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The Joint State Government Commission was created by act of July 1, 1937 (P.L.2460, No.459) as amended, as a continuing agency for the development of facts and recommendations on all phases of government for the use of the General Assembly.

JOINT STATE GOVERNMENT COMMISSION, 1999

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November 1999

TO THE MEMBERS OF THE GENERAL ASSEMBLY:

The Joint State Government Commission is pleased to present the report of the Advisory Committee on Domestic Relations Law. This report is the second report presented to the General Assembly by the advisory committee and contains recommendations relating to custody. In April, the advisory committee issued a report which contained recommended amendments to the Divorce Code.

This advisory committee, under the able leadership of Judge Emanuel Bertin, has labored diligently for over four years. On behalf of the General Assembly, I wish to thank Judge Bertin and the members of the advisory committee for their work.

Respectfully submitted,

Roger A. Madigan
Chairman

Click the number of the page you'd like to see.

CONTENTS

Introduction	1
Summary of Recommendations	3
Proposed Subchapter A of Chapter 53	7
Proposed Chapter 54	35
Cross Reference Table	109

INTRODUCTION

This is the second report of the Joint State Government Commission Advisory Committee on Domestic Relations Law and is limited to recommendations regarding custody. The first report, issued in April 1999, focused on proposed Divorce Code amendments.

Senate Resolution No. 43 of 1993, Pr.'s No. 1673 (adopted February 1, 1994), created the Advisory Committee and Task Force on Domestic Relations Law. It directed the Commission to undertake an ongoing study of domestic relations law, but excluded the subjects of child abuse and adoption. The advisory committee is chaired by Judge Emanuel A. Bertin of Montgomery County. The task force, chaired by Senator Stewart J. Greenleaf, is comprised of the majority and minority chairs of the Senate and House Judiciary Committees and the Senate and House Aging and Youth Committees.

At its meeting of October 25, 1999, the legislative task force received this report of the advisory committee and authorized its transmittal to the General Assembly. This report contains proposed legislation for a revised Subchapter A of Chapter 53 (Custody Generally) and proposed Chapter 54 (Uniform Child Custody Jurisdiction and Enforcement Act) of Title 23 (Domestic Relations) of the Pennsylvania Consolidated Statutes. It also contains the official comments of the advisory committee to proposed Subchapter A of Chapter 53 and the official

comments of the National Conference of Commissioners on Uniform State Laws to proposed Chapter 54.

The official comments may be used in determining the legislative intent of the General Assembly. See 1 Pa.C.S. § 1939 and *In re Martin's Estate*, 365 Pa. 280, 74 A.2d 120 (1950).

SUMMARY OF RECOMMENDATIONS

- Repeal the present custody provisions (23 Pa.C.S. §§ 5301 to 5314) and propose a revised custody statute (23 Pa.C.S. §§ 5321 to 5339)
- Incorporate the Uniform Child Custody Jurisdiction and Enforcement Act (Chapter 54) and repeal the present Uniform Child Custody Jurisdiction Act (Subchapter B of Chapter 53)
- Include new definitions for abuse, adult, agency, parental duties, primary physical custody, relocation, shared legal custody, shared physical custody, sole legal custody, sole physical custody and supervised visitation (§ 5322)
- Clarify definitions for child, legal custody, partial physical custody and visitation and retain the definition for physical custody (§ 5322)
- Specify the types of custody and visitation that a court may award (§ 5323(a))
- Mandate that a custody or visitation order contain sufficient detail for a party to enforce it through law enforcement authorities (§ 5323(d))
- Provide that a party who willfully fails to comply with any custody or visitation order may be adjudged in contempt (§ 5323(e))
- Permit parties living separate and apart in the same residence to seek a custody or visitation order, which will only be effective upon either one party physically vacating the residence or the court awarding one party exclusive possession of the residence (§ 5323(f))
- Establish standing for a parent, an adult caring for a child at risk, an adult residing with a child for at least twelve consecutive months and an adult caring for a child after parental relinquishment to participate in any custody or visitation action (§ 5324)
- Expand standing to seek partial physical custody or visitation to include not just grandparents and great-grandparents, but any adult related to the child, where the parent is deceased (§ 5325(a)(1))
- Provide standing for a grandparent or great-grandparent to participate in an action for partial physical custody or visitation, where the parents are separated or divorced or the child resided with the grandparent or great-grandparent and was subsequently removed by a parent (§ 5325(a)(2) and (3))
- Establish presumptions in cases concerning primary physical custody between parents, between a parent and a third party and between two third parties (§ 5326)

- Provide factors to determine the best interest of the child (§ 5327(a) and (b))
- Require consideration of certain criminal convictions of a party and member of that party's household (§ 5328(a))
- Combine the list of criminal offenses set forth in former section 5303(b) and (b.1) (§ 5328(a))
- Expand the list of criminal offenses to include driving under the influence of alcohol or controlled substances and certain violations of The Controlled Substance, Drug, Device and Cosmetic Act (§ 5328(a))
- Retain the provision regarding an award when one parent is convicted of murdering the other parent (§ 5328(b))
- Clarify the evaluation process for counseling (§ 5328(c), (d) and (e))
- Provide that a court may order a party to pay all or part of the costs of the counseling, evaluations, information programs and appointment of a guardian ad litem or counsel for the child (§§ 5328(f), 5332(c), 5333(d), 5334(e) and 5335(d))
- Retain the provision regarding consideration of criminal charges (§ 5329)
- Prohibit a court from basing a custody or visitation order exclusively on certain factors (§ 5330)
- Require the parties to submit parenting plans (§ 5331)
- Provide for attendance at informational programs concerning parental duties (§ 5332)
- Provide for counseling as part of a custody or visitation order (§ 5333)
- Provide for the appointment of a guardian ad litem for a child (§ 5334)
- Provide for the appointment of counsel for a child (§ 5335)
- Clarify how records and information may be accessed and what constitutes confidential information (§ 5336)
- Provide a statutory framework for relocation cases (§ 5337)
- Establish that a relocation may properly occur only if all individuals with custody or visitation rights to the child consent or the court approves the relocation (§ 5337(b))

- Explain how a party must give reasonable notice of a relocation (§ 5337(c))
- Explain how a party may object to a proposed relocation (§ 5337(d))
- Explain how a party may confirm a relocation with the court (§ 5337(e))
- Provide for an expedited full hearing on the relocation (§ 5337(f)(1))
- Mandate consideration of certain factors in determining whether to grant a proposed relocation (§ 5337(g))
- Establish the burden of proof in relocation cases (§ 5337(h))
- Provide for consequences when a party fails to give reasonable notice of a relocation (§ 5337(i))
- Provide for the effect of a relocation which occurs prior to a full expedited hearing (§ 5337(j))
- Provide for modification of a custody or visitation order based on the standard of “best interest of the child” (§ 5338(a))
- Provide that a court may award reasonable interim or final counsel fees, costs and expenses, based on a consideration of relevant factors, including good faith, financial resources, the need to engage experts and the best interest of the child (§ 5339)

CHAPTER 53

CUSTODY

SUBCHAPTER A

CUSTODY GENERALLY

**THIS REVISED SUBCHAPTER A REPLACES PRESENT
SUBCHAPTER A OF CHAPTER 53, WHICH WILL BE
REPEALED BY THE IMPLEMENTING LEGISLATION**

Sec.

5321. Scope.

5322. Definitions.

5323. Award of custody or visitation.

5324. Standing for any form of physical custody, legal custody or visitation.

5325. Standing for partial physical custody and visitation.

5326. Presumption in cases concerning primary physical custody.

5327. Factors to consider when awarding custody.

5328. Consideration of criminal conviction.

5329. Consideration of criminal charge.

5330. Factors not to consider when awarding custody.

5331. Parenting plan.

5332. Informational programs.

5333. Counseling as part of order.

5334. Guardian ad litem for child.

5335. Counsel for child.

5336. Access to records and information.

5337. Relocation.

5338. Modification of existing custody order.

5339. Award of counsel fees, costs and expenses.

§ 5321. Scope.

This subchapter applies to disputes relating to custody and visitation matters.

§ 5322. Definitions.

The following words and phrases when used in this subchapter shall have the meanings given to them in this section unless the context clearly indicates otherwise:

“Abuse.” As defined in section 6102 (relating to definitions).

Comment: This definition is new to the Pennsylvania custody statute.

Under section 6102, “abuse” is defined as follows:

The occurrence of one or more of the following acts between family or household members, sexual or intimate partners or persons who share biological parenthood:

(1) Attempting to cause or intentionally, knowingly or recklessly causing bodily injury, serious bodily injury, rape, involuntary deviate sexual intercourse, sexual assault, statutory sexual assault, aggravated indecent assault, indecent assault or incest with or without a deadly weapon.

(2) Placing another in reasonable fear of imminent serious bodily injury.

(3) The infliction of false imprisonment pursuant to 18 Pa.C.S. § 2903 (relating to false imprisonment).

(4) Physically or sexually abusing minor children, including such terms as defined in Chapter 63 (relating to child protective services).

(5) Knowingly engaging in a course of conduct or repeatedly committing acts toward another person, including following the person, without proper authority, under circumstances which place the person in reasonable fear of bodily injury. The definition of this paragraph applies only to proceedings commenced under this title and is inapplicable to any criminal prosecutions commenced under Title 18 (relating to crimes and offenses).

“Adult.” An individual 18 years of age or older.

Comment: This definition is new to the Pennsylvania custody statute.

“Agency.” Any organization, society, institution or other entity, including the county children and youth social service agency or court facility, which provides for the care of the child.

Comment: This definition is new to the Pennsylvania custody statute.

“Child.” An unemancipated individual under 18 years of age.

Comment: Based on the definition in former section 5302 (definitions): “Any unemancipated person under 18 years of age.”

“Legal custody.” The right to make major decisions on behalf of the child, including, but not limited to, medical, religious and educational decisions.

Comment: Based on the definition in former section 5302: “The legal right to make major decisions affecting the best interest of a minor child, including, but not limited to, medical, religious and educational decisions.”

“Parental duties.” Includes meeting the physical, emotional and social needs of the child.

Comment: This definition is new to the Pennsylvania custody statute.

“Partial physical custody.” The right to assume physical custody of the child for less than a majority of the time.

Comment: Based on the definition of “partial custody” in former section 5302: “The right to take possession of a child away from the custodial parent for a certain period of time.”

“Physical custody.” The actual physical possession and control of a child.

Comment: Identical to the definition in former section 5302.

“Primary physical custody.” The right to assume physical custody of the child for the majority of time.

Comment: This definition is new to the Pennsylvania custody statute.

“Relocation.” A change in a residence of the child which significantly impairs the ability of a nonrelocating party to exercise custodial rights.

Comment: This definition is new to the Pennsylvania custody statute.

“Shared legal custody.” The right of more than one individual to legal custody of the child.

Comment: This definition is new to the Pennsylvania custody statute. It is intended that shared legal custody includes consultation on major decisions and reasonable consent of the parties.

“Shared physical custody.” The right of more than one individual to assume physical custody of the child, each having approximately the same amount of physical custodial time with the child.

Comment: This definition is new to the Pennsylvania custody statute.

“Sole legal custody.” The right of one individual to exclusive legal custody of the child.

Comment: This definition is new to the Pennsylvania custody statute.

“Sole physical custody.” The right of one individual to exclusive physical custody of the child.

Comment: This definition is new to the Pennsylvania custody statute.

“Supervised visitation.” Visitation in which an agency or an adult designated by the court or agreed upon by the parties monitors the interaction between the child and the individual with visitation rights.

Comment: This definition is new to the Pennsylvania custody statute.

“Visitation.” The right to spend time with the child, but not the right to remove the child from the care or control of a custodial party.

Comment: Based on the definition in former section 5302: “The right to visit a child. The term does not include the right to remove a child from the custodial parent’s control.”

§ 5323. Award of custody or visitation.

(a) Types of award.--After considering the factors set forth in section 5327 (relating to factors to consider when awarding custody), the court may award any of the following types of custody and visitation if it is in the best interest of the child:

- (1) Sole legal custody.
- (2) Shared legal custody.
- (3) Sole physical custody.
- (4) Shared physical custody.
- (5) Primary physical custody.
- (6) Partial physical custody.
- (7) Visitation.

(8) Supervised visitation.

Comment: Under this provision, the court should address both physical and legal custody in any award of custody.

(b) Interim award.--The court may issue an interim award of custody or visitation to a party who has standing under section 5324 (relating to standing for any form of physical custody, legal custody or visitation) or 5325 (relating to standing for partial physical custody and visitation), in the manner prescribed by the Pennsylvania Rules of Civil Procedure governing special relief in custody and visitation matters.

Comment: Subsection (b) provides for an interim award of special relief in accordance with the Pennsylvania Rule of Civil Procedure No. 1915.13.

(c) Notice.--Any custody or visitation order shall include notice of a party's obligations under section 5337 (relating to relocation).

(d) Enforcement.--In awarding custody or visitation, the court shall specify the terms and conditions of the award in sufficient detail to enable a party to enforce the court order through law enforcement authorities.

(e) Contempt for noncompliance with any custody or visitation order.--

(1) A party who willfully fails to comply with any custody or visitation order may, as prescribed by general rule, be adjudged in contempt. Contempt shall be punishable by any one or more of the following:

(i) Imprisonment for a period of not more than six months.

(ii) A fine of not more than \$500.

(iii) Probation for a period of not more than six months.

(iv) An order for nonrenewal, suspension or denial of operating privilege pursuant to section 4355 (relating to denial or suspension of licenses).

(v) Counsel fees and costs.

(2) An order committing an individual to jail under this section shall specify the condition which, when fulfilled, will result in the release of that individual.

Comment: Based on former section 4346 (contempt for non-compliance with visitation or partial custody order) and revised to apply to all custody or visitation orders. Paragraph (1)(v) (“counsel fees and costs”) is new and was not part of former section 4346. The addition of this explicit sanction is consistent with 23 Pa.C.S. §§ 3502(e)(7) regarding the sanction for failure to comply with an equitable distribution order and 3703(7) regarding payment of arrearages for alimony and alimony pendente lite. Additionally, in paragraph (2), the term “individual” replaces “person” in the first instance and “obligor” in the second instance.

(f) Parties in same residence.--Parties living separate and apart in the same residence may seek relief under this subchapter, but any custody or visitation order made under such a circumstance shall be effective only upon:

- (1) one party physically vacating the residence; or
- (2) an order awarding one party exclusive possession of the residence.

Comment: This subsection removes a long-standing obstacle to a party who otherwise has standing to commence a custody action.

§ 5324. Standing for any form of physical custody, legal custody or visitation.

The following individuals may file an action under this subchapter for any form of physical custody, legal custody or visitation and shall be given notice and an opportunity to participate in any such action initiated by another party:

- (1) Parent.--A parent of the child.
- (2) Adult caring for child at risk.--With respect to a child who is substantially at risk due to parental abuse, neglect, drug or alcohol abuse or incapacity, an adult:

(i) whose relationship with the child began either with the consent of a parent of the child or pursuant to a court order; and

(ii) who assumes parental duties on behalf of the child.

Comment: Based on former section 5313(b) (when grandparents may petition) and expanded to include any adult who meets the standing requirements set forth in paragraph (2).

(3) Adult residing with child for at least 12 consecutive months.--An adult who has:

(i) resided with the child for a period of at least 12 consecutive months, excluding brief temporary absences of the child from the principal residence of that adult;

(ii) filed the action:

(A) within six months after the termination of the residential period under subparagraph (i); or

(B) at any time, if the residential requirement under subparagraph (i) has been met and the residency has not terminated;

(iii) developed a significant relationship with the child; and

(iv) regularly performed parental duties on behalf of the child:

(A) with the permission or acquiescence of at least one of the child's parents; and

(B) primarily for reasons other than financial compensation.

Comment: Conceptually based on sections 2.03(1)(b) and 2.04(1) of the American Law Institute's Principles of the Law of Family Dissolution: Analysis and Recommendations (Tentative Draft No. 3, Part I, March 20, 1998) ("ALI draft").

(4) Adult caring for child after parental relinquishment.--An adult with a substantial and sincere interest in the welfare of the child to whom a parent

relinquished physical custody of the child, if the parent either consented in writing or did not object to the entry of an order confirming custody with that adult.

Comment: The phrase “did not object” in paragraph (4) includes the failure of a party to appear at the proceeding at which the court confirmed custody. Paragraphs (2), (3) and (4) are intended to include the parent’s parent or grandparent if that individual satisfies the criteria for standing.

Under this section, the enumerated classes of individuals have standing to file an action for primary physical custody, sole physical custody, shared physical custody, partial physical custody, sole legal custody, sole physical custody, visitation or supervised visitation.

See the comment following the introductory language of section 5325(a) (standing for partial physical custody and visitation).

§ 5325. Standing for partial physical custody and visitation.

(a) Who may file.--In addition to those parties set forth in section 5324 (relating to standing for any form of physical custody, legal custody or visitation), the following individuals may file an action under this chapter for partial physical custody or visitation:

Comment: This subsection and section 5324 (standing for any form of physical custody or visitation) expand the class of parties who may file a custody or visitation action or participate in an action initiated by another party.

The integrity of the custody process is protected by Subchapter E (Wrongful Use of Civil Proceedings) of Chapter 83 (Particular Rights and Immunities) of 42 Pa.C.S. (Judiciary and Judicial Procedure). 42 Pa.C.S. section 8351 (wrongful use of civil proceedings) provides, among other things, that a person is subject to liability for the wrongful use of civil proceedings if that person acts in a grossly negligent manner or without probable cause in initiating or continuing an action, and the proceedings have terminated in favor of the adverse party. 42 Pa.C.S. section 8353 (damages) provides that an aggrieved party is entitled to recover expenses, including reasonable

counsel fees, which were reasonably incurred in defending against the action.

In addition, 42 Pa.C.S. section 2503 (right of participants to receive counsel fees) provides that a party is entitled to recover reasonable counsel fees as a sanction against another party for dilatory, obdurate or vexatious conduct during the pendency of a matter.

Also see section 5339 (award of counsel fees, costs and expenses).

(1) When parent of child is deceased.--An adult related to the child by blood, adoption or marriage, where a parent of the child is deceased.

Comment: Based on former section 5311 (when parents deceased) and expanded to include any adult related to the child by blood, adoption or marriage. Before the court orders partial physical custody or visitation, it must consider the additional factors set forth in section 5327(b)(1) (grandparents and other family members under factors to consider when awarding custody).

(2) When parents are separated or parents' marriage is dissolved.--The parent's parent or grandparent where the parents of the child:

- (i) have been separated for a period of at least six months; or
- (ii) have commenced a proceeding to dissolve their marriage, in which case the parent's parent or grandparent may file while the dissolution proceeding is pending or subsequent to the dissolution of the marriage.

