

D R A F T

FOR DISCUSSION ONLY

INTERSTATE CHILD VISITATION ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

January 18, 1995, Draft

INTERSTATE CHILD VISITATION ACT

With Prefatory Note and Comments

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ON UNIFORM STATE LAWS

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INTERSTATE CHILD VISITATION ACT
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INTRODUCTORY NOTE

Dissatisfaction concerning the terms of a custody and visitation decree is a major reason for post-decretal litigation. This dissatisfaction is often results in violations of the custody and visitation aspects of the decree. The custodial parent may attempt to limit or abrogate the decree-granted access of the non-custodial parent. Because children normally need frequent and continuing contact with both parents, these actions are likely to have a detrimental effect on the child.

As with financial support, state borders have become the biggest obstacle to enforcement of state policies designed to ensure that children have access to both parents. If the either parent leaves the state where the custody determination was made, the other parent faces considerable difficulty in enforcing the provisions the visitation and custody provisions of the decree. Locating the child, making service of process, obtaining jurisdiction and preventing adverse modification all present problems.

In accordance with the decision made at the first drafting committee meeting this draft does not address the concept of the "continuing exclusive jurisdiction" of the tribunal that issued the custody decree. The concept of continuing jurisdiction is already a major part of two acts that regulate interstate jurisdiction and enforcement of custody and visitation decrees: the Uniform Child Custody Jurisdiction Act (UCCJA) and the Parental Kidnapping Prevention Act (PKPA), 28 U.S.C. §1738A. If a custody determination is rendered in accordance with the UCCJA's jurisdictional principles all other states must enforce it. Modification is exclusively within the original state which issued the decree so long as that state still maintains jurisdiction consistently with any of the jurisdictional requirements of UCCJA§3, or unless it declines to exercise jurisdiction. Brigitte Bodenheimer, *Interstate Custody: Initial Jurisdiction and Continuing Jurisdiction Under the UCCJA*, 14 Fam.L.Q. 203, 214 (1981).

The PKPA also provides that the jurisdiction of a court which has made a decree consistently with its terms, continues, so long as the court has jurisdiction under its state law, and it remains the residence of at least one contestant or the child. Other states are required to defer to a court having continuing jurisdiction under this section. See e.g., *Capobianco v. Willis*, 567 N.Y.S.2d 770 (App.Div. 1991). Most importantly, this section makes the law of the original decree state determinative of whether it has continuing jurisdiction, provided that the original exercise of jurisdiction met the federal requirements of subsection (c) of the PKPA. *Bock v. Bock*, 824 P.2d 723 (Alaska 1992).

The PKPA as a federal statute preempts all state law to the contrary, including provisions of the UCCJA. See e.g., *Shute v. Shute*, 607 A.2d 890 (Vt. 1992). For a full discussion of whether the PKPA has preemptive effect on the UCCJA, see Russell Coombs, *Interstate Child Custody: Jurisdiction, Recognition and Enforcement*, 66 Minn.L.Rev. 711, 822-834 (1982). Given the extensive coverage of continuing jurisdiction for all visitation and custody cases in the UCCJA and PKPA, the drafting committee decided not to address the concept in this Act.

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 may also be utilized. All of these enforcement procedures differ in local details. In addition to these differences there are varying standards for what will be enforced from procedure to procedure. 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 a 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.

All of the difficulties inherent in the lack of uniformity for visitation orders also apply to the custody part of the same order. The Uniform Child Custody Jurisdiction Act defines visitation as a part of custody. The American Bar Association's

1 Family Law Section adopted a resolution requesting the drafting committee to include provisions addressed to both custody
2 and visitation. The drafting committee, at its initial meeting, decided that this Act should cover enforcement of all aspects of
3 the custody determination. The title of the Act is not changed. However, the term "custody determination" is used to
4 describe what is being enforced.
5

6 As an enforcement statute, this Act stands in the shadow of the Uniform Child Custody Jurisdiction Enforcement Act
7 and the Parental Kidnapping Prevention Act. In addition the Uniform Interstate Family Support Act has received a
8 considerable amount of attention from state legislatures. In drafting the provisions of this Act, I have tried to make the
9 sections congruent with comparable sections of those acts. To the extent that provisions of those statutes are consistent with
10 the purposes of this Act, I have used them. In addition to those three statutes, the *Obstacles Study* provided many useful
11 suggestions. A number of them have been incorporated into this draft.
12

13 The provisions of the Act reflect the decisions taken by the drafting committee. First, That Act time limitations for
14 filing responsive pleadings, holding a hearing and rendering a decision are severely restricted. This is because enforcement
15 procedures have occasionally been as lengthy as the original custody proceeding. Children should not be subject to long
16 litigation. Therefore the enforcement procedure has been drafted to be as summary a process as possible.
17

18 Time is extremely important when visitation rights are at issue. If visitation rights cannot be enforced quickly, they
19 often cannot be enforced at all. This is particularly true if there is a limited time within which visitation can be exercised
20 such as may be the case when one parent has been granted visitation during the winter or spring holiday period. Without
21 speedy consideration and resolution of the enforcement of such visitation rights, the ability to visit may be lost entirely.
22

23 Second, in order to ensure that the tribunal acts quickly, extraordinary remedies are available to the enforcing tribunal.
24 If the enforcing tribunal is concerned that the parent, who has physical custody of the child, will flee or harm the child,
25 injunctive relief is made available
26

