

D R A F T

FOR DISCUSSION ONLY

UNIFORM CHILD ABDUCTION PREVENTION ACT

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM LAWS

For March 17-19, 2006 Drafting Committee Meeting

WITH PREFATORY NOTE AND COMMENTS

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By

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM LAWS

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UNIFORM CHILD ABDUCTION PREVENTION ACT

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UNIFORM CHILD ABDUCTION PREVENTION ACT

Prefatory Note

In August, 2003, the National Conference of Commissioners on Uniform State Laws (NCCUSL) appointed a study committee to explore the feasibility of a uniform law to prevent child abduction in international custody disputes. The Joint Editorial Board for Uniform Family Law Acts in October 18, 2003, urged the NCCUSL Committee on Scope and Program to recommend the creation of a drafting committee. NCCUSL appointed a Drafting Committee on the Prevention of International Child Abduction with Lyle Hillyard, Utah, as Chair and Linda Elrod as Reporter. In addition to the drafting committee and official advisors, observers are Jeff Atkinson, ABA Family Law Section; Richard Barry, AAML; Teresa Lauderdale, parent; Texas; Jenni Thompson, consultant, formerly with the Polly Klaas Foundation; and Lawrence R. Whyte, parent, Houston, Texas.

The first meeting was held on April 9-11, 2004. The drafting committee asked, and Scope allowed it, to expand the scope to include domestic as well as international abductions because all abductions start as domestic abductions. The drafting committee met September 10-12, 2004; April 8-10, 2005; July 26-27 for first reading at the annual meeting; November 11-12, 2005; and March 17-19, 2006.

Child abduction is a serious problem. The Office of Juvenile Justice and Delinquency Prevention estimated that 262,100 children were abducted in 1999; 203,900 of them (or 78 per cent) were abducted by a family member. There are 1773 family abductions for every stranger abduction. Approximately 1000 of the abductions were international. *See* Second National Incidence Studies of Missing, Abducted, Runaway, and Thrownaway Children (NISMART-2) (Oct. 2002).

Many abductions occur before the court has entered an order or decree concerning the custody of the child. Families going through custody disputes and divorce proceedings are the highest risk group for potential abductions. *AMERICA'S HIDDEN CRIME: WHEN THE KIDNAPPER IS KIN* 10-11 (Polly Klaas Foundation 2004). Many existing custody determinations do not contain sufficient provisions to prevent an abduction because the orders are too vague or contain no restrictions. Judges need information about abduction risk factors so that they can place appropriate restrictions to prevent abductions either pre or post decree. Dealing appropriately with the risk factors at the time of a custody dispute or family law proceeding may be the best way to protect children from abduction.

Three states have directly tackled the issue by enacting specific child abduction prevention statutes. *See* ARK. STAT. ANN. § 9-13-401-407 (2005); TEX. FAM. CODE §153.501-§153.503; CAL. FAM. CODE § 3408 (covering both international and domestic abductions). All were passed with little opposition and set a framework to alert courts to the potential risks of, and means of preventing, child abduction. Other states list abduction risk factors. *See* FLA. STAT. §

61.45; OR. REV. STAT. § 109.035.

This Act will fill the void in the majority of states by identifying families at risk for abduction and providing methods to prevent the abduction of children. The goal is to prevent abduction by either parent or others acting in concert with them. This Act aims to prevent imminent and future abductions, and future violations of custody determinations (i.e. violation of custody and visitation rights specified in court orders).

1 **UNIFORM CHILD ABDUCTION PREVENTION ACT**

2
3 **SECTION 1. SHORT TITLE.** This [act] may be cited as the Uniform Child Abduction
4 Prevention Act.

5 **Comment**

6
7 The purpose of this Act is to deter domestic and international child abductions by parents
8 or any persons acting on behalf of the parent through identification of risk factors and imposition
9 of preventive measures. The Act is civil law. It is designed to ensure that courts are aware of
10 and use necessary measures to prevent the abduction of a child by parents or those acting on their
11 behalf.

12
13 This Act complements other existing legislation aimed at protecting children from
14 abduction. All states specify the jurisdictional requirements for making and enforcing a child
15 custody determination. The Uniform Child Custody Jurisdiction and Enforcement Act
16 (UCCJEA), 9 U.L.A. Part I 657 (1999), enacted in forty-five states, and the Uniform Child
17 Custody Jurisdiction Act, 9 U.L.A. Part I 115 (1988) require that the child have a sufficient
18 relationship to the state issuing the initial decree. In most instances this state will be the state in
19 which the child has lived for six months preceding the filing of the petition. The Parental
20 Kidnapping Prevention Act of 1980 (“PKPA”), 28 U.S.C. § 1738A, requires that states give full
21 faith and credit to sister state decrees made in accordance with the principles of the PKPA, in an
22 effort to avoid shopping for a friendly forum.

