as to whom the child is a legitimate child under prior law of this State or under the law of another jurisdiction, or if a child otherwise becomes the subject of an adoption proceeding, the agency or person to whom the child has been or is to be relinquished, or the mother or the person having custody of the child, shall file a petition in the [_____] court to terminate the parental rights of the father, unless the

father's relationship to the child has been previously terminated or determined by a court not to exist.

(b) In an effort to identify the natural father, the court shall cause inquiry to be made of the mother and any other appropriate person. The inquiry shall include the following: whether the mother was married at the time of conception of the child or at any time thereafter; whether the mother was cohabiting with a man at the time of conception or birth of the child; whether the mother has received support payments or promises of support with respect to the child or in connection with her pregnancy; or whether any man has formally or informally acknowledged or declared his possible paternity of the child.

(c) If, after the inquiry, the natural father is identified to the satisfaction of the court, or if more than one man is identified as a possible father, each shall be given notice of the proceeding in accordance with Subsection (e). If any of them fails to appear or, if appearing, fails to claim custodial rights, his parental rights with reference to the child shall be terminated. if the natural father or a man representing himself to be the natural father, claims custodial rights, the court shall proceed to determine custodial rights.

(d) If, after the inquiry, the court is unable to identify the natural father or any possible natural father and no person has appeared claiming to be the natural father and claiming custodial rights, the court shall enter an order terminating the unknown natural father's parental rights with reference to the child. Subject to the disposition of an appeal upon expiration of [6 months] after an order terminating parental rights is issued under this subsection, the order cannot be questioned by any person, in any manner, or upon any ground, including fraud, misrepresentation, failure to give any required notice, or lack of jurisdiction of the parties or of the subject matter.

(e) Notice of the proceeding shall be given to every person identified as the natural father or a possible natural father [in the manner appropriate under rules of civil procedure for the service of process in a civil action in this state, or] in any manner the court direct. Proof of giving the notice shall be filed with the court before the petition is heard. [If no person has been identified as the natural father or a possible father, the court, on the basis of all information available, shall determine whether publication or public posting of notice of the proceeding is likely to lead to identification and, if so, shall order publication or public posting at times and in places and manner it deems appropriate.]

§ 26. [Uniformity of Application and Construction]

This Act shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this Act among states enacting it.

§ 27. [Short Title]

This Act may be cited as the Uniform Parentage Act.

§ 28. [Severability]

If any provisions of this Act or the application thereof to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

§ 29. [Time of Taking Effect]

The following acts and parts of acts are repealed:

(1) [Paternity Act]

(2)

(3)

§ 30. [Time of Taking Effect]

This Act shall take effect on _____.

Appendix P

EXECUTIVE SUMMARY
NATIONAL INCIDENCE STUDIES ON MISSING, ABDUCTED, RUNAWAY AND THROWNAWAY CHILDREN IN AMERICA*

OVERVIEW

Major Conclusions

❑ What has in the past been called the missing children problem is in reality a set of at least five very different, distinct problems. Each of these problems needs to be researched, analyzed, and treated separately.

❑ Many of the children in at least four of these categories were not literally missing. Caretakers did know where they were. The problem was in recovering them.

❑ Because of definitional controversies and confusion about the concept of missing children, public policy still needs to clarify the domain of this problem. Which children and which situations should be included, what do they have in common, and what are they to be called?

❑ Family Abduction appeared to be a substantially larger problem that previously thought.

❑ The Runaway problem did not appear to be larger in 1988 than at the time of the last national survey in 1975.

❑ More than a fifth of the children who have previously been termed Runaways should actually be considered Thrownaways.

❑ There were a large group of literally missing children who have not been adequately recognized by previous research and policy concerning missing children. These were children who were missing because they got lost, or injured, or because they miscommunicated with caretakers about where they would be or when they would be home.

BACKGROUND, METHODOLOGY AND DEFINITIONS

The National Incidence Studies of Missing, Abducted, Runaway and Thrownaway Children (NISMART) was undertaken in response to the mandate of the 1984 Missing Children Act. Its objective was to estimate the incidence of five categories of children, those who were:

❑ Abducted by family members
❑ Abducted by non-family members
❑ Runaways
❑ Thrownaways
❑ Missing because they had gotten lost or injured, or for some other reason.

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*The NISMART research was conducted under a grant from the Office of Juvenile Justice and Delinquency Prevention and reported in May 1990. This excerpt only contains materials relevant to family abduction. For a complete copy of the Executive Summary or the full research results, contact the Juvenile Justice Clearinghouse, 1-800-638-8736.

Nismart collected data from six separate sources:

Household Survey. The centerpiece was a telephone survey of 34,822 randomly selected households, which yielded interviews with 10,544 caretakers about the experiences of 20,505 children. The response rate for eligible households was 89 percent. The modern sophistication of such surveys allowed us to derive accurate national estimates, while compensating for households without phones and other nonparticipating households.

Juvenile Facilities Survey. This was a survey of residential facilities, such as boarding schools and group homes, to find out how many children had run away from these facilities, in addition to children who ran from households.

Returned Runaway Study. This interview study with children who had run away and returned home was primarily methodological. Its goal was to find out if children's accounts of episodes matched those of their parents.

Police Records Study. This was a study of police records in 83 law enforcement agencies in a national random sample of 21 countries to find out how many Non-Family Abductions were reported.

FBI DATA Reanalysis. A reanalysis was conducted of 12 years of FBI homicide data to determine how many children were murdered in conjunction with possible abductions by strangers.

Community Professionals Study. This was a study of 735 agencies having contact with children in a national random sample of 29 counties to determine how many children known to these agencies were abandoned or thrown away.

Serious definitional controversies surround each of the problems studied., which made it necessary to estimate the incidence of each according to at least two definitions. For example, in many States the crime of abduction can entail the coerced movement of a person as little as a few feet. Yet the public thinks of abduction in terms of notorious crimes like the Lindbergh or Adam Walsh kidnappings, where a child is taken a substantial distance, for a substantial period of time, or with the intent to keep or kill. Similarly, some State laws define parental abduction as an episode in which a parent takes a child or keeps a child for any length of time in violation of a custody decree. But the popular image of a parental abduction is of a parent who flees to another city or another country with a child or who hides the child incommunicado.

