

Uniform Unregulated Child Custody Transfer Act

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ON UNIFORM STATE LAWS

and by it

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IN ALL THE STATES

at its

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NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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Uniform Unregulated Child Custody Transfer Act

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David D. Biklen	Connecticut, <i>Chair</i>
Barbara A. Atwood	Arizona
Vincent C. Deliberato Jr.	Pennsylvania
Lyle W. Hillyard	Utah
Debra H. Lehrmann	Texas
James G. Mann	Pennsylvania
Laura McConnell-Corbyn	Oklahoma
Louise Ellen Teitz	Rhode Island
Stephanie J. Willbanks	Vermont
Thomas S. Hemmendinger	Rhode Island, <i>Division Chair</i>
Carl H. Lisman	Vermont, <i>President</i>

Other Participants

Arthur R. Gaudio	New Hampshire, <i>Reporter</i>
Ann M. Haralambie	Arizona, <i>American Bar Association Advisor</i>
Mark J. Cutrona	Delaware, <i>Style Liaison</i>
Tim Schnabel	Illinois, <i>Executive Director</i>

Copies of this act may be obtained from:

Uniform Law Commission
111 N. Wabash Ave., Suite 1010
Chicago, IL 60602
(312) 450-6600
www.uniformlaws.org

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Uniform Unregulated Child Custody Transfer Act

Prefatory Note

The unregulated transfer of custody of children occurs in the shadows of child welfare oversight. While the extent of the practice is impossible to determine precisely, reported cases suggest that it occurs throughout the United States. This act provides a needed regulatory framework for prohibiting the practice and comprehensive requirements to minimize the risk of disruption in adoptions.

Several years before commencement of the drafting of this act, public awareness began to focus on unregulated child custody transfers (see, e.g., Twohey, M, *The Child Exchange: Inside America's Underground Market for Adopted Children*, Reuters, Oct. 17, 2018, <https://www.reuters.com/investigates/adoption/#article>). Some parents found that after the birth or adoption of their child they experienced considerable difficulty or even an inability in caring for the child or effectively managing the child's behavior. In many of those cases the difficulty might have been due to the parents' own inexperience or lack of training and preparation in child-rearing, or a byproduct of the child's physical or psychological health challenges at the time of the adoption, or both. Perhaps after some initial unsuccessful attempts to obtain assistance and not knowing where else to turn, some of those parents decided to transfer custody of their child to another person – a person sometimes unknown to them whom they found through friends or acquaintances or, in some cases, a person found through the Internet or other media. In many cases, there was no evidence showing that the person to whom custody of the child had been transferred possessed the ability to care for the child. Nor, in some cases, did that person have the authority under state law to make decisions regarding the child's health, education, and welfare.

In some cases, the instigation for the transfers might have been more sinister. By means of the Internet or other media, potential child molesters or sex traffickers seeking children contacted parents who were experiencing difficulties parenting a child. Thereafter, custody of the child might have been transferred to the previously unknown individual.

Background

In 2013, after attention began to focus on unregulated custody transfers, a U.S. Working Group was formed, consisting of representatives from several federal agencies, state child welfare organizations, and the National Association of Attorneys General. The Working Group produced a report specifying three issues that should be addressed in legislation: (1) a clear provision stating that an unregulated custody transfer is a violation of state law; (2) authorization for the state child protection agency to investigate and interdict instances of unregulated transfers; and (3) a requirement that child-placing agencies provide better information and training for prospective adoptive parents so that they know what to anticipate when adopting children with certain special needs and how to deal with them (see Brown, K., Morrison, E., Nguyen, N., & Sweet, A., *Steps Have Been Taken to Address Unregulated Custody Transfers of Adopted Children*, Sept. 2015, Government Accountability Office, <http://www.gao.gov/products/GAO-15-733>).

Although several states adopted statutes dealing in some fashion with the issues involved in unregulated child custody transfers, the Utah statute closely followed the Working Group recommendations (Utah Stat., Section 78A-6-105(64) (definition of unregulated custody transfer); Section 62A-4a-711 (knowing act of unregulated custody transfer classified as Class B misdemeanor); Section 62A-4a-609 (requiring disclosure of information and training in high risk adoptions)). That statute provided some of the initial background and drafting input for this uniform act. Members of the Working Group and the Utah legislative drafting service were observers during the drafting of this uniform act and provided critical input. Other observers (child welfare advocates, adoption specialists, and representatives from various stakeholder groups such as the United States Department of State and the United States Immigration and Naturalization Service) also provided critical input.

The incidence of unregulated custody transfers is a matter of national concern. Congress has recently considered bills prohibiting the practice as part of the Child Abuse Prevention and Treatment Act, S. 1927, 117 Cong. (2021). This uniform act would complement any federal statutory enactment on this topic.

Summary of Act

The Uniform Unregulated Child Custody Transfer Act is composed of four articles.

Article 1 provides the definitions and scope of the act.

Article 2 prohibits a parent from transferring custody of a child to someone beyond family members and other specified categories of individuals if the parent intends to abandon the parent's rights and responsibilities regarding the child. The prohibition applies to a parent or guardian with custody of a child as well as to an individual with whom a child has been placed for adoption. The act further provides the child protection agency with the authority to perform home visits to investigate probable violations of the act and to take appropriate action to protect the child. It also prohibits solicitation and advertising through which a person seeks to obtain custody of, or locate, a child in violation of the article, or to facilitate such a transfer.

Article 3 deals with the adoption of children whose physical or psychological health or other circumstances at the time of a proposed placement for adoption would predict that the adoptive parents might face challenges in caring for the child. This article seeks to assure that prospective adoptive parents are informed about, and given instruction on dealing with, various issues before they might arise. It requires the child-placing agency through which an adoption is facilitated to provide the prospective adoptive parents with: (1) general information about adopting children with these health or behavioral issues; (2) specific information about the physical and psychological health of their prospective adoptive child; (3) guidance and instruction on dealing with the challenges that may present themselves in rearing the child placed with them; and (4) information on accessing certain post-placement and post-adoption financial assistance and support services to help preserve the adoption.