23
24 If prevention fails, the UCCJEA also includes enforcement procedures. If the abduction
25 is international, over seventy countries have ratified a Hague Convention that facilitates the
26 return of an abducted child to the child’s habitual residence. *See* The Hague Convention on the
27 Civil Aspects of International Child Abduction, 51 Fed. Reg. 10494 et seq. (1986), and the
28 International Child Abduction Remedies Act (ICARA), 42 U.S.C. §§ 11601-11610. There are
29 also federal laws to help locate missing children: Missing Children Act, 28 U.S.C. § 534 (1982);
30 Missing Children Search Assistance Act; and the National Child Search Assistance Act, 42
31 U.S.C. §§ 5779 & 5780 (1990).

32
33 Federal and state laws also make parental kidnapping a crime. *See* International Parental
34 Kidnapping Crime Act (IPKCA), 18 U.S.C. § 1204; The Fugitive Felon Act, 18 U.S.C. § 1073;
35 The Extradition Treaties Interpretation Act of 1998, 18 U.S.C. § 3181; and the Prosecutorial
36 Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act of 2003,
37 Pub. L. 108-21, 117 Stat. 650(AMBER Alert Program). Currently, every state criminally forbids
38 custodial interference by parents or relatives of the child. State laws differ as to the elements of
39 the offenses, the punishments given, and whether a custody order must exist in order for such

1 criminal laws to apply. In addition to criminal actions, a court may find an abductor in contempt
2 and there are tort actions for custodial interference.
3

4 **SECTION 2. DEFINITIONS.** In this [act]:

5 (1) “Abduction” means the wrongful removal or retention of a child by a parent,
6 other family member, or person acting on behalf of the parent or family member.

7 (2) “Child” means an unemancipated individual who is less than 18 years of age.

8 (3) “Child-custody determination” means a judgment, decree, or other order of a
9 court providing for the legal custody, physical custody, parenting time, or visitation with respect
10 to a child. The term includes a permanent, temporary, initial, and modification order.

11 (4) “Child-custody proceeding” means a proceeding, including a proceeding for
12 divorce, separation, neglect, abuse, dependency, guardianship, paternity, termination of parental
13 rights, and protection from domestic violence, in which the legal custody, physical custody,
14 parenting time, or visitation with respect to a child is an issue.

15 (5) “Court” means a forum recognized under the law of a state to establish,
16 enforce, or modify a child-custody determination.

17 (6) “Custody” means the right to provide physical care for and exercise
18 supervision over a child by operation of law, by court order, or by an agreement of the parties
19 that has legal effect under the law of a state.

20 (7) “Jurisdiction,” depending on the context, means:

21 (A) a [county], state, tribe, or country; or

22 (B) the authority of a court to make a child custody determination.

23 (8) “Motion” means a petition.

1 (9) “Order” means a judgment or decree of a court.

2 (10) “Parenting time” means the residential and nonresidential time allocated by
3 court order to each parent.

4 (11) “Record” means information that is inscribed on a tangible medium or that is
5 stored in an electronic or other medium and is retrievable in perceivable form.

6 (12) “State” means a state of the United States, the District of Columbia, Puerto
7 Rico, the United States Virgin Islands, or any territory or insular possession subject to the
8 jurisdiction of the United States.

9 [(13) “Tribe” means an Indian nation, tribe, or band, or Alaskan Native village,
10 recognized by federal law or formally acknowledged by a state.]

11 **Comment**

12
13 The definition of a child as a person under age 18 is the same as in the Uniform Child
14 Custody Jurisdiction and Enforcement Act (UCCJEA) Section 102(2) and the Parental
15 Kidnapping Prevention Act (PKPA). State law determines when a child becomes emancipated
16 before age 18. This Act is limited to the abduction of minors even though the risk of abduction
17 may apply to a disabled adult who has an appointed adult guardian.

18
19 The definition of “child-custody determination” is identical to UCCJEA Section 102(3).
20 Local terminology may use labels such as “custody,” “visitation,” “access,” “managing
21 conservatorship,” “parenting time,” or “parenting plan.”

22
23 The definition of “child-custody proceeding” is identical to UCCJEA Section 102(4).

24
25 The term “custody” means generally the right to provide the physical residence for a
26 child. A biological or legal parent has a natural right to the care, custody and control of a child. If
27 the family is intact, both parents provide the child’s physical residence, usually in one location. If
28 the parents have never married and do not live together or the parties separate or divorce, the
29 court in a paternity action or other legal proceeding may designate which parent has the right to
30 physical residency at any given time by court order, often incorporating an agreement of the
31 parties. If a child is removed from the care of the parents, a state entity, such as a social welfare
32 agency, may have the right to determine the child’s residency. A parent abducts a child if a parent
33 or someone acting under that parent’s direction, unilaterally removes the child without the

1 consent of the other parent or entity, thereby interfering with the other parent’s rights to provide
2 residency.
3

4 **SECTION 3. WHO MAY SEEK PREVENTION MEASURES.**

5 (a) The court that has jurisdiction is one that has jurisdiction [insert citation to
6 state’s law - Uniform Child Custody Jurisdiction and Enforcement Act/UCCJA] to make a child
7 custody determination.

