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## **PARENTAL KIDNAPPING LAW REFORM PACKAGE**

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### **PARENTAL KIDNAPPING CRIME ACT**

Problem            fl        Abductor parents can escape punishment for parental kidnapping if the state criminal custodial interference laws in the state from which the child was removed or in the haven state do not apply to the specific conduct that has occurred.

fl        For instance, in some states a parent who takes a child before there is a custody order may not be prosecuted. In others, a parent with joint custody may not be criminally charged for kidnapping. Still in others, a custodial parent who hides a child from the noncustodial parent may not be subject to prosecution.

fl        Interstate kidnappings present serious problems for

law enforcement officers and prosecutors. Unless the first state commits its resources to extradition, the abductor can evade prosecution by leaving the state.

fl Inconsistencies in state laws make it possible for parents to get away with kidnapping, to the detriment of thousands of children.

Solution fl The proposed uniform criminal parental kidnapping law melds the best provisions found in existing state laws into one comprehensive statute.

fl To protect all children from kidnapping, the statute clearly defines a broad range of situations that are criminally punishable.

fl The Parental Kidnapping Crime Act is recommended for adoption by every state to deter parental kidnapping and to promote prosecution of abductors who violate the

law. FLAGGING SCHOOL, DAY CARE &  
BIRTH RECORDS OF MISSING CHILDREN ACT

Problem fl Abductor parents frequently request the abducted child's school records and birth certificate to enroll the child in a new school and to obtain passports.

fl In some states, parental requests for these records can be "flagged." If the abductor requests records that have been flagged, the searching parent and/or law enforcement is notified. Information about the requesting parent, particularly address information, can then be used to find the abducted child.

fl Many states, however, do not authorize "flagging," either by law or regulation. As a result, invaluable leads to the abductor's and the child's whereabouts go undetected.

Solution fl Every state should enact "flagging" laws.

fl Requests for missing children's birth certificates and school and day care records should be shared with law enforcement.

fl States that already have flagging laws should review their laws against the guidelines in this statute to ensure the maximum efficacy.

fl A uniform act enables states to better assist one another in flagging in interstate kidnapping cases.

## TORTIOUS INTERFERENCE WITH CHILD CUSTODY AND VISITATION ACT

Problem fl Abductors who succeed in taking and concealing their children often have help from relatives, friends, and others.

fl Left-behind parents have sued these "helpers" on grounds that their conduct has caused them harm and resulting damages.

fl Most of these law suits have been based on common law torts, as very few states have enacted tort statutes governing child abduction-related harms. In the absence of statutory guidance, some courts have allowed parental kidnapping tort suits while others have refused to recognize these causes of action.

Solution fl States should enact legislation expressly allowing tort suits for interference with child custody and visitation and specifying the relief available.

fl Three important purposes are served by the proposed statute: compensation of the injured parent, deterrence of those who might otherwise assist in the abduction and concealment scheme, and fostering the return of abducted children.

## EXPEDITED ENFORCEMENT OF CHILD CUSTODY AND VISITATION ACT

### Introduction

### Background

The Uniform Child Custody Jurisdiction Act (UCCJA) and the Parental Kidnapping Prevention Act (PKPA) require courts in every state to enforce valid sister state custody and visitation orders so long as the court that made the order exercised jurisdiction in accordance with mandated jurisdictional prerequisites and due process. However, neither law provides mechanisms for enforcement, instead leaving it up to each state to specify enforcement procedures.

As a result, the law of enforcement has evolved differently in

different jurisdictions. For example, in one state, it might be common practice to file a Motion to Enforce or a Motion to Grant Full Faith and Credit to initiate an enforcement action. In another, a writ of habeas corpus might be a commonly used vehicle. Contempt might be still another way to enforce the existing decree.

In addition to differences in procedures to enforce a decree, different jurisdictions have adopted varying standards for enforcement. Many courts tend to limit consideration to whether the court which issued the decree had jurisdiction when it made the custody decree. Other courts broaden consideration to a scrutiny of whether enforcement would be in the best interests of the child.

#### Shortcomings of current law

Lack of uniformity complicates the enforcement process. It increases the costs of the enforcement action in part because the expertise of more than one lawyer may be required, one in the original forum and one in the state where enforcement is to be sought. It decreases the lack of certainty of outcome. While the legal process never assures a particular outcome, when a court has issued a determination, the parties should feel that they must abide by it or seek appellate review or modification in the appropriate forum.

Title I of the statute and corresponding commentary were drafted by Adrienne Volenik. Title II and corresponding commentary were drafted by Janet Kosid Uthe. Both are legal consultants to the Parental Abduction Training and Dissemination Project at the ABA Center on Children and the Law. Co-editors were Linda K. Girdner, project director, and Patricia M. Hoff, legal director. This project was supported by Grant No. 93-MC-CX-0002 from the Office of Juvenile Justice and Delinquency Prevention, Office of Justice Programs, U.S. Department of Justice. Points of view or opinions in this document are those of the authors and do not necessarily represent the official position or policies of the U.S. Department of Justice. The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association.

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Finally, enforcement can be a long and drawn-out process. Fighting vigorously, a parent opposed to the provisions of a custody determination may be able to delay implementation for many months, possibly even years, thereby frustrating not only the other parent, but also the process that led to the issuance of the original court decree.

#### Proposed uniform law: Title I

Title I of this Act addresses these concerns. First, it establishes standardized, simplified, and streamlined procedures to be followed in every jurisdiction to enforce both custody and visitation rights. Secondly, the Act establishes a brief time frame within which all decisions must be made. This is important in all instances and particularly so where visitation rights are at issue. If visitation rights cannot be enforced quickly, they may be impossible to enforce effectively at all. This is particularly true if there is a limited time within which visitation can be exercised such as may be the case when one parent has been granted visitation during the winter holiday break. Without speedy consideration and resolution of the enforcement of such visitation rights, the ability to visit during that period may be lost entirely.

Third, the Act limits a court's inquiry to whether the court which entered the determination had subject matter jurisdiction consistent with federal law to do so and to whether the due process rights of the parties were observed. If these questions are answered in the affirmative, and the determination has not been modified, the custody determination must be enforced.

In addition, the Act attempts to create an environment in which costs can be kept to a minimum. The procedures and pleadings are purposely kept simple so that parties can elect to proceed without counsel. When appropriate, hearings can be held telephonically or via other technology that would permit a party, or counsel, to participate without being physically present. Finally, costs and fees are to be awarded unless the court determines that such an award would be clearly inappropriate.

## Title II

Title II of the Act establishes an important role for prosecutors and law enforcement in the civil aspects of child custody and parental abduction disputes. Section 1 is modeled upon existing California law<sup>1</sup>. An estimated 354,100 children were abducted by parents or other family members in the United States in 1988. See David Finkelhor, Gerald Hotaling & Andrea Sedlak, U.S. Dep't of Justice, National Incidence Studies, Missing, Abducted, Runaway, and Thrownaway Children in America, Executive Summary (1990). 2. See Patricia M. Hoff, When Friends, Relatives and Lawyers are Part of the Problem, Ch.5 in *Obstacles to the Recovery and Return of Parentally Abducted Children*, Linda K. Girdner, Patricia M. Hoff, eds. (U.S. Department of Justice, 1994).<sup>3</sup> See Cal. Civ. Code 49; Ohio Rev. Code Ann 2307.50; S.D. Cod. Laws 20-9-7 (Michie 1987); R.I. Gen. Laws 9-1-43; Tex.Fam. Code 36.01-36.08 (1986). See also S. Car. Code 21-21-45 (1989)(custodian may maintain action for recovery of children and damages). See generally, Rest. 2d Torts 700.4. See *Kunz v. Deitch*, 660 F. Supp. 679 (N.D. Ill. 1987) (tortious deprivation of right of custody); *Plant v. Engel*, 469 A.2d 1299 (N.H. 1983) (intentionally aiding and abetting in interference with custody rights); *Pankratz v. Willis*, 744 P.2d 1182 (Ariz. App. 1982) (intentional infliction of emotional distress); *Kramer v. Lieneweber*, 642 S.W. 2d 864 (Mo.App. 1982) (interference with custody rights).<sup>5</sup> Final Report, *Obstacles to the Recovery and Return of Parentally Abducted Children* (Linda K. Girdner and Patricia M. Hoff, eds., Office of Juvenile Justice and Delinquency Prevention 1993).<sup>6</sup> See National Center for Missing and Exploited Children, *Selected State Legislation* 22 (1994).<sup>1</sup> David Finkelhor, Gerald Hotaling & Andrea Sedlak, U.S. Dep't of Justice, National Incidence Studies, Missing, Abducted, Runaway, and Thrownaway Children in America, Executive Summary (1990). This number reflects the "Broad Scope" Family Abduction estimate, which was defined to include situations where a family member took a child in violation of a custody agreement or decree. 2. *Id.* See also Chris Hatcher & Loren Brooks, *Perspectives from Left-Behind Parents and their Helpers in Specific Cases* in Final Report, *Obstacles to the Recovery and Return of Parentally Abducted Children* ch. 12 (Linda K. Girdner & Patricia M. Hoff, eds., Office of Juvenile Justice and Delinquency Prevention 1993) (children in kindergarten and elementary school are the primary victims of parental abduction).<sup>3</sup> The other half involved a caretaker who knew where the child was most of the time, but had difficulty in securing the child's return.<sup>4</sup> As of August 31, 1994, approximately half of the states have statutes requiring a missing child's school records and/or birth certificates be flagged. Five states require flagging of school records only. See Kan. Stat. Ann. 72-53, 106 (1991); Mass. Gen. Laws Ann. ch 22A 9 (West 1985); Minn. Stat. Ann. 123.751 (West 1993); Mont. Code Ann. 44-2-511(4a) (1993); N.C. Gen. Stat. 115V-403 (1993); Ohio Rev. Code 3319.321; Ore. 336.195. Six involve birth certificates only. See Fla. Stat. Ann. 937.024 (West 1991); KY. Rev. Stat. Ann. 213-061 (Baldwin 1991); Mich. Rev. Stat. Ann. 14.15 (Callahan 1993);