Thus, within each of the individual problems, *we present incidence estimates according to at least two definitions*: what we call, first, a "Broad Scope" and then a "Policy Focal" definition. "Broad Scope" generally defines the problem the way the affected families might define it. It includes both serious and also more minor episodes that may nonetheless be alarming to the participants. By contrast, "Policy Focal" generally defines the problem from the point of view of the police or other social agencies. It is restricted to episodes of a more serious nature, where children are at risk and there is a need for immediate intervention. Policy Focal cases are a subset of Broad Scope ones.

We have also created two definitions of non-family abduction: the Legal Definition Abductions and Stereotypical Kidnappings. The Legal Definition Abduction corresponds to the crime of abduction as it is specified in the criminal law of many States and includes the short-term, coercive movement

entailed in many rapes and assaults. Stereotypical Kidnappings, by contrast, reflect more closely the popular stereotype of a kidnapping, as a long-term, long-distance, or fatal episode.

These carefully crafted definitions were the result of a three-stage process, involving a panel of 34 experts, and a review of relevant legal statutes, law review articles, and prior studies.

FAMILY ABDUCTION

Family Abduction (Broad Scope) was defined as situations where a family member 1) took a child in violation of a custody agreement or decree; or 2) in violation of a custody agreement or decree failed to return a child at the end of a legal or agreed-upon visit, with the child being away at least overnight.

A "family member," in addition to the usual meaning, included anyone with a romantic or sexual involvement with a parent. Moreover, "abductions" could be perpetrated by custodial as well as noncustodial caretakers. The incidence estimates were based entirely on the Household Survey portion of NISMART.

There were an estimated 354,100 Broad Scope Family Abductions in 1988. This is quite a bit higher than earlier guesstimates of 25,000 to 100,000.

A Policy Focal Family Abduction was a more serious episode, entailing one of three additional aggravating conditions:

- ❑ An attempt was made to conceal the taking or the whereabouts of the child or to prevent contact with the child; or

- ❑ The child was transported out of State; or

- ❑ There was evidence that the abductor had the intent to keep the child indefinitely or to permanently alter custodial privileges.

There were an estimated 163,200 Policy Focal Family Abductions in 1988, or 46 percent of the Broad Scope cases. Family Abduction had the largest estimated incidence of any Policy Focal category in NISMART.

Most of the Broad Scope Family Abductions were perpetrated by men, noncustodial fathers, and father figures. Most victims were children from ages 2 to 11 with slightly more at younger ages, but relatively few infants and older teens. Half involved unauthorized takings, mostly from the children's homes; half involved failures to return the child after an authorized visit or stay.

The most common times for Family Abduction were in January and August. These are the times when school vacations end and visitations are exchanged. Most of the episodes lasted 2 days to a week, with very few, 10 percent, a month or more. In only a tiny fraction, 1 percent or less, was the child still being held by the abductor.

The period immediately after a divorce was *not* when most Family Abductions occurred. Instead 41 percent occurred before the relationship ended. Another 41 percent did not occur until 2 or more

years after a divorce or separation. This was probably because it took time for parents to develop new stable households, move to other communities, develop new relationships, and become disenchanted with the legal system—all factors that could precipitate abductions.

A number of figures give a sense of the scope of the most serious Broad Scope cases. In 1 out of 10 cases the child was removed from the State. In 3 out of 10 cases the child experienced serious or mild mental harm, according to the caretaker. In about a third of the cases, there was an attempt to conceal the child's whereabouts. In 4 out of 10 cases, the caretaker contacted the police. In 5 out of 10 cases, the caretaker contacted an attorney. Although sexual abuse is one of the most feared components of family abduction, its occurrence was unusual (less than 1%).

Also of interest, in half the episodes, the caretakers *did know* where the children were most of the time. The problem was not discovering the whereabouts of the child, but getting the child returned to proper custody.

There were interesting regional disparities in the occurrence of Family Abduction, with the South overrepresented and the Midwest underrepresented. It is possible that the more traditional legal system in the South makes noncustodial fathers pessimistic about getting a favorable outcome, so that they take matters into their own hands.

CONCLUSIONS AND RECOMMENDATIONS

NISMART drew two important conclusions concerning the overall "missing children" problem.

❑ Although the five problems studied here are often grouped together as one—"missing children"—in fact, they are extremely dissimilar social problems. They affect different children and different families. They have very different causes, different dynamics, different remedies, different policy advocates, and different types of institutions and professionals who are concerned. *They could not be lumped together for meaningful scientific analysis.*

❑ There was a second serious obstacle to grouping these five categories of children under the rubric "missing children": *not all these children were literally missing*. As the studies revealed, a large proportion of the caretakers knew where their children were most of the time during the episodes. For example, in the case of family abduction, only 17 percent of the children had their whereabouts not at all known to caretakers. Many caretakers knew that the children were at the home of their ex-spouse, but they could not get them back. In the case of runaways from households, only 28 percent of the children were entirely missing. Most runaways were known to be at the homes of friends or relatives. Even in the case of non-family abductions, most episodes were so short-lived, as in the case of an abduction and rape, that the child may not have been missed by anyone.

Thus, *we determined that it was not possible to develop a meaningful and useful global figure for the "number of missing children."* First, because of the profound differences among the problems, it did not make sense from a scientific standpoint to add together such disparate episodes as runaways, stranger abducted children, parentally abducted children, and so forth, or even some portion of each of these problems, into a single number of so-called missing children. Second, children in these categories were "missing" in different senses, and in many cases, as we pointed out earlier, not missing at all. Finally, when such numbers as these have been lumped together in the past, it has created a

great deal of confusion. People have assumed that missing children meant children who had been abducted or who had permanently disappeared. Thus, all the statistical findings and conclusions of this study are made about the five distinct social problems, and there are no global figures. We specifically discourage anyone from trying to create or use such a global number on the basis of NISMART statistics.

We offer the following recommendations:

❑ Public policy around what has become known as "missing children" needs to clarify its domain. It needs to be more specific about which children and which situations are included, why they are included, and what they are to be called. If the five problems studied here need an overarching framework, we propose the compound term "Missing and Displaced," rather than the simple term "Missing."