8 (b) Either the court sua sponte may impose prevention measures or a person or
9 entity with a right to seek custody under state law may file a motion either in a pending case or
10 independently for abduction prevention measures alleging that there is a credible risk of
11 abduction of the child. The motion must be verified and include a copy of any existing child
12 custody determination, if available. [Subject to local law providing for the confidentiality of
13 procedures, addresses, and other identifying information], the motion should specify:

14 (1) name, birthdate, and gender of the child at risk for abduction;

15 (2) the present address or physical location of the child, if known, unless
16 disclosure would put the child or parent’s safety at risk;

17 (3) the risk factors for abduction including those described in section 6 or
18 any other factors;

19 (4) whether a prior motion to prevent abduction or domestic violence has
20 been filed by either parent, the date of such motion, and its disposition.

21 (c) If a party alleges in an affidavit or a pleading under oath that the health, safety,
22 or liberty of a party or child would be jeopardized by disclosure of identifying information, the
23 information must be sealed and may not be disclosed to the other party or the public unless the

1 court orders the disclosure to be made after a hearing in which the court takes into consideration
2 the health, safety, or liberty of the party or child and determines that the disclosure is in the
3 interest of justice.

4 **Comment**

5 A court needs subject matter jurisdiction over the child under the UCCJEA to make a
6 child custody determination.

7
8 The contents of the motion follow those for pleadings under the UCCJEA § 209. The
9 information is made subject to local law on the protection of names or identifying information in
10 certain cases. A number of states have enacted laws relating to the protection of victims in
11 domestic violence and child abuse cases which provide for the confidentiality of victims' names,
12 addresses, and other information. These procedures must be followed if the state law requires
13 their applicability. If a state does not have local law that provides for protecting names and
14 addresses, then subsection (c) or a similar provision should be adopted. Section (c) is modeled
15 after UCCJEA § 209(e). Under UCCJEA § 207(b)(1), domestic violence shall be considered in
16 its inconvenient forum analysis. Under UCCJEA § 208, if a court has jurisdiction because a
17 person seeking to invoke its jurisdiction has engaged in unjustifiable conduct, the court shall
18 decline to exercise its jurisdiction. However, as the comment to Section 208 explains, domestic
19 violence victims should not be charged with unjustifiable conduct for conduct that occurred in
20 the process of fleeing domestic violence.

21
22 Usually the motion will be filed by a parent who fears that the other parent or family
23 members are preparing to abduct the child. A state child welfare agency may have lawful
24 custody and could be the party alleging the risk of abduction.
25

26 **SECTION 4. EX PARTE RELIEF TO PREVENT ABDUCTION.**

27 (a) If a movant who has filed a motion under Section 3 alleges facts which
28 indicate that the risk of abduction is imminent, the court may issue an immediate ex parte order
29 granting temporary relief, if the court finds credible evidence to support the allegation. Credible
30 evidence may be based on the testimony of the movant or other witnesses. The movant should
31 provide information about the existence of all known passports or international travel documents
32 as to the child and any person with child custody determinations over the child.

1 (b) The ex parte order must:

2 (1) prohibit access to the child by the respondent or any person acting on
3 the respondent's behalf and grant temporary physical custody of the child to the movant or other
4 appropriate party;

5 (2) require that the passport of the child be deposited with the court;

6 (3) enjoin the parties or any person acting on either party's behalf from
7 removing the child from the court's jurisdiction except as expressly permitted in the order;

8 (4) specify a date certain for expiration of the ex parte order;

9 (5) list the persons with custody rights in the child or attach a certified
10 copy of the order governing the child's custody upon expiration of the ex parte order; and

11 (6) contain a statement of respondent's right to a hearing within [____]
12 days.

13 (c) If an order is issued under subsection (b)(1) is subject to the following:

14 (1) if the child was with the movant at the time of the order, the
15 respondent must be served with notice of the order within [____] hours after the order is issued;

16 (2) a hearing shall be scheduled within [____] days after the order is
17 issued;

18 Unless the court finds that notice to the respondent of the motion is likely to
19 defeat the purpose of the motion, notice must be given of the intent to file the motion not less
20 than 24 hours before filing. Notice may be given by telephone, facsimile, or other electronic
21 means. If giving notice is likely to defeat the purpose of the motion, the movant may provide an
22 affidavit explaining the circumstances that justify that notice not be given.

1 (d) The court may award the prevailing party reasonable legal fees, costs and
2 expenses unless the party from whom fees and expenses are sought establishes that the award
3 would be clearly inappropriate.

4 **Comment**

5 Ex parte relief could be granted before a decree is in place or post decree. Abductions that
6 occur before a custody determination is made are a major problem. Section 4 allows the court to
7 issue relief immediately to prevent an abduction. Both UCCJA § 3(a)(3)(ii) and UCCJEA § 201
8 recognize that emergencies require prompt judicial action and allow for temporary custody orders
9 when a child, sibling, or parent is subjected to or threatened with mistreatment or abuse. Either
10 the state must be the child’s home state or the child must be present in the state for a court to
11 exercise emergency jurisdiction. The child could be in the custody of the movant or the
12 respondent or a family member.

