DRAFT

FOR DISCUSSION ONLY

UNIFORM CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

Draft

UNIFORM CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT

With Prefatory Note and Comments

DRAFTING COMMITTEE ON CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT

MARIAN P. OPALA, Supreme Court, Rm. 238, State Capitol, Oklahoma City, OK 73105. *Chair*,
DEBORAH E. BEHR, Office of Attorney General, Dept. of Law, P.O.Box 110300, Juneau,

AK 99811.
ROBERT N. DAVIS, Univ. of Mississippi, School of Law, University, MS 38677.
ROBERT L. MCCURLEY, Jr., Alabama Law Institute, P.O.Box 1425, Tuscalossa, AL 35486.
DOROTHY J. POUNDERS, 47 N. Third St., Memphis, TN 38103.
BATTLE ROBINSON, Family Court Building, 22 The Circle, Georgtown, DE 19947
HARRY L. TINDALL, 2800 Texas Commerce Tower, 600 Travis St. Houston, TX 77002
LEWIS VAFIADES, P.O.Box 919, 23 Water St., Bangor, ME 04402
MARTHA LEE WALTERS, Ste. 220, 975 Oak St., Eugene, OR 97401
ROBERT G. SPECTOR, Robert G., Univ. of Oklahoma College of Law, 300 Timberdell Rd., Norman, OK 73019, *Reporter*

EX OFFICIO

BION M. GREGORY, Office of Legislative Council, State Capitol, Suite 3021, Sacramento, CA 95814-4996, *President*
DAVID PEEPLES, 224th District Court, Bexar County Courthouse, 100 Dolorosa, San Antonio, TX 78205; 210-220-2843 *Chair, Division F.*

EXECUTIVE DIRECTOR

FRED H. MILLER, University of Oklahoma, College of Law, 300 Timberdell Road, Norman, OK 73019, *Executive Director*
WILLIAM J. PIERCE, 1505 Roxbery Road, Ann Arbor, MI, *Executive Director Emeritus.*

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NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS
676 St. Claire Street, Suite 1700
Chicago, Illinois 60611
312/915-0195

UNIFORM CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT
Fifth Draft
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INTRODUCTORY NOTE

This Act, the Uniform Child Custody Jurisdiction and Enforcement Act, revisits the problem of the interstate child thirty years after the Conference promulgated the Uniform Child Custody Jurisdiction Act (UCCJA). It seeks to accomplish two purposes.

First, it revises the law on child custody jurisdiction in light of federal enactments and thirty years of contradictory case law. Article 2 of the Act provides for a clearer determination of which State can exercise original jurisdiction over a child-custody determination. It also, for the first time, enunciates a standard of continuing jurisdiction and clarifies modification jurisdiction. Other aspects of the Article harmonize the law on

simultaneous proceedings, clean hands and forum non conveniens. Several sections of the original UCCJA that were obsolete were omitted from this revision.

Second, this Act provides in Article 3 for an expedited process to enforce interstate child custody and visitation determinations. In doing so, it brings uniformity to the law of interstate enforcement that is currently chaotic. In many respects this Act accomplishes for custody and visitation determinations the same certainty that has occurred in interstate child support law with the promulgation of the Uniform Interstate Family Support Act.

REVISION OF THE UNIFORM CHILD CUSTODY JURISDICTION ACT

In 1994 the Conference's Study Committee on Family Law recommended to the Scope and Program Committee that Uniform Child Custody Jurisdiction Act be amended to conform it to federal enactments, particularly the Parental Kidnapping Prevention Act, (PKPA), 28 U.S.C. §1738A (Full Faith and Credit to Child Custody Determinations). In the same year the American Bar Association's Family Law Section's Council unanimously passed the following resolution at its spring 1994 meeting in Charleston:

> RESOLUTION
>
> WHEREAS the Uniform Child Custody Jurisdiction Act (UCCJA) is in effect in all 50 of the United States, and the Federal Parental Kidnapping Prevention Act (PKPA), 28 U.S.C.A. §1738A, governs the full faith and credit due a child custody determination by a court of a U.S. state or territory, and
>
> WHEREAS numerous scholars have noted that certain provisions of the PKPA and the UCCJA are inconsistent with each other,
>
> THEREFORE BE IT RESOLVED the Council of the Family Law Section of the American Bar Association urges the National Conference of Commissioners on Uniform State Laws (NCCUSL) to study whether revisions to the UCCJA should be drafted and promulgated in a revised version of the uniform act.

The UCCJA was successfully adopted as law in all 50 states, the District of Columbia and the Virgin Islands. A number of adoptions, however, have significantly departed from the original text. In addition, almost thirty years of litigation since the promulgation of the UCCJA has produced substantial discrepancy in its interpretation in state courts. These non-uniform interpretations have created many situations where the goals of the UCCJA were rendered unobtainable.

In 1980 the federal government enacted the Parental Kidnapping Prevention Act (PKPA), 28 U.S.C.A. §1738A, to address interstate custody problems that continued to exist after the adoption of the UCCJA. The PKPA mandates that state authorities give full faith and credit to other states' custody determinations, so long as those determinations were made in conformity with the provisions of the PKPA. The PKPA provisions regarding bases for jurisdiction, restrictions on modifications, preclusion of simultaneous proceedings, and notice requirements are similar to those in the UCCJA. There are, however, some significant differences. For example, under the UCCJA there are four interchangeable bases of initial jurisdiction. The PKPA, however, prioritizes the "home State" jurisdiction by requiring that full faith and credit cannot be given to a State that exercises initial jurisdiction for any other reason when there is a

"home State." In addition the PKPA authorizes continuing exclusive jurisdiction in the decree state so long as one parent or the child remains in that jurisdiction. The UCCJA only hints at such a requirement. To further complicate the process, the PKPA partially incorporates state UCCJA law in its language.

The existing Drafting Committee on the Uniform Child Visitation Act was then requested by the Scope and Program Committee to revise the Uniform Child Custody Jurisdiction Act. The purposes of the revisions are to bring the UCCJA into compliance with the Parental Kidnapping Prevention Act and other federal statutes such as the Violence Against Women's Act, 18 U.S.C. §2265 (Full Faith and Credit for Protective Orders), as well as to make those changes to the UCCJA which are necessary after almost 30 years of inconsistent court interpretations.

The Drafting Committee on the Uniform Interstate Child Visitation Act combined these revisions, along with the enforcement provision it was drafting, into a proposed Uniform Child Custody Jurisdiction and Enforcement Act. This draft contains the following suggested amendments to the UCCJA:

1. Providing for home State priority: The PKPA provides for full faith and credit only when the custody determination is made by the home State. Other state custody determinations are not entitled to PKPA enforcement unless there is no home State. The UCCJA, however, specifically authorizes four independent bases of jurisdiction without prioritization. Under the UCCJA a significant-connection custody determination may have to be enforced even if it would be denied enforcement under the PKPA. This draft prioritizes home State jurisdiction in Section 201.

2. A clarification of emergency jurisdiction: There are several problems with the current emergency jurisdiction provision of the UCCJA §3(a)(3). First, the language of the UCCJA does not specify that emergency jurisdiction may only be exercised to protect the child on a temporary basis until the court with jurisdiction issues a permanent order. Some courts have interpreted the UCCJA language to so provide. Other courts, however, have held that there is no time limit on the emergency jurisdiction. Simultaneous proceedings and conflicting custody orders have resulted from these different interpretations.

Second, the emergency jurisdiction provisions predated the widespread enactment of state domestic violence statutes. Those statutes are often invoked to keep one parent away from the other parent and the children when there is a threat of violence. Whether these situations are sufficient to invoke the emergency jurisdiction provision of the UCCJA has been the subject of some confusion since the emergency jurisdiction provision does not specifically refer to violence directed against the parent of the child or to a sibling of the child.

Finally, the UCCJA provides no exception to the notice requirement, or the ban on simultaneous proceeding, in emergency cases. Therefore, custody orders issued on a temporary emergency basis (e.g., child abuse orders or domestic violence orders of protection), prior to notice being given to all contestants or during the pendency of another custody proceeding in another state, would not currently be enforceable in any other state pursuant to the UCCJA, although they may have to be enforced under the Violence Against Women Act.

This draft contains a separate section on emergency jurisdiction at Section 204

which addresses these issues.

3. Providing for exclusive continuing jurisdiction for the decree granting state: The failure of the current UCCJA to clearly state that the decree granting state retains exclusive jurisdiction to modify that decree has resulted in two major problems. First, different interpretations of the UCCJA on continuing jurisdiction have resulted in conflicting custody decrees. States have different interpretations as to how long continuing jurisdiction lasts. Some courts have held that modification jurisdiction continues until the last contestant leaves the state, regardless of how many years the child has lived outside the state or how tenuous the child's connections to the state have become. Other courts have held that continuing modification jurisdiction ends as soon as the child has established a new home State, regardless of how significant the child's connections to the decree state remain. This divergence of views leads to simultaneous proceedings and conflicting custody orders.

The second problem arises when it is necessary to determine whether the state with continuing jurisdiction has relinquished it. There should be a clear basis to determine when that court has relinquished jurisdiction. Currently, the UCCJA provides no guidance on this issue. The resulting ambiguity concerning whether a court has declined jurisdiction can result in one court improperly exercising jurisdiction because it erroneously believes that the other court has declined jurisdiction. This can cause simultaneous proceedings and conflicting custody orders. In addition some courts have declined jurisdiction after only informal contact between courts, with no notice to contestants and no opportunity for the parties to be heard. This raises serious due process questions. This draft addresses these issues in Section 106, 202, and 206.

4. What custody proceedings are covered: The definition of custody proceeding in the UCCJA is ambiguous. States have rendered conflicting decisions regarding certain types of proceedings. There is no general agreement whether the UCCJA applies to neglect, abuse, dependency, wardship, guardianship, termination of parental rights, adoption and protection from domestic violence proceedings. This draft includes a sweeping definition that includes all cases involving custody of or visitation with a child as a "custody determination."

5. Role of "Best Interests:" The jurisdictional scheme of the UCCJA was designed to promote the best interests of the children whose custody was in question by discouraging parental abduction and providing that, in general, the state with the closest connections to and the most evidence regarding a child should decide that child's custody. The "best interest" language in the jurisdictional sections of the UCCJA was not intended to be an invitation to address the merits of the custody dispute in the jurisdictional determination or to otherwise provide that "best interests" considerations should override jurisdictional determinations or provide an additional jurisdictional basis.

This draft eliminates the term "best interests" in order to establish clarity between the jurisdictional standards and the substantive standards relating to custody and visitation of children.

