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Uniform Child Custody Jurisdiction and Enforcement Act: Part I

Substitute Senate Bill 185, currently pending before the Ohio Senate, would replace Ohio's current version of the Uniform Child Custody Jurisdiction Act (UCCJA)<sup>1</sup> with the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA).<sup>2</sup> The UCCJEA was recommended by the National Conference of Commissioners on Uniform State Laws in 1997 and has several stated purposes. First, the UCCJEA “revises the law on child custody jurisdiction in light of federal enactments and almost thirty years of inconsistent case law.”<sup>3</sup> Second, it was also intended to “provide 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.”<sup>4</sup> Additionally, the UCCJEA was intended to provide “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.”<sup>5</sup> A section-by-section review of the proposed statute follows.

R.C. 3127.01 (Definitions). Several definitions are added by the UCCJEA or modify those of the UCCJA.

“Parenting determination.” Currently, R.C. 3109.21(B) defines a parenting determination as a court decision or order and instructions that “allocates parental rights and responsibilities for the care of a child, including any designation of parenting time rights, and designates a residential parent and legal custodian of the child or that, in relation to any other person, provides for the custody of a child, including visitation rights.” New R.C. 3127.01(B)(10) expands the definition to include “permanent, temporary, initial, and modification orders.”

“Parenting proceeding.” Current R.C. 3109.21(C) provides that a parenting proceeding “includes proceedings in which a parenting determination is one of several issues, such as an action for divorce or separation, and includes child neglect and dependency proceedings.” New R.C. 3127.01(B)(11) enumerates that a parenting proceeding “includes proceedings for divorce, dissolution, legal separation, to determine whether a child is an abused, neglected or dependent child, to establish guardianship, to determine the existence of a parent and child relationship, to terminate parental rights, and for protection from domestic violence, in which the issue may appear.” The section would exclude from the definition juvenile delinquency proceedings or contractual emancipations.

“Home state.” The current definition in R.C. 3109.21(E) is essentially unchanged in the new R.C. 3127.01(B)(5).

“Modification decree.” The current definition in R.C. 3109.12(G) also is essentially unchanged in the new R.C. 3127.01(B)(9).

“Physical custody.” The current definition in R.C. 3109.21(H) as “actual possession and control of a child” is modified to “the physical care and supervision of a child” in new R.C. 3127.01(B)(14).

New R.C. 3127.01 would add several new definitions.

The term “abandoned” is defined in R.C. 3127.01(B)(1) as meaning “the parents of a child have failed to visit or maintain contact with the child for more than ninety days, regardless of whether the parents resume contact with the child after that ninety-day period.”

R.C. 3127.02 (Adoptions or emergency medical care). This new section specifically provides that the UCCJEA does not govern adoption proceedings or proceedings “pertaining to the authorization of emergency medical care for a child.”

R.C. 3127.03 (Indian tribes). This new section states that a parenting proceeding involving an Indian child as defined in 25 U.S.C. 1901 et seq., the Indian Child Welfare Act, is not subject to the UCCJEA to the extent that the proceeding is governed by the Indian Child Welfare Act. It further provides that an Indian tribe shall be treated as a “state of the United States” for the purposes of the UCCJEA.<sup>6</sup> Any parenting proceedings made by a tribe “under factual circumstances in substantial conformity with the jurisdictional standards” of the UCCJEA must be “recognized and enforced” under the Act.

R.C. 3127.04 (Foreign countries). Likewise, foreign countries are treated for the purpose of the UCCJEA as a state of the United States and parenting determinations made in a foreign country “under factual circumstances in substantial conformity with the jurisdictional standards” of the UCCJEA must be “recognized and enforced” under the Act. However, the UCCJEA provides in new R.C. 3127.04(C) that “[a] court of this state need not apply” the UCCJEA if “the law governing parenting determinations of a foreign country violates fundamental principles of human rights.”<sup>7</sup>

R.C. 3127.05 (Parties bound by decrees). New R.C. 3127.05 provides that a parenting determination made by a court of this state binds all persons who have been properly served 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.” This section substantially restates current R.C. 3109.30(A).<sup>8</sup>

R.C.3127.06 (Priority). This section restates the provisions of current R.C. 3109.37 which provides that upon the request of a party to a parenting proceeding that raises a question of the exercise or existence of jurisdiction, the question shall be given “calendar priority” and “handled expeditiously.” The Commissioners moved this section to the beginning of the Act to emphasize its importance.<sup>9</sup> Prior section R.C. 3109.37 is essentially unchanged.