13
14 A victim of domestic violence may obtain a temporary emergency order in the “safe
15 haven” state that can ripen into a home state if there is no prior custody order and no action is
16 filed in the home state within six months of the child’s departure. One fear is that an abuser may
17 try to use the act to gain temporary custody.

18
19 State law or local order may determine if an action has to be filed of record before a
20 motion for ex parte relief is filed, the duration of the ex parte order, and the time for a full
21 hearing on the merits.

22
23 **SECTION 5. WARRANT TO TAKE PHYSICAL CUSTODY OF CHILD.**

24 [(a) The procedure for the warrant to take physical custody should follow [Insert
25 Section 311 of the UCCJEA].

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

27 (1) recite the facts upon which a determination of imminent risk of
28 abduction of a child is based;

29 (2) direct law enforcement officers to take physical custody of the child
30 immediately; and

1 (3) provide for the placement of the child pending further order of the
2 court.

3 (b) If the child is taken into physical custody without notice under Section 4, the
4 respondent must be served with the motion, warrant, and order immediately after the child is
5 taken into physical custody. If a warrant is executed, the motion must be heard on the next
6 judicial day after the warrant is executed, or, if not possible, on the first judicial day possible.

7 (c) A warrant to take physical custody of a child is enforceable throughout this
8 state. If the court finds on the basis of the sworn testimony of the movant or other witness that a
9 less intrusive remedy will not be effective, it may authorize law enforcement officers to enter
10 private property to take physical custody of the child. If required by exigent circumstances of the
11 case, the court may authorize law enforcement officers to make a forcible entry at any hour.

12 (d) In a warrant to take physical custody of a child, the court may impose
13 conditions upon placement of a child to ensure the appearance of the child and the child's
14 custodian.

15 **Comment**

16 This section tracks UCCJEA § 311 which allows for a petitioner to file a verified
17 application for the issuance of a warrant to take physical custody of the child if the child is
18 immediately likely to be removed from this State. The judge has discretion and can weigh
19 whether an emergency actually exists, whether the petitioner sought relief because of fear the
20 respondent would run if notice were given, whether a prompt hearing with notice would meet the
21 needs of the case, and the type of relief that needs to be given on an emergency basis.
22

23 **SECTION 6. HEARING.** Unless a motion has been filed for ex parte relief, the court
24 shall hold a hearing on the allegations made in the motion under Section 3. If the movant
25 establishes by a preponderance of the evidence, and the court finds, after consideration of the

1 factors set forth in Section 6, that a credible risk exists that the respondent will abduct the child,
2 the court may order relief under the act. If the court finds a credible risk of abduction, the court
3 shall determine what relief, including that described in Section 9, will best protect the child from
4 abduction, considering the legal and other difficulties in returning the child to the jurisdiction and
5 the potential harm to the child, if the child is abducted.

6 **Comment**

7 This section requires a hearing before imposing any restrictions on a party's rights to
8 access. It seeks to balance the rights of both parents or others with court-ordered visitation and
9 the potential for denial of one party's rights to custody. The preponderance of the evidence
10 standard allows for a balancing of the interests; the movant must show a reasonable basis for the
11 fear of the risk of abduction.
12

13 **SECTION 7. RISK FACTORS OF ABDUCTION.**

14 (a) To determine whether there is credible risk of the abduction of the child, the
15 court shall consider evidence that the respondent has:

16 (1) abducted the child;

17 (2) threatened to abduct the child;

18 (3) recently engaged in a pattern of conduct that appears to include
19 planning activities that could facilitate removal of the child from the jurisdiction, including:

20 (A) abandoning employment;

21 (B) selling a primary residence, terminating a lease in the
22 jurisdiction, or conducting any other relocation activities;

23 (C) closing financial management accounts, liquidating assets,
24 hiding or destroying financial documents, and conducting any other extraordinary financial

1 activities;

2 (D) applying for a passport, visa, or other travel documents,
3 purchasing of travel tickets for the respondent or the child; or

4 (E) seeking to obtain the child's birth certificate or school or
5 medical records;

6 (4) engaged in domestic violence, stalking, or child abuse or neglect;

7 (5) failed or refused to cooperate with the other parent or the court
8 concerning a child custody determination for the child;

9 (6) engaged in any other conduct the court considers relevant to the risk of
10 abduction;

11 (7) lacks a financial reason to stay in the jurisdiction;

12 (8) lacks strong ties to the United States, whether or not the respondent is a
13 citizen or permanent resident of the United States;

14 (9) has strong familial, financial, emotional, or cultural ties to another
15 country that:

16 (A) is not a party to or compliant with the Hague Convention on
17 the Civil Aspects of International Child Abduction according to the most recent report on
18 compliance issued by the United States Department of State;

19 (B) presents legal or other difficulties to returning the child to this
20 country;

21 (C) does not have legal mechanisms for immediately and
22 effectively enforcing an order issued by this state regarding access to the child;

1 (D) does not provide for the extradition of a parent who abducts
2 the child and for the return of the child to the country;

3 (E) poses a risk that the child's physical or emotional health or
4 safety would be endangered in the country because of specific circumstances relating to the child
5 or because of human rights violations committed against children, [including arranged marriages,
6 child labor, lack of child abuse laws, female genital mutilation, prostitution, and any form of
7 child slavery.]

