

MINUTES OF THE HOUSE JUDICIARY COMMITTEE

The meeting was called to order by Vice Chairman Lance Kinzer at 3:30 P.M. on March 8, 2007 in Room 313-S of the Capitol.

All members were present except:

Jason Watkins- excused  
Kevin Yoder- excused  
Mike O'Neal- excused

Committee staff present:

Jerry Ann Donaldson, Kansas Legislative Research  
Athena Andaya, Kansas Legislative Research  
Jill Wolters, Office of Revisor of Statutes  
Duston Slinkard, Office of Revisor of Statutes  
Cindy O'Neal, Committee Assistant

Conferees appearing before the committee:

Eric Fish, National Conference on Uniform State Law  
Linda Elrod, Professor, Washburn School of Law  
Ron Nelson, Johnson County  
Sandy Barnett, Kansas Coalition Against Sexual & Domestic Violence  
Kathy Olsen, Kansas Bankers Association

The hearing on **SB 18 - uniform child abduction prevention act**, was opened.

Eric Fish, National Conference on Uniform State Law, testified that the act is a valuable tool for deterring both domestic and international child abduction. The U.S. Department of Justice reports over 200,000 instances yearly of a child being taken in violation of a custody agreement by a family member. At least 1,000 children are abducted from the U.S. and taken to a foreign country each year. The act is intended to provide courts and parties with tools to prevent an unlawful abduction from occurring in the first place. (Attachment 1)

Linda Elrod, Professor, Washburn School of Law, explained that the proposed bill provides for the following:

- guidance regarding the warning signs and risk factors of a potential child abduction, such as abandonment of a job, liquidation of assets, or obtaining travel documents
- address problems which arise by international child abduction, such as differentiating between nations that are signatories to international child abduction conventions and those that are not
- gives the court effective measures to use, such as imposition of travel restrictions

Ron Nelson, Attorney from Johnson County, practices in the area of domestic relations, where a large number of clients have conflict child-custody issues. The proposed bill addresses the issue where interstate and international child abduction by parents happen because they want to use the child as a pawn in their dispute. Studies suggested that in 1999, 53% of family abducted children were gone less than one week and 21% were gone one month or more. (Attachment 2)

Sandy Barnett, Kansas Coalition Against Sexual & Domestic Violence, expressed her concern that the act would be used by perpetrators of domestic violence to keep the protective parent from fleeing to a shelter in order to protect her and the children. However, the Uniform Law Commission has assured the group that "fleeing to escape domestic violence" is not wrongful under the act. (Attachment 3)

The hearing on **SB 18** was closed.

The hearing on **SB 183 - uniform commercial code, article 1, general provisions**, was opened.

Eric Fish, National Conference on Uniform State Law, appeared before the committee in support of the bill. He explained that it improves old Article 1 in the following ways:

- The UCC has entirely been amended or revised between 1985 and 2003. Most states have enacted these revisions and amendments. The proposed bill would bring Article 1 up-to-date

## CONTINUATION SHEET

MINUTES OF THE House Judiciary Committee at 3:30 P.M. on March 8, 2007 in Room 313-S of the Capitol.

with the rest of the UCC.

- Reduces interpretation problems and opportunities for litigation.
- The courts will have more complete evidence on the meaning of contracts and the intent of the parties to them.
- General writing and signature requirements are deleted to make way for the specific provisions for the electronic records and signatures that are contained in the substantive UCC articles. (Attachment 4)

Kathy Olsen, Kansas Bankers Association, appeared as a proponent to the bill, which reinstates current law with regard to choice of law rules. She believes that the choice of law is better because all transactions should be governed by the laws of a state where there is a reasonable relation. (Attachment 5)

The hearing on **SB 183** was closed.

The hearing on **SB 308 - uniform commercial code, article 7, revisions**, was opened.

Eric Fish, National Conference on Uniform State Law, appeared as a proponent to the bill. He explained that the proposed bill would:

- Extend the statute of fraud requirements to include electronic records and signatures by creating new definitions of “record” and “sign”. The new definitions recognize information is stored in electronic format and electronic symbols.
- It permits the conversion of electronic documents to tangible documents and vice versa.
- Would clarify that a person had “control” of a document of title for Article 7 purposes if a system employed for evidencing the transfer of interests in the electronic document reliably establishes that person as the person to which the electronic document was issued or transferred. (Attachment 6)

The hearing on **SB 308** was closed.

The committee meeting adjourned. The next meeting was scheduled fro March 12, 2007.

# UNIFORM CHILD ABDUCTION PREVENTION ACT

## - A SUMMARY -

Child abduction is one of the most frightening and heartbreaking crimes faced by parents and families today. According to the Office of Juvenile Justice and Delinquency Prevention, an estimated 262,100 children were abducted in 1999 alone. Despite the familiar image in the news of children abducted by predatory strangers, the majority of child abductions are perpetrated by family members. Indeed, of the 262,100 children abducted in 1999, approximately 203,900 (78%) were abducted by a family member. While current State laws address initial child-custody determinations and the criminal repercussions of child abductions, they generally provide inadequate prevention mechanisms.

In 2006, the Uniform Law Commission (ULC) promulgated the **Uniform Child Abduction Prevention Act (UCAPA)**. The act provides States with a valuable tool for deterring both domestic and international child abductions by parents and any persons acting on behalf of the parents. Recognizing that most States have already developed substantial bodies of law regarding child custody determinations and enforcement, including specifically the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), the Uniform Law Commission drafted **UCAPA** to be compatible with and to augment existing state law.

The act anticipates the need for cooperation and communication among the courts of different states. Because abduction situations will likely involve more than one state, it is vital that courts have the ability to communicate effectively. The act accomplishes this goal by building on the interstate jurisdiction and enforcement mechanisms of the UCCJEA, including provisions on temporary emergency jurisdiction.

An action for abduction prevention measures may be brought either by a court on its own motion, by a party to a child-custody determination or an individual with a right to seek such a determination, or by a prosecutor or public attorney. The party seeking the abduction prevention measures must file a petition with the court specifying the risk factors for abduction as well as other biographical information including the name, age and gender of the child, the current address of the child and the person against whom the measures are sought, a statement regarding any prior actions related to abduction or domestic violence, a statement addressing any prior arrests for domestic violence or child abuse by either party, and finally any additional information required by existing State child custody law including the UCCJEA.

**UCAPA** sets out a wide variety of factors that should be considered in determining whether there is a credible risk that a child will be abducted. These factors include overt signs such as previous abductions, attempts to abduct the child, or threats of abduction, as well as signs of general abuse including domestic violence, negligence, or refusal to obey a child-custody determination. The act also includes a wide range of activities that may indicate a planned abduction including abandoning employment, liquidating assets, obtaining travel documents or travel tickets, or requesting the child's school or medical records.

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Date 3-8-07  
Attachment # 1

The act also addresses the special problems involved with international child abduction by including several risk factors specifically related to international abduction. In particular, the act requires courts to consider whether the party in question is likely to take a child to a country that isn't a party to the Hague Convention on the Civil Aspects of International Child Abduction, or to a country that places the child at risk, has laws that would restrict access to the child, that is on the current list of state sponsors of terrorism, or is engaged in an active military action or war. In addition, a court will consider issues related to citizenship such as a recent change in citizenship status or a denial of United States Citizenship.

If a court determines that a credible risk exists that the child will be abducted, it may then enter an order containing provisions and measures meant to prevent abduction. The act lists a number of specific measures that a court may order. These include imposing travel restrictions, prohibiting the individual from removing the child from the State or other set geographic area, placing the child's name in the United States Department of State's Child Passport Issuance Alert Program, or requiring the individual to obtain an order from a foreign country containing identical terms to the child-custody determination. An abduction prevention order is effective until the earliest of the order's expiration, the child's emancipation, the child's 18<sup>th</sup> birthday, or until the order is modified, revoked, or vacated.

If abduction appears imminent, a court may issue a warrant to take physical custody of the child, direct law enforcement officers to take steps to locate and return the child, or exercise other appropriate powers under existing state laws. A warrant to take physical custody is enforceable in the enacting state even if issued by different state. The court may authorize law enforcement officers to enter private property, or even to make a forcible entry at any hour, if the circumstances so warrant. Nevertheless, the person on whom the warrant is being executed must be served with the warrant when or immediately after the child is taken into custody and the person must be afforded a hearing no later than the next judicial day or the next possible judicial day if the next day is impossible.

By giving courts a means to identify risk factors for child abduction and a system for imposing appropriate abduction prevention measures, the **Uniform Child Abduction Prevention Act** will provide States with a powerful tool to combat the threat of abduction that faces tens of thousands of children every year. The States should consider its enactment as expediently as possible.

**UNIFORM CHILD ABDUCTION  
PREVENTION ACT**

drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT  
IN ALL THE STATES

at its

ANNUAL CONFERENCE  
MEETING IN ITS ONE-HUNDRED-AND-FIFTEENTH YEAR  
HILTON HEAD, SOUTH CAROLINA

July 7-14, 2006

*WITH PREFATORY NOTE AND COMMENTS*

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By

NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS

October 25, 2006

## ABOUT NCCUSL

The **National Conference of Commissioners on Uniform State Laws** (NCCUSL), now in its 115<sup>th</sup> year, provides states with non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of state statutory law.

Conference members must be lawyers, qualified to practice law. They are practicing lawyers, judges, legislators and legislative staff and law professors, who have been appointed by state governments as well as the District of Columbia, Puerto Rico and the U.S. Virgin Islands to research, draft and promote enactment of uniform state laws in areas of state law where uniformity is desirable and practical.

- NCCUSL strengthens the federal system by providing rules and procedures that are consistent from state to state but that also reflect the diverse experience of the states.
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- NCCUSL's deliberative and uniquely open drafting process draws on the expertise of commissioners, but also utilizes input from legal experts, and advisors and observers representing the views of other legal organizations or interests that will be subject to the proposed laws.
- NCCUSL is a state-supported organization that represents true value for the states, providing services that most states could not otherwise afford or duplicate.