6. Applicability to Native Americans: It is currently unclear whether Native American tribes are intended to be included under the definition of "State." This ambiguity creates uncertainty as to whether child custody determinations made by Native American tribal courts are ever entitled to enforcement under the UCCJA and whether

Native American tribal authorities are obliged to enforce state court determinations. Currently some states have enacted statutes exempting from UCCJA coverage all proceedings that would fall under the Indian Child Welfare Act. Others disagree. This draft defines "State" to include Indian tribe as that term is defined in the Violence Against Women's Act.

7. Other Changes: This draft also makes a number of additional amendments to the UCCJA as pointed out in the comments to those sections. These changes are not necessary to conform the Act to federal statutes. However, the Drafting Committee determined that these changes will result in an improved Act that is easier to apply.

ENFORCEMENT PROVISIONS

The Drafting Committee for a proposed Uniform Interstate Child Visitation Act was originally charged with the task of developing remedies for interstate visitation and custody cases. As with child support, state borders have become the biggest obstacle to enforcement of custody and visitation orders. If either parent leaves the state where the custody determination was made, the other parent faces considerable difficulty in enforcing the visitation and custody provisions of the decree. Locating the child, making service of process and preventing adverse modification in a new forum all present problems.

There is currently no uniform method of enforcing custody and visitation orders validly entered in another state. As documented by the ABA Center on Children and the Law's Report, *Obstacles to the Recovery and Return of Parentally Abducted Children* (*Obstacles Study*), despite the fact that both the UCCJA and the PKPA direct the enforcement of visitation and custody orders entered in accordance with mandated jurisdictional prerequisites and due process, neither deals with the mechanisms for enforcement.

As the *Obstacles Study* pointed out, the lack of specificity in enforcement procedures has resulted in the law of enforcement evolving differently in different jurisdictions. In one state it might be common practice to file a Motion to Enforce or a Motion to Grant Full Faith and Credit to initiate an enforcement proceeding. In another a Writ of Habeas Corpus or a Citation for Contempt might be commonly used. In some states, mandamus and prohibition also may be utilized. All of these enforcement procedures differ from jurisdiction to jurisdiction. While many states tend to limit considerations in enforcement proceedings to whether the court which issued the decree had jurisdiction to make the custody determination, others broaden the considerations to scrutiny of whether enforcement would be in the best interests of the child.

Lack of uniformity complicates the enforcement process in several ways: (1) It increases the costs of the enforcement action in part because the expertise of more than one lawyer may be required--one in the original forum and one in the state where enforcement is sought; (2) It decreases the lack of certainty of outcome; (3) It can turn enforcement into a long and drawn out procedure. A parent opposed to the provisions of a visitation determination may be able to delay implementation for many months, possibly even years, thereby frustrating not only the other parent, but also the process that led to the issuance of the original court order.

The provisions of Article 3 reflect the decisions taken by the drafting committee. The Act provides an extremely swift remedy along the lines of habeas corpus. Time is extremely important in visitation and custody cases. If visitation rights cannot be enforced quickly, they often cannot be enforced at all. This is particularly true if there is a limited time within which visitation can be exercised such as may be the case when one parent has been granted visitation during the winter or spring holiday period. Without speedy consideration and resolution of the enforcement of such visitation rights, the ability to visit may be lost entirely. Similarly, a custodial parent must be able to obtain prompt enforcement when the noncustodial parent refuses to return a child as the end of authorized visitation, particularly when a summer visitation extension will infringe on the school year. A swift enforcement mechanism is desirable for violations of both custody and visitation provisions.

The draft also provides that the enforcing tribunal will be able to utilize an extraordinary remedy. If the enforcing tribunal is concerned that the parent, who has physical custody of the child, will flee or harm the child, a warrant to take physical possession of the child is available.

The scope of the enforcing court's inquiry is limited to the issue of whether the decree court had jurisdiction and complied with due process in rendering the original custody decree. No further inquiry is necessary because neither Article 2 nor the PKPA allow an enforcing tribunal to modify a custody determination.

The Drafting Committee decided there should be a role for public authorities in the enforcement process. California law provides for a substantial role for prosecutors and police officers in the enforcement of custody decrees One of the basic policies behind the California approach is that the involvement of public authorities will encourage the parties to abide by the terms of the custody determination. If the parties know that prosecutors and law enforcement officers are available to help in securing compliance with custody determinations, they may be deterred from interfering with the exercise of rights established by court order.

The California model could also prove more effective in remedying violations of the custody determination. Most parties do not have the resources to enforce a custody determination in another jurisdiction. The availability of the prosecutor as an enforcement agency will help ensure that this remedy can be made available regardless of income level. In addition the prosecutor has resources to draw on that are unavailable to the average litigant..

This draft provides a permissive role for the prosecutor and law enforcement in enforcing a custody determination. It does not authorize the prosecutor be involved in the action leading up to the making of the custody determination except when requested by the tribunal, when there is a violation the Hague Convention on the Civil Aspects of Child Abduction or when the person holding the child has violated a criminal statute.. The Act does not mandate that the prosecutor be involved in all cases referred to it.

The draft takes the position that the role of the prosecutor and law enforcement ought to be permissive and not mandatory. Not all States, or local prosecutors, may wish to expend the funds necessary for an effective custodial enforcement program.

At the request of the Drafting Committee, the Scope and Program Committee

determined that the revisions of the UCCJA and the enforcement remedy provided by a Uniform Interstate Child Visitation Act be combined into one new act to be entitled the Uniform Child Custody Jurisdiction and Enforcement Act.

[ARTICLE] 1
GENERAL PROVISIONS

SECTION 101. DEFINITIONS. In this [Act]:

(1) "Child" means an individual who has not attained 18 years of age.

(2) "Child-custody determination" means that portion of a judgment, decree, or other order of a tribunal providing for the legal-custody or physical-custody of or visitation with a child. The term includes permanent, temporary, initial, and modification orders. The term does not include that portion of an order relating to child support or any other monetary obligation of an individual.

(3) "Child-custody proceeding" means a proceeding in which legal custody or physical custody of or visitation with a child is an issue. The term includes a proceeding involving [adoption], divorce, separation, neglect, abuse, dependency, guardianship, paternity, termination of parental rights, or protection from domestic abuse. The term does not include a proceeding involving juvenile delinquency, contractual emancipation or an enforcement proceeding under Article III of this [Act]..

(4) "Commencement" means the filing of the first pleading in a proceeding.

(5) "Contestant" means a person who claims a right to legal custody of or a right of visitation with a child under the law of a State.

(6) "Home State" means the State in which a child lived with a parent or a person acting as parent for at least six consecutive months immediately before the commencement of a child-custody proceeding. In the case of a child less than six months of age, the term means the State in which the child lived from birth with any of the persons mentioned. A period of temporary absence of any of the named persons is counted as part of the period.

(7) "Initial determination" means the first child-custody determination concerning a particular child.

(8) "Issuing State" means the State in which a child-custody determination is made.

(9) "Issuing tribunal" means the tribunal that makes a child-custody determination for which enforcement is sought under this [Act].

(10) "Legal custody" means the right to make major decisions concerning the child;

(11) "Modification" means a child-custody determination that changes, replaces, supersedes, or is otherwise made after a previous determination concerning the same child, whether or not made by the tribunal that made the previous determination.

(12) "Person acting as parent" means a person other than a parent, including a state or private agency having supervision or placement authority with respect to the child, who:

(i) has physical custody of a child or has had physical custody for a period of six consecutive months, including any temporary absence, within one year immediately preceding the commencement of a child-custody proceeding; and

(ii) has been awarded legal custody by a tribunal or claims a right to legal custody under state law.

(13) "Physical custody" means the physical care and supervision of a child.

(14) "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or insular possession subject to the jurisdiction of the United States. The term includes an Indian tribe, band, pueblo, nation, or other organized group or community of Indians, including an Alaska Native village as defined in or established under the Alaska Native Claims Settlement Act, 43 U.S.C. §1601 et seq., that is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(15) "Tribunal" means a court, agency, or other entity authorized to establish, enforce, or modify a child-custody determination.

(16) "Tribunal of this State" means the [court, administrative agency, quasi-judicial entity, or combination].

(17) "Warrant" means an order issued by a tribunal authorizing law enforcement officers to detain a child.

Comment

The UCCJA did not contain a definition of "child." The definition here is taken from the PKPA and is part of the process of conforming the UCCJA to the PKPA. The drafting committee abandoned an attempt to define a child functionally as one who was subject of a custody proceeding. Such a definition resulted in potentially including adult guardianships in the Act which the drafting committee did not consider desirable.

The drafting committee decided to use the word "person" instead of "individual" in the definition of contestant. This was to facilitate UCCJEA coverage of cases where the legal custody of a child is given to a state agency in, for example, a child neglect proceeding. The use of the term "individual" might raise doubts about the applicability of the Act in cases in Juvenile Court involving child abuse and neglect. The PKPA's definition of "contestant" utilizes the term "person." The phrase "under the law of a State" has been added to the definition of "contestant" to emphasize that this Act does not confer any substantive custody rights. Only those persons authorized to seek custody or visitation under State law may be considered a contestant. The term "contestant" as defined in the PKPA does not include this phrase. It's inclusion in the Act does not create a conflict with the PKPA. The federal statute cannot give any state law substantive rights.

The Committee on Style has changed the term "custody determination and "custody proceedings as found in the original UCCJA to "child-custody determination and "child-custody proceeding." No substantive change is intended by the change in terminology. The definition of "child-custody determination" now closely tracks the PKPA definition.

The definition of "child-custody proceeding" has been rewritten several times. The Drafting Committee decided to retain the phrase "is one of several issues," as it appeared in the UCCJA. The Committee on Style has substituted "is an issue." The Drafting Committee expanded the list of custody proceedings from the comparable definition in the UCCJA. The listed proceedings have generally been adjudicated to be the type of proceeding to which the UCCJA and PKPA are applicable. There are however some contrary holdings. See e.g., *Interest of L.G*, 890 P.2d 647 (Colo. 1995) (juvenile neglect proceedings are not "custody proceedings" under the PKPA). The list of examples removed any controversy about the types of proceedings where a custody determination can occur. Proceedings that affect access to the child are subject to this

Act. The inclusion of protection for domestic violence proceedings is necessary after the passage of the Violence Against Women Act, 18 U.S.C. §2265 (Full Faith and Credit for Protective Orders). However, If a state adopts the jurisdictional provisions of the Uniform Adoption Act, that Act would govern adoption proceedings. Juvenile delinquency or proceeding to confer contractual rights are not "custody proceedings" because they do not relate to civil aspects of access to a child. While a determination of paternity is covered under the Uniform Interstate Family Support Act, the custody and visitation aspects of paternity cases are custody proceedings. Cases involving the Hague Convention on the Civil Aspects of Child Abduction have not been included at this point because custody of the child is not determined in a proceeding under the International Child Abductions Remedies Act. Those proceedings are specially included in Article 3.