Article 4 provides, *inter alia*, the effective dates for Articles 2 and 3.

Uniform Unregulated Child Custody Transfer Act

[Article] 1

General Provisions

Section 101. Title

This [act] may be cited as the Uniform Unregulated Child Custody Transfer Act.

Section 102. Definitions

In this [act]:

(1) “Child” means an unemancipated individual under [18] years of age.

(2) “Child-placing agency” means a person with authority under other law of this state to identify or place a child for adoption. The term does not include a parent of the child.

(3) “Custody” means the exercise of physical care and supervision of a child.

(4) “Intercountry adoption” means an adoption or placement for adoption of a child who resides in a foreign country at the time of adoption or placement. The term includes an adoption finalized in the child’s country of residence or in a state.

(5) “Parent” means an individual recognized as a parent under other law of this state.

(6) “Person” means an individual, estate, business or nonprofit entity, public corporation, government or governmental subdivision, agency, or instrumentality, or other legal entity.

(7) “Record” means information:

(A) inscribed on a tangible medium; or

(B) stored in an electronic or other medium and retrievable in perceivable form.

(8) “State” means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any other territory or possession subject to the jurisdiction of the United States. The term includes a federally recognized Indian tribe.

Legislative Note: Insert the state’s age of majority in the bracket in paragraph (1).

Comment

1. The definition of a “child” is limited to an unemancipated child who is under 18 years of age, or the state’s age of majority if it is not 18. The provisions of this act are focused on a child who is in the custody of a parent, guardian, or individual with whom a child has been placed for adoption. Since an emancipated individual is no longer in the custody of the parent or other person, that individual is not a “child” for purposes of this act.

2. A “child-placing agency” is a person authorized under state or federal law to identify or place a child for adoption. The term includes incorporated and unincorporated entities, whether for-profit or non-profit, as well as individuals, including attorneys, who are authorized to identify or place children for adoption.

3. The definition of “custody” is derived from, and is substantially similar to, the definition of “physical custody” used in Section 102(14) of the Uniform Child-Custody Jurisdiction and Enforcement Act. Article 2 of this act is focused on situations in which a parent, guardian, or individual with whom a child has been placed for adoption transfers physical custody of a child.

4. An “intercountry adoption” is a placement for adoption of a foreign-born child who, at the time of adoption or placement, resides outside of the United States. An adoption of a foreign-born child is often finalized in the child’s country of residence before the child immigrates to the United States. An adoption of a foreign-born child that is finalized in a state of the United States is also included in the definition.

5. The definition of “parent” is determined by other law of the enacting state.

6. The definitions of “person”, “record”, and “state” are the standard Uniform Law Commission definitions of those terms.

Section 103. Limitation on Applicability

This [act] does not apply to custody of an Indian child, as defined in Section 4(4) of the Indian Child Welfare Act of 1978, 25 U.S.C. Section 1903(4)[, as amended], to the extent

custody is governed by the Indian Child Welfare Act of 1978, 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 federal law cited in this section and Section 202. 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. 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.*

Comment

This act does not apply to an Indian child to the extent that custody of the child is governed by the Indian Child Welfare Act, 25 U.S.C. Sections 1901 through 1963.

[Article] 2

Prohibition of Unregulated Custody Transfer

Section 201. Definitions

In this [article]:

(1) “[Guardian]” means a person recognized as a [guardian] under other law of this state.

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

Legislative Note: *If the state uses a term other than “guardian” to designate a person other than a parent that has the legal authority and duty to care for a child, insert that term in paragraph (1) and when “guardian” or “guardianship” is used in Sections 202 and 203.*

Comment

1. A “guardian” is a person other than a parent that has the legal authority and duty to care for a child as recognized under other law of the enacting state.

2. An “intermediary” is a person who seeks to facilitate or assist a parent, a third party, or both in bringing about a transfer of custody of a child. Compensation for any assistance in the transfer is not prerequisite in this definition. The term refers to a person who facilitates or assists in a child custody transfer that is in violation of Section 203(a). (See Sections 203(c) and 205(a)(3).)

Section 202. Applicability

This [article] does not apply to a transfer of custody of a child by a parent or [guardian] of the child to:

- (1) a parent of the child;
- (2) a stepparent of the child;
- (3) an adult who is related to the child by blood, marriage,[or] adoption[, or other relationship recognized by other law of this state];
- (4) an adult who, at the time of the transfer, had a close relationship with the child or the parent or [guardian] of the child for a substantial period, and whom the parent or [guardian] reasonably believes, at the time of the transfer, to be a fit custodian of the child;[or]
- (5) an Indian custodian, as defined in Section 4(6) of the Indian Child Welfare Act of 1978, 25 U.S.C. Section 1903(6)[, as amended], of the child[; or]
- (6) a member of the child's customary family unit recognized by the child's indigenous group under other law of this state].

Legislative Note: *If a state chooses to allow custody transfers to other individuals who have a legally recognized relationship to the child, it should add the individuals in the bracketed part of paragraph (3).*

If the state permits custody of a child by a member of the child's customary family unit as recognized by the child's indigenous group, the state should adopt bracketed paragraph (6).

Comment

1. The objective of Article 2 is to prohibit an unregulated custody transfer of a child. Section 203 prohibits custody transfers by a parent, guardian, or individual with whom the child has been placed for adoption unless the transfer has been conducted in accordance with state-recognized processes that assure the safety of the child.

Section 202 sets forth certain custody transfers that are exempt from the prohibition in Section 203. The exempt transfers are those made to a parent, stepparent, family member, family-like individual, Indian custodian, or member of the child's indigenous customary family.

2. A parent has an inherent right to custody of the parent's child and subparagraph (1) recognizes that right. Thus, for example, under this article a divorced or separated parent may transfer custody of a child to the other parent for the purpose of visiting or living with the other parent. Although that right may be limited to some extent by a child custody agreement or order, or other law of the state, that limitation is not within the scope of this act.

