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The Proposed Arkansas Uniform Child Custody Jurisdiction Act

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COMMENTS

COMMENT: THE PROPOSED ARKANSAS UNIFORM CHILD CUSTODY JURISDICTION ACT

Introduction

The Uniform Child Custody Jurisdiction Act[1] is designed to alleviate the plight of "interstate children"—a term descriptive of children shifted from state to state as the victims of custody battles which are fought in the courts of more than one state.[2] The number of children shifted from state to state every year in the hope of obtaining a favorable custody decree is so large that the problem has become a national scandal.[3]

The Act would terminate this chaotic state of the law by prescribing a statutory procedure to follow to obtain an initial or modified child custody decree in an interstate situation. The Act is not limited to divorce-related child custody disputes. It would also facilitate the settlement of disputes arising under other court determined custody arrangements for children that have been abandoned, neglected,[4] mistreated, orphaned,[5] or otherwise brought within the jurisdiction of the court.

Regardless of the fact situation in which a particular custody dispute arises, the interstate recognition and enforcement of custody decrees have never achieved a reasonably desirable level of acceptability. As a result, displeased parents have grown to rely upon numerous "self-help" actions, notably child-abduction, to obtain custody of the child. Thus the child, whose best interest is the presumed focus of all child custody arrangements, is exposed to potential emotional damage due to extended custody battles and frequent movement from state to state.

An effective solution to the problems facing the interstate rec-

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1. Uniform Child Custody Jurisdiction Act [hereinafter cited as U.C.C.J.A.].

2. Ehrenzweig, *The Interstate Child and Uniform Legislation: A Plea for Extralitigious Proceedings*, 64 Mich. L. Rev. 1 (1965).

3. Bodenheimer, *The Uniform Child Custody Jurisdiction Act: A Legislative Remedy for Children Caught in the Conflict of Laws*, 22 Vand. L. Rev. 1207, 1208 (1969). Professor Bodenheimer's article is the leading authority in the area of child custody under the proposed Uniform Act. Bodenheimer served as the official Reporter on the Committee which acted for the National Conference of Commissioners on Uniform State Laws in preparing the U.C.C.J.A.

4. *See, e.g.*, Boatwright v. Pulaski County Juvenile Court, 250 Ark. 138, 464 S.W.2d 600 (1971).

5. *See* 29 Ark. L. Rev. 104 (1975).

ognition and adjustment of child custody awards has been long overdue. The Uniform Child Custody Jurisdiction Act was developed to meet this challenge. The Act was recommended for adoption in each state by the American Bar Association in 1968 after the proposed legislation was prepared by the National Conference of Commissioners on Uniform State Laws. As of March 1978, twenty states had adopted the Act.[6] The Arkansas General Assembly, however, has refused to pass the Act.[7]

1. Major Factors Preventing the Interstate Enforcement of Child Custody Awards

Attempts at self-help to avoid or modify child custody decrees have reached an epidemic level. Displeased parents have little reason to fear criminal or civil sanctions for removing a child from the custody of one parent to another state in violation of custody decree orders.[8] Under present conditions, only in the most remote circumstances will the child and the offending parent be ordered to return for the proper resolution of the custody dispute.[9]

Factors giving rise to this transitory and almost lawless situation are complex, but depend primarily on two recent major developments in our society: (a) the constantly changing social characteristics of our nation and (b) a new, modern definition, which has been adopted by many courts, of what constitutes the best interest of the child.

a. Societal Factors

While most of the present legal mechanisms used to enforce child custody awards are grounded on social customs common to the

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6. Alaska, California, Colorado, Delaware, Florida, Hawaii, Idaho, Indiana, Iowa, Maryland, Michigan, Minnesota, Montana, New York, North Dakota, Ohio, Oregon, Pennsylvania, Wisconsin, and Wyoming. Six of these states adopted the U.C.C.J.A. in 1977. National Conference of Commissioners on Uniform State Laws, Uniform Law Memo 1 (Spring/Summer 1977). An evaluation of the relative success of the California U.C.C.J.A. is available in Porter & Walsh, *The Evolution of California's Child Custody Law: A Question of Statutory Interpretation*, 7 Sw. U.L. Rev. 1 (1975), and *Plight of the Putative Father in California Child Custody Proceedings: A Problem of Equal Protection*, 6 U. Cal. D.L. Rev. 1 (1973).

7. The Act was defeated in the 1977 session of the Arkansas General Assembly. In 1977 the bill (S. 259) passed both the Senate and House Judiciary committees and also the Senate as a whole. On the last day of the 1977 session, proponents were successful in passing the bill in the House, but were subsequently defeated upon a request for a roll call vote.

8. *See, e.g.*, Estes v. State, 246 Ark. 1145, 442 S.W.2d 221 (1969) (construing Ark. Stat. Ann. § 41-2411 (Repl. 1977)).

9. *Id.*

eighteenth and nineteenth centuries, decreasing justification for reliance upon those rules can be found in our modern society.[10]

In the past various cultural, religious, and legal constraints served to maintain the total number of divorces at a minimal level. Few divorces meant even fewer applications for initial and modified custody decrees. Today, however, the number of marriages ending in divorce has reached a level that is unprecedented.[11] Divorce has truly become an established aspect of our American culture.

The total number of children involved in divorce and custody proceedings has increased as well. In 1968 it was estimated that over three million children were involved in court-ordered custody arrangements across the nation.[12] This figure, extrapolated to 1978, has increased to approximately seven million children.[13]

Finally, the high mobility of the American public also strains the desired permanence of child custody awards.[14] Estimates are that twenty percent of all Americans move every year.[15] Since many of these moves are across state lines, the opportunity immediately arises for either parent to seek a more favorable decree against the other parent.

In light of these trends, it is apparent that courts and legislators should no longer fail to recognize the validity of custody decrees issued in other states. These decrees were originally issued to achieve the best possible custody arrangement for the child's welfare and should not be subsequently changed by a court of any state without a very strong showing that a change will in fact meet the child's needs.

b. The "Best Interest of the Child"—A New Definition

All courts in making a child custody award look to the best interest of the child as the controlling element in a custodial determination.[16] The term "best interest" is flexible.[17] However, a defini-

10. *See generally* Batt, *Child Custody Disputes: A Developmental-Psychological Approach to Proof and Decisionmaking*, 12 Willamette L.J. 491 (1976).

11. U.S. Department of Commerce, Bureau of the Census, *Statistical Abstract of the U.S.* 55 (1977).

12. Bodenheimer, *supra* note 3, at 1207-08.

13. *Id.*

14. Comment, *Conflicting Custody Decrees: In Whose Best Interest?*, 7 Duq. L. Rev. 262 (1968-1969).

15. C. Abrams, The Language of Cities: A Glossary of Terms 191-92 (1971): "High physical mobility is characteristic of Americans, approximately one in five of whom have changed their place of residence every year since 1948. . . ."

16. *See* Walker v. Walker, 262 Ark. 648, 559 S.W.2d 716 (1978); Townsend v. Lowery, 238 Ark. 338, 382 S.W.2d 1 (1963); Holt v. Holt, 228 Ark. 22, 305 S.W.2d 545 (1957); West v.

tional problem occurs in applying the term primarily because of the conflict between the requirement of easily opened custody decrees and of the need for stability in the interest of the child's long-term welfare.

This problem is allegedly caused by the fact that many courts are still guided by remnants of arbitrary common law rules dictating "the best interest of the child."[18] At common law custody by the natural parent was presumed to be in the best interest of the child:[19] the custody of children of "tender years" was ordinarily awarded to the mother,[20] and the father had an almost absolute right to serve as the natural guardian of his children.[21] Most of these rules only incidentally aided in determining which was the proper parent to assume the future responsibility of the child. The rules also fostered the requirement for frequently reopened decrees because the child, as he grew older, constantly changed from one category of common law parental custody preference to another.

At the beginning of this century, a few enlightened jurisdictions began to discover that the common law rules were not actually serving the best interest of the child.[22] These courts began to consider various psychological, social, economic, and cultural data in deciding custody.[23] Paralleling this increased interest in sociological data were the efforts of child development experts who began to focus on factors which should be considered in child custody disputes.[24] They learned that the stability found in a secure and continuous parent-child relationship was of prime importance.

Griffin, 207 Ark. 367, 180 S.W.2d 839 (1944); Kirby v. Kirby, 189 Ark. 937, 75 S.W.2d 817 (1934); Daily v. Daily, 175 Ark. 161, 298 S.W. 1012 (1927), for the Arkansas Supreme Court's application of the term "best interest."