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**UNIFORM CHILD ABDUCTION PREVENTION ACT**

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# UNIFORM CHILD ABDUCTION PREVENTION ACT

## Prefatory Note

Child abduction is a serious problem both in scope and effect. A study commissioned by the Office of Juvenile Justice and Delinquency Prevention estimated that 262,100 children were abducted in 1999; 203,900 (78 per cent) of them were abducted by a parent or family member; approximately 1000 of the abductions were international.<sup>1</sup> The purpose of the Uniform Child Abduction Prevention Act is to deter both predecree and postdecree domestic and international child abductions by parents, persons acting on behalf of a parent or others. Family abductions may be preventable through the identification of risk factors and the imposition of appropriate preventive measures.

The Uniform Child Abduction Prevention Act is premised on the general principle that preventing an abduction is in a child's best interests. Abducted children may suffer long-lasting harm. Federal law recognizes that parental abduction is harmful to children.<sup>2</sup> Child abductions can occur before or after entry of a child-custody determination. This Act allows the court to impose abduction prevention measures at any time.

Many abductions occur before a court has had the opportunity to enter a child-custody determination. Children at the center of custody disputes are at the highest risk for potential abductions.<sup>3</sup> Jurisdictional laws help deter abductions by specifying the proper state to handle custody litigation. The Uniform Child Custody Jurisdiction Act<sup>4</sup> sets out four concurrent bases for jurisdiction. Congress passed the Parental Kidnapping Prevention Act of 1980 to deter abductions, discourage interstate conflicts, and promote cooperation between states about

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<sup>1</sup>See DAVID FINKELHOR, HEATHER HAMMER & ANDREA J. SEDLAK, NATIONAL INCIDENCE STUDIES OF MISSING, ABDUCTED, RUNAWAY, AND THROWN AWAY CHILDREN, CHILDREN ABDUCTED BY FAMILY MEMBERS: NATIONAL ESTIMATE AND CHARACTERISTICS (Oct. 2002).

<sup>2</sup> International Child Abduction Remedies Act, 42 U.S.C. § 11601(a)(1) ("The Congress makes the following findings: (1) The international abduction or wrongful retention of children is harmful to their well-being . . ."). See also Dorothy S. Huntington, Parental Kidnapping: A New Form of Child Abuse, available at [http://www.hiltonhouse.com/articles/child\\_abuse-huntington.txt](http://www.hiltonhouse.com/articles/child_abuse-huntington.txt) (characterizing child abduction as abuse).

<sup>3</sup> AMERICA'S HIDDEN CRIME: WHEN THE KIDNAPPER IS KIN 10-11 (Polly Klaas Foundation 2004). See also Janet R. Johnston et al., Early Identification of Risk Factors for Parental Abduction (OJJDP March 2001) (indicating that men are more likely to abduct before an order is entered while women are more likely to abduct after a child custody determination).

<sup>4</sup> 9 UNIF. L. ANN. Part I 115 (1988).

custody matters by resolving jurisdictional conflicts.<sup>5</sup> The Parental Kidnapping Prevention Act prioritizes the state in which the child has lived for six months preceding the filing of the petition (the home state) as the place for custody litigation<sup>6</sup> and prohibits a second state from assuming jurisdiction if there is an action pending in the state that has proper jurisdiction.<sup>7</sup> The Uniform Child Custody Jurisdiction and Enforcement Act,<sup>8</sup> now in 45 jurisdictions, also prioritizes home state jurisdiction notwithstanding the child's absence. Jurisdictional laws do not provide prevention measures for abduction.

Post-decree abductions often occur because the existing child-custody determinations lack sufficient protective provisions to prevent an abduction. An award of joint physical custody without a designation of specific times; a vague order granting "reasonable visitation"; or the lack any restrictions on custody and visitation make orders hard to enforce. The awareness of abduction risk factors and preventive measures available can reduce the threat of abduction by giving the court the tools to make the initial child-custody determination clearer, more specific, and more easily enforceable.

If an abduction occurs after a child-custody determination, all states have enforcement remedies. Forty-six jurisdictions use the procedures in Article 3 of the Uniform Child Custody Jurisdiction and Enforcement Act. In addition, courts can punish abductors for contempt and allow tort actions for custodial interference. Several federal laws help locate missing children<sup>9</sup> and criminalize international parental kidnapping.<sup>10</sup> While there is no federal law criminalizing interstate parental kidnapping, there is a mechanism for apprehending persons who violate state parental kidnapping laws and travel across state lines.<sup>11</sup> While every state criminally forbids

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<sup>5</sup> Pub. L. No. 96-611, note 7 to 28 U.S.C. §1738A.

<sup>6</sup> 28 U.S.C. Section 1738A(c).

<sup>7</sup> 28 U.S.C.A. Section 1738A(g).

<sup>8</sup> 9 UNIF. L. ANN. Part I 657 (1999).

<sup>9</sup>Missing Children Act, 28 U.S.C. § 534 (1982); Missing Children Search Assistance Act and the National Child Search Assistance Act, 42 U.S.C. § 5779 & § 5780 (1990); and the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act of 2003, Pub. L. 108-21, 117 Stat. 650 (AMBER Alert Program).

<sup>10</sup> See International Parental Kidnapping Crime Act (IPKCA), 18 U.S.C. § 1204; The Fugitive Felon Act, 18 U.S.C. § 1073; and The Extradition Treaties Interpretation Act of 1998, 18 U.S.C. § 3181.

<sup>11</sup> Unlawful Flight to Avoid Prosecution, 18 U.S.C. § 1204; The Fugitive Felon Act, 18 U.S.C. § 1073. When enacting the Parental Kidnapping Prevention Act, Congress declared that the Unlawful Flight to Avoid Prosecution provision applies to cases involving parental

custodial interference by parents or relatives of the child, the laws differ as to the elements of the offenses, the punishments given, and whether a child-custody determination must exist for a violation to occur.<sup>12</sup>

If the abduction is international, the Hague Convention on the Civil Aspects of International Child Abduction, currently in effect between the United States and fifty-five countries, facilitates the return of an abducted child to the child's habitual residence.<sup>13</sup> Many countries, however, have not ratified the Hague Convention on the Civil Aspects of International Child Abduction, the United States has not accepted all nations' accessions, and some countries that have ratified do not comply with the treaty obligations.

This Act is civil law and complements existing state law. This Act does not limit, contradict, or supercede the Uniform Child Custody Jurisdiction and Enforcement Act or the Uniform Child Custody Jurisdiction Act. This Act is not meant to prevent a legitimate relocation action filed in accordance with the law of the state having jurisdiction to make a child-custody determination nor to prevent a victim of domestic violence from escaping abuse.

The Uniform Child Abduction Prevention Act applies to predecree and intrastate cases, to emergency situations, and to cases in which risk factors exist and the current child-custody determination lacks abduction prevention measures. Only three states have enacted comprehensive child abduction prevention statutes;<sup>14</sup> two other states include provisions to reduce the risk of abduction.<sup>15</sup> This Act will fill a void in the majority of states by identifying circumstances indicating a risk of abduction and providing measures to prevent the abduction of children, predecree or postdecree.

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kidnapping and interstate or international flight to avoid prosecution. Pub. L. No. 96-611, 10(a).

<sup>12</sup> Appendix A. Citation List of State Parental Kidnapping Statutes, National Clearinghouse for the Defense of Battered Women, The Impact of Parental Kidnapping Laws and Practice on Domestic Violence Survivors 32 (2005).

<sup>13</sup> See The Hague Convention on the Civil Aspects of International Child Abduction, 51 Fed. Reg. § 10494 et seq. (1986); the International Child Abduction Remedies Act (ICARA), 42 U.S.C. §§ 11601-11610. For a current list of United States treaty partners, visit [www.travel.state.gov/family/abduction/hague\\_issues/hague\\_issues\\_1487.html](http://www.travel.state.gov/family/abduction/hague_issues/hague_issues_1487.html).

<sup>14</sup> See ARK. STAT. ANN. § 9-13-401-407 (2005); CAL. FAM. CODE § 3048 (2004); TEX. FAM. CODE §153.501- §153.503 (2003).

<sup>15</sup> See FLA. STAT. § 61.45 (2005); OR. REV. STAT. § 109.035 (2005).

## UNIFORM CHILD ABDUCTION PREVENTION ACT

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

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

(1) "Abduction" means the wrongful removal or wrongful retention of a child.

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

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

(4) "Child-custody proceeding" means a proceeding in which legal custody, physical custody, or visitation with respect to a child is at issue. The term includes a proceeding for divorce, dissolution of marriage, separation, neglect, abuse, dependency, guardianship, paternity, termination of parental rights, or protection from domestic violence.

(5) "Court" means an entity authorized under the law of a state to establish, enforce, or modify a child-custody determination.

(6) "Petition" includes a motion or its equivalent.

(7) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

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

(9) “Travel document” means records relating to a travel itinerary, including travel tickets, passes, reservations for transportation, or accommodations. The term does not include a passport or visa.

(10) “Wrongful removal” means the taking of a child that breaches rights of custody or visitation given or recognized under the law of this state.

(11) “Wrongful retention” means the keeping or concealing of a child that breaches rights of custody or visitation given or recognized under the law of this state.

### **Comment**

To the extent possible, the definitions track the Uniform Child Custody Jurisdiction and Enforcement Act. The definition of a child as a person under age 18 is the same as in Section 102(2) of the Uniform Child Custody Jurisdiction and Enforcement Act. State law determines when a child becomes emancipated before age 18. This Act is limited to the abduction of minors even though the risk of abduction may apply to a disabled adult who has an appointed adult guardian.