❑ Public policy needs to more clearly differentiate each of the separate social problems included under the so-called "missing children" umbrella.

❑ Increased attention needs to be given to the problem of Family Abduction. The incidence of this problem proved larger than earlier estimates, and its 163,200 Policy Focal cases were the most numerous of all Policy Focal categories. Family Abductions may well be on the rise and yet could be readily amenable to prevention.

❑ All policy, publication, and research on the problem of Runaways should take into account the difference between Runaways and Thrownaways. Thrownaways are a large group with different dynamics; they suffer from being lumped together indiscriminately with Runaways.

❑ There needs to be special attention and an increased policy focus on the problem of children who run away from institutions. These children are among the most chronic runaways and the ones at highest risk of becoming crime victims and perpetrators; they need a specialized approach.

❑ New attention should be given to the problem of children who fell into our category of Lost, Injured, or Otherwise Missing. This group, as numerous in total as Runaways, experienced substantially more physical harm than any other category except those who were victims of Non-Family Abductions. The 139,000 children reported to police in this category are almost as numerous as the Runaways reported to police. Some of the children in this category probably experienced quite minor episodes, but others were very serious cases. A policy about missing children needs especially to include the serious group in this category.

❑ Another set of incidence studies should be undertaken 5 years from now, conducted largely along the lines of the present approach with a few modifications. These modifications would include a more comprehensive canvas of police records, a more direct sample of juvenile justice facilities, and a planned coordination with future child abuse and neglect incidence studies. In addition, we urge that interim methodological studies be undertaken to improve the future incidence efforts.

❑ The Department of Justice should consider the possibility of ongoing data collection systems, for example, using the National Crime Survey or a police-based "sentinel" system that could provide yearly incidence statistics for some categories of missing and displaced children.

Appendix Q

SAMPLE JURY INSTRUCTIONS

Child Abduction (California)
[Defendant is accused in [Count[s]_____ of] the information of having committed the crime of child abduction, a violation of Section 278 of the Penal Code.]
Every person not having a right of custody, who maliciously takes, detains, conceals or entices away any minor child with the specific intent to detain or conceal such child from a [person] [guardian] [or] [public agency] having the lawful charge of the child, is guilty of the crime of child abduction in violation of Penal Code Section 278.
In order to prove such crime, each of the following elements must be proved:

1. A person took, detained, concealed or enticed away a minor child;
2. Such person did not have a right of custody of such child;
3. Such person did so maliciously; and
4. With the specific intent to detain and conceal such child from a [person] [guardian] [or] [public agency] having the lawful charge of the child.

The Committee on Standard Jury Instruction, Criminal, of the Superior Court of Los Angeles County, California, 1 CALIFORNIA JURY INSTRUCTIONS Parts 1-11 (5th ed. 1988) [hereinafter CALJIC].

[CALJIC 9.70 (1991 Revision)].

Child Abduction—Person with Custody Right—No Court Order in Effect (California)
[Defendant is accused in [Count[s] _____ of] the information of having violated Section 277 of the Penal Code, a crime.]

In the absence of a court order determining rights of custody or visitation to a minor child, every person having a right of custody of a child who maliciously takes, detains, conceals, or entices away that child without good cause, and with the intent to deprive the custody right of [another person] [or] [a public agency] also having a custody right to that child, is guilty of a violation of Section 277 of the Penal Code, a crime.

"Good cause" means a good faith and reasonable belief that the taking, detaining, concealing, or enticing away of the child is necessary to protect the child from immediate bodily injury or emotional harm.

[A subsequently obtained court order for custody or visitation is not a defense to this action.]

In order to prove such crime, each of the following elements must be proved:

1. No court had made an order determining the rights of custody or visitation to a minor child;
2. A person, having a right of custody of that child, took, obtained, concealed, or enticed away such child;
3. Such person did so maliciously;
4. Such person did so without good cause; and
5. With a specific intent to deprive [another person] [or] [a public agency] of [his] [her] [its] custody rights to the minor child.

[A person who takes, detains, conceals, or entices away a minor child on grounds of "good cause", [must] [has a duty to] file a report of such action within a reasonable time with the law enforcement agency in the jurisdiction where the child has been living, setting forth the basis for the immediate bodily injury or emotional harm to the child. If you find that such a report was not filed within a reasonable time, you should consider such failure, along with the other evidence, in determining the existence of the elements of the crime.]
[CALJIC 9.70.5 (1991 New)].

Child Abduction—Violation of Custody Decree (California)
[Defendant is accused in [Count[s] _____ of] the information of having violated Section 278.5 of the Penal Code, a crime.]

Every person having a right to physical custody of or visitation with a child pursuant to an order, judgment or decree which grants another person, guardian or public agency right to physical custody of or visitation with that child, who detains, conceals, takes or entices away that child with intent to deprive [another] [that other] person of [his] [her] [that] right to physical custody or visitation, is guilty of a violation of Section 278.5 of the Penal Code, a crime.

In order to prove such crime, each of the following elements must be proved:

1. A person had a right to [physical custody of] [or] [visitation with] a child pursuant to an order, judgment or decree of court,
2. Such order, judgment or decree also granted [another person] [a guardian] [or] [a public agency] a right to custody of or visitation with that child, and
3. The first person [detained] [concealed] [took] [or] [enticed away] that child with the specific intent to deprive the other [person] [guardian] [or] [public agency] of [his] [or] [her] [or] [its] right to custody or visitation.

[CALJIC 9.71 (1991 Revision)].

Violation of Custody—Taking or Enticing (Colorado)
The elements of the crime of violation of custody are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. took or enticed any child,
5. under the age of eighteen,
6. from the custody of its [parent] [guardian] [lawful custodian],
7. knowing that he had no privilege to do so or was heedless in that regard.

[8. without the affirmative defense in instruction number ___ .]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of violation of custody.

After considering all the evidence, if you decide the prosecution has failed to prove each of the elements beyond a reasonable doubt, you should find the defendant not guilty of violation of custody.
Colorado Supreme Court Committee on Criminal Jury Instruction, COLORADO JURY INSTRUCTIONS CRIMINAL (1985) [hereinafter COLJI-CRIM.].
[COLJI-CRIM. 11:09].