Even though a parent with custody of a child was never married to the child's other parent, the custodial parent may transfer custody of the child to the noncustodial parent to the extent not limited by other law of the state.

3. In subparagraph (2), custody transfers of a child to the child's stepparent are exempted from the prohibition of this article. A stepparent has a special relationship with the child arising from the marital relationship between the child's parent and the stepparent. Thus, a stepparent is treated in a fashion similar to a parent.

4. Subparagraph (3)(A) provides that custody transfers of a child to the child's adult family members are not intended to be within the prohibition of this article. For example, it is a common and accepted experience that custody of a child might be transferred to an adult relative of the child so that the child might spend some time, perhaps even a vacation, with the relative and the relative's children.

It is also not uncommon that custody of a child might be transferred to an adult family member when the parent is unable to care for the child. For example, a parent may be deployed in the armed services. Mechanisms to establish temporary legal custody of children when a custodial parent is deployed can be found in the Uniform Deployed Parent Custody and Visitation Act.

As another example, a parent may be incarcerated or experiencing medical difficulties. In those cases, the transfer of custody of a child to an adult family member is not prohibited by this article.

5. Subparagraph (3)(B) provides an additional exception for transfers to individuals who, at the time of the transfer, had a close relationship for a substantial period with the child or with the parent or guardian of the child, and whom the parent or guardian reasonably considers to be a fit custodian of the child.

An example of an individual included in subparagraph (3)(B) is someone sometimes known as a "fictive kin" (see, e.g., Ga. Code, Section 20-1-15). In many circumstances, especially in certain cultures, an individual who is not related to the child but who has a close and long-standing relationship with the child or parent is, effectively, considered by the family to be a family member. The reasons and origins of the relationship may be varied. For example, the relationship may have an origin in racial or ethnic culture, or it may arise from the parent and the "fictive kin" living closely or in the same neighborhood. For purposes of this article, such an individual has a sufficiently close relationship that the individual is treated in a fashion similar to a family member as long as the parent or guardian reasonably considers the individual to be a fit custodian of the child.

Another example of an individual included in subparagraph (3)(B) is someone who is *in loco parentis* with the child. Some laws recognize a version of the doctrine of *in loco parentis* under which an individual who has been treated as a parent by the child and who has formed a meaningful parental relationship with the child for a substantial period may be treated as a *de facto* parent (see Uniform Parentage Act, Section 609 (2017)). This doctrine involves not just a “close relationship” as with a fictive kinship, but a “meaningful parental relationship.”

The exemption of individuals identified in paragraph (3)(B) is based on a policy evaluation and determination that transfers to individuals in this category do not present the type of danger to a child that the article is intended to prevent. Because of the close relationship with the child or the child’s parent or guardian and because of the parent’s or guardian’s determination of fitness, they can be expected to be individuals who are able to provide for the health, safety, and well-being of the child. If a transfer excluded by this paragraph should, in fact, be harmful to the child, other provisions of this article (see Section 204) or other law of the enacting state are available to protect the child.

6. Subparagraph (4) recognizes an Indian custodian as an individual to whom a parent may transfer custody of a child. As relevant to this article, an Indian custodian is an Indian individual to whom temporary physical care, custody, and control of an Indian child may be transferred by a parent. An Indian custodian is recognized under the federal Indian Child Welfare Act, 25 USC Section 1903.

7. Subparagraph (5) permits a parent to transfer custody of a child to a member of the child’s customary family unit as recognized by the child’s indigenous group if that relationship is recognized by state law. An example is *hānai* in Hawaii (see *Interest of AB*, 145 Hawai’i 498, 454 P.3d 439 (2019)).

This subparagraph might also apply to a transfer of custody of an Indian child to an individual who is a member of the same tribe if that tribe is recognized by state law although not by federal law.

8. For some purposes it may be preferential, and in some cases required, that legal processes specified by other law of the state be followed to accomplish custody transfers to some of the individuals listed above. Although this section excludes certain transfers from the scope of this article, a custody transfer must nevertheless comply with legal processes required by other state law.

Section 203. Prohibited Custody Transfer

(a) Except as provided in subsection (b), a parent or [guardian] of a child or an individual with whom a child has been placed for adoption may not transfer custody of the child to another person with the intent, at the time of the transfer, to abandon the rights and responsibilities concerning the child.

(b) A parent or [guardian] of a child or an individual with whom a child has been placed for adoption may transfer custody of the child to another person with the intent, at the time of the transfer, to abandon the rights and responsibilities concerning the child only 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) cite to the state's safe haven law][; or]
- (6) . . .].

(c) 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). This prohibition does not apply if the person, as soon as practicable after the transfer, notifies the [child protection agency] or [law enforcement authority] of the transfer or takes appropriate action to establish custody under subsection (b).

(d) Violation of this section is a [insert class of offense].

(e) Violation of subsection (a) is not established solely because a parent or [guardian] that transfers custody of a child does not regain custody.

Legislative Note: A state should insert in subsection (c) and in Sections 204, 306, and 308 the title of the appropriate state agency responsible for child protective services.

A state that has a safe haven law should insert a reference to that law in subsection (b)(5).

The state should insert in subsection (b)(6) a reference to any process the state permits for transfer of custody of a child that is not included in subsection (b)(1) through (5).

Comment

Note: For purposes of Comments 1 through 6, below, a reference to “parent” includes a parent, guardian, or individual with whom a child has been placed for adoption.

1. Subsection (a) sets out the essential objective of this article: Except as permitted in subsection (b), a parent may not transfer custody of a child with the intent, at the time of the transfer, of abandoning the parent's rights and responsibilities regarding the child. The intent to abandon the parent's rights and responsibilities concerning a child means that the parent no longer intends to provide support or assistance for the minor child or take any responsibility for the child; the parent intends to cut parental and supportive bonds that bind the parent to the child. Effectively the parent is attempting to wash the parent's hands of any further association with and support for the child.