Comment: Based on former section 5312 (when parents' marriage is dissolved or parents are separated). Before the court orders partial physical custody or visitation, it must consider the additional factors set forth in section 5327(b)(1).

(3) When child resides with parent's parent or grandparent.--The parent's parent or grandparent with whom the child has resided for a period of at least 12 months excluding brief temporary absences of the child from the principal

residence of the parent's parent or grandparent, where the child is subsequently removed from the home by a parent.

Comment: Based on former section 5313(a) (when grandparents may petition). Before the court orders partial physical custody or visitation, it must consider the additional factors set forth in section 5327(b)(2).

(b) Effect of adoption.--

(1) Subsection (a) shall not apply if the child has been adopted by an individual other than a stepparent or parent's parent or grandparent.

(2) Any partial physical custody or visitation rights granted to a party with standing under this section prior to the adoption of the child by an individual other than a stepparent or parent's parent or grandparent shall be automatically terminated upon the adoption unless such rights are specifically extended pursuant to an agreement or order of court.

Comment: Based on former section 5314 (exception for adopted children).

§ 5326. Presumption in cases concerning primary physical custody.

(a) Between parents.--In any action regarding the custody of the child between the parents of the child, there shall be no presumption that custody should be awarded to a particular parent.

(b) Between a parent and third party.--In any action regarding the custody of the child between a parent of the child and a non-parent, there shall be a presumption that custody shall be awarded to the parent. The presumption in favor of the parent may be rebutted by clear and convincing evidence.

Comment: The clear and convincing evidence standard is employed in light of the broadened standing provisions of sections 5324 (standing for any form of physical custody, legal

custody or visitation) and 5325 (standing for partial physical custody and visitation).

(c) Between third parties.--In any action regarding the custody of the child between a nonparent and another nonparent, there shall be no presumption that custody should be awarded to a particular party.

§ 5327. Factors to consider when awarding custody.

(a) Factors.--In ordering any form of custody or visitation, the court shall determine the best interest of the child by considering all relevant factors, including the following:

Comment: The factors are not listed in order of preference.

(1) Which party is more likely to encourage and permit frequent and continuing contact between the child and another party.

(2) The parental duties performed by each party on behalf of the child.

(3) The need for stability and continuity in the child's education, family life and community life.

(4) The availability of extended family.

(5) The child's sibling relationships.

Comment: Factor (5) is intended to include full-blood siblings, half-blood siblings, step-siblings and adoptive siblings.

(6) The present and past abuse committed by a party or member of the party's household.

(7) The well-reasoned preference of the child, based on the child's maturity and judgment.

(8) The attempts of a parent to turn the child against the other parent.

(9) Which party is more likely to maintain a loving, stable, consistent and nurturing relationship with the child adequate for the child's emotional needs.

(10) Which party is more likely to attend to the daily physical, emotional, developmental, educational and special needs of the child.

(11) The proximity of the residences of the parties.

(12) Each party's availability to care for the child or ability to make appropriate child care arrangements.

(13) The level of conflict between the parties and the willingness and ability of the parties to cooperate with one another.

(14) The history of drug or alcohol abuse of a party or member of a party's household.

(15) The mental and physical condition of a party or member of a party's household.

(16) Any other relevant factor.

(b) Grandparents and other family members.--

(1) In ordering partial physical custody or visitation to a party who has standing under section 5325(a)(1) or (2) (relating to standing for partial physical custody and visitation), the court shall consider the following:

(i) the amount of personal contact between the child and the party prior to the filing of the action;

(ii) whether the award interferes with any parent-child relationship; and

(iii) whether the award is in the best interest of the child.

Comment: Based on former sections 5311 (when parent deceased) and 5312 (when parents' marriage is dissolved or parents are separated).

(2) In ordering partial physical custody or visitation to a parent's parent or grandparent who has standing under section 5325(a)(3), the court shall consider whether the award:

- (i) interferes with any parent-child relationship; and
- (ii) is in the best interest of the child.

Comment: Based on former section 5313(a) (when grandparents may petition).

§ 5328. Consideration of criminal conviction.

(a) Offenses.--Where a party seeks any form of custody or visitation, the court shall consider whether that party or member of that party's household has been convicted of or has pleaded guilty or no contest to any of the following offenses:

- (1) 18 Pa.C.S. Ch. 25 (relating to criminal homicide).
- (2) 18 Pa.C.S. § 2702 (relating to aggravated assault).
- (3) 18 Pa.C.S. § 2706 (relating to terroristic threats).
- (4) 18 Pa.C.S. § 2709(b) (relating to harassment and stalking).
- (5) 18 Pa.C.S. § 2901 (relating to kidnapping).
- (6) 18 Pa.C.S. § 2902 (relating to unlawful restraint).
- (7) 18 Pa.C.S. § 2903 (relating to false imprisonment).
- (8) 18 Pa.C.S. § 3121 (relating to rape).
- (9) 18 Pa.C.S. § 3122.1 (relating to statutory sexual assault).
- (10) 18 Pa.C.S. § 3123 (relating to involuntary deviate sexual intercourse).
- (11) 18 Pa.C.S. § 3124.1 (relating to sexual assault).
- (12) 18 Pa.C.S. § 3125 (relating to aggravated indecent assault).
- (13) 18 Pa.C.S. § 3126 (relating to indecent assault).
- (14) 18 Pa.C.S. § 3127 (relating to indecent exposure).

- (15) 18 Pa.C.S. § 3301 (relating to arson and related offenses).
- (16) 18 Pa.C.S. § 4302 (relating to incest).
- (17) 18 Pa.C.S. § 4304 (relating to endangering welfare of children).
- (18) 18 Pa.C.S. § 5902(b) (relating to prostitution and related offenses).
- (19) 18 Pa.C.S. § 6312 (relating to sexual abuse of children).
- (20) 23 Pa.C.S. § 6114 (relating to contempt for violation of order or agreement).
- (21) 75 Pa.C.S. § 3731 (relating to driving under influence of alcohol or controlled substance).
- (22) Section 13(a)(1) of the act of April 14, 1972 (P.L.233, No.64), known as The Controlled Substance, Drug, Device and Cosmetic Act, to the extent that it prohibits the manufacture, sale or delivery, holding, offering for sale, or possession of any controlled substance or other drug or device.

Comment: Based on former section 5303(b) and (b.1) and expanded to include household members, which include minors convicted of the crimes enumerated in this subsection. The list of crimes under former sections 5303(b) (consideration of criminal conviction) and 5303(b.1) (consideration of criminal charge) were not identical. 18 Pa.C.S. § 5902(b) (prostitution and related offenses) was listed under former section 5303(b) but not under former section 5303(b.1). The following six offenses were included under former section 5303(b.1) but not under former section 5303(b): 18 Pa.C.S. § 2702 (aggravated assault), 18 Pa.C.S. § 2706 (terroristic threats), 18 Pa.C.S. § 2709(b) (harassment and stalking), 18 Pa.C.S. § 2903 (false imprisonment), 18 Pa.C.S. § 3301 (arson and related offenses), and 23 Pa.C.S. § 6114 (contempt for violation of order or agreement).

This new language combines the two former lists and adds two other offenses: 75 Pa.C.S. § 3731 (driving under influence of alcohol or controlled substance) and section 13(a)(1) of the act of April 14, 1972 (P.L.233, No.64), known as The Controlled Substance, Drug, Device and Cosmetic Act.

(b) Parent convicted of murder.--No court shall award custody, partial custody or visitation to a parent who has been convicted of murder under 18 Pa.C.S. § 2502(a) (relating to murder) of the other parent of the child who is the subject of the order unless the child is of suitable age and consents to the order.

Comment: Identical to former section 5303(b.2) (parent convicted of murder).

(c) Initial evaluation.-- The court shall provide for an evaluation to determine whether:

(1) the party or household member who committed an offense under subsection (a) poses a threat to the child; and

(2) counseling is necessary for that party or household member.

(d) Counseling.--

(1) Where the court determines under subsection (c) that counseling is necessary, it shall appoint a qualified professional specializing in treatment relating to the particular offense to provide counseling to the offending individual.

(2) Counseling may include a program of treatment or individual therapy designed to rehabilitate the offending individual which addresses, but is not limited to, issues regarding physical and sexual abuse, the psychology of the offender and the effects of the offense on the victim.

Comment: Based on former section 5303(c) (counseling).

(e) Subsequent evaluation.--

(1) At any time during or subsequent to the counseling under subsection (d), the court may require another evaluation to determine whether further counseling is necessary.

(2) If the court awards custody or visitation to a party who committed an offense under subsection (a) or who shares a household with an individual who committed an offense under subsection (a), the court may require subsequent evaluations on the rehabilitation of the offending individual and the well-being of the child subsequent to the order. If upon review of a subsequent evaluation the court determines that the offending individual poses a threat of harm to the child, the court may schedule a hearing to modify the custody or visitation order.

Comment: Based on former section 5303(c).

(f) Costs.--The court may order a party to pay all or part of the costs of the counseling and evaluations under this section.

§ 5329. Consideration of criminal charge.

(a) Expedited hearing.--A party who has obtained information under 42 Pa.C.S. § 1904 (relating to availability of criminal charge information in child custody proceedings) or otherwise about a charge filed against the other party for an offense listed under section 5328(a) (relating to consideration of criminal conviction) may move for a temporary custody or visitation order or modification of an existing custody or visitation order. The court shall hold the hearing under this subsection in an expeditious manner.

(b) Risk of harm.--In evaluating any request under subsection (a), the court shall consider whether the party who is or has been charged with an offense set forth in section 5328(a) poses a risk of harm to the child.

(c) No prejudice.--Failure to either apply for information under 42 Pa.C.S. § 1904 or act under this section shall not prejudice any party in a custody or visitation proceeding.

Comment: Based on former section 5303(b.1) (consideration of criminal charge). This section refers to the offenses set forth in section 5328(a) (offenses under consideration of criminal conviction). See the comment to section 5328(a).

§ 5330. Factors not to consider when awarding custody.

In ordering any form of custody or visitation, the court shall not base its decision upon the following factors:

- (1) The custody or visitation arrangements pursuant to an interim or emergency order entered without the benefit of a full hearing.
- (2) The disparity of the economic circumstances of the parties.
- (3) The race, religion, ethnic background or sexual orientation of a party.

Comment: A custody or visitation order may not be based exclusively on these factors. However, this does not preclude the court from considering these factors if they are relevant in analyzing the factors set forth in section 5327 (factors to consider when awarding custody).

§ 5331. Parenting plan.

(a) Purpose.--In a contested custody proceeding, the court shall require the parties to submit parenting plans for the care and custody of the child, to aid the court in resolving the custody dispute. A parenting plan and the position of a party as set forth in that parenting plan shall not be admissible as evidence by another party.

(b) Contents.--A parenting plan shall include the following:

- (1) The schedule for personal care and control of the child, including parenting time, holidays and vacations.
- (2) The education and religious involvement, if any, of the child.
- (3) The health care of the child.

Comment: This paragraph is intended to cover such issues as who will take the child to the doctor and how to ensure that the child receives proper medication.

(4) Child-care arrangements.

(5) Transportation arrangements.

(6) A procedure by which proposed changes, disputes and alleged breaches of the custody order may be adjudicated or otherwise resolved through mediation, arbitration or other means.

(7) Any matter specified by the court.

(8) Any other matter that serves the best interest of the child.

§ 5332. Informational programs.

(a) Attendance.--The court may direct the parties to attend informational programs concerning parental duties.

(b) Process not delayed.--Subsequent proceedings and the entry of any order or decree shall not be delayed because of the lack of participation in any informational program by one of the parties.

(c) Costs.--The court may order a party to pay all or part of the costs of the information programs under this section.

§ 5333. Counseling as part of order.

(a) Attendance.--The court may, as part of a custody or visitation order, require the parties to attend counseling sessions.

(b) Abuse.--In situations involving abuse, the court may order individual counseling for the abuser.

(c) Verification.--Each party's participation in the counseling sessions shall be verified by the counselor.

(d) Costs.--The court may order a party to pay all or part of the costs of the counseling sessions under this section.

Comment: Based on former section 5305(a) (counseling).

§ 5334. Guardian ad litem for child.

(a) Appointment.--The court may appoint a guardian ad litem for the child. The court shall specify the terms of the appointment, including the role, duties and scope of authority of the guardian ad litem.

(b) Investigation and report.--The guardian ad litem shall investigate and report to the court information relevant to the custody or visitation proceeding.

(c) Abuse.--If substantial allegations of abuse are made, the court shall appoint a guardian ad litem for the child if:

(1) counsel for the child is not appointed under section 5335 (relating to counsel for child); or

(2) the court is satisfied that the relevant information will be presented to the court only with such appointment.

(d) Subject to examination.--A guardian ad litem who submits a report or makes a recommendation to the court shall be subject to examination by the parties.

(e) Costs.--The court may order a party to pay all or part of the costs of appointing a guardian ad litem under this section.

Comment: Conceptually based on section 2.15 of the ALI draft.

§ 5335. Counsel for child.

(a) Appointment.--The court may appoint counsel to represent the child if the court determines that the appointment will assist in resolving the issues in the custody or visitation proceeding.

(b) Abuse.--Substantial allegations of abuse constitute a reasonable basis for appointing counsel for the child.

(c) Not subject to examination.--Counsel appointed by the court for the child shall not be subject to examination unless such counsel testifies in the matter.

(d) Costs.--The court may order a party to pay all or part of the costs of appointing counsel for the child under this section.

Comment: Conceptually based on section 2.15 of the ALI draft. Also see the guidelines set forth by the American Academy of Matrimonial Lawyers regarding counsel for a child.

§ 5336. Access to records and information.

(a) General rule.--Except as provided in subsections (b) and (c):

(1) A parent or party granted custody or visitation under section 5323 (relating to award of custody or visitation) shall be provided access to:

(i) the medical, dental, religious and school records of the child;

(ii) the address of the child and any other party; and

(iii) any other information that the court deems necessary or proper.

(2) Upon request, a parent, party or entity possessing any information set forth in paragraph (1) shall provide it to any parent or party granted custody or visitation.

(b) Nondisclosure of confidential information.--The court shall not order the disclosure of any of the following information to any parent or party granted custody or visitation:

(1) The address of a victim of abuse.

(2) Confidential information from an abuse counselor or shelter.

(3) Information independently protected from disclosure by the child's right to confidentiality under the act of July 9, 1976 (P.L.817, No.143), known as the Mental Health Procedures Act, or any other statute.

(c) Other information.--The court may determine not to release information set forth in subsection (a), in which case it shall state the reason for its denial on the record.

Comment: Based on former section 5309 (access to records and information).

§ 5337. Relocation.

(a) Applicability.--This section applies to any proposed relocation.

(b) General rule.--No relocation shall occur unless:

(1) every individual who has custody or visitation rights to the child consents to the proposed relocation; or

(2) the court approves the proposed relocation.

(c) Notice.--

(1) The party proposing the relocation shall notify every other individual who has custody or visitation rights to the child.

(2) Reasonable notice shall be given no later than:

(i) the 60th day before the date of the proposed relocation; or

(ii) the 10th day after the date that the individual knows of the relocation,

if:

(A) the individual did not know and could not reasonably have known of the relocation in sufficient time to comply with the 60-day notice; and

(B) it is not reasonably possible to delay the date of relocation so as to comply with the 60-day notice.

(3) Except as provided by section 5336 (relating to access to records and information), the following information, if available, must be included with the notice of the proposed relocation:

(i) The address of the intended new residence.

(ii) The mailing address, if not the same as the address of the intended new residence.

(iii) The home telephone number of the intended new residence.

(iv) The name of the new school district and school.

(v) The date of the proposed relocation.

(vi) The reasons for the proposed relocation.

(vii) A proposal for a revised custody or visitation schedule.

(viii) Any other information which the party proposing the relocation deems appropriate.

(ix) A warning to the nonrelocating party that if the nonrelocating party does not file with the court an objection to the proposed relocation within 30 days after receipt of the notice, that party shall be foreclosed from objecting to the relocation.

(4) If any of the information set forth in paragraph (3) is not known when the notice is sent but is later made known to the party proposing the relocation, then that party shall promptly inform every individual who received notice under this subsection.

Comment: This subsection is not intended to abrogate the expedited hearing process set forth in *Plowman v. Plowman*,

409 Pa. Super. 143, 597 A.2d 701 (1991). Rule 1930.4 of the Pennsylvania Rules of Civil Procedure governs the service of original process in domestic relations matters.

(d) Objection to proposed relocation.--

(1) A party entitled to receive notice may file with the court an objection to the proposed relocation and seek a temporary or permanent order to prevent the relocation.

(2) An objection made under this subsection shall be filed with the court within 30 days of receipt of the proposed relocation notice.

(3) If notice of the proposed relocation has been properly given and no objection to the proposed relocation has been filed in court, then it shall be presumed that the nonrelocating party has consented to the proposed relocation.

(4) If a party entitled to notice does not file with the court an objection to the relocation within 30 days after receipt of the notice but later petitions the court for review of the custodial arrangements, the court shall not accept testimony challenging the relocation.

(e) Confirmation of relocation.--If no objection to the proposed relocation is filed under subsection (d), the party proposing the relocation may file the following with the court prior to the relocation:

(1) an affidavit stating that the party provided notice to every individual entitled to notice, the time to file an objection to the proposed relocation has passed and no individual entitled to receive notice has filed an objection to the proposed relocation;

(2) a petition to confirm the relocation and modify any existing custody or visitation order; and

(3) a proposed order containing the information set forth in subsection (c)(3).

Comment: It is intended that if a party chooses to file under this subsection, then the party must file all three items listed.

(f) Hearing.--

(1) The court shall hold an expedited full hearing on the proposed relocation after a timely objection has been filed and before the relocation occurs unless exigent circumstances exist, in which case the relocation may occur pending an expedited full hearing.

(2) If the court approves the proposed relocation, it shall:

(i) modify any existing custody or visitation order; or

(ii) establish the terms and conditions of a custody or visitation order.

(g) Relocation factors.--In determining whether to grant a proposed relocation, the court shall consider the following factors:

(1) The nature, quality, extent of involvement and duration of the child's relationship with the party proposing to relocate and with the nonrelocating party, siblings and other significant persons in the child's life.

(2) The age, developmental stage, needs of the child, and the likely impact the relocation will have on the child's physical, educational and emotional development, taking into consideration any special needs of the child.

(3) The feasibility of preserving the relationship between the non-relocating party and the child through suitable custody arrangements, considering the logistics and financial circumstances of the parties.

(4) The child's preference, taking into consideration the age and maturity of the child.

