

ALPHA FILES 1986-1987

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NATIONAL CONFERENCE OF STATE LEGISLATURES
CHILD SUPPORT ENFORCEMENT SEMINAR EVALUATION FORM
OCTOBER, 1979

Please fill out at conclusion of seminar and turn in at luncheon on Friday, October 12 or before you leave.

AFFILIATION

1. Legislator Federal CSE Other-please identify
- Legislative staff State CSE _____

OVERALL REACTION

2. What did you hope to accomplish by attending the seminar? Were your expectations met?
3. Please rate the overall conference:
- Excellent Very Good Average Poor .

SUBJECT MATTER

4. Was the subject matter of the seminar relevant to your needs and/or the needs of your legislature?
5. What suggestions do you have for making the program more valuable?

FORMAT

6. Was the seminar format (the combination of plenary speakers and concurrent sessions) appropriate for the subject matter? What changes, if any, would you suggest?
7. How did you feel about the length of the seminar?

FACULTY

8. Please comment on the seminar faculty and their effectiveness as moderators, speakers and resource people.

MATERIALS

9. Did you find the conference materials helpful? Which were most useful, which least?

Packet Materials:

Guidelines for Discussion and Term Definitions

HEW Office of Child Support Enforcement Materials

List of Pending Federal Legislation

Demographic Factors in Child Support Enforcement

Discussion Papers

Background Articles

Uniform Laws

Display Table Materials

10. Are there particular materials you would like to receive in a post conference mailing?

LOGISTICS

11. Were your hotel accommodations satisfactory?
12. Which days of the week are most convenient for you to attend seminars?

FUTURE ACTION

13. Do you think you will take any action in the area of child support enforcement when you return to your state? If so, what?



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July 1979

CHILD SUPPORT ENFORCEMENT PROJECT

In 1975 a new Federal program was established to assist States in making their Child Support Enforcement programs more effective. Program development has varied widely among the States since that time. While some States realize significant cost savings through enforcing the child support obligations of absent parents, many still lack adequate legislative tools to conduct an effective program. The Child Support Enforcement Project of the National Conference of State Legislatures is designed to help lawmakers both understand the Child Support Enforcement program and play a more active role in resolving the impediments to effective programs in their States.

The Project is being carried out under the auspices of The National Institute for Child Support Enforcement (which is funded through the Office of Child Support Enforcement of the U.S. Department of Health, Education and Welfare). The ten-month effort will provide services to legislators through an information clearinghouse, regional seminars, technical assistance and a "Legislator's Guide to Child Support Enforcement."

Regional Seminars

Two regional seminars will bring legislators together with resource people from the field for information sharing and discussions. Topics to be covered include the general concepts underlying the Child Support Enforcement program, policy options, innovative state programs, model legislation and impediments to effective programs.

The Western Regional Seminar is scheduled for Denver, Colorado on October 11-12. The Eastern Regional Seminar is scheduled for Hartford, Connecticut on October 22-23. All interested legislators and staff are invited to attend the seminars. Assistance with airfare costs is available for a limited number of legislators per State (subject to designation by legislative leadership in each State.) A summary of the proceedings will be prepared and shared after each seminar with participants and others who are interested.

Technical Assistance

The project will offer technical assistance to legislators geared towards the assessment of problems and identification of solutions to improve individual State programs. Assistance will be available in such areas as conducting policy research studies, preparing testimony, bill drafting, and a limited number of State workshops structured for the particular needs of the State.

Information Clearinghouse

An information clearinghouse will be established and maintained to respond to requests from legislators and staff on Child Support Enforcement issues. Statutory abstracts, research reports, statistical information, significant court decisions, and names of resource people will be available.

Legislator's Guide to Child Support Enforcement

A legislator's guide to the issue will be published. Information shared in the seminars and State workshops and materials collected for the clearinghouse service will form the basis for the guide. Some of the topics to be included are case histories of innovative legislation, definition of policy questions and options, and descriptions of relevant research.

A BRIEF INTRODUCTION TO CHILD SUPPORT ENFORCEMENT

Child Support Enforcement is a new approach to assisting dependent children. Federal law requires that each State establish a Child Support Enforcement program. The responsible State government unit is commonly referred to as the IV-D agency. Each program receives 75 percent of its funding from the Federal government.

The Child Support Enforcement program was established in response to the changes taking place in the Aid to Families with Dependent Children Program (AFDC). AFDC was established in the 1930's to provide for children who did not have the benefits of support from both parents. Assistance is available to families in which a responsible parent is dead, absent, disabled, or in some cases, unemployed.

When the AFDC program was first established, death of the father was the major basis for eligibility. Currently, over 80 percent of the families receiving AFDC are eligible because a parent is absent from the home, while over 30 percent of the children are born of unmarried parents.

The State IV-D agency is responsible for locating absent parents, establishing paternity, establishing child support obligations, and collecting and monitoring child support payments. Federal law requires that these services be offered to AFDC and non-AFDC families.

The Child Support Enforcement Program has proven itself to be cost effective. According to figures from the U.S. Department of Health, Education and Welfare (HEW) welfare rolls have been reduced and savings have been realized as support payments from absent parents have been used to offset AFDC payments.

While the Child Support Enforcement program is located in the social services department in most states, it is unlike any other human service program. The program ensures support to children while reducing State and local welfare and related program expenditures.

HEW reported that for Fiscal Year 1978 one billion dollars was collected at a cost of \$321 million dollars. Hence nationally, the program collected more than \$3.00 for every \$1.00 spent. Unfortunately there is a wide variance in the effectiveness of State programs. Seventeen States are still collecting less than what they spend to make their AFDC collections.

A variety of impediments contribute to this ineffectiveness. Included are budgetary and staffing limitations, curtailed access to information on absent parents' location and assets, crowded court dockets, absence of legal enforcement tools such as wage assignments and garnishment, and lack of cooperation between States on interstate cases. A number of these problems could be addressed through State legislation.