17. *See* Verser v. Ford, 37 Ark. 27, 29 (1881)(chancellor not bound by rigid rules and should act as "humanity, respect for the parental affection, and regard for the infant's best interests may prompt"). For factors to be considered in determining the custodial "best interest" of the child, *see* Uniform Marriage and Divorce Act § 402, which offers the following criteria: (1) the wishes of the parents; (2) the wishes of the child; (3) the interaction and relationship of the child with his parents, siblings, and any other person who may significantly affect the child's best interest; (4) the child's adjustment to his or her home, school, and community; and (5) the mental and physical health of all individuals involved.

18. Judicial attitudes toward child custody cases have been criticized as "marked by question begging, rigid rules, and platitudes which unfortunately tend to inhibit careful inquiry and thorough evaluation." Foster & Freed, *Child Custody*, 39 N.Y.U.L. Rev. 423, 427 (1964).

19. Siebert v. Benson, 243 Ark. 843, 422 S.W.2d 683 (1968).

20. Walker v. Walker, 262 Ark. 648, 559 S.W.2d 716 (1978).

21. *See* Coulter v. Sypert, 78 Ark. 193, 95 S.W. 457 (1906).

22. For a modern approach to use of various social scientific factors to determine the child's best interest, *see generally* Batt, *supra* note 10, and authorities cited therein.

23. *Id.* at 492.

24. *Id. passim.*

Stability is now recognized by child development experts as the most important factor influencing the child's future health, growth, and maturity.[25] As a result, some experts have claimed that, in the absence of emergency situations, custody decrees should remain immutable for a period of at least one or two years.[26] Others have urged that custody determinations should nearly always be permanent and irrevocable.[27] Stability, then, is recognized as being in the child's best interest. Accordingly, at the outset the Act incorporates into the modern definition of "best interest" the concept that stability for the child is the highest priority of the custody determination.[28]

Unfortunately, the United States Supreme Court and the courts of states that have not adopted the Act have been slow to accept stability as the most important element in child custody determinations.[29] The general view is that the courts must have wide and unhampered flexibility in modifying child custody awards and that ease in modification outweighs the interest of the child's stability.[30] Specifically, the United States Supreme Court has stated that a custody decree is essentially of a transitory nature, and that a court in addressing a custody decree, if it is to perform its function responsibly, cannot be bound by a prior decree of another court.[31]

As a consequence, the situation is presented almost daily where the court of one state has before it the child of a parent seeking a custody award or attempting to modify an earlier award granted in another state. In many instances the court in that state has neither the necessary evidence nor the appearance of the other parent to aid its objective determination of the child's best interest. Furthermore, the court, in deciding whether to exercise jurisdiction in interstate child custody disputes, realizes that if it does not make the award,

25. Bodenheimer, *supra* note 3, at 1209 (citing R. Levy, Uniform Marriage and Divorce Legislation: A Preliminary Analysis 237 (1969); A. Watson, Psychiatry for Lawyers 197 (1968)).

26. *See, e.g.*, the Uniform Marriage and Divorce Act § 409, which recognizes a two-year waiting period to discourage child custody modifications, *discussed in* Newbern & Johnson, *The Uniform Marriage and Divorce Act: Analysis for Arkansas*, 28 Ark. L. Rev. 175, 185 (1974).

27. Bodenheimer, *supra* note 3, at 1209.

28. U.C.C.J.A. § 1. Stability has been recognized as an important element, though not controlling, in Arkansas child custody determinations. Boatwright v. Pulaski County Juvenile Court, 250 Ark. 138, 464 S.W.2d 600 (1971). *See also* Schiller, *Child Custody: Evaluation of Current Criteria*, 26 DePaul L. Rev. 241 (1977); Comment, *Best Interest of Children v. Constitutional Rights of Parents*, 81 Dick. L. Rev. 733 (1977).

29. *See generally Children in Transit: Child Custody and the Conflict of Laws*, 6 U. Cal. D.L. Rev. 160 (1973); 35 La. L. Rev. 904 (1975).

30. *See* authorities cited note 28 *supra*.

31. Kovacs v. Brewer, 356 U.S. 604, 612 (1958).

the parent will often seek another forum.[32] Yet, far too many times a custody award is made under these circumstances. As a result, the final determination of the issue of the child's best interest is left open to speculation.

It is clear that many judicial policies affecting child custody determinations and enforcement are insufficient to meet the needs of children. Obviously, some changes should be made in outmoded attitudes that do not recognize that stability, rather than uncontrolled child custody modifications, is paramount to the child's best interest. Modifications should become the exception, not the rule, and should be granted only after a strong showing of significant "changed circumstances."[33] Provision of an orderly procedure should be the intent of any legislative change to protect the child from the possible emotional damage which a custody dispute may cause.

2. *Basic Provisions and Purposes of the Act*

The Uniform Child Custody Jurisdiction Act is a simple but comprehensive scheme by which courts, in an interstate child custody dispute, are guided in an orderly procedure when considering a request for child custody.[34] The dominant objective of the Act is to obtain the best and most permanent solution for the benefit of the child.[35] The stability of the child in a continuous parental relationship is the objective, and this goal ordinarily outweighs all other considerations.

Generally, the first step in the process of issuing or modifying a decree is that a court in one of the states involved in the dispute

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32. Bodenheimer, *supra* note 3, at 1211. *See also* Brosky & Alford, *Sharpening Solomon's Sword: Current Considerations in Child Custody Cases,* 81 Dick. L. Rev. 683 (1977); Foster & Freed, *Children and the Law,* 2 Fam. L.Q. 40, 49 (1968).

33. The frequently litigated topic of what exactly constitutes "changed conditions" sufficient for a court to reopen and modify custody decrees is beyond the scope of this comment. Basically, the Arkansas Supreme Court has set forth the rule that only if conditions have changed so as to warrant modification of the decree, or if conditions come to light which were unknown to the court when the decree was rendered, may there be a modification. *See* Park v. Crowley, 221 Ark. 340, 253 S.W.2d 561 (1952); Thompson v. Thompson, 213 Ark. 595, 212 S.W.2d 8 (1948); Nelson v. Nelson, 146 Ark. 362, 225 S.W. 619 (1920). *See also* 17 Ark. L. Rev. 223 (1963).

34. Bodenheimer, *supra* note 3, at 1218.

35. U.C.C.J.A. § 1. *See also* 73 Yale L.J. 134, 134-35 (1963), which focuses on the major problems involved in a child custody modification request of a decree from another state:

> [T]he difficult problem of striking an appropriate balance between these interests is complicated by uncertainty as to finality and modifiability of such decrees in the granting state, by the introduction of technical issues of jurisdiction and conflict of laws, and by an overriding concern for the welfare of the child.

assumes full responsibility for the custody of the child.[36] This court is referred to in the Act as the "custody court." For this purpose the state court is selected which has access to as much evidence and information as possible concerning the child and family. Next, other essential sources of evidence, which are often out of state in the case of an interstate custody dispute, are channelled into the custody court. At this point, based upon all of the evidence available, a decree is issued which other states must abide by and, more importantly, enforce in their jurisdiction if necessary. Future adjustments in custody and visitation privileges are generally made only by the original custody court. However, if the child and family no longer have appreciable ties with the original court, a new custody court is selected for purposes of modification and all pertinent information is channelled from the prior to the subsequent court.[37] The Act covers such matters as jurisdiction, notice, evidence, and information in addressing the specifics of the orderly process it sets out.

a. Jurisdiction

The Act establishes basic jurisdictional rules in an interstate custody dispute. It requires not only minimum contacts with the state for jurisdictional purposes, but also maximum contacts.[38] Jurisdiction in custody cases is normally limited to courts in the child's home state or state in which there are other strong contacts with the child and his family. The Act recognizes that appropriate standards of jurisdiction are the only practicable means to distinguish decrees that deserve recognition by other states from those that do not.[39]

The Act attempts to eliminate the most common abuse of interstate enforcement of child custody awards by providing that the mere "physical presence" of the child in the state is no longer sufficient grounds for the court to take jurisdiction.[40] The basic notion underlying the Act, that jurisdiction be limited to those states which have maximum access to all relevant facts, forbids jurisdiction when the child and parent are only physically present with no durable ties to the state.[41] As a result, if the presence of the child in

36. The following summary of the basic scheme of the U.C.C.J.A. is based on Bodenheimer, *supra* note 3, at 1218.

37. U.C.C.J.A. §§ 3, 14.

38. Bodenheimer, *supra* note 3, at 1218.

39. 73 Yale L.J. 134, 148-50 (1963). For an evaluation of standards of jurisdiction in current usage, *see* Jarrett, *Jurisdiction in Interstate Child Custody Disputes,* 12 Gonz. L. Rev. 423 (1977).

40. U.C.C.J.A. § 3(b), (c).

41. Bodenheimer, *supra* note 3, at 1227-28.

the state is only temporary, a court in that state will not have jurisdiction to determine custody.