(5) Whether there is an established pattern of conduct of either party to promote or thwart the relationship of the child and the other party.

(6) Whether the relocation will enhance the general quality of life for the party seeking the relocation, including, but not limited to, financial or emotional benefit or educational opportunity.

(7) Whether the relocation will enhance the general quality of life for the child, including, but not limited to, financial or emotional benefit or educational opportunity.

(8) The reasons and motivation of each party for seeking or opposing the relocation.

(9) Any other factor affecting the best interest of the child.

(h) Burden of proof.--

(1) The party proposing the relocation has the burden of establishing that the relocation will serve the best interest of the child as shown under the factors set forth in subsection (g).

(2) Each party has the burden of establishing the integrity of that party's motives in either seeking the relocation or seeking to prevent the relocation.

(i) Failure to provide reasonable notice.--The court may consider a failure to provide reasonable notice of a proposed relocation as:

(1) a factor in making a determination regarding the relocation;

(2) a factor in determining whether custody or visitation rights should be modified;

- (3) a basis for ordering the return of the child to the nonrelocating party if the relocation has occurred without reasonable notice;
- (4) sufficient cause to order the party proposing the relocation to pay reasonable expenses and counsel fees incurred by the party objecting to the relocation; and
- (5) a ground for contempt and the imposition of sanctions against the party proposing the relocation.
- (j) Effect of relocation prior to hearing.--If a party relocates with the child prior to a full expedited hearing, the court shall not confer any presumption in favor of the relocation.

Comment: This relocation section is based in part on the Proposed Model Relocation Act (PMRA) of the American Academy of Matrimonial Lawyers dated March 9, 1997. The comments contained in the PMRA may be instructive in the application of this section, to the extent that they are relevant to and consistent with this section.

§ 5338. Modification of existing order.

- (a) Best interest of the child.--Upon petition, a court may modify a custody or visitation order to serve the best interest of the child.
- (b) Applicability.--This section shall apply to any custody or visitation order entered by a court of this Commonwealth or any other state subject to the jurisdictional requirements set forth in Chapter 54 (relating to uniform child custody jurisdiction and enforcement).

Comment: Subsection (a) codifies the standard used in *Karis v. Karis*, 518 Pa. 601, 544 A.2d 1328 (1988), where the Supreme Court held that “a petition for modification of a partial custody to shared custody order requires the court to inquire into the best interest of the child regardless of whether a ‘substantial’ change of circumstances has been shown.” 518 Pa. at 607-8. The court may determine what constitutes the best interest of

the child by analyzing, among other things, the impact of a relocation and the persistent disregard of a custody order by a party.

§ 5339. Award of counsel fees, costs and expenses.

Under this chapter, a court may award reasonable interim or final counsel fees, costs and expenses to any party, based on any relevant factor including, but not limited to, the following:

- (1) The good faith conduct of the parties.
- (2) The relative financial resources of the parties, including the ability of a party to participate in custody litigation.
- (3) The need of a party to engage experts.
- (4) The best interest of the child.

Comment: These factors are not in order of priority.

THE IMPLEMENTING LEGISLATION WILL REPEAL SECTIONS 5301 TO 5314 AND SECTION 4346 OF TITLE 23.

CHAPTER 54

THE FOLLOWING IS THE UNIFORM CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT (UCCJEA) AS APPROVED BY THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, EDITED CONSISTENT WITH THE STYLE OF THE PENNSYLVANIA CONSOLIDATED STATUTES, AND WITH THE ADDITION OF AN INTRASTATE APPLICATION PROVISION. IN THE PREFATORY NOTE AND COMMENTS, THE PARALLEL PENNSYLVANIA CITATION IS PROVIDED IN PARENTHESES AFTER EACH UCCJEA CITATION.

UNIFORM CHILD CUSTODY JURISDICTION AND ENFORCEMENT

PREFATORY NOTE

This Act, the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), revisits the problem of the interstate child almost thirty years after the Conference promulgated the Uniform Child Custody Jurisdiction Act (UCCJA). The UCCJEA accomplishes two major purposes.

First, it revises the law on child custody jurisdiction in light of federal enactments and almost thirty years of inconsistent case law. Article 2 (Subchapter B) of this Act provides clearer standards for which states can exercise original jurisdiction over a child custody determination. It also, for the first time, enunciates a standard of continuing jurisdiction and clarifies modification jurisdiction. Other aspects of the article harmonize the law on simultaneous proceedings, clean hands, and forum non conveniens.

Second, this Act provides in Article 3 (Subchapter C) for a remedial process to enforce interstate child custody and visitation determinations. In doing so, it brings a uniform procedure to the law of interstate enforcement that is currently producing inconsistent results. In many respects, this Act accomplishes for custody and visitation determinations the same uniformity that has occurred in interstate child support with the promulgation of the Uniform Interstate Family Support Act (UIFSA).

Revision of Uniform Child Custody Jurisdiction Act

The UCCJA was adopted as law in all 50 states, the District of Columbia, and the Virgin Islands. A number of adoptions, however, significantly departed from the original text. In addition, almost thirty years of litigation since the promulgation of the UCCJA produced substantial inconsistency in interpretation by state courts. As a result, the goals of the UCCJA were rendered unobtainable in many cases.

In 1980, the federal government enacted the Parental Kidnaping Prevention Act (PKPA), 28 U.S.C. § 1738A, to address the interstate custody jurisdictional problems that continued to exist after the adoption of the UCCJA. The PKPA mandates that state authorities give full faith and credit to other states' custody

determinations, so long as those determinations were made in conformity with the provisions of the PKPA. The PKPA provisions regarding bases for jurisdiction, restrictions on modifications, preclusion of simultaneous proceedings, and notice requirements are similar to those in the UCCJA. There are, however, some significant differences. For example, the PKPA authorizes continuing exclusive jurisdiction in the original decree state so long as one parent or the child remains there and that state has continuing jurisdiction under its own law. The UCCJA did not directly address this issue. To further complicate the process, the PKPA partially incorporates state UCCJA law in its language. The relationship between these two statutes became “technical enough to delight a medieval property lawyer.” Homer H. Clark, *Domestic Relations* § 12.5 at 494 (2d ed. 1988).

As documented in an extensive study by the American Bar Association's Center on Children and the Law, *Obstacles to the Recovery and Return of Parentally Abducted Children* (1993) (*Obstacles Study*), inconsistency of interpretation of the UCCJA and the technicalities of applying the PKPA, resulted in a loss of uniformity among the states. The *Obstacles Study* suggested a number of amendments which would eliminate the inconsistent state interpretations and harmonize the UCCJA with the PKPA.

The revisions of the jurisdictional aspects of the UCCJA eliminate the inconsistent state interpretations and can be summarized as follows:

1. Home state priority. The PKPA prioritizes “home state” jurisdiction by requiring that full faith and credit cannot be given to a child custody determination by a state that exercises initial jurisdiction as a “significant connection state” when there is a “home state.” Initial custody determinations based on “significant connections” are not entitled to PKPA enforcement unless there is no home state. The UCCJA, however, specifically authorizes four independent bases of jurisdiction without prioritization. Under the UCCJA, a significant connection custody determination may have to be enforced even if it would be denied enforcement under the PKPA. The UCCJEA prioritizes home state jurisdiction in section 201 (section 5421).

2. Clarification of emergency jurisdiction. There are several problems with the current emergency jurisdiction provision of the UCCJA § 3(a)(3). First, the language of the UCCJA does not specify that emergency jurisdiction may be exercised only to protect the child on a temporary basis until the court with appropriate jurisdiction issues a permanent order. Some courts have interpreted the UCCJA language to so provide. Other courts, however, have held that there is no time limit on a custody determination based on emergency jurisdiction. Simultaneous proceedings and conflicting custody orders have resulted from these different interpretations.

Second, the emergency jurisdiction provisions predated the widespread enactment of state domestic violence statutes. Those statutes are often invoked to keep one parent away from the other parent and the children when there is a threat of violence. Whether these situations are sufficient to invoke the emergency

jurisdiction provision of the UCCJA has been the subject of some confusion since the emergency jurisdiction provision does not specifically refer to violence directed against the parent of the child or against a sibling of the child.

The UCCJEA contains a separate section on emergency jurisdiction at section 204 (section 5424) which addresses these issues.

3. Exclusive continuing jurisdiction for the state that entered the decree. The failure of the UCCJA to clearly enunciate that the decree-granting state retains exclusive continuing jurisdiction to modify a decree has resulted in two major problems. First, different interpretations of the UCCJA on continuing jurisdiction have produced conflicting custody decrees. States also have different interpretations as to how long continuing jurisdiction lasts. Some courts have held that modification jurisdiction continues until the last contestant leaves the state, regardless of how many years the child has lived outside the state or how tenuous the child's connections to the state have become. Other courts have held that continuing modification jurisdiction ends as soon as the child has established a new home state, regardless of how significant the child's connections to the decree state remain. Still other states distinguish between custody orders and visitation orders. This divergence of views leads to simultaneous proceedings and conflicting custody orders.

The second problem arises when it is necessary to determine whether the state with continuing jurisdiction has relinquished it. There should be a clear basis to determine when that court has relinquished jurisdiction. The UCCJA provided no guidance on this issue. The ambiguity regarding whether a court has declined jurisdiction can result in one court improperly exercising jurisdiction because it erroneously believes that the other court has declined jurisdiction. This caused simultaneous proceedings and conflicting custody orders. In addition, some courts have declined jurisdiction after only informal contact between courts with no opportunity for the parties to be heard. This raised significant due process concerns. The UCCJEA addresses these issues in sections 110, 202, and 206 (sections 5410, 5422 and 5426).

4. Specification of what custody proceedings are covered. The definition of custody proceeding in the UCCJA is ambiguous. States have rendered conflicting decisions regarding certain types of proceedings. There is no general agreement on whether the UCCJA applies to neglect, abuse, dependency, wardship, guardianship, termination of parental rights, and protection from domestic violence proceedings. The UCCJEA includes a sweeping definition that, with the exception of adoption, includes virtually all cases that can involve custody of or visitation with a child as a "custody determination."

5. Role of "best interests." The jurisdictional scheme of the UCCJA was designed to promote the best interests of the children whose custody was at issue by discouraging parental abduction and providing that, in general, the state with the closest connections to, and the most evidence regarding, a child should decide that child's custody. The "best interest" language in the jurisdictional sections of the

UCCJA was not intended to be an invitation to address the merits of the custody dispute in the jurisdictional determination or to otherwise provide that “best interests” considerations should override jurisdictional determinations or provide an additional jurisdictional basis.

The UCCJEA eliminates the term “best interests” in order to clearly distinguish between the jurisdictional standards and the substantive standards relating to custody and visitation of children.

6. Other changes. This draft also makes a number of additional amendments to the UCCJA. Many of these changes were made to harmonize the provisions of this Act with those of the Uniform Interstate Family Support Act. One of the policy bases underlying this Act is to make uniform the law of interstate family proceedings to the extent possible, given the very different jurisdictional foundations. It simplifies the life of the family law practitioner when the same or similar provisions are found in both Acts.

Enforcement Provisions

One of the major purposes of the revision of the UCCJA was to provide a remedy for interstate visitation and custody cases. As with child support, state borders have become one of the biggest obstacles to enforcement of custody and visitation orders. If either parent leaves the state where the custody determination was made, the other parent faces considerable difficulty in enforcing the visitation and custody provisions of the decree. Locating the child, making service of process, and preventing adverse modification in a new forum all present problems.

There is currently no uniform method of enforcing custody and visitation orders validly entered in another state. As documented by the *Obstacles Study*, despite the fact that both the UCCJA and the PKPA direct the enforcement of visitation and custody orders entered in accordance with mandated jurisdictional prerequisites and due process, neither act provides enforcement procedures or remedies.

As the *Obstacles Study* pointed out, the lack of specificity in enforcement procedures has resulted in the law of enforcement evolving differently in different jurisdictions. In one state, it might be common practice to file a Motion to Enforce or a Motion to Grant Full Faith and Credit to initiate an enforcement proceeding. In another state, a Writ of Habeas Corpus or a Citation for Contempt might be commonly used. In some states, Mandamus and Prohibition also may be utilized. All of these enforcement procedures differ from jurisdiction to jurisdiction. While many states tend to limit considerations in enforcement proceedings to whether the court which issued the decree had jurisdiction to make the custody determination, others broaden the considerations to scrutiny of whether enforcement would be in the best interests of the child.

Lack of uniformity complicates the enforcement process in several ways: (1) It increases the costs of the enforcement action in part because the services of

more than one lawyer may be required--one in the original forum and one in the state where enforcement is sought; (2) It decreases the certainty of outcome; (3) It can turn enforcement into a long and drawn out procedure. A parent opposed to the provisions of a visitation determination may be able to delay implementation for many months, possibly even years, thereby frustrating not only the other parent, but also the process that led to the issuance of the original court order.

The provisions of Article 3 (Subchapter C) provide several remedies for the enforcement of a custody determination. First, there is a simple procedure for registering a custody determination in another state. This will allow a party to know in advance whether that state will recognize the party's custody determination. This is extremely important in estimating the risk of the child's non-return when the child is sent on visitation. The provision should prove to be very useful in international custody cases.

Second, the Act provides a swift remedy along the lines of habeas corpus. Time is extremely important in visitation and custody cases. If visitation rights cannot be enforced quickly, they often cannot be enforced at all. This is particularly true if there is a limited time within which visitation can be exercised such as may be the case when one parent has been granted visitation during the winter or spring holiday period. Without speedy consideration and resolution of the enforcement of such visitation rights, the ability to visit may be lost entirely. Similarly, a custodial parent must be able to obtain prompt enforcement when the noncustodial parent refuses to return a child at the end of authorized visitation, particularly when a summer visitation extension will infringe on the school year. A swift enforcement mechanism is desirable for violations of both custody and visitation provisions.

The scope of the enforcing court's inquiry is limited to the issue of whether the decree court had jurisdiction and complied with due process in rendering the original custody decree. No further inquiry is necessary because neither Article 2 (Subchapter B) nor the PKPA allows an enforcing court to modify a custody determination.

Third, the enforcing court will be able to utilize an extraordinary remedy. If the enforcing court is concerned that the parent, who has physical custody of the child, will flee or harm the child, a warrant to take physical possession of the child is available.

Finally, there is a role for public authorities, such as prosecutors, in the enforcement process. Their involvement will encourage the parties to abide by the terms of the custody determination. If the parties know that public authorities and law enforcement officers are available to help in securing compliance with custody determinations, the parties may be deterred from interfering with the exercise of rights established by court order.

The involvement of public authorities will also prove more effective in remedying violations of custody determinations. Most parties do not have the resources to enforce a custody determination in another jurisdiction. The availability

of the public authorities as an enforcement agency will help ensure that this remedy can be made available regardless of income level. In addition, the public authorities may have resources to draw on that are unavailable to the average litigant.

This Act does not authorize the public authorities to be involved in the action leading up to the making of the custody determination, except when requested by the court, when there is a violation of the Hague Convention on the Civil Aspects of International Child Abduction, or when the person holding the child has violated a criminal statute. The Act does not mandate that public authorities be involved in all cases. Not all states, or local authorities, have the funds necessary for an effective custody and visitation enforcement program.

CHAPTER 54

Subchapter

- A. General Provisions
- B. Jurisdiction
- C. Enforcement
- D. Intrastate Application
- E. Miscellaneous Provisions

SUBCHAPTER A

GENERAL PROVISIONS

Sec.

- 5401. Short title of chapter.
- 5402. Definitions.
- 5403. Proceedings governed by other law.
- 5404. Application to Native American tribes.
- 5405. International application of chapter.
- 5406. Effect of child custody determination.
- 5407. Priority.
- 5408. Notice to persons outside Commonwealth.
- 5409. Appearance and limited immunity.
- 5410. Communication between courts.
- 5411. Taking testimony in another state.
- 5412. Cooperation between courts; preservation of records.

§ 5401. Short title of chapter.

This chapter shall be known and may be cited as the Uniform Child Custody Jurisdiction and Enforcement Act.

Comment: Section 1 of the UCCJA was a statement of the purposes of the Act. Although extensively cited by courts, it was eliminated because Uniform Acts no longer contain such a section. Nonetheless, this Act should be interpreted according to its purposes which are to:

(1) Avoid jurisdictional competition and conflict with courts of other states in matters of child custody which have in the past resulted in the shifting of children from state to state with harmful effects on their well-being;

(2) Promote cooperation with the courts of other states to the end that a custody decree is rendered in that state which can best decide the case in the interest of the child;

(3) Discourage the use of the interstate system for continuing controversies over child custody;

(4) Deter abductions of children;

(5) Avoid relitigation of custody decisions of other states in this state; and

(6) Facilitate the enforcement of custody decrees of other states.

§ 5402. Definitions.

The following words and phrases when used in this chapter shall have the meanings given to them in this section unless the context clearly indicates otherwise:

“Abandoned.” Left without provision for reasonable and necessary care or supervision.

“Child.” An individual who has not attained 18 years of age.

“Child custody determination.” 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. The term does not include an order relating to child support or other monetary obligation of an individual.

“Child custody proceeding.” A proceeding in which legal custody, physical custody or visitation with respect to a child is an issue. The term includes a proceeding for divorce, separation, neglect, abuse, dependency, guardianship, paternity, termination of parental rights and protection from domestic violence, in which the issue may appear. The term does not include a proceeding involving juvenile delinquency, contractual emancipation or enforcement under Subchapter C (relating to enforcement).

“Commencement.” The filing of the first pleading in a proceeding.

“Court.” An entity authorized under the law of a state to establish, enforce or modify a child custody determination.

“Home state.” The state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding. In the case of a child six months of age or younger, the term means the state in which the child lived from birth with any of the persons mentioned. A period of temporary absence of any of the mentioned persons is part of the period.

“Initial determination.” The first child custody determination concerning a particular child.

“Issuing court.” The court that makes a child custody determination for which enforcement is sought under this chapter.

“Modification.” A child custody determination that changes, replaces, supersedes or is otherwise made after a previous determination concerning the same child, whether or not it is made by the court that made the previous determination.

“Person.” An individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government or governmental subdivision, agency or instrumentality, public corporation or any other legal or commercial entity.

“Person acting as a parent.” A person, other than a parent, who:

(1) has physical custody of the child or has had physical custody for a period of six consecutive months, including any temporary absence, within one year immediately before the commencement of a child custody proceeding; and

(2) has been awarded legal custody by a court or claims a right to legal custody under the laws of this Commonwealth.

“Physical custody.” The physical care and supervision of a child.

“State.” 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.

“Tribe.” A Native American tribe or band, or Alaskan Native village, which is recognized by Federal law or formally acknowledged by a state.

“Warrant.” An order issued by a court authorizing law enforcement officers to take physical custody of a child.