This section is designed to protect a child and prevent the child from being transferred into the custody of a person who might not be fit or able to provide for the health, safety, and well-being of the child. It is further designed to protect a child from being transferred to the custody of a person who might be a child trafficker or sexual molester. It also assures that the person to whom custody is transferred has the legal authority to make decisions regarding the health, education, and welfare of the child.

A permanent transfer of custody by methods other than those set out in subsection (b) is not permitted. Thus, for example, a power of attorney is not sufficient to carry out a permanent transfer of custody and relinquishment of all parental rights and responsibilities.

2. "An individual with whom a child has been placed for adoption" is separately identified in subsection (a) because, during the period between a child's placement with an individual and the finalization of the child's adoption, the individual is not yet the parent of the child. Nor, in most cases, is the individual a guardian of the child in the sense that a guardian is appointed by a judicial decree. To assure protection of such a child from an unregulated custody transfer by the individual, the individual is specifically included here.

3. The intent aspect in subsection (a) is significant. If a transfer of custody of a child is not made with the intent of abandoning the rights and responsibilities of the parent, the transfer does not violate this subsection.

For example, a transfer of custody of a child to a childcare provider or babysitter is not normally made with an intent to abandon the parent's rights and responsibilities regarding the child. The transfer of custody is temporary, and the parent does not cease parental obligations toward the child. At the end of a workday the parent will pick up the child from daycare, or when the parent returns home from an evening event the parent will regain custody of the child from the babysitter. The parent never intended to abandon the parent's rights and responsibilities concerning the child.

Transfers for longer periods, if made without an intent to abandon the parent's rights and responsibilities regarding the child, do not violate this section. For example, transferring custody of a child to a residential school or residential treatment facility, or to live with someone else while the parent maintains contact, makes legal decisions, and is otherwise available to make parental decisions does not violate this section.

4. Subsection (b) allows a parent to transfer custody of a child if that transfer is

accomplished through one of the processes listed in subsections (b)(1) through (b)(6). These processes are recognized by other state law as legitimate procedures by which a parent may transfer custody of a child and terminate the parent's rights and responsibilities regarding the child. This assures that the person to whom custody is transferred has the legal authority to make decisions regarding the health, education, and welfare of the child.

Thus, this section does not prohibit a transfer of custody of a child:

- (a) to a prospective adoptive parent incident to an adoption or to a guardian incident to a guardianship (subsection (b)(1));
- (b) to an individual incident to a judicial award of custody (subsection (b)(2));
- (c) through a placement by a child-placing agency, including a state agency, such as in a foster care placement or placement for adoption (subsection (b)(3)); or
- (d) in accordance with any judicial or tribal action (subsection (b)(4)).

Subsection (b)(5), if enacted by a state, exempts a child custody transfer from the prohibition of this section if the transfer is made in accordance with the state's safe haven law. Thus, for example, a parent might leave an infant in accordance with the state's safe haven law with a designated person or agency with the intent to terminate parental rights and responsibilities regarding the child (see Ariz. Rev. Stat. Section 47.10.013(c)).

Subsection (b)(6), if enacted by a state, exempts a child custody transfer from the prohibition of this section if the transfer is made in accordance with other specified law of the state.

5. Subsection (c) prohibits a third party from obtaining custody of a child in a situation in which the parent is prohibited from transferring custody of the child by subsection (a). In doing so, it imposes a prohibition on the receiving person that is reciprocal in nature to the prohibition imposed on the parent.

Subsection (c) also prohibits a person from acting as an intermediary in a child custody transfer if the transfer is prohibited by subsection (a). As defined in Section 201(2), an "intermediary" is a person who facilitates or assists either the transferee or transferor, or both, in accomplishing the custody transfer. The intermediary need not receive compensation to violate this provision.

To be in violation of this subsection, the receiving party or intermediary must know or reasonably should know that the custody transfer would be in violation of subsection (a). Thus, it is possible in an appropriate circumstance that a receiving party or intermediary might lack sufficient *mens rea* to be guilty of a violation of this subsection.

6. Subsection (d) provides that a violation of this section is a crime. The subsection applies to a parent who transfers custody of a child in violation of subsection (a). It also applies to a person who receives or solicits the transfer of a child and to an intermediary who facilitates the transfer of a child in violation of subsection (c).

The exact degree or level of crime is left to the state in insert. A state may insert the category of crime it determines appropriate, e.g., felony, misdemeanor, or infraction. A state may also designate a violation of this section as a specific crime defined by other state law, e.g., child endangerment or abandonment. The penalties attendant to a violation would then be determined by the other state law.

7. Subsection (e) recognizes that although a parent or guardian might transfer custody of a child without intending to abandon the rights or responsibilities of the parent or guardian regarding the child, subsequent facts or circumstances might occur that result in the transfer becoming permanent without any intent by the parent. To deal with such a circumstance, it provides that the mere fact that the parent does not regain custody of the child does not, by itself, establish that the parent, when initiating the transfer of custody, had the requisite intent. Corroborating evidence would be needed to prove the intent.

For example, a parent or guardian who is suffering from a substance use disorder might transfer custody of a child to another individual intending the transfer to be temporary, thereby permitting the parent or guardian to obtain treatment for the disorder. If the parent or guardian should then become institutionalized or fail to recover from the disorder and not regain custody of the child, the fact that the transfer has effectively become permanent does not, of itself, establish that the initial transfer of the child was made with an intent to abandon the rights or responsibilities of the parent or guardian regarding the child. Furthermore, even if the parent or guardian recovers from the disorder but allows the custody with the transferee to continue, that does not establish, per se, the requisite intent at the time of the transfer of custody. Other factors may be present to explain the continuance of the custody of the child with the transferee.

This subsection applies only to parents and guardians. It does not apply to an individual with whom a child has been placed for adoption.