Violation of Custody—Court Order Violated (Colorado)
The elements of the crime of violation of custody are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. violated an order of any district or juvenile court of this State which:
   a. granted custody,
   b. of a child under eighteen years,
   c. to any person, agency, or institution,
4. with the intent to deprive the lawful custodian of the custody of said child,
5. who was then under the age of eighteen years.

[6. without the affirmative defense in instruction number ___ .]

[COLJI-CRIM. 11:10].

Custodial Interference in the First and Second Degrees (Connecticut)
Custodial Interference in the First Degree is a Class D felony, punishable with a term not to exceed 5 years.

Custodial Interference in the Second Degree is a Class A misdemeanor, punishable with a term not to exceed 1 year.

a. The defendant is charged with Custodial Interference in the First Degree in violation of Section 53a-97 of the General Statutes. That Section reads as follows:

"A person is guilty of custodial interference in the first degree when he commits the crime of custodial interference in the second degree as defined in section 53a-98;
(1) under circumstances which expose the child or person taken or enticed from lawful custody to a risk that his safety will be endangered or his health materially impaired; or (2) if he takes or entices the child or person out of this state."

b. That section makes reference to another section of our General Statutes, Section 53a-98, which provides as follows:

"A person is guilty of custodial interference in the second degree when: (1) Being a relative of a child less than sixteen years old and intending to hold such child permanently or for a protracted period and knowing that he has no right to do so, he takes or entices such child from his lawful custodian; or (2) knowing that he has no legal right to do so he takes or entices from lawful custody any incompetent person or any person entrusted by authority of law to the custody of another person or institution."

c. Therefore, your first inquiry will be to determine whether or not the state has proved beyond a reasonable doubt that the defendant committed the crime of Custodial Interference in the Second Degree. If it has been so proven, you will then go on to determine whether the additional elements of Custodial Interference in the First Degree have been so proven.

d. Having found the accused to be a relative of the child taken within the definition I have given you (*Schutte vs. Douglass*, 90 Conn. 529, by blood and/or marriage), and that the child abducted is less than sixteen years old, not having reached his sixteenth birthday on the day of the taking, you must determine whether the elements of custodial interference have been proven beyond a reasonable doubt.

e. Did the accused in taking the child, intend to hold such child permanently or for a protracted period? A person acts "intentionally" with respect to a result or to conduct when his conscious objective is to cause such result or to engage in such conduct. "Conscious" is defined as perceiving, apprehending, or noticing with a degree of controlled thought or observation. Here, as in all matters of finding intent, you may have to rely on your own judgment of the facts and circumstances, as proved to you. How and under what circumstances was the child taken? What preparations did the party taking the child make, and how did he remove the child? What precautions, if any, did he take to prevent the parents or lawful custodians from knowing who had taken him and where they went? All these, and many other questions, when answered in the light of the evidence you have heard, may assist you in determining this intent. And if you find there are not enough circumstances to convince you beyond a reasonable doubt that he actually intended to hold the child permanently or for a lengthy period, you must conclude that custodial interference has not been proved and return a verdict of not guilty.

f. It is important, also, to remember that it need not be proved that the accused actually did hold the child for any lengthy period, but merely that he intended to. Thus, even if you find that the accused was apprehended almost immediately, or before he could put in effect what you determine were his plans and intentions, you still may find the accused guilty as to this element concerning the holding period.

g. Further, as an essential element of this offense, you must find that the accused knew, at the time, that he had no legal right to take the child. If, in fact, there was some legal basis for his

taking him, you must find the accused not guilty. Even if he actually had no such right, but believed reasonably and in good faith that he did, he cannot be held to have known that he had no such right, and must be acquitted.

h. Finally, to make out this crime, the evidence must convince you beyond a reasonable doubt that the accused took or enticed the child from his lawful custodian. The taking need not be a taking by force or against the child's will; the child may have come with the accused willingly. But in order to convict, you must find, if that is the case, that the child's willingness resulted from words or conduct of the accused which whetted or created the child's desire or willingness to come with him—in law this is considered an enticement.

i. If you find all these elements to have been proved beyond a reasonable doubt, you may convict the defendant of custodial interference in the second degree. But if you should find further that the circumstances in which he took or enticed the child exposed that child to the risk of endangerment of safety, or a material impairment of health, or if he took or enticed the child or person out of this state, you may instead, find custodial interference in the first degree. Failing to find proof beyond a reasonable doubt as to any one of the requirements and elements I have stated to you, you must then return a verdict of not guilty.

Douglas B. Wright & David B. Havanich, 2 CONNECTICUT JURY INSTRUCTIONS § 730-960 (2d ed. 1975) [hereinafter CONJI].

[CONJI § 753].

Interference with Parental Custody (Kansas)
The defendant is charged with the crime of interference with parental custody. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That _____ is a child under 14 years of age;
2. That the child was in the lawful custody of _____ as (parent) (guardian) (or other person having lawful charge or custody);
3. That the defendant (took) (carried away) (decoyed or enticed) the child;
4. That this was done with the intent to detain or conceal the child from _____; and
5. That this act occurred on or about _____ day of _____ , 19 __ , in _____ County, Kansas.

Kansas Judicial Council, PATTERN INSTRUCTION FOR KANSAS—CRIMINAL (2d ed. 1982) [hereinafter PIK-CRIM.].

[PIK-CRIM. 56.26 (1987/1988 Supp.)].

Aggravated Interference with Parental Custody by Parent's Hiring of Another (Kansas)
The defendant is charged with the crime of aggravated interference with parental custody. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That _____ is a child under 14 years of age;
2. That the child was in the lawful custody of _____ as (parent) (guardian) (or other person having lawful charge or custody);
3. That the defendant _____, hired another person to (take) (carry away) (decoy or entice away) _____;
4. That _____ was (taken) (carried away) (decoyed or enticed away) by such other person;

5. That this was done with the intent to detain or conceal the child from _____; and
6. That this act occurred on or about the ____ day of _____ , 19___ , in _____ County, Kansas.

[PIK-CRIM. 56.26-A (1987/1988 Supp.)].