Comment: The UCCJA did not contain a definition of “child.” The definition here is taken from the PKPA.

The definition of “child custody determination” now closely tracks the PKPA definition. It encompasses any judgment, decree or other order which provides for the custody of, or visitation with, a child, regardless of local terminology, including such labels as “managing conservatorship” or “parenting plan.”

The definition of “child custody proceeding” has been expanded from the comparable definition in the UCCJA. These listed proceedings have generally been determined to be the type of proceeding to which the UCCJA and PKPA are applicable. The list of examples removes any controversy about the types of proceedings where a custody determination can occur. Proceedings that affect access to the child are subject to this Act. The inclusion of proceedings related to protection from domestic violence is necessary because in some states domestic violence proceedings may affect custody of and visitation with a child. Juvenile delinquency or proceedings to confer contractual rights are not “custody proceedings” because they do not relate to civil aspects of access to a child. While a determination of paternity is covered under the Uniform Interstate Family Support Act, the custody and visitation aspects of paternity cases are custody proceedings. Cases involving the Hague Convention on the Civil Aspects of International Child Abduction have not been included at this point because custody of the child is not determined in a proceeding under the International Child Abductions Remedies Act. Those proceedings are specially included in the Article 3 (Subchapter C) enforcement process.

“Commencement” has been included in the definitions as a replacement for the term “pending” found in the UCCJA. Its inclusion simplifies some of the simultaneous proceedings provisions of this Act.

The definition of “home state” has been reworded slightly. No substantive change is intended from the UCCJA.

The term “issuing state” is borrowed from UIFSA. In UIFSA, it refers to the court that issued the support or parentage order. Here, it refers to the state, or the court, which made the custody determination that is sought to be enforced. It is used primarily in Article 3 (Subchapter C).

The term “person” has been added to ensure that the provisions of this Act apply when the state is the moving party in a custody proceeding or has legal custody of a child. The definition of “person” is the one that is mandated for all Uniform Acts.

The term “person acting as a parent” has been slightly redefined. It has been broadened from the definition in the UCCJA to include a person who has acted as a parent for a significant period of time prior to the filing of the custody proceeding as well as a person who currently has physical custody of the child. In addition, a person acting as a parent must either have legal custody or claim a right to legal custody under the law of this state. The reference to the law of this state means that a court determines the issue of whether someone is a “person acting as a parent” under its own law. This reaffirms the traditional view that a court in a child custody case applies its own substantive law. The court does not have to undertake a choice-of-law analysis to determine whether the individual who is claiming to be a person acting as a parent has standing to seek custody of the child.

The definition of “tribe” is the one mandated for use in Uniform Acts. Should a state choose to apply this Act to tribal adjudications, this definition should be enacted as well as the entirety of section 104 (section 5404).

The term “contestant” has been omitted from this revision. It was defined in the UCCJA § 2(1) as “a person, including a parent, who claims a right to custody or visitation rights with respect to a child.” It seems to have served little purpose over the years, and whatever function it once had has been subsumed by state laws on who has standing to seek custody of or visitation with a child. In addition UCCJA § 2(5) which defined “decree” and “custody decree” has been eliminated as duplicative of the definition of “custody determination.”

§ 5403. Proceedings governed by other law.

This chapter does not govern an adoption proceeding or a proceeding pertaining to the authorization of emergency medical care for a child.

Comment: Two proceedings are governed by other acts. Adoption cases are excluded from this Act because adoption is a specialized area which is thoroughly covered by the Uniform Adoption Act (UAA) (1994). Most states either will adopt that Act or will adopt the jurisdictional provisions of that Act.

Therefore, the jurisdictional provisions governing adoption proceedings are generally found elsewhere.

However, there are likely to be a number of instances where it will be necessary to apply this Act in an adoption proceeding. For example, if a state adopts the UAA then section 3-101 of the Act specifically refers in places to the Uniform Child Custody Jurisdiction Act which will become a reference to this Act. Second, the UAA requires that if an adoption is denied or set aside, the court is to determine the child's custody. UAA § 3-704. Those custody proceedings would be subject to this Act. See Joan Heifetz Hollinger, *The Uniform Adoption Act: Reporter's Ruminations*, 30 *Fam.L.Q.* 345 (1996).

Children that are the subject of interstate placements for adoption or foster care are governed by the Interstate Compact on the Placement of Children (ICPC). The UAA § 2-107 provides that the provisions of the compact, although not jurisdictional, supply the governing rules for all children who are subject to it. As stated in the Comments to that section: "Once a court exercises jurisdiction, the ICPC helps determine the legality of an interstate placement." For a discussion of the relationship between the UCCJA and the ICPC see *J.D.S. v. Franks*, 893 P.2d 732 (Ariz. 1995).

Proceedings pertaining to the authorization of emergency medical care for children are outside the scope of this Act since they are not custody determinations. All states have procedures which allow the state to temporarily supersede parental authority for purposes of emergency medical procedures. Those provisions will govern without regard to this Act.

§ 5404. Application to Native American tribes.

(a) Primacy of Indian Child Welfare Act.--A child custody proceeding that pertains to a Native American child as defined in the Indian Child Welfare Act of 1978 (Public Law 95-608, 25 U.S.C. § 1901 et seq.) is not subject to this chapter to the extent that it is governed by the Indian Child Welfare Act of 1978.

(b) Tribe treated as state.--A court of this Commonwealth shall treat a tribe as if it were a state of the United States for the purpose of applying this subchapter and Subchapter B (relating to jurisdiction).

(c) Tribal custody determinations.--A child custody determination made by a tribe under factual circumstances in substantial conformity with the jurisdictional standards of this chapter must be recognized and enforced under Subchapter C (relating to enforcement).

Comment: This section extends the terms of this Act to Indian tribes. The definition of “tribe” is found at section 102(16) (section 5402). This Act does not purport to legislate custody jurisdiction for tribal courts. However, a Tribe could adopt this Act as enabling legislation by simply replacing references to “this State” with “this Tribe.”

If the Indian Child Welfare Act requires that a case be heard in tribal court, then its provisions determine jurisdiction.

§ 5405. International application of chapter.

(a) Foreign country treated as state.--A court of this Commonwealth shall treat a foreign country as if it were a state of the United States for the purpose of applying this subchapter and Subchapter B (relating to jurisdiction).

(b) Foreign custody determinations.--Except as otherwise provided in subsection (c), a child custody determination made in a foreign country under factual circumstances in substantial conformity with the jurisdictional standards of this chapter must be recognized and enforced under Subchapter C (relating to enforcement).

(c) Violation of human rights.--A court of this Commonwealth need not apply this chapter if the child custody law of a foreign country violates fundamental principles of human rights.

Comment: The provisions of this Act have international application to child custody proceedings and determinations of other countries. Another country will be treated as if it were a state of the United States for purposes of applying Articles 1 and 2 (Subchapters A and B) of this Act. Custody determinations of other countries will be enforced if the facts of

the case indicate that jurisdiction was in substantial compliance with the requirements of this Act.

In this section, the term “child custody determination” should be interpreted to include proceedings relating to custody or analogous institutions of the other country. See generally, Article 3 of The Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children. 35 I.L.M. 1391 (1996).

A court of this state may refuse to apply this Act when the child custody law of the other country violates basic principles relating to the protection of human rights and fundamental freedoms. The same concept is found in section 20 of the Hague Convention on the Civil Aspects of International Child Abduction (return of the child may be refused if this would not be permitted by the fundamental principles of the requested state relating to the protection of human rights and fundamental freedoms). In applying subsection (c), the court’s scrutiny should be on the child custody law of the foreign country and not on other aspects of the other legal system. This Act takes no position on what laws relating to child custody would violate fundamental freedoms. While the provision is a traditional one in international agreements, it is invoked only in the most egregious cases.

This section is derived from section 23 of the UCCJA.

§ 5406. Effect of child custody determination.

A child custody determination made by a court of this Commonwealth that had jurisdiction under this chapter binds all persons who have been served in accordance with the laws of this Commonwealth or notified in accordance with section 5408 (relating to notice to persons outside Commonwealth) or who have submitted to the jurisdiction of the court, and who have been given an opportunity to be heard. As to those persons, the determination is conclusive as to all decided issues of law and fact except to the extent the determination is modified.

Comment: No substantive changes have been made to this section which was section 12 of the UCCJA.

§ 5407. Priority.

If a question of existence or exercise of jurisdiction under this chapter is raised in a child custody proceeding, the question, upon request of a party, must be given priority on the calendar and handled expeditiously.

Comment: No substantive change was made to this section which was section 24 of the UCCJA. The section is placed toward the beginning of Article 1 to emphasize its importance.

The language change from “case” to “question” is intended to clarify that it is the jurisdictional issue which must be expedited and not the entire custody case. Whether the entire custody case should be given priority is a matter of local law.

§ 5408. Notice to persons outside Commonwealth.

(a) General rule.--Notice required for the exercise of jurisdiction when a person is outside this Commonwealth may be given in a manner prescribed by the laws of this Commonwealth for service of process or by the law of the state in which the service is made. Notice must be given in a manner reasonably calculated to give actual notice but may be by publication if other means are not effective.

(b) Proof of service.--Proof of service may be made in the manner prescribed by the laws of this Commonwealth or by the law of the state in which the service is made.

(c) Submission to jurisdiction.--Notice is not required for the exercise of jurisdiction with respect to a person who submits to the jurisdiction of the court.

Comment: This section authorizes notice and proof of service to be made by any method allowed by either the state which issues the notice or the state where the notice is received. This eliminates the need to specify the type of notice in the Act and, therefore, the provisions of section 5 of the UCCJA which specified how notice was to be accomplished were eliminated. The change reflects an approach in this Act to use local law to determine many procedural issues. Thus, service by facsimile is permissible if allowed by local rule in either state. In addition,

where special service or notice rules are available for some procedures, in either jurisdiction, they could be utilized under this Act. For example, if a case involves domestic violence and the statute of either state would authorize notice to be served by a peace officer, such service could be used under this Act.

Although section 105 (section 5405) requires foreign countries to be treated as states for purposes of this Act, attorneys should be cautioned about service and notice in foreign countries. Countries have their own rules on service which must usually be followed. Attorneys should consult the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, 20 U.S.T. 36, T.I.A.S. 6638 (1965).

§ 5409. Appearance and limited immunity.

(a) General rule.--A party to a child custody proceeding, including a modification proceeding or a petitioner or respondent in a proceeding to enforce or register a child custody determination, is not subject to personal jurisdiction in this Commonwealth for another proceeding or purpose solely by reason of having participated or of having been physically present for the purpose of participating in the proceeding.

(b) Service.--A person who is subject to personal jurisdiction in this Commonwealth on a basis other than physical presence is not immune from service of process in this Commonwealth. A party present in this Commonwealth who is subject to the jurisdiction of another state is not immune from service of process allowable under the laws of that state.

(c) Acts committed while in this Commonwealth.--The immunity granted by subsection (a) does not extend to civil litigation based on acts unrelated to the participation in a proceeding under this chapter committed by an individual while present in this Commonwealth.

Comment: This section establishes a general principle that participation in a custody proceeding does not, by itself, give the court jurisdiction over any issue for which personal jurisdiction over the individual is required. The term “participate” should be read broadly. For example, if jurisdiction is proper under Article 2 (Subchapter B), a respondent in an original custody determination, or a party in a modification determination, should be able to request custody without this constituting the seeking of affirmative relief that would waive personal jurisdictional objections. Once jurisdiction is proper under Article 2 (Subchapter B), a party should not be placed in the dilemma of choosing between seeking custody or protecting a right not to be subject to a monetary judgment by a court with no other relationship to the party.

This section is comparable to the immunity provision of UIFSA § 314. A party who is otherwise not subject to personal jurisdiction can appear in a custody proceeding or an enforcement action without being subject to the general jurisdiction of the state by virtue of the appearance. However, if the petitioner would otherwise be subject to the jurisdiction of the state, appearing in a custody proceeding or filing an enforcement proceeding will not provide immunity. Thus, if the noncustodial parent moves from the state that decided the custody determination, that parent is still subject to the state’s jurisdiction for enforcement of child support if the child or an individual obligee continues to reside there. See UIFSA § 205. If the noncustodial parent returns to enforce the visitation aspects of the custody determination, the state can utilize any appropriate means to collect the back-due child support. However, the situation is different if both parties move from state A after the determination, with the custodial parent and the child establishing a new home state in state B, and the noncustodial parent moving to state C. The noncustodial parent is not, at this point, subject to the jurisdiction of state B for monetary matters. See *Kulko v. Superior Court*, 436 U.S. 84 (1978). If the noncustodial parent comes into state B to enforce the visitation aspects of the determination, the noncustodial parent is not subject to the jurisdiction of state B for those proceedings and issues requiring personal jurisdiction by filing the enforcement action.

A party also is immune from service of process during the time in the state for an enforcement action except for those claims for which jurisdiction could be based on contacts other than mere physical presence. Thus, when the noncustodial parent comes into state B to enforce the visitation aspects of the

decree, state B cannot acquire jurisdiction over the child support aspects of the decree by serving the noncustodial parent in the state. Cf. UIFSA § 611 (personally serving the obligor in the state of the residence of the obligee is not by itself a sufficient jurisdictional basis to authorize a modification of child support). However, a party who is in this state and subject to the jurisdiction of another state may be served with process to appear in that state, if allowable under the laws of that state.

As the Comments to UIFSA § 314 note, the immunity provided by this section is limited. It does not provide immunity for civil litigation unrelated to the enforcement action. For example, a party to an enforcement action is not immune from service regarding a claim that involves an automobile accident occurring while the party is in the state.

§ 5410. Communication between courts.

(a) General rule.--A court of this Commonwealth may communicate with a court in another state concerning a proceeding arising under this chapter.

(b) Participation of parties.--The court may allow the parties to participate in the communication. If the parties are not able to participate in the communication, they must be given the opportunity to present facts and legal arguments before a decision on jurisdiction is made.

(c) Matters of cooperation between courts.--Communication between courts on schedules, calendars, court records and similar matters may occur without informing the parties. A record need not be made of the communication.

(d) Record.--Except as otherwise provided in subsection (c), a record must be made of a communication under this section. The parties must be informed promptly of the communication and granted access to the record.

(e) Definition.--As used in this section, the term "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.

Comment: This section emphasizes the role of judicial communications. It authorizes a court to communicate concerning any proceeding arising under this Act. This includes communication with foreign tribunals and tribal courts. Communication can occur in many different ways such as by telephonic conference and by on-line or other electronic communication. The Act does not preclude any method of communication and recognizes that there will be increasing use of modern communication techniques.

Communication between courts is required under sections 204, 206, and 307 (sections 5424, 5426 and 5447) and strongly suggested in applying section 207 (section 5427). Apart from those sections, there may be less need under this Act for courts to communicate concerning jurisdiction due to the prioritization of home state jurisdiction. Communication is authorized, however, whenever the court finds it would be helpful. The court may authorize the parties to participate in the communication. However, the Act does not mandate participation. Communication between courts is often difficult to schedule and participation by the parties may be impractical. Phone calls often have to be made after-hours or whenever the schedules of judges allow.

This section does require that a record be made of the conversation and that the parties have access to that record in order to be informed of the content of the conversation. The only exception to this requirement is when the communication involves relatively inconsequential matters such as scheduling, calendars, and court records. Included within this latter type of communication would be matters of cooperation between courts under section 112 (section 5412). A record includes notes or transcripts of a court reporter who listened to a conference call between the courts, an electronic recording of a telephone call, a memorandum or an electronic record of the communication between the courts, or a memorandum or an electronic record made by a court after the communication.

The second sentence of subsection (b) protects the parties against unauthorized ex parte communications. The parties' participation in the communication may amount to a hearing if there is an opportunity to present facts and jurisdictional arguments. However, absent such an opportunity, the participation of the parties should not be considered a substitute for a hearing and the parties must be given an opportunity to fairly and fully present facts and arguments on the jurisdictional issue before a determination is made. This may be done through a hearing or, if appropriate, by affidavit or

memorandum. The court is expected to set forth the basis for its jurisdictional decision, including any court-to-court communication which may have been a factor in the decision.

§ 5411. Taking testimony in another state.

(a) General rule.--In addition to other procedures available to a party, a party to a child custody proceeding may offer testimony of witnesses who are located in another state, including testimony of the parties and the child, by deposition or other means allowable in this Commonwealth for testimony taken in another state. The court on its own motion may order that the testimony of a person be taken in another state and may prescribe the manner in which and the terms upon which the testimony is taken.

(b) Means and location.--A court of this Commonwealth may permit an individual residing in another state to be deposed or to testify by telephone, audiovisual means or other electronic means before a designated court or at another location in that state. A court of this Commonwealth shall cooperate with courts of other states in designating an appropriate location for the deposition or testimony.

(c) Transmission of documentary evidence.--Documentary evidence transmitted from another state to a court of this Commonwealth by technological means that do not produce an original writing may not be excluded from evidence on an objection based on the means of transmission.

Comment: No substantive changes have been made to subsection (a) which was section 18 of the UCCJA.

Subsections (b) and (c) merely provide that modern modes of communication are permissible in the taking of testimony and the transmittal of documents. See UIFSA § 316.

§ 5412. Cooperation between courts; preservation of records.

(a) Assistance of another state.--A court of this Commonwealth may request the appropriate court of another state to:

(1) hold an evidentiary hearing;

(2) order a person to produce or give evidence pursuant to procedures of that state;

(3) order that an evaluation be made with respect to the custody of a child involved in a pending proceeding;

(4) forward to the court of this Commonwealth a certified copy of the transcript of the record of the hearing, the evidence otherwise presented and any evaluation prepared in compliance with the request; and

(5) order a party to a child custody proceeding or any person having physical custody of the child to appear in the proceeding with or without the child.

(b) Assistance to another state.--Upon request of a court of another state, a court of this Commonwealth may hold a hearing or enter an order described in subsection (a).

(c) Expenses.--Travel and other necessary and reasonable expenses incurred under subsections (a) and (b) may be assessed against the parties according to the laws of this Commonwealth.

(d) Preservation of records.--A court of this Commonwealth shall preserve the pleadings, orders, decrees, records of hearings, evaluations and other pertinent records with respect to a child custody proceeding until the child attains 18 years of

age. Upon appropriate request by a court or law enforcement official of another state, the court shall forward a certified copy of those records.

Comment: This section is the heart of the judicial cooperation provision of this Act. It provides mechanisms for courts to cooperate with each other in order to decide cases in an efficient manner without causing undue expense to the parties. Courts may request assistance from courts of other states and may assist courts of other states.