Similarly, presence in the state for the purpose of "migratory divorce" requiring domicile of only short duration will not confer custody jurisdiction.[42] This policy is based on the fact that jurisdiction to make a child custody award involves considerations different from those involved in jurisdiction to dissolve a marriage.[43] Following this view, submission by the other parent to the jurisdiction of a migratory divorce court does not grant the court sufficient contacts with the state to dispose of the custody issue.[44] Mere technical personal jurisdiction does not add relevant new evidence, and consent cannot confer a basis for interstate jurisdiction which does not otherwise exist.[45]

Closely related to the Act's rejection of the physical presence of the child in the state as a basis of jurisdiction is the limitation of the doctrine of emergency jurisdiction.[46] Emergency jurisdiction of a court over a child within its jurisdiction has often been confused with the physical presence rule. This jurisdiction is found in the power of the state, derived from "the protection that is due to the incompetent or helpless"[47] or from the responsibility in an emergency to act as *parens patriae*,[48] to take measures concerning the custody of a child found within its borders. This jurisdictional device is clearly "not intended for the settlement of custody disputes between parents and others."[49] Accordingly, the Act limits emergency jurisdiction based solely on physical presence to appropriate cases of abandonment, neglect, or mistreatment.[50]

The Act establishes rules for the ascertainment of which state court should take jurisdiction over the custody proceeding in an interstate situation. Rather than domicile, the criterion most commonly used in divorce proceedings, the Act grants primary child custody jurisdiction to the court in the child's "home state."[51] The

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42. *Id.*

43. *Id.* (citing Stumberg, *The Status of Children in the Conflict of Laws*, 8 U. Chi. L. Rev. 42, 53 (1940)).

44. Bodenheimer, *supra* note 3, at 1228.

45. *Id.*

46. *Id.* at 1229 (citing Restatement (Second) of Conflict of Laws § 79 (Proposed Official Draft 1967)).

47. Finlay v. Finlay, 240 N.Y. 429, 431, 148 N.E. 624, 625 (1925).

48. *Id.* at 434, 148 N.E. at 626.

49. Bodenheimer, *supra* note 3, at 1230; Rheinstein, *Jurisdiction in Matters of Child Custody*, 26 Conn. B.J. 48, 64 (1952).

50. U.C.C.J.A. § 3(a)(3).

51. *Id.* § 3(a)(1). *See also* Bodenheimer, *supra* note 3, at 1224.

home state is generally the state in which the child has lived for at least six consecutive months with a parent or person acting as parent immediately before the custody proceedings were instituted. This definition of home state parallels the sociological view that the "established home"[52] constitutes the last place where the child has lived with a parent for a sufficient time to become integrated within the community. Most American children have been found to be integrated into the community after living there for six months.[53]

Thus, if the child lived in a state for six months with one parent who claims custody immediately before the case goes to court, that state automatically has home state jurisdiction. However, if the child is abducted by the other parent, home state jurisdiction is extended by the Act for an additional six months to permit the stay-at-home parent the opportunity to sue in his own state.[54] This extension protects the parent with legal custody of the child from the necessity of following the abducting parent and child to another state to reclaim the child in court.[55] This extension also applies to the situation where the child is away at school or has run away from home.[56]

The home state jurisdiction provision is supplemented in section 3 of the Act with the "significant connection" test. This is basically an alternative jurisdictional provision.[57] For example, if the family has moved frequently and there is no state in which the child has lived for six months prior to suit, home state jurisdiction may not exist. In this situation the significant connection test is applied to determine the correct state court to take jurisdiction in that "there is available in this state substantial evidence concerning the child's present or future care, protection, training, and personal relationships. . . ."[58]

As in the home state test, this rule rejects mere physical presence of the child in the state as a basis sufficient to confer jurisdiction.

b. Simultaneous Jurisdiction and Declining Jurisdiction

It is apparent that in many situations, particularly when the

52. *See* Ratner, *Child Custody in a Federal System*, 62 Mich. L. Rev. 795, 815 (1964), for a general discussion of "established home."

53. *Id.* at 818.

54. U.C.C.J.A. § 3(a)(1)(ii).

55. Bodenheimer, *supra* note 3, at 1225-26.

56. *Id.* at 1226.

57. U.C.C.J.A. § 3(a)(2).

58. *Id.*

significant connection test is utilized to grant jurisdiction, more than one state will have a basis for jurisdiction under the Act. Which court has priority in exercising jurisdiction under these circumstances?

Section 6 is entitled "Simultaneous Proceeding in Other States" and addresses this problem. Simply stated, while jurisdiction may possibly exist in more than one state under the home state and significant connection provisions, jurisdiction may not be exercised simultaneously in two or more states.[59]

The Act supplements this rule with two guidelines for determining priority. First, priority of filing the petition determines which of the courts that have jurisdiction may proceed with the case. Subsequent courts will then yield to that court.[60] Various notice provisions of the Act insure that courts will be informed of pending proceedings involving the same child in other states.[61] Secondly, the familiar "inconvenient forum" principle permits a court to decline jurisdiction in certain circumstances.[62] The Act has refashioned this principle to accomodate child custody cases and "to encourage judicial restraint in exercising jurisdiction whenever another state appears to be in a better position to determine custody of the child."[63] This principle implements the Act's strong policy against competitive and conflicting proceedings in custody cases.[64]

In appropriate cases both of the priorities may be combined to select the correct forum.[65] For example, if a court with priority based on the first-to-file rule determines that a subsequent court is the more appropriate forum, it may defer to that court. Once a custody decree has been rendered, the original court is given preferential jurisdiction under the modification-of-custody provisions of the Act. If, however, the original court's jurisdiction has ended, any conflicts among subsequent courts would again be resolved with the aid of the first-in-time or the inconvenient forum principles.[66]

Another permissible reason for declining jurisdiction within the context of "simultaneous jurisdiction" is that the petitioner has acted reprehensibly in taking the child from the other parent.[67] The court in these circumstances should ordinarily, unless required by

59. U.C.C.J.A. § 6; Bodenheimer, *supra* note 3, at 1230.
60. U.C.C.J.A. § 6.
61. *Id.* §§ 4, 5.
62. *Id.* § 7.
63. *Id.* § 7(c)(1)-(5); Bodenheimer, *supra* note 3, at 1230.
64. U.C.C.J.A. § 1(a)(1).
65. Bodenheimer, *supra* note 3, at 1231.
66. *Id.*; U.C.C.J.A. § 14.
67. U.C.C.J.A. § 8.

the child's best interest, decline to exercise jurisdiction.[68] While this provision is closely related to the enforcement sections of the Act, its utilization at this point in the custody dispute as a jurisdictional device serves the same purpose.

c. Notice, Evidence, and Information

The various provisions of the Act would be meaningless without a system by which all the interested parties and courts could insure that a custody decree was issued and enforced based on all of the important evidence and information available. The Act recognizes that one court operating in isolation cannot do justice to the child or contestants within the interstate situation because a large portion of the relevant evidence may be in other states.[69] Therefore, to promote the exchange of information and other forms of assistance between the courts of various states in custody cases, a free-flow of judicial and evidentiary data must be guaranteed.[70]

Generally, the Act contains a number of provisions for obtaining and distributing custody dispute facts which would not reach the court through the normal adversary process.[71] The court itself takes an active part in obtaining the evidence through the assistance of courts in other states. As a result, the chancellor is able to look beyond state boundaries to arrive at a fully informed judgment which considers all contestants, resident and nonresident alike, on an equal basis and in relation to the welfare of the child.[72]

Besides assuring the best and most complete source of information, this system of notice and information is important for another policy reason—it serves to avoid decrees which are partial to the local resident because of the one-sided nature of the hearings and may therefore cause resistance to recognition by other states.[73] Presently, the petitioner's own story and that of his witnesses are often all the evidence the chancellor has before him when making the custody decision.[74]

The notice provisions of the Act require that before a decree is

68. *Id.*

69. Bodenheimer, *supra* note 3, at 1242.

70. U.C.C.J.A. § 1(a)(8).

71. *Id.* §§ 6, 9, 10, 16-22; Bodenheimer, *supra* note 3, at 1243.

72. Bodenheimer, *supra* note 3, at 1243. In Arkansas it has been recognized "that in no type of case do the personal observations of the chancellor mean more than they do in a child custody matter." Perez v. Perez, 256 Ark. 639, 640, 509 S.W.2d 531, 531 (1974). *See also* Cousins v. Smith, 254 Ark. 28, 33-34, 491 S.W.2d 587, 591 (1973).

73. Bodenheimer, *supra* note 3, at 1243.

74. *Id.*

issued or modified, reasonable notice and opportunity to be heard shall be given to all of the parties to the custody dispute.[75] Notice under the Act shall be given in a manner "reasonably calculated" to give notice.[76] The details of this provision emulate the familiar notice provisions of the Uniform Interstate and International Procedure Act[77] and will reduce the number of claimants seeking to avoid the res judicata effect of the contested custody decree where one party claims that he was not properly informed of the proceeding.