"Commencement" has been included in the definitions as a replacement for the term "pending" found in the UCCJA. Its inclusion simplifies some of the simultaneous proceedings provisions of this Act.

Subsection (5) of the original UCCJA defining "decree" and "custody decree" has been eliminated as duplicative of the definition of "custody determination."

The definition of "home State" has been slightly rewritten by the Committee on Style. No substantive chance is intended from the UCCJA.

The term "issuing state" is borrowed from UIFSA. In UIFSA it refers to the tribunal that issued the support or parentage order. Here, it refers to the state, or the tribunal, which decided the custody determination that is sought to be enforced. It is used primarily in Article 2.

The term "legal custody" has been added to clarify certain sections. It means a right accorded by law to exercise parental rights and responsibilities toward a child.

The term "person acting as parent" has been redefined in accordance with the decision of the Drafting Committee. The term has been broadened from the original definition to include a person who has acted as a parent for a significant period of time prior to the filing of the custody proceeding as well as a person who currently has physical custody of the child.

Indian tribes have been added to the definition of "State" to include custody determinations made in proceedings which occur under tribal jurisdiction. The definition of Indian tribe is taken from the Violence Against Women's Act, 42 U.S.C. §3796gg-2. That Act requires tribes to give full faith and credit to Victim Protection Orders issued by States and requires States to give full faith and credit to tribal court Victim Protection Orders. Since many Victim Protection Orders are custody determination within the meaning of this Act, the definition of tribe in VAWA should control here.

[Note: The original Section 1 of the UCCJA on the Purposes of the Act has been eliminated. Uniform Acts no longer contain such a section.]

SECTION 102. RELATIONSHIP TO OTHER PROCEEDINGS.

[(a)] A child-custody proceeding that pertains to an Indian child as defined in the Indian Child Welfare Act, 25 U.S.C. §§1901 et seq., is not subject to this [Act] to the extent that it is governed by the Indian Child Welfare Act.

[(b) An adoption proceeding is governed by [the Uniform Adoption Act.]]

Comment

Two types of custody proceedings are governed by other acts. First, in cases governed by the Indian Child Welfare Act, the jurisdictional requirements of that statute take precedence. Second, in States that adopt the Uniform Adoption Act, the jurisdictional requirements of that Act should control. If the State does not adopt the Uniform Adoption Act, the jurisdictional scheme of this Act will govern. Accordingly, subsection (b) is placed in brackets.

SECTION 103. INTERNATIONAL APPLICATION OF [ACT]. The provisions of this [Act] apply to child-custody proceedings and determinations of other countries rendered by appropriate authorities if there is reasonable notice and opportunity to be heard. A tribunal of this State may refuse to apply this [Act] when the child-custody law of the other country ignores basic principles relating to the protection of human rights and fundamental freedoms.

Comment

In accordance with the decision of the Drafting Committee, the Act will have international application to child custody proceedings and determination of other countries. In this section the terms "custody proceeding" should be interpreted to included proceedings relating to custody or analogous institutions of the other country.

The tribunal need not apply the provisions of this act when to do so would violate fundamental principles of humans rights. The same concept is found in Section 20 of the Hague Convention on the Civil Aspects of Child Abduction (return of the child 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). This draft adopts a suggestion from the floor during the first reading to the effect that the court's scrutiny should be on the child-custody law of the foreign country and not on other aspects of the other legal system.

This section is derived from Section 23 of the original UCCJA.

SECTION 104. BINDING FORCE OF CHILD-CUSTODY DETERMINATION.

A child-custody determination made by a tribunal of this State which had jurisdiction under this [Act] binds all parties who have been served in this State or notified in accordance with Section 106 or who have submitted to the jurisdiction of the tribunal, and who have been given an opportunity to be heard. As to those parties, the determination is conclusive as to all issues of law and fact decided unless and until the determination is modified.

Comment

No substantive changes have been made to this section. Language changes were required by the Committee on Style. This was Section 12 of the original Act.

SECTION 105. PRIORITY. Upon request of a party to a child-custody proceeding which raises a question of existence or exercise of jurisdiction under this [Act], the issue must be given priority on the calendar and handled expeditiously.

Comment

No major changes have been made to this section which was Section 24 of the original Act. Any language changes were required by the Committee on Style. The Drafting Committee determined that it should be placed toward the beginning of Article 1 to emphasize its importance.

The change from "case" to "issue" is to clarify that it is the jurisdictional issue which must be expedited and not the entire custody case. Whether the entire custody case should be given priority is a matter of local law.

SECTION 106. NOTICE TO PERSONS OUTSIDE STATE.

(a) Notice required for the exercise of jurisdiction when a person is outside this State must be given in a manner reasonably calculated to give actual notice, and may be given:

(1) by personal service outside this State in the manner prescribed for service of process within this State;

(2) in a manner prescribed by the law of another State in which the service is made for personal service of process in that State in an action in any of its courts of general jurisdiction;

(3) by any form of mail addressed to the person to be served which request a receipt and results in delivery; or

(4) as directed by the tribunal, including publication, if other means of notification are determined by the tribunal to be ineffective to give actual notice.

(b) 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 this State, the order pursuant to which the service is made, or the law of the State 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.

(c) Notice required for the exercise of jurisdiction, need not have been given as to a person who submits to the jurisdiction of the tribunal.

ALTERNATIVE SECTION 106(A)

(a) Notice required for the exercise of jurisdiction when a person is outside this State must be given in a manner reasonably calculated to give actual notice, and may

be given:

(1) as prescribed by [the law of this State];

(2) in a manner prescribed by the law of another State in which the service is made for personal service of process in that State in an action in any of its courts of general jurisdiction.

Comment

No substantive changes were made to this section which was Section 5 of the original UCCJA. Language changes were required by the Committee on Style. A number of technical amendments were adopted pursuant to suggestions made after the first reading.

This section continues to allow service of process by any means available in the place where service is accomplished. Thus service by fax would be permissible if allowed by local rule where the service was made.

An alternative to Section (a) would simply authorize notice to be made by any method permissible by either the State which issues the notice or the State where the notice is received and thereby eliminating the need to specify the type of notice in this Act.

Subsection (b) of the prior version which mandated that service take place either 10 or 20 days prior to any hearing under the Act has been eliminated. Local law should determine how long prior to the hearing notice must occur. This corresponds with the use of local law to determine when an order can be issued without notice in the case of irreparable harm.

SECTION 107. COMMUNICATION BETWEEN TRIBUNALS.

(a) A tribunal of this State may communicate with a tribunal in another State concerning a proceeding arising under this [Act]. Communications between tribunals that affect the rights of a party must be made in a manner that allows the parties to participate, or allows the parties or their attorneys to present jurisdictional facts and legal arguments to the tribunals before a final determination is made as to which forum is appropriate.

(b) A record of communications between tribunals must be made. The record may consist of notes or transcripts of a court reporter who listened to a conference call between the tribunals, an electronic recording of a telephone call, a recording of other electronic communications between the tribunals, or a written record made by one or more tribunals after the communication.

Comment

This section emphasizes the role of judicial communications under the Act. It contains the authorization for tribunal to communicate concerning any proceeding arising under this Act. Language has been added to emphasize the role of the parties in the communication process. If the communication between the tribunals involves relatively inconsequential concerns such as scheduling, calendars or consultation on other minor matters, the communication can occur without the parties' participation. However, on all matters which could affect the parties' substantive rights, a tribunal must communicate with another tribunal in a manner which allows the parties to participate. In any event, a record of the communication must be made.

This section is consistent with Canon 3B of the American Bar Association's Code of Judicial Conduct (1990), which prohibits a judge from initiating, permitting, or considering ex parte communications or considering other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding. It authorizes, where circumstances require, ex parte communications for emergencies, scheduling, or administrative purposes, that do not deal with substantive matters or issues on the merits where the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and where the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond. See the discussion in *Nebraska ex rel Grape v. Zach*, 524 N.W.2d 788 (Neb.Sup.Ct. 1994).

Communication can occur in many different ways such as by telephonic

conference and by on-line or other electronic communication.

SECTION 108. TAKING TESTIMONY IN ANOTHER STATE.

(a) In addition to other procedures available to a party, any party to a child-custody proceeding, a guardian ad litem or another representative of the child may offer testimony of witnesses, including parties and the child, by deposition or other allowable means, given in another State. The tribunal on its own motion may order 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 is taken.

(b) A tribunal of this State may permit an individual residing in another State to be deposed or to testify by telephone, audiovisual means, or other electronic means before a designated tribunal or at another location in that State. A tribunal of this State shall cooperate with tribunals of other States in designating an appropriate location for the deposition or testimony.

(c) Documentary evidence transmitted from another State to a tribunal of this State, by telephone, telecopier, facsimile or other electronic means that do not provide for an original writing, may not be excluded from evidence on an objection based on the means of transmission.

Comment

No substantive changes have been made to subsection (a) which was Section 18 of the original Act. The inclusion of the phrase "or a guardian ad litem or other representative of the child" is not meant to suggest that a State appoint a representative of the child. This Act takes no position on whether an attorney or guardian ad litem should be appointed for the child.

Subsections (b) and (c) merely provide that modern modes of communication are permissible in the taking of testimony and the transmittal of documents. See UIFSA §316. Any language changes were required by the Committee on Style.

SECTION 109. COOPERATION BETWEEN TRIBUNALS.

(a) A tribunal of this State may request the appropriate tribunal of another State to,

(1) hold an evidentiary hearing;

(2) order a person to produce or give evidence under procedures of that State;

(3) order than an evaluation made with respect to the custody of a child involved in a pending proceeding;

(4) forward to the tribunal of this State certified copies of the transcript of the record of the hearing, the evidence otherwise presented, or any evaluation prepared in compliance with the request.

(5) order a party to a child-custody proceeding or any person having physical custody of the child to appear in the proceeding with or without the child.

(b) Upon request of a tribunal of another State, a tribunal of this State may hold hearings or enters orders as described in paragraph (a).

(c) Travel and other necessary expenses incurred under subsections (a) and (b) may be assessed against the parties.

(d) In a child-custody proceeding in this State the tribunal shall preserve the pleadings, orders, decrees, any record made of its hearings, any evaluations, and other pertinent documents until the child attains 18 years of age. [The tribunal shall forward all required documents to a Federal Child Custody Registry if it is established.] Upon appropriate request by a tribunal or law enforcement officials of another State, the tribunal shall forward certified copies of those documents.