N.M. Stat. Ann. 32-8-4 (Michie 1985); Okla. Stat. tit. 63 1-323.1 (1991); W.Va. Code 16-5-12b (1991). Fourteen states require flagging of both school records and birth certificates (many states use separate statutes to require that both types of records be flagged). See Alaska Stat. 14.30-700 (1991); Alaska Stat. 18.50-315 (1991); Ariz. Rev. Stat. Ann. 15-829 (1991); Ariz. Rev. Stat. Ann. 36-326.02 (1993); Ark Code Ann. 12-12-802-803 (1993); Idaho Code 18-4510-4511 (1993); Ill. Rev. Stat. ch. 23, para. 2273-2275 (1988); Ind. Code Ann. 31-6-13-6 (Burns. 1991); Ind. Code Ann. 10-1-7-8 (Burns 1991); Mo. Ann. Stat. 43.407-43.408 (Vernon 1992); Neb. Rev. Stat. 43-2005 (1943); Neb. Rev. Stat. 43-2007 (1943); Nev.Rev. Stat. 432.305 (1991); N.D. Cent. Code 54-23.2-04.2 (1988); Pa. Stat. Ann. tit. 35 450.403A (1930); R.I. Gen. Laws 43-28.8-7-8-8 (1993); Utah Code Ann. 53A-11-502 (1992); Utah Code Ann. 26-2-27 (1992); Va. Code Ann. 22.1-288.1 (Michie 1950).5. See, e.g., Ind. Code 12-17.2-5-18.6, 31-6-13-4 (1994), N.D.Rev.Stat. 54-23.2-04.2 (1991).6. Senate, State of New York, Bill No. S6523 (passed by Senate January 24, 1994)(codified at N.Y.Exec.Law 837-e (1994)).7. Final Report, Obstacles to the Recovery and Return of Parentally Abducted Children (Linda K. Girdner and Patricia M. Hoff, eds., Office of Juvenile Justice and Delinquency Prevention 1993).8. See National Center for Missing and Exploited Children, Selected State Legislation 7 (1994).9. See Linda K. Girdner, The View from State Missing Children Clearinghouses in Final Report, Obstacles to the Recovery and Return of Parentally Abducted Children ch. 9 (Linda K. Girdner & Patricia M. Hoff, eds., Office of Juvenile Justice and Delinquency Prevention 1993).10. See, e.g., Ind. Code 20.8.1-3-17.1 (1994), N.D. Rev. Stat. 54-23.2-.4.2 (1994).. For a discussion of state missing and exploited children's clearinghouses, see Linda K. Girdner, The View from State Missing Children Clearinghouses, in Final Report, Obstacles to the Recovery and Return of Parentally Abducted Children, (Linda K. Girdner & Patricia M. Hoff, eds., Office of Juvenile Justice and Delinquency Prevention 1993).. National Center for Missing and Exploited Children, Selected State Legislation 6 (1994). which authorizes increased activity on the part of prosecutors in custody disputes.

The involvement of the prosecutor is crucial to the efficient enforcement of custody determinations. Because civil enforcement of custody orders is not within the usual scope of the prosecutor's authority, creating statutory authority for such involvement is necessary. The Act clearly delineates the scope and nature of the assistance that can be provided. For instance, if a parent disappears with the child while a custody action is pending, the prosecutor will take all reasonable steps available to locate them or otherwise to assist in securing compliance with any existing court order. Likewise, if there is reason to believe that one party will flee with jurisdiction with the child or fail to appear when ordered to do so, the prosecutor can take action. A clear mandate of prosecutorial assistance in civil enforcement of custody decrees will also minimize the possibility that the prosecutor will incur liability for such actions. Further, the involvement of the prosecutor is likely to enhance the location and recovery of missing children and encourage the peaceful transition of custody from one parent or guardian to another.

The same rationale supports increased involvement by law enforcement officers in locating parents and missing children and in enforcing custody determinations. Section 2 authorizes law enforcement officers to take all actions reasonably necessary to locate the child and gain compliance with all existing court orders when a valid temporary or permanent custody determination has already been entered or an enforcement action under this Act has been filed. Law enforcement is also authorized to help locate a parentally abducted child when a custody action has been filed.

Legal procedures that can achieve results quickly at low cost and which provide for assistance from police and the prosecutor may cause disgruntled parents to forego self-help where the potential for

trauma to the child is high. Uniform custody enforcement procedures nationwide and the involvement of law enforcement officers and prosecutors, when appropriate, will do much to further stability and predictability in this complex area of the law.

## EXPEDITED ENFORCEMENT ON CHILD CUSTODY AND VISITATION ACT

### Title I

#### Section 1 - Definitions

For the purposes of this Act:

1. "Custody determination" means any judgment, decree or other order of a court, whether permanent or temporary, or an initial or a modification order, providing for the custody of, or visitation with, a child, or which in any way affects the custody of a child, issued in the context of a custody proceeding. "Custody proceeding" includes proceedings in which a custody determination is one of several issues, such as an action for divorce or separation, as well as neglect, abuse, dependency, wardship, guardianship, termination of parental rights, adoption, and protection from domestic violence proceedings. A custody determination does not include a judgment, decree or other order of a court regarding paternity or relating to child support or any other monetary obligation of any person, or a decision made in a juvenile delinquency, status offender or emancipation proceeding.
2. "Petitioner" means any party to a custody determination, or a prosecutor, who files a petition in accordance with Title II of this Act, seeking enforcement of the provisions of a custody determination, including those governing visitation rights.
3. "Respondent" means any party to a custody determination against whose interests a petition to enforce the custody determination is filed in accordance with this Act.

#### Section 2 - Subject Matter Jurisdiction to Enforce

1. An action to enforce a custody determination may be brought in any court of this State which is competent to decide child custody matters.
2. Jurisdiction to enforce does not confer subject matter jurisdiction to modify or to make a custody determination.
3. A petitioner who files an action pursuant to this Act does not thereby submit to the jurisdiction of the court for any other purpose.

#### Section 3 - Stay of Modification Proceedings

1. Stay of Modification Action - Whenever a court of this jurisdiction which has before it an action to modify a custody determination learns of the pendency of an action to enforce the same custody determination brought in any state pursuant to this Act or any Act substantially similar to it, the court shall stay the modification order pending the entry of an order to enforce the determination, or one denying or dismissing the enforcement action.

2. Communication Between Courts - Whenever a court of this jurisdiction which has before it a petition to enforce a custody determination learns of the pendency of a proceeding to modify the same custody determination, it shall immediately communicate with the court in which the modification action is pending. Both parties and the prosecutor, where appropriate, shall be given the opportunity to participate in this communication which shall be on the record.

#### Section 4 - Procedure

1. Petition - Any party to a custody determination, or a prosecutor acting pursuant to Title II of this Act, seeking to enforce a custody determination may do so by filing a Petition to Enforce in any court which has jurisdiction to enforce such actions pursuant to Section 2.

2. Information to be submitted - The petitioner in an action to enforce a custody determination shall in his or her first pleading or in an affidavit attached to that pleading declare under oath:

- (A) whether a certified copy of the custody determination has been appended to the petition;
- (B) whether, if known, the court which issued the determination identified the jurisdictional basis it relied upon in exercising subject matter jurisdiction and, if so, what it was;
- (C) whether, to the petitioner's knowledge, the determination has subsequently been modified;
- (D) whether the respondent was notified of and given an opportunity to be heard in the proceedings which resulted in the custody determination and, if so, the nature of the notification and the extent of the respondent's participation;
- (E) whether there is litigation currently pending between the parties concerning the custody determination other than the enforcement action;
- (F) the location of the child and/or the respondent if known;
- (G) that the respondent will be served with notice of the enforcement action pursuant to the provisions of this Act, or that the petitioner is seeking a waiver of notice pursuant to Section 9 of this Act and is requesting that the court issue a warrant directing law enforcement officials to take physical custody of the child for delivery to the court pursuant to Section 9.