27 Third, the scope of the enforcing court's inquiry has been limited to the issue of whether the decreeing court had
28 subject matter jurisdiction and complied with due process in rendering the original custody decree. Any further inquiry
29 would not be necessary given that the Act does not authorize the modification of a custody determination.
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- (1) "Child" means an individual who is the subject of a custody determination.
- (2) "Contestant" means an individual, including a parent, who claims a right to custody or visitation rights with respect to a child.
- (3) "Custody determination" means a judgment, decree, or other order of a tribunal providing for custody or visitation of a child. It includes permanent, temporary, initial and modification orders. A custody determination does not include a decision relating to parentage, child support or any other monetary obligation of any individual.
- (4) "Custody proceeding" means a proceeding in which a custody determination is one of several issues, and includes actions for adoption, divorce, separation, neglect, abuse, dependency, wardship, guardianship, termination of parental rights, protection from domestic abuse, and proceeding 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. Actions for status offender, juvenile delinquency and emancipation are not custody proceedings.
- (5) "Issuing state" means the state which decided a custody determination for which enforcement is sought under this [Act].
- (6) "Modification" and "modify" mean a custody determination that changes, replaces, supersedes, or is otherwise made subsequent to, a prior determination concerning the same child.
- (7) "Petitioner" means any party to a custody determination who files a petition seeking enforcement of the provisions of that custody determination.
- (8) "Physical custody" means actual possession and control of the child.
- (9) "Respondent" means the individual resisting enforcement of a custody determination under this [Act].
- (10) "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 "State" includes a foreign jurisdiction and any Indian tribe, band and village that has been recognized by the United States under 25 Code of Federal Regulations, Part 83.
- (11) "Tribunal" means a court, agency, or other entity authorized to establish, enforce, or modify a custody determination.
- (12) "Warrant" means an order issued by a tribunal authorizing law enforcement officers to take a child into custody.

We do not begin this area with a clean slate. There has already been extensive practice under the Uniform Child Custody Jurisdiction Act, the Parental Kidnapping Prevention Act and the Uniform Interstate Family Support Act. Most lawyers and judges are familiar with the definitions used in these statutes. Therefore, whenever possible, the definitions in this Act conform to those enactments.

1 The definition of "child" is derived from UIFSA. Following discussions at the first drafting committee meeting, the
2 term "child" is defined functionally as the individual for whom the custody determination was issued. It could include
3 individuals over the age of eighteen who, because of physical or mental deficiencies are still the subject of a custody
4 determination.

5
6 The definition of "contestant" is taken from the UCCJA §2(2). It was not in the previous draft. It was added to the
7 definitions in order to implement the decision relating to the scope of the notice section.

8
9 The definition of "custody determination" is derived from the UCCJA and PKPA. However, the definition clearly
10 indicates what determinations are not enforceable under this Act. Paternity determinations and support orders are clearly
11 governed by UIFSA and are specifically excluded from coverage by this Act.

12
13 The definition of "custody proceeding" is slightly expanded from the comparable definition in the UCCJA and PKPA.
14 The list of examples removes any controversy about the types of proceedings where a custody determination can occur.
15 Decrees of any of these proceedings that affect access to the child can be enforced under this Act.
16 Juvenile delinquency, status offender or emancipation proceedings are not "custody proceedings" because they do not relate
17 to civil aspects of access to a child.

18
19 The term "issuing state" is borrowed from UIFSA. There it refers to the tribunal that issued the support or parentage
20 order. Here, it refers to the state, or the tribunal, which decided the custody determination that is sought to be enforced.

21
22 The definition of "modification" and "modify" comes from the PKPA.

23
24 The term "petitioner" means the party seeking enforcement. The individual against whom enforcement is sought is the
25 "respondent."

26
27 The term "State" is defined, in the first sentence, in accordance with NCCUSL requirements. Foreign jurisdictions are
28 included to ensure that proceedings under the Hague Convention on the Civil Aspects of Child Abduction and the
29 International Child Abductions Remedies Act, 42 U.S.C. §§ 11601 et seq. are covered. Most states enforce foreign custody
30 determinations under the authority of UCCJA §23. See e.g., *Mc. v. Mc.*, 521 A.2d 381 (N.J.Chan. 1986)(Ireland decree);
31 *Vause v. Vause*, 409 N.W.2d 412 (Wis.App. 1987)(West German decree); *Marriage of Dagan*, 103 Or.App. 453, 798 P.2d
32 253 (1990)(Israeli decree). However, a number of states have not adopted UCCJA §23 and therefore international cases
33 need to be specifically mentioned in this section.

34
35 Indian tribes are also included in the definition of "State" because many custody determinations are made by tribal
36 courts under the authority of the Indian Child Welfare Act (ICWA), 25 U.S.C. §1901 et seq. The PKPA and the UCCJA
37 have been interpreted to require enforcement of tribal custody determinations. See e.g., *In re Larch*, 872 F.2d 66 (4th
38 Cir.1989)(Cherokee tribe is a state for purposes of the Parental Kidnapping Prevention Act); *Martinez v. Superior Court*,
39 152 Ariz. 300, 731 P.2d 1244 (Ct.App.1987)(Indian reservations are territories or possessions of the United States within
40 the meaning of Arizona's Uniform Child Custody Jurisdiction Act). The term Indian tribe is defined in accordance with the
41 Code of Federal Regulations.