Comment

In accordance with our discussion at the last Committee meeting, I have combined Sections 109 and 110 (formerly sections 19, 20, 21 and 22 of the UCCJA). The current version authorizes tribunal to request assistance from tribunals of other States and to assist tribunals of other States. I have also changed the section on the assessment of costs for travel under this section. The UCCJA provides that the costs may be assessed against the parties or the State or County. I received a number of comments that assessment against a government entity in a case where the government is not involved is inappropriate and therefore removed that provision.

No other substantive changes have been made. The term "social study" was replaced with the modern term: "custody evaluation." The Act does not take a position on the admissibility of a custody evaluation that was done in another State. It merely authorizes a tribunal to seek assistance of a tribunal another State or render assistance to a tribunal in another State.

Subsection (d) of the former draft authorized a tribunal upon taking jurisdiction of a case to request a certified copy of the transcript from another State. That has been dropped in this version as duplicative of Subsection (a)(4).

Subsection (d) was Section 21 of the original Act. No substantive changes were made. Language has been added to ensure that the appropriate documents will be sent to a Federal Child Custody Registry, if established, as well as to law enforcement in another state.

Other language changes between this draft and the original UCCJA sections were required by the Committee on Style.

[ARTICLE] 2
JURISDICTION

SECTION 201. INITIAL CHILD-CUSTODY DETERMINATION.

(a) Subject to Section 204, a tribunal of this State which is competent to determine child custody has jurisdiction to make an initial child-custody determination only if:

(1) this State is the home State of the child on the date of the commencement of the proceeding or was the home State of the child within six months before the date of the commencement of the proceeding and the child is absent from this State but a parent or person acting as parent continues to live in this State;

(2) a tribunal of another State does not have jurisdiction under paragraph (1), or a tribunal of the home State of the child has declined to exercise jurisdiction on the ground that this State is the more appropriate forum under Section 207, and:

(i) the child and the child's parents, or the child and at least one contestant, have a significant connection with this State, other than mere physical presence; and

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

(3) no State would have jurisdiction under paragraph (1) or (2), or all tribunals having jurisdiction under paragraphs (1) or (2) have declined to exercise jurisdiction on the ground that a tribunal of this State is the more appropriate forum to determine the custody of the child under Section 207.

(b) Physical presence of the child in this State, or of the child and a person claiming physical custody, legal custody of or visitation with the child, is not alone sufficient to invoke the jurisdiction of a tribunal of this State to make a child-custody determination.

(c) Physical presence of the child is not a prerequisite for making a child-custody determination.

(d) Personal jurisdiction over a party is neither a prerequisite nor sufficient for making a child-custody determination.

Comment

The basic UCCJA jurisdiction section has been modified in several ways. The extended home State provision has been modified, in accordance with the decision of the drafting committee, to apply whenever the child has left the state and a parent or person acting as a parent remains. It is no longer necessary to determine why the child has been removed. The only inquiry relates to the status of the person left behind. This change provides a slightly different home State standard than the PKPA. The PKPA requires a determination that the child has been removed by a contestant or for other reasons. The scope of the PKPA provision is theoretically narrower than this version of the UCCJA. However, the phrase "or for other reasons" seems to cover most fact situations where the child is not in the home State and therefore the differences are more apparent than real. In another sense this version is narrower than the PKPA. The PKPA's definition of extended home State is more expansive than this section because it applies whenever a "contestant" remains in the home State. In accordance with the decision of the drafting committee, this version of the UCCJA retains the narrower classification of "parent or person acting as parent."

Significant connection jurisdiction is amended in three ways. First, it eliminates the "best interest" language. This phrase tended to create confusion between the jurisdictional issue and the substantive custody determination. Since the language was not necessary for the jurisdictional determination, it has been removed. The section also prioritizes home State jurisdiction in the same manner as the PKPA. This prioritization is necessary to conform the UCCJA to the PKPA.

Second, a significant connection state may assume jurisdiction when the home State decides that significant connection state would be the most appropriate forum under the section on forum non conveniens. Third, the determination of significant connections has been changed to eliminate the language of "present or future care." The jurisdictional determination should be made by determining whether there is sufficient evidence in the state for the court to make an informed custody determination. That evidence might relate to the past as well as "present or future."

Emergency jurisdiction has been moved to a separate section. This is to make it clear that the power to protect a child in crisis does not give the power to enter a permanent order for that child.

Paragraph (a)(3) retains the concept of jurisdiction by necessity or referral as found in the original Act and in the PKPA. However, language has been added to indicate that a third State only has jurisdiction when both the home State and the

significant connection States have determined that the third State would be a more appropriate forum. The third state does not have jurisdiction to decide the custody determination upon referral from a home State if there is a State that could exercise significant connection jurisdiction.

Subsection (c) has been rewritten slightly by the Committee on Style. No substantive change was intended. Physical presence of the child is neither necessary not sufficient for jurisdiction to make a child custody determination.

Subsection (d) has been added for clarification. Personal jurisdiction over a parent, a person acting as a parent or a contestant is not necessary under this Act. In other words neither minimum contacts or service within the jurisdiction is necessary for the tribunal to have jurisdiction to make a custody determination. The requirements of this section plus the notice provisions of the Act are all that is necessary to satisfy procedural due process. This Act, like the UCCJA and the PKPA is based on Justice Frankfurter's concurrence in *May v. Anderson*, 345 U.S. 528 (1953). As pointed out by Professor Bodenheimer, the reporter for the UCCJA, no "workable interstate custody law could be built around [Justice] Burton's plurality opinion.... Bridgette 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).

Other language changes between the UCCJA and this draft are required by the Committee on Style.

SECTION 202. EXCLUSIVE, CONTINUING JURISDICTION.

(a) Subject to Section 204, a tribunal of this State which has made a child-custody determination consistent with Section 201 or 203 has exclusive, continuing jurisdiction over the determination until:

(1) a tribunal of this State determines that:

(i) it no longer has jurisdiction under Section 201(a)(1) or (2); or

(ii) a tribunal of another State would be a more convenient forum under Section 207; or

(2) a tribunal of this State or a tribunal of another State determines that this State no longer remains the residence of the child nor a parent or a person acting as a parent.

(b) A State that has made a child custody determination and does not have exclusive, continuing jurisdiction under this Section may modify that determination only if it has jurisdiction under Section 201.

Comment

This is a new section addressing continuing jurisdiction. Continuing jurisdiction was not specifically addressed under the original UCCJA . Its absence caused considerable confusion. This section borrows from UIFSA as well as recent UCCJA case law and makes the continuing jurisdiction of the original decree state exclusive so long the child, a parent or person acting as a parent remains in the state and the state continues to have jurisdiction under the home State or significant connection provisions of Section 201. If, after the child acquires a new home State, the relationship between the child and the state with exclusive continuing jurisdiction becomes so attenuated that the tribunal could no longer find a significant connection or substantial evidence, jurisdiction would no longer exist.

The use of the phrase "a tribunal of this State" under (a)(1) will hopefully make it clear that the original decree state is the sole determinant of whether jurisdiction continues. A party seeking to modify a custody determination must obtain an order from the original decree state stating that it no longer has jurisdiction. The only exception is under (a)(2) when the child, parents and persons acting as parents have left the State which made the custody determination prior to the commencement of the modification proceeding. Continuing jurisdiction of a State is not affected by all parties

leaving the state after the commencement of the modification proceeding. Whether a child, a parent or a person acting as a parent "continues to reside" in the original decree State can occasionally be a matter of extensive litigation between States. However, on balance, considerations of waste of resources suggest authorizing another forum to decide that all parties have left the State which made the custody determination.

This draft makes language changes in subsection (a)(2). It reverts to the PKPA language of "continues to reside." This is one issue that we will have to work on with the Style Committee.

In accordance with the majority of UCCJA case law, the state with exclusive continuing exclusive jurisdiction may relinquish jurisdiction when it determines that another state would be a more convenient forum under the principles of section 207.

The continuing jurisdiction provisions of this section are narrower than the comparable provisions of the PKPA. That statute authorizes continuing jurisdiction so long as any "contestant" remains in the original decree state and that state continues to have jurisdiction under its own law. Under this provision, the remaining person must be the child, a parent or a person acting as a parent. This is a narrower group of individuals than "contestants." This does not present a conflict with the PKPA. The PKPA's reference in §1738(c)(1) authorizes states to narrow the class of cases that would be subject to exclusive continuing jurisdiction.

Subsection (b) has been added in this draft. If the State that made the original child-custody determination loses exclusive, continuing jurisdiction it can modify its own determination only if it has jurisdiction under Section 201.

SECTION 203. MODIFICATION OF DETERMINATION.

(a) Subject to Section 204, a tribunal of this State may not modify a child-custody determination made by a tribunal of another State unless

(1) the tribunal of the other State determines (i) it no longer has exclusive, continuing jurisdiction under Section 202 or determines that a tribunal of this State would be a more convenient forum under Section 207 and (ii) a tribunal of this State has jurisdiction under the standards of Section 201(a)(1) or (2); or

(2) a tribunal of this State or a tribunal of the other State determines (i) that the other State no longer remains the residence of the child nor a parent or a person acting as a parent and (ii) a tribunal of this State has jurisdiction under the standards of Section 201(a)(1) or (2).

Comment

In accordance with the decision of the Drafting Committee this section has been moved to follow the section on continuing jurisdiction. It prohibits a tribunal from modifying a custody determination made consistently with this Act by another a tribunal State unless the tribunal of that State determines that it no longer has exclusive, continuing jurisdiction under section 202 or that this State would be a more convenient forum under Section 207. The modification State is normally not authorized to determine that the original decree State has lost its jurisdiction. The only exception is when all parties have moved away from the original State. The tribunal of the modification State must have jurisdiction under the standards of Section 201. In other words the modification State must be able to exercise either "home state" or "significant connection" jurisdiction.

A question was raised during the first reading concerning the effect in a modification jurisdiction of a provision in the custody law of the original State that a modification proceeding could not be brought for two years. That question is one of choice of law. It raises the issue of whether the modification forum should apply its own custody law or the custody law of the original determination state. That issue was not addressed in the original UCCJA and, I think, is beyond the scope of our Act.

SECTION 204. TEMPORARY EMERGENCY JURISDICTION.

(a) A tribunal of this State which is competent to make a child-custody determination has temporary emergency jurisdiction if the child is present in this State and the child has been abandoned or it is necessary in an emergency to protect the

child because the child or a sibling or parent of the child is subjected to or threatened with mistreatment or abuse.