The definition of “child-custody determination” is the same as the definition in Section 102(3) of the Uniform Child Custody Jurisdiction and Enforcement Act. This Act uses the traditional terminology of “custody” and “visitation” because that is the language used in the Uniform Child Custody Jurisdiction and Enforcement Act although local terminology may differ. The definition of a child-custody proceeding differs insignificantly from Section 102(4) of the Uniform Child Custody Jurisdiction and Enforcement Act.

The definition of abduction covers wrongful removal or wrongful retention. The definition is broad enough to encompass not only an abduction committed by either parent or a person acting on behalf of the parent but also other abductions. Generally both parents have the right to companionship and access to their child unless a court states otherwise. Abductions can occur against an individual or other entity with custody rights, as well as against an individual with visitation or access rights. A parent with joint legal or physical custody rights, by operation of law, court order, or legally binding agreement, commits an abduction by wrongfully interfering with the other parent’s rights. A removal or retention of a child can be “wrongful” predecree or postdecree. An abduction is wrongful where it is in breach of an existing “child-custody determination” or, if predecree, in violation of rights attributed to a person by operation of law. The term “breaches rights of custody” tracks Article 3 of the Hague Convention on the Civil Aspects of International Child Abduction.

### **SECTION 3. COOPERATION AND COMMUNICATION AMONG COURTS.**

Sections [110], [111], and [112] of [insert citation to the provisions of the Uniform Child Custody Jurisdiction and Enforcement Act or its equivalent in the state] apply to cooperation and communications among courts in proceedings under this [act].

#### **Comment**

It is possible, even likely, that abduction situations will involve more than one state. Thus, there is a need for mechanisms for communication among courts, for testimony to be obtained quickly by means other than physical presence, and for cooperation between courts in different states. Sections 110, 111, and 112 of the Uniform Child Custody Jurisdiction and Enforcement Act provide mechanisms to deal with these issues. States that do not have the Uniform Child Custody Jurisdiction and Enforcement Act may want to include these provisions or use some similar provision of existing state law.

### **SECTION 4. ACTIONS FOR ABDUCTION PREVENTION MEASURES.**

(a) A court on its own motion may order abduction prevention measures in a child-custody proceeding if the court finds that the evidence establishes a credible risk of abduction of the child.

(b) A party to a child-custody determination or another individual or entity having a right under the law of this state or any other state to seek a child-custody determination for the child may file a petition seeking abduction prevention measures to protect the child under this [act].

(c) A prosecutor or public authority designated under [insert citation to Section 315 of the Uniform Child Custody Jurisdiction and Enforcement Act or applicable law of this state] may seek a warrant to take physical custody of a child under Section 9 or other appropriate prevention measures.

#### **Comment**

An abduction may occur before a child-custody proceeding has commenced, after the filing but before entry of a child-custody determination, or in violation of an existing child-custody determination. To obtain abduction prevention measures, either the court on its own may impose the measures or a party to a child custody proceeding or an individual or entity having the right to seek custody may file a petition seeking abduction prevention measures.

A court hearing a child custody case may determine that the evidence shows a credible risk of abduction. Therefore, even without a party filing a petition under this Act, the court on its own motion can impose appropriate abduction prevention measures. Usually, however, a parent who fears that the other parent or family members are preparing to abduct the child will file a petition in an existing custody dispute. An individual or other entity, such as the state child welfare agency, which has a right to lawful custody may file a petition alleging a risk of abduction and seeking prevention measures with respect to a child who is not yet the subject of a child-custody determination.

The Act allows a prosecutor or public authority designated in Section 315 of the Uniform Child Custody Jurisdiction and Enforcement Act to seek a warrant under Section 9 of this Act if there is an imminent risk of wrongful removal.

#### **SECTION 5. JURISDICTION.**

(a) A petition under this [act] may be filed only in a court that has jurisdiction to make a child-custody determination with respect to the child at issue under [insert citation to Uniform Child Custody Jurisdiction and Enforcement Act or the Uniform Child Custody Jurisdiction Act].

(b) A court of this state has temporary emergency jurisdiction under [insert citation to Section 204 of the Uniform Child Custody Jurisdiction and Enforcement Act or Section 3(a)(3) of the Uniform Child Custody Jurisdiction Act] if the court finds a credible risk of abduction.

#### **Comment**

This Act complements, but does not limit, contradict, or supercede the Uniform Child Custody Jurisdiction and Enforcement Act, 9 U.L.A. Part I 657 (1999), or the Uniform Child Custody Jurisdiction Act, 9 U.L.A. Part I 115 (1988). A court must have jurisdiction sufficient to make an initial child-custody determination, a modification, or temporary emergency jurisdiction to issue prevention measures under this Act.

The Parental Kidnapping Prevention Act prioritizes the child's home state as the primary

jurisdictional basis; prohibits a court in one state from exercising jurisdiction if a valid custody proceeding is already pending in another state; and requires that states give full faith and credit to sister state decrees made in accordance with its principles. The Uniform Child Custody Jurisdiction and Enforcement Act follows the Parental Kidnapping Prevention Act.

A court has temporary emergency jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act only if the child has been abandoned or it is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse. This Act equates a credible risk of abduction with threatened mistreatment or abuse for emergency jurisdiction purposes.

If a state would be able to exercise emergency jurisdiction under Section 204 the Uniform Child Custody Jurisdiction and Enforcement Act, it can do so even if another court has issued a child-custody determination and has continuing exclusive jurisdiction. The reference to Section 204 brings in all of its provisions that include communication, length of time of temporary orders, and the like.

Under Section 208 of the Uniform Child Custody Jurisdiction and Enforcement Act, if a court has jurisdiction because a person seeking to invoke its jurisdiction has engaged in unjustifiable conduct, the court shall decline to exercise its jurisdiction. However, as the comment to Section 208 explains, domestic violence victims should not be charged with unjustifiable conduct for conduct that occurred in the process of fleeing domestic violence. Domestic violence also shall be considered in a court's inconvenient forum analysis under Section 207(b)(1) of the Uniform Child Custody Jurisdiction and Enforcement Act.

**SECTION 6. CONTENTS OF PETITION.** A petition under this [act] must be verified and include a copy of any existing child-custody determination, if available. The petition must specify the risk factors for abduction, including the relevant factors described in Section 7. Subject to [insert citation to Section 209(e) of the Uniform Child Custody Jurisdiction and Enforcement Act or cite the law of this state providing for the confidentiality of procedures, addresses, and other identifying information], if reasonably ascertainable, the petition must contain:

- (1) the name, date of birth, and gender of the child;
- (2) the customary address and current physical location of the child;



(3) the identity, customary address, and current physical location of the respondent;

(4) a statement of whether a prior action to prevent abduction or domestic violence has been filed by a party or other individual or entity having custody of the child, and the date, location, and disposition of the action;

(5) a statement of whether a party to the proceeding has been arrested for a crime related to domestic violence, stalking, or child abuse or neglect, and the date, location, and disposition of the case; and

(6) any other information required to be submitted to the court for a child-custody determination under [insert citation to Section 209 of the Uniform Child Custody Jurisdiction and Enforcement Act or applicable law of this state].

#### **Comment**

The contents of the petition follow those for pleadings under Section 209 of the Uniform Child Custody Jurisdiction and Enforcement Act. The information is made subject to state law on the protection of names or identifying information in certain cases. A number of states have enacted laws relating to the protection of victims in domestic violence and child abuse cases by keeping confidential the victims' names, addresses, and other information. These procedures must be followed if the state law requires their applicability. If a state does not protect names and addresses, then a provision similar to Section 209(e) of the Uniform Child Custody Jurisdiction and Enforcement Act should be added. That provision reads:

If a party alleges in an affidavit or a pleading under oath that the health, safety, or liberty of a party or child would be jeopardized by disclosure of identifying information, the information must be sealed and may not be disclosed to the other party or the public unless the court orders the disclosure to be made after a hearing in which the court takes into consideration the health, safety, or liberty of the party or child and determines that the disclosure is in the interest of justice.

The requirement for information on domestic violence or child abuse is to alert the court to the possibility that a batterer or abuser is attempting to use the Act. Domestic violence underlies large numbers of parental kidnapping. One study found that approximately one half of abductors had been violent toward the other parent during the marriage or relationship. Some

batterers abduct their children during or after custody litigation; others abduct before initiating legal proceedings. The court should not allow a batterer to use this Act to gain temporary custody or additional visitation in an uncontested hearing. A person who has committed domestic violence or child abuse poses a risk of harm to the child. Such a person, however, may still seek relief in a contested hearing where the issues can be fully examined by the court. In order to screen for domestic violence or child abuse, the petition requires disclosure of all relevant information and the court can inquire about domestic violence at any hearing.

Notice and opportunity to be heard should be given according to the law of the state and may be by publication if other means are not effective. See Section 108(a) of the Uniform Child Custody Jurisdiction and Enforcement Act.