42
43 There is no requirement that an Indian tribe or a foreign nation have a procedure for making custody determinations
44 that is similar to the Uniform Child Custody Jurisdiction Act. The enforcement statute is not reciprocal. Lack of subject
45 matter jurisdiction and lack of notice are defenses to enforcement.

46
47 The term "tribunal," rather than court, seems appropriate here. Some states may utilize a quasi-judicial or an
48 administrative agency to handle custody and visitation disputes---as well as child support. In order to make the act
49 acceptable to those jurisdictions, the term tribunal is carried over from UIFSA.

1 **Section 102. Tribunals Of This State.** The [court, administrative agency, quasi-judicial entity, or combination] [is the tribunal]
2 [are the tribunals] of this State.

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4	Comment
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This provision is taken from UIFSA §102.

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1 **Section 103. Non-exclusive Remedy.** The enforcement mechanism provided by this [Act] does not affect the availability of
2 other procedures to enforce a custody determination.

3
4 **Comment**

5 There is often a need for a number of remedies to ensure that a child custody determination is obeyed. This Act is
6 designed to provide the remedy that will be used most often. However, if other remedies would easily facilitate the return of
7 a child, they are still available. For example, the ability of the petitioner to cite the respondent for contempt of court is
8 unaffected by this Act. See *Brighty v. Brighty*, 883 S.W.2d 494 (Ky.Sup.Ct. 1994)(issuing state had jurisdiction to enforce a
9 custody order by contempt even though it no longer had jurisdiction to modify the determination). Cf. UIFSA §205 (tribunal
10 may enforce its own order even when it lacks jurisdiction to modify it).

11
12 In addition tort claims may be available for interference in custodial relations. See e.g. Restatement, Torts 2d §700
13 (intentional interference with custodial relations); *Pankratz v. Willis*, 155 Ariz. 8, 744 P.2d 1182 (Ariz.Ct.App. 1987)
14 (intentional infliction of emotional distress claim against grandparents for destroying the relationship between the
15 noncustodial parent and the child).

16
17 This Act is one for the civil enforcement of a custody determination. Therefore none of the provisions in this Act
18 affect the availability of criminal sanctions for custodial interference in effect in every State.

19
20 In accordance with the discussion at the last meeting this section has been redrafted to utilize the terms "procedure"
21 and "mechanism" rather than remedy.
22
23

1 **ARTICLE 2: JURISDICTION**

2 **Section 201. Jurisdiction**

3 (a) A tribunal of this State has jurisdiction to enforce a custody determination of the issuing state when the petitioner, the
4 respondent, or the child is present in this State.

5 (b) The provisions of this [Act] apply to proceedings under the Hague Convention on the Civil Aspects of International Child
6 Abduction and the International Child Abductions Remedies Act, 42 U.S.C. §§11601 et seq.

7 (c) No provision in this [Act] confers jurisdiction upon a tribunal of this State to modify a custody determination of the issuing
8 state.

9
10 **Comment**

11
12 Enforcement of custody determinations of issuing states is required by both the UCCJA §13 and the PKPA, 28
13 U.S.C. §1738A(a). However, in accordance with our decision in the last drafting committee meeting, in order to ensure that
14 the tribunal is not issuing an advisory opinion the petitioner, respondent or child must be present in this State.

15
16 Subsection (b) makes the enforcement remedy provided by this act applicable to orders requiring the return of a child
17 issued under the authority of the International Child Abduction Remedies Act, 42 U.S.C. §11601 et seq. implementing the
18 Hague Convention on the Civil Aspects of International Child Abduction. A specific section was thought necessary because
19 even though an ICARA proceedings often occurs prior to any formal custody determination, the need for a speedy
20 enforcement remedy is just as necessary.

21
22 Subsection (c) makes it clear that the procedure for enforcement of a custody determination does not authorize a
23 modification of that custody determination. Whether a tribunal may modify a custody determination is governed by the
24 PKPA, 28 U.S.C. §1738A(f) and the UCCJA §14. Nothing in this Act authorizes a tribunal to modify a custody
25 determination of another State. In fact, as a practical matter, the expedited procedure of an enforcement proceedings makes
26 a modification determination difficult or impossible.

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(b) A petitioner is not amenable to service of process while physically present in this State to participate in a proceeding under this [Act].

Comment

Section 203. Simultaneous Proceedings

(a) Whenever a tribunal of this State has pending a proceeding to enforce a custody determination under this [Act], it shall inquire of the parties whether a proceeding affecting the custody determination is pending in another State. If a proceeding affecting the custody determination is pending in another State, the tribunal shall immediately communicate with the tribunal in which the custody proceeding is pending in order to avoid unnecessary litigation. Communication with other tribunals should be made in a manner which allows the parties to participate. A record shall be made of the communication.

(b) If a modification proceeding is pending in a tribunal which is exercising continuing jurisdiction under 28 U.S.C. §1738A(d)[Parental Kidnapping Prevention Act], and a tribunal of this State is not exercising emergency jurisdiction pursuant to [Uniform Child Custody Jurisdiction Act §3(a)(3)], a tribunal of this State shall stay the enforcement proceeding until the determination of the custody modification proceeding.