(b) If a tribunal of this State lacks jurisdiction under Sections 201-203, it may not make a final child-custody determination under this section. The tribunal shall require the person seeking the order to commence a proceeding in the State having jurisdiction under Sections 201-203.

(c) A temporary determination made under this section remains in effect for the period stated in the order. The period stated in the order shall be the period that the tribunal deems necessary for the person seeking to order to obtain an order from the State having jurisdiction under Sections 201-203, but not longer than 90 days.

Comment

The problem of emergency jurisdiction permeates all questions involved in revising the UCCJA to conform it to federal enactments. It seemed appropriate to deal with the issue in a separate section and then refer to it when the issues arise in connection with other forms of jurisdiction. The provisions of this section are an elaboration of what was formerly Section 3(a)(3), emergency jurisdiction, of the original UCCJA. The scope of this jurisdiction has been taken, in part, from the PKPA and the Violence Against Women's Act. Accordingly, an emergency is defined as "mistreatment or abuse" The original UCCJA also used the term neglect. However, neglect is so elastic that it could justify taking emergency jurisdiction in wide variety of cases. Under the PKPA, if a State exercised emergency temporary jurisdiction on the basis of neglect without a finding of mistreatment or abuse, the order would not be entitled to federal enforcement and non-modification in other States. Therefore this Act eliminates the term neglect as part of the process of conforming to federal law.

This section also authorizes a tribunal to assume temporary jurisdiction when there has been threatened harm or abuse to a sibling of the child or to the child's parent. This comports with modern day statutes governing domestic violence proceedings. To the extent that domestic violence and protective order proceedings affect custody of or visitation to an interstate child, they are subject to the provisions of this Act.

This section recognizes several aspects of what has become common practice under the UCCJA. First, a court may take jurisdiction to protect the child even though it could claim neither home State nor significant connection jurisdiction. Second, the duties of states to recognize, enforce and not modify a custody determination of another state do not take precedence over the need to enter an emergency order to protect the child. Third, custody determinations made under the emergency jurisdiction provisions must be temporary. Therefore this section provides that orders issued under

this section must include a direction to the parties to file a petition in the state with jurisdiction under sections 201-203. The order stays in effect until that occurs but, in no event, for more than 90 days. The order must state on its face that it is of limited duration.

It may be necessary for a tribunal to issue an emergency custody determination without notice and hearing in order to prevent irreparable harm to the child. The drafting committee decided not address that issue in the context of this Act. Rather the determination of when irreparable harm exists, the notice required, and the length of time between the ex parte order and a hearing will be determined by individual state law. That is provided for by the introductory phrase in Section 205 which indicates that the notice and hearing rules provided by this Act are subjected to State requirements for dispensing with notice in cases involving irreparable harm.

SECTION 205. NOTICE; OPPORTUNITY TO BE HEARD; JOINDER. Subject to [local rules on dispensing with notice in cases of irreparable harm], before a child-custody determination is made under this [Act], reasonable notice of hearing and an opportunity to be heard must be given to [those persons required by local law to receive notice of a custody determination.] [Those persons required under local law to intervene or be joined in a custody proceeding] shall be joined as parties

Comment

This section makes two substantive changes from Section 4 of the original UCCJA. First it recognizes that there may be cases where it is necessary for a tribunal to issue an emergency temporary custody determination without notice of hearing. The drafting committee recognized the need for such orders but decided to defer to local procedure on temporary restraining orders to determine such issues as when such an order is appropriate and when a hearing must be held. Thus this section is subject to local rules which provides an exception to the notice and opportunity requirement for ex parte emergency orders.

Second this section does not attempt to dictate who is entitled to notice. Local rules vary with regard to persons entitled to seek custody of a child. See 101(5)(Contestant) and 101(11)(Person acting as a parent). Therefore this section simply indicates that those persons should receive notice but leaves the rest of the determination to local law.

Rules requiring joinder of people with an interest in the custody of and visitation with a child also vary widely throughout the country. Although the Drafting Committee originally recommended elimination of the section on joinder, it may well be appropriate to add a sentence here to require joinder of those persons that local law considers to be indispensable parties.

The custody determination cannot be enforced against any person who was entitled to but did not receive notice. See 28 U.S.C. §1738A(e).

A sentence of the original UCCJA section which indicated that persons outside the State were to be give notice and opportunity to be heard in accordance with Article I was eliminated as redundant.

SECTION 206. SIMULTANEOUS PROCEEDINGS.

(a) Subject to Section 204, a tribunal of this State may not exercise its jurisdiction under this Article if at the time of the commencement of the proceeding a proceeding concerning the custody of the child had been commenced in a tribunal of another State

having jurisdiction substantially in conformity with this [Act], unless the proceeding is stayed by the tribunal of the other State because a tribunal of this State is a more convenient forum under Section 207.

(b) Before hearing a child-custody proceeding, a tribunal of this State shall examine the pleadings and other information supplied by the parties pursuant to Section 209. If the tribunal determines that a child-custody proceeding was commenced in a tribunal in another State having jurisdiction substantially in accordance with this [Act], the tribunal of this State shall stay its proceeding and communicate with the tribunal of the other State. If the tribunal of the State having jurisdiction substantially in accordance with this [Act] does not determine that the tribunal of this State is a more appropriate forum, the tribunal of this State shall dismiss the proceeding.

(c) In a proceeding to modify a child-custody determination the tribunal shall inquire of the parties as to whether a proceeding to enforce the determination has been commenced in another State. If a proceeding to enforce the determination has been commenced in another State, the tribunal may:

(1) stay the proceeding for modification pending the entry of an order of a tribunal of the other State enforcing, denying, or dismissing the proceeding for enforcement;

(2) enjoin the parties from continuing with the proceeding for enforcement; or

(3) proceed with the modification under such conditions as it considers are appropriate.

Comment

This section represents the remnants of the simultaneous proceedings provision of the original UCCJA. The Drafting Committee has determined that they should be placed with the original jurisdiction section. The problem of simultaneous proceedings is no longer a significant issue. Most of the problems have been resolved by the prioritization of home State jurisdiction under Section 201, the exclusive continuing jurisdiction provisions of Section 202 and the prohibitions on modification of Section 203. If there is a home State there can be no significant connection jurisdiction and therefore no simultaneous proceedings. If there is an State of exclusive continuing jurisdiction, there cannot be another state with concurrent jurisdiction and therefore no simultaneous proceedings. Of course, the home State, as well as the State with exclusive continuing jurisdiction, could defer to another State under Section 207. However, that decision is left entirely to the home State or the exclusive continuing jurisdiction State.

Under this Act the simultaneous proceedings problem will only arise when there is no home State and more than one significant connection state. For those cases this Section retains the "first in time" rule of the UCCJA. This section also retains the policy favoring judicial communication of the UCCJA. Communication between tribunals is required when it is determined that a proceeding has been commenced in another State.

Subsection (c) concerns the problem of simultaneous proceedings in the state with modification jurisdiction and enforcement proceedings under Article 3. This section authorizes the court with exclusive continuing jurisdiction to stay the modification proceeding pending the outcome of the enforcement proceeding, to enjoin the parties from continuing with the enforcement proceeding, or to continue the modification proceeding under such conditions as it determines are appropriate. The tribunal may wish to communicate with the enforcement tribunal. However, communication is not mandatory. Although the enforcement State is required by the PKPA to enforce according to its terms a custody determination made consistently with it, that duty is subject to the decree being modified by a State with the power to do so under the PKPA. An order to enjoining the parties from enforcing the decree is the equivalent of a temporary modification by a State with the authority to do so.

The term "pending" has been replaced. It has caused considerable confusion in the case law. It has been replaced with the term "commencement of the proceeding" as more accurately reflecting the policy behind this section.

SECTION 207. INCONVENIENT FORUM.

(a) A tribunal of this State which has jurisdiction under this [Act] to make a child-custody determination may decline to exercise its jurisdiction at any time before making a determination if it finds that it is an inconvenient forum under the circumstances of the case and that a tribunal of another State is a more appropriate forum. The issue of inconvenient forum may be raised upon the tribunal's own motion or upon motion of a party or a guardian ad litem or other representative of the child.

(b) Before determining whether it is an inconvenient forum, the tribunal of this State shall consider whether it is appropriate that a tribunal of another State exercise jurisdiction. For this purpose, the tribunal shall allow the parties to submit information, and shall consider all relevant factors, including:

(1) the length of time the child has resided outside this State;

(2) the distance between this State and the State whose tribunal would assume jurisdiction;

(3) the relative financial circumstances of the parties;

(4) any agreement of the parties as to which State should assume jurisdiction;

(5) the nature and location of the evidence required to resolve the pending litigation, including the testimony of the child;

(6) the ability of the tribunal of each State to decide the issue expeditiously and the procedures necessary to present the evidence;

(7) the familiarity of the tribunal with the facts and issues of the pending litigation; and

(8) the health and safety of the parties.

(c) If the tribunal of this State finds that it is an inconvenient forum and that a

tribunal of another State is a more appropriate forum, it shall stay the proceedings upon condition that a child-custody proceeding be promptly commenced in another designated State and impose any other condition the tribunal considers just and proper.

(d) The tribunal of this State may decline to exercise its jurisdiction under this [Act] if a child-custody determination is incidental to an action for divorce or another proceeding while retaining jurisdiction over the divorce or other proceeding.

Comment

This section generally retains the focus of the original section. It authorizes tribunals to decide that another State has better access to the evidence pertaining to a custody determination taking into consideration the relative circumstances of the parties. If so the tribunal may defer to the other State. The list of factors that the court may consider has been updated from the original UCCJA. The list is not meant to be exclusive. For example, although it is not specifically listed the fact that the person remaining in the State which made the original custody determination has moved to another part of the State would be relevant in the context of the distance between the parties and the familiarity of the tribunal with the facts and issues of the case. Similarly in considering the ability of the two States to arrive at an expeditious resolution of the controversy, the tribunal could consider the different procedural and evidentiary laws of the two States, as well as the flexibility of the tribunal dockets.

Before determining whether to decline or retain jurisdiction, the tribunal of this State may communicate, in accordance with Section 107, with a tribunal of another State and exchange information pertinent to the assumption of jurisdiction by either tribunal.

There are two departures from Section 7 of the UCCJA. First, the tribunal may not simply dismiss the action. To do so would leave the case in limbo. Rather the tribunal shall stay the case and direct the parties to file in the State that has been found the be the more convenient forum. The tribunal is also authorized to impose any other conditions it considers appropriate. This might include dismissing the case if the custody proceeding is not commenced in the other State or resuming jurisdiction if a tribunal of the other State refuses to take the case.