R.C. 3127.07 (Notice). Notice required for the exercise of jurisdiction over a person outside the State of Ohio is to be given in accordance with the Rules of Civil Procedure or the Juvenile Rules or by the law of the state in which service is made. Notice shall be given in a manner “reasonably calculated to give actual notice” but may be by publication. R.C. 3127.07(A). Notice is not required if the person submits to the jurisdiction of the court. R.C. 3127.07(C). This section is substantially similar to current R.C. 3109.23 except that the current subsection C is not retained.<sup>10</sup>

R.C. 3127.08 (Appearance and limited immunity). This new section provides that a party to a parenting proceeding, including a modification proceeding, or a petitioner or respondent in a proceeding to enforce or register a parenting determination, is not subject to personal jurisdiction in Ohio for another proceeding or purpose solely by reason of having participated, or having been physically present, in the proceeding. R.C. 3127.08(A). A party who is subject to personal jurisdiction in Ohio on a basis other than physical presence is not immune from service of process in Ohio; further, a party present in Ohio who is subject to the jurisdiction of another state is not immune from service of process permitted by that state. R.C. 3127.08(B). The immunity granted by this section does not extend to civil litigation based on acts unrelated to the UCCJEA proceedings that are committed in Ohio. R.C. 3127.08(C).<sup>11</sup> The purpose of this section is to establish a general principle that participation in a parenting proceeding under the UCCJEA does not, by itself, give the court jurisdiction over any issue for which personal jurisdiction is required. For example, once jurisdiction is proper under the Act, a party should not be placed in the dilemma of choosing between custody or protecting a right not to be subjected to a monetary judgment by a court with no other relationship to the party.

R.C. 3127.09 (Communicating between courts). Pursuant to this new section, courts may communicate with each other regarding a UCCJEA matter and the court shall give the parties an opportunity to participate in the communication. In the event that the parties are not able to participate in the communication, they “shall be given the opportunity to present facts and legal arguments before a decision concerning jurisdiction is made.” R.C. 3127.09(B). The section requires that a record be made of the communication in a tangible form or that is stored in a retrievable medium. R.C. 3127.09(D) & (E).

R.C. 3127.10 (Taking testimony in another state). This new provision provides that a party to a parenting proceeding may offer testimony of witnesses who are located in other states, including the testimony of the parties and the child, by deposition or other allowable means. Furthermore, a party residing in another state may be permitted to testify by telephone, audiovisual means or in other electronic forms.

R.C. 3127.11 (Cooperation between courts). The provision permits an Ohio court to request a court of another state to do any of the following: hold an evidentiary hearing; order a person to produce or give evidence pursuant to the procedures of that state; order that an evaluation be made pertaining to the allocation of parental rights and responsibilities; forward a certified copy of the transcript of the record of the hearing, the evidence presented, and any evaluation; or, order a party having physical custody of a child to appear in the proceeding with or without the child. Conversely, such actions may be taken by an Ohio court upon the request of the court of another state. Reasonable travel and other expenses may be assessed against parties. This section is substantially similar to current R.C. 3109.34, R.C. 3109.35 & R.C. 3019.36 except that the term “social studies” made with respect to the allocation of parental rights and responsibilities has been replaced with “evaluation.”

R.C. 3127.15 (Initial child custody jurisdiction). This section replaces current R.C. 3109.22. The new statute provides that an Ohio court has jurisdiction to make an initial determination in a parenting proceeding only if one of the following applies:

Ohio is the home state of the child on the commencement of the proceeding or was the home state within six months before the commencement of the proceeding and the child is absent from Ohio but a parent (or person acting as parent) continues to live here.

