

Memorandum

From: David Biklen and Art Gaudio
To: Drafting committee, advisor, and observers
Date: March 26, 2021
Re: Suggested revisions

Below are proposed revisions to the draft you received last week based on suggestions or issues raised by Barbara Atwood and the U.S. Department of State. We will discuss the revisions at our Zoom meeting on March 31, 2021.

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Section 102. Definitions.

(4) “Inter-country adoption” means an adoption or placement for adoption of a child resident in a foreign country by a U.S. citizen. The term includes an adoption finalized in the child’s country of residence or in a state.

Reporter’s Notes

Removed definition of “Guardian” and placed it in Article 2.

Revised definition of “Inter-country adoption” following suggestions from the U.S. Department of State.

Section 103. Limitation on Applicability

This [act] does not apply to custody of {or visitation with} an Indian child, as defined in the Indian Child Welfare Act, 25 U.S.C. Section 1903(4), [as amended,] to the extent the issue is governed by the Indian Child Welfare Act, 25 U.S.C. Sections 1901 through 1963[, as amended].

Legislative Note: It is the intent of this act to incorporate future amendments to the cited federal law. However, in a state in which the constitution or other law does not permit incorporation of future amendments when a federal statute is incorporated into state law, the phrase “as amended” should be omitted from subsection (a)(3). The phrase also should be omitted in a state in which, in the absence of a legislative declaration, future amendments are incorporated into state law.

Reporter's Notes

Added "custody of or visitation with" in the first line. Should we use "visitation with."

Substituted "the issue is governed by" to replace "application would conflict with" in the second and third lines.

[Article] 2

Prohibition of Unregulated Custody Transfer

Section 201. Definition

In this [article]:

(1) "Guardian" means a person recognized as a guardian under law of this state other than this [act] and an individual with whom a child has been placed for adoption; and

(2) "Intermediary" means a person that assists or facilitates a transfer of custody of a child, whether or not for compensation.

Reporter's Notes

Removed the definition of "Guardian" from Section 102(4) and inserted it here since it is used only in Article 2. Also added "and an individual with whom a child has been placed for adoption" to the definition of "Guardian." As discussed at our last meeting, this allows us to avoid the clutter of repeating that phrase several times.

Section 202. Applicability

This [article] does not apply to a transfer of custody of a child to:

- (1) a parent of the child;
- (2) a guardian or stepparent of the child;
- (3) an adult member of the child's family;

(4) an adult individual who is not a member of the child’s family but whom the parent or guardian knows well enough to be confident about the child’s safety with the individual;

(5) an Indian custodian of the child as recognized in the Indian Child Welfare Act, 25 USC Section 1903),[as amended,][, or member of the child’s customary family unit as recognized by the child’s indigenous group by law of this state other than this [act]].

***Legislative Note:** If the state’s law permits the transfer of custody of a child to a member of the child’s customary family unit as recognized by the child’s indigenous group, the state should include the bracketed portion of paragraph (5).*

Reporter’s Notes

1. Removed “an individual with whom a child has been placed for adoption in paragraph (2) and combined paragraphs (2) and (3).

2. Separated former paragraph (4) into new paragraphs (3) and (4). Also discontinued use “related to” and now use “member of child’s family.” The latter term is better understood and will, hopefully, avoid confusion about the meaning of “related to.”

3. Revised current paragraph (4) by removing “close relationship for a substantial period” and using the current language. The new wording, I believe, gets us closer to what we wanted to say in this regard.

4. Added citation to ICWA as in Section 103, above.

Section 203. Prohibited Custody Transfer

(a) A parent or guardian of a child may not transfer custody of the child to another person, or allow a prior transfer of custody of the child to another person to continue, with the intent permanently to relinquish the parent’s or guardian’s rights and responsibilities regarding the child except through:

- (1) adoption or guardianship;
- (2) judicial award of custody;

(3) placement by or through a child-placing agency; [or]

(4) other judicial or tribal action[; or

(5)].

(b) A person may not receive custody of a child, or act as an intermediary in a transfer of custody of a child, if the person knows or reasonably should know the transfer violates subsection (a).

(c) A violation of this section is a [misdemeanor].

(d) {The fact that a transfer of custody of a child by a parent or guardian might subsequently become permanent does not, of itself, establish the intention of the parent or guardian, at the time of transfer, to relinquish permanently rights and responsibilities regarding the child.}

{If a parent or guardian transfers custody of a child, the sole fact that the transfer subsequently becomes permanent does not establish that the parent or guardian at the time of the transfer intended to relinquish permanently parental rights and responsibilities regarding the child.}

{If a parent or guardian transfers custody of a child, the sole fact that the child's custody is not subsequently restored to the parent or guardian does not establish that the parent or guardian at the time of the transfer intended to relinquish permanently parental rights and responsibilities regarding the child.}

Legislative Note: Subsection (a)(5) is bracketed. It is intended that the state insert here each process permitted by law of the state for transfer of custody of a child that is not included in the preceding subsections.

Subsection (c) designates a violation of this section as a misdemeanor. It is intended that the state insert the degree or level of misdemeanor. Alternatively, the state may designate a violation as a specific crime, e.g., child endangerment or abandonment. The state may also insert another category of crime, e.g., felony or infraction.

Reporter's Notes

Subsection (d): three alternative versions of the same provision. In them I removed reference to “or a continuance of a prior transfer of custody of a child,” at least for the time being.

The subsection is certainly intended to deal with the actual act of transferring custody of a child, which can be ambiguous. E.g., a transfer of custody of a child before entering a drug rehabilitation program might be interpreted either as temporary until the rehab is completed, or permanent with intent to relinquish rights and responsibilities. Our purpose here is to say that the mere fact that the transfer ultimately becomes permanent should not be interpreted as establishing an intent to relinquish permanently rights and responsibilities at the time of transfer.

However, continuance of a prior transfer of custody is somewhat different. There is no additional act of transferring custody of the child. There is, however, a failure to act, which may or may not be ambiguous. If the transfer becomes permanent because the parent in the above example fails to recover custody of the child after successfully completing the rehab program, was that failure with an intent to relinquish permanently parental rights and responsibilities. While it may not be free from doubt, it seems much more likely that there was such an intent. In that case do we want this subsection to apply?

Section 204. Authority of the [Department of Child Protection].

(a) If the [department of child protection] has probable cause to believe that a parent or guardian has transferred or will transfer custody of a child in violation of Section 203(a), the [department] may conduct a home visit to assess the welfare of the child and to facilitate compliance with Section 203(a).

(b) Nothing in this [act] prevents the [department of child protection] from taking appropriate action necessary to protect a child from harm.

Legislative Note: *The state should insert the title of the appropriate state agency responsible for child protective services.*

Reporter's Notes

Revised subsection (a) to use active voice rather than passive voice; no substantive change.