3. Notice and Service - Notice of an action filed pursuant to this Act shall be given in accordance with the provisions of the UCCJA and the PKPA unless a waiver of notice is sought pursuant to Section 9.

ALTERNATIVE - Notice of an action filed pursuant to this Act, unless waived pursuant to Section 9, shall be by:

(A) personal service - by delivering copies of the petition to the respondent by (1) a sheriff, marshal, or constable; (2) a registered process server; (3) a person at least 18 years of age not a party to the action;

(B) substituted service - by leaving copies of the petition at the dwelling, usual place of abode, or usual place of business of the person served in the presence of a competent member of the household or a person apparently in charge of the office or place of business, at least 18 years of age, who was informed of the general nature of the papers, and thereafter mailing copies to the person served at the place where the copies were left;

(C) certified or registered mail - by mailing a copy of the petition by first class mail requiring a return receipt; or

(D) publication - by publication, in accordance with the laws of the state and with the approval of the court when no other method of service is available.

4. Action by the Court - Within (5) days of the filing of proof of service of the petition, the court shall review the petition and either issue its Order to Show Cause Why the Custody Determination Should Not Be Enforced or dismiss the Petition.

Whenever the petitioner requests a waiver of notice pursuant to Section 9 of this Act, the court shall either grant or deny the request within (2) two days of its filing. In the event the request is granted, the court shall issue simultaneously its Order to Show Cause Why the Custody Determination Should Not Be Enforced.

5. Answer to the Petition - The respondent shall have (5) days following receipt of an Order to Show Cause Why the Custody Determination Should Not Be Enforced to answer the petition and deliver copies to the petitioner and prosecutor, if participating pursuant to Title II, unless the Court shall order the time shortened for good cause shown. The Answer shall address the following:

(A) whether, if known, the court which issued the determination identified the jurisdictional basis it relied upon in exercising subject matter jurisdiction and, if so, what it was;

(B) whether the respondent was notified of and given an opportunity to be heard in the proceedings which resulted in the determination and the nature of the notice and the extent to which the respondent participated in the proceedings;

(C) whether the decree has been modified and, if so, a certified copy of the modified decree shall be attached;

(D) whether there is currently pending any other proceeding between the parties to determine or modify custody;

The answer shall not be a vehicle for modification of the existing determination nor for seeking relief other than the dismissal of the Petition.

6. Relief Granted upon Review of the Pleadings - Within (3) three days of the receipt of the Answer, the court shall review the pleadings. If, based on its review of the pleadings, it concludes that there is no genuine issue between the parties as to any law or material fact, it shall issue its order either enforcing the custody determination and granting such other relief as it deems appropriate pursuant to Section 10 or dismissing the petition.

7. Scheduling a Hearing - If, after review of the Petition and Answer, the court concludes that a genuine issue of law or material fact exists between the parties, it shall schedule the matter for hearing within (3) days, limiting inquiry to the disputed issues of law or material fact and directing the respondent to appear at the hearing with or without the child as is appropriate in the circumstances.

8. Presence of a Party at the Hearing - Upon application by a party or by the prosecutor, acting pursuant to Title II of this Act, the court may order that the hearing, which shall be on the record, be conducted by conference call or other available technology.

9. Communication Between Courts - The court may communicate at any time with the court of the state which issued the custody determination and shall do so if requested by a party. Such communication shall be on the record and in a manner designed to permit the parties and, when appropriate, the prosecutor to participate.

10. Computation of Time - In computing any period of time set forth in this Act, the day of the event from which the designated period of time is to run shall not be included. When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation.

#### Section 5 - Scope of Inquiry of Court

1. A court shall issue an order enforcing a custody determination if:

(A) the court which issued the determination exercised subject matter jurisdiction in compliance with the jurisdictional prerequisites of the PKPA as determined from the pleadings or other competent evidence;

(B) the respondent was given reasonable notice and opportunity to be heard consistent with the requirements of the UCCJA and the PKPA; and

(C) the determination has not been modified by a court in compliance with the PKPA.

#### Section 6 - Standard of Proof

The standard of proof to be applied in an enforcement action brought pursuant to this Act is preponderance of the evidence.

#### Section 7 - Burden of Proof

1. The petitioner in the action has the burden of proving that the custody determination is entitled to enforcement. It will be presumed that the burden has been met:

(A) if the information required to be submitted in Section 4 demonstrates:

(1) that the court which issued the determination exercised subject matter jurisdiction in compliance with the jurisdictional prerequisites of the PKPA;

(2) that the respondent was given reasonable notice and opportunity to be heard consistent with the requirements of the PKPA and the UCCJA; and

(3) that the custody determination has not been modified by a court in compliance with the PKPA; and

2. The petitioner has filed a certified copy of the custody determination by appending it to the petition.

## Section 8 - Defenses to a Petition to Enforce

The only defenses to a petition to enforce that can be considered by the court are:

(A) that the court that issued the determination lacked subject matter jurisdiction in accordance with the provisions of the PKPA;

(B) that the respondent was not given reasonable notice of or an opportunity to be heard, consistent with the requirements of the PKPA and the UCCJA, in the proceeding that resulted in the determination. This defense shall not be available if the respondent purposefully concealed his or her location from the petitioner, took deliberate steps to avoid service of process, or elected not to participate in the custody proceeding when he or she had been properly served or had actual knowledge of the proceedings; or

(C) that the custody decree has subsequently been modified by a court exercising jurisdiction in compliance with the provisions of the PKPA.

## Section 9 - Preliminary Relief:

### Waiver of Notice and Warrant to Take Physical Custody of the Child

1. Waiver of Notice and Warrant to Take Physical Custody of the Child - When it appears to any court with jurisdiction to enforce a custody determination that there is reason to believe that the child will suffer immediate harm or be removed from the jurisdiction if the respondent is notified of the enforcement proceedings, the Court shall waive notice requirements and issue a warrant to take physical custody of the child. The warrant shall recite the facts supporting the issuance of the warrant and shall direct law enforcement officials to take physical custody of the child for immediate delivery to the court. The warrant may authorize law enforcement officials to enter private property to take physical custody of the child. When the child is taken into physical custody pursuant to a warrant or as soon thereafter as is reasonably possible, the respondent shall be served with notice of the proceedings and the court's Order to Show Cause Why the Custody Determination Should Not Be Enforced.

When the child has been recovered or the warrant is otherwise no longer required, the court shall dismiss such warrant without further court proceedings and direct that any entry into the NCIC concerning said warrant be deleted.

2. Presumption of Immediate Harm - Immediate harm is presumed to exist where the respondent is currently the subject of criminal charges relating to the wrongful removal, retention or concealment of the child or is currently hiding the child from the petitioner. For purposes of this section, a respondent may be "currently hiding" the child from the petitioner even though the petitioner, despite the respondent's effort to conceal, has located the child.

3. Disposition of the Child Who is Taken into Physical Custody Pursuant to a Warrant - If a warrant to take physical custody of the child is issued, the Court shall, pending resolution of the enforcement action, authorize placement of the child with the petitioner, unless such a placement would be contrary to the best interests of the child, would be impractical, or there is good cause to

believe that petitioner would flee the jurisdiction with the child. In the event the child is not placed with the petitioner, the court shall make such other placement as may be in the child's best interests including placement with another responsible adult or with a child protection agency. When the child is placed with the petitioner pursuant to a warrant to take physical custody of the child, the court may impose conditions on the petitioner to insure the presence of the petitioner and/or the child, if so required by the Court, at any future hearing. Conditions may include requiring the petitioner to (A) state under oath that he or she will produce the child, (B) post a bond, (C) surrender passports, or (D) any other condition that the court sees fit to impose.

## Section 10 - Final Relief

1. Order Entered at Conclusion of Hearing - At the conclusion of the hearing on the enforcement action brought pursuant to this Act, the court shall issue its order either granting the petition to enforce or dismissing it. In no event shall the court take the matter under advisement for more than one (1) day.

2. Judgment to be Granted Full Faith and Credit - Full faith and credit shall be accorded by the courts of every State and the United States to the judgment ordering the enforcement of the custody determination.

3. Order Enforcing the Custody Determination - In the event that the court grants the petition to enforce, it may include in its Final Order a direction to law enforcement officials to assist the petitioner in effectuating the Order. The Order may include an authorization to enter into private property to secure the child.