(c) If a custody proceeding or a proceeding under this [Act] is pending in another State, the tribunal may stay the enforcement action until the determination of that proceeding.

Comment

Simultaneous proceedings present problems of the interrelation between this Act and the PKPA and UCCJA. In accordance with the decision at the last meeting, this section discusses simultaneous proceeding solely from the point of view of the enforcement tribunal. It does not set out whether a tribunal, when presented with a motion to modify a custody determination, must inquire about enforcement proceedings. That issue is covered by UCCJA §§ 6,9,10.

The enforcement tribunal is under a mandatory duty to inquire whether other proceedings are pending between the parties that might affect this enforcement action. This includes other enforcement proceedings. If so, a tribunal of this state must communicate with the tribunal where the custody proceeding is pending. The purpose of the communication is to avoid unnecessary and wasteful litigation. According to the decision of the last drafting committee, if the tribunal where the other proceeding is pending is exercising continuing jurisdiction over the custody determination, pursuant to the PKPA, the enforcement tribunal shall defer to it. Since the parties rights and obligations are in the process of being determined by a tribunal which has the power to bind the parties, the enforcement tribunal should not attempt to enforce that which may soon be modified.

This deference to the tribunal with PKPA continuing jurisdiction could promote further litigation. A respondent faced with an enforcement action could quickly file in the State with PKPA continuing jurisdiction in an attempt to frustrate the effect of the enforcement action. Such a later filed petition would not be "pending" in the sense of this section. However, a policy of extended deference to the State with PKPA continuing jurisdiction would suggest including provisions for a mandatory stay if a proceeding is filed in the State with PKPA continuing jurisdiction after the enforcement action has begun.

Section (c) authorizes the court to stay the enforcement proceeding if a custody proceeding or a proceeding under this Act is pending in another State that does not have PKPA continuing jurisdiction. Modification and enforcement proceeding could also be pending in more than one State. It might be appropriate for some of the actions to proceed simultaneously. Enforcement proceedings may for example be brought against a custodial parent in one State and grandparents with visitation in another. If the actions are not duplicative they might both proceed to a conclusion. On the other hand if a modification proceeding is brought in the new home state of the child, when there is no PKPA continuing jurisdiction State, at the same time that an enforcement proceeding is brought in another state, it might be appropriate for the enforcement state to stay its proceeding. If two enforcement actions are brought in States which do not have PKPA continuing jurisdiction, the tribunals should be allowed to determine which State should proceed.

Whether an enforcement tribunal should enter a temporary custody order depends on whether an emergency exists. That determination must be made in accordance with the "emergency jurisdiction" provision of UCCJA §3(a)(3) and 26 U.S.C. §1738A(c)(2)(C), [Parental Kidnapping Prevention Act]. Case law under those sections holds that the emergency order is to continue only so long as to allow the parties to have their rights determined by the tribunal with continuing jurisdiction. See e.g., *In re A.L.H.*, 630 A.2d 1288 (Vt. 1993); *Matter of Maureen S.*, 592 N.Y.S.2d 55 (App. Div. 1992) That tribunal may well decide that the enforcement state, if it is the new home state, should assume jurisdiction over the custody

1 determination. See e.g. *Marriage of Coleman*, 493 N.W.2d 133 (Minn.App. 1992)(state of continuing jurisdiction defers to
2 Nebraska the new home state that is exercising emergency jurisdiction); *Swain v. Vogt*, 619 N.Y.S.2d (App.Div. 1994)(state
3 of continuing jurisdiction defers to Maine even though the mother removed the child from New York in violation of a court
4 order). This section does not address that issue other than to note that the stay of the proceedings is subject to the exercise of
5 emergency jurisdiction.

6
7 Under this section a tribunal is required to communicate with other tribunals. It should communicate in a manner
8 which allows the parties to participate. In any event a record of the communication must be made. Communications between
9 judges that affect the substantive rights without participation by the parties, raises due process and ethical concerns. See the
10 discussion in *Nebraska ex rel Grape v. Zach*, 21 Fam.L.Rep. 1101 (Neb.Sup.Ct. 1994).

11
12 This section does not address the role of the modification court when it is informed that a petition for enforcement is
13 pending in another tribunal. The role of the modification court is governed by the UCCJA and the PKPA and not by this Act.
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1 **ARTICLE 3: PROCEDURE**

2 **Section 301. Pleading**

3 (a) The petitioner's first pleading under this [Act] shall be verified and shall attach a certified copy of all orders to be enforced.

4 (b) The pleading shall state:

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

7 (2) whether the custody determination for which enforcement is sought has been modified;

8 (3) whether the respondent was notified and given an opportunity to be heard in the proceeding which resulted in the
9 custody determination;

10 (4) whether there is any proceeding pending between the parties which would affect the current enforcement action,
11 including proceedings relating to domestic violence and orders of protection;

12 (5) the present address of the child and the respondent, if known;

13 (6) the relief sought.

14 (c) The petitioner shall attach to the pleading a Show Cause Order. The Order shall inform the respondent that a hearing will be
15 held at a specific time no less than fourteen calendar days following the receipt of notice.