8 (F) has local laws or practices that would:

9 (i) enable the respondent, without due cause, to prevent the
10 movant or petitioner from contacting the child;

11 (ii) restrict the movant from freely traveling to or exiting
12 from the country because of the movant's gender, nationality, marital status, or religion; or

13 (iii) restrict the child's ability legally to leave the country
14 after the child reaches the age of majority because of a child's gender, nationality, or religion;

15 (G) is included by the United States Department of State on a list
16 of state sponsors of terrorism;

17 (H) is a country for which the United States Department of State
18 has issued a current warning to United States citizens regarding travel to the country;

19 (I) does not have an embassy of the United States in the country;

20 (J) is engaged in active military action or war, including a civil
21 war;

22 (10) is undergoing a change in immigration or citizenship status that

1 would adversely affect the respondent’s ability to remain in the United States legally;

2 (11) has had an application for United States citizenship denied;

3 (12) has forged or presented misleading or false evidence to obtain or
4 attempt to obtain a visa, passport, social security card, driver’s license, or other government-
5 issued identification card or has made a misrepresentation to the United States government.

6 (13) has used multiple names to attempt to mislead or defraud.

7 (b) In weighing the factors, the court shall consider credible evidence that the
8 respondent believed in good faith that the conduct was necessary to avoid imminent harm to the
9 child or parent.

10 **Comment**

11 (a) The risk factors are based on research that has been done during the last twelve years.
12 The more of these factors that are present, the more likely an abduction. However, the mere
13 presence of one or more of these factors does not mean that an abduction will occur just as the
14 absence of these factors does not guarantee that no abduction will occur. “Knowing when to ask
15 for prevention measures, and which ones to request, is facilitated by an evaluation of three
16 factors - the risk of abduction, obstacles to recovery, and the potential harm to the child if
17 abducted.” NATIONAL CENTER FOR MISSING & EXPLOITED CHILDREN, FAMILY ABDUCTION:
18 PREVENTION AND RESPONSE 7 (Patricia Hoff, ed. 5th ed. March 2002).

19
20 Studies have demonstrated that preceding an abduction, there are warning signs, or
21 common red flags, such as: (1) a parent has previously abducted the child or threatened to do so;
22 (2) a parent has no strong ties to the child’s home state; (3) a parent has citizenship in another
23 country or strong emotional ties to the country of origin; (4) a parent has friends or family living
24 abroad; (5) a parent has a strong support network; (6) a parent has no financial reasons to stay in
25 the area; (7) a parent is engaged in planning activities which indicate an attempt to move; (8) a
26 parent shows a history of marital instability, violence or child abuse, or a prior criminal record. In
27 addition, a parent may be distrustful or suspicious due to a belief that abuse has occurred and
28 have a social support for the belief. *See* Janet Johnston & Linda Girdner, *Family Abductors:*
29 *Descriptive Profiles and Preventative Interventions* (U.S. Dep’t of Justice, OJJDP 2001); ABA,
30 EARLY IDENTIFICATION OF RISK FACTORS FOR PARENTAL ABDUCTION (NCJ185026).
31 Arkansas, California and Texas statutes include these factors. *See* CAL. FAM. CODE § 3408(b)(1);
32 TEX. FAM. CODE § 153.502.
33

1 Researchers have identified three important characteristics of abducting parents or family
2 members: they (1) dismiss the value of the other parent in the child’s lives; (2) have young
3 children or children vulnerable to influence; and (3) often have the support of their family and
4 others. Johnston & Girdner, *supra*.

5
6 (b)(1) Because of the difficulties associated with securing return of children from
7 countries that have not ratified or acceded to the Hague Convention, judges should be
8 particularly sensitive to the importance of preventative means where there is an identified risk of
9 a child being removed to such countries. The court may also take into consideration the
10 difficulties a petitioner may face in trying to retrieve the child from a country that has ratified the
11 Hague Convention but is not compliant. Compliance Reports are available at
12 http://www.travel.state.gov/family/abductin/hague_issues

13
14 (c) (1) One of the problems with the risk factors is that some of the same activities might
15 be undertaken by a victim of domestic violence. “The motivation to abduct may also be an
16 attempt to protect the child from a parent who is perceived to molest, abuse, or neglect the child,
17 and in some cases, this may be a legitimate concern.” See Merle H. Weiner, *International Child*
18 *Abduction and the Escape from Domestic Violence*, 69 *FORDHAM L. REV.* 593 (2000); Claire
19 L’Heureaux-Dubé, *Cherishing our Children: The Role of the Hague Convention on the Civil*
20 *Aspects of International Child Abduction*, V *THE JUDGES’ NEWSLETTER* 17, 19 (Spring 2003)
21 (stating “The Hague Convention . . . is not sensitive enough to the needs of mothers who abduct
22 their children in order to escape from abusive situations”). Children suffer from seeing abuse of
23 parent as well as by being abused themselves. Howard Davidson, *Child Abuse and Domestic*
24 *Violence: Legal Connections and Controversies* 29 *FAM. L.Q.* 357, 369-371 (1995).