Section 204. Authority and Responsibility of [child protection agency]

(a) If the [child protection agency] has [probable cause] [a reasonable basis] to believe that a person has transferred or will transfer custody of a child in violation of Section 203(a), the [agency] may conduct a home visit as provided by other law of this state and take appropriate action to protect the welfare of the child.

(b) If the [child protection agency] conducts a home visit for a child adopted or placed through an intercountry adoption, the [agency] shall:

(1) prepare a report on the welfare and plan for permanent placement of the child;
and

(2) provide a copy to the United States Department of State.

(c) This [act] does not prevent the [child protection agency] from taking appropriate action under other law of this state.

Comment

1. Subsection (a) allows the child protection agency to conduct a home visit in accordance with other law of the state and to take action to protect the welfare of the child. A home visit, for purposes of the section, is usually a visit to the home where the child resides. However, it may be a visit to any setting at which the child is located. The processes and procedures for a home visit will normally be specified by other law of the state.

The purpose of this subsection is not only to allow the department to ascertain whether there has been a transfer in violation of Section 203(a), but also, in cases in which a transfer has not yet occurred, to allow the department to assist the parent, guardian, or individual with whom the child has been placed for adoption. In some cases that assistance might involve counseling of the parent, guardian, or individual. In others it might involve advice and assistance in using the legitimate means of transferring custody of a child as specified in Section 203(b).

2. In many instances when a child is adopted or placed through an intercountry adoption, the child's country of origin requests the United States Department of State to inform it if custody of the child has been transferred in an unregulated custody transfer. To assist the Department of State in obtaining information in this regard, subsection (b) requires the child protection agency, if it conducts a home visit under Section 204(a), to provide a copy of its report on the welfare of the child and an assessment on the plan for permanent placement of the child to the Department.

At the time of approval of this act by the Uniform Law Commission, the appropriate office within the Department of State to which the report should be submitted is the Office of Children's Issues, Bureau of Consular Affairs.

3. Subsection (c) makes clear that regardless of the other provisions of this article which give wide latitude to the custody transfer decisions of the parent, guardian, or individual with whom the child has been placed for adoption, the child protection agency may nonetheless take appropriate action to protect the child from harm.

Section 205. Prohibited Soliciting or Advertising

(a) A person may not solicit or advertise to:

(1) identify a person to which to make a transfer of custody in violation of Section 203(a);

(2) identify a child for a transfer of custody in violation of Section 203(c); or

(3) act as an intermediary in a transfer of custody in violation of Section 203(c).

(b) Violation of this section is a [insert class of offense].

Comment

1. Child custody transfers that would violate Section 203 are not made to individuals with preexisting familial or associational ties to the parent, guardian, or individual with whom the child has been placed for adoption (see Section 202). To find a prospective transferee and arrange a transfer it is, therefore, usually necessary to search for and locate an interested party. That search might be accomplished by some form of solicitation or advertising.

This section does not limit the prohibited solicitation or advertising to any particular medium. That advertising might involve use of the Internet through which advertisements or notices are placed stating that a parent, guardian, or individual is seeking to transfer custody of a child or that a third party is seeking to locate a child for a custody transfer. However, other forms of communication might also be used, such as newspaper advertisements or announcements.

Even though solicitation or advertising is initiated to transfer custody of a child, it might not result in a completed transfer. Nonetheless, solicitation or advertising, an initial step in a prohibited custody transfer, has been performed. To prevent this precursor step, advertising for the transfer is separately prohibited.

2. Soliciting and advertising may be seen as a form of speech. The First Amendment of the United State Constitution protects freedom of speech and does not allow the government to interfere with that speech. However, that prohibition is not absolute. The government may prohibit speech if that speech is related to an illegal activity. (*Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 93 S.Ct. 2553, 23 L.Ed.2d 669 (1973)). Indeed, advertising to commit a crime is not protected speech (*U.S. v. Williams*, 553 U.S. 285, 128 S.Ct. 1830, 170 L.Ed.650 (2008)). The prohibition on solicitation and advertising in this section is directly aimed at and limited to criminal activity prohibited by Section 203.

Even if advertising or soliciting for an unregulated custody transfer were deemed protected commercial speech, a limitation of that speech is legitimate if it advances a compelling state interest that is narrowly drawn to focus on speech aimed at a violation of a core prohibition in the act (*Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of N.Y.*, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed 341 (1980)).

The protection of children from the dangers that may result from an unregulated custody transfer is a compelling state interest. As set forth in Section 203 and further described in its Comments, this act is designed to prevent a child from suffering harm if the child is transferred to the care of a person who lacks the authority under law to make decisions regarding the child's health, education, and welfare. It is also designed to protect a child from the potential of being transferred into the custody of a person who might be a child trafficker or sexual molester.

This prohibition on solicitation or advertising is narrowly focused on speech that is aimed at a violation of a core prohibition of the act. The core prohibition in the act is an unregulated child custody transfer. As noted above, some form of solicitation or advertising is usually involved in locating persons to whom or from whom custody of a child might be transferred. In reality, solicitation or advertising is an initial step in achieving an unregulated child custody transfer. The limitation on speech set forth in this section is narrowly focused on that core prohibition. Only speech that is aimed at implementing or facilitating an unregulated child custody transfer is prohibited. No other speech is affected. This limitation will not have a wider sweep than is necessary to accomplish the core prohibition of the act.

3. Three specific situations of prohibited solicitation or advertising are identified. A parent, guardian, or individual with whom a child has been placed for adoption might initiate the solicitation or advertising in an attempt to find a person to whom the parent might transfer custody of a child in violation of Section 203(a). Alternatively, a third person might initiate the solicitation or advertising to locate a child, i.e., the third person is seeking to locate a child whose custody would be transferred to that person in violation of Section 203(c). Finally, an intermediary seeking to facilitate or assist a parent, guardian, or individual, or a third party, or both with a custody transfer that would violate Section 203(c) might initiate the solicitation or advertising.