16
17 **Comment**
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19 The pleading are intended to provide the tribunal with as much information as possible. Attaching a certified copy of
20 all orders sought to be enforced allows the tribunal to have the necessary information. While, in theory, the determination
21 may be registered with the state UCCJA registry, many states have not implemented the registry. Therefore while registration
22 of the decree could be considered as a condition precedent to enforcement, it is likely to prove unworkable in a number of
23 states.
24

25 The remainder of the information required relates to the permissible scope of the tribunal's inquiry. If properly
26 presented the tribunal will be able to make a decision on the basis of the pleadings without the necessity for holding a
27 hearing. The petitioner has the responsibility to inform the court of all proceedings that would affect the current enforcement
28 action. Specific mention is made of domestic violence and orders of protection to ensure that they are disclosed. Perhaps
29 forms can be developed for both the petition and answer that would be available from the court clerk. The forms could be
30 constructed to provide sufficient information to allow the tribunal to make a decision solely on the pleadings.
31

32 The final section reflects the drafting committee's decision to collapse the section on the Order To Show Cause
33 (formerly §303) with the section on pleading and to require the petitioner to have the Order issued at the same time as the
34 pleading.

1 **Section 302. Notice.**

2 (a) Reasonable notice and opportunity to be heard shall be given to the respondent, any contestant, and any individual who has
3 physical custody of the child.

4 (b) Notice required for this [Act] shall be given in a manner reasonably calculated to give actual notice, and may be:

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

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

8 (3) by any form of mail addressed to the person to be served and requesting a receipt; or

9 (4) as directed by the tribunal including publication, if other means of notification are ineffective.

10	Comment
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11 In accordance with the decision made at the last drafting committee meeting, the notice section is taken from UCCJA
12 §§ 4.5(a). Again it is useful to have the same requirements for all the interstate custody statutes. The drafting committee
13 decided that all persons whose interest could be affected by an enforcement proceeding should be given notice. This group
14 of people has been defined as "contestants" which is the term used in the UCCJA, to refer to anyone who claims a right of
15 custody or visitation with the child. The effect of noticing anyone with an interest in the enforcement of the custody
16 determination should be to preclude further litigation. The resulting determination will have *res judicata* effect on those
17 persons notified. See UCCJA §12.

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(b) The answer may request the petition be dismissed because:

(2) the respondent lacked notice and opportunity to be heard in the proceedings before the issuing tribunal;

(4) the custody determination has been modified by a tribunal having jurisdiction to modify under 28 U.S.C. §1738A

determination shall be attached to the answer.

(d) The tribunal may extend the time for filing any pleading under this Act for good cause shown.

Comment

This section sets out what should be contained in the answer. The respondent is given a very short period of time from receipt of the notice. This again is in keeping with the summary nature of the enforcement proceeding. The contents of the answer are designed to determine whether the jurisdictional and notice aspects of the petition are correct. In addition, if the respondent claims the custody determination has been modified, a certified copy of the modification should be attached to the answer.

The only affirmative relief the respondent may request relates to enforcement of the custody determination. The respondent may not request a modification of the custody decree in the enforcement action. Therefore no information that would only be relevant to a modification action should be included in the answer, such as information concerning the best interests of the child. If the respondent is concerned that the child would be harmed as a result of the enforcement action, the respondent should file a petition under the "emergency jurisdiction" provisions of the UCCJA §3(a)(3). See §203.

There is an argument that the respondent may not request any affirmative relief. However, both parties to a custody determination may have enforcement problems. Perhaps the visiting parent is not returning the child at the appropriate time in addition to the custodial parent not allowing the child to be picked up on time. The tribunal should be allowed to address both enforcement problems in the same proceeding.

The petitioner is given an extremely short time to answer the respondent. Less time is justified here since the petitioner knows the case is proceeding. However, the tribunal may extend the time periods for filing any pleading under this Act for good cause shown.

This section does not attempt to address the issue of whether the child should be separately represented in an enforcement proceeding. The child is not a named party. Whether counsel or a guardian *ad litem* should be appointed for the child is left to the law of each individual state.

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(c) The tribunal may order any party to the proceedings who is present in the State to appear personally before the tribunal. The tribunal may order any individual in this State having physical custody of the child to personally appear with the child.

If the pleadings show that there is an issue requiring a hearing, the hearing must be held within a very short period of time. No attempt has been made to limit the time for the hearing. If the answer alleges that the issuing state did not have jurisdiction to issue the custody determination, the tribunal must allow the parties sufficient time to explore the issue. The resulting determination will have *res judicata* effect on those issues. If the issuing state litigated the issues of subject matter jurisdiction and adequate notice, UCCJA §12 prevents relitigation of those issues in the context of the enforcement action.

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(e) The defense of immunity based on the relationship of husband and wife or parent and child does not apply in a proceeding under this [Act].

Comment

The remainder of this section is derived from UIFSA §316 and the UCCJA §§18,19 and 20, particularly with regard to documentary evidence, the privilege of self-incrimination, spousal privileges and immunities. The reasons for the inclusion of those sections in UIFSA and the UCCJA apply as well to proceedings under this Act.

Nothing in this Act addresses the question of whether the tribunal should appoint an attorney or guardian ad litem for the child in the enforcement proceeding. That issue is left to each individual state to determine.

1 Section 306. Communication Between Tribunals.

(a) A tribunal of this State may communicate with a tribunal of another State in writing, or by telephone or other means, to obtain information concerning the laws of that state, the legal effect of a custody determination of that tribunal, the status of a proceeding in the other State, or other related matters. A tribunal of this state shall furnish similar information by similar means to a tribunal of another State.