Other notice provisions of the Act insure not only that the notice and jurisdictional requisites are met, but also constitute an innovative evidentiary and informational system as well. The common theme in these provisions is that the notice provisions are tied to the evidentiary needs of the custody proceeding. For example, Section 9 provides that every party in his first pleading shall give information under oath as to the child's present and past addresses and the name and present address of the person with whom the child has lived during the last five years.[78] The declarant shall also state whether he has participated in any other litigation concerning the custody of the child in any state[79] and if he knows of any person not a party to the proceeding who has physical custody of the child or claims to have custody or visitation rights with respect to the child.[80] The court in some cases may require joinder of a person determined to be a party. He will then be notified of the pendency of the proceeding and of his joinder.[81]

Additionally the declarant shall give additional information as required by the court.[82] The court may examine the parties about the details of the information furnished and about other matters pertinent to determining the court's jurisdiction and disposition of the case. Each party thereafter has a continuing duty to inform the court of other custody proceedings concerning the child of which he

75. U.C.C.J.A. § 4.

76. *Id.* § 5.

77. Ark. Stat. Ann. §§ 27-2501 to -2507 (Cum. Supp. 1977). However, read in light of May v. Anderson, 345 U.S. 528 (1953), the leading United States constitutional case on personal notice in child custody cases, the exact scope of the notice requirements necessary for child custody proceedings may still be unclear. In *May* one of the parties to the proceeding successfully remained out of the jurisdiction to avoid service of process and later avoided the res judicata effect of the decree because of the lack of "notice."

78. U.C.C.J.A. § 9(a).

79. *Id.*

80. *Id.*

81. U.C.C.J.A. § 10.

82. *Id.* § 9(b).

later obtains information.[83] No longer will a party be able to avoid service and the binding effect of a decree[84] since it is very likely that some party to the proceeding will inform the court of that party's interest in the custody proceeding.

Another innovative section of the Act authorizes the court to order any party to the proceeding who is in the state to appear personally before the court and bring the child if he has physical custody.[85] If the party is outside the state, the court can give notice with a statement indicating that if the party does not appear, with or without the child as required by the court, failure to appear may result in a binding decision adverse to the party.[86]

The policy reason behind this provision is clear.[87] Under the Act the purpose of personal jurisdiction is to bring all the custody claimants before the court so that the chancellor can make a personal evaluation and permit them to present their evidence. This aim is not attained by a mere "requirement" of personal jurisdiction found in most long-arm statutes, where technical jurisdiction and not personal jurisdiction is commonly the result.[88] The Act assists the courts in obtaining personal appearance with the aid of a court order issued in the state of a person's residence.[89] Travel expenses may also be advanced or reimbursed at the discretion of the court to permit the appearance of the parties.[90]

In the event travel to the adjudicating state is not practicable, out-of-state depositions or hearings before a court in another state may be arranged by the court.[91] In addition, the other state's social services department may be requested to provide information for use in the custody proceeding.[92] The Act also permits a person to give his statement voluntarily in one state for use in a custody proceeding in another.[93] The opportunity of a custody claimant to

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83. *Id.* § 9(c).

84. *See, e.g.*, May v. Anderson, 345 U.S. 528 (1953).

85. U.C.C.J.A. § 11.

86. *Id.*

87. Bodenheimer, *supra* note 3, at 1234 (citing Rheinstein, *Jurisdiction in Matters of Child Custody*, 26 Conn. B.J. 48, 57, 63 (1952)).

88. Bodenheimer, *supra* note 3, at 1234.

89. U.C.C.J.A. § 11.

90. *Id.* §§ 11, 19-20.

91. *Id.* § 18.

92. *Id.* § 20(a). The proposed Act includes as an optional provision the social services study requirement. For discussions of the practical use of such reports *see* Gozansky, *Court-Ordered Investigations in Child Custody Cases*, 12 Willamette L.J. 511 (1976); Leavell, *Custody Disputes and the Proposed Model Act*, 2 Ga. L. Rev. 162, 185-89 (1968); 40 U. Col. L. Rev. 485 (1968). *Compare* social study mandates in the Arkansas Revised Uniform Adoption Act, Ark. Stat. Ann. §§ 56-201 to -221 (Cum. Supp. 1977).

93. U.C.C.J.A. § 20(b).

have his or her side of the case considered by the court is thus amply provided by the Act.

3. A Comparison of the Act's Major Provisions with Arkansas Law

To the Arkansas attorney practicing in the area of domestic relations the most important provisions of the proposed Act concern the interstate procedures for custody decree modification and the deterrence of parental exercise of self-help in an interstate situation.

a. Modification of Child Custody Awards

The Act creates basic rules that must be followed to ascertain the best interest of the child when there is a request to modify a custody decree issued by another state. Strict judicial adherence to the modification rules is essential. The rules for modification affect the areas of jurisdiction, simultaneous jurisdiction, declining jurisdiction, notice, bond, enforcement, and punitive decrees.

(1) *Jurisdiction*

In order to restrict in this state the modification of custody decrees issued in other states, section 14 of the Act would require that a person seeking modification must address his petition to the prior custody court unless that court no longer has jurisdiction or has expressly waived its jurisdictional priority.[94] The fact that the prior court had previously considered the case and has the case file among its records is one factor favoring the continued jurisdiction of that court.[95] However, once all the persons involved have moved away or the contact with the state has otherwise decreased, modification jurisdiction also moves. Under the Act all documents of the original court are then transmitted to the next court.[96]

Arkansas presently has no counterpart to the Act's jurisdictional requirements for modification. As a practical matter, if the child and at least one contestant are present in Arkansas for anything resembling a legitimate reason, their mere physical presence is sufficient to exercise modification jurisdiction.[97] No other single

94. *See id.* §§ 13-15.

95. Bodenheimer, *supra* note 3, at 1236 (citing Ratner, *Legislative Resolution of the Interstate Child Custody Problem: A Reply to Professor Currie and a Proposed Uniform Act*, 38 S. Cal. L. Rev. 183 (1965); Ratner, *Child Custody in a Federal System*, 62 Mich. L. Rev. 795 (1964)). *See also* Bodenheimer, *The Rights of Children and the Crisis in Custody Litigation: Modification of Custody In and Out of State*, 46 U. Col. L. Rev. 495 (1975); Comment, *Child Custody Modification and the Family Code*, 27 Baylor L. Rev. 725 (1975).

96. U.C.C.J.A. § 14.

97. *See, e.g.*, Bonds v. Lloyd, 259 Ark. 557, 535 S.W.2d 218 (1976) (citing Restatement

rule so abets the child-abductor searching for a forum to obtain jurisdictional grounds.[98]

Perhaps even more disturbing is that no clear demarcation in the cases exists between decisions in which the Arkansas courts have recognized the jurisdictional priority of another state and those in which the courts have disregarded it and accepted jurisdiction. Since the basis of jurisdiction is the threshold issue in child custody modification under the proposed Act, this area of Arkansas law is obviously one in direct conflict with the Act. The Act would provide succinct guidelines for the parties to the proceeding as to whether an Arkansas court may permissively take jurisdiction over the matter.

(2) *Simultaneous Jurisdiction and Declining Jurisdiction*

As early as 1928 the Arkansas Supreme Court dealt with the problem of simultaneous jurisdiction in child custody modification cases.[99] The only rule to be gleaned from the early cases, however, is that recognition of simultaneous jurisdiction with courts of other states is solely within the discretion of the chancellor.[100] As a practical matter, a case is rarely overturned in Arkansas for failing to recognize and defer to another state court's exercise of custody jurisdiction.[101]

Under the Act, however, it is expressly prohibited for a state court to exercise jurisdiction if it is found that a proceeding concerning the custody of the child was pending in a court of another state exercising jurisdiction substantially in conformity with the Act.[102]

(Second) of Conflict of Laws § 79 (1971); Shaw v. Shaw, 251 Ark. 665, 473 S.W.2d 848 (1971)). In *Bonds* the court said, "This court has held custody cases are not viewed as property cases and do not come within the rule of the full faith and credit clause of the Federal Constitution relating to foreign judgments." Bonds v. Lloyd, 259 Ark. 557, 561, 535 S.W.2d 218, 220 (1976). *See also* Cooper v. Cooper, 229 Ark. 770, 318 S.W.2d 587 (1958) (citing May v. Anderson, 345 U.S. 528 (1953)); Gregory v. Jackson, 212 Ark. 363, 205 S.W.2d 471 (1947); Keneipp v. Phillips, 210 Ark. 264, 196 S.W.2d 220 (1946).