Aggravated Interference with Parental Custody by Hiree (Kansas)
The defendant is charged with the crime of aggravated interference with parental custody. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:
1. That _____ is a child under 14 years of age;
2. That the child was in the lawful custody of _____ as (parent) (guardian) (or other person having lawful charge or custody);
3. That the defendant _____ (took) (carried away) (decoyed or enticed away) the child;
4. That the defendant was hired by another to (take) (carry away) (decoy or entice) the child;
5. That this was done with the intent to deprive _____ of the custody of the child; and
6. That this act occurred on or about the ____ day of _____ , 19___ , in _____ County, Kansas.

[PIK-CRIM. 56.26-B (1987/1988 Supp.)].

Aggravated Interference with Parental Custody—Other Circumstance (Kansas)
The defendant is charged with the crime of aggravated interference with parental custody. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:
1. That _____ is a child under 14 years of age;
2. That the child was in the lawful custody of _____ as (parent) (guardian) (or other person having lawful charge or custody);
3. That the defendant (took) (carried away) (decoyed or enticed away) the child;
4. That this was done with the intent to deprive _____ of the custody of the child; and
5. That the defendant has previously been convicted of interference with parental custody.
   or
   That the defendant took the child outside the state without the consent of _____ (or the court).
   or
   That the defendant, after lawfully taking the child outside the state while exercising visitation or custody rights, refuses to return the child at the expiration of these rights.
   or
   That the defendant (refuses to return) (impedes the return) of the child at the expiration of visitation or custody rights outside the state.
   or
   That the defendant detained or concealed the child in a place unknown to _____, either inside or outside this state.
6. That this act occurred on or about the _____ day of _____ , 19___ , in _____ County, Kansas.

[PIK-CRIM. 56.26-C (1987/1988 Supp.)].

Custodial Interference by Relative (Parental Kidnapping) (Massachusetts)
[This instruction is drafted under the felony branch of Mass. Gen. L. ch. 265, § 26A. It may be adapted for the misdemeanor branch of the same offense by eliminating the fifth element and the corresponding statutory language.]

The defendant is charged with having violated section 26A of chapter 265 of our General Laws, which provides as follows:

Whoever, being a relative of a child less than eighteen years old,
without lawful authority,
holds or intends to hold such a child permanently or for a protracted period,
or
takes or entices such a child from his lawful custodian . . .
[and does so]
by taking or holding [the] child
outside the Commonwealth
or
under circumstances which expose the [child] taken or enticed from lawful custody to a risk which endangers his safety
shall be punished . . . .

In order to prove that the defendant is guilty of this offense, the Commonwealth must prove five things beyond a reasonable doubt:
First: That the defendant is a relative of the child involved;
Second: That the child was less than 18 years of age at the time;
Third: The Commonwealth must prove *either* that the defendant held or intended to hold the child permanently or for a protracted period, *or* that the defendant took or enticed the child from his (her) lawful custodian;
Fourth: The Commonwealth must prove that the defendant did so without lawful authority; and
Fifth: The Commonwealth must prove that the defendant took or held the child *either* outside Massachusetts *or* in a way which exposed him (her) to a risk which endangered his (her) safety.

Commonwealth of Massachusetts District Court Department of the Trial Court, MODEL JURY INSTRUCTION FOR USE IN THE DISTRICT COURT (1988) [hereinafter MASJI].
[MASJI 5.405].

Parental Taking or Retention of a Child (Michigan)

1. The defendant is charged with unlawfully taking or retaining a child. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

2. First, that the defendant took [*state name of child*], or that he kept [*state name of child]* for more than twenty-four hours.

3. Second, that the defendant intended to keep or conceal the child from:

[*Choose one of the following]*:

a. The parent or legal guardian who had legal [custody/visitation rights] at the time.
b. The person who had adopted the child.
c. The person who had lawful charge of the child at the time.

Michigan State Bar Standing Committee on Standard Criminal Jury Instructions, 2 MICHIGAN CRIMINAL JURY INSTRUCTIONS (2d ed. Supp. 1991) [hereinafter CJI2d].
[CJI2d 19.6].

Nature and Definition of Offense (New York)
Custodial interference is a relatively new offense, carved out of the area formerly occupied by kidnapping, to cover situations involving custody disputes. The offense is not limited solely to custody disputes involving children, but also

includes the taking from lawful custody of incompetent persons and those entrusted to the care of another person or institution.

It is a two-degree crime. Custodial interference in the second degree is a class A misdemeanor. The first degree is a class E felony. The elements are the same, except that the first degree contains the aggravating factor of the noncustodial parent removing the child from the state. The legislature raised the penalty for the first degree to a felony in recognition of the seriousness of the crime, and to enable the custodial parent to avail himself or herself of the facilities of the FBI's child locator service and to enable the state to extradite the defendant because of the felonious nature of the crime.

The basic elements of the crime are as follows: the defendant is a relative; the child is under 16 years of age; the defendant takes or entices the child from the lawful custodian; for a protracted period; without the consent of the lawful custodian.

Howard G. Leventhal, Esq., CHARGES TO THE JURY AND REQUESTS TO CHARGE IN A CRIMINAL CASE (Revised Ed. 1991 Cumulative Supp.) [hereinafter CHARGES TO JURY CRIM.].
[CHARGES TO JURY CRIM. § 24:01].

Custodial Interference in the First Degree (New York)
A person is guilty of custodial interference in the first degree when he commits the crime of custodial interference in the second degree and with intent to permanently remove the victim from this state, he removes such person from the state; or, under circumstance which expose the victim to a risk that his safety will be endangered or his health materially impaired.

The statute also provides for the assertion of an affirmative defense that the victim had been abandoned or that the taking was necessary in an emergency to protect the victim because he was subjected to or threatened with mistreatment or abuse. Since this is denominated as an affirmative defense, the defendant has the burden of establishing it by a preponderance of the evidence.
[CHARGES TO JURY CRIM. § 24:02].

Custodial Interference in the Second Degree (New York)
A person is guilty of custodial interference in the second degree when, being a relative of a child less than 16 years old, intending to hold such child permanently or for a protracted period, and knowing that he has no legal right to do so, he takes or entices such child from his lawful custodian; or, knowing that he has no legal right to do so, he takes or entices from lawful custody any incompetent person or other person entrusted by authority of law to the custody of another person or institution.