The provision on the assessment of costs for travel provided in the UCCJA § 19 has been changed. The UCCJA provided that the costs may be assessed against the parties or the state or county. Assessment of costs against a government entity in a case where the government is not involved is inappropriate and, therefore, that provision has been removed. In addition, if the state is involved as a party, assessment of costs and expenses against the state must be authorized by other law. It should be noted that the term “expenses” means out-of-pocket costs. Overhead costs should not be assessed as expenses.

No other substantive changes have been made. The term “social study” as used in the UCCJA was replaced with the modern term: “custody evaluation.” The Act does not take a position on the admissibility of a custody evaluation that was conducted in another state. It merely authorizes a court to seek assistance of, or render assistance to, a court of another state.

This section combines the text of sections 19 - 22 of the UCCJA.

SUBCHAPTER B

JURISDICTION

Sec.

- 5421. Initial child custody jurisdiction.
- 5422. Exclusive, continuing jurisdiction.
- 5423. Jurisdiction to modify determination.
- 5424. Temporary emergency jurisdiction.
- 5425. Notice; opportunity to be heard; joinder.
- 5426. Simultaneous proceedings.

5427. Inconvenient forum.

5428. Jurisdiction declined by reason of conduct.

5429. Information to be submitted to court.

5430. Appearance of parties and child.

§ 5421. Initial child custody jurisdiction.

(a) General rule.--Except as otherwise provided in section 5424 (relating to temporary emergency jurisdiction), a court of this Commonwealth has jurisdiction to make an initial child custody determination only if:

(1) this Commonwealth is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding and the child is absent from this Commonwealth but a parent or person acting as a parent continues to live in this Commonwealth;

(2) a court of another state does not have jurisdiction under paragraph (1), or a court of the home state of the child has declined to exercise jurisdiction on the ground that this Commonwealth is the more appropriate forum under section 5427 (relating to inconvenient forum) or 5428 (relating to jurisdiction declined by reason of conduct), and:

(i) the child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this Commonwealth other than mere physical presence; and

(ii) substantial evidence is available in this Commonwealth concerning the child's care, protection, training and personal relationships;

(3) all courts having jurisdiction under paragraph (1) or (2) have declined to exercise jurisdiction on the ground that a court of this Commonwealth is the more appropriate forum to determine the custody of the child under section 5427 or 5428; or

(4) no court of any other state would have jurisdiction under the criteria specified in paragraph (1), (2) or (3).

(b) Exclusive jurisdictional basis.--Subsection (a) is the exclusive jurisdictional basis for making a child custody determination by a court of this Commonwealth.

(c) Physical presence and personal jurisdiction unnecessary.--Physical presence of or personal jurisdiction over a party or a child is not necessary or sufficient to make a child custody determination.

Comment: This section provides mandatory jurisdictional rules for the original child custody proceeding. It generally continues the provisions of the UCCJA § 3. However, there have been a number of changes to the jurisdictional bases.

1. Home state jurisdiction. The jurisdiction of the home state has been prioritized over other jurisdictional bases. Section 3 of the UCCJA provided four independent and concurrent bases of jurisdiction. The PKPA provides that full faith and credit can only be given to an initial custody determination of a “significant connection” state when there is no home state. This Act prioritizes home state jurisdiction in the same manner as the PKPA thereby eliminating any potential conflict between the two acts.

The six-month extended home state provision of subsection (a)(1) has been modified slightly from the UCCJA. The UCCJA provided that home state jurisdiction continued for six months when the child had been removed by a person seeking the child’s custody or for other reasons and a parent or a person acting as a parent continues to reside in the home state. Under this Act, it is no longer necessary to determine why the child has been removed. The only inquiry relates to the status of the person left behind. This change provides a slightly more refined home state standard than the UCCJA or the PKPA, which also requires a determination that the child has been removed

“by a contestant or for other reasons.” The scope of the PKPA’s provision is theoretically narrower than this Act. However, the phrase “or for other reasons” covers most fact situations where the child is not in the home state and, therefore, the difference has no substantive effect.

In another sense, the six-month extended home state jurisdiction provision in this Act is narrower than the comparable provision in the PKPA. The PKPA’s definition of extended home state is more expansive because it applies whenever a “contestant” remains in the home state. That class of individuals has been eliminated in this Act. This Act retains the original UCCJA classification of “parent or person acting as parent” to define who must remain for a state to exercise the six-month extended home state jurisdiction. This eliminates the undesirable jurisdictional determinations which would occur as a result of differing state substantive laws on visitation involving grandparents and others. For example, if state A’s law provided that grandparents could obtain visitation with a child after the death of one of the parents, then the grandparents, who would be considered “contestants” under the PKPA, could file a proceeding within six months after the remaining parent moved and have the case heard in state A. However, if state A did not provide that grandparents could seek visitation under such circumstances, the grandparents would not be considered “contestants” and state B where the child acquired a new home state would provide the only forum. This Act bases jurisdiction on the parent and child or person acting as a parent and child relationship without regard to grandparents or other potential seekers of custody or visitation. There is no conflict with the broader provision of the PKPA. The PKPA in §(c)(1) authorizes states to narrow the scope of their jurisdiction.

2. Significant connection jurisdiction. This jurisdictional basis has been amended in four particulars from the UCCJA. First, the “best interest” language of the UCCJA has been eliminated. This phrase tended to create confusion between the jurisdictional issue and the substantive custody determination. Since the language was not necessary for the jurisdictional issue, it has been removed.

Second, the UCCJA based jurisdiction on the presence of a significant connection between the child and the child’s parents or the child and at least one contestant. This Act requires that the significant connections be between the child, the child’s parents or the child and a person acting as a parent.

Third, a significant connection state may assume jurisdiction only when there is no home state or when the home state decides that the significant connection state would be a more appropriate forum under section 207 or 208 (section 5427 or 5428).

Fourth, the determination of significant connections has been changed to eliminate the language of “present or future care.” The jurisdictional determination should be made by determining whether there is sufficient evidence in the state for the court to make an informed custody determination. That evidence might relate to the past as well as to the “present or future.”

Emergency jurisdiction has been moved to a separate section. This is to make it clear that the power to protect a child in crisis does not include the power to enter a permanent order for that child except as provided by that section.

Subsection (a)(3) provides for jurisdiction when all states with jurisdiction under subsections (a)(1) and (2) determine that this state is a more appropriate forum. The determination would have to be made by all states with jurisdiction under subsection (a)(1) and (2). Jurisdiction would not exist under this paragraph because the home state determined it is a more appropriate place to hear the case if there is another state that could exercise significant connection jurisdiction under subsection (a)(2).

Subsection (a)(4) retains the concept of jurisdiction by necessity as found in the UCCJA and in the PKPA. This default jurisdiction only occurs if no other state would have jurisdiction under subsections (a)(1) through (a)(3).

Subsections (b) and (c) clearly state the relationship between jurisdiction under this Act and other forms of jurisdiction. Personal jurisdiction over, or the physical presence of, a parent or the child is neither necessary nor required under this Act. In other words, neither minimum contacts nor service within the state is required for the court to have jurisdiction to make a custody determination. Further, the presence of minimum contacts or service within the state does not confer jurisdiction to make a custody determination. Subject to section 204 (section 5424), satisfaction of the requirements of subsection (a) is mandatory.

The requirements of this section, plus the notice and hearing provisions of the Act, are all that is necessary to satisfy due process. This Act, like the UCCJA and the PKPA is based on

Justice Frankfurter's concurrence in *May v. Anderson*, 345 U.S. 528 (1953). As pointed out by Professor Bodenheimer, the reporter for the UCCJA, no "workable interstate custody law could be built around [Justice] Burton's plurality opinion" Bridgette Bodenheimer, *The Uniform Child Custody Jurisdiction Act: A Legislative Remedy for Children Caught in the Conflict of Laws*, 22 Vand.L.Rev. 1207, 1233 (1969). It should also be noted that since jurisdiction to make a child custody determination is subject matter jurisdiction, an agreement of the parties to confer jurisdiction on a court that would not otherwise have jurisdiction under this Act is ineffective.

§ 5422. Exclusive, continuing jurisdiction.

(a) General rule.--Except as otherwise provided in section 5424 (relating to temporary emergency jurisdiction), a court of this Commonwealth which has made a child custody determination consistent with section 5421 (relating to initial child custody jurisdiction) or section 5423 (relating to jurisdiction to modify determination) has exclusive, continuing jurisdiction over the determination until:

(1) a court of this Commonwealth determines that neither the child, nor the child and one parent, nor the child and a person acting as a parent have a significant connection with this Commonwealth and that substantial evidence is no longer available in this Commonwealth concerning the child's care, protection, training and personal relationships; or

(2) a court of this Commonwealth or a court of another state determines that the child, the child's parents and any person acting as a parent do not presently reside in this Commonwealth.

(b) Modification where court does not have exclusive, continuing jurisdiction.--A court of this Commonwealth which has made a child custody determination and does not have exclusive, continuing jurisdiction under this section may modify that

determination only if it has jurisdiction to make an initial determination under section 5421.

Comment: This is a new section addressing continuing jurisdiction. Continuing jurisdiction was not specifically addressed in the UCCJA. Its absence caused considerable confusion, particularly because the PKPA, § 1738(d), requires other states to give full faith and credit to custody determinations made by the original decree state pursuant to the decree state's continuing jurisdiction so long as that state has jurisdiction under its own law and remains the residence of the child or any contestant.

This section provides the rules of continuing jurisdiction and borrows from UIFSA as well as recent UCCJA case law. The continuing jurisdiction of the original decree state is exclusive. It continues until one of two events occurs:

1. If a parent or a person acting as a parent remains in the original decree state, continuing jurisdiction is lost when neither the child, the child and a parent, nor the child and a person acting as a parent continue to have a significant connection with the original decree state and there is no longer substantial evidence concerning the child's care, protection, training and personal relations in that state. In other words, even if the child has acquired a new home state, the original decree state retains exclusive, continuing jurisdiction, so long as the general requisites of the "substantial connection" jurisdiction provisions of section 201 (section 5421) are met. If the relationship between the child and the person remaining in the state with exclusive, continuing jurisdiction becomes so attenuated that the court could no longer find significant connections and substantial evidence, jurisdiction would no longer exist.

The use of the phrase "a court of this state" under subsection (a)(1) makes it clear that the original decree state is the sole determinant of whether jurisdiction continues. A party seeking to modify a custody determination must obtain an order from the original decree state stating that it no longer has jurisdiction.

2. Continuing jurisdiction is lost when the child, the child's parents, and any person acting as a parent no longer reside in the original decree state. The exact language of subsection (a)(2) was the subject of considerable debate. Ultimately the Conference settled on the phrase that "a court of this state or a

court of another state determines that the child, the child's parents, and any person acting as a parent do not presently reside in this state" to determine when the exclusive, continuing jurisdiction of a state ended. The phrase is meant to be identical in meaning to the language of the PKPA which provides that full faith and credit is to be given to custody determinations made by a state in the exercise of its continuing jurisdiction when that "state remains the residence of" The phrase is also the equivalent of the language "continues to reside" which occurs in UIFSA § 205(a)(1) to determine the exclusive, continuing jurisdiction of the state that made a support order. The phrase "remains the residence of" in the PKPA has been the subject of conflicting case law. It is the intention of this Act that subsection (a)(2) of this section means that the named persons no longer continue to actually live within the state. Thus, unless a modification proceeding has been commenced, when the child, the parents, and all persons acting as parents physically leave the state to live elsewhere, the exclusive, continuing jurisdiction ceases.

The phrase "do not presently reside" is not used in the sense of a technical domicile. The fact that the original determination state still considers one parent a domiciliary does not prevent it from losing exclusive, continuing jurisdiction after the child, the parents, and all persons acting as parents have moved from the state.

If the child, the parents, and all persons acting as parents have all left the state which made the custody determination prior to the commencement of the modification proceeding, considerations of waste of resources dictate that a court in state B, as well as a court in state A, can decide that state A has lost exclusive, continuing jurisdiction.

The continuing jurisdiction provisions of this section are narrower than the comparable provisions of the PKPA. That statute authorizes continuing jurisdiction so long as any "contestant" remains in the original decree state and that state continues to have jurisdiction under its own law. This Act eliminates the contestant classification. The Conference decided that a remaining grandparent or other third party who claims a right to visitation, should not suffice to confer exclusive, continuing jurisdiction on the state that made the original custody determination after the departure of the child, the parents and any person acting as a parent. The significant connection to the original decree state must relate to the child, the child and a parent, or the child and a person acting as a parent. This revision does not present a conflict with the PKPA.

The PKPA's reference in § 1738(d) to § 1738(c)(1) recognizes that states may narrow the class of cases that would be subject to exclusive, continuing jurisdiction. However, during the transition from the UCCJA to this Act, some states may continue to base continuing jurisdiction on the continued presence of a contestant, such as a grandparent. The PKPA will require that such decisions be enforced. The problem will disappear as states adopt this Act to replace the UCCJA.

Jurisdiction attaches at the commencement of a proceeding. If state A had jurisdiction under this section at the time a modification proceeding was commenced there, it would not be lost by all parties moving out of the state prior to the conclusion of proceeding. State B would not have jurisdiction to hear a modification unless state A decided that state B was more appropriate under section 207 (section 5427).

Exclusive, continuing jurisdiction is not reestablished if, after the child, the parents, and all persons acting as parents leave the state, the noncustodial parent returns. As subsection (b) provides, once a state has lost exclusive, continuing jurisdiction, it can modify its own determination only if it has jurisdiction under the standards of section 201 (section 5421). If another state acquires exclusive, continuing jurisdiction under this section, then its orders cannot be modified even if this state has once again become the home state of the child.

In accordance with the majority of UCCJA case law, the state with exclusive, continuing jurisdiction may relinquish jurisdiction when it determines that another state would be a more convenient forum under the principles of section 207 (section 5427).

§ 5423. Jurisdiction to modify determination.

Except as otherwise provided in section 5424 (relating to temporary emergency jurisdiction), a court of this Commonwealth may not modify a child custody determination made by a court of another state unless a court of this Commonwealth has jurisdiction to make an initial determination under section 5421(a)(1) or (2) (relating to initial child custody jurisdiction) and:

- (1) the court of the other state determines it no longer has exclusive, continuing jurisdiction under section 5422 (relating to exclusive continuing

jurisdiction) or that a court of this Commonwealth would be a more convenient forum under section 5427 (relating to inconvenient forum); or

(2) a court of this Commonwealth or a court of the other state determines that the child, the child's parents and any person acting as a parent do not presently reside in the other state.

Comment: This section complements section 202 (section 5422) and is addressed to the court that is confronted with a proceeding to modify a custody determination of another state. It prohibits a court from modifying a custody determination made consistently with this Act by a court in another state unless a court of that state determines that it no longer has exclusive, continuing jurisdiction under section 202 (section 5422) or that this state would be a more convenient forum under section 207 (section 5427). The modification state is not authorized to determine that the original decree state has lost its jurisdiction. The only exception is when the child, the child's parents, and any person acting as a parent do not presently reside in the other state. In other words, a court of the modification state can determine that all parties have moved away from the original state. The court of the modification state must have jurisdiction under the standards of section 201 (section 5421).

§ 5424. Temporary emergency jurisdiction.

(a) General rule.--A court of this Commonwealth has temporary emergency jurisdiction if the child is present in this Commonwealth and 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.

(b) No previous custody determination or proceeding.--If there is no previous child custody determination that is entitled to be enforced under this chapter and a child custody proceeding has not been commenced in a court of a state having jurisdiction under sections 5421 (relating to initial child custody jurisdiction) through

5423 (relating to jurisdiction to modify determination), a child custody determination made under this section remains in effect until an order is obtained from a court of a state having jurisdiction under sections 5421 through 5423. If a child custody proceeding has not been or is not commenced in a court of a state having jurisdiction under sections 5421 through 5423, a child custody determination made under this section becomes a final determination, if it so provides and this Commonwealth becomes the home state of the child.

(c) Previous custody determination or proceeding.--If there is a previous child custody determination that is entitled to be enforced under this chapter or a child custody proceeding has been commenced in a court of a state having jurisdiction under sections 5421 through 5423, any order issued by a court of this Commonwealth under this section must specify in the order a period that the court considers adequate to allow the person seeking an order to obtain an order from the state having jurisdiction under sections 5421 through 5423. The order issued in this Commonwealth remains in effect until an order is obtained from the other state within the period specified or the period expires.

(d) Mandatory communication between courts.--A court of this Commonwealth which has been asked to make a child custody determination under this section, upon being informed that a child custody proceeding has been commenced in or a child custody determination has been made by a court of a state having jurisdiction under sections 5421 through 5423, shall immediately communicate with the other court. A court of this Commonwealth which is exercising jurisdiction pursuant to sections 5421 through 5423, upon being informed that a child custody proceeding has been commenced in or a child custody determination has been made by a court

of another state under a statute similar to this section shall immediately communicate with the court of that state to resolve the emergency, protect the safety of the parties and the child and determine a period for the duration of the temporary order.

Comment: The provisions of this section are an elaboration of what was formerly section 3(a)(3) of the UCCJA. It remains, as Professor Bodenheimer's comments to that section noted, "an extraordinary jurisdiction reserved for extraordinary circumstances."

This section codifies and clarifies several aspects of what has become common practice in emergency jurisdiction cases under the UCCJA and PKPA. First, a court may take jurisdiction to protect the child even though it can claim neither home state nor significant connection jurisdiction. Second, the duties of states to recognize, enforce and not modify a custody determination of another state do not take precedence over the need to enter a temporary emergency order to protect the child.

Third, a custody determination made under the emergency jurisdiction provisions of this section is a temporary order. The purpose of the order is to protect the child until the state that has jurisdiction under sections 201 - 203 (sections 5421 through 5423) enters an order.

Under certain circumstances, however, subsection (b) provides that an emergency custody determination may become a final custody determination. If there is no existing custody determination, and no custody proceeding is filed in a state with jurisdiction under sections 201 - 203 (sections 5421 through 5423), an emergency custody determination made under this section becomes a final determination, if it so provides, when the state that issues the order becomes the home state of the child.

Subsection (c) is concerned with the temporary nature of the order when there exists a prior custody order that is entitled to be enforced under this Act or when a subsequent custody proceeding is filed in a state with jurisdiction under sections 201 - 203 (sections 5421 through 5423). Subsection (c) allows the temporary order to remain in effect only so long as is necessary for the person who obtained the determination under this section to present a case and obtain an order from the state with jurisdiction under sections 201 - 203 (sections 5421

through 5423). That time period must be specified in the order. If there is an existing order by a state with jurisdiction under sections 201 - 203 (sections 5421 through 5423), that order need not be reconfirmed. The temporary emergency determination would lapse by its own terms at the end of the specified period or when an order is obtained from the court with jurisdiction under sections 201 - 203 (sections 5421 through 5423). The court with appropriate jurisdiction also may decide, under the provisions of 207 (section 5427), that the court that entered the emergency order is in a better position to address the safety of the person who obtained the emergency order, or the child, and decline jurisdiction under section 207 (section 5427).