98. For discussion of the problem of child-abduction, *see* Foster & Freed, *Child Snatching and Custodial Fights: The Case for the Uniform Child Custody Jurisdiction Act,* 28 Hastings L.J. 1011 (1977); Hudak, *The Plight of the Interstate Child in American Courts,* 9 Akron L. Rev. 257 (1975); Hudak, *Seize, Run, and Sue: The Ignominy of Interstate Child Custody Litigation in American Courts,* 39 Mo. L. Rev. 521 (1974); Comment, *Legalized Kidnapping of Children by Their Parents,* 80 Dick. L. Rev. 305 (1975); Comment, *Uniform Child Custody Jurisdiction Act: An Attempt to Stop Child Rustling,* 12 Willamette L.J. 623 (1976); 55 N.C.L. Rev. 1275 (1977).

99. Hamilton v. Anderson, 176 Ark. 76, 2 S.W.2d 673 (1928). *See also* Bonds v. Lloyd, 259 Ark. 557, 535 S.W.2d 218 (1976); Shaw v. Shaw, 251 Ark. 665, 473 S.W.2d 848 (1971).

100. *See* cases cited note 99 *supra.*

101. *See* cases cited note 99 *supra. But see* Edrington v. Fitzgerald, 257 Ark. 61, 514 S.W.2d 712 (1974).

102. U.C.C.J.A. § 6.

Thus, a proceeding in Arkansas would be stayed under the Act pending the other state's decision to exercise its home state or significant connection jurisdiction.[103] The converse would be true when the court of another state has before it contestants under a previously issued Arkansas decree.

The Arkansas Supreme Court has previously approved authority in basic compliance with the Act in matters of declining jurisdiction. In *Shaw v. Shaw*[104] the Arkansas court cited with approval the language of Justice Traynor in *Sampsell v. Superior Court*[105] where it was found that courts of more than one state may have jurisdiction over a child "domiciled" in one state, but that the actual exercise of jurisdiction should be deferred to that court with a more substantial interest in the child.[106] The Arkansas Supreme Court in *Shaw*, however, only adopted the first part of the *Sampsell* rule. *Shaw* therefore stands for the proposition that it is presumed to be in the child's best interest for a court of this state to exercise its discretion and modify out-of-state custody decrees regardless of simultaneous jurisdiction of another state court.

Adoption of the Act, however, would establish statutorily a rebuttable presumption that the best interest of the child has been provided for when the chancellor declines jurisdiction and defers to a court with prior jurisdiction over the child.[107] This provision would restrict the chancellor's exercise of discretion in these matters. The Act recognizes that often the withholding of jurisdiction is just as important to the welfare of the child as deciding to exercise jurisdiction.[108]

In making the decision whether to decline jurisdiction the Act provides three general rules. First, the court should decline jurisdiction when simultaneous proceedings in other states are already pending.[109] Second, the chancellor should decline jurisdiction when, under the circumstances of the case, the Arkansas court would be an inconvenient forum.[110] And finally, the court may decline jurisdiction by reason of reprehensible conduct of one of the parties, most particularly in the case of child-abduction.[111]

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103. *Id.*

104. 251 Ark. 665, 473 S.W.2d 848 (1971).

105. 32 Cal. 2d 763, 197 P.2d 739 (1948).

106. The use of the term "domicile" was rejected in the Act's formula for jurisdiction because of confusion caused by its long-term use and varied application. *See* Bodenheimer, *supra* note 3, at 1224 (citing A. Ehrenzweig, Conflict of Laws 281-82 (1962)).

107. U.C.C.J.A. §§ 3, 6.

108. *In re* Lang, 9 App. Div. 2d 401, 193 N.Y.S.2d 763 (1959).

109. U.C.C.J.A. § 6.

110. *Id.* § 7(c)(1)-(5).

111. *Id.* § 8.

(3) *Notice*

The Act carefully outlines notice requirements that must be met before a modification is made. Notice is to be given to all contestants, parents whose rights have not been previously terminated, and any person who has physical custody of the child.[112] Provisions are made for identifying, locating, and notifying persons outside the state of the custody proceedings,[113] thereby meeting what is believed to be the constitutional requirements for sufficient notice in interstate child custody cases.[114]

Under the Act "actual notice" to the parties is not required. Arkansas has also recognized that less than actual notice is sufficient in the requested appearance of contestants in child custody cases[115] and also in the peripheral issues of child support and alimony.[116]

The Act goes a step further in that it also permits notice by mail.[117] The Arkansas Supreme Court has refused to recognize mail notice when the notice, while received, signed, and returned by the contestant, failed properly to inform the contestant of the consequences of failure to appear.[118] While no case appears to be directly in point, it is not unreasonable to assume that the Arkansas court would permit mail notice when the party has been properly informed of the nature of the hearing and of the personal consequences of not appearing. This would follow the court's prior decisions that a parent's right to custody of a child is a personal right and that a judgment in personam will be given extraterritorial effect only if it appears that the person sought to be bound was previously notified.[119]

Notice provisions of the Act do not appear therefore to be in any real conflict with Arkansas law.

(4) *Bond*

In many child custody disputes the enforcement of the decree is often the sole issue. It is observed that insufficient legal sanctions

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112. *Id.* § 6.

113. *Id.* §§ 4, 5.

114. *See* May v. Anderson, 345 U.S. 528 (1953).

115. Seaton v. Seaton, 221 Ark. 778, 781-82, 255 S.W.2d 954, 956 (1953). *But see* Pope v. Pope, 239 Ark. 352, 389 S.W.2d 425 (1965).

116. Schley v. Dodge, 206 Ark. 1151, 178 S.W.2d 851 (1944).

117. U.C.C.J.A. § 5(a)(3).

118. Taliaferro v. Taliaferro, 252 Ark. 1078, 483 S.W.2d 189 (1972).

119. Cooper v. Cooper, 229 Ark. 770, 318 S.W.2d 587 (1958) (citing May v. Anderson, 345 U.S. 528 (1953)).

exist to compel the party's compliance with the court orders.[120] Under the Act bonds play an integral part in enforcing custody decrees and ancillary orders. The Arkansas Supreme Court has also approved the use of bonds to force parties to appear at a hearing[121] or to compel the recognition of visitation privileges.[122]

The Act requires that the court is to set bond at a figure equal to all foreseeable reasonable expenses suffered by one party for the failure of the other party to comply with the decree. This amount may include travel and other expenses, including attorneys' fees and the expenses of witnesses, if such are just and proper under the circumstances.[123]

Since bonds have long been recognized in Arkansas to enforce custody orders, no apparent conflict with Arkansas law upon passage of the Act is contemplated. Indeed, the Act would clearly authorize chancery courts to set bonds at an amount sufficient to cover all reasonable expenses of the innocent party incurred by reason of the other party's noncompliance with the custody decree.

(5) *Enforcement*

The deterrent effect of the Act would decrease the number of attempts to avoid complying with custody decrees issued by another state. Therefore, the Act's enforcement provisions would be utilized only in rare occasions as an alternative of last resort. Ordinarily the enforcement device exercised is the declining of jurisdiction.[124]

However, if the adjudication of the issue of jurisdiction is not in and of itself successful in compelling compliance with the orders, the court can impose a bond requirement or utilize contempt citations. Since the Act is silent on the use of civil and criminal contempt citations for violation of custody orders, their use as a sanction is likely to be permitted. Arkansas courts have often used con-

120. Arkansas imposes criminal liability for interference with the lawful exercise of child custody. Ark. Stat. Ann. § 41-2411 (Repl. 1977). However, while criminal sanction may be an effective tool against the parent or other child-abductor, legal authority does not exist to compel the return of the child to Arkansas even though the parent is returned, tried, convicted, and sentenced to jail. Estes v. State, 246 Ark. 1145, 442 S.W.2d 221 (1969)(decided under the prior criminal custody statute, Ark. Stat. Ann. § 41-1121 (Cum. Supp. 1973)). The U.C.C.J.A., if passed in Arkansas, would fill this statutory void to enable the child to be returned to Arkansas, as well as the child-abductor.

121. Herring v. Morton, 248 Ark. 718, 453 S.W.2d 400 (1970).

122. Massey v. James, 251 Ark. 217, 471 S.W.2d 770 (1971); Reid v. Reid, 218 Ark. 66, 234 S.W.2d 195 (1950). *See also* Coder v. Coder, 226 Ark. 478, 290 S.W.2d 628 (1956); Fulks v. Walker, 225 Ark. 390, 283 S.W.2d 347 (1955).

123. U.C.C.J.A. §§ 7, 8, 11, 15, 19, 20.

124. *Id.* § 8.

tempt citations to compel compliance with custody order provisions.[125] While contempt citations are severe, their use under the Act would be almost *prima facie* justified, but less frequent.