25
26 **SECTION 8. CONTENT OF CHILD CUSTODY DETERMINATION.**

27 (a) The court shall include all of the following in a child-custody determination:

28 (1) the basis for the court's exercise of jurisdiction;

29 (2) the manner in which notice and opportunity to be heard were given to
30 the persons entitled to notice of the proceeding;

31 (3) a precise description of the custody, visitation, or parenting time of
32 each parent and any access rights of others; [and]

33 (4) a provision stating that a violation of the order may subject the party in
34 violation to civil and criminal penalties, [and]

1 [(5) identification of the child’s domicile or habitual residence at the time
2 of the issuance of the order.]

3 (b) Any failure to expressly state in the child-custody determination the provisions
4 described in subsection (a) does not invalidate a determination or make it unenforceable.

5 **Comment**

6 This section tracks California law on ensuring that orders for child custody are clear,
7 specific and enforceable on its face nationally and internationally. Because subject matter
8 jurisdiction is determined at the time of institution of the action, every child-custody order should
9 contain a statement specifying the basis for the court’s exercise of jurisdiction. The Uniform
10 Child Custody Jurisdiction and Enforcement Act (UCCJEA) and the Parental Kidnapping
11 Prevention Act, 28 U.S.C. § 1738A prefer home state jurisdiction for the initial determination of
12 custody. Therefore, a custody order made by a court in the child’s home state is the most likely to
13 be enforced. If the child has a home state, a custody order based on significant connection
14 jurisdiction may not be enforceable. If a child is abducted, the left behind party can bring an
15 action within six months to retain the home state status. The decree state which had initial
16 jurisdiction properly retains continuing exclusive jurisdiction unless all parties have left the state,
17 there is no basis under state law for jurisdiction, or the state declines to exercise its continuing
18 jurisdiction. The more apparent on the face of the document that the court issuing the order had
19 proper jurisdiction, the more likely courts in other states and countries are to recognize it as
20 valid. The UCCJEA includes foreign countries in the definition of states.

21
22 (2) Due process requires that notice be given to interested parties. The UCCJEA also
23 requires notice to interested parties for a child custody order. *See* UCCJEA § 205. A statement
24 showing that the parties were properly served and given adequate notice makes it apparent on the
25 face of the order that due process was met. States do not require personal jurisdiction over both
26 parents to make a child-custody order under the UCCJEA.

27
28 (3) Vague orders are difficult to enforce without additional litigation. Custody, parenting
29 time, visitation and access should be defined as precisely as possible. The dates and times for
30 each parent’s parenting time should be specified, including holidays, birthdays, telephone or
31 internet contact. The term “reasonable visitation” can lead to conflicts between the parents and
32 make it difficult for law enforcement officers to know if the order is being violated.

33
34 (4) Judges need to impress upon both parties the importance of complying with the court
35 order. The order can state in bold language: VIOLATION OF THIS ORDER MAY SUBJECT
36 THE PARTY IN VIOLATION TO CIVIL AND CRIMINAL PENALTIES.

37
38 (5) Because every case may be a potential international abduction case, the order should

1 identify the country of domicile or habitual residence of a child at the time the order was made.
2 Although the Hague Convention on the Civil Aspects of International Child Abduction does not
3 define habitual residence and the determination will be made by the court in the country to which
4 the child has been wrongfully removed or retained, a statement in the order may assist in the
5 determination of the child habitual residence at the time of the order.
6

7 **SECTION 9. MEASURES TO PREVENT ABDUCTIONS.**

8 (a) After considering the factors described in Section 7 and any other evidence of
9 abduction risk, if the court finds a credible risk of abduction, the court shall enter a prevention
10 order, considering the potential physical and psychological harm to the child, and the legal and
11 practical difficulties of returning the child to the jurisdiction if the child is abducted. In its order,
12 the court may include, but is not limited to, the following prevention measures:

13 (1) appoint an attorney for the child or a person to represent the child's
14 best interests under law of this state other than this [act];

15 (2) appoint an appropriate person other than the respondent as the sole
16 legal and residential custodian of the child;

17 (3) establish a parenting plan if none has been established;

18 (4) require appointment of a parent coordinator;

19 (5) require supervised access to the child by the respondent until the court
20 finds that supervision is no longer necessary;