6 (b) The communication should be in a manner which allows the parties to participate. A record shall be made of the
7 communication.

8 (c) The expenses of communicating with a tribunal of another State may be assessed as costs under [§403 of this Act].

Comment

This section is derived from UIFSA §317 and UCCJA §7(d). It encourages judicial communication. The communication should be done in a manner which allows the parties to participate. In any event, a record must be made of the conversation. There can be significant due process concerns when a decision is based on a communication between two tribunals outside of the presence of the parties and without a record of the communication. See *Yost v. Johnson*, 581 A.2d 178 (Del.Sup.Ct 1991)(trial court violated procedural due process when it contacted the Virginia court without notifying the parties, failed to permit the parties to participate in the telephone conversation and failed to create or produce a written record of the call).

Section 307. Scope of the Proceeding

(a) A tribunal shall enforce a custody determination of an issuing tribunal if it finds that:

- (1) the issuing tribunal's exercise of subject matter jurisdiction complied with its own law, unless 28 U.S.C. §1738A [Parental Kidnapping Prevention Act] requires enforcement of different tribunal's custody determination;
- [(1) the issuing tribunal's exercise of subject matter jurisdiction complied with [RUCCJA]];
- (2) the respondent received notice in accordance with [UCCJA §§4, 5];
- (3) the determination has not been modified, stayed, or vacated by the issuing tribunal or by a tribunal acting under the authority of 28 U.S.C. §1738A [Parental Kidnapping Prevention Act].

(b) The petitioner has the burden of proving the requirements of subsection (a) by a preponderance of the evidence.

(c) The only defenses to the enforcement of a custody determination are:

- (1) the issuing tribunal's exercise of subject matter jurisdiction did not comply with its own law;
- (2) a different tribunal has made a custody determination that is entitled to enforcement under 28 U.S.C. §1738A [Parental Kidnapping Prevention Act],
- (3) the respondent did not receive notice in accordance with [UCCJA §§4, 5];
- (4) the determination has been modified, stayed, or vacated by the issuing tribunal or by a tribunal acting under the authority of 28 U.S.C. §1738A [Parental Kidnapping Prevention Act].

Comment

The scope of inquiry for the enforcing tribunal is really 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. However, if the issuing tribunal's determination was not made in accordance with its own UCCJA, the enforcing tribunal cannot enforce it. The requirement is phrased in terms of exercise of subject matter jurisdiction because there is a current controversy over whether the UCCJA's requirements are subject matter jurisdiction or merely relate to its exercise. Compare *Williams v. Williams*, 555 N.E.2d 142 (Ind. 1990)(authority to hear custody cases is not directly granted by UCCJA; rather it merely serves to restrict the existing power of the court and can therefore be waived) with *Marriage of Mosier*, 836 P.2d 1158 (Kan.Sup.Ct. 1992)(UCCJA's requirements are subject matter jurisdiction and can be raised by the court on its own motion to vacate an agreed modification made two years earlier). Phrased this way, it requires the enforcing tribunal to inquire whether the issuing state's determination was made in accordance with its own law.

The issuing tribunal may have complied with its own version of the UCCJA and the custody determination may still not be entitled to enforcement. It is a defense to enforcement that another jurisdiction has issued a custody determination that is required to be enforced under the PKPA. This is likely to occur when one tribunal has based its determination on UCCJA §3(a)(2)(significant connections) and another jurisdiction has rendered a determination based on UCCJA §3(a)(1)(home state). When this occurs, the PKPA mandates 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 at the original custody determination is a defense to its enforcement. The petitioner should describe the type of notice the respondent was given and the extent of the respondent's participation in the custody proceeding. 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. Therefore, if the respondent did not receive actual notice of the proceedings in accordance with the UCCJA, the petitioner should provide an explanation of why constructive notice was used.

As a civil action, petitioner should have to prove these elements by a preponderance of the evidence. There are no affirmative 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. However, that issue cannot be addressed in

1 an enforcement statute. If the child would be endangered, there is a basis for the assumption of emergency jurisdiction under
2 UCCJA §3(a)(3) and PKPA §(c)(2)(C) Upon the finding of an emergency, the tribunal should issue a temporary order and
3 direct the parties proceed in the tribunal that is exercising continuing jurisdiction over the custody proceeding.
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1
2 **ARTICLE 4: RELIEF**

3 **Section 401. Emergency Relief**

4 (a) Upon the filing of a petition, the petitioner may file a verified application for a waiver of notice and issuance of a warrant
5 to take physical custody of the child if the petitioner believes the child will suffer immediate harm or be removed from the
6 jurisdiction. There is a rebuttable presumption that immediate harm exists if the respondent is the subject of criminal charges
7 relating to the wilful removal, retention, or concealment of the child, or is currently concealing the child from the petitioner in
8 violation of a custody determination.

9 (b) If the tribunal finds that the child will suffer immediate harm or be removed from the jurisdiction, it may waive notice
10 requirements and issue a warrant to take physical custody of the child.

11 (c) The warrant shall:

12 (1) recite the facts upon which a conclusion of immediate harm is based;

13 (2) direct law enforcement officers to take immediate physical custody of the child;

14 (3) be enforceable throughout the State;

15 (4) provide for the placement of the child pending final relief, and

16 (5) provide that the respondent be served with notice and show cause order as soon as the child is taken into physical
17 custody.