In a prosecution for custodial interference in the second degree, the burden of proof is on the People to prove beyond a reasonable doubt that the defendant had knowledge of a court order awarding custody of the infant child to the complainant.
[CHARGES TO JURY CRIM. § 24:03].

Relative Taking Child—Model Charge (New York)
The defendant, _____ , is charged in the _____ count of the indictment with the crime of custodial interference in the first degree as follows:

[*read count*]

Penal Law Section 135.50(1) defines the crime of custodial interference in the first degree as follows:

> "A person is guilty of custodial interference in the first degree when, being a relative of a child less than 16 years old, intending to hold such child permanently or for a protracted period, and knowing that he has no legal right to do so, he takes or entices such child from his lawful custodian, and, with intent to permanently remove the victim from this state, he removes such person from the state."

You would only be entitled to find the defendant, _____, guilty of this charge if the People have proven to your satisfaction beyond a reasonable doubt each of the following elements:

1. That the defendant, _____ , was a relative of _____.
   A "relative" means a parent, ancestor, brother, sister, uncle or aunt.
2. That at the time of the incident, the child, _____, was less than 16 years old.
3. That the defendant, _____, took or enticed _____ from his lawful custodian.
   "Took" means laid hold of, seized, took possession of, assumed ownership of, appropriated to one's own use.
   "Enticed" means wrongfully solicited, persuaded, allured, attracted, drew by blandishment, coaxed or seduced.
4. That the defendant, _____, intended to hold _____ permanently or for a protracted period.
   A person acts intentionally with respect to a result or to conduct described by a statute defining a crime when his conscious objective is to cause such results or to engage in such conduct.
   Intent is a mental operation, which can be proven usually by the facts and circumstances leading up to, surrounding, and following the events in question. Intent is basically a subjective element, that is, the operation of a person's mind. However, since we cannot x-ray a person's mind to determine what he is thinking, you may infer a person's intent by his acts or words or both. Premeditation is not a prerequisite in determining intent. Intent may be formed in seconds or in a brief instant before the commission of an act. However, it is necessary for the intent to be formed prior to or during the commission of the act or acts resulting in the commission of the crime. You may, but need not, infer that a person intends that which is the natural and probable consequences of the acts done by him. This permissible inference in no way, however, shifts the burden of proof beyond a reasonable doubt with respect to this element of intent from the shoulders of the prosecution.
5. That the defendant, _____, knew that he had no legal right to do so.
   A person acts knowingly with respect to conduct or to a circumstance described by a statute defining an offense when he is aware that his conduct is of such nature or that such circumstance exists.
6. That the defendant, _____, removed _____ from the State of New York.
7. That the defendant, _____, intended to permanently remove _____ from the State of New York.

Again, in order for you to convict the defendant, _____, of the crime of custodial interference in the first degree, the People must prove to your satisfaction beyond a reasonable doubt each of these seven elements:

1. That the defendant, _____, was a relative of _____; and
2. That at the time of the incident, the child, _____, was less than 16 years old; and 3.That the defendant, _____, took or enticed _____ from his lawful custodian; and
4. That the defendant, _____, intended to hold _____ permanently or for a protracted period; and
5. That the defendant, _____, knew that he had no legal right to do so; and
6. That the defendant, _____, removed _____ from the State of New York; and
7. That the defendant, _____, intended to permanently remove _____ from the State of New York.

Therefore, with respect to count _____ of the indictment, if you find that the People have proven to your satisfaction beyond a reasonable doubt each of the foregoing elements, then you would be justified in finding the defendant, _____, guilty of the crime of custodial interference in the first degree.

On the other hand, if you find that the People have failed to prove to your satisfaction beyond a reasonable doubt any one or more of the foregoing elements, or if you have reasonable doubt of the defendant's guilt based upon the evidence or lack of evidence, then you must find the defendant, _____, not guilty of the crime of custodial interference in the first degree.
[CHARGES TO JURY CRIM. § 24:04].

Abduction by Parent Without Custody (Virginia)
The defendant is charged with the crime of abduction. Kidnapping and abduction are the same crime. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

1. That the defendant by [force; intimidation; deception] did [seize; take; transport; detain; hide] (name of child); and
2. That the defendant did so with the intent to withhold or conceal (name of child) from (name of parent with custody); and
3. That the defendant acted in violation of a Court order and without legal justification or excuse; and
4. That (name of child) was removed from the Commonwealth by the defendant.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the offense as charged, then you shall find the defendant guilty and fix his punishment at:

1. A specific term of imprisonment, but not less than one (1) year nor more than five (5) years; or
2. Confinement in jail for a specific time, but not more than twelve (12) months; or
3. A fine of a specific amount, but not more than ($1,000.00; $2,500.00]*; or
4. Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than [$1,000.00; $2,500.00].*

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the offense, then you shall find the defendant not guilty.

* For crimes committed before July 1, 1990, use $1,000.00; for crimes committed on or after July 1, 1990, use $2,500.00.

Model Jury Instruction Committee, 1 VIRGINIA MODEL JURY INSTRUCTIONS (1990 Supp.) [hereinafter VIRMJI]. [VIRMJI 4.300].

Parental Abduction (Virginia)
The defendant is charged with the crime of parental abduction. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

1. That the defendant withheld (name of child) from (name of custodial parent); and
2. That the defendant did so knowingly, wrongfully and intentionally; and
3. That the defendant did so in a clear and significant violation of a Court order respecting the custody or visitation of such child; and
4. That (name of child) was withheld outside of the Commonwealth by the defendant.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the offense as charged, then you shall find the defendant guilty and fix his punishment at:

1. A specific term of imprisonment, but not less than one (1) year nor more than five (5) years; or
2. Confinement in jail for a specific time, but not more than twelve (12) months; or
3. A fine of a specific amount, but not more than ($1,000.00; $2,500.00]*; or
4. Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than [$1,000.00; $2,500.00].*

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the offense, then you shall find the defendant not guilty.

* For crimes committed before July 1, 1990, use $1,000.00; for crime committed on or after July 1, 1990, use $2,500.00.
[VIRMJI 4.350].