If you have any questions or desire further information, contact Deborah Bernington, Child Support Enforcement Project Director, NCSL, 1405 Curtis St., Suite 2300, Denver, Colorado 80202.

****PLEASE NOTE****

THE ORIGINAL FILE CONTAINS ^{A BOUND}~~AN OVERSIZED~~ DOCUMENT THAT
IS UNSUITABLE FOR FILMING. PLEASE REFER TO THE ALASKA
STATE ARCHIVES TO VIEW THE ORIGINAL.

STATE OF ALASKA

THE CHILD SUPPORT ENFORCEMENT ACT



THE

UNIFORM RECIPROCAL ENFORCEMENT OF SUPPORT ACT

AND OTHER APPLICABLE STATUTORY PROVISIONS CONCERNING

CHILD SUPPORT MATTERS

CORRECTIONS

Sec. 47.23.060(c) should read as follows:

(c) In a court proceeding where the support of a minor child is at issue, the court may order either or both parents to pay the amount necessary for support, maintenance, nurture and education of the child. Upon a showing of good cause the court may order the parents required to pay support to give reasonable security for payments. An order for prospective child support may be modified or revoked as the court considers necessary. (am sec. 21 ch 126 SLA 1977)

Sec. 47.23.070 should read as follows:

Sec. 47.23.070. ORDER TO ASSIGN WAGES FOR SUPPORT. (a) In a proceeding in which the court has ordered either or both parents to pay for the support of a minor child, the court may, on its own motion or motion of a party or the agency on behalf of a party, after notice and an opportunity for hearing, order either parent or both parents to assign to the custodian of the child that portion of salary or wages of either parent due them currently and in the future sufficient to pay the amount ordered by the court for the support, maintenance, nurture and education of the minor child.

(b) The order of assignment is binding upon an employer upon service of a copy of the order upon the employer and until further order of the court. The employer may, for each payment made under the order, deduct \$1 from other wages or salary owed to the employee.

(c) The assignment made under court order has priority as against an attachment, execution, or other assignment unless otherwise ordered by the court.

(d) An employer may not terminate an employee's employment because his wages are subject to an order under this section. (am sec. 22 ch 126 SLA 1977)

THE CHILD SUPPORT ENFORCEMENT ACT

the

UNIFORM RECIPROCAL ENFORCEMENT OF SUPPORT ACT

and other applicable statutory provisions concerning

CHILD SUPPORT MATTERS

Chapter 126, Laws of Alaska 1977, Section

1 Purpose

Title 47, Chapter 23, Section

- | | | | |
|------|---------------------------------------------------------------------------------------------------------|------|--------------------------------------------------------------------------------------------------------------|
| .010 | Creation of Child Support Enforcement Agency | .170 | Administrative Establishment of Support Obligations; Hearing |
| .020 | Duties of the Agency | .180 | Administrative Establishment of Support Obligations; Decision |
| .030 | Establishment of Fund | .190 | Administrative Establishment of Support Obligations; Modification of a Finding or Decision of Responsibility |
| .040 | Determination of Paternity | .200 | Administrative Establishment of Support Obligations; Use of Standards in Determination of Support Payments |
| .045 | Determination of Support Obligation | .210 | Administrative Establishment of Support Obligations; Judicial Review |
| .050 | Legal Assistance | .220 | Administration of Established Support Obligations; Judicial Review |
| .060 | Order of Support | .230 | Assertion of Lien |
| .070 | Order to Assign Wages for Support Enforcement of Support Orders | .240 | Service of Lien |
| .080 | Enforcement of Support Orders | .250 | Order to Withhold and Deliver |
| .090 | Repealed | .260 | Civil Liability Upon Failure to Comply with an Order |
| .095 | Agency Exempt from Execution | .270 | Judicial Relief from Administrative Execution |
| .100 | All Persons May Use Agency | .280 | Severability; Alternative when Method of Notification Held Invalid |
| .110 | Definitions | | |
| .120 | Obligor Liable for Public Assistance Furnished Obligor | | |
| .130 | Subrogation of State | | |
| .140 | Power of Agency to Administratively Establish and Enforce Support Obligation; Procedures to be Utilized | | |
| .150 | Require Notice in Administrative Enforcement of Support Orders | | |
| .160 | Administrative Establishment of Support Obligation; Notice and Finding of Financial Responsibility | | |

Title 25, Chapter 25, Section

- | | | | |
|------|-----------------------------|------|------------------------------------------------------|
| .010 | Definitions | .070 | Furnishing Support by State or Political Subdivision |
| .020 | Additional Remedies | .080 | Enforcement |
| .030 | Extent of Duties of Support | .090 | Complaint for Support |
| .040 | Extradition | .100 | Officials to Represent Plaintiff |
| .050 | Relief from Extradition | .110 | Complaint for a Minor |
| .060 | Choice of Law | | |

.120	Court Duty When Alaska Initiating State	.210	Additional Agency Duties When Alaska Responding State
.130	Costs and Fees	.220	Additional Agency Duty When Alaska Initiating State
.140	Jurisdiction by Arrest	.230	Evidence of Husband and Wife
.150	State Information Agency	.240	Application of Payments
.160	Court Duty When Alaska Responding State	.250	Effect of Participation in Proceeding
.170	Further Duty of Responding State	.252	Proceedings Not To Be Stayed
.171	Hearings and Continuances	.254	Registration of Foreign Support Orders
.173	Rules of Evidence	.256	Agency to Represent Obligee
.175	Paternity	.258	Effect of Registration; Enforcement Procedures
.180	Order of Support	.260	Uniformity of Interpretation
.190	Transmitting Orders to Initiating State	.270	Short Title
.200	Additional Powers of Court		

Title 12, Chapter 62 CODE OF CRIMINAL PROCEDURES

Sec. 12.62.020 Collection and Storage

.070 Disclosure of Tax Returns and Reports

Title 43, Chapter 5 REVENUE AND TAXATION

Sec. 43.05.230 (a)

Reference Chapter 126, Laws of Alaska, 1977 PURPOSE. Common law and statutory procedures governing the remedies for enforcement of support for financially dependent minor children by responsible parents have not proven sufficiently effective or efficient to cope with the increasing incidence of financial dependency. The increasing workload of courts, district attorneys, and the attorney general has made such remedies uncertain, slow and inadequate, thereby resulting in a growing burden on the financial resources of the state which is required to provide public assistance grants for basic maintenance requirements when parents fail to meet their primary obligations. The state, therefore, exercising its police and sovereign power, declares that the common law and Alaska statutes pertaining to the establishment and enforcement of child support obligations shall be augmented by additional remedies in order to meet the needs of minor children. It is declared to be the public policy of this state that this Act be construed and administered to the end that children shall be maintained from the resources of responsible parents, thereby relieving, at least in part, the burden presently born by the general citizenry through welfare and welfare related programs.