### **SECTION 7. FACTORS TO DETERMINE RISK OF ABDUCTION.**

(a) In determining whether there is a credible risk of abduction of a child, the court shall consider any evidence that the petitioner or respondent:

- (1) has previously abducted or attempted to abduct the child;
- (2) has threatened to abduct the child;
- (3) has recently engaged in activities that may indicate a planned abduction,

including:

- (A) abandoning employment;
- (B) selling a primary residence;
- (C) terminating a lease;
- (D) closing bank or other financial management accounts, liquidating assets, hiding or destroying financial documents, or conducting any unusual financial activities;
- (E) applying for a passport or visa or obtaining travel documents for the respondent, a family member, or the child; or
- (F) seeking to obtain the child's birth certificate or school or medical

records;

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

(5) has refused to follow a child-custody determination;

(6) lacks strong familial, financial, emotional, or cultural ties to the state or the

United States;

(7) has strong familial, financial, emotional, or cultural ties to another state or

country;

(8) is likely to take the child to a country that:

(A) is not a party to the Hague Convention on the Civil Aspects of International Child Abduction and does not provide for the extradition of an abducting parent or for the return of an abducted child;

(B) is a party to the Hague Convention on the Civil Aspects of International Child Abduction but:

(i) the Hague Convention on the Civil Aspects of International Child Abduction is not in force between the United States and that country;

(ii) is noncompliant according to the most recent compliance report issued by the United States Department of State; or

(iii) lacks legal mechanisms for immediately and effectively enforcing a return order under the Hague Convention on the Civil Aspects of International Child Abduction;

(C) poses a risk that the child's physical or emotional health or safety would be endangered in the country because of specific circumstances relating to the child or

because of human rights violations committed against children;

(D) has laws or practices that would:

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

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

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

(E) is included by the United States Department of State on a current list of state sponsors of terrorism;

(F) does not have an official United States diplomatic presence in the country; or

(G) is engaged in active military action or war, including a civil war, to which the child may be exposed;

(9) is undergoing a change in immigration or citizenship status that would adversely affect the respondent's ability to remain in the United States legally;

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

(11) has forged or presented misleading or false evidence on government forms or supporting documents to obtain or attempt to obtain a passport, a visa, travel documents, a Social Security card, a driver's license, or other government-issued identification card or has made a misrepresentation to the United States government;

(12) has used multiple names to attempt to mislead or defraud; or

(13) has engaged in any other conduct the court considers relevant to the risk of abduction.

(b) In the hearing on a petition under this [act], the court shall consider any evidence that the respondent believed in good faith that the respondent's conduct was necessary to avoid imminent harm to the child or respondent and any other evidence that may be relevant to whether the respondent may be permitted to remove or retain the child.

### Comment

The list of risk factors constitutes a summary of the wide variety of types of behaviors and characteristics that researchers have found to be present. The risk factors are based on research that has been done during the last twelve years. Research also shows that abducting parents dismiss the value of the other parent in the child's life; have young children or children vulnerable to influence; and often have the support of their family and others. Parents who have made credible threats to abduct a child or have a history are particularly high risk especially when accompanied by other factors, such as quitting a job, selling a home, and moving assets. See Janet Johnston & Linda Girdner, *Family Abductors: Descriptive Profiles and Preventative Interventions* (U.S. Dep't of Justice, OJJDP 2001 NCJ 182788); ABA, EARLY IDENTIFICATION OF RISK FACTORS FOR PARENTAL ABDUCTION (NCJ185026). The more of these factors that are present, the more likely the chance of an abduction. However, the mere presence of one or more of these factors does not mean that an abduction will occur just as the absence of these factors does not guarantee that no abduction will occur. Some conduct described in the factors can be done in conjunction with a relocation petition, which would negate an inference that the parent is planning to abduct the child.

International abductions pose more obstacles to return of a child than do abductions within the United States. Courts should consider evidence that the respondent was raised in another country and has family support there, has a legal right to work in a foreign country and has the ability to speak that foreign language. There are difficulties associated with securing return of children from countries that are not treaty partners under the Hague Convention on the Civil Aspects of Child Abduction or are not compliant with the Convention. Compliance Reports are available at the United States Department of State website or may be obtained by contacting the Office of Children's Issues in Department of State.

Courts should be particularly sensitive to the importance of preventive measures where there is an identified risk of a child being removed to countries that are guilty of human rights violations, including arranged marriages of children, child labor, lack of child abuse laws, female genital mutilation, sexual exploitation, any form of child slavery, torture, and the deprivation of

liberty. These countries pose potentially serious obstacles to return of a child and pose the possibility of harm.

Courts need to be sensitive to domestic violence issues. Batterers often abduct their children before as well as during and after custody litigation. However, courts also need to be aware of the dynamics of domestic violence. Rather than a vindictive reason for taking the child, a victim fleeing domestic violence may be attempting to protect the victim and the child. Almost half of the parents in one parental kidnapping study were victims of domestic violence and half of the parents who were contemplating abducting their children were motivated by the perceived need to protect their child from physical, sexual, and emotional abuse. GEOFFREY L. GREIF & REBECCA L. HEGAR, *WHEN PARENTS KIDNAP: THE FAMILIES BEHIND THE HEADLINES* 8 (1993). Some of the risk factors involve the same activities that might be undertaken by a victim of domestic violence who is trying to relocate or flee to escape violence. If the evidence shows that the parent preparing to leave is fleeing domestic violence, the court must consider that any order restricting departure or transferring custody may pose safety issues for the respondent and the child, and therefore, should be imposed only when the risk of abduction, the likely harm from the abduction, and the chances of recovery outweigh the risk of harm to the respondent and the child.

The Uniform Child Custody Jurisdiction and Enforcement Act recognizes that domestic violence victims should be considered. The Comment to Section 208 of the Uniform Child Custody Jurisdiction and Enforcement Act (Jurisdiction Declined by Reason of Conduct) states that "Domestic violence victims should not be charged with unjustifiable conduct for conduct that occurred in the process of fleeing domestic violence, even if their conduct is technically illegal. An inquiry must be made whether the flight was justified under the circumstances of the case."

#### **SECTION 8. PROVISIONS AND MEASURES TO PREVENT ABDUCTION.**

(a) If a petition is filed under this [act], the court may enter an order that must include:

- (1) the basis for the court's exercise of jurisdiction;
- (2) the manner in which notice and opportunity to be heard were given to the persons entitled to notice of the proceeding;
- (3) a detailed description of each party's custody and visitation rights and residential arrangements for the child;
- (4) a provision stating that a violation of the order may subject the party in

violation to civil and criminal penalties; and

(5) identification of the child's country of habitual residence at the time of the issuance of the order.

(b) If, at a hearing on a petition under this [act] or on the court's own motion, the court after reviewing the evidence finds a credible risk of abduction of the child, the court shall enter an abduction prevention order. The order must include the provisions required by subsection (a) and measures and conditions, including those in subsections (c), (d), and (e), that are reasonably calculated to prevent abduction of the child, giving due consideration to the custody and visitation rights of the parties. The court shall consider the age of the child, the potential harm to the child from an abduction, the legal and practical difficulties of returning the child to the jurisdiction if abducted, and the reasons for the potential abduction, including evidence of domestic violence, stalking, or child abuse or neglect.

(c) An abduction prevention order may include one or more of the following:

(1) an imposition of travel restrictions that require that a party traveling with the child outside a designated geographical area provide the other party with the following:

(A) the travel itinerary of the child;

(B) a list of physical addresses and telephone numbers at which the child can be reached at specified times; and

(C) copies of all travel documents;

(2) a prohibition of the respondent directly or indirectly:

(A) removing the child from this state, the United States, or another geographic area without permission of the court or the petitioner's written consent;

(B) removing or retaining the child in violation of a child-custody determination;

(C) removing the child from school or a child-care or similar facility; or

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

(3) a requirement that a party to register the order in another state as a prerequisite to allowing the child to travel to that state;

(4) with regard to the child's passport:

(A) a direction that the petitioner to place the child's name in the United States Department of State's Child Passport Issuance Alert Program;

(B) a requirement that the respondent surrender to the court or the petitioner's attorney any United States or foreign passport issued in the child's name, including a passport issued in the name of both the parent and the child; and

(C) a prohibition upon the respondent from applying on behalf of the child for a new or replacement passport or visa;

(5) as a prerequisite to exercising custody or visitation, a requirement that the respondent provide:

(A) to the United States Department of State Office of Children's Issues and the relevant foreign consulate or embassy, an authenticated copy of the order detailing passport and travel restrictions for the child;

(B) to the court:

(i) proof that the respondent has provided the information in



subparagraph (A); and

(ii) an acknowledgment in a record from the relevant foreign consulate or embassy that no passport application has been made, or passport issued, on behalf of the child;

(C) to the petitioner, proof of registration with the United States Embassy or other United States diplomatic presence in the destination country and with the Central Authority for the Hague Convention on the Civil Aspects of International Child Abduction, if that Convention is in effect between the United States and the destination country, unless one of the parties objects; and

(D) a written waiver under the Privacy Act, 5 U.S.C. Section 552a [as amended], with respect to any document, application, or other information pertaining to the child authorizing its disclosure to the court and the petitioner; and

(6) upon the petitioner's request, a requirement that the respondent obtain an order from the relevant foreign country containing terms identical to the child-custody determination issued in the United States.

(d) In an abduction prevention order, the court may impose conditions on the exercise of custody or visitation that:

(1) limit visitation or require that visitation with the child by the respondent be supervised until the court finds that supervision is no longer necessary and order the respondent to pay the costs of supervision;

(2) require the respondent to post a bond or provide other security in an amount sufficient to serve as a financial deterrent to abduction, the proceeds of which may be used to pay

for the reasonable expenses of recovery of the child, including reasonable attorneys fees and costs if there is an abduction; and

(3) require the respondent to obtain education on the potentially harmful effects to the child from abduction.

(e) To prevent imminent abduction of a child, a court may:

(1) issue a warrant to take physical custody of the child under Section 9 or the law of this state other than this [act];

(2) direct the use of law enforcement to take any action reasonably necessary to locate the child, obtain return of the child, or enforce a custody determination under this [act] or the law of this state other than this [act]; or

(3) grant any other relief allowed under the law of this state other than this [act].

(f) The remedies provided in this [act] are cumulative and do not affect the availability of other remedies to prevent abduction.

### **Comment**

This act provides courts with a choice of remedies. Ideally the court will choose the least restrictive measures and conditions to maximize opportunities for continued parental contact while minimizing the opportunities for abduction. The most restrictive measures should be used when there have been prior custody violations and overt threats to take the child; when the child faces substantial potential harm from an abducting parent who may have serious mental or personality disorder, history of abuse or violence or no prior relationship with the child; or when the obstacles to recovering the child are formidable due to countries not cooperating and enforcing orders from the United States, not being signatories to the Hague Convention on the Civil Aspects of International Child Abduction or non-compliant. Section 8 lists the possible prevention measures categorized as travel restrictions, conditions on the exercise of custody and visitation, and urgent measures when abduction is imminent or in progress.