A court of another state does not have jurisdiction under the above section or a court of the home state of the child has declined to exercise jurisdiction on the basis that Ohio is the more appropriate forum and both of the following apply: (a) the child and the child's parents or the child and at least one parent have a significant connection with Ohio other than mere physical presence; and (b) substantial evidence is available in Ohio concerning the child's care, protection, training, and personal relationships.

All courts having jurisdiction under the above provisions have declined to exercise jurisdiction on the ground that Ohio is the more appropriate forum.

No court would have jurisdiction under the above criteria.

The section further provides that the physical presence of, or personal jurisdiction over, a party or a child is not necessary to make a parenting determination.

This new section makes the following changes to the current prerequisites to initial jurisdiction: it deletes the language from current R.C. 3109.22(A)(1) regarding the absence of a child from Ohio “because of his removal or retention by a parent;” it removes the language from R.C. 3109.22(A)(2) that “it is in the best interest of the child” that Ohio assume jurisdiction; and, the provision of current R.C. 3109.22(A)(3) regarding abandonment of the child or the need to protect a child on emergency basis from mistreatment or abuse is moved to new R.C. 3127.18.<sup>12</sup>

One significance of the new section is that it prioritizes the jurisdiction of the home state over other jurisdictional bases. Current R.C. 3109.22 provides four independent and concurrent bases of jurisdiction. The Parental Kidnapping Prevention Act (PKPA), 29 U.S.C. 1738, provides that full faith and credit can be given only to an initial custody determination of a “significant connection” state when there is no home state. New R.C. 3127.15 prioritizes home state jurisdiction in the same manner as the PKPA thereby eliminating any conflict between it and the UCCJEA.<sup>13</sup>

R.C. 3127.16 (Exclusive, continuing jurisdiction). This new section provides that if an Ohio court has made a parenting determination consistent with the UCCJEA, that court has exclusive, continuing jurisdiction until a determination is made that

the child, the child's parents, or any person acting as a parent do not reside in Ohio. Continuing jurisdiction was not addressed in the UCCJA which created confusion with section 1738(d) of the PKPA which requires other states to give full faith and credit to custody determinations made by the original decree state pursuant to that state's continuing jurisdiction so long as that state had jurisdiction under its own law and remains the residence of the child or a party.<sup>14</sup> However, continuing jurisdiction would be lost when the child, the child's parents or any person acting as a parent no longer reside in the original decree state.

R.C. 3127.17 (Jurisdiction to modify determination). This section would replace the provisions of current R.C. 3109.31. The new section provides that an Ohio court may not modify a parenting determination of another state unless the Ohio court has jurisdiction to make an initial determination under R.C. 3127.15 and one of the following applies:

The court of the other state determines that it no longer has exclusive, continuing jurisdiction under R.C. 3127.16 or similar statute or that an Ohio court would be a more convenient forum.

The Ohio court or the court of another state determines that the child, the child's parents, or any person acting as a parent do not presently reside in Ohio.

Current R.C. 3109.31 states that an Ohio court shall not modify a parenting decree of another state unless it appears to the Ohio court that the decree issuing state does not now have jurisdiction, or has declined to exercise jurisdiction, and Ohio has jurisdiction. The new section provides clarification in two respects. First, it makes it provides that the modification state is not authorized to determine that the original decree state has lost its jurisdiction. Second, an exception is provided when a modification state can determine that jurisdiction has moved away from the original state- when all parties have moved away from the original state.<sup>15</sup>

R.C. 3127.18 (Temporary Emergency Jurisdiction). This section provides that an Ohio court has "temporary emergency" jurisdiction if a child is present in the state and either of the following apply:

The child has been abandoned.<sup>16</sup>

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.