Second, subsection (g) of the UCCJA which allowed the court to assess fees and costs if it was a clearly inappropriate tribunal, has been eliminated. The Drafting Committee determined that if a tribunal had jurisdiction under this Act it could not be a clearly inappropriate tribunal.

SECTION 208. JURISDICTION DECLINED BY REASON OF CONDUCT.

(a) If a tribunal of this State has jurisdiction under this [Act] because of the wrongful conduct of the person invoking the jurisdiction such as secreting, retaining, or restraining the child, the tribunal may decline to exercise its jurisdiction.

(b) If a tribunal of this State declines to exercise its jurisdiction pursuant to subsection (a), it may fashion an appropriate remedy to insure the safety of the child and prevent a repetition of the wrongful conduct.

(c) If a tribunal dismisses a petition because it declines to exercise its jurisdiction under this section, it shall charge the party invoking the jurisdiction of the tribunal with reasonable expenses incurred by or on behalf of the other party, including costs, communication expenses, attorney's fees, investigative fees, expenses for witnesses, travel expenses, and child care during the course of the proceedings, unless the party from whom fees are sought establishes that the award would be clearly inappropriate. The tribunal may not assess fees, costs, or expenses against this State except as otherwise provided by law other than this [Act].

Comment

The "Clean Hands" section of the original UCCJA has been truncated in this revision. Since there is no longer a multiplicity of jurisdictions which could take cognizance of a child custody proceeding, there is less of a concern that one parent will take the child to another jurisdiction in an attempt to find a more favorable forum. The prioritization of home State in Section 201 and the exclusive continuing jurisdiction provisions of Section 202 should solve most of the jurisdiction problems generated by abducting parents. For example, if a parent takes the child from the home State and seeks an original custody determination elsewhere, the stay-at-home parent has six months to file a custody petition under the extended home State jurisdictional provision of Section 201 which will ensure that the case is retained in the home State If a petitioner for a modification determination takes the child from the state that issued the original custody determination, another state cannot assume jurisdiction because of the continuing exclusive jurisdiction of the original state.

Nonetheless there are still a number of cases where parents or their surrogates act in a reprehensible manner. Tribunals should be given the power to decline to exercise jurisdiction that is inappropriately invoked by the conduct of one of the parties. For example if one parent abducts the child pre-decree and establishes a new home

State, that jurisdiction may decline to hear the case, if that is appropriate under the circumstances. Similarly if one parent has either wrongfully restrained the child from visiting with the other parent, or has wrongfully retained the child after visitation, and seeks to modify the decree, the tribunal could refuse to entertain the motion.

Subsection (b) authorizes the court to fashion an appropriate remedy for the safety of the child and to prevent a repetition of the wrongful conduct. Thus it would be appropriate for the tribunal to notify the other parent and to provide for foster care for the child until returned to the other parent. The tribunal could also provide that a custody proceeding shall be instituted in another state that would have jurisdiction under this [Act].

The attorney fee standard for this Section is patterned after the International Child Abduction Remedies Act, 42 U.S.C. §11607(b)(3). While not required by federal statute, it does make the attorney's fee standards uniform between state and federal statutes.

SECTION 209. INFORMATION TO BE SUBMITTED TO TRIBUNAL.

(a) In a child-custody proceeding, each party, in its first pleading or in an attached affidavit, shall , if reasonably ascertainable, give information under oath as to the child's present address, the places where the child has lived during the last five years, and the names and present addresses of the persons with whom the child has lived during that period. The pleading or affidavit must state whether the party:

(1) has participated, as a party or witness or in any other capacity, in any other litigation concerning the custody of or visitation with the child;

(2) has information of any child-custody proceeding concerning the child in a tribunal of this or any other State; and

(3) knows of any person not a party to the proceeding who has physical custody of the child or claims legal custody or physical custody of, or a right of visitation with respect to the child.

(b) If the information required by subsection (a) is not provided, the tribunal, upon its own motion or that of a party, may stay the proceeding until the information is provided.

(c) If the declaration as to any of the items in subsection (a)(1) through (4) is in the affirmative, the declarant shall give additional information under oath required by the tribunal. The tribunal may examine the parties under oath as to details of the information furnished and other matters pertinent to the tribunal's jurisdiction and the disposition of the case.

(d) Each party has a continuing duty to inform the tribunal of any proceeding concerning the child in this or any other State of which the party obtained information during this proceeding.

(e) Upon a finding, which may be made ex parte, that the health, safety, or liberty

of a party or a child would be unreasonably put at risk by the disclosure of identifying information, or if an existing order so provides, a tribunal of this State shall order that the address of the child or party or other identifying information not be disclosed in a pleading or other document filed in a proceeding under this [Act]. However, the information must be provided to the tribunal.

Comment

The pleading requirements from the Section 9 of UCCJA are carried over into this revision. Subsection (b) has been added. It authorizes the tribunal to stay the proceeding until the information required in Subsection (a) has been disclosed.

Subsection (e) has been added to protect the address of victims of domestic violence or child abuse. The source for the section is UIFSA §312.

SECTION 210. APPEARANCE OF PARTIES AND CHILD.

(a) A tribunal of this State may order a party to a child-custody proceeding who is in this State to appear personally before the tribunal. The tribunal may order any person who is in this State and has physical-custody of the child to appear personally with the child.

(b) If a party to a child-custody proceeding whose presence is desired by the tribunal is outside this State, the tribunal may order that a notice given pursuant to Section 106 include a statement directing the party to appear personally with or without the child and declaring that failure to appear may result in a decision adverse to the party.

(c) If a party to a child-custody proceeding who is outside this State is directed to appear under subsection (b) or desires to appear personally before the tribunal with or without the child, the tribunal may require another party to pay necessary travel and other expenses of the party so appearing and of the child.

Comment

No major changes have been made to this section which was Section 11 of the UCCJA. Language was added to Subsection (a) to authorize the tribunal to require a non-party who had physical custody of the child to produce the child. Other language changes were mandated by the Committee on Style.

Several sections from the original UCCJA have been eliminated in this revision. The sections on the establishment of a custody registry and the filing of custody determinations in the registry were not included. Many courts never established them and those that did utilized them infrequently. The Drafting Committee decided not to include them.

[ARTICLE] 3
ENFORCEMENT

SECTION 301. DEFINITIONS. In this [article]:

(1) "Petitioner" means a person who is seeking enforcement of a custody determination.

(2) "Respondent" means a person against whom an enforcement proceeding has been commenced.

Comment

For purposes of this article, petitioner and respondent are defined as the person who is seeking enforcement of a custody determination and the person against whom a custody proceeding is filed. The definitions have been added here to clarify certain aspects of the notice and hearing sections.

SECTION 302. SCOPE; TEMPORARY VISITATION.

(a) This [article] may be invoked to enforce child custody determinations made under the laws of any State and to orders made under the Hague Convention on the Civil Aspects of International Child Abduction and the International Child Abductions Remedies Act, 42 U.S.C. §§11601 et seq.

(b) The enforcement procedure provided by this [article] does not affect the availability of other remedies to enforce a child-custody determination.

(c) This [article] does not confer jurisdiction upon a tribunal to modify a child-custody determination issued by a tribunal of another State. A tribunal of this State, which does not have jurisdiction to modify a child-custody determination, may issue an order enforcing a child custody determination issued by a tribunal of another State and may issue a temporary order enforcing a visitation schedule that implements that schedule. A temporary order issued under this subsection remains in effect for the period stated in the order. The period stated shall be the period necessary for the person seeking the order to obtain an order from the State having jurisdiction under [Article 2], but no longer than 90 days.

Comment

Subsection (a) applies the enforcement remedy provided by this Article to child custody determinations of other states as well as orders requiring the return of a child issued under the authority of the International Child Abduction Remedies Act, 42 U.S.C. §11601 et seq. implementing the Hague Convention on the Civil Aspects of International Child Abduction. A specific section was thought necessary because even though an ICARA proceeding often occurs prior to any formal custody determination, the need for a speedy enforcement remedy is just as necessary.

The process provided by this article for the enforcement of a custody determination will be the procedure that will normally be utilized. As indicated by subsection (b), this article does not detract from the number of remedies available under local law. There is often a need for a number of remedies to ensure that a child custody determination is obeyed. If other remedies would easily facilitate the return of a child, they are still available. The petitioner, for example, can still cite the respondent

for contempt of court or file a tort claim for intentional interference with custodial relations.

This [article] does not confer jurisdiction upon a tribunal of this State to modify a child-custody determination issued by a tribunal of another State. The procedure for enforcement of a custody determination does not authorize a modification of that custody determination. However, a court is authorized to issue a temporary order if it is necessary to enforce visitation rights without violating the rules on non-modification. Such an order could include make-up visitation or substitution of a specific visitation schedule for "reasonable and seasonable." However requests for a permanent change in the visitation schedule must be addressed to the tribunal with exclusive continuing jurisdiction. The order remains in effect only long enough for the petitioner to obtain an appropriate order from the State having jurisdiction under Article 2, but, in no event, for more than 90 days. This provision is the counter-part of emergency jurisdiction for visitation enforcement.

SECTION 303. DUTY TO ENFORCE. A tribunal of this State shall recognize and enforce a child-custody determination of a tribunal of another State if the latter tribunal exercised jurisdiction that was in substantial conformity with this [Act] or the determination was made under factual circumstances meeting the jurisdictional standards of this [Act] and the determination has not been modified in accordance with this [Act]. The determination may be enforced in the same manner as a child-custody determination of a tribunal of this State.

Comment

This article supplies the enforcement mechanism for the interstate child custody cases. It reflects some of the decisions made at the last drafting committee meeting to shorten the time periods and to provide a summary remedial process modeled after habeas corpus. Subsection (a) is the transformation of Section 13 of the original UCCJA which contained the basic duty to enforce. The language of the original section was retained to ensure that the duty to enforce has not been lessened in this Act. Enforcement of custody determinations of issuing states is also required by federal law in the PKPA, 28 U.S.C. §1738A(a). The changes made in Article 2 of this Act now make the enforcement section of this Act consistent with the enforcement provisions of the PKPA.

Subsection (a) also incorporates language from Section 15 of the UCCJA to the effect that a custody determination of another state will be enforced in the same manner as a custody determination made by a tribunal of this State. Whatever remedies are available to enforce a local determination can be utilized to enforce a custody determination of another State. This article provides an additional remedy. However it does not authorize the tribunal to take actions that are not authorized by this article or by other local law. Thus a tribunal could not require a respondent to pay a punitive damage award to the petitioner, even if petitioner asked for that remedy, unless such an award were otherwise available.