Sec. 47.23.010. CREATION OF CHILD SUPPORT ENFORCEMENT AGENCY. There is created in the Department of Revenue the child support enforcement agency.

Sec. 47.23.020. DUTIES OF THE AGENCY. The agency shall
(1) obtain, enforce, and administer child support orders of the superior courts of the state;

(2) adopt regulations to carry out the purposes of this chapter including regulations which establish

(A) schedules for determining the amount an obligor is liable to contribute toward the support of an obligee under this chapter and under Title IV-D, Social Security Act; and

(B) procedures for hearings conducted under sec. 170 of this chapter;

(C) a uniform schedule of fees which may be charged the obligor if the child support payments are 10 or more days overdue or if payment is made by a check backed by insufficient funds.

(3) administer and enforce the Uniform Reciprocal Enforcement of Support Act (AS 25.25);

(4) establish, enforce, and administer child support obligations administratively in accordance with this chapter; and

(5) administer the state plan required under Title IV-D of the Social Security Act as amended.

Sec. 47.23.030. ESTABLISHMENT OF FUND. There is established in the state general fund a continuing, revolving, reserve account to receive collections and make the authorized disbursements of the Agency.

Sec. 47.23.040. DETERMINATION OF PATERNITY. (a) The agency shall appear on behalf of minor children or their mother or legal custodian

or the state and initiate efforts to have the paternity of children born out of wedlock determined by the court on voluntary application by the mother or other legal custodian.

(b) The agency may not attempt to establish paternity in any case involving incest or forcible rape, when legal proceedings for adoption are pending, or when it would not be in the best interests of the children or the state.

Sec. 47.23.045. DETERMINATION OF SUPPORT OBLIGATION. The agency may appear in an action seeking an award of support in behalf of a child owed a duty of support, and may also appear in an action seeking modification of a support order, decree or judgment already entered. Action under this section may be undertaken upon application of an obligee, or at the agency's own discretion if the obligor is liable to the state under sec. 120(a); or (b) of this chapter.

Sec. 47.23.050. LEGAL ASSISTANCE. The agency shall contract with the Department of Law to provide needed legal services.

Sec 47.23.060. ORDER OF SUPPORT. (a) An order of support establishes a relationship by which the custodian of the child is the administrator for the purposes of administering child support on behalf of the child. The court shall carefully consider the need for support, the ability of both parents to meet such support obligations, the extent to which the parents supported the child before divorce, and the economic ability of the parents to pay after separation and divorce. The court shall also consider the effect on the support obligation of a change in custodian. The need of the child for support shall be considered regardless of the sex of the parent awarded custody of the child.

(b) Repealed.

(c) In a court proceeding where the support of a minor child is at issue, the court may order either or both parents to pay the amount necessary for the support of a minor child, the court may, on its own motion or motion of a party or the agency on behalf of a party, after notice and an opportunity for hearing, order either parent or both parents to assign to the custodian of the child that portion of salary or wages of either parent due them currently and in the future sufficient to pay the amount ordered by the court for the support, maintenance, nurture and education of the minor child.

Sec. 47.23.070 (a) The order of assignment is binding upon an employer upon service of a copy of the order upon the employer and until further order of the court. The employer may, for each payment made under the order, deduct \$1 from other wages or salary owed to the employee.

(b) The assignment made under court order has priority as against an attachment, execution or other assignment unless otherwise ordered by the court.

(c) An employer may not terminate an employee's employment because his wages are subject to an order under this section.

Sec. 47.23.080. ENFORCEMENT OF SUPPORT ORDERS. (a) A court order requiring payment of child support shall be modified to order payments be made to the agency upon application.

(b) The agency on behalf of the custodian or the state shall take all necessary action permitted by law to enforce child support orders so entered, including petitioning the court for orders to aid in the enforcement of child support.

(c) The determination or enforcement of a duty of support is unaffected by any interference by the custodian of the child with rights of custody or visitation granted by a court.

(d) No order of arrest may be issued in the enforcement of child support unless the court has reason to believe that the obligee [sic] may flee the jurisdiction or unless the obligee [sic] has been ordered to appear in the action and has failed to do so.

AS 47.23.090 is repealed.

Sec. 47.23.095. AGENCY EXEMPT FROM EXECUTION. No execution may issue against money held in the fund established under sec. 30 of this chapter.

Sec. 47.23.100. ALL PERSONS MAY USE AGENCY. The agency shall provide aid to any person due child support under the laws of this state upon application. If the obligee is indigent or otherwise unable to pay for these services, the agency shall act without charge to the obligee. If the agency determines that the obligee is financially able to pay, costs shall be assessed according to regulations adopted by the department and be paid into the fund established in sec. 30 of this chapter.

Sec 47.23.110. DEFINITIONS. In this chapter (1) "agency" means the child support enforcement agency;

(2) "department" means the Department of Revenue;

(3) "Duty of support" includes a duty of child support imposed or imposable by law, by a court order, decree or judgment, or by a finding or decision rendered under this chapter whether interlocutory or final, whether incidental to a proceeding for divorce, legal separation, separate maintenance, or otherwise, and includes the duty to pay arrearages of support past due and unpaid;

(4) "obligee" means a person to whom a duty of support is owed;

(5) "obligor" means a person owing a duty of support;

(6) "support order" means any judgment, decree, or order of child support in favor of an obligee whether temporary or final, or subject to modification, revocation, or remission, regardless of the kind of action or proceeding in which it is entered.