4. Costs and Fees - The prevailing party in an action brought pursuant to this Act shall be awarded necessary travel and other costs including those incurred by witnesses, private investigation fees, and attorneys' fees to be assessed against the losing party unless the losing party establishes by clear and convincing evidence that such an order would be clearly inappropriate.

5. Court costs - Court costs shall be assessed against the losing party unless that party establishes by clear and convincing evidence that this would be clearly inappropriate. In that case, the prevailing party shall pay court costs unless such an order would be clearly inappropriate or such costs have been covered by payments from Federal, State or local legal assistance or other programs.

### 6. Financial Sanctions

(A) Financial sanctions shall be assessed against any petitioner who:

(1) seeks enforcement of a custody determination that he or she knows has been modified, intentionally concealing from the court, the prosecutor or law enforcement officers information about the modification; or

(2) alters the terms of the custody determination in order to mislead the court, the prosecutor or law enforcement officers.

(B) Financial sanctions shall be assessed against any respondent who:

(1) interposes as a defense to an enforcement action a custody determination that he or she knows has been modified, intentionally concealing from the court, the prosecutor or law enforcement officers information about the modification; or

(2) alters the terms of a custody determination in order to mislead the court, the prosecutor or law enforcement officers.

(C) Intent to conceal will be presumed to exist if the party fails to inform the court of the modification of which he or she is aware in either the petition to enforce or the affidavit attached thereto or the answer filed in accordance with Section 4 of this Act.

(D) Financial sanctions shall be awarded to the prevailing party in an amount not less than three (3) times the actual costs including attorney's fees incurred by that party. When appropriate, sanctions may also be awarded to the prosecutor, if participating in the enforcement action, in such amount as the court deems just under the circumstances. Sanctions awarded to the prosecutor shall include law enforcement costs incurred pursuant to Section 2 of Title II. Any costs that are actually recovered on behalf of law enforcement shall be paid by the prosecutor to law enforcement.

7. Any award made pursuant to this Section shall constitute a judgment and shall be enforceable as such.

#### Section 11 - Judicial Review

1. Dismissal or denial of a petition to enforce - dismissal or denial of a petition to enforce shall be considered de novo upon original application to a higher court of this state in accordance with the provisions of this Act.

2. Appeal from an order enforcing a custody determination - appeal from an order enforcing a custody determination entered pursuant to this Act shall be in accordance with established procedures in a civil action. An order to enforce shall not be stayed pending appeal.

#### Section 12 - Non-Exclusive Remedy

The remedies established by this Act shall be in addition to remedies already available under the laws of this state. Title II: The Role of Prosecutor and Law Enforcement in Civil Enforcement of Child Custody Determinations

#### Section 1 - Assistance of Prosecutor

1. In any case where a petition to determine the custody or visitation of a child has been filed in a court of competent jurisdiction of any state or where a temporary order pending issuance of a custody determination has been entered in accordance with the applicable family law of any state, and (1) the location of a party in possession of the minor child is not known, or (2) there is reason to believe that such party may not appear in the proceedings although ordered to appear personally with the child, or (3) there is reason to believe that such party will flee the jurisdiction with the child or otherwise attempt to hide the child from the court, the prosecutor shall take all reasonable actions necessary, whether civil or criminal, to locate such party and the child and to procure compliance with an order to appear with the child for the purpose of adjudication of custody.

[Optional Provision: The petition to determine custody may be filed by the prosecutor.]

2. In any case where a custody determination has been entered by a court of any state exercising

jurisdiction in accordance with the provisions of the PKPA and the child is taken or detained by another person in violation of the determination, upon request of the prosecutor of another state or a party to the determination whether or not a resident of this state, the prosecutor shall take all actions reasonably necessary to locate and return the child and to otherwise assist in the enforcement of the custody or visitation determination or other order of the court by use of any appropriate civil or criminal proceeding including, but not limited to, an action to enforce brought pursuant to this Act.

3. In cases submitted to this state for assistance pursuant to the Hague Convention on the Civil Aspects of International Child Abduction, the state attorney general and the prosecutor will perform the activities described in subdivisions A, B, and E, and otherwise take all appropriate actions to effectuate this treaty.

4. In performing the functions described in subdivisions A, B, C, and E, the prosecutor shall act on behalf of the court and shall not represent any party to the custody determination.

5. If the prosecutor represents to the court, by written declaration under penalty of perjury, that a warrant to take physical custody of the child is needed, the court may issue such warrant in accordance with Section 9 of this Act and may order the child placed with a parent, person, or agency recommended by the prosecutor or make such other placement as is appropriate in accordance with Section 9(C).

Upon a written declaration of the prosecutor that the child has been recovered or that the warrant is otherwise no longer required, the court shall dismiss such warrant without further court proceedings and direct that any entry into the NCIC concerning said warrant be deleted.

6. (A) Such sums as may be necessary to implement the civil provisions of this Act shall be appropriated.

(B) When the prosecutor incurs expenses implementing the civil provisions of this Act, including expenses incurred in another state, such expenses shall be reimbursed from state appropriations subject to an offset for any awards in favor of the prosecutor's office entered and paid by a party pursuant to this Act.

(C) When the prosecutor incurs expenses implementing the civil provisions of this Act, including expenses incurred in another state, the court shall assess against the losing party such expenses unless the losing party establishes by clear and convincing evidence that such an order would be clearly inappropriate. Such an assessment of costs shall constitute a judgment and shall be enforceable as such.

[Alternative provision] When the prosecutor incurs expenses implementing the civil provisions of this Act, including expenses incurred in another state, the courts shall assess such costs against the losing party unless the losing party establishes by clear and convincing evidence that such an order would be clearly inappropriate. In the event that such expenses are not assessed against the losing party, the court shall, if appropriate, assess some or all of such expenses against the prevailing party. An award of expenses made pursuant to this Act shall constitute a judgment and shall be enforceable as such.

7. In any action to enforce a custody decree brought pursuant to this Act, or any substantially similar act, where the petitioner is represented by out-of-state counsel or a prosecutor from another state acting pursuant to Title II, Section 1 of this Act, or a comparable statute, the prosecutor of this state

shall provide the association or affiliation required by law necessary to facilitate the appearance of the out-of-state counsel or prosecutor.

## Section 2 - Assistance of Law Enforcement

1. Law enforcement shall be authorized to take all actions reasonably necessary to locate a child and to procure compliance with all existing court orders when: (1) a child is taken, detained or concealed by another person in violation of a custody determination; (2) a petition to enforce a custody or visitation determination has been filed in a court of competent jurisdiction pursuant to this Act; or (3) a petition to determine custody or visitation of the child has been filed in a court which has jurisdiction in accordance with the provisions of the PKPA.

2. For the purposes of this Act, the term "all actions reasonably necessary to locate the child or to procure compliance with any order affecting custody or visitation of the child," includes, but is not limited to, the following:

- (A) Taking a missing person report;
- (B) Entering the child's description into the NCIC Missing Person File;
- (C) Taking a crime report of criminal custodial interference;
- (D) Locating the child;
- (E) Investigating the crime of custodial interference;
- (F) Requesting assistance from the Federal Parent Locator Service, or the State Parent Locator Service, if authorized by state law;
- (G) Accompanying a parent or other party to a custody determination of any state who is recovering an abducted child or securing compliance with a custody or visitation order in order to prevent violence between the parties;
- (H) Assisting a parent to obtain physical possession of a child pursuant to a custody determination of any state which has been filed in this state pursuant to the UCCJA if there is no claim of a conflicting custody order or other exigent circumstances raised by the other party or otherwise made known to the officer after a reasonably diligent inquiry;
- (I) Taking the child into physical custody if it reasonably appears that any person will flee the jurisdiction of the court with the child or otherwise hide the child from the court or if exigent circumstances otherwise warrant protection of the child;
- (J) Coordinating placement of the child with Social Services or Child Protective Services or other placement directed by the court;
- (K) Securing the personal appearance of a party or a child when a warrant or other court order has been issued directing that the party and/or the child be present at the court proceedings;
- (L). Executing court orders of this state directing the return of the child to the party entitled to

have custody or visitation with the child at that time (including entry into private premises to effectuate such orders as directed by the court, or otherwise authorized by consent or exigent circumstances warranting protection of the child);

(M) Arranging to transport the child back to the court of competent jurisdiction pursuant to court order;

(N) Serving legal process;

(O) Directing that a child's school records or birth certificate be flagged and that the investigating officer be notified in the event that a copy of such records are requested by the abductor parent, if authorized by state law.

(P) [Optional Provision. Accessing information contained in the National Child Custody Registry (if enacted).]

3. (A) Such sums as may be necessary to implement the civil provisions of this Title shall be appropriated.