It should be noted that even though advertising prohibited by this section might be separately initiated by all three parties (a parent, guardian, or individual, a transferee, and an intermediary) in any individual custody transfer, it need not be. Only one party, for example an intermediary, might conduct the advertising. In that case, although all three parties might engage in a child custody transfer prohibited by Section 203, only one of them will have engaged in advertising prohibited by this section.

4. Subsection (b) states that a violation of this section is a crime. The exact degree or level of crime is left to the state to insert. A state may insert the category of crime it determines appropriate, e.g., felony, misdemeanor, or infraction. A state may also designate a violation of this section as a specific crime defined by other state law, e.g., solicitation to transfer custody of a child. The penalties attendant to a violation would then be determined by the other state law.

5. Section 230 of the Communications Decency Act (47 U.S.C. Section 230) currently protects interactive computer service platforms from liability due to solicitation or advertising conducted by other persons using the service platform. However, Section 230 does not protect the persons who use such a platform to conduct the solicitation or advertising.

[Section 206. Enforcement]

The [law enforcement authority] may investigate a possible violation of this [article] and take legal action as provided by law of this state.]

Legislative Note: *A state should omit this section if other law of the state already authorizes a state officer to take action to enforce this act.*

Comment

This section provides the appropriate law enforcement authority with the authority to investigate and take legal action to enforce the article in accordance with law of the state. Thus, it has the authority to seek criminal sanctions under Sections 203(c) and 205(b), or to bring other actions as authorized in other state law such as seeking injunctive relief.

[[Article] 3

Information and Guidance

Legislative Note: Article 3 is optional because other law of the state may require a child-placing agency to provide information to and require preparation for a prospective adoptive parent comparable to that required in this article. If the state has comparable requirements, it need not enact this article. If the state does not have comparable requirements, it should enact this article.

Section 301. Definition

In this [article], “prospective adoptive parent” means an individual who has been approved or permitted under other law of this state to adopt a child.

Comment

A “prospective adoptive parent” in this article is an individual who has already been approved or permitted to adopt a child. The approval process and requirements are governed by other state law. The term applies to an individual who has been approved to adopt a child even though a child has not yet been placed with the individual for adoption. It also applies to an individual with whom a child has been placed for adoption, but the adoption has not yet been finalized.

Section 302. Scope

This [article] applies to placement for adoption of a child who:

- (1) has been or is in foster or institutional care;
- (2) previously has been adopted in a state;
- (3) has been or is being adopted under the law of a foreign country;
- (4) has come or is coming to a state from a foreign country to be adopted; or
- (5) is not a citizen of the United States.

Comment

Article 3 is designed to enhance the likelihood of a positive outcome for an adoption in which there is a heightened degree of risk for a disruption or dissolution. Its provisions apply only to adoptions in which circumstances at the time of the placement of the child with a prospective adoptive parent indicate that there is a heightened degree of risk that the adoption might be disrupted or dissolved.

Section 302 provides a list of circumstances that are likely to result in a heightened degree of risk for disruption or dissolution of the adoption. The list was developed from a review of placements identified by some states that have already enacted provisions similar to those in this article, as well as from the experiences and opinions of child-placement professionals.

Section 303. General Adoption Information

Within a reasonable time before a child-placing agency places a child for adoption with a prospective adoptive parent, the agency shall provide or cause to be provided to the prospective adoptive parent general adoption information. The information must address:

(1) possible physical, mental, emotional, and behavioral issues concerning:

(A) identity, loss, and trauma that a child might experience before, during, or after adoption; and

(B) a child leaving familiar ties and surroundings;

(2) the effect that access to resources, including health insurance, may have on the ability of an adoptive parent to meet the needs of a child;

(3) causes of disruption of an adoptive placement or dissolution of an adoption and resources available to help avoid disruption or dissolution; and

(4) prohibitions under Sections 203 and 205.

Comment

1. Section 303 is the first of four sections that require a child-placing agency involved in placement of the child to provide information, guidance, or assistance to the prospective adoptive parent. Each section requires the provision of a different kind of information, guidance, or assistance and, in some cases, at a different time during the progress of a placement or adoption.

2. Subsection (a) requires the provision of general adoption information to a prospective adoptive parent regarding adoptions that have a heightened degree of risk for disruption. The

information that must be provided is generic and not child-specific, i.e., it is not focused on any particular child. The information is, however, related in a general way, to the types of issues that might be encountered during or after an adoption that has a heightened degree of risk for disruption or dissolution.

The objective of this section is to inform a prospective adoptive parent about various matters that the parent might not have appreciated and that might affect the parent's decision to proceed further along the adoption pathway. By requiring the provision of the information, the section seeks to enhance the chances that a placement, once made, will ultimately result in a successful adoption.

Subsection (a) also specifies that the information must be provided to a prospective adoptive parent within a reasonable time before the child-placing agency places the child with the parent. Since this adoption information is generic, it may be provided in a standard format. Further, the child-placing agency need not personally provide the information to the parent if the agency causes the information to be provided to the parent. Nevertheless, the provider should do more than merely dispense the information to the prospective adoptive parent. It should take reasonable steps to confirm that the parent grasps the information and understands it.

3. Subsections (b)(1), (b)(2), and (b)(3) require distribution of information about a variety of matters that might arise in an adoption that has a heightened degree of risk for disruption or dissolution.

4. Subsection (b)(4) requires the child-placing agency to inform the prospective adoptive parent about the prohibitions on an unregulated custody transfer of a child and solicitation or advertising for an unregulated custody transfer set out in Article 2.