Sec 47.23.120. OBLIGOR LIABLE FOR PUBLIC ASSISTANCE FURNISHED OBLIGEE. (a) An obligor is liable to the state in the amount of assistance granted under AS 47.25.310 - 47.25.420 to a child whom the obligor

owes a duty of support except that if a support order has been entered, the liability of the obligor may not exceed the amount of support provided for in the support order.

(b) An obligor is liable to the state in the amount of the cost incurred if the state is maintaining a child whom the obligor owes a duty of support in a foster home or institution, except that if a support order has been entered, or an agreement for payment of that cost executed between the obligor and the state, the liability of the obligor may not exceed the amount provided in the support order or agreement.

Sec. 47.23.130. SUBROGATION OF STATE. If the obligor is liable to the state under sec. 120 (a) or (b) of this chapter, the state is subrogated to the rights of the obligee to either bring an action seeking a support order or to proceed under secs. 160-270 of this chapter to establish and enforce a duty of support and further to enforce by execution, in accordance with secs. 230-270 of this chapter or otherwise, any support order already entered in favor of the obligee, up to the amount for which the obligor is liable to the state under secs. 120(a) and (b) of this chapter.

Sec 47.23.140 POWER OF AGENCY TO ADMINISTRATIVELY ESTABLISH AND ENFORCE SUPPORT OBLIGATION; PROCEDURES TO BE UTILIZED. (a) If no support order has been entered, the agency may establish a duty of support utilizing the procedures prescribed in secs. 160-220 of this chapter, and may enforce a duty of support utilizing the procedure prescribed in secs. 230-270 of this chapter. Action under this subsection may be undertaken upon application of an obligee, or at the agency's own discretion if the obligor is liable to the state under secs. 120(a) or (b) of this chapter.

(b) If a support order has been entered, the agency may enforce the support order utilizing the procedures prescribed in secs. 150 and 230-270 of this chapter.

Sec. 47.23.150. REQUIRED NOTICE IN ADMINISTRATIVE ENFORCEMENT OF SUPPORT ORDERS. (a) Action to enforce a support order administratively under secs. 230-270 of this chapter is initiated by the agency serving a notice on the obligor of his liability under the support order. Notice under this subsection shall be served personally or by registered, certified, or insured mail, return receipt requested, for restricted delivery only to the person to whom the notice is directed or to the person authorized under federal regulation to receive that person's restricted delivery mail.

(b) Notice served under (a) of this section shall state the amount of the obligor's liability under the support order and that the property of the obligor is subject to execution in that amount in accordance with the procedures prescribed in sec. 230-270 of this chapter at the expiration of 70 days from the date of service of the notice.

Sec. 47.23.160. ADMINISTRATIVE ESTABLISHMENT OF SUPPORT OBLIGATIONS; NOTICE AND FINDING OF FINANCIAL RESPONSIBILITY. (a) An action to establish a duty of support authorized under sec. 140(a) of this chapter is initiated by the agency serving on the alleged obligor a

notice and finding of financial responsibility. The notice and finding served under this subsection shall be served personally or by registered, certified, or insured mail, return receipt requested, for restricted delivery only to the person to whom the notice and finding is directed or to the person authorized under federal regulation to receive his restricted delivery mail.

(b) The notice and finding of financial responsibility served under (a) of this section shall state (1) the sum or periodic payments for which the alleged obligor is found to be responsible, calculated by taking into consideration the need of the alleged obligee, the alleged obligor's liability to the state under sec. 130 of this chapter if any, and his duty of support under the law;

(2) the name of the alleged obligee and his custodian;

(3) that the alleged obligor may appear and show cause in a hearing held by the agency why the finding is incorrect, should not be finally ordered, and should be modified or rescinded, because (A) no duty of support is owed, or (B) the amount of support found to be owed is incorrect;

(4) that if the person served with the notice and finding of financial responsibility does not request a hearing within 30 days, the property of the person will be subject to execution in accordance with secs. 230 - 270 of this chapter in the amounts stated in the finding without further notice or hearing.

Sec. 47.23.170. ADMINISTRATIVE ESTABLISHMENT OF SUPPORT OBLIGATIONS: HEARING. (a) A person served with a notice and finding of financial responsibility is entitled to a hearing if a request in writing for a hearing is served on the agency by registered mail, return receipt requested, within 30 days of the date of service of the notice of financial responsibility;

(b) If a request under (a) is made, the execution under secs. 230 - 270 of this chapter shall be stayed pending the decision on the hearing, or the decision of a court, if appealed. If no request for a hearing is made, the finding of responsibility is final at the expiration of the 30-day period.

(c) If a hearing is requested, it shall be held within 30 days of the date of service of the request for hearing on the agency.

(d) The hearing officer shall determine the amount of periodic payments necessary to satisfy the past, present, and future liability of the alleged obligor under sec. 130 of this chapter, if any, and under any duty of support imposed under the law. The amount of periodic payments determined under this subsection is not limited by the amount of any public assistance payment made to or for the benefit of the child.

(e) The hearing officer shall consider the following in making his determination under (d) of this section:

(1) the needs of the alleged obligee, disregarding the income or assets of the custodian of the alleged obligee;

(2) the amount of the alleged obligor's liability to the state under sec. 125 of this chapter if any,

(3) the intent of the legislature that children be supported as much as possible by their natural parents;

(4) the ability of the alleged obligor to pay.

(f) If the alleged obligor requesting the hearing fails to appear at the hearing, the hearing officer shall enter a decision declaring the property of the alleged obligor subject to execution in accordance with secs. 230-270 of this chapter in the amounts stated in the notice and filing [sic] of financial responsibility.