21 (6) prohibit the respondent from directly or indirectly:

22 (A) removing the child from the care of the person with lawful
23 custody;

24 (B) disrupting or removing the child from the school, child-care

1 facility, or similar facility in which the child is enrolled; or

2 (C) approaching the child at any location other than a site
3 designated for supervised visitation;

4 (7) require the respondent to post a bond or provide other security in an
5 amount sufficient to serve as a financial deterrent to abduction, the proceeds of which may be
6 used to offset the expenses of recovery of the child, including attorneys fees and costs, if there is
7 an abduction;

8 (8) restrict the right of a party to remove the child from the jurisdiction
9 without permission of the court or a person designated by the court;

10 (9) require that a party traveling overnight with the child provide the
11 person with lawful custody with the following:

12 (A) the travel itinerary of the child;

13 (B) a list of physical addresses and telephone numbers so the child
14 can be reached at any time,

15 (C) copies of any travel documents;

16 (10) require the respondent to receive counseling on the potentially
17 harmful effects to the child from, and the criminal and civil consequences, of abduction;

18 (11) require a party who has moved to another state to register the child
19 custody determination in the other state, if there is a mechanism for registration, as a prerequisite
20 to allowing the child to travel to that state;

21 (12) order passport and travel controls, including controls that:

22 (A) prohibit the respondent and any person acting on the

1 respondent's behalf from removing the child from this state or the United States;

2 (B) require the respondent to surrender any passport issued in the
3 child's name, including any passport issued in the name of both the parent and the child;

4 (C) prohibit the respondent from applying on behalf of the child
5 for a new or replacement passport or international travel visa;

6 (D) require respondent to purchase an airline ticket with open
7 travel dates for the parent remaining in the jurisdiction in case the child is not returned; and

8 (E) seek to place the respondent's name on the prevent departure
9 list.

10 (13) Require the respondent to provide as a condition prerequisite to
11 exercising custody rights:

12 (A) to the United States Department of State's Office of
13 Children's Issues and the relevant foreign consulate or embassy:

14 (i) a record of any court-ordered passport and travel
15 controls for the child; and

16 (ii) a properly authenticated copy of the court order
17 detailing the restrictions and documentation of the respondent's agreement to the restrictions; and

18 (B) to the court, proof of receipt of the written notice to the United
19 States Department of State's Office of Children's Issues and to the relevant foreign consulate or
20 embassy of passport restrictions;

21 (C) require a party to register with the U.S. Embassy and foreign
22 Central Authority in the destination country;

1 (D) Direct the movant to contact the Passport Issuance Alert
2 Program with respect to the child.

3 (14) authorize the assistance of law enforcement; and

4 (15) at petitioner’s request, require the respondent to obtain an order from
5 another jurisdiction containing terms identical to the custody and visitation order issued in the
6 United States.

7 (b) An order issued under paragraph (6) of subsection (a) is enforceable under
8 applicable state law as if it were a child custody determination.

9 (c) If the court orders any of the measures in subsection (a), those measures must
10 be specifically noted on the record of the court proceedings and stated in the order issued by the
11 court.

12 **Comment**

13 The court should have many choices of remedies. Ideally the judge would choose the
14 least restrictive measures to maximize opportunities for continued parental contact while
15 minimizing the opportunities for abduction. The higher the risk of abduction, the more
16 restrictions should be used. Johnston and Girdner, in *Family Abductors: Descriptive Profiles and*
17 *Preventive Interventions* 7 identified the situations requiring the most restrictive measures: “. . .
18 more restrictive measures are warranted under three conditions:

- 19
- 20 a. When the risks for abduction are particularly high, as indicated by prior custody
21 violations, clear evidence fo plans to abduct, and overt threats to take the child;
22
 - 23 b. When obstacles to locating and recovering an abducted child would be
24 particularly great, as they would be in uncooperative jurisdictions in some States
25 and abroad - especially in countries not party to the Hague Convention and non-
26 compliant Hague countries;
27
 - 28 c. When the child faces substantial potential harm from an abducting parent, such as
29 a parent who has a serious mental or personality disorder, a history of abuse or
30 violence, or little or no prior relationship with the child.”
31

1 In addition, the most restrictive measures are likely to be imposed when the threat is that
2 the child will be taken out of the United States to a foreign jurisdiction with a different culture
3 and legal system which does not recognize the legal rights of women and will not enforce
4 custody orders from the United States.
5