The new section further provides that if there is no previous parenting proceeding determination that is entitled to be enforced, and a parenting proceeding has not been commenced in another state pursuant to the UCCJEA, an emergency parenting determination will remain in effect until an order is obtained from a state having jurisdiction. If a parenting proceeding has not been or is not commenced, an emergency parenting determination becomes a final determination if it so provides and Ohio becomes the home state of the child.<sup>17</sup>

If there is a previous parenting determination or if a parenting proceeding has been commenced in another state pursuant to the UCCJEA or similar state statutes, then any emergency order issued by an Ohio court must specify a period of time adequate to allow the person seeking an order from the state having jurisdiction. Ohio's order remains in effect until an order is obtained from the state with jurisdiction or until the period specified in the order expires.<sup>18</sup> Once an Ohio court is informed that a parenting proceeding has been commenced in a state having jurisdiction, the Ohio court must "immediately communicate" with that other court "to resolve the emergency, protect the safety of the parties and the child, and determine a period for the duration of the temporary order."<sup>19</sup>

This new section makes clear that a court may take jurisdiction to protect a child even though there is neither home state nor significant connection jurisdiction; the protection of the child also takes precedence over the duty of a state to recognize,

enforce, and not modify the custody determinations of another state<sup>20</sup> Furthermore, the placement of the section emphasizes its temporary nature.

Current R.C. 3109.22(A)(3) provides that an emergency order may be issued when a child “has been subjected to or threatened with mistreatment or abuse or is otherwise neglected or dependent.” The proposed statute would harmonize this provision with the PKPA which does not use the term “neglect.”

Footnotes

- 1 R.C. 3109.21 et seq.
- 2 The UCCJEA would be codified at R. C. 3127.01 et seq.
- 3 Prefatory Note to UCCJEA. The UCCJA was recommended by the Commissioners in 1968 and was adopted by Ohio in 1977.
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- 6 A “tribe” is defined as “an Indian tribe or Alaskan Native village that is recognized by federal or state law.” R.C. 3127.01(B)(16).
- 7 This concept is found in Section 20 of the Hague Convention on the Civil Aspects of International Child Abductions. The Commissioners' commentary on this provision notes that in applying this section, “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.” Comment to Section 105 of the Uniform Child Custody Jurisdiction and Enforcement Act (1997), National Conference of Commissioners on Uniform State Laws.
- 8 Comment to Section 106 of the Uniform Child Custody Jurisdiction and Enforcement Act (1997), National Conference of Commissioners on Uniform State Laws.
- 9 Comment to Section 107 of the Uniform Child Custody Jurisdiction and Enforcement Act (1997), National Conference of Commissioners on Uniform State Laws.
- 10 R.C. 3109.23(C) provides as follows: “Notice under division (B) of this section shall be served, mailed, delivered, or last published at least twenty days before any hearing in this state.”
- 11 Comment to Section 109 of the Uniform Child Custody Jurisdiction and Enforcement Act (1997), National Conference of Commissioners on Uniform State Laws.
- 12 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. Comment to Section 201 of the Uniform Child Custody Jurisdiction and Enforcement Act (1997), National Conference of Commissioners on Uniform State Laws.
- 13 Comment to Section 201 of the Uniform Child Custody Jurisdiction and Enforcement Act (1997), National Conference of Commissioners on Uniform State Laws.
- 14 Comment to Section 202 of the Uniform Child Custody Jurisdiction and Enforcement Act (1997), National Conference of Commissioners on Uniform State Laws.
- 15 Comment to Section 203 of the Uniform Child Custody Jurisdiction and Enforcement Act (1997), National Conference of Commissioners on Uniform State Laws.
- 16 The term “abandoned” is defined in new R.C. 3127.01(B)(1) as meaning “the parents of a child have failed to visit or maintain contact with the child for more than ninety days, regardless of whether the parents resume contact with the child after that ninety-day period.”
- 17 Proposed R.C. 3127.18(B).

- 18 Proposed R.C 3127.18(C).
- 19 Proposed R.C. 3127.18(D).
- 20 Comment to Section 204 of the Uniform Child Custody Jurisdiction and Enforcement Act (1997), National Conference of Commissioners on Uniform State Laws.

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16 OHDRJ 93

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