(B) When a law enforcement agency incurs expenses implementing the civil provisions of the Act, such expenses shall be reimbursed from state appropriations subject to an offset for any awards on behalf of the law enforcement agency entered and paid pursuant to this Act.

(C) When a law enforcement agency incurs expenses implementing the civil provisions of this Act, the court shall assess against the losing party such expenses unless the losing party establishes by clear and convincing evidence that such an order would be clearly inappropriate. An assessment of costs made pursuant to this Act shall constitute a judgment and shall be enforceable as such.

[Alternative provision] When a law enforcement agency incurs expenses implementing the civil provisions of this Act, the court shall assess such expenses against the losing party unless the losing party establishes by clear and convincing evidence that such an order would be clearly inappropriate. In the event that such expenses are not awarded against the losing party, the court shall, if appropriate, assess some or all of such expenses against the prevailing party. An award of costs made pursuant to this Act shall constitute a judgment and shall be enforceable as such. Section-By-Section Analysis and Commentary

## Title I

### Comment to Section 1

This section sets forth the operative definitions used throughout the Act, including Titles I and II.

### Comment to Section 2

A person contemplating where to file an enforcement action has several possible choices of venue: (1) where the child and/or the respondent is located, (2) where the court that made the determination for which enforcement is sought is located, or (3) where the court which now can exercise child custody jurisdiction is located. The courts in each of these three locations would have subject matter jurisdiction to entertain an enforcement action. However, as a practical matter, filing where the child and/or the respondent is located will make the most sense in the majority of cases because the order

can be quickly executed in the jurisdiction which issued it without resort to any further enforcement action.

Typically, when habeas corpus actions have been used to enforce custody determinations, they have been filed where the child or respondent is located. This is also true where motions to enforce or motions to grant full faith and credit have been vehicles for enforcement. Generally, it is the contempt action, used to effect enforcement, that has been brought either in the jurisdiction where the respondent or child is located or in the jurisdiction that issued the original determination. See, e.g., *De la Pena v. Torrone*, 467 So. 2d 336 (Fla. Dist. Ct. App. 1985) (Out of state mother held in contempt); *Willis v. Willis*, 495 N.E.2d 478 (Ohio C.P. 1985) (Ohio court had jurisdiction to rule on father's contempt action despite mother's move to West Virginia); *Dobbins v. Maner*, 517 So. 2d 619 (Ala. Civ. App. 1987) (The court found the mother, who had moved with her son to Tennessee in contempt for violating the visitation provisions of the Alabama custody decree); *Kendall v. Whalen*, 526 A.2d 588 (Me. 1987) (The court found it had continuing jurisdiction pursuant to the UCCJA to rule on a contempt motion even if the mother had left the jurisdiction); *Brown v. Brown*, 676 S.W.2d 519 (Mo. 1984) (Court concluded it had jurisdiction to rule on a contempt motion against an out of state mother); *In re Marriage of Kehres*, 517 N.E.2d 617 (Ill. App. Ct. 1987) (Illinois court had jurisdiction pursuant to the UCCJA to rule on a contempt action against a mother who had relocated to Virginia). In accord *Kirylik v. Kirylik*, 357 S.E.2d 449 (S.C. 1987) (The court recognized its inherent power to enforce compliance with its prior custody order through contempt even though the court no longer had jurisdiction to modify the order. Nonetheless, the court declined to hold the Delaware mother in contempt, urging the father to apply for relief in Delaware where a modification action was already pending.)

A decision to file an enforcement action in the state where the original decree was entered may have more to do with encouraging that state to exercise continuing jurisdiction than with a reasonable expectation that the resulting order will lead to immediate compliance by the respondent. It may also be sensible to file an enforcement action before the child is located. In such a case, filing may make most sense where the original determination was made.

Subsection B makes it clear that the expedited procedures developed for enforcement of a custody determination may not be used to modify an existing custody decree. Even if the court could exercise jurisdiction to modify a decree consistently with the provisions of the PKPA, it may not do so. Any modification action must be filed as a separate action.

According to Subsection C, a petitioner who files an action to enforce is not to be subjected to the general jurisdiction of the court by virtue of the filing. This is to ensure that there exists no deterrent to filing such an action when the respondent has violated the provisions of the custody decree.

### Comment to Section 3

An action to enforce a custody determination shall always take precedence over an action to modify the determination. This is true whether the modification action has been filed prior to the filing of the enforcement action or subsequent to it. In essence, priority is given to the enforcement of an existing decree because the rights of the parties have already been determined by it. Thus those rights should be enforced up until the time that they are modified by a court exercising modification jurisdiction in accordance with the provisions of the PKPA.

In addition, an enforcement action brought pursuant to this Act must be resolved quickly. Under most circumstances, an enforcement action could be resolved in less than three weeks. If this is the

case, staying a modification proceeding for that limited time period will make little difference to the modification action in the long run.

Subsection B mandates judicial communication which must be initiated by the court hearing the enforcement action. While communication is frequently discretionary, it is required in this circumstance so that: (1) the court in which the modification action is pending can determine whether the enforcement action has been brought in a court which believes it has continuing jurisdiction over the underlying custody matter, (2) the court in which the modification action is pending can determine the approximate length of time that the stay will be in force so that scheduling in the modification action can be made accordingly, and (3) both courts can exchange information that might be relevant in determining whether the court in the enforcement action should consider staying implementation of an order to enforce pending the outcome of the modification action. (See Comment to UCCJA Section 15: "This does not mean that the state of enforcement may not in an emergency stay enforcement if there is danger of serious mistreatment of the child." See also Comment to Section 10.)

#### Comment to Section 4

A serious obstacle to enforcement of foreign custody decrees is the lack of uniform enforcement procedures that can be implemented in an expeditious fashion. The procedures established in this section are similar to the procedures followed in habeas corpus actions since the habeas format has been designed to encourage the speedy consideration and resolution of issues. Every effort has been made to keep the procedures simple so that a petition to enforce can be filed by a person unrepresented by counsel.

Subsection B of Section 4 of the Act requires that a certified copy of the custody determination be appended to the petition. This requirement is intended to have the same effect as Section 15 of the UCCJA which provides that once a certified copy of a custody determination is filed with the clerk of the court it shall be treated in like manner as a custody decree issued by a court of that state. While filing with the clerk of the court is recommended, it is not required and a failure to do so will not excuse the court from enforcing the determination if a copy has been appended to the pleadings in compliance with this subsection. Appending the determination to the pleadings rather than filing it separately, as some cases have required (see Comment to Section 7), has at least two advantages: (1) it is cheaper since the separate filing fee will not have to be paid and (2) by appending the decree rather than filing it separately with the clerk, it will be before the court and, therefore, easier for the court to review it as part of its evaluation of the petition and answer, since the court will not have to send down to the clerk's office for a copy.

Subsection B further details the information to be included in the petition and answer. This information all relates to the permitted scope of inquiry in the enforcement action set forth in Section 5. If properly presented this information should enable a court to decide whether a determination is entitled to enforcement without the need for an evidentiary hearing in the majority of cases or to determine that a hearing will be concerned with only a particular issue.

This is designed to supply the court with sufficient information to determine whether the court which entered the determination had subject matter jurisdiction in the case. Was the state the child's home state? If not, was it because there was no home state but the state did have significant connections to the child and at least one parent? Did the court have emergency jurisdiction? Did no other state have jurisdiction consistent with the provisions of the UCCJA and the PKPA?

Similarly, did the respondent receive adequate notice and opportunity to be heard? If the petition and answer confirm that the respondent did not receive actual notice of the original proceeding that resulted in the determination, the court might limit its inquiry at a hearing to whether substituted service was adequate to assure due process under the circumstances of the case. The court could also investigate whether the respondent had taken deliberate steps to make it difficult or impossible for the petitioner to give actual notice of the proceedings. See Comment to Section 7.

If the court learned that other proceedings were pending between the parties, it could schedule a hearing or request further written information to determine if these proceedings would have any bearing on the enforceability of the decree.

In order to make the enforcement process easy for the unrepresented to undertake, forms should be developed for both the petition and the answer that are available from the clerk of the court. The forms should be constructed to enable the parties to provide the required information in sufficient detail so that the court can routinely make decisions based solely on the written pleadings.

Subsection C provides two alternatives for service of process. The first requires that service be in accordance with the provisions of the UCCJA and the PKPA. This provision has the advantage that it requires no change in existing law. The alternative provision for service of process permits personal service to be completed by an adult not a party to the action. This bypasses sheriff or marshal service which can take a long time and be costly. This and other time and money saving methods for achieving service of process are in keeping with the overall goals of the Act of promoting time efficiency and cost effectiveness. This provision is modeled after provisions of the California Code of Civil Procedure. See e.g. Cal. Code Civ. Pro. 415.10, 415.20(b), 414.30, and 415.40.