(6) *Punitive Custody Decrees*

Punitive custody decrees are modified custody decrees issued by a court as a result of a violating parent's persistent defiance of the original custody decree provisions.[126] Ordinarily the punitive custody decree revokes all custody and visitation privileges to which the guilty parent was originally entitled.

The Arkansas Supreme Court follows the rule adopted by the Act which expressly rejects the use of punitive decrees. In *Hamilton v. Anderson*[127] the Arkansas court held that "the custody of the child is not awarded for the purpose of gratifying the feelings of either parent or with any idea of punishing or rewarding either parent."[128]

However, in the absence of punitive decrees, a real problem does exist in selecting a method to compel either parent to comply with the provisions of the decree. Already mentioned is the most common device used by Arkansas chancery courts to insure parental compliance with the custody award, that is, the posting of a bond.

The Act provides an alternative means to enforce the provisions of the decree in the enforcement and recognition provisions of Section 15. Under this section the decree of *State A* is made automatically enforceable in the court of *State B* upon filing the decree in *State B*. Through the cooperation of *State B*, payment of travel and other expenses may be imposed on the violator, in addition to the forfeiture of the bond if one had been imposed by *State A*. The return of the child to *State A* may also be obtained by this provision.

Section 15 is very important also because it solves the inherent problem with bonds—they are often deliberately forfeited. In many court-ordered bond arrangements, a contestant can elect to forfeit the bond and yet retain the possession of the child without further liability, since the original state no longer has a sufficient interest in the child. Under the Act, not only would the violator be forced to return the child to the site of the custody proceedings, but the

125. *See, e.g.*, Dennison v. Mobley, 257 Ark. 216, 515 S.W.2d 215 (1974); Songer v. State, 236 Ark. 20, 364 S.W.2d 155 (1963); Bates v. State, 210 Ark. 652, 197 S.W.2d 45 (1946).

126. Bodenheimer, *supra* note 3, at 1238-40 (citing Moniz v. Moniz, 142 Cal. App. 2d 527, 530, 298 P.2d 710, 712 (1956)).

127. 176 Ark. 76, 2 S.W.2d 673 (1928). *See also* Caldwell v. Caldwell, 156 Ark. 383, 246 S.W. 492 (1923).

128. Hamilton v. Anderson, 176 Ark. 76, 79, 2 S.W.2d 673, 674 (1928).

violator would be responsible for the expenses caused by his misdeeds.

By the combined use of bonds and the cooperation of other states, the Act's provisions would certainly serve to decrease the use of punitive decrees and the successful attempts at self-help.

b. Deterrence of Self-Help

The deterrence of self-help measures, notably child-abduction, is another primary goal of the Act.[129] The Act's treatment of this problem is a marked departure from present Arkansas law and is a better approach.

Two recent cases exemplify the dichotomy between Arkansas law and the proposed Act's solution to the problem. In both *Johnson v. Arledge*[130] and *Bonds v. Lloyd*[131] one divorced parent lived in Arkansas and the other parent resided in Texas with legal custody of the children. In *Johnson* the custody decree was issued in Arkansas, and in *Bonds* the decree was issued in Texas. In each case the parent living in Arkansas "learned" of the alleged mistreatment of the children in custody of the other parent in Texas. The Arkansas parents, in both cases, went to Texas and, in violation of the court orders granting custody to the Texas parent, unlawfully removed the child to Arkansas. Upon returning to Arkansas, the parents in both cases requested modification of the custody award based on physical presence of the child in Arkansas and alleged changed conditions.

The chancery court in *Johnson* found the abducting parent in contempt for violating the court orders, but declined to punish the violator. The chancellor then proceeded to ignore the Texas court's home state jurisdiction in the matter and to make a new award of custody.[132] The court in *Bonds,* on the other hand, expressly recognized the home state jurisdiction of Texas and attempted to defer jurisdiction to that court pending its decision whether to exercise or decline jurisdiction.[133] The chancellor in *Bonds* was acting in substantial compliance with the proposed Act's provisions for modification.

However, in each case the Arkansas parent was eventually rewarded for his abduction of the child with a modified decree grant-

129. U.C.C.J.A. § 1(a)(5).
130. 258 Ark. 608, 527 S.W.2d 917 (1975).
131. 259 Ark. 557, 535 S.W.2d 218 (1976).
132. Johnson v. Arledge, 258 Ark. 608, 527 S.W.2d 917 (1975).
133. Bonds v. Lloyd, 259 Ark. 557, 535 S.W.2d 218 (1976).

ing him custody. The Arkansas Supreme Court upheld the chancellor's decision in *Johnson,* while reversing the chancellor in *Bonds.* In fact, the chancellor in *Bonds* was admonished by the Arkansas Supreme Court for "arbitrarily" refusing to accept jurisdiction and deferring to the Texas court.[134] The conflict, therefore, between Arkansas law and the Act could not be more acute than in this area.

Although the facts of each case demanded the immediate exercise of official authority to ascertain and insure the welfare and best interest of the children involved, the Arkansas Supreme Court's approach clearly did not permit that exercise. Under the Act Texas would have first priority under the home state rule in determining the welfare of the children lawfully within its jurisdiction.[135] Therefore, the Arkansas parent, upon learning of allegations of mistreatment or noncompliance with the custody orders, would first ask the Texas court to investigate the situation; or, in a more indirect approach, request the Arkansas court to inquire of the Texas court in behalf of the Arkansas parent. Undoubtedly the Texas officials would immediately investigate the report and any action, if necessary, would then be taken. Since both Texas and Arkansas have an interest in the children, the Texas court, with home state jurisdiction, would require that any future custody modification hearings be held in Texas. The Texas court, on one hand, could defer jurisdiction to Arkansas to decide the custody issue. Arkansas, on the other hand, would be expected to return the children to Texas—protected if necessary—until the matter of custody was finally resolved.

This approach recognizes the autonomy of each state court's jurisdiction. Texas would have primary jurisdiction under the home state rule and, in return, the Arkansas court would be assured that the parents and family in Arkansas would be properly notified of any future proceedings in Texas. The child's best interest would be insured since the immediate issue of the child's safety would have been addressed. The child's long term welfare would also be protected since the child would not have been subjected to a traumatic abduction and continued litigation based perhaps only upon unfounded rumors from a remote state.

It is apparent that if the Act's jurisdictional standards for initial and modified decrees are recognized, child-abduction should prove useless to a parent in seeking to gain legal custody of the

134. *Id.* at 563, 535 S.W.2d at 221.

135. U.C.C.J.A. § 3(a)(i). "Home state" jurisdiction would be applicable since the parties had lawfully been in Texas six months prior to the proceeding at issue.

child.[136] Not only would the abductor fail to find a court which could legally take jurisdiction over the matter, but also the court would send the parent and child back to the prior state court.

In sum, the Act would simplify the Arkansas rules regarding modification of custody awards in a manner antagonistic to child-abduction. As the situation currently stands, there are no clear rules in this area.

E. Conclusion

The Uniform Child Custody Jurisdiction Act represents a voluntary attempt at the state level to solve the difficult problems encountered in enforcing child custody decrees in an interstate context. The Act is a product of over thirty years of judicial applications and observations, and its adoption in Arkansas would alleviate the critical problems facing the resolution of interstate child custody disputes.

While many persons critical of the Act perceive it to constitute a direct threat to local judicial autonomy, it must be stressed that the Act's primary focus is only on procedural aspects of state custody proceedings in *interstate* situations. For example, the Act excludes any direction as to the manner in which the chancellor actually arrives at the custody determination, as well as to questions concerning child support and monetary obligations.

However, as an incident to changing the procedural mechanisms, some substantive rules of law, as discussed previously, will have to be adjusted in each state to accomodate the reciprocal effect of the Act's provisions. It is suggested that many changes necessitated by the passage of the Act will stimulate better informed and more carefully considered custody findings. As a result, these decrees will be more readily enforced out of state. Indeed, the vulnerability of custody decrees issued in Arkansas should be greatly *minimized,* not increased, by the passage of the Act.

The Act will again be introduced in the Arkansas General Assembly in 1979; however, its passage is not guaranteed. A reasonable alternative to its enactment would be for the Arkansas Supreme Court expressly to recognize the plight of interstate children and the basic philosophy underlying the Act. Specifically, the court could judicially adopt the standards of the Act.

Regardless of whether by statute or judicial adoption, immedi-

136. Bodenheimer, *supra* note 3, at 1241.

ate action needs to be taken to provide for the interstate child's best interest, which is the paramount goal of any child custody determination.