If a person files a petition under this Act, even if the court decides not to order restrictive measures or impose conditions, the court may clarify and make more specific the existing child-custody determination. To enter an abduction prevention order, the court must have jurisdiction

to make a child-custody determination even if it is emergency jurisdiction. The court should set out the basis for the court's exercise of jurisdiction. The more apparent on the face of the document that the court issuing the order had proper jurisdiction, the more likely courts in other states and countries are to recognize it as valid. The court should also include a statement showing that the parties were properly served and given adequate notice. This makes it apparent on the face of the order that due process was met. *See* Sections 108 and 205 of the Uniform Child Custody Jurisdiction and Enforcement Act. States do not require personal jurisdiction to make a child-custody determination.

The court may make an existing child-custody order clearer and more specific. Vague orders are difficult to enforce without additional litigation. The term "reasonable visitation" can lead to conflicts between the parents and make it difficult for law enforcement officers to know if the order is being violated. The court may specify the dates and times for each party's custody and visitation, including holidays, birthdays, and telephone or Internet contact. Because joint custody arrangements create special enforcement problems, the court should ensure that the order specifies the child's residential placement at all times. Whenever possible, the residential arrangements should represent the parents' agreement. However, to prevent abductions, it is important for the court order to be specific as to the residential arrangements for the child. If there is a threat of abduction, awarding sole custody to one parent makes enforcement easier.

The court may also include language in the prevention order to highlight the importance of both parties complying with the court order by including in bold language: "VIOLATION OF THIS ORDER MAY SUBJECT THE PARTY IN VIOLATION TO CIVIL AND CRIMINAL PENALTIES."

Because every abduction case may be a potential international abduction case, the prevention order should identify the place of habitual residence of a child. Although the Hague Convention on the Civil Aspects of International Child Abduction does not define "habitual residence" and the determination is made by the court in the country hearing a petition for return of a child, a statement in the child-custody determination or prevention order may help. A typical statement reads:

The State of \_\_\_\_\_, United States of America, is the habitual residence of the minor children within the meaning of the Hague Convention on the Civil Aspects of International Child Abduction.

If the court finds a credible risk of abduction, this Act provides numerous measures to prevent an abduction. Courts can require a party traveling outside a specified geographical area to provide the other party with all relevant information about where the child will be and how to contact the child. The court can impose travel restrictions prohibiting the respondent from leaving the United States or a specific geographical area; from removing the child from school, day care or other facilities, and can restrict contact other than as specified in the order. The court may also impose passport restrictions and require the respondent to provide assurances and

safeguards as a condition of traveling with the child.

The court may also choose to impose restrictions on custody or visitation. The most common, and one of the most effective, restrictions is supervised visitation. Visitation should remain supervised until the court decides the threat of abduction has passed. In addition, the court may require the posting of a bond sufficient to serve both as a deterrent and as a source of funds for the cost of the return of the child. If domestic violence is present, the court may want to order the abusive person to obtain education, counseling or attend a batterers' intervention and prevention program.

Because of international abduction cases are the most complex and difficult, reasonable restrictions to prevent such abductions are necessary. If a credible risk of international abduction of the child exists, passport controls and travel restrictions may be indispensable. It may be advantageous in some cases to obtain a "mirror" or reciprocal order. Before exercising rights, the respondent would need to get a custody order from the country to which the respondent will travel that recognizes both the United States order and the court's continuing jurisdiction. The foreign court would need to agree to order return of the child if the child was taken in violation of the court order. This potentially expensive and time consuming remedy should only be ordered when likely to be of assistance. Because the foreign court may subsequently modify its order, problems can arise.

The court may do whatever is necessary to prevent an abduction, including using the warrant procedure under this act or under the law of the state. Many law enforcement officers are unclear about their role in responding to parental kidnapping cases. One study showed that 70 percent of law enforcement agencies reported that they did not have written policies and procedures governing child abduction cases. A provision in the custody order directing law enforcement officer to "accompany and assist" a parent to recover an abducted child may be useful but is not included in this Act. The language tracks Section 316 of the Uniform Child Custody Jurisdiction and Enforcement Act that authorizes law enforcement to take any lawful action reasonably necessary to locate a child or a party and assist a prosecutor or appropriate public official in obtaining return of a child or enforcing a child-custody determination.

The remedies provided in this Act are intended to supplement and complement existing law.

#### **SECTION 9. WARRANT TO TAKE PHYSICAL CUSTODY OF CHILD.**

(a) If a petition under this [act] contains allegations, and the court finds that there is a credible risk that the child is imminently likely to be wrongfully removed, the court may issue an ex parte warrant to take physical custody of the child.

(b) The respondent on a petition under subsection (a) must be afforded an opportunity to be heard at the earliest possible time after the ex parte warrant is executed, but not later than the next judicial day unless a hearing on that date is impossible. In that event, the court shall hold the hearing on the first judicial day possible.

(c) An ex parte warrant under subsection (a) to take physical custody of a child must:

(1) recite the facts upon which a determination of a credible risk of imminent wrongful removal of the child is based;

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

(3) state the date and time for the hearing on the petition; and

(4) provide for the safe interim placement of the child pending further order of the court.

(d) If feasible, before issuing a warrant and before determining the placement of the child after the warrant is executed, the court may order a search of the relevant databases of the National Crime Information Center system and similar state databases to determine if either the petitioner or respondent has a history of domestic violence, stalking, or child abuse or neglect.

(e) The petition and warrant must be served on the respondent when or immediately after the child is taken into physical custody.

(f) A warrant to take physical custody of a child, issued by this state or another state, is enforceable throughout this state. If the court finds that a less intrusive remedy will not be effective, it may authorize law enforcement officers to enter private property to take physical custody of the child. If required by exigent circumstances, the court may authorize law

enforcement officers to make a forcible entry at any hour.

(g) If the court finds, after a hearing, that a petitioner sought an ex parte warrant under subsection (a) for the purpose of harassment or in bad faith, the court may award the respondent reasonable attorney's fees, costs, and expenses.

(h) This [act] does not affect the availability of relief allowed under the law of this state other than this [act].

### Comment

This section authorizes issuance of a warrant in an emergency situation, such as an allegation that the respondent is preparing to abduct the child to a foreign country and is on the way to the airport. The harm is the credible risk of imminent removal. If the court finds such a risk, the court should temporarily waive the notice requirements and issue a warrant to take physical custody of the child. Immediately after the warrant is executed, the respondent is to receive notice of the proceedings. This section mirrors Section 311 of the Uniform Child Custody Jurisdiction and Enforcement Act on warrants to pick up a child which are available when there is an existing child-custody determination. In many states, the term used in civil cases is "writ of attachment."

The court should hear the testimony of the petitioner or another witness before issuing the warrant. The testimony may be heard in person, by telephone, or by any other means acceptable under local law, which may include video conferencing or use of other technology.

Domestic violence includes "family" violence. Because some batterers may try to use the warrant procedure to prevent victims and the children from escaping domestic violence or child abuse, the court should check relevant state and national databases to see if either the petitioner or respondent's name is listed or if relevant information exists that has not been disclosed before issuing the warrant and ordering placement. LUNDY BANCROFT & JAY G. SILVERMAN, *THE BATTERER AS PARENT: ADDRESSING THE IMPACT OF DOMESTIC VIOLENCE ON FAMILY DYNAMICS* 73, 75 (2002)(indicating that most parental abductions take place in the context of a history of domestic violence because threatening to take the child from the mother is a form of control).

Some courts have computer terminals on the bench and a database search takes seconds. Courts without computer access can seek the assistance of law enforcement. Unless impracticable, the court should conduct a search of all person databases of the National Crime Information Center system, including the protection order file, the historical protection order file, the warrants file, the sex offender registry, and the persons on supervised release file. In addition, it is recommended that courts run searches in the National Law Enforcement Telecommunication

System in the petitioner's state of birth, current state of residence, and other recent states of residence. Civil courts are authorized by statute and National Crime Information Center policy to have access to information in several files for domestic violence and stalking cases. Because child abduction involves family members and can harm children, and violence between the parents is often a factor leading to child abduction, cases in which a parent alleges a risk of wrongful removal should permit access to the relevant databases.

The court should also view comparable state databases, such as the state department of social service registry of persons found to have abused or neglected children. If the petitioner or respondent are listed for a reason related to a crime of domestic or family violence, the court may refuse to issue a warrant or order any appropriate placement authorized under the laws of the state. The warrant must provide for the placement of a child pending the hearing. Temporary placement will most often be with the petitioner unless the database check reveals the petitioner is a likely or known abuser.

The court must state the reasons for issuance of the warrant. The warrant can be enforced by law enforcement officers wherever the child is found in the state. The warrant may authorize entry upon private property to pick up the child if no less intrusive means are possible. In extraordinary cases, the warrant may authorize law enforcement to make a forcible entry at any hour. This section also authorizes law enforcement officers to enforce out of state warrants.

Section 9 applies only to wrongful removals, not wrongful retentions. It does not hinder a court from issuing any other immediate ex parte relief to prevent a wrongful removal or retention as may be allowed under law other than this act.

**SECTION 10. DURATION OF ABDUCTION PREVENTION ORDER.** An abduction prevention order remains in effect until the earliest of:

- (1) the time stated in the order;
- (2) the emancipation of the child;
- (3) the child's attaining 18 years of age; or
- (4) the time the order is modified, revoked, vacated, or superseded by a court with jurisdiction under [insert citation to Sections 201 through 203 of the Uniform Child Custody Jurisdiction and Enforcement Act or Section 3 of the Uniform Child Custody Jurisdiction Act and applicable law of this state].