Subsection D provides for quick review and action when a petition is filed. Review of the petition is triggered by filing of proof of service. Within (5) five days of this event, the court must decide whether, on the face of the pleadings, the petitioner has made a prima facie case for enforcement. If so, it must issue an Order to Show Cause Why the Custody Determination Should Not Be Enforced. If not, the court should dismiss the Petition.

In the event the petitioner has requested a waiver of notice pursuant to the Act, the court must rule upon the request within (2) two days. If the court grants the request, it shall simultaneously issue its Order to Show Cause Why the Custody Determination Should Not Be Enforced. It is presumed that the court would not grant a waiver of notice and the accompanying Warrant to Take Physical Custody of the Child unless the court believed that the petitioner had made a prima facie case for enforcement, thus triggering the requirement that the respondent file an answer.

Subsection E sets forth the information that should be included in the answer. As with the information contained in the petition, the contents of the answer address the issues of subject matter jurisdiction and due process. In addition, they look at whether the decree has been modified and whether other proceedings are currently pending between the parties. This is the only information that should have relevance to the question of whether the custody determination is entitled to enforcement.

These requirements foreclose the respondent from seeking entry of a new custody order via the enforcement process. This is modeled on provisions like Ga. Code Ann. 19-9-23 (1978) which prohibits a claim for modification of custody from being raised in a habeas corpus action brought to enforce a child custody order.

Because the expedited enforcement action is not to be used as a vehicle for any other purpose including modification, no other information is relevant. Information, for example, about the best interests of the child cannot be considered. Therefore, it should not be included in the answer. In the event the respondent does include information other than that required in subsection E, the court must disregard it as it evaluates the pleadings to determine whether or not the custody determination must be enforced. Any modification action must be filed separately and is subject to the stay and communication provisions of this Act.

The respondent is given (5) five days to file the answer. This time may be shortened by order of the court for good cause shown. This is to be determined on a case by case basis.

Subsection F continues the emphasis on speedy review and resolution of enforcement questions. Within (3) three days of the receipt or filing of the answer, the court must review the pleadings and determine if there are any material issues of law or fact. If there are no material issues of law or fact, the court shall, within the prescribed time period, determine enforceability solely on the basis of the pleadings in much the same fashion that a court would rule on a motion for summary judgment.

A hearing will be scheduled only if the court concludes that a genuine issue of law or fact exists. If that is the case, the hearing shall be scheduled to take place within three days. The court shall limit the hearing to those issues that are contested. If, for example, the only dispute between the parties is whether the respondent received adequate notice of the proceedings, the hearing shall be limited to an exploration of that question. Similarly, if the parties dispute the basis for the exercise of subject matter jurisdiction, the court must allow exploration of that issue. At all times, however, the court must consider these issues with an eye toward application of UCCJA Section 12 "Binding Force and Res Judicata Effect of Custody Decree." In some instances, even if the parties dispute jurisdictional facts, res judicata principles may foreclose revisiting the issue.

According to UCCJA Section 12, the "custody decree" is conclusive as to "all issues of law and fact decided and as to the custody determination made unless and until that determination is modified" if the decision was made by a court exercising jurisdiction under UCCJA Section 3. The decree is binding on all parties who were properly served who were given notice and an opportunity to be heard. In a case where a court found that it had subject matter jurisdiction pursuant to UCCJA Section 3 and the PKPA based on facts presented to it, that ruling would be res judicata on the issue and it could not be relitigated in an enforcement action unless the ruling was clearly not supported by the facts or was predicated on fraud or deceit. See, e.g., *Lofts v. Superior Court*, 682 P.2d 412, 415 (Ariz. 1984) (The court vacated a lower court order which denied full faith and credit to an order issued by a Washington court on the basis that a court in a second state need only determine whether the decreeing court "fully and fairly litigated and finally decided" the question of subject matter jurisdiction. If it did, the determination is res judicata and cannot be relitigated in another state.)

Similarly, if the court which entered the determination expressly found that the parties had been given reasonable notice and opportunity to be heard in the custody proceeding, principles of res judicata would preclude relitigation of that question in an enforcement action.

In order to minimize costs to any or all participants, the court may, pursuant to subsection H, allow a party or the prosecutor to participate in a hearing through conference call or other available technology. This may be particularly important to a prosecutor who has assisted in the location of a respondent and /or child pursuant to the

provisions of Title II, and who has important information to share with the court pertinent to the enforcement proceeding but who cannot attend an enforcement hearing held in a distant state.

In keeping with the emphasis in the UCCJA on communication between courts, Subsection I also permits communication if reason exists for the court to do so. Such may be the case if the parties provide different interpretations of provisions of the custody determination. The easy answer, call the judge who entered the determination to find out what she or he meant. Communication can occur while the court is scrutinizing the pleadings, during a scheduled hearing or after the hearing while the judge is deliberating. Whenever judicial communication takes place, it shall be on the record and both parties and the prosecutor, if involved in the case, must be given the opportunity to participate.

Subsection J on computation of time parallels the language commonly found in civil rules of procedure governing computation of time.

#### Comment to Section 5

Another obstacle to enforcement is that some courts have permitted consideration of the best interests of the child to intrude. This has been true particularly in the habeas corpus proceeding. When this occurs, expanding consideration of issues beyond that of whether the custody decree is entitled to enforcement, the proceeding essentially becomes one of modification. See, e.g., *Walt v. Walt*, 574 So. 2d 205, 211 (Fla. Dist. Ct. App. 1991) (The court stated that when using habeas corpus to enforce a custody decree, a Florida court "must make a finding that the required change of custody" is in the best interests of the child.) This Act would prohibit such consideration, limiting the scope of inquiry to whether or not the court which issued the custody determination had subject matter jurisdiction to do so consistent with the UCCJA and the PKPA, whether the respondent was given reasonable notice and opportunity to be heard and whether or not the determination has been modified by a court with jurisdiction to do so pursuant to the PKPA. See also Ga. Code Ann. Section 19-9-23 (1978) which prohibits consideration of modification in a habeas corpus action brought to enforce a child custody order.

#### Comment to Section 6

Except where otherwise specified, the preponderance of the evidence standard was selected because this is a civil proceeding which has as its purpose the enforcement of an existing order. While a higher standard might be appropriate for determining the actual merits of a custody determination in the first place, the burden should be less stringent when the focus is the implementation of an existing order.

#### Comment to Section 7

The petitioner should be able to meet the burden of proof by submitting the information required in Section 4. The petitioner must provide sufficient information to show that the court which issued the determination had subject matter jurisdiction consistent with the provisions of the PKPA. If lawyers and judges are doing their jobs properly, the determination should state this basis clearly, whether it be home state or significant connection jurisdiction, emergency jurisdiction, or the fact that no other state had a basis for subject matter jurisdiction.

Because lack of notice or opportunity to be heard can be raised as a defense to enforcement, the peti-

tioner should clearly describe the kind of notice that the respondent was given and the extent of the respondent's participation in the custody proceeding. The fact that the respondent was not given actual notice will not necessarily defeat an enforcement action particularly if the respondent's purposeful actions made it impossible for him or her to be served. This is frequently the case when an abductor parent absconds with the child and conceals his or her whereabouts. See, e.g. *Sanders v. Shephard*, 541 N.E.2d 1150 (Ill. App. Ct. 1989). Therefore, if the respondent did not receive actual notice of the proceedings in accordance with the notice provisions of the UCCJA, the petitioner should include in the pleadings an explanation of why constructive notice was used.

Subsection B is included in deference to Section 15 of the UCCJA that a certified copy be filed with the clerk of the court in order to assure that it will be treated like a custody decree issued by a court of that state. Some courts have taken Section 15 to mean that filing is a condition precedent to enforcement. See, e.g., *In re Marriage of Dagan and Dagan*, 798 P.2d 253 (Or. Ct. App. 1990) (the court refused to enforce an Israeli judgment because the father who was seeking enforcement failed to file a certified copy of it with the county clerk); *In re Marriage of Agathos*, 550 N.E.2d 1161 (Ill. App. Ct. 1990) (an order granting comity to a Greek custody order was reversed because the order had been registered pursuant to the Uniform Enforcement of Foreign Judgments Act instead of pursuant to the UCCJA).

Under this statute, filing with the clerk of the court is recommended but it is not necessary and a failure to do so will not excuse the court from enforcing the determination if a copy has been appended to the pleadings in compliance with this subsection. Appending the determination to the pleadings rather than filing it separately, as some cases have required, has the advantage of being cheaper since a separate filing fee will not have to be paid and consideration by the court will be facilitated since the court will not have to send down to the clerk's office to get it when evaluating the petition and answer.