Edward O. Moody

APPENDIX: Uniform Child Custody Jurisdiction Act†

SECTION 1. [*Purposes of Act; Construction of Provisions.*]
(a) The general purposes of this Act 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) assure that litigation concerning the custody of a child take place ordinarily in the state with which the child and his family have the closest connection and where significant evidence concerning his care, protection, training, and personal relationships is most readily available, and that courts of this state decline the exercise of jurisdiction when the child and his family have a closer connection with another state;

(4) discourage continuing controversies over child custody in the interest of greater stability of home environment and of secure family relationships for the child;

(5) deter abductions and other unilateral removals of children undertaken to obtain custody awards;

(6) avoid re-litigation of custody decisions of other states in this state insofar as feasible;

(7) facilitate the enforcement of custody decrees of other states;

(8) promote and expand the exchange of information and other forms of mutual assistance between the courts of this state and those of other states concerned with the same child; and

(9) make uniform the law of those states which enact it.

(b) This Act shall be construed to promote the general purposes stated in this section.

SECTION 2. [*Definitions.*] As used in this Act:

(1) "contestant" means a person, including a parent, who claims a right to custody or visitation rights with respect to a child;

(2) "custody determination" means a court decision and court orders and instructions providing for the custody of a child, including visitation rights; it does not include a decision relating to child support or any other monetary obligation of any person;

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† Printed without Prefatory Note and Comments.

(3) "custody proceeding" includes proceedings in which a custody determination is one of several issues, such as an action for divorce or separation, and includes child neglect and dependency proceedings;

(4) "decree" or "custody decree" means a custody determination contained in a judicial decree or order made in a custody proceeding, and includes the initial decree and a modification decree;

(5) "home state" means the state in which the child immediately preceeding the time involved lived with his parents, a parent, or a person acting as parent, for at least 6 consecutive months, and in the case of a child less than 6 months old the state in which the child lived from birth with any of the persons mentioned. Periods of temporary absence of any of the named persons are counted as part of the 6-month or other period;

(6) "initial decree" means the first custody decree concerning a particular child;

(7) "modification decree" means a custody decree which modifies or replaces a prior decree, whether made by the court which rendered the prior decree or by another court;

(8) "physical custody" means actual possession and control of a child;

(9) "person acting as parent" means a person, other than a parent, who has physical custody of a child and who has either been awarded custody by a court or claims a right to custody; and

(10) "state" means any state, territory, or possession of the United States, the Commonwealth of Puerto Rico, and the District of Columbia.

SECTION 3. [*Jurisdiction.*]

(a) A court of this State which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if:

(1) this State (i) is the home state of the child at the time of commencement of the proceeding, or (ii) had been the child's home state within 6 months before commencement of the proceeding and the child is absent from this State because of his removal or retention by a person claiming his custody or for other reasons, and a parent or person acting as parent continues to live in this State; or

(2) it is in the best interest of the child that a court of this State assume jurisdiction because (i) the child and his parents, or the child and at least one contestant, have a significant connection with this State, and (ii) there is available in this State substantial evidence concerning the child's present or future care, protection, training, and personal relationships; or

(3) the child is physically present in this State and (i) the child has been abandoned or (ii) it is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse or is otherwise neglected [or dependent]; or

(4) (i) it appears that no other state would have jurisdiction under prerequisites substantially in accordance with paragraphs (1), (2), or (3), or another state has declined to exercise jurisdiction on the ground that this State is the more appropriate forum to determine the custody of the child, and (ii) it is in the best interest of the child that this court assume jurisdiction.

(b) Except under paragraphs (3) and (4) of subsection (a), physical presence in this State of the child, or of the child and one of the contestants, is not alone sufficient to confer jurisdiction on a court of this State to make a child custody determination.

(c) Physical presence of the child, while desirable, is not a prerequisite for jurisdiction to determine his custody.

SECTION 4. [*Notice and Opportunity to be Heard.*] Before making a decree under this Act, reasonable notice and opportunity to be heard shall be given to the contestants, any parent whose parental rights have not been previously terminated, and any person who has physical custody of the child. If any of these persons is outside this State, notice and opportunity to be heard shall be given pursuant to section 5.

SECTION 5. [*Notice to Persons Outside this State; Submission to Jurisdiction.*]

(a) Notice required for the exercise of jurisdiction over a person outside this State shall be given in a manner reasonably calculated to give actual notice, and may be:

(1) by personal delivery outside this State in the manner prescribed for service of process within the State;

(2) in the manner prescribed by the law of the place in which the service is made for service of process in that place in an action in any of its courts of general jurisdiction;

(3) by any form of mail addressed to the person to be served and requesting a receipt; or

(4) as directed by the court [including publication, if other means of notification are ineffective].

(b) Notice under this section shall be served, mailed, or delivered, [or last published] at least [10, 20] days before any hearing in this State.

(c) Proof of service outside this State may be made by affidavit of

the individual who made the service, or in the manner prescribed by the law of this State, the order pursuant to which the service is made, or the law of the place in which the service is made. If service is made by mail, proof may be a receipt signed by the addressee or other evidence of delivery to the addressee.
(d) Notice is not required if a person submits to the jurisdiction of the court.

SECTION 6. [*Simultaneous Proceedings in Other States.*]
(a) A court of this State shall not exercise its jurisdiction under this Act if at the time of filing the petition a proceeding concerning the custody of the child was pending in a court of another state exercising jurisdiction substantially in conformity with this Act, unless the proceeding is stayed by the court of the other state because this State is a more appropriate forum or for other reasons.
(b) Before hearing the petition in a custody proceeding the court shall examine the pleadings and other information supplied by the parties under section 9 and shall consult the child custody registry established under section 16 concerning the pendency of proceedings with respect to the child in other states. If the court has reason to believe that proceedings may be pending in another state it shall direct an inquiry to the state court administrator or other appropriate official of the other state.
(c) If the court is informed during the course of the proceeding that a proceeding concerning the custody of the child was pending in another state before the court assumed jurisdiction it shall stay the proceeding and communicate with the court in which the other proceeding is pending to the end that the issue may be litigated in the more appropriate forum and that information be exchanged in accordance with sections 19 through 22. If a court of this State has made a custody decree before being informed of a pending proceeding in a court of another state it shall immediately inform that court of the fact. If the court is informed that a proceeding was commenced in another state after it assumed jurisdiction it shall likewise inform the other court to the end that the issues may be litigated in the more appropriate forum.

SECTION 7. [*Inconvenient Forum.*]
(a) A court which has jurisdiction under this Act to make an initial or modification decree may decline to exercise its jurisdiction any time before making a decree if it finds that it is an inconvenient forum to make a custody determination under the circumstances of the case and that a court of another state is a more appropriate forum.

(b) A finding of inconvenient forum may be made upon the court's own motion or upon motion of a party or a guardian ad litem or other representative of the child.
(c) In determining if it is an inconvenient forum, the court shall consider if it is in the interest of the child that another state assume jurisdiction. For this purpose it may take into account the following factors, among others:

(1) if another state is or recently was the child's home state;

(2) if another state has a closer connection with the child and his family or with the child and one or more of the contestants;

(3) if substantial evidence concerning the child's present or future care, protection, training, and personal relationships is more readily available in another state;

(4) if the parties have agreed on another forum which is no less appropriate; and

(5) if the exercise of jurisdiction by a court of this state would contravene any of the purposes stated in section 1.

(d) Before determining whether to decline or retain jurisdiction the court may communicate with a court of another state and exchange information pertinent to the assumption of jurisdiction by either court with a view to assuring that jurisdiction will be exercised by the more appropriate court and that a forum will be available to the parties.
(e) If the court finds that it is an inconvenient forum and that a court of another state is a more appropriate forum, it may dismiss the proceedings, or it may stay the proceedings upon condition that a custody proceeding be promptly commenced in another named state or upon any other conditions which may be just and proper, including the condition that a moving party stipulate his consent and submission to the jurisdiction of the other forum.
(f) The court may decline to exercise its jurisdiction under this Act if a custody determination is incidental to an action for divorce or another proceeding while retaining jurisdiction over the divorce or other proceeding.
(g) If it appears to the court that it is clearly an inappropriate forum it may require the party who commenced the proceedings to pay, in addition to the costs of the proceedings, in this State, necessary travel and other expenses, including attorneys' fees, incurred by other parties or their witnesses. Payment is to be made to the clerk of the court for remittance to the proper party.
(h) Upon dismissal or stay of proceedings under this section the court shall inform the court found to be the more appropriate forum of this fact, or if the court which would have jurisdiction in the other

state is not certainly known, shall transmit the information to the court administrator or other appropriate official for forwarding to the appropriate court.

(i) Any communication received from another state informing this State of a finding of inconvenient forum because a court of this State is the more appropriate forum shall be filed in the custody registry of the appropriate court. Upon assuming jurisdiction the court of this State shall inform the original court of this fact.

SECTION 8. [*Jurisdiction Declined by Reason of Conduct.*]

(a) If the petitioner for an initial decree has wrongfully taken the child from another state or has engaged in similar reprehensible conduct the court may decline to exercise jurisdiction if this is just and proper under the circumstances.