Sec. 47.23.180. ADMINISTRATIVE ESTABLISHMENT OF SUPPORT OBLIGATIONS: DECISION. (a) Within 20 days of the date of the hearing, the hearing officer shall promulgate findings and a decision determining whether a duty of support exists and, if a duty of support is found, the amount of periodic payments or sum for which the alleged obligor is found to be responsible.

(b) Liability to the state under sec. 130 of this chapter is limited to the amount for which the obligor is found to be responsible under (a) of this section.

(c) A decision rendered under (a) of this section is modified to the extent that a subsequent order, judgment, or decree of a superior court is inconsistent with the decision rendered under (a) of this section.

Sec. 47.23.190. ADMINISTRATIVE ESTABLISHMENT OF SUPPORT OBLIGATIONS: MODIFICATION OF A FINDING OR DECISION OF RESPONSIBILITY. (a) Unless a support order has been entered, the obligor, or the obligee or his custodian, may petition the agency or its designee for a modification of the finding or decision of responsibility previously entered with regard to future periodic support payments.

(b) The agency shall grant a hearing upon a petition made under (a) of this section if affidavits submitted with the petition make a showing of good cause and material change in circumstances sufficient to justify action under (e) of this section.

(c) If a hearing is granted, the agency shall serve a notice of hearing together with a copy of the petition and affidavits submitted on the obligee or his custodian and the obligor personally or by registered, certified, or insured mail, return receipt requested, for restricted delivery only to the person to whom the notice is directed or to the person authorized under federal regulation to receive his restricted delivery mail.

(d) A hearing shall be set not less than 15 nor more than 30 days from the date of mailing of notice of hearing, unless extended for good cause.

(e) Modification of future periodic support payments may be ordered upon a showing of good cause and material change in circumstances.

Sec. 47.23.200. ADMINISTRATIVE ESTABLISHMENT OF SUPPORT OBLIGATIONS: USE OF STANDARDS IN DETERMINATION OF SUPPORT PAYMENTS. (a) In making its findings under sec. 160 of this chapter, and in establishing and modifying amounts of periodic support payments under secs. 180 and 190 of this chapter, the agency shall consider the standards adopted by regulation under sec. 20 of this chapter and any standards for determination of support payments used by the superior court of the district of residence of the obligor.

Sec. 47.23.210. ADMINISTRATIVE ESTABLISHMENT OF SUPPORT OBLIGATIONS: OBTAINING JUDICIAL REVIEW. (a) Judicial review by the superior court of an agency decision establishing or modifying a duty of support or amounts of support due may be obtained by filing a notice of appeal in accordance with the applicable rules of court governing appeals in civil matters. A notice of appeal shall be filed within 30 days of the decision.

(b) The complete record of the proceedings, or the parts of it which the appellant designates, shall be prepared by the agency. A copy shall be delivered to all parties participating in the appeal. The original shall be filed in the superior court within 30 days after the appellant pays the estimated cost of preparing the complete or designated record or files a corporate surety bond equal to the estimated cost.

(c) The complete record includes

- (1) the notice and finding of financial responsibility;
- (2) the request for a hearing;
- (3) the decision of the hearing officer;
- (4) the exhibits admitted or rejected;
- (5) the written evidence;
- (6) all other documents in the case.

(d) Upon order of the superior court, appeals may be taken on the original record or parts of it. The record may be typewritten or duplicated by any standard process. Analogous rules of court governing appeals in civil matters shall be followed when this chapter is silent, and when not in conflict with this chapter.

(e) The superior court may enjoin agency action in excess of constitutional or statutory authority at any stage of an agency proceeding. If agency action is unlawfully or unreasonably withheld, the superior court may compel the agency to initiate action.

Sec. 47.23.220. ADMINISTRATIVE ESTABLISHMENT OF SUPPORT OBLIGATIONS: PROCEDURE ON REVIEW. (a) An appeal shall be heard by the superior court sitting without a jury.

(b) Inquiry in an appeal extends to the following questions:

- (1) whether the agency has proceeded without or in excess of jurisdiction;

(2) whether there was a fair hearing; and

(3) whether there was a prejudicial abuse of discretion. Abuse of discretion is established if the agency has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.

(c) The court may exercise its independent judgment on the evidence. If it is claimed that the findings are not supported by the evidence, abuse of discretion is established if the court determines that the findings are not supported by (1) the weight of the evidence, or (2) substantial evidence in the light of the whole record.

(d) The court may augment the agency record in whole or in part, or hold a hearing de novo. If the court finds that there is relevant evidence which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing, the court may

(1) enter judgment as provided in (c) of this section and remand the case to be reconsidered in the light of that evidence; or

(2) admit the evidence at the appellate hearing without remanding the case.

(e) The court shall enter judgment setting aside, modifying, remanding, or affirming the decision, without limiting or controlling in any way the discretion legally vested in the agency.

(f) The court in which proceedings under this section are started may stay the operation of the decision until

(1) the court enters judgment;

(2) a notice of further appeal from the judgment is filed; or

(3) the time for filing the notice of appeal expires.

(g) No stay may be imposed or continued if the court is satisfied that it is against the public interest.

(h) If further appeal is taken, the supreme court may, in its discretion, stay the superior court judgment or agency order.

Sec. 47.23.230. ASSERTION OF LIEN. (a) At the expiration of 30 days from either (1) the date of service of notice under sec. 150 of this chapter, or (2) the date of service of a notice and finding of financial responsibility under sec. 160 of this chapter, the agency may assert a lien upon the real or personal property of the obligor, in the amount of the obligor's liability.

(b) No lien filed under this section has any effect against earnings, or bank deposits or balances, unless it states the amount of the obligor's liability under this chapter and unless the lien is served in accordance with sec. 240 of this chapter.

(c) The lien shall attach to all real and personal property of the

obligor and be effective on the date of filing of the lien with the recorder of the recording district in which the property attached is located. A lien against earnings shall attach and be effective upon filing with the recorder of the recording district in which the employer does business or maintains an office or agent for the purpose of doing business.