**SECTION 11. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

**SECTION 12. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT.** This [act] modifies, limits, and supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001, et seq., but does not modify, limit, or supersede Section 101(c) of the act, 15 U.S.C. Section 7001(c), of that act or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

**SECTION 13. EFFECTIVE DATE.** This [act] takes effect on . . . .



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TESTIMONY OF RONALD W. NELSON TO HOUSE JUDICIARY COMMITTEE  
SB 18 – Uniform Child Abduction Prevention Act  
March 8, 2007

Members of the Committee: Good afternoon. I am Ronald W. Nelson. I am a Johnson County lawyer who practices exclusively in the area of domestic relations. I've been involved in domestic relations issues for a number of years and had the pleasure of being involved in working on the re-write of the Kansas Child Custody statutes in 2000. I've written extensively for local, state and national publications and presented seminars to lawyers on various domestic relations issues. My clientele is fairly evenly split between representing men and women. I've handled a significant number of matters in both trial and appellate courts on significant domestic relations issues. My practice has especially focused on high conflict child-custody cases, which involve interstate and international child custody and support issues, and interstate and international child abduction cases. I am a Fellow in both the American Academy of Matrimonial Lawyers and the International Academy of Matrimonial Lawyers and I previously served on the Governing Board of the American Bar Association Family Law Section.

Today I am testifying in favor of passage of the Uniform Child Abduction Prevention Act (UCAPA), which is the subject of Senate Bill 18. This important bill addresses the growing problem of interstate and international child abduction by parents and others who seek to use the child as a pawn in their disputes. Although addressing these issues has not been nearly so chaotic as before passage of the Uniform Child Custody Jurisdiction Act in 1978 and the Uniform Child Custody Jurisdiction and Enforcement Act in 2000 (when parents had to travel from state-to-state-to-state filing one action after another to re-establish custody rights already established in one or more other jurisdictions), problems continue and the UCAPA seeks to address those problems.

Although "stranger" abductions and kidnappings are most publicized – and feared – by far the most common child abduction is parental child abduction, which often occurs when the parents separate or begin divorce proceedings but also which may occur in other periods of turmoil. A parent may remove or retain the child from the other seeking to gain an advantage in expected or pending child-custody proceedings or because that parent fears losing the child in those expected or pending child-custody proceedings; a parent may refuse to return a child at the end of an access visit or may flee with the child to prevent an access visit. Parental child abductions may be within the same city, within the state region or within the same country, or may be international. Studies performed for the U.S. Department of Justice's Office of Juvenile Justice and Delinquency Prevention reported that in 1999, 53% percent of family abducted children were gone less than one week, and 21% were gone one month or more.<sup>1</sup>

Historically, Kansas law has held that a parent cannot "kidnap" that parent's own child. In the absence of temporary or final child custody orders, both parents have equal rights to the "custody" of their child and either one of them can take their child wherever they want – with or without the other parents consent or knowledge. The fact is, however, that as society has become more mobile; as long distance travel and communication has become easier and less expensive; as inter-faith, inter-national, inter-

<sup>1</sup> , NISMART National Family Abduction Report, October 2002.

cultural marriages have become more common; as society has become more complex; and as the rights of mothers and fathers to time with their child have become more fact intensive; and as the outcomes of child custody decisions have become less predictable, the more often parents have sought to use extra-judicial methods of gaining advantage in those situations.

Even though strides have been made by limiting the State where child custody actions can be filed by passage of the Uniform Child Custody Jurisdiction Act and federal Parental Kidnapping Prevention Act and, more recently, by procedures for enforcement of temporary and final child custody orders by the Uniform Child Custody Jurisdiction and Enforcement Act, even more efficient and rapid remedies need to be instituted to protect children against being used as pawns in tragic interstate and international games of "custody-chess."

The Uniform Child Abduction Prevention Act (UCAPA) is an important step to address the growing problem of parental abduction and protect the child from credible threats to do so. The UCAPA is modeled on effective measures already in effect in other arenas to address this issue: the Convention on the Civil Aspects of International Child Abduction, which was adopted by the Hague Convention on Private International Law<sup>2</sup>, and Child Abduction Prevention Acts from other States in the United States.<sup>3</sup> This new Act does not supersede any law, but provides additional resources and methods to prevent and address potential, threatened and actual family child abductions. The UCAPA does not provide "new" remedies, but provides one reference point for remedies already widely used, but which are often not known or understood by attorneys or judges dealing with these emergency abduction situations.

The UCAPA closely follows the Hague Convention on the Civil Aspects of International Child Abduction and the Uniform Child Custody Jurisdiction and Enforcement Act in its language.

- The UCAPA specifically states that only a state that has jurisdiction under the UCCJEA may enter an order implementing remedies. It prohibits a court in one state from exercising jurisdiction if a valid custody proceeding is already pending in another state and requires that states give full faith and credit to sister state decrees made in accordance with its principles – all as is required by the federal Parental Kidnapping Prevention Act. While a State may enter a prevention order if the petitioning party alleges an "emergency," that matter must immediately be referred to the State having appropriate jurisdiction under the UCCJEA as the "home state" or other significant connections if the child hasn't resided in the State for six months. This Act equates a credible risk of abduction with threatened mistreatment or abuse for emergency jurisdiction purposes, but sets forth those allegations that must be made.

A purpose of the UCAPA is to preserve whatever status quo custody arrangement existed for the child prior to the time of the alleged wrongful removal or retention and to deter a parent from crossing boundaries in search of a more sympathetic court – which is the same purpose as the Hague International Convention. An additional purpose is to preserve jurisdiction in that place which has the closest connection with the family and child. As stated by one court regarding Hague proceedings:

Every family dispute has its own unique set of facts, and the case before us certainly is no different. However, there is a central core of matters at which The Hague Convention was aimed: situations where one parent attempts to settle a difficult family situation, and obtain an advantage in any possible future custody

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<sup>2</sup> The Hague Convention on the Civil Aspects of International Child Abduction is a multilateral treaty developed by the Hague Conference on Private International Law that provides an expeditious method to return a child taken from one member nation to another. Proceedings on the Convention concluded October 25, 1980 and the Convention entered into force between the signatory nations on December 1, 1983. The Convention is now in force between the United States and 55 other Nation-States.

<sup>3</sup> See Ark. Stat. Ann. § 9-13-401-407 (2005); Cal. Fam. Code § 3048 (2004); Tex.Fam. Code §153.501- §153.503 (2003).

struggle, by returning to the parent's native country, or country of preferred residence. That is exactly what happened here.<sup>4</sup>

The UCAPA defines "abduction" in the same way it is used in the Hague Convention on the Civil Aspects of International Child Abduction; that is, as "the wrongful removal or wrongful retention of a child." Case law under the Hague Convention has indicated the term does not require that the removal was "intentionally" wrongful in order to qualify as a "wrongful retention or removal"— it is sufficient that the removal or retention deprive another joint holder of rights of the continued exercise of that right. "The conduct made actionable by the Convention – the wrongful removal or retention of children – is wrongful not in a criminal sense but in a civil sense."<sup>5</sup> Thus, for the removal or retention to be wrongful, it is enough to show that the rights of custody were either being exercised or that they would have been exercised if not for the actions of the person alleged to have wrongfully removed or retained the children.<sup>6</sup> "Generally speaking, 'wrongful removal' refers to the act of keeping the child without the consent of the person who was actually exercising custody of the child. 'Wrongful retention' refers to the act of keeping the child without the consent of the person who was actually exercising custody. The archetype of this conduct is the refusal by the noncustodial parent to return a child at the end of an authorized visitation period."<sup>7</sup> A "wrongful removal or retention" of a child occurs within the meaning of the Convention when an action is taken by one parent in contravention to the rights of a person or institution under the law of the State of the child's habitual residence.<sup>8</sup> The Hague Convention Explanatory Note makes clear that:

. . . the removal of a child by one of the joint holders without the consent of the other, is . . . wrongful, and this wrongfulness derives in this particular case, not from some action in breach of a particular law, but from the fact that such action has disregarded the rights of the other parent which are also protected by law, and has interfered with their normal exercise. The Convention's true nature is revealed most clearly in these situations: it is not concerned with establishing the person to whom custody of the child will belong at some point in the future, nor with the situations in which it may prove necessary to modify a decision awarding joint custody on the basis of facts which have subsequently changed. It seeks, more simply, to prevent a later decision on the matter being influenced by a change of circumstances brought about through unilateral action by one of the parties.<sup>9</sup>

- The UCAPA spells out many remedies that are already available, although they are not widely known by lawyers or judges, to deal with domestic or international parental abductions, all of which are cumulative, including:

- imposition of travel restrictions that require that a party traveling with the child outside designated geographical area provide the other party with specific designated information;

- prohibitions against the removal of the child from the State, the United States, or another geographic area without the court's permission or that of the petitioner;

- prohibitions against removing the child from school or a child-care facility or from approaching the child at any location other than a site designated for supervised parenting time;

<sup>4</sup> *Friedrich v. Friedrich*, 983 F.2d 1396, 1402 (6<sup>th</sup> Cir. 1993):

<sup>5</sup> *Legal Analysis of the Hague Convention*, 51 Fed.Reg. 10494, 10505 (1986).

<sup>6</sup> Hague Convention, Article 3.

<sup>7</sup> *Legal Analysis of the Hague Convention*, 51 Fed.Reg. 10494, 10503 (1986).

<sup>8</sup> Hague Convention, Article 3.

<sup>9</sup> Elisa Perez-Vera, *Explanatory Report: Hague Conference on Private International Law*, in 3 Acts and Documents of the Fourteenth Session ("Explanatory Report"), ¶ 71, at 447-48.

-require registration of the child-custody order in another state to which the child will travel before that travel is allowed;

-require surrender of or placement of restrictions upon the child's passport or obtaining a new or replacement passport or visa;

-require that the respondent obtain an order from the relevant foreign country containing identical child-custody provisions as those contained in the child-custody order issued in the United States.

-imposing conditions, restrictions, or supervision on the exercise of custody or visitation.