6 Determining the potential harm to the child requires an analysis of the individual child.
7 The younger the child the more likely they are to be abducted, the more likely they are to be
8 victimized and therefore, are more likely to be in need of supervised visitation. Some have
9 characterized family abduction as a form of child abuse because of the harmful effects on the
10 child. D.S. HUNTINGTON, PARENTAL KIDNAPPING: A NEW FORM OF CHILD ABUSE (1982);
11 PATRICIA M. HOFF, KIDNAPPING: PREVENTION AND REMEDIES (ABA CENTER FOR CHILDREN
12 AND THE LAW 1997). Some children abducted by family members suffer severe life-long
13 emotional and psychological damage; however, others do not. Where children are missing for a
14 lengthy period, their lives are different than those missing only a few days. Some abducted
15 children suffer depression; loss of community; loss of medical benefits; loss of stability, security
16 and trust; excessive fearfulness; loneliness; anger; helplessness; disruption in identify formation;
17 and fear of abandonment. Children abducted internationally often have even more difficulties due
18 to language and cultural differences. Marilyn Freeman, *The Effects and Consequences of*
19 *International Child Abduction*, 32 FAM. L. Q. 603 (1998)(reviewing literature).
20

21 (a) (1) The intent is not to change the law of the state as to representatives for children.
22 States differ as to whether to appoint an attorney for the child, best interest lawyer, or guardian ad
23 litem. This section recognizes that the child should have a voice and should be the focus, rather
24 than the “rights” of the parents. The ABA Standards for Lawyers Who Represent Children in
25 Custody Cases provide that the court should appoint a Child’s Attorney or a Best Interests lawyer
26 if there is threat of abduction. The appointment should be consistent with applicable state law.
27 Different types of representation may be needed for different children within a family depending
28 on their ages. *See* Uniform Representation of Children in Abuse and Custody and Visitation
29 Cases.
30

31 (2) A court finding that any of the risk factors have been proved by a preponderance of
32 the evidence should not award joint custody. The finding of a risk factor is sufficient to
33 overcome a presumption in favor of joint custody. The American Bar Association Family Law
34 Section adopted a Model Joint Custody statute in August, 1989. The Model Statute Section 1
35 expressly states, “Joint custody is inappropriate in cases in which spouse abuse, child abuse or
36 parental kidnapping is likely to occur.” The Model Statute also requires the court to consider
37 “any history of or potential for child abuse, spouse abuse, or parental kidnapping”and “the
38 geographic proximity of the parents to each other as this relates to the practical considerations of
39 joint physical custody” when determining whether joint custody is in the best interests of the
40 child.
41

42 (6) While some states do not like to impose on a parent’s constitutional right to travel, a
43 credible risk of abduction is sufficient to restrict a parent’s mobility with the child. The court

1 may want to require the written permission of other parent or court order before the child is
2 removed from the jurisdiction.

3
4 (7) A high enough bond can be a deterrent and serve as a source of funds to help retrieve
5 the child if an abduction occurs. Judges in several states have required parents to post a bond to
6 ensure compliance with court orders.

7
8 (10) If domestic violence is present, the court may want to order the abusive person to
9 obtain counseling or attendance at a batterers' intervention and prevention program (BIPP).
10 Some research suggests that anger management programs do not seem to work as well as
11 batterers' intervention programs.

12
13 (12) If there is a credible risk of international abduction, passport controls are
14 indispensable. International abductions are among the most complex and frustrating and all
15 reasonable restrictions to prevent such abductions are necessary. *See In re Marriage of*
16 *Mouschovias*, 831 N.E.2d 1222 (Ill. App. Ct. 2005)(holding that limiting visitation to the United
17 States or have an attorney hold the passports of the children was not a "restriction" on visitation,
18 particularly when the father could petition the court if he had specific travel plans and could not
19 reach an agreement with the mother).

20
21 (14) Many law enforcement officers are unclear about their role in responding to parental
22 kidnapping cases. A provision in the custody order directing law enforcement officer to
23 "accompany and assist" a parent to recover an abducted child may be useful. One study showed
24 that 70 percent of law enforcement agencies reported that they did not have written policies and
25 procedures governing family abduction cases. The UCCJEA Sections 315 and 316 authorize law
26 enforcement to enforce a child-custody determination.

27
28 (15) It may be possible to obtain a "mirror" or reciprocal order. Before exercising rights,
29 the respondent would need to get a custody order from the respondent's native country that
30 recognizes the United States order and continuing jurisdiction in the United States. The foreign
31 court would need to agree to order return of the child if the child was taken in violation of the
32 court order. This potentially expensive and time consuming remedy should only be ordered
33 when likely to be of assistance. These orders may be modified or enforced pursuant to the laws of
34 the other country.

35
36 (b) Temporary or permanent orders are governed by state law.
37

38 **SECTION 10. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In
39 applying and construing this uniform act, consideration must be given to the need to promote
40 uniformity of the law with respect to its subject matter among states that enact it.

1 **SECTION 11. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND**
2 **NATIONAL COMMERCE ACT.** This [act] modifies, limits, and supersedes the federal
3 Electronic Signatures in Global and National Commerce Act (15 U.S.C. Section 7001 et seq.) but
4 does not modify, limit, or supersede Section 101(c) of the act (15 U.S.C. Section 7001(c)) of that
5 act or authorize electronic delivery of any of the notices described in Section 103(b) of that act
6 (15 U.S.C. Section 7003(b)).

7 **SECTION 12. EFFECTIVE DATE.** This [act] takes effect on