(d) Whenever a lien has been filed under this section and there is in the possession of any person, political subdivision, or department of the state having actual notice of the lien, any property which may be subject to the lien, that property may not be paid over, released, sold, transferred, encumbered or conveyed unless

(1) a written release or waiver signed by a representative of the agency has been delivered to the person, political subdivision, or department of the state; or

(2) a decision has been made in a hearing held under sec. 170 of this chapter or by a superior court ordering release of the lien on the grounds that no debt exists or that the debt has been satisfied.

Sec. 47.23.240. SERVICE OF LIEN. (a) The agency may at any time after filing of a lien filed under sec. 230 of this chapter serve a copy of the lien upon any person, political subdivision, or department of the state possessing earnings, or deposits or balances held in any bank account of any nature which are due, owing, or belonging to the obligor.

(b) A lien filed under sec. 230 of this chapter shall be served upon a person, political subdivision, or department of the state personally or by registered, certified, or insured mail, return receipt requested.

Sec. 47.23.250. ORDER TO WITHHOLD AND DELIVER. (a) At the expiration of 30 days from the date of service of notice under sec. 150 of this chapter, or from the date of service of a notice and finding of financial responsibility under sec. 160 of this chapter, the agency may issue to any person, political subdivision, or department of the state an order to withhold and deliver property.

(b) All real or personal property belonging to the obligor is subject to an order to withhold and deliver, including, but not limited to, earnings which are due, owing, or belonging to the debtor.

(c) The agency may issue an order to withhold and deliver when it has reason to believe that there is in the possession of a person, political subdivision, or department of the state property which is due, owing, or belonging to the obligor.

(d) The order to withhold and deliver shall be served upon the person, political subdivision or department of the state possessing the property in the manner provided for service of liens under sec. 240 of this chapter. The order shall state the amount of the obligor's liability and shall state in summary the terms of secs. 260 and 270 of this chapter.

(e) Any person, political subdivision, or department of the state served with an order to withhold and deliver is required to make true answers to inquiries contained in the order under oath and in writing within 30 days of service of the order and is further required to answer all inquiries subsequently put.

(f) If any person, political subdivision, or department of the state upon whom service of an order to withhold and deliver has been made possesses property due, owing, or belonging to the obligor, that person, subdivision or department shall withhold the property immediately upon receipt of the order and shall deliver the property to the agency upon demand after the expiration of the 30-day period from the date of service of the order. The agency shall hold property delivered under this sub-section in trust for application against the liability of the obligor under sec. 130 of this chapter or for return, without interest, depending on final determination of liability or nonliability under this chapter. The agency may accept a good and sufficient bond conditioned upon final determination of liability in lieu of requiring delivering of property under this subsection.

(g) Delivery to the agency of the money or other property due, owing, or belonging to the obligor shall satisfy the requirement of the order to withhold and deliver. Delivery of money due and owing to the obligor under any contract of employment, express or implied, or held by any person, political subdivision, or department of the state, and subject to withdrawal by the obligor, shall be delivered by remittance payable to the order of the agency.

(h) The agency shall defend and hold harmless for such actions people withholding or delivering money or property to the agency in accordance with this section.

(i) The exemptions from execution by judgment debtors under AS 09.35.080(a) and the restrictions from execution by judgment debtors under AS 09.35.080(b)(1) do not apply to proceedings to enforce the payment of child support under secs. 230 - 270 of this chapter.

Sec. 47.23.260 CIVIL LIABILITY UPON FAILURE TO COMPLY WITH AN ORDER OR LIEN. If any person, political subdivision, or department of the state (1) fails to make answer to an order to withhold and deliver within the time prescribed in sec. 250 of this chapter; (2) fails or refuses to deliver property in accordance with an order issued under sec. 250 of this chapter; (3) pays over, releases, sells, transfers, or conveys real property subject to a lien filed under sec. 230 of this chapter to or for the benefit of the obligor or any other person; (4) fails or refuses to surrender upon demand property attached; (5) fails or refuses to honor an assignment of wages presented by the agency, the person, political subdivision, or department of the state is liable to the agency in an amount equal to 100 per cent of the amount constituting the basis of the lien, order to withhold and deliver, attachment, or assignment of wages, together with costs, interest, and reasonable attorney fees.

Sec. 47.23.270. JUDICIAL RELIEF FROM ADMINISTRATIVE EXECUTION. Any person against whose property a lien has been filed under sec. 230 of this chapter or an order to withhold and deliver served in accordance with sec. 250 of this chapter may apply for relief to the superior court.

Sec. 47.23.280. SEVERABILITY: ALTERNATIVE WHEN METHOD OF NOTIFICATION HELD INVALID. If any provision of this chapter or the application of it to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of this chapter which can be given effect without the invalid provision or application, and to this end the provisions of this chapter are severable. If any method of notification provided for in this chapter is held invalid, service as provided for by the laws of the state for service of process in a civil action shall be substituted for the method held invalid.

Chapter 25. Uniform Reciprocal Enforcement of Support Act.

Sec. 25.25.010 DEFINITIONS As used in this chapter, unless the context otherwise requires,

(1) "state" includes the State of Alaska and a state, territory or possession of the United States and the District of Columbia in which this or a substantially similar reciprocal law has been enacted;

(2) "initiating state" means a state in which a proceeding under this or a substantially similar reciprocal law is commenced;

(3) "responding state" means a state in which a proceeding under the proceeding in the initiating state is or may be commenced;

(4) "court" means and includes a court having jurisdiction to determine the liability of persons for the support of dependents in this state and a state having a substantially similar reciprocal law;

(5) "law" includes both common and statute law;

(6) "duty of support" includes a duty of support imposed or imposed by law, or by a court order, decree or judgment, whether interlocutory or final, whether incidental to a proceeding for divorce, legal separation, separate maintenance or otherwise, and includes the duty to pay arrearages of support past due and unpaid;

(7) "obligor" means a person owing a duty of support;

(8) "obligee" means a person to whom a duty of support is owed;

(9) "foreign support order" means any support order defined in (10) of this section issued by a court of competent jurisdiction in another state;

(10) "support order" means any judgment, decree, or order of support in favor of an obligee, whether temporary or final or subject to modification, revocation, or remission, regardless of the kind of action or proceeding in which it is entered.