18 (d) The tribunal may authorize law enforcement officers to enter private property to take physical custody of the child.

19 (e) The tribunal may impose conditions upon placement of the child to ensure the appearance of the child and the child's custodian
20 at the enforcement hearing.

21 **Comment**

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

27 Immediate harm cannot be totally defined and, like the issuance of temporary restraining orders, is left to the
28 circumstances of the case. It could include findings of abuse if the child is left with the respondent, continued flight, or other
29 circumstances that the tribunal concludes makes the issuance of notice a danger to the child. In cases where the respondent is
30 the subject of a criminal proceeding or is secreting the child in violation of a court order, a rebuttable resumption of
31 immediate harm exists. The tribunal must state the reasons for the waiver of notice and issuance of the warrant. The warrant
32 can be enforced by law enforcement officers throughout the jurisdiction. The warrant may authorize entry upon private
33 property to pick up the child.

34 The warrant must provide for the placement of the child pending the determination of the enforcement proceeding.
35 Since the issuance of the warrant would not occur absent a risk of immediate harm to the child, placement cannot be with the
36 respondent. Normally the child would be placed with the petitioner. However, if placement with the petitioner is not
37 indicated, the tribunal can order any other appropriate placement authorized under the laws of the tribunal's state. Placement
38 with the petitioner may not be indicated if there is a likelihood that the petitioner also will flee the jurisdiction. Placement
39 with the petitioner may not be practical if the petitioner is proceeding through an attorney and is not present before the
40 tribunal.
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42

1 This section authorizes the tribunal to utilize whatever means are available in the tribunal's jurisdiction to ensure the
2 appearance of the petitioner and child at the enforcement hearing. Such means might include cash bonds, a surrender of a
3 passport or whatever the tribunal determines is necessary.
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5 In accordance with the decision at the last drafting committee meeting this section contains the material that was
6 formerly in §§401 and 402.
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(c) An order granting the petition may include a direction to law enforcement officers to assist the petitioner in enforcing the order. The order shall be enforceable throughout the State. The order may authorize law enforcement officers to enter private property to take physical custody of the child.

Comment

Other remedies that might be used for visitation violations include supervised visitation with a third party or public agency, make up visitation of the same time period such as weekend for weekend, holiday for holiday. Restitution of monetary amounts expended because of visitation abuse are also possible remedies if the tribunal has personal jurisdiction over the individual ordered to pay. Whether an enforcement tribunal would be barred from using these remedies depends on whether the issuing state would require a modification procedure to utilize them.

In accordance with the decision at the last drafting committee meeting, Article 5 of the first draft is merged into Article 4 of this draft. Article 6 on "Registration" has been abandoned.

1 **Section 403. Costs, Fees and Expenses.** The tribunal shall award the prevailing party reasonable expenses incurred by or on
2 behalf of the party, including tribunal costs, telephone expenses, legal fees, investigation fees, witness expenses, foster home or
3 other care during the course of the proceedings, unless the losing party establishes that such an award would be clearly
4 inappropriate.

6 Comment

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

11
12 The losing party has the burden of showing that such an award would be clearly inappropriate. Fees and costs may be
13 inappropriate if their payment would cause the parent and child to seek public assistance.

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

15
16 "In furtherance of the purposes of section 1738A of title 28, United States Code [this section], as added by
17 subsection (a) of this section, State courts are encouraged to--

18 "(2) award to the person entitled to custody or visitation pursuant to a custody determination which is consistent
19 with the provisions of such section 1738A [this section], necessary travel expenses, attorneys' fees, costs of private
20 investigations, witness fees or expenses, and other expenses incurred in connection with such custody determination
21 ...
22

23
24 The term "prevailing party" is not given a special definition for this Act. It is assumed that each state will apply the their
25 own standard. If the petitioner prevails on some issue and respondent on others, local law will determine whether there is a
26 prevailing party. Cf. UIFSA §313 (tribunal may assess costs against obligee only if allowed by local law).

Section 404. Recognition and Enforcement. Tribunals of this State shall enforce according to its terms, and shall not modify, orders enforcing custody determinations made consistently with the provisions of this [Act] by a tribunal of another State unless the [registry established under UCCJA §16] indicates the order has been superseded, vacated or modified.

Comment

The enforcement order to be effective must also be enforced by other states. This section requires tribunals of this state to enforce orders issued by other states when made consistently with the provisions of this Act. The term full faith and credit is not used. It probably is not possible to order another state to give full faith and credit to one state's orders. The term "according to its terms, and shall not modify" is used in the UCCJA and the PKPA.

1 **Section 405. Appeals.** A final order in a proceeding under this [Act] may be appealed in accordance with expedited appellate
2 procedures in civil cases. An order enforcing a custody determination shall be stayed only if the tribunal is notified that a custody
3 proceeding is pending in a state with continuing jurisdiction under 28 U.S.C. § 1738A [Parental Kidnapping Prevention Act].