Any hearing in the state with jurisdiction under sections 201 - 203 (sections 5421 through 5423) on the temporary emergency determination is subject to the provisions of sections 111 and 112 (sections 5411 and 5412). These sections facilitate the presentation of testimony and evidence taken out of state. If there is a concern that the person obtaining the temporary emergency determination under this section would be in danger upon returning to the state with jurisdiction under sections 201 - 203 (sections 5421 through 5423), these provisions should be used.

Subsection (d) requires communication between the court of the state that is exercising jurisdiction under this section and the court of another state that is exercising jurisdiction under sections 201 - 203 (sections 5421 through 5423). The pleading rules of section 209 (section 5429) apply fully to determinations made under this section. Therefore, a person seeking a temporary emergency custody determination is required to inform the court pursuant to section 209(d) (section 5429(d)) of any proceeding concerning the child that has been commenced elsewhere. The person commencing the custody proceeding under sections 201 - 203 (sections 5421 through 5423) is required under section 209(a) (section 5429(a)) to inform the court about the temporary emergency proceeding. These pleading requirements are to be strictly followed so that the courts are able to resolve the emergency, protect the safety of the parties and the child, and determine a period for the duration of the temporary order.

Relationship to the PKPA. The definition of emergency has been modified to harmonize it with the PKPA. The PKPA's definition of emergency jurisdiction does not use the term "neglect." It defines an emergency as "mistreatment or abuse." Therefore, "neglect" has been eliminated as a basis for the assumption of temporary emergency jurisdiction. Neglect is so

elastic a concept that it could justify taking emergency jurisdiction in a wide variety of cases. Under the PKPA, if a state exercised temporary emergency jurisdiction based on a finding that the child was neglected without a finding of mistreatment or abuse, the order would not be entitled to federal enforcement in other states.

Relationship to protective order proceedings. The UCCJA and the PKPA were enacted long before the advent of state procedures on the use of protective orders to alleviate problems of domestic violence. Issues of custody and visitation often arise within the context of protective order proceedings since the protective order is often invoked to keep one parent away from the other parent and the children when there is a threat of violence. This Act recognizes that a protective order proceeding will often be the procedural vehicle for invoking jurisdiction by authorizing a court to assume temporary emergency jurisdiction when the child's parent or sibling has been subjected to or threatened with mistreatment or abuse.

In order for a protective order that contains a custody determination to be enforceable in another state it must comply with the provisions of this Act and the PKPA. Although the Violence Against Women Act (VAWA), 18 U.S.C. § 2265, does provide an independent basis for the granting of full faith and credit to protective orders, it expressly excludes "custody" orders from the definition of "protection order," 18 U.S.C. § 2266.

Many states authorize the issuance of protective orders in an emergency without notice and hearing. This Act does not address the propriety of that procedure. It is left to local law to determine the circumstances under which such an order could be issued, and the type of notice that is required, in a case without an interstate element. However, an order issued after the assumption of temporary emergency jurisdiction is entitled to interstate enforcement and nonmodification under this Act and the PKPA only if there has been notice and a reasonable opportunity to be heard as set out in section 205 (section 5425). Although VAWA does require that full faith and credit be accorded to ex parte protective orders if notice will be given and there will be a reasonable opportunity to be heard, it does not include a "custody" order within the definition of "protection order."

VAWA does play an important role in determining whether an emergency exists. That Act requires a court to give full faith and credit to a protective order issued in another state if the

order is made in accordance with the VAWA. This would include those findings of fact contained in the order. When a court is deciding whether an emergency exists under this section, it may not relitigate the existence of those factual findings.

§ 5425. Notice; opportunity to be heard; joinder.

(a) General rule.--Before a child custody determination is made under this chapter, notice and an opportunity to be heard in accordance with the standards of section 5408 (relating to notice to persons outside Commonwealth) must be given to all persons entitled to notice under the laws of this Commonwealth as in child custody proceedings between residents of this Commonwealth, any parent whose parental rights have not been previously terminated and any person having physical custody of the child.

(b) Lack of notice or opportunity to be heard.--This chapter does not govern the enforceability of a child custody determination made without notice or any opportunity to be heard.

(c) Joinder and intervention.--The obligation to join a party and the right to intervene as a party in a child custody proceeding under this chapter are governed by the laws of this Commonwealth as in child custody proceedings between residents of this Commonwealth.

Comment: This section generally continues the notice provisions of the UCCJA. However, it does not attempt to dictate who is entitled to notice. Local rules vary with regard to persons entitled to seek custody of a child. Therefore, this section simply indicates that persons entitled to seek custody should receive notice but leaves the rest of the determination to local law. Parents whose parental rights have not been previously terminated and persons having physical custody of the child are specifically mentioned as persons who must be given notice. The PKPA, § 1738A(e), requires that they be given notice in order for the custody determination to be entitled to full faith and credit under that Act.

State laws also vary with regard to whether a court has the power to issue an enforceable temporary custody order without notice and hearing in a case without any interstate element. Such temporary orders may be enforceable, as against due process objections, for a short period of time if issued as a protective order or a temporary restraining order to protect a child from harm. Whether such orders are enforceable locally is beyond the scope of this Act. Subsection (b) clearly provides that the validity of such orders and the enforceability of such orders is governed by the law which authorizes them and not by this Act. An order is entitled to interstate enforcement and nonmodification under this Act only if there has been notice and an opportunity to be heard. The PKPA, § 1738A(e), also requires that a custody determination is entitled to full faith and credit only if there has been notice and an opportunity to be heard.

Rules requiring joinder of people with an interest in the custody of and visitation with a child also vary widely throughout the country. The UCCJA has a separate section on joinder of parties which has been eliminated. The issue of who is entitled to intervene and who must be joined in a custody proceeding is to be determined by local state law.

A sentence of the UCCJA § 4 which indicated that persons outside the state were to be given notice and an opportunity to be heard in accordance with the provision of that Act has been eliminated as redundant.

§ 5426. Simultaneous proceedings.

(a) General rule.--Except as otherwise provided in section 5424 (relating to temporary emergency jurisdiction), a court of this Commonwealth may not exercise its jurisdiction under this subchapter if, at the time of the commencement of the proceeding, a proceeding concerning the custody of the child has been commenced in a court of another state having jurisdiction substantially in conformity with this chapter, unless the proceeding has been terminated or is stayed by the court of the other state because a court of this Commonwealth is a more convenient forum under section 5427 (relating to inconvenient forum).

(b) Stay, communication with other court.--Except as otherwise provided in section 5424, a court of this Commonwealth, before hearing a child custody proceeding, shall examine the court documents and other information supplied by the parties pursuant to section 5429 (relating to information to be submitted to court). If the court determines that a child custody proceeding has been commenced in a court in another state having jurisdiction substantially in accordance with this chapter, the court of this Commonwealth shall stay its proceeding and communicate with the court of the other state. If the court of the state having jurisdiction substantially in accordance with this chapter does not determine that the court of this Commonwealth is a more appropriate forum, the court of this Commonwealth shall dismiss the proceeding.

(c) Modification.--In a proceeding to modify a child custody determination, a court of this Commonwealth shall determine whether a proceeding to enforce the determination has been commenced in another state. If a proceeding to enforce a child custody determination has been commenced in another state, the court may:

(1) stay the proceeding for modification pending the entry of an order of a court of the other state enforcing, staying, denying or dismissing the proceeding for enforcement;

(2) enjoin the parties from continuing with the proceeding for enforcement;
or

(3) proceed with the modification under conditions it considers appropriate.

Comment: This section represents the remnants of the simultaneous proceedings provision of the UCCJA § 6. The problem of simultaneous proceedings is no longer a significant issue. Most of the problems have been resolved by the prioritization of home state jurisdiction under section 201 (section 5421); the exclusive, continuing jurisdiction provisions

of section 202 (section 5422); and the prohibitions on modification of section 203 (section 5423). If there is a home state, there can be no exercise of significant connection jurisdiction in an initial child custody determination and, therefore, no simultaneous proceedings. If there is a state of exclusive, continuing jurisdiction, there cannot be another state with concurrent jurisdiction and, therefore, no simultaneous proceedings. Of course, the home state, as well as the state with exclusive, continuing jurisdiction, could defer to another state under section 207 (section 5427). However, that decision is left entirely to the home state or the state with exclusive, continuing jurisdiction.

Under this Act, the simultaneous proceedings problem will arise only when there is no home state, no state with exclusive, continuing jurisdiction and more than one significant connection state. For those cases, this section retains the “first in time” rule of the UCCJA. Subsection (b) retains the UCCJA’s policy favoring judicial communication. Communication between courts is required when it is determined that a proceeding has been commenced in another state.

Subsection (c) concerns the problem of simultaneous proceedings in the state with modification jurisdiction and enforcement proceedings under Article 3 (Subchapter C). This section authorizes the court with exclusive, continuing jurisdiction to stay the modification proceeding pending the outcome of the enforcement proceeding, to enjoin the parties from continuing with the enforcement proceeding, or to continue the modification proceeding under such conditions as it determines are appropriate. The court may wish to communicate with the enforcement court. However, communication is not mandatory. Although the enforcement state is required by the PKPA to enforce according to its terms a custody determination made consistently with the PKPA, that duty is subject to the decree being modified by a state with the power to do so under the PKPA. An order to enjoin the parties from enforcing the decree is the equivalent of a temporary modification by a state with the authority to do so. The concomitant provision addressed to the enforcement court is section 306 (section 5446) of this Act. That section requires the enforcement court to communicate with the modification court in order to determine what action the modification court wishes the enforcement court to take.

The term “pending” that was utilized in the UCCJA section on simultaneous proceedings has been replaced. It has caused considerable confusion in the case law. It has been replaced

with the term “commencement of the proceeding” as more accurately reflecting the policy behind this section. The latter term is defined in section 102(5) (section 5402).

§ 5427. Inconvenient forum.

(a) General rule.--A court of this Commonwealth which has jurisdiction under this chapter to make a child custody determination may decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances and that a court of another state is a more appropriate forum. The issue of inconvenient forum may be raised upon motion of a party, the court's own motion or request of another court.

(b) Factors.--Before determining whether it is an inconvenient forum, a court of this Commonwealth shall consider whether it is appropriate for a court of another state to exercise jurisdiction. For this purpose, the court shall allow the parties to submit information and shall consider all relevant factors, including:

- (1) whether domestic violence has occurred and is likely to continue in the future and which state could best protect the parties and the child;
- (2) the length of time the child has resided outside this Commonwealth;
- (3) the distance between the court in this Commonwealth and the court in the state that would assume jurisdiction;
- (4) the relative financial circumstances of the parties;
- (5) any agreement of the parties as to which state should assume jurisdiction;
- (6) the nature and location of the evidence required to resolve the pending litigation, including testimony of the child;

(7) the ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence; and

(8) the familiarity of the court of each state with the facts and issues in the pending litigation.

(c) Stay.--If a court of this Commonwealth determines that it is an inconvenient forum and that a court of another state is a more appropriate forum, it shall stay the proceedings upon condition that a child custody proceeding be promptly commenced in another designated state and may impose any other condition the court considers just and proper.

(d) Jurisdiction declined.--A court of this Commonwealth may decline to exercise its jurisdiction under this chapter if a child custody determination is incidental to an action for divorce or another proceeding while still retaining jurisdiction over the divorce or other proceeding.

Comment: This section retains the focus of section 7 of the UCCJA. It authorizes courts to decide that another state is in a better position to make the custody determination, taking into consideration the relative circumstances of the parties. If so, the court may defer to the other state.

The list of factors that the court may consider has been updated from the UCCJA. The list is not meant to be exclusive. Several provisions require comment. Subsection (b)(1) is concerned specifically with domestic violence and other matters affecting the health and safety of the parties. For this purpose, the court should determine whether the parties are located in different states because one party is a victim of domestic violence or child abuse. If domestic violence or child abuse has occurred, this factor authorizes the court to consider which state can best protect the victim from further violence or abuse.

In applying subsection (b)(3), courts should realize that distance concerns can be alleviated by applying the communication and cooperation provisions of sections 111 and 112 (sections 5411 and 5412).

In applying subsection (b)(7) on expeditious resolution of the controversy, the court could consider the different procedural and evidentiary laws of the two states, as well as the flexibility of the court dockets. It also should consider the ability of a court to arrive at a solution to all the legal issues surrounding the family. If one state has jurisdiction to decide both the custody and support issues, it would be desirable to determine that state to be the most convenient forum. The same is true when children of the same family live in different states. It would be inappropriate to require parents to have custody proceedings in several states when one state could resolve the custody of all the children.

Before determining whether to decline or retain jurisdiction, the court of this state may communicate, in accordance with section 110 (section 5410), with a court of another state and exchange information pertinent to the assumption of jurisdiction by either court.

There are two departures from section 7 of the UCCJA. First, the court may not simply dismiss the action. To do so would leave the case in limbo. Rather, the court shall stay the case and direct the parties to file in the state that has been found to be the more convenient forum. The court is also authorized to impose any other conditions it considers appropriate. This might include the issuance of temporary custody orders during the time necessary to commence a proceeding in the designated state, dismissing the case if the custody proceeding is not commenced in the other state or resuming jurisdiction if a court of the other state refuses to take the case.

Second, UCCJA § 7(g), which allowed the court to assess fees and costs if it was a clearly inappropriate court, has been eliminated. If a court has jurisdiction under this Act, it could not be a clearly inappropriate court.

§ 5428. Jurisdiction declined by reason of conduct.

(a) General rule.--Except as otherwise provided in section 5424 (relating to temporary emergency jurisdiction) or by other laws of this Commonwealth, if a court of this Commonwealth has jurisdiction under this chapter because a person seeking to invoke its jurisdiction has engaged in unjustifiable conduct, the court shall decline to exercise its jurisdiction unless:

(1) the parents and all persons acting as parents have acquiesced in the exercise of jurisdiction;

(2) a court of the state otherwise having jurisdiction under sections 5421 (relating to initial child custody jurisdiction) through 5423 (relating to jurisdiction to modify determination) determines that this Commonwealth is a more appropriate forum under section 5427 (relating to inconvenient forum); or

(3) no court of any other state would have jurisdiction under the criteria specified in sections 5421 through 5423.

(b) Jurisdiction declined, remedy.--If a court of this Commonwealth declines to exercise its jurisdiction pursuant to subsection (a), it may fashion an appropriate remedy to ensure the safety of the child and prevent a repetition of the unjustifiable conduct, including staying the proceeding until a child custody proceeding is commenced in a court having jurisdiction under sections 5421 through 5423.

(c) Jurisdiction declined, expenses.--If a court dismisses a petition or stays a proceeding because it declines to exercise its jurisdiction pursuant to subsection (a), it shall assess against the party seeking to invoke its jurisdiction necessary and reasonable expenses, including costs, communication expenses, attorney fees, investigative fees, expenses for witnesses, travel expenses and child care during the course of the proceedings unless the party from whom fees are sought establishes that the assessment would be clearly inappropriate. The court may not assess fees, costs or expenses against this Commonwealth unless authorized by law other than this chapter.

Comment: The “Clean Hands” section of the UCCJA has been truncated in this Act. Since there is no longer a multiplicity of jurisdictions which could take cognizance of a child custody proceeding, there is less of a concern that one parent will take

the child to another jurisdiction in an attempt to find a more favorable forum. Most of the jurisdictional problems generated by abducting parents should be solved by the prioritization of home state in section 201 (section 5421); the exclusive, continuing jurisdiction provisions of section 202 (section 5422); and the ban on modification in section 203 (section 5423). For example, if a parent takes the child from the home state and seeks an original custody determination elsewhere, the stay-at-home parent has six months to file a custody petition under the extended home state jurisdictional provision of section 201 (section 5421), which will ensure that the case is retained in the home state. If a petitioner for a modification determination takes the child from the state that issued the original custody determination, another state cannot assume jurisdiction as long as the first state exercises exclusive, continuing jurisdiction.

Nonetheless, there are still a number of cases where parents, or their surrogates, act in a reprehensible manner, such as removing, secreting, retaining, or restraining the child. This section ensures that abducting parents will not receive an advantage for their unjustifiable conduct. If the conduct that creates the jurisdiction is unjustified, courts must decline to exercise jurisdiction that is inappropriately invoked by one of the parties. For example, if one parent abducts the child pre-decree and establishes a new home state, that jurisdiction will decline to hear the case. There are exceptions. If the other party has acquiesced in the court's jurisdiction, the court may hear the case. Such acquiescence may occur by filing a pleading submitting to the jurisdiction, or by not filing in the court that would otherwise have jurisdiction under this Act. Similarly, if the court that would have jurisdiction finds that the court of this state is a more appropriate forum, the court may hear the case.

This section applies to those situations where jurisdiction exists because of the unjustified conduct of the person seeking to invoke it. If, for example, a parent in the state with exclusive, continuing jurisdiction under section 202 has either restrained the child from visiting with the other parent, or has retained the child after visitation, and seeks to modify the decree, this section is inapplicable. The conduct of restraining or retaining the child did not create jurisdiction. Jurisdiction existed under this Act without regard to the parent's conduct. Whether a court should decline to hear the parent's request to modify is a matter of local law.

The focus in this section is on the unjustified conduct of the person who invokes the jurisdiction of the court. A technical

illegality or wrong is insufficient to trigger the applicability of this section. This is particularly important in cases involving domestic violence and child abuse. 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. Thus, if a parent flees with a child to escape domestic violence and in the process violates a joint custody decree, the case should not be automatically dismissed under this section. An inquiry must be made into whether the flight was justified under the circumstances of the case. However, an abusive parent who seizes the child and flees to another state to establish jurisdiction has engaged in unjustifiable conduct and the new state must decline to exercise jurisdiction under this section.

Subsection (b) authorizes the court to fashion an appropriate remedy for the safety of the child and to prevent a repetition of the unjustified conduct. Thus, it would be appropriate for the court to notify the other parent and to provide for foster care for the child until the child is returned to the other parent. The court could also stay the proceeding and require that a custody proceeding be instituted in another state that would have jurisdiction under this Act. It should be noted that the court is not making a forum non conveniens analysis in this section. If the conduct is unjustifiable, it must decline jurisdiction. It may, however, retain jurisdiction until a custody proceeding is commenced in the appropriate tribunal if such retention is necessary to prevent a repetition of the wrongful conduct or to ensure the safety of the child.