Sec. 25.25.020. ADDITIONAL REMEDIES. The remedies provided in this chapter are in addition to and not in substitution for any other remedies.

Sec. 25.25.030. EXTENT OF DUTIES OF SUPPORT Duties of support arising under the law of this state, when applicable under sec. 60 of this chapter, bind the obligor, present in this state, regardless of the presence or residence of the obligee.

Sec. 25.25.040. EXTRADITION. (a) The governor of this state may

(1) demand from the governor of another state the surrender of a person found in such other state who is charged in this state with the crime of failing to provide for the support of a person in this state, and

(2) surrender on demand by the governor of another state a person found in this state who is charged in such other state with the crime of failing to provide for the support of a person in the other state.

(b) The provisions for extradition of criminals consistent with this chapter shall apply to any such demand although the person whose surrender is demanded was not in the demanding state at the time of the commission of the crime and although he had not fled therefrom. Neither the demand, the oath nor any proceedings for extradition under this section need state or show that the person whose surrender is demanded has fled from justice, or at the time of the commission of the crime was in the demanding or other state.

Sec. 25.25.050. RELIEF FROM EXTRADITION. Any obligor contemplated by sec. 40 of this chapter, who submits to the jurisdiction of the court of this or another state and complies with the court's order of support, is relieved of extradition for desertion or nonsupport entered in the courts of this state during the period of such compliance.

Sec. 25.25.060. CHOICE OF LAW Duties of support applicable under this law are those imposed or impossible under the laws of a state where the obligor was present during the period for which support is sought. The obligor is presumed to have been present in the responding state during the period for which support is sought until otherwise shown.

Sec. 25.25.070 FURNISHING SUPPORT B. STATE OR POLITICAL SUB-DIVISION When the state or a political subdivision of the state has furnished support to an obligee, it has the same right to invoke the provisions of this chapter as the obligee to whom the support was furnished for the purpose of securing reimbursement of expenditures so made and of obtaining continuing support.

Sec. 25.25.080 JURISDICTION AND ENFORCEMENT (-) Jurisdiction for all proceedings under this chapter is in the superior court.

(b) All duties of support, including the duty to pay arrears, are enforceable by a proceeding under this chapter, including a proceeding for civil contempt. The defense that the parties are immune to suit because of their relationship as husband and wife or parent and child is not available to the obligor.

Sec. 25.25.090. COMPLAINT FOR SUPPORT The complaint shall be verified and shall state the name and, so far as known to the plaintiff, the addresses and circumstances of the defendant, his dependents for whom support is sought, and all other pertinent information. The plaintiff may include in or attach to the complaint any information which may help in locating or identifying the defendant including, but without limitation by enumeration, a photograph of the defendant, a description of any distinguishing marks of his person, other names and aliases by which he has been or is known, the name of his employer, his fingerprints, or Social Security number.

Sec. 25.25.100. OFFICIALS TO REPRESENT PLAINTIFF The child support enforcement agency shall represent the plaintiff in a proceeding under this chapter.

Sec. 25.25.110 COMPLAINT FOR A MINOR A complaint on behalf of a minor obligee may be brought by a person having legal custody of the minor without appointment as guardian ad litem.

Sec. 25.25.120 COURT DUTY WHEN ALASKA INITIATING STATE If the court of this state, acting as an initiating state, finds that the complaint sets out facts from which it may be determined that the defendant owes a duty of support and that a court of the responding state may obtain jurisdiction of the defendant or his property, it shall so certify and shall cause three copies of (1) the complaint, (2) its certificate, and (3) this chapter, to be transmitted to the court in the responding state. If the name and address of such court is unknown and the responding state has an information agency comparable to that established in the initiating state, it shall cause the copies to be transmitted to the state information agency or other proper official of the responding state, with a request that it forward them to the proper court, and that the court of the responding state acknowledge their receipt to the court of the initiating state.

Sec. 25.25.130 COSTS AND FEES The supreme court may provide by rule that a court of this state, when the state is acting as an initiating state, may not require payment of either a filing fee or other costs from the obligee but may request the court of the responding state to collect fees and costs from the obligor. The supreme court may also provide by rule that a court of this state, when the state is acting as a responding state, may not require payment of a filing fee or other costs from the obligee, but may direct that all fees and costs requested by the court in the initiating state and those incurred in this state when acting as a responding state (including fees for filing of pleadings, service of process, seizure of property, stenographic or duplication service, or other service supplied to the obligee) be paid in whole or in part by the obligor. These costs or fees do not have priority over amounts due to the obligee.

Sec. 25.25.140 JURISDICTION BY ARREST When the court of this state, acting either as an initiating or responding state, has reason to believe that the defendant may flee the jurisdiction, it may (1) as an initiating state, request in its certificate that the court of the

responding state obtain the body of the defendant by appropriate process if that is permissible under the law of the responding state; or (2) as a responding state, obtain the body of the defendant by appropriate process. If the court of this state, acting as a responding state, obtains the body of the defendant, it may then release him upon his own recognizance or upon his giving a bond in an amount set by the court to assure his appearance at the hearing.

Sec. 25.25.150 STATE INFORMATION AND LOCATOR AGENCY The child support enforcement agency is designated as the state information and locator agency for all matters concerning the enforcement of support obligations under AS 47.23 and under this chapter, and it is its duty to:

(1) compile a list of the courts and their addresses in this state having jurisdiction under this chapter and the appropriate agency offices and their addresses and transmit it to the state information agency of every other state which has adopted this or a substantially similar statute;

(2) maintain a register of such lists received from other states;

(3) locate obligors by utilizing all sources of information and records available in the state, and in other states as appropriate; these sources include telephone directories, real property records, personal property records, vital statistics records, police records, records of appropriate federal agencies, records of employers who are willing to cooperate, and official records of the state including records of the state Departments of Public Safety, Health and Social Services, Revenue, and Labor; if state agencies or departments have information or records concerning the obligor which are made confidential by state statute, and they are not prohibited from doing so by federal statute or regulation, those agencies or departments shall cooperate with the child support enforcement agency at its request by supplying at least (A) the last known address of the obligor and (B) the name and address of the last known employer of the obligor, if that information is in their possession; this information shall be kept confidential by the child support enforcement agency and may be used by the agency only for purposes of child support enforcement.