Section 304. Information About Child

(a) Except as prohibited by other law of this state, within a reasonable time before a child-placing agency places a child for adoption with a prospective adoptive parent, the agency shall provide or cause to be provided to the prospective adoptive parent information specific to the child that is known to or reasonably obtainable by the agency and material to the prospective adoptive parent's informed decision to adopt the child. The information must include:

- (1) the child's family, cultural, racial, religious, ethnic, linguistic, and educational background;
- (2) the child's physical, mental, emotional, and behavioral health;
- (3) circumstances that might adversely affect the child's physical, mental,

emotional, or behavioral health;

(4) the child's medical history, including immunizations;

(5) the medical history of the child's genetic parents and siblings;

(6) the history of an adoptive or out-of-home placement of the child and the reason the adoption or placement ended;

(7) the child's United States immigration status;

(8) medical, therapeutic, and educational resources, including language-acquisition training, available to the adoptive parent and child after placement for adoption or adoption to assist in responding effectively to physical, mental, emotional, or behavioral health issues; and

(9) available records relevant to the information in paragraphs (1) through (8).

(b) If, before an adoption is finalized, additional information under subsection (a) that is material to a prospective adoptive parent's informed decision to adopt the child becomes known to or reasonably obtainable by the child-placing agency, the agency shall provide the information to the prospective adoptive parent.

(c) If, after an adoption is finalized, additional information under subsection (a) becomes known to the child-placing agency, the agency shall make a reasonable effort to provide the information to the adoptive parent.

Comment

1. Subsection (a) requires provision of child-specific information to the prospective adoptive parent before placement of the child with the parent. The information is about the specific child that the child-placing agency is proposing to place with the parent.

The purpose of this requirement is twofold: First, by informing the prospective parent about various matters in the child's personal history and background, it will assist the parent in making a realistic determination about the parent's willingness and ability to address the needs of the particular child and whether to proceed further in the adoption. It seeks to enhance the

chances of a successful adoption by avoiding surprises to the parent at a later date that might result in a disrupted adoption or perhaps in a desire to transfer custody of the child in violation of Article 2.

Second, it seeks to provide information that may be useful or essential to the parent or child at a later date. For example, as a child ages information regarding the child's health history might be significant in determining provision of medical care to the child.

2. Subsection (a) provides that the information must be provided by the child-placing agency unless the distribution of that information is prohibited by other law of the state. This provision recognizes that state law might prohibit provision of certain private information. For example, the genetic parent's health information might be considered private and protected by the state's privacy laws. As limited by that provision, the child-placing agency must nevertheless provide information to the prospective adoptive parent that is "known or reasonably obtainable by the agency."

As with information required to be provided by Section 303(a), the child-placing agency need not personally provide the information to the parent if the agency causes it to be provided to the parent. Nevertheless, the provider should do more than merely dispense the information to the prospective adoptive parent. The provider should take reasonable steps to confirm that the parent has grasped the information and understands it.

3. The child-specific matters about which the child-placing agency must inform the prospective adoptive parent are listed.

Subsection (a)(1) requires information on various aspects of the child's general background.

Subsection (a)(2) requires information on various aspects of the child's health.

Subsection (a)(3) requires information on previous circumstances, if any, that might adversely affect aspects of the child's health.

Subsection (a)(4) requires information on the child's medical history.

Subsection (a)(5) requires information on the medical history of the child's genetic family.

Subsection (a)(6) requires information regarding any prior adoptive or out-of-home placement (e.g., foster care, congregate care, etc.) and the reason the adoption or placement ended.

Subsection (a)(7) requires information about the child's immigration status if the child is not a United States citizen.

Subsection (a)(8) requires information about various post-placement and post-adoption resources that are available to the parent to assist in responding to the child's health issues.

Subsection (a)(9) requires that available records be provided regarding matters listed in the prior subsections.

4. Subsection (b) provides that if, after placement and before finalization of the adoption, additional material information required by subsection (a) about the child becomes known or reasonably obtainable to the child-placing agency, it must provide that information to the

prospective adoptive parent. It imposes a continuing duty on the agency until the adoption is finalized to act reasonably in obtaining material information and provide it to the parent.

5. Subsection (c) pertains to the child-placing agency's duty to provide information after the adoption is finalized. It states that if information required by subsection (a) about the child does, in fact, become known to the child-placing agency after the adoption is finalized, the agency must make reasonable efforts to locate and provide the information to the adoptive parents. It does not place a duty on the agency to continue to make efforts to obtain the information but requires the agency to provide information to the parents if it should obtain it. It also recognizes that although an agency might not have up-to-date location information about the parents, the agency must make reasonable efforts to locate them to provide the information.

Section 305. Guidance and Instruction

(a) A child-placing agency placing a child for adoption shall provide or cause to be provided to the prospective adoptive parent guidance and instruction specific to the child to help prepare the parent to respond effectively to needs of the child that are known to or reasonably ascertainable by the agency.

(b) The guidance and instruction under subsection (a) must address, if applicable:

(1) the potential effect on the child of:

- (A) a previous adoption or out-of-home placement;
- (B) multiple previous adoptions or out-of-home placements;
- (C) trauma, insecure attachment, fetal alcohol exposure, or malnutrition;
- (D) neglect, abuse, drug exposure, or similar adversity;
- (E) separation from a sibling or significant caregiver; and
- (F) a difference in ethnicity, race, or cultural identity between the child

and the prospective adoptive parent or other child of the parent;

(2) information available from the federal government on the process for the child to acquire United States citizenship; and

(3) any other matter the child-placing agency considers material to the adoption.

(c) The guidance and instruction under subsection (a) must be provided:

(1) for adoption of a child residing in the United States, a reasonable time before the adoption is finalized; or

(2) for an intercountry adoption, in accordance with federal law.

Comment

1. Subsection (a) requires a child-placing agency to provide guidance and instruction to an adoptive parent to prepare the parent to respond effectively to the needs of the child. As with information required to be provided by Sections 303 and 304, the child-placing agency need not personally provide the guidance and instruction to the parent if the agency causes it to be provided to the parent. Nevertheless, the provider should do more than merely dispense the guidance and instruction to the prospective adoptive parent. Guidance and instruction are educational processes, and the provider should take reasonable steps to confirm that the parent has gained the necessary education.

2. Subsection (b) sets out the matters that the guidance and instruction must address. They generally relate to some of the matters about which the child-placing agency must previously provide information to the prospective adoptive parents under Sections 303 and 304(a).