SECTION 304. LIMITED IMMUNITY OF PETITIONER.

(a) Participation by a petitioner in person or by an attorney in a proceeding to enforce a child-custody determination in this State does not confer personal jurisdiction over the petitioner for purposes of other proceedings.

(b) An individual is not amenable to service of civil process solely by being physically present in this State for the purpose of participating in a proceeding under this [article]. However, service of process may be made on the individual on a basis other than physical presence in this State.

(c) The immunity from service of process granted by this section does not extend to civil litigation based on acts unrelated to the participation in a proceeding under this [article] committed by an individual while present in this State.

Comment

This section is derived from UIFSA §314. A person who files an enforcement action under this article is not subjected to the general jurisdiction of the state by virtue of the filing. This is to ensure that there is no deterrent to filing such an action when the respondent has violated the provisions of the custody decree. However, if the petitioner would otherwise be subject to the jurisdiction of the State filing an enforcement proceeding will not provide immunity. Thus if the non-custodial parent moves from the State that decides the custody determination, that parent is still subject to the State's jurisdiction for enforcement of child support if one the child or an individual obligee continue to reside there. See UIFSA §205. If that parent returns to enforce the visitation aspects of the custody determination the State can utilize any appropriate means to collect the back due child support. However, assume that both parties move from F1 after the determination. The custodial parent and the child establish a new home state in F2 and the non-custodial parent moves to F3. The non-custodial parent is not at this point subject to the jurisdiction of F3 for monetary matters. See *Kulko v. California,* 436 U.S. 84 (1978). If the non-custodial parent comes into F2 to enforce the visitation aspects of the determination he is not subject to the jurisdiction of F2 for the enforcement of the back due child support by virtue of his filing the enforcement action.

A party also is immune from service of process during the time in the state for an enforcement action except for those claims for which jurisdiction could be based on other than mere physical presence. Thus when the non-custodial parent comes into F2 to enforce the visitation aspects of the decree, F2 cannot acquire jurisdiction over the child support aspects of the decree by serving the non-custodial parent in the State.

As the comments to UIFSA note, the immunity provided by this section is limited. It does not provide immunity for civil litigation unrelated to the enforcement action. For example, a party to an enforcement action is not immune from service for an automobile accident occurring while in the state.

SECTION 305. SIMULTANEOUS PROCEEDINGS. If an enforcement proceeding under this [article] has been commenced in this State and a tribunal of this State determines that a proceeding to modify the determination has been commenced in another State, the enforcement tribunal shall immediately communicate with the modification tribunal. The enforcement proceeding continues until the enforcement tribunal determines after consultation with the modification tribunal that the enforcement proceeding must be stayed.

Comment

The pleading rules of Section 306 require the parties to disclose any pending proceedings. The tribunal will have the information without actually inquiring of the parties. Normally an enforcement proceeding will take precedence over a modification action. However, communication between the modification and enforcement tribunal is necessary to avoid unnecessary litigation. The section, in combination with Section 201, requires the tribunals to communicate with each other. They might decide that the tribunal with jurisdiction under Article 2 shall continue with the modification action and stay the enforcement proceeding. Or they might decide that the enforcement proceeding shall go forward. The ultimate decision rests with the tribunal having exclusive continuing jurisdiction under Section 202 or if there is no State with exclusive continuing jurisdiction, then the State that would have jurisdiction to modify under Section 203.

The communication between the tribunals is governed by Section 107.

SECTION 306. PETITION.

(a) A petition under this [article] must be verified. Certified copies of all orders sought to be enforced must be attached to the petition. A facsimile of the certified copy of the order may be attached instead of the original.

(b) A petition for enforcement of a child-custody determination must state:

(1) whether the tribunal that issued the determination identified the jurisdictional basis it relied upon in exercising jurisdiction and, if so, what it was;

(2) whether the determination for which enforcement is sought has been stayed, vacated, or modified by a tribunal whose decision must be enforced under [Article 2] or the Parental Kidnapping Prevention Act, 28 U.S.C., Section 1738A;

(3) whether any proceeding has been commenced that could affect the current proceeding, including proceedings relating to domestic violence and protective orders;

(4) subject to Section 208(e), the present address of the child and the respondent, if known; and

(5) whether relief in addition to the immediate physical custody of the child is sought.

(c) The tribunal shall issue an order directing the respondent to appear with the child at a hearing. The hearing will be held on the next business day after the petition is filed or at a later date if requested by the petitioner. The order must state the time and place of the hearing and that at the hearing the tribunal will order the delivery of the child and set an additional hearing to determine whether further relief is appropriate unless the respondent can demonstrate that:

(1) the issuing tribunal did not have jurisdiction under [Article] 2;

(2) the child-custody determination for which enforcement is sought has

been vacated, stayed, or modified by a tribunal of a State having jurisdiction to do so under [Article] 2; or

(3) the respondent was entitled to, but did not receive, notice and opportunity to be heard in the proceedings before the tribunal that issued the order for which enforcement is sought.

Comment

The petition is intended to provide the tribunal with as much information as possible. Attaching certified copies of all orders sought to be enforced allows the tribunal to have the necessary information. The drafting committee eliminated the registry on the ground that most states had not implemented it. Therefore the only method by which the tribunal will have the orders is to require the parties to produce them.

The remainder of the information required relates to the permissible scope of the tribunal's inquiry. The petitioner has the responsibility to inform the court of all proceedings that would affect the current enforcement action. Specific mention is made of domestic violence and orders of protection to ensure that they are disclosed.

The final section relates to the order to show cause and its contents. The order requires the respondent to appear at a hearing on the next business day. At the hearing the tribunal will order the child to be delivered to the petitioner unless the respondent is prepared to assert that the issuing state lacked jurisdiction, the respondent did not receive notice, or that the order sought to be enforced has been vacated, modified, or stayed by a tribunal with jurisdiction to do so.

SECTION 307. SERVICE OF PETITION AND ORDER. Subject to Section 309, the petitioner shall, by any method authorized [by the law of this State] serve the petition and order upon respondent and any person who has physical custody of the child.

Comment

The petitioner has the responsibility to serve the respondent. Rather than specifying how order should be served, this section leaves that issue to local law. The Drafting Committee made the same decision regarding notice in Article 2 with regard to the dispensing of notice in emergency cases.

SECTION 308. HEARING.

(a) Subject to Section 204, upon a finding that the petitioner is entitled to the immediate physical custody of the child, the tribunal shall order the child delivered to the petitioner unless the respondent:

(1) proves that the issuing tribunal did not have jurisdiction under [Article] 2;

(2) proves that the determination has been vacated, modified, or stayed by the issuing tribunal or by a tribunal whose decision must be enforced under [Article] 2 or the Parental Kidnaping Prevention Act, 28 U.S.C., Section 1738A;

(3) proves that the respondent was entitled to, but did not receive, notice of hearing or opportunity to be heard in the proceedings before the tribunal that issued the order for which enforcement is sought.

(b) The tribunal shall award the fees authorized under Section 310 and may set another hearing to determine if additional relief is appropriate.

(c) If a party called to testify refuses to answer on the ground that the testimony may be self-incriminating, the tribunal may draw an adverse inference from the refusal.

(d) A privilege against disclosure of communications between spouses and a defense of immunity based on the relationship of husband and wife or parent and child does not apply in a proceeding under this [article].

Comment

This section has been substantially rewritten in accordance with the decision of the Drafting Committee. It now provides for an extremely fast remedy: the immediate delivery of the child. The scope of inquiry for the enforcing tribunal is quite limited. Federal law requires the tribunal to enforce the custody determination if the issuing state's decree was rendered in compliance with the PKPA. This [Act] requires enforcement of custody determinations that are made in conformity with Article 2 on jurisdiction.

The certified copy of the custody determination entitling the petitioner to the child is prima facie evidence of the issuing tribunal's jurisdiction to enter the order. If the order is one that is entitled to be enforced under Article 2 and if it has been violated the burden shifts to the respondent to show that the custody determination is not entitled to enforcement.

It is a defense to enforcement that another jurisdiction has issued a custody determination that is required to be enforced under Article 2 or the PKPA. An example of when this could occur is when one tribunal has based its original custody determination on the current UCCJA §3(a)(2)(significant connections) and another jurisdiction has rendered an original custody determination based on the current UCCJA §3(a)(1)(home State). When this occurs, the PKPA as well as Article 2 and Section 301 of this Act mandate that the home State determination be given full faith and credit in all other states, including the state that rendered the significant connections determination.

Lack of opportunity to be heard by a person entitled to notice and hearing at the original custody determination is a defense to enforcement of the custody determination. The defense of lack of notice should not be available if the respondent purposely hid from the petitioner, took deliberate steps to avoid service of process or elected not to participate in the initial proceedings.

There are no other defenses to an enforcement action. The drafting committee discussed whether there should be a defense if the child would be endangered by the enforcement of a custody or visitation order. If the child would be endangered, there is a basis for the assumption of emergency jurisdiction under Section 204 of this Act. Upon the finding of an emergency, the tribunal should issue a temporary order and direct the parties to proceed in the tribunal that is exercising continuing jurisdiction over the custody proceeding Article 2.

The tribunal shall determine at the hearing whether fees should be awarded under Section 309. If so, it should order them paid. The tribunal may determine if additional relief is appropriate. If so, it may set an additional hearing to determine that issue.

The remainder of this section is derived from UIFSA §316 with regard to the privilege of self-incrimination, spousal privileges and immunities.

SECTION 309. WARRANT TO TAKE PHYSICAL CUSTODY OF CHILD.

(a) Upon the filing of a petition, the petitioner may file a verified application for the issuance of a warrant to take physical custody of the child if the petitioner reasonably believes the child is likely to suffer serious immediate physical harm or be imminently removed from this State.

(b) If the tribunal, upon the testimony of the petitioner or other witness, finds that the child is likely to suffer serious immediate physical harm or be imminently removed from this State, it may issue a warrant to take physical custody of the child and an order requiring petitioner, respondent, and any person with physical custody of the child to appear with the child for a hearing. The hearing must be held on the next business day after the warrant is served. The order must include the statements required by Section 306(c).

(c) A warrant to take physical custody of a child must:

(1) recite the facts upon which a conclusion of serious immediate physical harm or imminent removal from the jurisdiction is based;

(2) direct law enforcement officers to take immediate physical possession of the child; and

(3) provide for the placement of the child pending final relief.

(d) The respondent shall be served with the petition and order immediately after the child is taken into physical custody.