-require that the respondent post a bond or other security to serve as a financial deterrent to abduction, with the proceeds used to pay for the reasonable expenses of recovery of the child, including reasonable attorneys fees and costs if there is an abduction; and

-issue a warrant to take physical custody of the child;

-direct law enforcement to take any action reasonably necessary to locate the child, obtain return of the child, or enforce a custody determination.

These remedies are already, for the most part, available under existing law. However, it is important that statute set for those remedies available because of the chaotic situations under which these actions will most likely arise.

As previously stated, a significant portion of my practice involves cases in which interstate or international jurisdictional issues are present and, as a result, I've handled a large number of cases in which threatened or actual parental child abduction is a concern. In those cases, rapid and effective action is critical. Child abduction is child abuse. A parent's attempt to "take the law into their own hands" by spiriting their child away from the other parent – without any authority from anyone other than their own sense of what is "right" harms their child and expresses contempt for ordered society. They seek not what is best for their child, but to impose what they want without regard to any independent or objective assessment of that situation. Numerous psychological studies show the harm visited upon the children by these unilateral acts.<sup>10</sup>

I strongly urge the Committee pass out the Uniform Child Abduction Prevention Act. It is an important act to protect children from becoming embroiled in an already tense situation that threatens to cause irreparable and unfathomable harm on the family and the subject children.

Thank you.

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<sup>10</sup> See e.g. Forehand, et al., CHILD ABDUCTION: PARENT AND CHILD FUNCTIONING AFTER RETURN. *Clinical Pediatrics* 28(7):311-316; The Impact of Parental Abduction on Children: A Review of the Literature, *AMERICAN JOURNAL OF ORTHOPSYCHIATRY* 62(4):599-206.

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House Judiciary Committee  
Senate Bill 18: Uniform Child Abduction Act  
March 8, 2007

Chairman O'Neal and Members of the Committee:

KCSDV is a statewide association of programs providing direct services to victims of sexual and domestic violence. These 30 member programs provide services in all areas of the state to both adult and child victims of abuse. These programs are refuges of safety for both women and children. KCSDV has taken a neutral position on UCAPA because we recognize as important its intent to prevent wrongful abductions of children. We are testifying today to request amendments that will reduce the possibility that UCAPA will be misused by domestic abusers.

The impact of domestic violence is not just limited to the violence perpetrated against the spouse or intimate partner; it also reaches deeply into the family and the family relationships. The manipulation and abuse of children is one of the tactics used by domestic violence perpetrators to maintain or gain control over the intimate partner. Men who batter their spouses or partners physically abuse their children at a seven times higher rate than non-battering men and they sexually abuse their children at a six times higher rate than non-battering men.<sup>1</sup> The risk of physical abuse of children by a batterer rises with the severity and the frequency of his violence toward his partner.<sup>2</sup>

Battered women who are attempting to protect themselves and their children from both sexual and physical abuse are often put in a catch-22 situation. If they flee with the children, they may be accused of child abduction or charged with the crime of interference with parental custody. These accusations can result in battered women being sought after as fugitives of the law, may result in their arrest, and may ultimately end up with the children being placed either in foster care or in the custody of the abuser. If battered mothers stay with the abuser, they may be held criminally responsible if the abuser injures or, worse, kills the child. Our laws do not help and we know that domestic and sexual violence perpetrators are becoming more and more savvy at using these laws against the protective parent.

<sup>1</sup> Bancroft, L., Silverman, J. (2003). The Batterer as Parent. Thousand Oaks, CA: Sage. Pp 42-47.

<sup>2</sup> Id. at 43.

We have met with Professor Linda Elrod, reporter for NCCUSL, about our concerns and she has agreed that the following requests are reasonable and prudent.

Our first concern with Uniform Child Abduction Prevention Act is whether it will be used by perpetrators of domestic violence to keep the protective parent from fleeing to a shelter, to a relative, or even out of state if necessary in order to protect her and the children. In our conversations with Professor Elrod, she has assured us that the UCAPA is not designed to prevent the protective parent from fleeing to safety with her children. We have been assured that fleeing to escape domestic violence is not “wrongful” under UCAPA. Thus, as this bill moves forward, we must eventually rely on “legislative history” to protect these mothers and kids. So, the following suggestions are made in the spirit of making that intention very clear.

We believe that some of the best pieces of the act as it relates to these concerns are in the comments sections. Unfortunately, most practitioners do not have ready access to these comments. We are asking that this Committee support having those comments be published in the statute books. We know that some states do publish the comments of uniform acts and we believe this is a particularly important time to do so.

Our second request, again in agreement with Professor Elrod, is that the committee consider a long overdue re-vamping of the Kansas crimes of interference with parental custody (K.S.A. 21-3422) and aggravated interference with parental custody (K.S.A. 21-3422a). Across the nation, states have begun to recognize this catch-22 for protective parents and now provide exceptions and defenses for parents fleeing domestic violence and abuse.

The Senate Judiciary Committee introduced and held hearings on SB 182. At this point we believe that SB 182 will be referred to the Legislative Coordinating Council for consideration during the summer interim committees.

KCSDV requests this committee support both the printing of the comments in the Kansas statute book and the careful consideration of amending the criminal Interference with Parental Custody and the Aggravated Interference with Parental Custody statute in the summer Interim Committee.

Respectfully submitted:

Sandy Barnett  
Executive Director

## Amendments to Article 1 of the Uniform Commercial Code

-A Summary-

Article 1 of the Uniform Commercial Code (UCC) provides definitions and general provisions which, in the absence of conflicting provisions, apply as default rules covering transactions and matters otherwise covered under a different article of the UCC. As other parts of the UCC have been revised and amended to accommodate changing business practices and development in the law, these modifications need to be reflected in an updated Article 1. Thus, Article 1 contains many changes of a technical, non-substantive nature, such as reordering and renumbering sections, and adding gender-neutral terminology. In addition, over the years it has been in place, certain provisions of Article 1 have been identified as confusing or imprecise. Several changes reflect an effort to add greater clarity in light of this experience. Finally, developments in the law have led to the conclusion that certain changes of a substantive nature needed to be made.

The first substantive change is intended to clarify the scope of Article 1. Section 1-102 now expressly states that the substantive rules of Article 1 apply only to transactions within the scope of other articles of the UCC. The statute of frauds requirement aimed at transactions beyond the coverage of the UCC has been deleted. Second, amended Section 1-103 clarifies the application of supplemental principles of law, with clearer distinctions about where the UCC is preemptive. Third, the definition of "good faith" found in 1-201 is revised to mean "honesty in fact and the observance of reasonable commercial standards of fair dealing". This change conforms to the definition of good faith that applies in all of the recently revised UCC articles except Revised Article 5. Finally, evidence of "course of performance" may be used to interpret a contract along with course of dealing and usage of trade.

Article 1 impacts every transaction governed by the UCC, including any sale of goods, any transfer of any negotiable instrument or check, any commercial electronic funds transfer, any letter of credit, any warehouse receipt or bill of lading, any transfer of an investment security, and any credit transaction in which a security interest is taken in specific collateral. These are the transactions governed by specific articles of the UCC and encompass the bulk of commercial activity in the American economy. Although its rules and definitions are often overlooked in rank of importance and are frequently considered mundane, it is truly the "hold together" article of the UCC, binding the other articles into one code. Therefore, it is very important to have it up-to-date and consistent with the rest of the UCC for smooth economic function in the United States.

House Judiciary

Date 3-8-07

Attachment # 4



March 8, 2007

To: House Committee on Judiciary

From: Kathleen Taylor Olsen, Kansas Bankers Association

**Re: SB 183: UCC Revised Article 1**

Mr. Chairman and Members of the Committee:

Thank you for the opportunity to appear before you today with regard to **SB 183**, a revision of the UCC's Article 1. We are generally supportive of its provisions as amended by the Senate Judiciary Committee. We requested the amendment found in New Section 15. This amendment reinstates the current law with regard to the choice of law rules.

According to the information we have received, there are twenty-two states that have enacted Revised Article 1. Of those twenty-two states, none of them have enacted the provisions regarding choice of law as they originally existed in **SB 183**. Rather, states have chosen to retain the current choice of law provisions found in K.S.A. 84-1-105.

The choice of law section in current K.S.A. 84-1-105 allows parties to a transaction to designate by agreement, which state law governs as long as the transaction bears a "reasonable relation" to that state.

The revised choice of law section proposed a bifurcated approach with one rule for business-to-business transactions and another rule for consumer transactions. For business-to-business transactions, the revision proposed that parties to a transaction could agree which state law governed without regard to whether the transaction bore a relation to the state designated. For consumer transactions, the revision's proposal required a reasonable relation to the state law agreed to by the parties, but also provided that the agreement would not be effective if the state in which the consumer resided had a law that was more protective of consumers and which could not be varied by agreement.

We believe the current choice of law section is better because we believe that all transactions should be governed by the laws of a state where there is a reasonable relation – a nexus to that transaction. It represents a good compromise as it does not allow businesses to "forum shop", but requires there to be a connection either with the location of the parties or the transaction.



Kansas Bankers Association

**SB 183**

Page Two

We also believe the current law is very clear and understandable and promotes certainty to entities and people doing business across state lines. Kansas entities should be able to rely on the fact that Kansas law will govern agreements they enter into. It would be almost impossible in this age of interstate commerce for a Kansas business to begin to know all of the nuances of the laws in other states where they may have customers.

The revised version is much more complex and would generate more litigation. Right now, litigation under the current provision is mostly limited to whether there is a "reasonable relation" to the state, and we have case law providing precedent on that issue. It is foreseeable that under the revised version, litigation over which state's laws are more protective of consumers will occur, as will litigation over whether a state's laws "may not be varied by agreement".

Finally, ironically, with every other state that has considered this body of law opting to not adopt the proposed choice of law provisions, for Kansas to do so would make our state's law nonuniform with both the current and thus-far revised Article 1 choice of law sections in every other state.