The attorney's fee standard for this section is patterned after the International Child Abduction Remedies Act, 42 U.S.C. § 11607(b)(3). The assessed costs and fees are to be paid to the respondent who established that jurisdiction was based on unjustifiable conduct.

§ 5429. Information to be submitted to court.

(a) General rule.--Subject to the rules set forth in Subchapter A of Chapter 53 (relating to custody) providing for the confidentiality of procedures, addresses and other identifying information in a child custody proceeding, each party in its first pleading or in an attached affidavit shall give information, if reasonably ascertainable, under oath as to the child's present address or whereabouts, the

places where the child has lived during the last five years and the names and present addresses of the persons with whom the child has lived during that period.

The pleading or affidavit must state whether the party:

(1) has participated, as a party or witness or in any other capacity, in any other proceeding concerning the custody of or visitation with the child and, if so, identify the court, the case number and the date of the child custody determination, if any;

(2) knows of any proceeding that could affect the current proceeding, including proceedings for enforcement and proceedings relating to domestic violence, protective orders, termination of parental rights and adoptions and, if so, identify the court, the case number and the nature of the proceeding; and

(3) knows the names and addresses of any person not a party to the proceeding who has physical custody of the child or claims rights of legal custody or physical custody of, or visitation with, the child and, if so, the names and addresses of those persons.

(b) Stay.--If the information required by subsection (a) is not furnished, the court, upon motion of a party or its own motion, may stay the proceeding until the information is furnished.

(c) Additional information.--If the declaration as to any of the items described in subsection (a)(1) through (3) is in the affirmative, the declarant shall give additional information under oath as required by the court. The court may examine the parties under oath as to details of the information furnished and other matters pertinent to the court's jurisdiction and the disposition of the case.

(d) Duty to disclose other proceedings.--Each party has a continuing duty to inform the court of any proceeding in this Commonwealth or any other state that could affect the current proceeding.

(e) Identifying information.--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.

Comment: The pleading requirements from section 9 of the UCCJA are generally carried over into this Act. However, the information is made subject to local law on the protection of names and other 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 which provide for the confidentiality of victims' names, addresses, and other information. These procedures must be followed if the child custody proceeding of the state requires their applicability. See, e.g., California Family Law Code § 3409(a). If a state does not have local law that provides for protecting names and addresses, then subsection (e) or a similar provision should be adopted. Subsection (e) is based on the National Council of Juvenile and Family Court Judges' Model Code on Domestic and Family Violence § 304(c). There are other models to choose from, in particular UIFSA § 312.

In subsection (a)(2), the term "proceedings" should be read broadly to include more than custody proceedings. Thus, if one parent was being criminally prosecuted for child abuse or custodial interference, those proceedings should be disclosed. If the child is subject to the Interstate Compact on the Placement of Children, facts relating to compliance with the Compact should be disclosed in the pleading or affidavit.

Subsection (b) has been added. It authorizes the court to stay the proceeding until the information required in subsection (a) has been disclosed, although failure to provide the information

does not deprive the court of jurisdiction to hear the case. This follows the majority of jurisdictions which held that failure to comply with the pleading requirements of the UCCJA did not deprive the court of jurisdiction to make a custody determination.

§ 5430. Appearance of parties and child.

(a) General rule.--In a child custody proceeding in this Commonwealth, the court may order a party to the proceeding who is in this Commonwealth to appear before the court in person with or without the child. The court may order any person who is in this Commonwealth and who has physical custody or control of the child to appear in person with the child.

(b) Party outside this Commonwealth.--If a party to a child custody proceeding whose presence is desired by the court is outside this Commonwealth, the court may order that a notice given pursuant to section 5408 (relating to notice to persons outside Commonwealth) include a statement directing the party to appear in person with or without the child and informing the party that failure to appear may result in a decision adverse to the party.

(c) Personal safety.--The court may enter any orders necessary to ensure the safety of the child and of any person ordered to appear under this section.

(d) Expenses.--If a party to a child custody proceeding who is outside this Commonwealth is directed to appear under subsection (b) or desires to appear personally before the court with or without the child, the court may require another party to pay reasonable and necessary travel and other expenses of the party so appearing and of the child.

Comment: No major changes have been made to this section which was section 11 of the UCCJA. Language was added to subsection (a) to authorize the court to require a non-party who has physical custody of the child to produce that child.

Subsection (c) authorizes the court to enter orders providing for the safety of the child and the person ordered to appear with the child. If safety is a major concern, the court, as an alternative to ordering a party to appear with the child, could order and arrange for the party's testimony to be taken in another state under section 111 (section 5411). This alternative might be important when there are safety concerns regarding requiring victims of domestic violence or child abuse to travel to the jurisdiction where the abuser resides.

SUBCHAPTER C

ENFORCEMENT

Sec.

5441. Definitions.

5442. Enforcement under Hague Convention.

5443. Duty to enforce.

5444. Temporary visitation.

5445. Registration of child custody determination.

5446. Enforcement of registered determination.

5447. Simultaneous proceedings.

5448. Expedited enforcement of child custody determination.

5449. Service of petition and order.

5450. Hearing and order.

5451. Warrant to take physical custody of child.

5452. Costs, fees and expenses.

5453. Recognition and enforcement.

5454. Appeals.

5455. Role of prosecutor or public official.

5456. Role of law enforcement.

5457. Costs and expenses.

§ 5441. Definitions.

The following words and phrases when used in this subchapter shall have the meanings given to them in this section unless the context clearly indicates otherwise:

“Petitioner.” A person who seeks enforcement of an order for return of a child under the Hague Convention on the Civil Aspects of International Child Abduction or enforcement of a child custody determination.

“Respondent.” A person against whom a proceeding has been commenced for enforcement of an order for return of a child under the Hague Convention on the Civil Aspects of International Child Abduction or enforcement of a child custody determination.

Comment: For purposes of this subchapter, “petitioner” and “respondent” are defined. The definitions clarify certain aspects of the notice and hearing sections.

§ 5442. Enforcement under Hague Convention.

Under this subchapter a court of this Commonwealth may enforce an order for the return of the child made under the Hague Convention on the Civil Aspects of International Child Abduction as if it were a child custody determination.

Comment: This section applies the enforcement remedies provided by this article to orders requiring the return of a child issued under the authority of the International Child Abduction Remedies Act (ICARA), 42 U.S.C. § 11601 et seq., implementing the Hague Convention on the Civil Aspects of International Child Abduction. Specific mention of ICARA proceedings is necessary because they often occur prior to any formal custody determination. However, the need for a speedy enforcement remedy for an order to return the child is just as necessary.

§ 5443. Duty to enforce.

(a) General rule.--A court of this Commonwealth shall recognize and enforce a child custody determination of a court of another state if the latter court exercised jurisdiction in substantial conformity with this chapter or the determination was made under factual circumstances meeting the jurisdictional standards of this chapter and the determination has not been modified in accordance with this chapter.

(b) Remedies.--A court of this Commonwealth may utilize any remedy available under other laws of this Commonwealth to enforce a child custody determination made by a court of another state. The remedies provided in this subchapter are cumulative and do not affect the availability of other remedies to enforce a child custody determination.

Comment: This section is based on section 13 of the UCCJA which contained the basic duty to enforce. The language of the original section has been retained and the duty to enforce is generally the same.

Enforcement of custody determinations of issuing states is also required by federal law in PKPA, 28 U.S.C. § 1738A(a). The changes made in Article 2 (Subchapter B) of this Act now make a state's duty to enforce and not modify a child custody determination of another state consistent with the enforcement and nonmodification provisions of the PKPA. Therefore, custody determinations made by a state pursuant to the UCCJA that would be enforceable under the PKPA will generally be enforced under this Act. However, if a state custody determination made pursuant to the UCCJA would not be enforceable under the PKPA, it will also not be enforceable under this Act. Thus a custody determination made by a "significant connection" jurisdiction when there is a home state is not enforceable under the PKPA regardless of whether a proceeding was ever commenced in the home state. Even though such a determination would be enforceable under the UCCJA with its four concurrent bases of jurisdiction, it would not be enforceable under this Act. This carries out the policy of the PKPA of strongly discouraging a state from exercising its

concurrent “significant connection” jurisdiction under the UCCJA when another state could exercise “home state” jurisdiction.

This section also incorporates the concept of section 15 of the UCCJA to the effect that a custody determination of another state will be enforced in the same manner as a custody determination made by a court of this state. Whatever remedies are available to enforce a local determination can be utilized to enforce a custody determination of another state. However, it remains a custody determination of the state that issued it. A child custody determination of another state is not subject to modification unless the state would have jurisdiction to modify the determination under Article 2 (Subchapter B).

The remedies provided by this subchapter for the enforcement of a custody determination will normally be used. This subchapter does not detract from other remedies available under other local law. There is often a need for a number of remedies to ensure that a child custody determination is obeyed. If other remedies would easily facilitate enforcement, they are still available. The petitioner, for example, can still cite the respondent for contempt of court or file a tort claim for intentional interference with custodial relations if those remedies are available under local law.

§ 5444. Temporary visitation.

(a) General rule.--A court of this Commonwealth which does not have jurisdiction to modify a child custody determination may issue a temporary order enforcing:

(1) a visitation schedule made by a court of another state; or

(2) the visitation provisions of a child custody determination of another state that does not provide for a specific visitation schedule.

(b) Time to obtain permanent change in visitation.--If a court of this Commonwealth makes an order under subsection (a)(2), it shall specify in the order a period that it considers adequate to allow the petitioner to obtain an order from a court having jurisdiction under the criteria specified in Subchapter B (relating to

jurisdiction). The order remains in effect until an order is obtained from the other court or the period expires.

Comment: This section authorizes a court to issue a temporary order if it is necessary to enforce visitation rights without violating the rules on nonmodification contained in section 303 (section 5443). Therefore, if there is a visitation schedule provided in the custody determination that was made in accordance with Article 2 (Subchapter B), a court can issue an order under this section implementing the schedule. An implementing order may include make-up or substitute visitation.

A court may also issue a temporary order providing for visitation if visitation was authorized in the custody determination, but no specific schedule was included in the custody determination. Such an order could include a substitution of a specific visitation schedule for “reasonable and seasonable.”

However, a court may not, under subsection (a)(2), provide for a permanent change in visitation. Therefore, requests for a permanent change in the visitation schedule must be addressed to the court with exclusive, continuing jurisdiction under section 202 (section 5422) or modification jurisdiction under section 203 (section 5423). As under section 204 (section 5424), subsection (b) of this section requires that the temporary visitation order stay in effect only long enough to allow the person who obtained the order to obtain a permanent modification in the state with appropriate jurisdiction under Article 2 (Subchapter B).

§ 5445. Registration of child custody determination.

(a) General rule.--A child custody determination issued by a court of another state may be registered in this Commonwealth, with or without a simultaneous request for enforcement, by sending to the appropriate court in this Commonwealth:

- (1) a letter or other document requesting registration;
- (2) two copies, including one certified copy, of the determination sought to be registered, and a statement under penalty of perjury that to the best of the

knowledge and belief of the person seeking registration the order has not been modified; and

(3) except as otherwise provided in section 5429 (relating to information to be submitted to court), the name and address of the person seeking registration and any parent or person acting as a parent who has been awarded custody or visitation in the child custody determination sought to be registered.

(b) Duties of registering court.--On receipt of the documents required by subsection (a), the registering court shall:

(1) cause the determination to be filed as a foreign judgment, together with one copy of any accompanying documents and information, regardless of their form; and

(2) serve notice upon the persons named pursuant to subsection (a)(3) and provide them with an opportunity to contest the registration in accordance with this section.

(c) Notice.--The notice required by subsection (b)(2) must state that:

(1) a registered determination is enforceable as of the date of the registration in the same manner as a determination issued by a court of this Commonwealth;

(2) a hearing to contest the validity of the registered determination must be requested within 20 days after service of notice; and

(3) failure to contest the registration will result in confirmation of the child custody determination and preclude further contest of that determination with respect to any matter that could have been asserted.

(d) Contest over validity of registered order.--A person seeking to contest the validity of a registered order must request a hearing within 20 days after service of the notice. At that hearing, the court shall confirm the registered order unless the person contesting registration establishes that:

(1) the issuing court did not have jurisdiction under Subchapter B (relating to jurisdiction);

(2) the child custody determination sought to be registered has been vacated, stayed or modified by a court having jurisdiction to do so under Subchapter B; or

(3) the person contesting registration was entitled to notice, but notice was not given in accordance with the standards of section 5408 (relating to notice to persons outside Commonwealth), in the proceedings before the court that issued the order for which registration is sought.

(e) Failure to contest.--If a timely request for a hearing to contest the validity of the registration is not made, the registration is confirmed as a matter of law and the person requesting registration and all persons served must be notified of the confirmation.

(f) Res judicata.--Confirmation of a registered order, whether by operation of law or after notice and hearing, precludes further contest of the order with respect to any matter that could have been asserted at the time of registration.

Comment: The remainder of this subchapter provides enforcement mechanisms for interstate child custody determinations.

This section authorizes a simple registration procedure that can be used to predetermine the enforceability of a custody determination. It parallels the process in UIFSA for the

registration of child support orders. It should be as much of an aid to pro se litigants as the registration procedure of UIFSA.

A custody determination can be registered without any accompanying request for enforcement. This may be of significant assistance in international cases. For example, the custodial parent under a foreign custody order can receive an advance determination of whether that order would be recognized and enforced before sending the child to the United States for visitation. Article 26 of the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children, 35 I.L.M. 1391 (1996), requires those states which accede to the Convention to provide such a procedure.

§ 5446. Enforcement of registered determination.

(a) General rule.--A court of this Commonwealth may grant any relief normally available under the laws of this Commonwealth to enforce a registered child custody determination made by a court of another state.

(b) Modification.--A court of this Commonwealth shall recognize and enforce, but may not modify, except in accordance with Subchapter B (relating to jurisdiction), a registered child custody determination of a court of another state.

Comment: A registered child custody determination can be enforced as if it was a child custody determination of this state. However, it remains a custody determination of the state that issued it. A registered custody order is not subject to modification unless the state would have jurisdiction to modify the order under Article 2 (Subchapter B).

§ 5447. Simultaneous proceedings.

If a proceeding for enforcement under this subchapter is commenced in a court of this Commonwealth and the court determines that a proceeding to modify the determination is pending in a court of another state having jurisdiction to modify the determination under Subchapter B (relating to jurisdiction), the enforcing court shall immediately communicate with the modifying court. The proceeding for

enforcement continues unless the enforcing court, after consultation with the modifying court, stays or dismisses the proceeding.

Comment: The pleading rules of section 308 (section 5448), require the parties to disclose any pending proceedings. Normally, an enforcement proceeding will take precedence over a modification action since the PKPA requires enforcement of child custody determinations made in accordance with its terms. However, the enforcement court must communicate with the modification court in order to avoid duplicative litigation. The courts might decide that the court with jurisdiction under Article 2 (Subchapter B) shall continue with the modification action and stay the enforcement proceeding. Or they might decide that the enforcement proceeding shall go forward. The ultimate decision rests with the court having exclusive, continuing jurisdiction under section 202 (section 5422), or if there is no state with exclusive, continuing jurisdiction, then the decision rests with the state that would have jurisdiction to modify under section 203 (section 5423). Therefore, if that court determines that the enforcement proceeding should be stayed or dismissed, the enforcement court should stay or dismiss the proceeding. If the enforcement court does not do so, the court with exclusive, continuing jurisdiction under section 202 (section 5422), or with modification jurisdiction under section 203 (section 5423), could enjoin the parties from continuing with the enforcement proceeding.

§ 5448. Expedited enforcement of child custody determination.

(a) Verification.--A petition under this subchapter must be verified. Certified copies of all orders sought to be enforced and of any order confirming registration must be attached to the petition. A copy of a certified copy of an order may be attached instead of the original.

(b) Petition.--A petition for enforcement of a child custody determination must state:

(1) whether the court that issued the determination identified the jurisdictional basis it relied upon in exercising jurisdiction and, if so, what the basis was;

(2) whether the determination for which enforcement is sought has been vacated, stayed or modified by a court whose decision must be enforced under this chapter and, if so, identify the court, the case number and the nature of the proceeding;

(3) whether any proceeding has been commenced that could affect the current proceeding, including proceedings relating to domestic violence, protective orders, termination of parental rights and adoptions and, if so, identify the court, the case number and the nature of the proceeding;

(4) the present physical address of the child and the respondent, if known;

(5) whether relief in addition to the immediate physical custody of the child and attorney fees is sought, including a request for assistance from law enforcement officials and, if so, the relief sought; and

(6) if the child custody determination has been registered and confirmed under section 5445 (relating to registration of child custody determination), the date and place of registration.

(c) Hearing.--Upon the filing of a petition, the court shall issue an order directing the respondent to appear in person with or without the child at a hearing and may enter any order necessary to ensure the safety of the parties and the child. The hearing must be held on the next judicial day after service of the order unless that date is impossible. In that event, the court shall hold the hearing on the first judicial day possible. The court may extend the date of hearing at the request of the petitioner.

(d) Contest over validity of custody determination.--An order issued under subsection (c) must state the time and place of the hearing and advise the

respondent that at the hearing the court will order that the petitioner may take immediate physical custody of the child and the payment of fees, costs and expenses under section 5452 (relating to costs, fees and expenses) and may schedule a hearing to determine whether further relief is appropriate unless the respondent appears and establishes that:

(1) the child custody determination has not been registered and confirmed under section 5445 and that:

(i) the issuing court did not have jurisdiction under Subchapter B (relating to jurisdiction);

(ii) the child custody determination for which enforcement is sought has been vacated, stayed or modified by a court having jurisdiction to do so under Subchapter B; or

(iii) the respondent was entitled to notice, but notice was not given in accordance with the standards of section 5408 (relating to notice to persons outside Commonwealth), in the proceedings before the court that issued the order for which enforcement is sought; or

(2) the child custody determination for which enforcement is sought was registered and confirmed under section 5444 (relating to temporary visitation), but has been vacated, stayed or modified by a court of a state having jurisdiction to do so under Subchapter B.

Comment: This section provides the normal remedy that will be used in interstate cases: the production of the child in a summary, remedial process based on habeas corpus.

The petition is intended to provide the court with as much information as possible. Attaching certified copies of all orders sought to be enforced allows the court to have the necessary information. Most of the information relates to the permissible

scope of the court's inquiry. The petitioner has the responsibility to inform the court of all proceedings that would affect the current enforcement action. Specific mention is made of certain proceedings to ensure that they are disclosed. A "procedure relating to domestic violence" includes not only protective order proceedings but also criminal prosecutions for child abuse or domestic violence.

