Art Gaudio, Reporter
October 28, 2020

**Issues Memo**
**Unregulated Transfer of Adopted Children Act**

The accompanying version of the Unregulated Transfer of Adopted Children Act contains three revisions from the past version.

The first change is to incorporate a definition of "in loco parentis" into Section 201.

The second change is the elimination of former Section 203 regarding permitted transfers and the addition of Section 202(d) (derived from former Section 203(b)(4)(A)) stating that the prohibitions of Section 202 do not apply if the custody transfer is permitted by other state law.

The third change in a revision in current Section 204 to provide for enforcement of the provisions of the article by the Attorney General and not the Department of Child Protection.

The comments below are also set out in the Reporter's Notes following the respective sections.

Section 201

Some states recognize the doctrine of "in loco parentis." Under that doctrine, an individual who has been treated as a parent by a child and who has formed a meaningful parental relationship with a child for a substantial period is treated as a parent. Bracketed subsection (1) contains a definition of *in loco parentis.* The bracketed clause in subsection (2) excludes a transfer of custody of a child to an individual who is *in loco parentis* from the operation of this article. If an enacting state recognizes the doctrine of *in loco parentis*, it should adopt the bracketed clause.

Section 202(d) and former Section 203

Subsection (d) replaces former Section 203 regarding permitted transfers of custody. That section attempted to gather together and enumerate various circumstances under which a transfer of a child's custody would be permissible. A number of issues, described below, were raised about the operation and effect of former Section 203.

First, as the drafting, discussion, and review of the section progressed it became clear that there might always be unthought-of circumstance under which, or unthought-of person to whom, a transfer should be permitted. For example, should a transfer to a third cousin be permitted and under what circumstances, or did the section permit a babysitter or boarding school to have custody of the child. In an attempt to deal with many of those issues, the section contained a final "catch-all" that was not unlike proposed subsection (d).

Second, concern was expressed about former Section 203 permitting, if not encouraging, unnecessary intervention and interference by the Department of Child Protection into appropriate, reasonable custody transfers by parents dealing with difficult situations, particularly in minority families. One of the requirements of the former section was that the transfer had to be to a person who is a "fit custodian of the child." Question was raised about whether this requirement, which is judgmental in nature, would allow the Department to question unnecessarily a legitimate decision by the parent.

Third, bringing the permitted custody transfer provision into this section highlights the importance of former Section 203(a). It states that if a parent wishes to transfer custody of a child with the intent of severing parental rights and responsibilities, the only permissible avenues are adoption, guardianship, or other listed processes. Any transfer of custody of a child under proposed Section 202(d), must therefore be without the intent to sever parental rights and responsibilities.

There are also a number of questions about proposed subsection (d), which are described below.

First, there is a question about whether proposed subsection (d) might legitimize inappropriate custody transfers that are not necessarily prohibited by existing state law. For example, would subsection (d) authorize a custody transfer by means of a power of attorney without going through an adoption or other authorized process required in subsection (a)? When the transfer is considered in light of subsection (a), if the intent were to sever parental rights and responsibilities, the transfer would not be permitted. Alternatively, would subsection (d) authorize a transfer of custody to a person who is a child trafficker? When considered in light of subsection (d), the transfer would not be permitted since child trafficking is not otherwise permitted under state law.

A second question about proposed subsection (d) is whether to carry over from former Section 203(b)(4)(A) the bracketed clause at the end of that subsection requiring the transfer of custody be "for purposes of the education, enrichment, health, safety, or welfare of the child." I believe that, from comments and discussions, the intent was not to include that clause because it might promote unnecessary involvement and intervention of the Department in reasonable custody transfers. Therefore, I did not include it in this draft, but the clause could easily be reinserted.

A third question is whether this approach would be sufficiently akin to the proposals currently before Congress to be acceptable as a model state law to implement the federal mandate. The objective and intent of this act is certainly the same as the federal proposals. Nonetheless, the wording and specificity on some issues are different.

Some observers questioned whether the prohibition on child custody transfer in subsection (a) should apply only to third parties, i.e. only to those who receive a child custody transfer or who facilitate one. That would, in effect, remove Section 202(a) and leave only

Section 202(b) (with some revisions that would be necessary). This version does not reflect that suggestion.

Some observers also suggested that the article apply only to custody transfers of adopted children or internationally adopted children. Those suggestions bring up many of the issues the committee has discussed previously, including constitutionality and enactability. This version does not reflect those suggestions.

## Section 204

The prior version of this section gave authority to investigate suspected violations of Article 2 and enforce its provisions to the Department of Child Protection. As noted regarding the revisions in Section 202, there was concern that the Department might unnecessarily intervene and interfere with appropriate, reasonable custody transfers by parents dealing with difficult situations, particularly in minority families. Providing the Department with the authority to investigate suspected violations and enforce the act would similarly give it authority to intervene and interfere unnecessarily. Instead the authority to investigate and enforce is now put with the Attorney General (or other appropriate law enforcement authority).

Nevertheless, even though the investigation and enforcement authority is now with the Attorney General, it is likely that, in many cases, due to the Department's authority under existing child abuse and child neglect statutes to investigate cases of potential child endangerment, the Department will be the entity initially investigating and making any request for enforcement to the Attorney General. Even in those cases where the matter comes before the Attorney General from a source other than the Department, it is likely that the Attorney General will, at least, ask for evaluation and input from the Department, thus involving the Department in the investigation. Therefore, it's not clear that the involvement of the Department can be totally removed.

The prior version of this section was written to make it clear that the Department had the authority to enforce the article by administrative processes or civil actions permitted by other state law, although in some states it might be necessary for the Department invoke the assistance of the Attorney General or local law enforcement agencies to bring the civil actions. The other processes or actions might have included, for example, an administrative decision to return custody of the child to the parents under probationary conditions or, alternatively, a civil action to remove the child from the parent's custody. The authority to invoke those processes or actions continues to exist under various child endangerment laws and does not need to be stated in this section to exist. Consequently, the Department would seem to still have the authority to enforce this article even without an express statement authorizing it, although assistance of the Attorney General or local law enforcement may be necessary in some states.

Although not expressly stated, the penal provisions of the prior versions of Sections 202(c) and 203(b) would have been enforced by the Attorney General or other law enforcement agencies. That will continue under the current revision. However, that authority would exist even without Section 204 based on the inherent authority of the Attorney General.

Thus, it seems that there are several questions to consider:

First, is Section 204 necessary at all since the authority of the Department and the Attorney General to investigate and enforce the law already exists in other law?

Second, should Section 204 be written in such a way as to strip the Department of the authority to investigate and enforce the article under existing child endangerment laws? Is that wise? Is that even possible in this limited purpose act?

Third, should the prior version of Section 204 specifically giving authority to the Department to investigate and enforce the article be reinstated?

Since any investigation initiated under this section may lead to enforcement of the penal provisions in the act, it's questionable whether "reasonably suspects" is a sufficiently rigorous standard to authorize the investigation. "Probable cause" might be the better standard. Both are stated in bracketed provisions in the first clause of Section 204. Should we use "probable cause"?

It was suggested that the section be revised to provide that the burden of proof is upon the entity enforcing the act. To the extent that any case involves criminal prosecution, the burden of proof would inherently be on the Attorney General and the standard would be "beyond a reasonable doubt." As to any non-criminal actions brought under other state law by either the Department or the Attorney General, the burden of proof and the standard would be set out in the other state law. Should we or can we change them in this act?