3. Subsection (c)(1) requires the guidance and instruction for a prospective adoptive parent of a child residing in the United State to be provided a “reasonable time” before the adoption is finalized. A “reasonable time” will depend on the circumstances, but it must be sufficient to provide the prospective adoptive parent reasonable time to consider the guidance and instruction and to make an informed decision as to whether to proceed with the adoption.

4. Providing guidance and instruction to a prospective adoptive parent after a child in an intercountry adoption has been placed, albeit before the adoption is finalized, might be too late for the parent’s informed decision on adoption. If the adoption is finalized after the child has left the child’s country of origin (for example, in the state where the parent resides), the adoptive parent has already made a significant emotional and financial decision before receiving important guidance and instruction on the adoption. To deal with that circumstance, subsection (c)(2) requires that the guidance and instruction be provided to the prospective adoptive parent in an intercountry adoption in accordance with federal law, which at the time of the approval of this uniform act by the Uniform Law Commission is before the child enters the United States.

Section 306. Information About Financial Assistance and Support Services

On request of a child who was placed for adoption or the child’s adoptive parent, the child-placing agency placing the child or the [child protection agency] shall provide information

about how to obtain financial assistance or support services:

(1) to assist the child or parent to respond effectively to adjustment, behavioral health, and other challenges; and

(2) to help preserve the placement or adoption.

Comment

1. This section requires the child-placing agency or the child protection agency to provide information on how to access support services and financial assistance to help preserve a placement or adoption. It is designed to allow the state to take advantage of funds available to it under the federal Family First Prevention Services Act of 2017 as well as from other sources.

If information is requested by either a child or a parent, it must be provided regardless of whether the request is made before or after the adoption is finalized.

2. The agency or department must provide information on how to obtain financial assistance or support services for the purpose of:

(a) assisting the child or parent to respond effectively to adjustment, behavioral, and other challenges; or

(b) assisting in the preservation the placement or adoption.

Section 307. Child-Placing Agency Compliance

(a) The [law enforcement authority] may investigate an allegation that a child-placing agency has failed to comply with this [article] and commence an action for injunctive or other relief or initiate an administrative proceeding against the child-placing agency to enforce this [article].

(b) The [state licensing authority] may initiate a proceeding to determine whether a child-placing agency has failed to comply with this [article]. If the [authority] finds that the child-placing agency has failed to comply, the [authority] may suspend or revoke the agency's license or take other action permitted by law of this state.

Legislative Note: In subsection (a), a state should insert the appropriate law enforcement authority that will investigate and bring a proceeding under subsection (a).

Comment

1. Article 3 places a number of obligations regarding the provision of information and services on the child-placing agency.

Subsection (a) allows the law enforcement authority to investigate an alleged failure of an agency to comply with this article. The law enforcement authority may bring proceedings to enforce the article. Among the various forms of relief the law enforcement authority might seek is injunctive relief. Other forms of relief might also be available under state law.

2. Subsection (b) allows the state licensing authority, which in most cases previously would have issued an operating license to a child-placing agency, to suspend or revoke that license if the agency fails to comply with this article. The authority may also take other actions permitted by state law.

Section 308. Rulemaking Authority

The [child protection agency] may adopt rules under [cite to state administrative procedure act] to implement Sections 303, 304, 305, and 306.]

Comment

This section authorizes the child protection agency to adopt rules to establish the content and manner of providing the information and the guidance and instruction required in Article 3.

[Article] 4

Miscellaneous Provisions

Section 401. Uniformity of Application and Construction

In applying and construing this uniform act, a court shall consider the promotion of uniformity of the law among jurisdictions that enact it.

Comment

This provision encourages judicial construction that will maintain uniformity among the various states adopting the act.

Section 402. Relation to Electronic Signatures in Global and National Commerce

Act

This [act] modifies, limits, or supersedes the Electronic Signatures in Global and National

Commerce Act, 15 U.S.C. Section 7001 et seq.[, as amended], but does not modify, limit, or supersede 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in 15 U.S.C. Section 7003(b).

Legislative Note: *It is the intent of this act to incorporate future amendments to the cited federal law. 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 should omit the phrase “, as amended”. A state in which, in the absence of a legislative declaration, future amendments are incorporated into state law also should omit the phrase.*

Comment

This section responds to the specific language of the Electronic Signatures in Global and National Commerce Act and is designed to avoid preemption of state law under that federal legislation.

Section 403. Transitional Provisions

[(a)] [Article] 2 applies to:

- (1) a transfer of custody on or after [the effective date of this [act]]; and
- (2) soliciting or advertising on or after [the effective date of this [act]].

[(b) [Article] 3 applies to placement of a child for adoption more than [60] days after [the effective date of this [act]].]

Legislative Note: *If the state enacts Article 3, Section 403(b) also should be enacted.*

Comment

1. Subsection (a)(1) provides that the provisions in [Article] 2 regarding child custody transfers apply to transfers that occur after the effective date of the act.

Subsection (a)(2) provides that the provisions in [Article] 2 regarding advertising apply to transfers that occur after the effective date of the act.

2. Subsection (b) provides that Article 3 applies to placements that occur more than 60 days after the effective date of the act. This period allows time for child-placing agencies to prepare for and apply the provisions of Article 3.

[Section 404. Severability

If a provision of this [act] or its application to a person or circumstance is held invalid, the invalidity does not affect another provision or application that can be given effect without the invalid provision.]

Legislative Note: *Include this section only if the state lacks a general severability statute or a decision by the highest court of the state adopting a general rule of severability.*

[Section 405. Repeals; Conforming Amendments]

(a) . . .

(b) . . .].

Legislative Note: *A state should examine its statutes to determine whether conforming revisions are required by provisions of this act relating to unregulated child custody transfers and provision of information and guidance to prospective adoptive parents. See Articles 2 and 3.*

Section 406. Effective Date

This [act] takes effect . . .