#### Comment to Section 8

The defenses that can be raised to enforcement are limited to three: (1) that the court that issued the determination lacked subject matter jurisdiction to do so, (2) that the respondent received inadequate notice of the proceedings and/or was denied a meaningful opportunity to participate, and (3) that the decree was subsequently modified by a court exercising jurisdiction in compliance with the provisions and of the PKPA. Lack of notice cannot be raised as a defense if the respondent purposely hid to avoid service of process. Similarly, if the respondent refused to participate in the custody proceeding but had actual notice of it, he or she cannot claim lack of reasonable opportunity to be heard. But note, if a party received notice but refused to participate on jurisdictional grounds, the argument may still exist that the court lacked jurisdiction to enter the order. If the enforcement process is to be meaningful and result in swift and predictable decisions, it must be limited to consideration only of these three issues.

#### Comment to Section 9

This provision permits a temporary waiver of notice in any case where there is reason to believe that the child will suffer immediate harm or be removed from the jurisdiction once the respondent learns that the petitioner has filed an enforcement action. In the event circumstances justify a waiver of notice, as they always will if the respondent is currently the subject of criminal charges related to custodial interference or is currently

hiding the child from the petitioner, the court will not only grant a temporary notice waiver but will also issue a warrant to take physical custody of the child. When this warrant is executed, the respondent will then receive notice of the proceedings. Note that it is the respondent's intent to conceal the child from the petitioner that is important here. If the petitioner discovers the location of the child despite the respondent's efforts at concealment, the court must still waive notice and issue its warrant in order to prevent further flight and concealment.

It is assumed that the court will issue a waiver of notice and a warrant only when it believes that the petitioner has, in the initial pleadings, made a prima facie case for enforcement. Consequently, if the court issues a warrant, it should simultaneously issue its Order to Show Cause Why the Custody Determination Should Not Be Enforced, thus requiring the respondent to file an answer to the petition.

It is also understood that grounds other than those listed in subsection B may justify the issuance of a warrant to take physical custody of the child. Most likely these would include (1) strong evidence to support allegations that the respondent will flee the jurisdiction with the child or otherwise attempt to hide the child from the petitioner or the court, and (2) strong evidence that the child is being or will be abused or neglected if allowed to remain with the respondent. In these cases, as in any case other than one where the respondent is currently the subject of criminal charges or currently hiding the child from the petitioner, the court must make a case by case determination whether to issue a warrant.

Subsection C establishes a preference for placement of a child taken into custody pursuant to a warrant with the petitioner. Where such a placement would be impractical, perhaps because the petitioner is financially unable to be present when the warrant is executed, or where the placement would be contrary to the best interests of the child, or when good cause exists to believe that petitioner will flee the jurisdiction of the court with the child, the court can order any other appropriate placement including one recommended by the prosecutor pursuant to the provisions of Title II.

Some states currently authorize the posting of cash bonds in custody cases. This Act incorporates the use of the bond as a means of protecting its process. While not mandated, the court can require a petitioner to post a cash bond if the child is placed in his or her custody subsequent to the execution of a warrant to take physical custody of the child. This bond would be subject to forfeiture in the event that the petitioner failed to return with the child for a subsequently scheduled hearing or failed to return the child in the event that the court concluded that the custody determination was not entitled to enforcement. Bonds are currently required in many states when a temporary restraining order or other preliminary relief is granted.

The bond requirement is not the only condition that the court can impose upon the petitioner. Other conditions can include the surrendering of passports or anything else that would reasonably encourage the petitioner to comply with the court's orders.

#### Comment to Section 10

Subsection A simply states the obvious, that the court can issue an order to enforce, granting the relief requested. In many instances, particularly if the child is not present,

the court may also direct law enforcement officials to assist the petitioner in picking up the child in accordance with the order. This can include entering private property, if necessary. See Section 10C. Very important to securing compliance with an order to enforce is the requirement of subsection B that the courts of every state and the United States accord full faith and credit to the order.

Subsection D of the Act creates the presumption that the prevailing party will be awarded costs and fees. The burden is upon the losing party to convince the court by clear and convincing evidence that such an award would be inappropriate. It would be inappropriate for the court to award costs and fees if to do so would make it difficult or impossible for the losing party to care for the child.

Similarly, the Act creates the presumption that court costs will be assessed against the losing party. Once again, the losing party carries the burden of convincing the court that such an assessment would be inappropriate. If the court so determines, it may then assess the petitioner for these costs unless that would also be clearly inappropriate. In individual cases, court costs can come from federal, state, or local programs.

Financial sanctions are mandated where a party seeks to perpetrate a fraud upon the court. In abbreviated procedures such as those contained in this Act, there can be no tolerance for a litigant who seeks to gain personal advantage by intentionally misleading the court. Financial sanctions will be paid either to the prosecutor, if he or she files the enforcement action or otherwise assists with it, or to the other party, if privately participating. In some cases it may be appropriate to award sanctions to both the private party and the prosecutor. Costs incurred by law enforcement officers acting pursuant to Section 2 of Title II are to be included in an accounting of the prosecutor's costs. Any such amounts actually recovered by the prosecutor on behalf of a law enforcement agency shall be paid to that agency.

In order to facilitate collection of amounts awarded as reimbursement for costs and fees or sanctions, such an award shall constitute a judgment and shall be enforceable as such.

Although not discussed in Section 10, it is recognized that in very limited circumstances, the court may, at the request of a party or the prosecutor, if he or she is participating in the action, enter a temporary stay of the enforcement order. Such extraordinary relief should be limited to very narrow circumstances where the court has grave concerns that the immediate enforcement of the order would cause serious trauma to the child. Such might be the case only where (1) there has been a period of prolonged and continuous separation of the child and the petitioner, (2) the child has attained sufficient age that his or her opposition to the terms of the existing custody determination deserves consideration, or (3) there is reason to believe that the child will suffer grave physical or emotional harm if the determination is enforced.

In practice, this might work as follows. A parent seeks exercise of emergency jurisdiction in a court which does not have jurisdiction to modify pursuant to the PKPA because of complaints by the child that he or she is being physically abused by the other parent. If the other parent files an action to enforce, pursuant to Section 3, the court before which the emergency jurisdiction petition is pending must stay that action until the court rules on the enforcement petition. The enforcement court may only consider whether

the custody determination is entitled to enforcement looking at whether the court which entered it had jurisdiction pursuant to the PKPA and whether the parties were provided adequate due process. If jurisdiction was proper and process provided, the court must grant the petition to enforce.

However, if as the result of the mandatory communication between courts required by Section 3, or as a result of other evidence presented via a petition to stay enforcement, the court is convinced that the child has been or will be physically abused if returned to the prevailing party, it may stay enforcement of its order to allow the respondent to file for modification in the proper jurisdiction. If the parent fails to do so within a time period prescribed by the court, the stay must be lifted. If, however, the action is filed, the court may extend the stay until the modification court enters its order.

In no case, however, should any stay be issued that is open ended in duration. A stay should be of limited duration in order to give the parties an opportunity to address their concerns in the proper forum. For example, a stay could be issued to expire within thirty days in the event that the party seeking it has not filed for a modification of the existing order in a court with proper jurisdiction.

#### Comment to Section 11

Like a habeas corpus petition that has been denied, a petition to enforce a custody determination can be filed anew by the petitioner in a higher court for consideration as an original action when it has been dismissed or denied by a lower court. The same procedures are to be followed for this filing as with the original. This will allow for expedited review of a dismissal or a denial.

Following the normal appeals process is required, however, if a respondent wishes to appeal an order enforcing a custody determination. This is to encourage a respondent unhappy with the terms of a custody determination to seek relief via modification of the determination in the appropriate court. This is particularly appropriate since the appeal will be limited to those issues raised in the enforcement action: jurisdiction and due process. Neither presents a vehicle to change the terms of the existing order.

The same reason applies to prohibiting a stay of the order to enforce. If the respondent wishes to challenge the terms of the original order, the logical place to do so is either in the court which issued the determination, if it continues to have jurisdiction in accordance with the PKPA, or in the court which has acquired jurisdiction to modify in accordance with the PKPA.

#### Section-By-Section Analysis and Commentary Title II

##### Comment to Section 1

California is currently the only state that authorizes the prosecutor to assist in locating and returning a child who is being detained or hidden in violation of a custody determination. See Chapter 7 "The Role of Prosecutors in the Civil Enforcement of Custody Decrees." Title II of this Act incorporates many features of the California law

because of the benefit it brings to all parties seeking the enforcement of a custody determination or help in locating a missing child. The prosecutor has resources to draw upon that are unavailable to the person of average or limited means.

Drawing upon those resources, the prosecutor is authorized to assist in finding a parent or child whose location is unknown and to take all reasonable steps, civil or criminal, to locate the child and procure compliance with an existing custody determination. Specifically, Subsection A requires the prosecutor to locate the child and procure compliance with orders requiring the appearance of a party or the children in court for the purposes of adjudicating custody and visitation. By reducing the success of pre-decree abductions, the orderly process of establishing custody is enhanced. This, in turn, promotes stability of the child's home life.