(e) A warrant to take physical possession of a child is enforceable throughout this State. If the tribunal finds that no less intrusive remedy is effective, it may authorize law enforcement officers to enter private property to take physical custody of the child. In extraordinary cases, the tribunal may authorize law enforcement officers to make a forcible entry at any hour.

(f) The tribunal may impose conditions upon placement of a child to ensure the

appearance of the child and the child's custodian at a hearing on the order to show cause.

Comment

This section concerns emergency provisions for a temporary waiver of notice in any case where there is a reason to believe that the child will suffer serious immediate physical harm or be removed from the jurisdiction once the respondent learns that the petitioner has filed an enforcement proceeding. If the tribunal finds immediate harm exists, it should temporarily waive the notice requirements and issue a warrant to take physical custody of the child. Immediately after the warrant is executed, the respondent is to receive notice of the proceedings.

The term "harm" cannot be totally defined and, as in the issuance of temporary retraining orders, the appropriate issuance of a warrant is left to the circumstances of the case. It includes cases where the respondent is the subject of a criminal proceeding. It also would include situations where the respondent is secreting the child in violation of a court order, abusing the child, a flight risk and other circumstances that the tribunal concludes makes the issuance of notice a danger to the child. The tribunal must hear the testimony of the petitioner or another witness prior to issuing the warrant. The testimony may be heard in person, via telephone or by any other means acceptable under local law. The tribunal must state the reasons for the issuance of the warrant. The warrant can be enforced by law enforcement officers wherever the child is found in the State. The warrant may authorize entry upon private property to pick up the child and if no less intrusive means are possible, make a forcible entry at any hour.

The warrant must provide for the placement of the child pending the determination of the enforcement proceeding. Since the issuance of the warrant would not occur absent a risk of immediate harm to the child, placement cannot be with the respondent. Normally the child would be placed with the petitioner. However, if placement with the petitioner is not indicated, the tribunal can order any other appropriate placement authorized under the laws of the tribunal's state. Placement with the petitioner may not be indicated if there is a likelihood that the petitioner also will flee the jurisdiction. Placement with the petitioner may not be practical if the petitioner is proceeding through an attorney and is not present before the tribunal.

This section authorizes the tribunal to utilize whatever means are available in the tribunal's jurisdiction to ensure the appearance of the petitioner and child at the enforcement hearing. Such means might include cash bonds, a surrender of a passport or whatever the tribunal determines is necessary.

After the child is taken has been taken into physical custody, the respondent shall be served with notice of the hearing. The hearing will then be held as in Section 308. This section was amended slightly after the First Reading. It no longer provides that the petitioner shall be the one to serve the respondent. Since no method of service is specified, local law will govern.

SECTION 310. COSTS, FEES, AND EXPENSES.

(a) The tribunal shall award the prevailing party, including a State, reasonable expenses incurred by or on behalf of the party, including costs, communication expenses, attorney's fees, investigative fees, expenses for witnesses, travel expenses, and child care during the course of the proceedings, unless the party from whom fees are sought establishes that the award would be clearly inappropriate.

(b) The tribunal may not assess fees, costs, or expenses against a State, except as otherwise provided by law other than this [Act].

Comment

In accordance with the decision of the drafting committee, this section is derived from International Child Abduction Remedies Act, 42 U.S.C. §11607(b)(3). It creates a presumption that a tribunal will award fees and costs against the non-prevailing party. The word "reasonable" is used in describing the fee awards. Included as costs are the amount of investigation fees incurred by private persons or by public officials as well as the cost of child placement during the proceedings.

The non-prevailing party has the burden of showing that such an award would be clearly inappropriate. Fees and costs may be inappropriate if their payment would cause the parent and child to seek public assistance.

This section is consistent with Section 8(c) of Pub.L. 96-611 which provides that:

> "In furtherance of the purposes of section 1738A of title 28, United States Code [this section], as added by subsection (a) of this section, State courts are encouraged to--
> "(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 [this section], necessary travel expenses, attorneys' fees, costs of private investigations, witness fees or expenses, and other expenses incurred in connection with such custody determination ...

The term "prevailing party" is not given a special definition for this Act. It is assumed that each state will apply its own standard.

Subsection (b) was added to ensure that this section would not apply to the state unless otherwise authorized. The language is taken from UIFSA §313 (tribunal may assess costs against obligee or support enforcement agency only if allowed by local law).

SECTION 311. RECOGNITION AND ENFORCEMENT. A tribunal of this State shall accord full faith and credit to an order enforcing a child-custody determination made consistently with this [Act] by a tribunal of another State unless the order has been stayed, vacated, or modified by a tribunal authorized to do so under [Article] 2.

Comment

The enforcement order to be effective must also be enforced by other states. This section requires tribunals of this state to give full faith and credit to enforcement orders issued by other states when made consistently with the provisions of this Act.

SECTION 312. APPEALS. An appeal may be taken from a final order in a proceeding under this [article] in accordance with [expedited appellate procedures in other civil cases]. Subject to Section 204, the enforcing tribunal may not stay an order enforcing a child-custody determination pending appeal.

Comment

The order may be appealed as an expedited civil matter. An enforcement order should not be stayed by the tribunal. Provisions for a stay would defeat the purpose of having a quick enforcement procedure. If there is a risk of serious mistreatment to the child a petition to assume emergency jurisdiction must be filed under Section 204. This section also leaves intact the possibility of obtaining extraordinary remedy such as mandamus or prohibition from an appellate court to stay the tribunal's enforcement action. In many states it is not possible to limit the constitutional authority of appellate courts to issue a stay. However, unless the information before the appellate panel indicates that emergency jurisdiction would be assumed under Section 204, there is no reason to stay the enforcement of the order pending appeal.

SECTION 313. ROLE OF [PROSECUTOR].

(a) The [prosecutor] may take any action, including the use of any available civil or criminal proceeding and a proceeding under this [Act], to locate a child, obtain the return of a child or enforce a child-custody determination if there is:

(1) an existing child-custody determination;

(2) a request from a tribunal in a pending child-custody case;

(3) a reasonable belief that a criminal statute has been violated; or

(4) a reasonable belief that the child has been wrongfully removed or retained in violation of the Hague Convention on the Civil Aspects of International Child Abduction and the International Child Abductions Remedies Act, 42 U.S.C. §§11601 et seq.

(b) A [prosecutor] acts on behalf of the tribunal and may not represent any party to child-custody determination.

Comment

Sections 313-315 were derived from the *Obstacles Report* and the California experience in authorizing a role for public authorities in custody and visitation enforcement. One of the basic policies behind this approach is that the involvement of public authorities will encourage the parties to abide by the terms of the custody determination. If the parties know that prosecutors and law enforcement officers are available to help in securing the return of a child, they may be deterred from interfering with the exercise of rights established by court order.

This model could also prove more effective in remedying violations of the custody determination. Most parties do not have the resources to enforce a custody determination in another jurisdiction. The availability of the prosecutor as an enforcement agency will help ensure that this remedy can be made available regardless of income level. In addition the prosecutor has resources to draw on that are unavailable to the average litigant.

The Drafting Committee decided that normally the role of the prosecutor should not begin until there is a custody determination that is sought to be enforced. The Act does not authorize the prosecutor be involved in the action leading up to the making of the custody determination except when requested by the tribunal, when there is a violation the Hague Convention on the Civil Aspects of Child Abduction or when the

person holding the child has violated a criminal statute.. The Act does not mandate that the prosecutor be involved in all cases referred to it. There is only so much time and money available for enforcement proceeding. Therefore the prosecutor eventually will have to develop guidelines to determine which cases will receive priority.

The prosecutor is authorized to locate the child and enforce the custody determination. This Act does not attempt to suggest how the prosecutor should exercise its duties under this Act. The prosecutor is authorized to utilize any criminal or civil proceeding to secure the enforcement of the custody determination, including proceedings under this Act. If the prosecutor proceeds pursuant to this Act, the prosecutor is subject to its provisions.

The prosecutor does not represent any party to the custody determination. It acts as a "friend of the court." It's role is to ensure that the custody determination is enforced.

SECTION 314. ROLE OF LAW ENFORCEMENT. At the request of a [prosecutor] acting pursuant to Section 313, a law enforcement officer may take all actions reasonably necessary to locate a child or a party and assist [a prosecutor] with responsibilities under Section 313.

Comment

This section authorizes law enforcement officials to assist in locating a child and enforcing a custody determination. There are two policy choices to be made at this juncture. The first is to determine how the assistance of law enforcement is to be obtained. One method is to indicate that law enforcement officers shall be involved when so requested by the prosecutor pursuant to §313. This removes all doubt from law enforcement as to the propriety of the request.

Another approach would authorize law enforcement officers to act when requested by a private individual. However, there would appear to be a requirement that law enforcement is acting to enforce a custody determination that is properly enforceable. Thus there would probably need to be some requirement that law enforcement make a preliminary determination that the decree was issued by a court that had jurisdiction to do so, that the person against whom it is being enforced had reasonable notice and that the decree has not been modified, superseded or stayed. This seems like a determination that law enforcement officers are not really competent to make.

An additional issue is whether all reasonable means should be defined. This section does not attempt to do so but rather leaves it to each individual jurisdiction to determine what is the appropriate role of law enforcement consistent with the purposes of this Act.

SECTION 315. COSTS AND EXPENSES. If the respondent is the nonprevailing party, the tribunal shall assess all expenses and costs incurred by the [prosecutor] and law enforcement officers pursuant to Sections 313 or 314, unless that party establishes that such an order would be clearly inappropriate.

Comment

One of the major problems of utilizing public officials to locate children and enforce custody and visitation determinations is cost. This section authorizes the prosecutor and law enforcement to recover costs and fees against the non-prevailing party.

[ARTICLE] 4.
MISCELLANEOUS PROVISIONS

SECTION 401. SHORT TITLE. This [Act] may be cited as the Uniform Child Custody Jurisdiction and Enforcement Act.

SECTION 402. UNIFORMITY OF APPLICATION AND CONSTRUCTION. This [Act] shall be applied and construed to effectuate its purpose to make uniform the law with respect to the subject matter of this [Act] among States enacting it.

SECTION 403. SEVERABILITY CLAUSE. If any provision of this [Act] or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this [Act] which can be given effect without the invalid provision or application, and to this end the provisions of this [Act] are severable.

SECTION 404. EFFECTIVE DATE. This [Act] takes effect _____.

SECTION 405. REPEALS. The following acts and parts of acts are hereby repealed:

(1) The Uniform Child Custody Jurisdiction Act;

(2)_____

(3) _____

SECTION 406. TRANSITIONAL PROVISIONS. A child-custody proceeding that was commenced before the effective date of this [Act] may be completed under the law in effect at the time the proceeding was commenced.