Interference with Custody of a Child (Wisconsin)
May 27, 1997 Interference with the custody of a child, as defined in § 948.31(1)(b) of the Criminal Code of Wisconsin, is committed by one who intentionally takes away any child from a legal custodian with intent to deprive the custodian of custody rights without the consent of the custodian.

Before the defendant may be found guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following five elements were present.

The first element requires that on (date of alleged offense), (name of child) had not attained the age of 18 years.

The second element requires that (name of custodian) had legal custody of (name of child) under a (court order) (judgment) in an action for divorce.

The third element requires that the defendant took away (name of child) from (name of custodian) without the consent of (name of custodian).

"Without consent" means no consent in fact.

Such taking need not necessarily be accompanied by force or violence.

The fourth element requires that the defendant acted intentionally.

"Intentionally" means that the defendant acted with the mental purpose to take away the child.

"Intentionally" also requires that the defendant knew that (name of custodian) had legal custody of (name of child) under a (court order) (judgment) and knew that (name of custodian) did not give consent to take away (name of child).

You cannot look into a person's mind to find out intent or knowledge. You may determine intent or knowledge directly or indirectly from all the facts and evidence concerning this offense. You may consider any statements or conduct of the defendant which indicate the state of mind. You may find intent and knowledge from such statements or conduct, but you are not required to do so. You are the sole judges of the facts, and you must not find the defendant guilty unless you are satisfied beyond a reasonable doubt that the defendant intentionally interfered with the custody of the child.

The fifth element requires that the defendant took away (name of child) with intent to deprive (name of custodian) of custody rights.

If you are satisfied beyond a reasonable doubt that on (date of alleged offense), (name of child) had not attained the age of 18 years, that (name of custodian) had legal custody of (name of child) under a (court order) (judgment) in an action for divorce, that the defendant intentionally took (name of child) away from (name of custodian) without the consent of (name of custodian), that the defendant knew (name of custodian) had legal custody of (name of child) and did not consent to the taking, and that the defendant acted with intent to deprive (name of custodian) of custody rights, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

Wisconsin Criminal Jury Instructions Committee, IIA WISCONSIN JURY INSTRUCTIONS CRIMINAL (Rel. No 23-1989) [hereinafter WIS-JI-CRIMINAL].

[WIS-JI-CRIMINAL 2166] [This instruction is to be used for offenses committed on or after July 1, 1989].

Interference with Custody of a Child (Wisconsin)
Interference with the custody of a child, as defined in 948.31(2) of the Criminal Code of Wisconsin, is committed by one who takes away any child from the parents of the child without the consent of the parents.

Before the defendant may be found guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

The first element requires that on (date of alleged offense), (name of child) had not attained the age of 18 years.

The second element requires that (name of parents) were the parents of (name of child).

The third element requires that the defendant took away (name of child) from (name of parents) without their consent.

"Without consent" means no consent in fact.

Such taking need not necessarily be accompanied by force or violence.

If you are satisfied beyond a reasonable doubt that on (date of alleged offense), (name of child) had not attained the age of 18 years, that (name of parents) were the parents of (name of child) and that the defendant took (name of child) away from (name of parents) without their consent, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

[WIS-JI-CRIMINAL 2167] [This instruction is to be used only for offenses committed on or after July 1, 1989].

Interference with Custody of a Nonmarital Child (Wisconsin)
Interference with the custody of a child, as defined in § 948.31(2) of the Criminal code of Wisconsin, is committed by one who takes away any child from the mother of the child without the consent of the mother where the child is a nonmarital child whose parents have not intermarried.

Before the defendant may be found guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

The first element requires that on (date of alleged offense), (name of child) had not attained the age of 18 years.

The second element requires that (name of mother) was the mother of (name of child).

The third element requires that (name of child) is a nonmarital child.

A nonmarital child is one who is neither conceived nor born while his or her parents are lawfully married to each other and whose parents have not subsequently married each other.

The fourth element requires that the defendant took away (name of child) from (name of mother) without her consent.

"Without consent" means no consent in fact.

Such taking need not necessarily be accompanied by force or violence.

If you are satisfied beyond a reasonable doubt that on (date of alleged offense) (name of child) had not attained the age of 18 years, that (name of mother) was the mother of (name of child) and that the defendant took (name of child) away from (name of mother) without her consent, and that (name of child) was a nonmarital child whose parents did not marry each other since the birth of (name of child), you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

[WIS-JI-CRIMINAL 2167A] [This instruction is to be used only for offenses committed on or after July 1, 1989].

Interference with the Custody of a Child by a Parent: Concealing a Child (Wisconsin)
Interference with the custody of a child by a parent, as defined in § 948.31(3)(a) of the Criminal Code of Wisconsin, is committed by a parent who intentionally conceals a child from the child's other parent.

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

First, that (name of defendant) was the parent of (name of child).

Second, that (name of defendant) concealed (name of child) from the other parent.

Third, that the defendant intentionally concealed (name of child).

The first element requires that (name of defendant) was the parent of (name of child). This element also requires that on (date of alleged offense), (name of child) had not attained the age of 18 years.

The second element requires that (name of defendant) concealed (name of child) from the other parent.

"Conceal" means to hide the child or do something else which prevents or makes more difficult the discovery of the child by the other parent.

The third element requires that the defendant intentionally concealed (name of child).

This requires that the defendant acted with the purpose to conceal (name of child) from the other parent and to interfere with that parent's custody rights.

If you are satisfied beyond a reasonable doubt from the evidence in this case that the defendant was the parent of (name of child), that on (date of alleged offense) (name of child) had not attained the age of 18 years, and that the defendant intentionally concealed
(name of child) from the child's other parent, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

[WIS-JI-CRIMINAL 2168] [This instruction is to be used only for offenses committed on or after July 1, 1989].

Child Abduction—Definitions (California)
As used in the offense of child abduction:

"Maliciously" means with intent to vex, annoy or injure another person, or to do a wrongful act. *People v. Casagranda*, 43 Cal. App. 2d 818, 822, 111 P.2d 672, 675 (1941).

"Fraudulently" includes all surprise, trick, cunning and unfair ways by which one person deceives or attempts to deceive another. *People v. Casagranda*, 43 Cal. App. 2d at 822, 111 P.2d at 675.