The prosecutor acts only after a petition to establish custody has been filed or a temporary custody order obtained. It may also be advisable to give prosecutors the authority to file the petition for custody as California has done. Such authority is useful in those rare cases when expedited action is essential and the parent or other party seeking assistance does not have the resources to petition for custody on his or her own behalf.

According to Section B, prosecutors are authorized to locate children who have been abducted by a parent and to procure compliance with custody and visitation orders. Prosecutors are authorized to use all available civil law remedies as well as criminal charges when appropriate under the law of the forum state. Prosecutors are given broad powers and flexibility to choose the appropriate remedy, civil or criminal, to resolve cases of parental abduction.

Although subsection B requires prosecutors to assist in all cases where the child has been taken, detained, or concealed in violation of a custody or visitation decree, it is anticipated that competition for public resources will impose limits on actions taken pursuant to Section 1 of Title II. Prosecutors are encouraged to develop guidelines for assistance commensurate with the extent of their resources.

Subsection C addresses assistance to be provided in Hague Convention cases. The Hague Convention on the Civil Aspects of International Child Abduction is an international treaty governing the return of internationally abducted and wrongfully retained children. Among signatory nations, it provides for the prompt return of internationally abducted and wrongfully retained children to the country of their habitual residence, subject to limited exceptions. The United States ratified this treaty in 1988 and it entered into force in the United States of July 1, 1988.

The International Child Abductions Remedies Act (P.L. 100-300), 42 U.S.C. 11601-11610, was enacted in 1988 to implement the provisions of the Child Abduction Convention. Pursuant to this Section, prosecutors and the State Attorney General would assist in locating internationally abducted children and in procuring compliance with court orders pertaining to custody and visitation as well as taking any other action necessary to effectuate this treaty.

In performing the functions mandated by this Act, the prosecutor does not represent any party to the proceeding, but acts as a "friend of the court." See subsection D. The prosecutor acts to ensure the presence of the parties and the child for the adjudication of

custody and visitation by a court of competent jurisdiction, not to advocate for any particular result in the custody proceedings. Once the parties and the child are before the court of competent jurisdiction for purposes of adjudicating custody and visitation, the parties and their attorneys, if any, should address those issues.

In addition to other functions, the prosecutor is authorized in Subsection E to apply to the court for a warrant to take a child into physical custody to ensure the presence of the child at a future custody proceeding. The prosecutor may make a recommendation concerning transporting the child to the jurisdiction of the court undertaking the custody adjudication and housing the child pending the court hearing. The court may make such orders as it deems appropriate. The court is to impose adequate measures to ensure that the child will be present at future custody proceedings.

According to Subsection F, if the prosecutor files an action, the prosecutor shall be eligible to recover costs, fees and financial sanctions in the same fashion as would a private litigant pursuant to Section 10. In addition, a prosecutor's expenses incurred in an investigation (other than a criminal investigation) to locate the parent or a child or to otherwise foster enforcement of a custody determination can be assessed against the losing party.

In order for the prosecutor to perform the functions required by Section 1, additional funds will be needed. These are to come from the state subject to an offset for any award of costs actually paid by a party. In the alternative section, the court has the authority to assess expenses incurred by a prosecutor in civil enforcement and investigations against even a prevailing party when the court finds that it would be clearly inappropriate for the losing party to pay them. This might occur when the losing party is indigent.

It is an underlying theme of Title II that assistance from prosecutors and law enforcement officers will foster the goal of encouraging parties to a custody determination to abide by its terms or to come to mutual voluntary agreement on modification or, if that is impossible, to seek change through the legal system. This goal is one worthy of state support because it fosters stability for children and respect for the rule of law.

Because prosecutors and law enforcement officers are members of broad networks of professionals with the knowledge and resources that can be used to track and locate abducting parents and missing children, they may have greater success in performing these functions than would others outside these networks. Consequently, if parties know that prosecutors and law enforcement officers are available to help in securing compliance with custody determinations, they may be deterred from interfering with the exercise of rights established by court order.

Since Title II authorizes both the prosecutor and law enforcement officers to undertake tasks in connection with child custody enforcement heretofore not routinely performed, legislatures must give thought to how these additional tasks are to be funded. One option, proposed in the alternative provision, would allow a court to impose a fee upon the person seeking assistance, unless clearly inappropriate, if the court declines to order payment of these costs by the losing party. This is similar to existing California law which allows the court in its discretion to allocate direct costs between the parties.

Such an approach can be controversial. First, requiring a party who seeks help to pay

for services may discourage application for assistance, thus thwarting the usefulness of the provision. In addition, the potential assessment of these costs may raise due process concerns. If a party can be assessed the costs incurred by law enforcement and/or the prosecution in locating a missing child, he or she should be informed of the potential liability and what the costs may be when the request for assistance is made. This would protect the party from unknowingly incurring what could amount to a significant and substantial financial liability that could eventually lead to a lien or other attachment of property if left unpaid.

For these reasons, the mechanism to fund prosecutorial and law enforcement involvement in these cases must be given the most careful consideration.

Assessment of costs against a party who has violated the terms of a custody determination is another question, as is the assessment of costs against a party who seeks assistance when none is merited. Indeed the potential of such assessment could have the salutary effect of encouraging compliance or encouraging modification through legal channels or of discouraging requests for help that is unwarranted. Unwarranted help might be provided if a party sought enforcement of a determination that had been modified in compliance with the terms of the PKPA or one entered by a court that clearly did not have jurisdiction. Further, it is not uncommon to assess against a losing party the costs of the litigation that his or her improper actions brought about. Applying the same rationale, prosecutorial and law enforcement services, necessitated because of the losing party's wrongful or improper actions, should be recoverable unless clearly inappropriate.

In order to facilitate collection of costs awarded pursuant to this Act, such awards constitute a judgment and are entitled to be enforced as such.

When enforcement actions are prosecuted by either out-of-state private counsel or by an out-of-state prosecutor, those attorneys may need to obtain court permission to appear in these proceedings. State law routinely requires affiliation with local counsel for such an appearance. To facilitate the appearance, the prosecutor shall provide the affiliation. See Subsection G.

#### Comment to Section 2

As set forth in Subsection A, law enforcement has a role to play in the civil enforcement of custody and visitation orders. When court orders pertaining to custody and visitation are thwarted by an abduction, a parent should be entitled to assistance in locating the abducted child and in compelling obedience to the custody or visitation decrees. Also, when a pre-decree abduction deprives a parent of the opportunity to have the court adjudicate the issues of custody and visitation, a parent should be entitled to assistance in locating the abducted child and in bringing the abductor and child before the court.

However, nothing in this Section prohibits an allocation of responsibility among law enforcement agencies. Different law enforcement agencies may perform different functions. For example, the sheriff's office may be primarily responsible for the execution of court orders obtained pursuant to Sections 9 and 10 of this Act. However, either the sheriff's office or the city police may accompany a parent on a civil stand-by

to keep the peace while a parent recovers a child who has been unlawfully detained.

Although this section requires law enforcement to assist in all cases where the child has been taken, detained, or concealed in violation of a custody or visitation decree, it is anticipated that competition for public resources will impose limits on the actions undertaken pursuant to this Section. Law enforcement agencies are encouraged to develop guidelines for assistance commensurate with the extent of their resources.

The actions listed in Subsection B are not an exhaustive list of all functions law enforcement are permitted to take in cases of parental abduction. They are, instead, examples to illustrate the range of actions permitted.

Some actions, such as the taking of a missing person report and the entering of an abducted child into the NCIC-Missing Person File, are mandated by federal law. (See The Missing Children Act of 1982 (Pub. L. 97-292, 28 U.S.C. 534(a)) and the National Child Search Assistance Act of 1990, Pub. L. 101-647, 42 U.S.C. 5780). Other actions, such as flagging school records and birth certificates, are mandated by state laws. (See Arizona, Arkansas, Florida, Idaho, Illinois, Indiana, Kentucky, Mississippi, Missouri, New Mexico, Oklahoma, Rhode Island, and Utah.)

According to Subsection C, costs incurred by law enforcement agencies implementing the civil provisions of this Act are to be paid by the state, subject to an offset for amounts assessed against the losing party and actually paid by that party. In the alternative section the court has the authority to assess expenses incurred by a law enforcement agency in civil actions implementing the civil provisions of this Act against even a prevailing party when the court finds that it would be clearly inappropriate for the losing party to pay them. This might occur when the losing party is indigent. An award of costs assessed against a prevailing party should act, similarly, as an offset against costs paid by the state.

Parties should be advised of their potential liability for costs at the time they seek assistance from a law enforcement agency. In order to facilitate collection of costs assessed pursuant to this Act, such awards constitute a judgment and are entitled to be enforced as such.

ENDNOTES