The order requires the respondent to appear at a hearing on the next judicial day. The term "next judicial day" in this section means the next day when a judge is at the courthouse. At the hearing, the court will order the child to be delivered to the petitioner unless the respondent is prepared to assert that the issuing state lacked jurisdiction, that notice was not given in accordance with section 108 (section 5408), or that the order sought to be enforced has been vacated, modified, or stayed by a court with jurisdiction to do so under Article 2 (Subchapter B). The court is also to order payment of the fees and expenses set out in section 312 (section 5452). The court may set another hearing to determine whether additional relief available under this state's law should be granted.

If the order has been registered and confirmed in accordance with section 304 (section 5444), the only defense to enforcement is that the order has been vacated, stayed or modified since the registration proceeding by a court with jurisdiction to do so under Article 2 (Subchapter B).

§ 5449. Service of petition and order.

Except as otherwise provided in section 5451 (relating to warrant to take physical custody of child), the petition and order must be served by any method authorized by the laws of this Commonwealth upon respondent and any person who has physical custody of the child.

Comment: In keeping with other sections of this Act, the question of how the petition and order should be served is left to local law.

§ 5450. Hearing and order.

(a) General rule.--Unless the court issues a temporary emergency order pursuant to section 5424 (relating to temporary emergency jurisdiction), upon a

finding that a petitioner is entitled to immediate physical custody of the child, the court shall order that the petitioner may take immediate physical custody of the child unless the respondent establishes that:

(1) the child custody determination has not been registered and confirmed under section 5445 (relating to registration of child custody determination) and that:

(i) the issuing court did not have jurisdiction under Subchapter B (relating to jurisdiction);

(ii) the child custody determination for which enforcement is sought has been vacated, stayed or modified by a court of a state having jurisdiction to do so under Subchapter B; or

(iii) the respondent was entitled to notice, but notice was not given in accordance with the standards of section 5408 (relating to notice to persons outside Commonwealth), in the proceedings before the court that issued the order for which enforcement is sought; or

(2) the child custody determination for which enforcement is sought was registered and confirmed under section 5445 but has been vacated, stayed or modified by a court of a state having jurisdiction to do so under Subchapter B.

(b) Costs, fees and expenses.--The court shall award the costs, fees and expenses authorized under section 5452 (relating to costs, fees and expenses) and may grant additional relief, including a request for the assistance of law enforcement officials, and set a further hearing to determine whether additional relief is appropriate.

(c) Refusal to testify.--If a party called to testify refuses to answer on the ground that the testimony may be self-incriminating, the court may draw an adverse inference from the refusal.

(d) Spousal privilege unavailable.--A privilege against disclosure of communications between spouses and a defense of immunity based on the relationship of husband and wife or parent and child may not be invoked in a proceeding under this subchapter.

Comment: The scope of inquiry for the enforcing court is quite limited. Federal law requires the court to enforce the custody determination if the issuing state's decree was rendered in compliance with the PKPA. 28 U.S.C. § 1738A(a). This Act requires enforcement of custody determinations that are made in conformity with Article 2's (Subchapter B's) jurisdictional rules.

The certified copy, or a copy of the certified copy, of the custody determination entitling the petitioner to the child is prima facie evidence of the issuing court's jurisdiction to enter the order. If the order is one that is entitled to be enforced under Article 2 (Subchapter B) and if it has been violated, the burden shifts to the respondent to show that the custody determination is not entitled to enforcement.

It is a defense to enforcement that another jurisdiction has issued a custody determination that is required to be enforced under Article 2 (Subchapter B). An example is when one court has based its original custody determination on the UCCJA § 3(a)(2) (significant connections) and another jurisdiction has rendered an original custody determination based on the UCCJA § 3(a)(1) (home state). When this occurs, Article 2 (Subchapter B) of this Act, as well as the PKPA, mandate that the home state determination be enforced in all other states, including the state that rendered the significant connections determination.

Lack of notice in accordance with section 108 (section 5408) by a person entitled to notice and opportunity to be heard at the original custody determination is a defense to enforcement of the custody determination. The scope of the defense under this Act is the same as the defense would be under the law of the state that issued the notice. Thus, if the defense of lack of

notice would not be available under local law if the respondent purposely hid from the petitioner, took deliberate steps to avoid service of process or elected not to participate in the initial proceedings, the defense would also not be available under this Act.

There are no other defenses to an enforcement action. If the child would be endangered by the enforcement of a custody or visitation order, there may be a basis for the assumption of emergency jurisdiction under section 204 (section 5424) of this Act. Upon the finding of an emergency, the court issues a temporary order and directs the parties to proceed either in the court that is exercising continuing jurisdiction over the custody proceeding under section 202 (section 5422), or the court that would have jurisdiction to modify the custody determination under section 203 (section 5423).

The court shall determine at the hearing whether fees should be awarded under section 312 (section 5452). If so, it should order them paid. The court may determine if additional relief is appropriate, including requesting law enforcement officers to assist the petitioner in the enforcement of the order. The court may set a hearing to determine whether further relief should be granted.

The remainder of this section is derived from UIFSA § 316 with regard to the privilege of self-incrimination, spousal privileges, and immunities. It is included to keep parallel the procedures for child support and child custody proceedings to the extent possible.

§ 5451. Warrant to take physical custody of child.

(a) General rule.--Upon the filing of a petition seeking enforcement of a child custody determination, the petitioner may file a verified application for the issuance of a warrant to take physical custody of the child if the child is immediately likely to suffer serious physical harm or be removed from this Commonwealth.

(b) Petition.--If the court, upon the testimony of the petitioner or other witness, finds that the child is imminently likely to suffer serious physical harm or be removed from this Commonwealth, it may issue a warrant to take physical custody of the child. The petition must be heard on the next judicial day after the warrant is

executed unless that date is impossible. In that event, the court shall hold the hearing on the first judicial day possible. The application for the warrant must include the statements required by section 5448(b) (relating to expedited enforcement of child custody determination).

(c) Warrant.--A warrant to take physical custody of a child must:

(1) recite the facts upon which a conclusion of imminent serious physical harm or removal from the jurisdiction is based;

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

(3) provide for the placement of the child pending final relief.

(d) Time of service.--The respondent must be served with the petition, warrant and order immediately after the child is taken into physical custody.

(e) Enforcement.--A warrant to take physical custody of a child is enforceable throughout this Commonwealth. If the court finds on the basis of the testimony of the petitioner or other witness that a less intrusive remedy is not effective, it may authorize law enforcement officers to enter private property to take physical custody of the child. If required by exigent circumstances of the case, the court may authorize law enforcement officers to make a forcible entry at any hour.

(f) Appearance of child.--The court may impose conditions upon placement of a child to ensure the appearance of the child and the child's custodian.

Comment: This section provides a remedy for emergency situations where there is a reason to believe that the child will suffer imminent, serious physical harm or be removed from the jurisdiction once the respondent learns that the petitioner has filed an enforcement proceeding. If the court finds such harm exists, it 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.

The term “harm” cannot be totally defined and, as in the issuance of temporary restraining orders, the appropriate issuance of a warrant is left to the circumstances of the case. Those circumstances include cases where the respondent is the subject of a criminal proceeding as well as situations where the respondent is secreting the child in violation of a court order, abusing the child, a flight risk and other circumstances that the court concludes make the issuance of notice a danger to the child. The court must hear the testimony of the petitioner or another witness prior to issuing the warrant. The testimony may be heard in person, via telephone, or by any other means acceptable under local law. The court must state the reasons for the 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.

The warrant must provide for the placement of the child pending the determination of the enforcement proceeding. Since the issuance of the warrant would not occur absent a risk of serious harm to the child, placement cannot be with the respondent. Normally, the child would be placed with the petitioner. However, if placement with the petitioner is not indicated, the court can order any other appropriate placement authorized under the laws of the court’s state. Placement with the petitioner may not be indicated if there is a likelihood that the petitioner also will flee the jurisdiction. Placement with the petitioner may not be practical if the petitioner is proceeding through an attorney and is not present before the court.

This section authorizes the court to utilize whatever means are available under local law to ensure the appearance of the petitioner and child at the enforcement hearing. Such means might include cash bonds, a surrender of a passport, or whatever the court determines is necessary.

§ 5452. Costs, fees and expenses.

(a) General rule.--The court shall award the prevailing party, including a state, necessary and reasonable expenses incurred by or on behalf of the party, including costs, communication expenses, attorney fees, investigative fees, expenses for

witnesses, travel expenses and child care during the course of the proceedings, unless the party from whom fees or expenses are sought establishes that the award would be clearly inappropriate.

(b) Assessment against a state.--The court may not assess fees, costs or expenses against a state unless authorized by law other than this chapter.

Comment: This section is derived from the International Child Abduction Remedies Act, 42 U.S.C. § 11607(b)(3). Normally the court will award fees and costs against the non-prevailing party. Included as expenses are the amount of investigation fees incurred by private persons or by public officials as well as the cost of child placement during the proceedings.

The non-prevailing party has the burden of showing that such an award would be clearly inappropriate. Fees and costs may be inappropriate if their payment would cause the parent and child to seek public assistance.

This section implements the policies of section 8(c) of Pub.L. 96-611 (part of the PKPA) which provides that:

In furtherance of the purposes of section 1738A of title 28, United States Code [this section], as added by subsection (a) of this section, State courts are encouraged to -

* * *

(2) award to the person entitled to custody or visitation pursuant to a custody determination which is consistent with the provisions of such section 1738A [this section], necessary travel expenses, attorneys' fees, costs of private investigations, witness fees or expenses, and other expenses incurred in connection with such custody determination

....

The term "prevailing party" is not given a special definition for this Act. Each state will apply its own standard.

Subsection (b) was added to ensure that this section would not apply to the state unless otherwise authorized. The language is

taken from UIFSA § 313 (court may assess costs against obligee or support enforcement agency only if allowed by local law).

§ 5453. Recognition and enforcement.

A court of this Commonwealth shall accord full faith and credit to an order issued by another state and consistent with this chapter which enforces a child custody determination by a court of another state unless the order has been vacated, stayed or modified by a court having jurisdiction to do so under Subchapter B (relating to jurisdiction).

Comment: The enforcement order, to be effective, must also be enforced by other states. This section requires courts of this state to enforce and not modify enforcement orders issued by other states when made consistently with the provisions of this Act.

§ 5454. Appeals.

An appeal may be taken from a final order in a proceeding under this subchapter in accordance with expedited appellate procedures in other civil cases. Unless the court enters a temporary emergency order under section 5424 (relating to temporary emergency jurisdiction), the enforcing court may not stay an order enforcing a child custody determination pending appeal.

Comment: The order may be appealed as an expedited civil matter. An enforcement order should not be stayed by the court. Provisions for a stay would defeat the purpose of having a quick enforcement procedure. If there is a risk of serious mistreatment or abuse to the child, a petition to assume emergency jurisdiction must be filed under section 204 (section 5424). This section leaves intact the possibility of obtaining an extraordinary remedy such as mandamus or prohibition from an appellate court to stay the court's enforcement action. In many states, it is not possible to limit the constitutional authority of appellate courts to issue a stay. However, unless the information before the appellate panel indicates that emergency jurisdiction would be assumed under section 204 (section 5424), there is no reason to stay the enforcement of the order pending appeal.

§ 5455. Role of prosecutor or public official.

(a) General rule.--In a case arising under this chapter or involving the Hague Convention on the Civil Aspects of International Child Abduction, the prosecutor or other appropriate public official may take any lawful action, including resort to a proceeding under this subchapter or any other available civil proceeding to locate a child, obtain the return of a child or enforce a child custody determination if there is:

- (1) an existing child custody determination;
- (2) a request to do so from a court in a pending child custody proceeding;
- (3) a reasonable belief that a criminal statute has been violated; or

(4) a reasonable belief that the child has been wrongfully removed or retained in violation of the Hague Convention on the Civil Aspects of International Child Abduction.

(b) Authority.--A prosecutor or appropriate public official acting under this section acts on behalf of the court and may not represent any party.

Comment: Sections 315 - 317 (sections 5455 through 5457) are derived from the recommendations of the *Obstacles Study* that urge a role for public authorities in civil enforcement of custody and visitation determinations. One of the basic policies behind this approach is that, as is the case with child support, the involvement of public authorities will encourage the parties to abide by the terms of the court order. The prosecutor usually would be the most appropriate public official to exercise authority under this section. However, states may locate the authority described in this section in the most appropriate public office for their governmental structure. The authority could be, for example, the Friend of the Court Office or the Attorney General. If the parties know that prosecutors and law enforcement officers are available to help secure the return of a child, the parties may be deterred from interfering with the exercise of rights established by court order.

The use of public authorities should provide a more effective method of remedying violations of the custody determination. Most parties do not have the resources to enforce a custody

determination in another jurisdiction. The availability of the prosecutor or other government official as an enforcement agency will help ensure that remedies of this Act can be made available regardless of income level. In addition, the prosecutor may have resources to draw on that are unavailable to the average litigant.

The role of the public authorities should generally not begin until there is a custody determination that is sought to be enforced. The Act does not authorize the public authorities to be involved in the action leading up to the making of the custody determination, except when requested by the court, when there is a violation of the Hague Convention on the Civil Aspects of International Child Abduction, or when the person holding the child has violated a criminal statute. This Act does not mandate that the public authorities be involved in all cases referred to it. There is only so much time and money available for enforcement proceedings. Therefore, the public authorities eventually will develop guidelines to determine which cases will receive priority.

The use of civil procedures instead of, or in addition to, filing and prosecuting criminal charges enlarges the prosecutor's options and may provide a more economical and less disruptive means of solving problems of criminal abduction and retention. With the use of criminal proceedings alone, the procedure may be inadequate to ensure the return of the child. The civil options would permit the prosecutor to resolve that recurring and often frustrating problem.

A concern was expressed about whether allowing the prosecutor to use civil means as a method of settling a child abduction violates either DR 7-105(A) of the Code of Professional Responsibility or Model Rule of Professional Responsibility 4.4. Both provisions either explicitly or implicitly disapprove of a lawyer threatening criminal action to gain an advantage in a civil case. However, the prohibition relates to threats that are solely to gain an advantage in a civil case. If the prosecutor has a good faith reason for pursuing the criminal action, there is no ethical violation. See *Committee on Legal Ethics v. Printz*, 416 S.E.2d 720 (W.Va. 1992) (lawyer can threaten to press criminal charges against a client's former employee unless employee made restitution).

It must be emphasized that the public authorities do not become involved in the merits of the case. They are authorized only to locate the child and enforce the custody determination. The public authority is authorized by this section to utilize any civil

proceeding to secure the enforcement of the custody determination. In most jurisdictions, that would be a proceeding under this Act. If the prosecutor proceeds pursuant to this Act, the prosecutor is subject to its provisions. There is nothing in this Act that would prevent a state from authorizing the prosecutor or other public official to use additional remedies beyond those provided in this Act.

The public authority does not represent any party to the custody determination. It acts as a “friend of the court.” Its role is to ensure that the custody determination is enforced.

Sections 315 - 317 (sections 5455 through 5457) are limited to cases covered by this Act, i.e., interstate cases. However, states may, if they wish, extend this part of the act to intrastate cases.

It should also be noted that the provisions of this section relate to the civil enforcement of child custody determinations. Nothing in this section is meant to detract from the ability of the prosecutor to use criminal provisions in child abduction cases.

§ 5456. Role of law enforcement.

At the request of a prosecutor or other appropriate public official acting under section 5455 (relating to role of prosecutor or public official), a law enforcement officer may take any lawful action reasonably necessary to locate a child or a party and assist a prosecutor or appropriate public official with responsibilities under section 5455.

Comment: This section authorizes law enforcement officials to assist in locating a child and enforcing a custody determination when requested to do so by the public authorities. It is to be read as an enabling provision. Whether law enforcement officials have discretion in responding to a request by the prosecutor or other public official is a matter of local law.

§ 5457. Costs and expenses.

If the respondent is not the prevailing party, the court may assess against the respondent all direct expenses and costs incurred by the prosecutor or other

appropriate public official and law enforcement officers under section 5455 (relating to role of prosecutor or public official) or 5456 (relating to role of law enforcement).

Comment: One of the major problems of utilizing public officials to locate children and enforce custody and visitation determinations is cost. This section authorizes the prosecutor and law enforcement to recover costs against the non-prevailing party. The use of the term “direct” indicates that overhead is not a recoverable cost. This section cannot be used to recover the value of the time spent by the public authorities’ attorneys.

SUBCHAPTER D

INTRASTATE APPLICATION

Sec.

5471. Intrastate application.

§ 5471. Intrastate application.

The provisions of this chapter allocating jurisdiction and functions between and among courts of different states shall also allocate jurisdiction and functions between and among the courts of common pleas of this Commonwealth.

Note: This section is not part of the UCCJEA and is included to provide intrastate application of the Act.

SUBCHAPTER E

MISCELLANEOUS PROVISIONS

Sec.

5481. Application and construction.

5482. Severability.

§ 5481. Application and construction.

In applying and construing this chapter, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

§ 5482. Severability.

If any provision of this chapter or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this chapter which can be given effect without the invalid provision or application, and to this end the provisions of this chapter are severable.

TRANSITIONAL PROVISIONS OF
IMPLEMENTING LEGISLATION

Section _____. A motion or other request for relief made in a child custody proceeding or to enforce a child custody determination which was commenced before the effective date of this act is governed by the law in effect at the time the motion or other request was made.

Comment: A child custody proceeding will last throughout the minority of the child. The commencement of a child custody proceeding prior to this Act does not mean that jurisdiction will continue to be governed by prior law. The provisions of this Act apply if a motion to modify an existing determination is filed after the enactment of this Act. A motion that is filed prior to enactment may be completed under the rules in effect at the time the motion is filed.

Uniform Child Custody Jurisdiction and Enforcement Act
Cross-Reference Table

<u>UCCJEA Numbering</u>	<u>Pa.C.S. Numbering</u>
Article 1	Subchapter A
Section 101	Section 5401
102	5402
103	5403
104	5404
105	5405
106	5406
107	5407
108	5408
109	5409
110	5410
111	5411
112	5412
Article 2	Subchapter B
Section 201	Section 5421
202	5422
203	5423
204	5424
205	5425
206	5426
207	5427
208	5428
209	5429
210	5430
Article 3	Subchapter C
Section 301	Section 5441
302	5442
303	5443
304	5444
305	5445
306	5446
307	5447
308	5448
309	5449
310	5450
311	5451
312	5452
313	5453
314	5454

UCCJEA Numbering

Pa.C.S. Numbering

315

5455

316

5456

317

5457

No cross-reference

Subchapter D Intrastate application

Section 5471

Article 4

Subchapter E

Section 401

Section 5481

402

5482

403

Transitional language in implementing legislation

404

Transitional language in implementing legislation

405

Transitional language in implementing legislation