"To entice" means to allure, to attract, to draw on, or to lead astray by exciting hope or desire. It does not necessarily include any domination over the child's will. *People v. Torres*, 48 Cal. App. 606, 609, 192 P. 175, 176 (1920).

"Detain" means to delay, to hinder, or to retard. It does not necessarily include force or menace. *People v. Moore*, 67 Cal. App. 2d 789, 791, 155 P.2d 403, 404 (1945).

"A person having a right of custody" means [the legal guardian of the child] [a person who has a parent and child relationship with the child] [or [a person] [or] [an agency] that has been granted custody of the child pursuant to a court order].

A "right of custody" means the right to physical custody of the child. [In the absence of a court order to the contrary, a parent loses his or her right of custody of the child to the other parent if the parent having the right to custody is dead, is unable or refuses to take the custody, or has abandoned his or her family.]
[CALJIC 9.72 (1991 Revision)].

Definition of "Detain" (California)
As used in this offense, the following words have the following meanings: "Detain" means to delay, to hinder, or to retard. It does not necessarily include the idea of force or menace.
[CALJIC 9.41].

Significance of Child's Desires (California)
In the offense with which defendant is charged, it is not material that the child may have gone with the defendant willingly. Further, it is immaterial whether the act was done with or without the child's consent. A violation of Penal Code section 278.5 is an offense against the custodial parent, not the child. It is designed to protect parents against the anxiety and grief which necessarily follows from the absence or concealment of their children.
People v. Campos, 131 Cal. App. 3d 894, 899 (1982); *People v. Cook*, 61 Cal. 478, 479 (1982); *People v. Moore*, 67 Cal. App. 2d 789, 792 (1945).

Child Abduction—Consent of Child (California)
The fact that a minor child consented to go, or to stay, or decided voluntarily to accompany an adult is not a defense to the crime of unlawfully taking, obtaining, concealing, or enticing away a minor child.
[CALJIC 9.73 (1991 New)].

Defendant's Belief the Action was Necessary to Protect Child (California)
It is not a defense to a charged violation of Penal Code section 278.5 that the person who takes, detains, conceals or retains a child in violation of a custody decree did so in the belief, whether reasonable or unreasonable, that the action was necessary to protect the child against the threat of some future harm. In such circumstances there are other remedies available to the person which must be exercised as a matter of law.
People v. Lortz, 127 Cal. App. 3d 363, 368 (1982).

Defense of Necessity—General (California)
A person is not guilty of a crime when [he] [she] engages in an act, otherwise criminal, through necessity. Necessity is an affirmative defense. Therefore, the defendant has the burden of proving by a preponderance of the evidence all of the facts necessary to establish the elements of this defense, namely:

1. The act charged as criminal was done to prevent a significant and imminent evil, namely, [a threat of bodily harm to oneself or another person] [or] [_____];
2. There was no reasonable legal alternative to the commission of the act;
3. The harm caused by the act was not disproportionate to the harm avoided;
4. The defendant entertained a good-faith belief that his act was necessary to prevent the greater harm;
5. Such belief was objectively reasonable under all the circumstances; and
6. The defendant did not substantially contribute to the creation of the emergency.

[CALJIC 4.43 (1989 New)].

Affirmative Defense—Protection of a Child (Michigan)

1. If the defendant [took/kept] the child to protect the child from an immediate and actual threat of physical or mental harm, abuse, or neglect, it is a defense to this charge.

2. This is [the only/an] issue in this case on which defendant has the burden of proof. In deciding whether the defendant has proved this defense, you should consider all of the evidence admitted during trial. If the evidence supporting this defense outweighs the evidence against it, then you must find the defendant not guilty.

3. If you decide that the defendant has failed to prove this defense, you must still consider whether the prosecutor has met his burden of proving beyond a reasonable doubt each of the elements of unlawfully taking or retaining a child.

[CJI2d 19.7].

Interference with the Custody of a Child: Affirmative Defenses (Wisconsin)
IF THERE IS EVIDENCE OF AN AFFIRMATIVE DEFENSE RECOGNIZED IN § 948.31(4), SUBSTITUTE THE FOLLOWING FOR THE FINAL TWO PARAGRAPHS OF THE APPLICABLE INSTRUCTION:

If you are not satisfied beyond a reasonable doubt that the defendant (here summarize the elements as stated in the second-to-last paragraph of the instruction), you must find the defendant not guilty.

If you are satisfied beyond a reasonable doubt that the defendant (here summarize the elements as stated in the second-to-last paragraph of the instruction), you must consider whether the action taken by the defendant (state the applicable defense as set forth is subsecs. (4)(a)1.-5.).

Wisconsin law provides that it is a defense to this crime if the person took the action (state the applicable defense).

The burden is on the defendant to satisfy you to a reasonable certainty by the greater weight of the credible evidence that he (state the applicable defense).

By the greater weight of the evidence is meant evidence which, when weighed against that opposed to it, has more convincing power. Credible evidence is evidence which in the light of reason and common sense is worthy of belief.

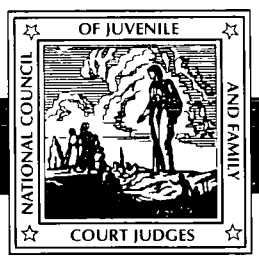
If you are satisfied to a reasonable certainty by the greater wight of the credible evidence that the defendant (state the applicable defense), you must find the defendant not guilty.

If you are not satisfied to a reasonable certainty by the greater weight of the credible evidence that the defendant (state the applicable defense) and you are satisfied beyond a reasonable doubt that the defendant (here summarize the elements of the crime), you should find the defendant guilty.

[WIS-JI-CRIMINAL 2169] [This instruction is to be used only for offenses committed on or after July 1, 1989].

Appropriateness of Court Proceedings (California)
Penal Code section 278.5 was "enacted to encourage parents who are unhappy with custody or visitation provisions under existing conditions to return to the civil court to seek judicial clarification or modification of the order, and to discourage them from taking the law into their own hands by concealing the child in a place unknown to the other parent."
People v. Lortz, 127 Cal. App. 3d 363, 368 (1982).

Specificity of Date (California)
When, as in this case, it is alleged that the crime charged was committed "on or about" a certain date, if the jury finds



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