



STATE OF NEW JERSEY

N J L R C

NEW JERSEY LAW REVISION COMMISSION

FINAL REPORT

Relating to

UNIFORM CHILD ABDUCTION PREVENTION ACT

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Introduction

In July of 2006, the National Conference of Commissioners on Uniform State Laws (NCCUSL) approved and recommended for enactment, the Uniform Child Abduction Prevention Act (UCAPA). Since then, the UCAPA has been enacted in only seven states: Nebraska, Utah, Kansas, South Dakota, Nevada, Colorado, and Louisiana, although bills incorporating some or all of the UCAPA are pending in at least ten more jurisdictions.¹

The UCAPA's stated purpose is to provide a mechanism for a court to impose child abduction prevention measures at any time, thereby deterring and preventing domestic and international abductions. Child abduction is defined as "wrongful removal" or "wrongful retention" of an unemancipated minor. The UCAPA was created to complement and enhance existing law, such as the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), the Parental Kidnapping Prevention Act (PKPA), and, with regard to international abduction, the Hague Convention on the Civil Aspects of International Child Abduction. As noted in the preface to the Original Text, the UCAPA is "premised on the general principle that preventing abduction is in a child's best interests."

Summary of Provisions of the UCAPA

The "Definitions" section of the UCAPA tracks as much as possible that of the UCCJEA. The UCAPA permits a court, on its own motion, to order abduction prevention measures if the court finds the evidence establishes a credible risk of abduction of the child. It also permits a party or anyone with the rights to seek a child-custody determination, to file a verified petition, in the court having jurisdiction to make a child custodial determination with respect to that child, for an order protecting the child from abduction. Provision exists for temporary emergency jurisdiction, in accordance with the UCCJEA, if the court finds a credible risk of abduction and for the prosecutor, or public authority with the power under the relevant state law, to seek a warrant to take physical custody of a child or other appropriate prevention measures.

In determining whether there is a credible risk of abduction of a child, the court may consider *any one or more* risk factors, including whether the petitioner or respondent has threatened to abduct the child, engaged in activities that may indicate a planned abduction (such as selling the primary residence, terminating a lease, abandoning employment), or engaged in domestic violence, stalking or child abuse. Petitioners may offer evidence of conduct not expressly mentioned in the UCAPA and courts are required to consider evidence regarding *both* the petitioner and the respondent when making

¹Louisiana's version of the Uniform Law, though modeled on the UCAPA, is also restricted to international abductions. A few states such as Arkansas, California, Oregon and Texas address child abduction prevention in legislation pre-dating the completion of the UCAPA, although Texas is now considering adoption of the UCAPA. Other federal legislation also addresses other aspects of the problems encountered with missing and abducted children.

determinations of the risks of abduction. However, the UCAPA does not discuss the weight the evidence is to be given.

The remainder of the UCAPA addresses the mechanics of the procedures to be implemented (duration of court orders, etc.), and the actual provisions required to be included in the court order. The measures and conditions a court may impose to prevent child abduction are within the discretion of the court so long as due consideration is given to custody and visitation rights of the parties, and the court considers the age of the child; potential harm to the child from the abduction; legal and practical difficulties of returning the child to the jurisdiction; and reasons for the potential abduction, including evidence of domestic violence, stalking, child abuse or neglect.

Concerns Regarding Adoption of the UCAPA

Criticism of the UCAPA has been expressed during the legislative hearings in states that considered its enactment. As a result, the versions of UCAPA enacted have been modified in significant respects. Some of the concerns raised in those legislative hearings as well as other concerns raised by careful review of the proposed Uniform Law are discussed briefly below.

One concern is that the initial draft, which sought to prevent the huge problem of international child abductions to those countries either not signatories of the Hague Treaty or non-complying signatories, should not have been expanded to include domestic abductions. Louisiana adopted a version of the UCAPA that applies exclusively to international adoptions. Other states have adopted similar laws.

Another concern is that some of the factors that the court may consider to determine whether a credible risk of abduction of a child exists, do not in and of themselves display evidence of such a risk. For example, obtaining a child's school records or birth certificate could be a simple exercise of parental responsibility rather than evidence of an abduction about to take place. Others argue that because certain risk factors are vague or ambiguous, all risk factors should be regrouped and prioritized into those factors that require immediate action and those that are merely contributing but not dispositive of abduction.

Section 8 includes measures to prevent abduction that some view as taking away fundamental liberties (such as the right to travel) and eliminating the presumption of innocence that even alleged criminal offenders now enjoy. Section 9 permits a court to issue an *ex parte* warrant to take physical custody of the child if that court finds a credible risk that the child is imminently likely to be wrongfully removed. Some characterize the *ex parte* mechanism as a potential weapon for abuse of one spouse by the other. The opportunity for a hearing exists *only* if the respondent petitions for a hearing, the time frame for such a hearing (within the next judicial day unless a hearing on that date is impossible, in which event the court shall hold the hearing on the first judicial day possible) may be insufficient, and the warrant may be issued *even without a hearing*. Equally troubling, however, is language in Section 9 requiring that the warrant

specifically direct “law enforcement officers to take physical custody of the child immediately” and “provide for the safe interim placement of the child pending further order of the court”. Although this directive mirrors language in the UCCJEA (§2A:34-85), the trauma of thrusting a very young child whose parent is the abductor into the hands of even the most concerned law enforcement officer may outweigh the benefit contemplated by the proposed provision.

Commission Recommendation

The Commission has considered the UCAPA but does not recommend its adoption. The UCAPA does not provide authority beyond the current powers of New Jersey judges in custody matters. The Commission did not address deficiencies in the Uniform Law or possible modifications to sections 7, 8 and 9 of the Official Text to correct them, concluding that the UCAPA is not necessary in light of the broad powers of the New Jersey chancery courts.

The New Jersey Constitution provides for the establishment and jurisdiction of the New Jersey Superior Court (*see* Article 6, §3, ¶¶1 and 2) and for division of the Superior Court into three distinct sections, including a Chancery Division, “which shall include a family part.” (*see* Article 6, §3, ¶3.) N.J.S. 2A:34-23 permits a court:

“to make such order as to the alimony or maintenance of the parties, and also as to the care, custody, education, and maintenance of the children, or any of them, as the circumstances of the parties and the nature of the case shall render fit, reasonable and just”

Invoking these constitutional and statutory provisions, New Jersey courts have adopted the “best interests” standard in determining the needs and welfare of children in the State. *See Mayer v. Mayer*, 150 N.J. Super. 556, 562 (Ch. Div. 1977) (court has broad discretion in dealing with custody of the child while being aware that the welfare and happiness of the child is the controlling consideration.)

New Jersey courts exercise broad powers when the disputed issues concern children. *See Paterno v. Paterno*, 254 N.J. Super. 190, 193 (Ch. Div. 1991) (“Nowhere are the equitable powers of the Chancery Division more crucial than in the realm of child custody and visitation in post-matrimonial actions.”) *See also Vannucchi v. Vannucchi*, 113 N.J. Super. 40 (App. Div. 1971), *certification denied*, 58 N.J. 163 (1971) (chancery division has authority under *parens patriae* jurisdiction to regulate custody which authority, firmly established in our jurisprudence, has its origin in the protection that is due to the incapacitated or helpless); and *Brown v. Parsons*, 136 N.J. Eq. 493 (E. & A. 1945) (chancery court’s authority is so broad that where the welfare of the child so requires, permanent custody may be fixed even disregarding the legal rights of parents.)