4
5 **Comment**
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7 The order may be appealed as an expedited civil matter. Normally, an enforcement order should not be stayed.
8 Provisions for a stay would defeat the purpose of having a quick enforcement procedure. If, however, a modification
9 procedure has been commenced in a tribunal having continuing jurisdiction under the PKPA, the enforcement tribunal should
10 stay its order for the same reasons indicated in §203. If there is a risk of serious mistreatment to the child a petition to
11 assume emergency jurisdiction must be filed under §3(b)(3) of the UCCJA. Absent such a filing there is no reason to stay the
12 enforcement of the order pending appeal.
13

1 [ARTICLE 5: ASSISTANCE OF PUBLIC AUTHORITIES]

2
3 Introduction to Article Five

4
5 This article is modeled upon the *Obstacles Report*, which in turn is based on the California experience in authorizing a
6 role for public authorities in custody and visitation enforcement. One of the basic policies behind the California approach is that
7 the involvement of public authorities will encourage the parties to abide by the terms of the custody determination. If the parties
8 know that prosecutors and law enforcement officers are available to help in securing compliance with custody determinations,
9 they may be deterred from interfering with the exercise of rights established by court order.

10 The California model could also prove more effective in remedying violations of the custody determination. Most parties
11 do not have the resources to enforce a custody determination in another jurisdiction. The availability of the prosecutor as an
12 enforcement agency will ensure that this remedy can be made available regardless of income level. In addition the prosecutor
13 has resources to draw on that are unavailable to the average litigant.
14

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17 **Section 501. Role of [Prosecutor]**

18 (a) The [prosecutor] at the request of a party or a [prosecutor] in another jurisdiction may take any action necessary to enforce
19 a custody determination, including locating the child and requesting the enforcement of the determination by a prosecutor in
20 another jurisdiction.

21 (b) The [prosecutor] is authorized to utilize any available civil or criminal proceeding including proceedings under this [Act].

22 (c) The [prosecutor] shall act on behalf of the court and does not represent any party to the custody determination.

23 Comment

24
25 This section departs somewhat from the California model which provides a role for public authorities, in some cases, prior
26 to the rendering of the custody determination. However, since this Act is an enforcement statute, the role of the prosecutor does
27 not begin until there is a custody determination that is sought to be enforced. The Act does not authorize the prosecutor be
28 involved in the action leading up to the making of the custody determination. Nor does the Act mandate that the prosecutor be
29 involved in all cases referred to it. There is only so much time and money available for enforcement proceeding. Therefore the
30 prosecutor will eventually have to develop guidelines to determine which cases will receive priority.
31

32 The prosecutor is authorized to locate the child and enforce the custody proceeding. This Act does not attempt to suggest
33 how the prosecutor should exercise its duties under this Act. It is assumed in locating the child the prosecutor would proceed
34 as in a state missing person case. The prosecutor is authorized to utilize any criminal or civil proceeding to secure the enforcement
35 of the custody determination, including this Act. If the prosecutor proceeds pursuant to this Act, the prosecutor is subject to its
36 provision. For example, it is required to abide by the pleading and notice requirements of §§301 and 302. If the prosecutor
37 believes that the child is threatened by imminent harm, it may request an emergency order under §401.
38

39 The prosecutor does not represent any party to the custody determination. It acts as a "friend of the court." It's role is to
40 ensure that the custody determination is enforced.
41
42

1 **Section 502. Role of Law Enforcement** At the request of the [prosecutor] acting pursuant to [§501 of this Act], law
2 enforcement officials shall be authorized to take all actions reasonably necessary to locate a child and secure compliance with
3 a custody determination.
4

5 **Comment**
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7 This section authorizes law enforcement to assist in locating a child and enforcing a custody determination. There are two
8 policy choices to be made at this juncture. The first is to determine how the assistance of law enforcement is to be obtained. One
9 method is to indicate that law enforcement officers shall be involved when so requested by the prosecutor pursuant to §501. This
10 removes all doubt from law enforcement as to the propriety of the request.
11

12 Another approach would authorize law enforcement officers to act when requested by a private individual. However, there
13 would appear to be a requirement that law enforcement is acting to enforce a custody determination that is properly enforceable.
14 Thus there would probably need to be some requirement that law enforcement make a preliminary determination that the decree
15 was issued by a court that had jurisdiction to do so, that the person against whom it is being enforced had reasonable notice and
16 that the decree has not been modified, superseded or stayed. This seems like a determination that law enforcement officers are
17 not really competent to make.
18

19 The second issue is whether all reasonable means should be defined. This section does not attempt to do so but rather
20 leaves it to each individual jurisdiction to determine what is the appropriate role of law enforcement consistent with the purposes
21 of this Act.
22

1 **Section 503. Costs and Expenses.** All expenses and costs incurred by the [prosecutor] and law enforcement officials for
2 proceedings under this [Act] shall be assessed against the losing party, unless the losing party establishes that such an order would
3 be clearly inappropriate. If costs are not assessed against the losing party, the tribunal may assess some or all of the costs and
4 expenses against the prevailing party. A monetary award made pursuant to this section shall constitute a judgement and be
5 enforceable as such.

6
7 **Comment**
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9 One of the major problems of utilizing public officials to locate children and enforce custody and visitation determinations
10 is cost. This section authorizes the prosecutor and law enforcement to recover costs and fees against the losing party. It differs
11 from §402 in two ways. First, if the losing party cannot afford all the costs they may also be assessed against the prevailing party.
12 The theory here is that one who utilizes government services may expect to pay a user fee under certain circumstances. Second,
13 the monetary award is made an automatic judgement and can be enforceable as such.