In conclusion, the KBA would request that you maintain the current status of the choice of law provisions for UCC transactions by adopting **SB 183** as amended. Thank you.

# REVISED ARTICLE 7 OF THE UNIFORM COMMERCIAL CODE

## - A SUMMARY -

### Revision in 2003

The original Article 7 of the Uniform Commercial Code, "Warehouse Receipts, Bills of Lading and Other Documents of Title," combined two earlier uniform acts, the Uniform Warehouse Receipts Act (1906) and the Uniform Bills of Lading Act (1909), with some principles from the Uniform Sales Act (which became Article 2-Sales of the UCC). Article 7 had not been revisited after the 1951 promulgation of the original Uniform Commercial Code until 2003, a period of 52 years. The longevity of the principles of warehouse receipts and bills of lading suggests very successful law and law-making as it pertains to the commercial storage and shipment of goods. The basic principles do not change basically in the 2003 revision. But there are reasons to readdress this area of the commercial law in 2003, which shall be discussed a little later. First, it is necessary to establish some of the basics.

### Introduction to Documents of Title

The storage and shipment of tangible goods for commercial purposes has been going on for centuries. The physical side of the business is carried on by entities that provide warehouses (warehousemen) and entities that carry the goods from place of origin to destination (common carriers). These are tangible, visible businesses. What is not tangible and visible is the transfer of rights in the goods while they are stored and/or shipped. The common law provided the rules of bailment. The terminology of bailor and bailee is still incorporated in the Uniform Act. As the law developed, the transfer of rights came to depend upon the transfer of specific documents of title. The transfer of the documents from one person to another became the transfer of the rights. The title documents were warehouseman's receipts on the storage/warehouse side, and the bill of lading on the carrier side. The original uniform acts and the 2003 revision all incorporate these basics.

One of the important principles carried forward into the 2003 revision is that of negotiability. Free transfer of interests is an important policy norm throughout the UCC. In Article 7, documents of title may be negotiable. Whether a document is negotiable or non-negotiable depends upon how it identifies the transferee and how it is transferred. A negotiable document may be one of two kinds of paper documents, bearer paper or order paper. A document made out to bearer may be transferred from one person to another by simple delivery of possession. The delivery transfers the rights to the goods (therefore the title) to the transferee. Order paper is made out to a specific person. After initial delivery to the person named on the document, it may be negotiated to another person by the indorsement of the named person and delivery of possession to that other person. The rights to the goods (and therefore the title) pass with the negotiation to the transferee.

Documents of title may also be made non-negotiable. This is primarily done by a statement on the face of the instrument. Non-negotiable documents of title may also be assigned or transferred. The difference between negotiable and non-negotiable documents is the rights

that they may transfer. A non-negotiable document of title transfers only the actual interests of the transferor. A negotiable document of title may transfer more than the actual interests of the transferor. If negotiated, for example, it transfers free of any claims against the issuer of the document. A non-negotiable document is not free of such claims.

Negotiation as a concept exists to make commerce in goods possible. Goods would not be transferred if the purchaser always has to look behind the transaction to see who may come after the goods after the transfer is complete. Negotiation erases the peril. The principle enunciated in Article 7 is consistent with other parts of the UCC governing notes, drafts, checks and investment securities.

### **Electronic Documents of Title**

Article 7 governs other important aspects of the transfer of rights in goods when stored or shipped, such as the liens of warehousemen and carriers and their enforcement and allocation of risk of loss of the goods either in storage or transit, but the issue of negotiation has been its single most important aspect, up to the revisions in 2003. Something very important has happened to change the way we look at the principle of negotiation. That something is computers, electronic communications and the ability to create electronic documents of title. Computers have been accused and applauded for their impact on commerce and business. Their impact on storage and shipment of goods is profound. Federal law has actually recognized electronic documents for some time, but electronic documents of title cannot be substituted one to one with tangible documents of title. Their characteristics in electronic form are not the same as their characteristics in tangible form.

The tangible form is a written document on paper with signatures of issuers and subsequent transferors. The individual document is a unique token of the rights and interests it represents. Even if there is a copy, there is always the original. This is not so with electronic documents. Originals and copies are indistinguishable from each other in electronic form. Signatures in the sense of an individual's scribing them uniquely on a piece of paper cannot be equally duplicated in an electronic document. Transferors and transferees, who are remote from each other when tangible documents are transferred, are not remote from each other in electronic media. Electronic communications can occur between any two persons anywhere in the world. Yet, it is difficult for each participant in an electronic communication to verify or authenticate the identity of the other party. To have the effective electronic documents that commerce demands, new concepts have to be introduced into the law. The concept of negotiation as we have known it in American law cannot apply in electronic media. The great addition to Article 7, therefore, is the new rules for electronic documents of title.

These rules must deal with distinct issues: recognition of electronic documents of title, statute of fraud extensions, establishment of the unique original in electronic form (sometimes thought of as authentication), and interchangeability between electronic and tangible documents of title. In addition, the rules for electronic documents of title must fit as seamlessly as possible into the existing system governing tangible documents of title. The law should avoid skewing the choice between tangible and electronic documents of title in the favor of either form. Only

the actual marketplace should determine users' choices. Revised Article 7 deals with these issues and meets the test of seamless insertion into the existing law.

### **Recognition of Electronic Documents of Title**

Recognition of electronic documents of title begins in the definition of "Document of Title:" "An electronic document of title is evidence by a record consisting of information stored in an electronic medium." Other definitions have been modified to accord with this root definition. For example, "Holder" is defined to include: "a person in control of a negotiable electronic document of title." Electronic documents of title become the equal to tangible documents of title.

### **Statute of Frauds Requirements**

Revised Article 7 extends statute of fraud requirements to include electronic records and signatures. Any writing requirement that relates to enforceability of a document is a statute of frauds requirement. Article 7 treats electronic records and signatures as the equivalent of paper documents and written, manual signatures. This initially occurs in new definitions of "record" and "sign." A record is "information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form." The term "sign" is defined to "execute or adopt a tangible symbol" and "to attach or logically associate with the record an electronic sound, symbol or process." Within Revised Article 7, wherever the term "writing" or an equivalent may have been used before revision, the term "record" is uniformly used. When a document is required to be signed anywhere in Revised Article 7, electronic signing meets the test.

In addition, Revised Article 7 provides language stating expressly that it modifies, limits and supersedes the federal Electronic Signatures in Global and National Commerce Act. This express language, permitted in the federal act, avoids any issue of federal preemption. The federal statute allows specific tailoring for the purposes of incorporating electronic records and signatures into state law.

### **Establishing the Unique Token**

It is not possible to transfer an electronic document of title in the same manner as a tangible document of title, particularly in terms of negotiating it. It cannot be guaranteed that a transfer directly from one person to the next by delivery and/or signature will transfer the authentic original document of title. An electronic alternative to the tangible system is necessary. To accomplish the equivalent system for electronic documents of title, Article 7 adapts the concept of "control" to the purpose. It is not a brand-new concept. It initially was developed in Article 8 of the Uniform Commercial Code for investment securities in the indirect holding system. The 1999 revisions to Article 9 adapted the concept further for secured transactions. Further adaptation of the concept occurred in Section 16 of the Uniform Electronic Transactions Act for promissory notes. This latter adaptation is most important for Revised Article 7, because the issues of negotiation for promissory notes are very similar to those for documents of title.

A person has control of a document of title for Article 7 purposes "if a system employed for evidencing the transfer of interests in the electronic document reliably establishes that person as the person to which the electronic document was issued or transferred." Such a system exists when it establishes a "single authoritative copy ...which is unique, identifiable and ... unalterable." The authoritative copy must identify the person in control or the next person to whom the document has transferred. The person in control determines to whom the document is next transferred. Further, the standard requires that copies that are not authoritative, including copies of the authoritative copy, must be readily identifiable as not being the authoritative copy.

There is more than one way to meet this set of standards, unlike negotiation of a paper document, which occurs in one way only. One way to establish the single authoritative document is to have a single custodian of the electronic record, who enters all transfers of the document and identifies the person in control on its records, records that for all who want to know is the source of the single authoritative copy. In such a system, the person in control notifies the custodian of any transfer or authorized change in the document, who then notates its records appropriately and notifies the person in control and other relevant parties of the action. A transfer would obviously shift control from transferor to transferee. The transferee would become the new person in control.

Encryption technology may provide other methods for meeting these standards. Some kind of hybrid system of encryption and custodian may arise. UCC Article 7 prescribes no system per se and more than one system may develop over time. It is not possible to predict what technology may finally bring to electronic transfer systems. Revised Article 7 allows the technology to develop without need to amend it later when a new kind of technology comes along.

### **Interchangeability**

UCC Article 7 provides for an electronic system of transfer for electronic documents of title and for the traditional paper system of documents of title which includes negotiable documents of title. There are dual tracks. Control is the operative term with electronic documents and negotiation is the operative term for tangible documents of title. With respect to the transfer of rights in a particular group of goods, can electronic documents be converted to tangible documents and vice versa? UCC Article 7 provides for such conversions. An electronic document may be converted when the person in control surrenders control to the issuer, which then issues a tangible document of title containing a statement that it substitutes for the electronic document. The same kind of process will convert a tangible document to an electronic one. The person entitled to enforce a tangible document surrenders possession to the issuer. The electronic document must also state that it is a substitute for the tangible document. Without the ability to convert from tangible to electronic documents, this system would not work.

### **Other Benefits to Revision**

The revisions to UCC Article 7, beyond making way for electronic documents of title, primarily update or clarify existing rules of law. There are references to tariffs and regulations in

original UCC Article 7 that no longer exist with deregulation. These have been eliminated in the revision. There is nothing as significant as the rules for electronic documents of title. But these rules alone make it imperative for the states to enact the revision to UCC Article 7 as soon as practicable. Documents of title are fundamental to the transfer of goods in interstate commerce. The new rules are wholly commerce friendly and every state needs them as soon as possible.