(b) Unless required in the interest of the child, the court shall not exercise its jurisdiction to modify a custody decree of another state if the petitioner, without consent of the person entitled to custody, has improperly removed the child from the physical custody of the person entitled to custody or has improperly retained the child after a visit or other temporary relinquishment of physical custody. If the petitioner has violated any other provision of a custody decree of another state the court may decline to exercise its jurisdiction if this is just and proper under the circumstances.

(c) In appropriate cases a court dismissing a petition under this section may charge the petitioner with necessary travel and other expenses, including attorneys' fees, incurred by other parties or their witnesses.

SECTION 9. [*Information under Oath to be Submitted to the Court.*]

(a) Every party in a custody proceeding in his first pleading or in an affidavit attached to that pleading shall give information under oath as to the child's present address, the places where the child has lived within the last 5 years, and the names and present addresses of the persons with whom the child has lived during that period. In this pleading or affidavit every party shall further declare under oath whether:

(1) he has participated (as a party, witness, or in any other capacity) in any other litigation concerning the custody of the same child in this or any other state;

(2) he has information of any custody proceeding concerning the child pending in a court of this or any other state; and

(3) he knows of any person not a party to the proceedings who has physical custody of the child or claims to have custody or visitation rights with respect to the child.
(b) If the declaration as to any of the above items 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 as to other matters pertinent to the court's jurisdiction and the disposition of the case.
(c) Each party has a continuing duty to inform the court of any custody proceeding concerning the child in this or any other state of which he obtained information during this proceeding.

SECTION 10. [*Additional Parties.*] If the court learns from information furnished by the parties pursuant to section 9 or from other sources that a person not a party to the custody proceeding has physical custody of the child or claims to have custody or visitation rights with respect to the child, it shall order that person to be joined as a party and to be duly notified of the pendency of the proceeding and of his joinder as a party. If the person joined as a party is outside this State he shall be served with process or otherwise notified in accordance with section 5.

SECTION 11. [*Appearance of Parties and the Child.*]
[(a) The court may order any party to the proceeding who is in this State to appear personally before the court. If that party has physical custody of the child the court may order that he appear personally with the child.]
(b) If a party to the proceeding whose presence is desired by the court is outside this State with or without the child the court may order that the notice given under section 5 include a statement directing that party to appear personally with or without the child and declaring that failure to appear may result in a decision adverse to that party.
(c) If a party to the proceeding who is outside this State 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 to the clerk of the court travel and other necessary expenses of the party so appearing and of the child if this is just and proper under the circumstances.

SECTION 12. [*Binding Force and Res Judicata Effect of Custody Decree.*] A custody decree rendered by a court of this State which had jurisdiction under section 3 binds all parties who have been served in this State or notified in accordance with section 5 or who

have submitted to the jurisdiction of the court, and who have been given an opportunity to be heard. As to these parties the custody decree is conclusive as to all issues of law and fact decided and as to the custody determination made unless and until that determination is modified pursuant to law, including the provisions of this Act.

SECTION 13. [*Recognition of Out-of-State Custody Decrees.*] The courts of this State shall recognize and enforce an initial or modification decree of a court of another state which had assumed jurisdiction under statutory provisions substantially in accordance with this Act or which was made under factual circumstances meeting the jurisdictional standards of the Act, so long as this decree has not been modified in accordance with jurisdictional standards substantially similar to those of this Act.

SECTION 14. [*Modification of Custody Decree of Another State.*]
(a) If a court of another state has made a custody decree, a court of this State shall not modify that decree unless (1) it appears to the court of this State that the court which rendered the decree does not now have jurisdiction under jurisdictional prerequisites substantially in accordance with this Act or has declined to assume jurisdiction to modify the decree and (2) the court of this State has jurisdiction.
(b) If a court of this State is authorized under subsection (a) and section 8 to modify a custody decree of another state it shall give due consideration to the transcript of the record and other documents of all previous proceedings submitted to it in accordance with section 22.

SECTION 15. [*Filing and Enforcement of Custody Decree of Another State.*]
(a) A certified copy of a custody decree of another state may be filed in the office of the clerk of any [District Court, Family Court] of this State. The clerk shall treat the decree in the same manner as a custody decree of the [District Court, Family Court] of this State. A custody decree so filed has the same effect and shall be enforced in like manner as a custody decree rendered by a court of this State.
(b) A person violating a custody decree of another state which makes it necessary to enforce the decree in this State may be required to pay necessary travel and other expenses, including attorneys' fees, incurred by the party entitled to the custody or his witnesses.

SECTION 16. [*Registry of Out-of-State Custody Decrees and Proceedings.*] The Clerk of each [District Court, Family Court] shall maintain a registry in which he shall enter the following:

(1) certified copies of custody decrees of other states received for filing;

(2) communications as to the pendency of custody proceedings in other states;

(3) communications concerning a finding of inconvenient forum by a court of another state; and

(4) other communications or documents concerning custody proceedings in another state which may affect the jurisdiction of a court of this State or the disposition to be made by it in a custody proceeding.

SECTION 17. [*Certified Copies of Custody Decree.*] The Clerk of the [District Court, Family Court] of this State, at the request of the court of another state or at the request of any person who is affected by or has a legitimate interest in a custody decree, shall certify and forward a copy of the decree to that court or person.

SECTION 18. [*Taking Testimony in Another State.*] In addition to other procedural devices available to a party, any party to the proceeding or a guardian ad litem or other representative of the child may adduce testimony of witnesses, including parties and the child, by deposition or otherwise, in another state. The court on its own motion may direct 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 shall be taken.

SECTION 19. [*Hearings and Studies in Another State; Orders to Appear.*]

(a) A court of this State may request the appropriate court of another state to hold a hearing to adduce evidence, to order a party to produce or give evidence under other procedures of that state, or to have social studies made with respect to the custody of a child involved in proceedings pending in the court of this State; and to forward to the court of this State certified copies of the transcript of the record of the hearing, the evidence otherwise adduced, or any social studies prepared in compliance with the request. The cost of the services may be assessed against the parties or, if necessary, ordered paid by the [County, State].

(b) A court of this State may request the appropriate court of another state to order a party to custody proceedings pending in the court of this State to appear in the proceedings, and if that party has physical custody of the child, to appear with the child. The

request may state that travel and other necessary expenses of the party and of the child whose appearance is desired will be assessed against another party or will otherwise be paid.

SECTION 20. [*Assistance to Courts of Other States.*]
(a) Upon request of the court of another state the courts of this State which are competent to hear custody matters may order a person in this State to appear at a hearing to adduce evidence or to produce or give evidence under other procedures available in this State [or may order social studies to be made for use in a custody proceeding in another state]. A certified copy of the transcript of the record of the hearing or the evidence otherwise adduced [and any social studies prepared] shall be forwarded by the clerk of the court to the requesting court.
(b) A person within this State may voluntarily give his testimony or statement in this State for use in a custody proceeding outside this State.
(c) Upon request of the court of another state a competent court of this State may order a person in this State to appear alone or with the child in a custody proceeding in another state. The court may condition compliance with the request upon assurance by the other state that travel and other necessary expenses will be advanced or reimbursed.

SECTION 21. [*Preservation of Documents for Use in Other States.*] In any custody proceeding in this State the court shall preserve the pleadings, orders and decrees, any record that has been made of its hearings, social studies, and other pertinent documents until the child reaches [18, 21] years of age. Upon appropriate request of the court of another state the court shall forward to the other court certified copies of any or all of such documents.

SECTION 22. [*Request for Court Records of Another State.*] If a custody decree has been rendered in another state concerning a child involved in a custody proceeding pending in a court of this State, the court of this State upon taking jurisdiction of the case shall request of the court of the other state a certified copy of the transcript of any court record and other documents mentioned in section 21.

SECTION 23. [*International Application.*] The general policies of this Act extend to the international area. The provisions of this Act relating to the recognition and enforcement of custody decrees of other states apply to custody decrees and decrees involving legal institutions similar in nature to custody, rendered by appropriate

authorities of other nations if reasonable notice and opportunity to be heard were given to all affected persons.

SECTION 24. [*Priority.*] Upon the request of a party to a custody proceeding which raises a question of existence or exercise of jurisdiction under this Act the case shall be given calendar priority and handled expeditiously.

SECTION 25. [*Severability.*] If any provision of this Act or the application thereof to any person or circumstance is held invalid, its invalidity does not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

SECTION 26. [*Short Title.*] This Act may be cited as the Uniform Child Custody Jurisdiction Act.

SECTION 27. [*Repeal.*] The following acts and parts of acts are repealed:

(1)
(2)
(3)

SECTION 28. [*Time of Taking Effect.*] This Act shall take effect . . . .