Sec. 25.25.160 AGENCY DUTY WHEN ALASKA RESPONDING STATE When the child support enforcement agency of this state, acting as a responding state, receives from the court or child support enforcement agency of an initiating state the copies mentioned in sec. 120 of this chapter, it shall (1) attempt to locate the obligor, (2) present the cause to the court to docket and to set a time and place for hearing, if the obligor does not agree to entry of a voluntary order, and (3) take such action as is necessary in accordance with the laws of this state to obtain jurisdiction.

Sec. 25.25.170. FURTHER DUTY OF RESPONDING STATE If the obligor or his property is not found in this state and the child support enforcement agency discovers that the obligor or his property may be found in another state, it shall forward the documents received from the initiating state to the state information agency in the state in which the obligor is believed to be located. The agency shall inform the initiating state of its action immediately.

Sec. 25.25.171 HEARING AND CONTINUANCES If the obligee is not present at a hearing on the merits of the complaint and the obligor denies owing the duty of support alleged in the petition or offers evidence constituting a defense, the court, upon request of either party, shall continue the hearing to permit evidence relative to the duty to be adduced by either party by deposition or by appearing in person before the court. The court may designate the judge of the initiating court as a person before whom a deposition may be taken.

Sec. 25.25.173 RULES OF EVIDENCE In a hearing for the enforcement of this chapter, the court is governed by the rules of evidence applicable in a civil suit in superior court. If the action is based upon a support order issued by another court, a certified copy of the order shall be received as evidence of the duty of support, subject only to any defenses available to an obligor with respect to paternity or to a defendant in an action or a proceeding to enforce a foreign money judgment. Any such order may be modified by the courts of this state.

Sec. 25.25.175 PATERNITY If the obligor asserts as a defense that he is not the father of the child for whom support is sought and the court finds that the defense is not frivolous, then if both of the parties are present at the hearing, or the court finds that the presence of either or both of the parties is not necessary, the court may adjudicate the paternity issue. Otherwise, the court may continue the action until the paternity issue has been adjudicated. Nothing in this section is intended to diminish the standard of proof for establishing paternity.

Sec. 25.25.180 ORDER OF SUPPORT If the court of the responding state finds a duty of support, it may order the defendant to furnish support or reimbursement therefor and subject the property of the defendant to the order.

Sec. 25.25.190 TRANSMITTING ORDERS TO INITIATING STATE The court of this state, when acting as a responding state, shall cause to be transmitted to the court of the initiating state a copy of all orders of support or orders for reimbursement therefor.

Sec. 25.25.200 ADDITIONAL POWERS OF COURT (a) The court of this state, when acting as the responding state, has the power to subject the defendant to such terms and conditions as the court may consider proper to assure compliance with its orders and in particular to

(1) require the defendant to furnish recognizance in the form of a cash deposit or bond of the character and in the amount which the court may consider proper to assure payment of the amount required to be paid by the defendant;

(2) require the defendant to make payments at specified intervals to the child support enforcement agency and to report personally to the agency at such times as may be considered necessary;

(3) punish the defendant who violates an order of the court to the same extent as is provided by law for contempt of court in any other suit or proceeding cognizable by the court.

(b) Payment may be made by personal check if that method of payment had been previously made regularly to the clerk of the court or obligor, or if certified check or postal money orders are not readily available.

Sec. 25.25.210 ADDITIONAL AGENCY DUTIES WHEN ALASKA RESPONDING STATE The child support enforcement agency of this state, when acting as a responding state has the following duties:

(1) upon the receipt of a payment made by the defendant under an order of the court or otherwise, to transmit the payment immediately to the court or child support enforcement agency of the initiating state, and

(2) upon request, to furnish to the court or child support enforcement agency of the initiating state a certified statement of all payments made by the defendant.

Sec. 25.25.220 ADDITIONAL AGENCY DUTY WHEN ALASKA INITIATING STATE The child support enforcement agency of this state, when acting as an initiating state, has the duty to receive and disburse in accordance with law or regulation all payments made by the defendant or transmitted by the court or child support enforcement agency of the responding state.

Sec. 25.25.230. EVIDENCE OF HUSBAND AND WIFE Laws attaching a privilege against the disclosure of communications between husband and wife are inapplicable to proceedings under this chapter. Husband and wife are competent witnesses and may be compelled to testify to a relevant matter, including marriage and parentage.

Sec. 25.25.240 APPLICATION OF PAYMENTS An order of support issued by a court of this state, when acting as a responding state, does not supersede a previous order of support issued in a divorce or separate maintenance action, but the amounts for a particular period paid under either order shall be credited against amounts accruing or accrued for the same period under both.

Sec. 25.25.250 EFFECT OF PARTICIPATION IN PROCEEDING Participation in a proceeding under this chapter does not confer upon any court jurisdiction of any of the parties thereto in any other proceeding.

Sec. 25.25.252 PROCEEDINGS NOT TO BE STAYED Except as provided in sec. 258(c) of this chapter, a court of this state, when the state is a responding state, may not stay the proceeding or refuse a hearing under this chapter because of any pending or prior action or proceeding for divorce, separation, annulment, dissolution, habeas corpus, adoption, or custody in this or any other state. The court shall hold a hearing and may issue a support order pendente lite. In the interest of a speedy resolution of the support issue, it may require the obligor to post a bond for the prompt prosecution of the pending proceeding. If the other action or proceeding is concluded before the hearing in the instant proceeding and the judgment in the other proceeding provides for the support demanded in the complaint being heard, the court must conform

the support order to the amount allowed in the other action or proceeding. After the court has conformed its support order to the amount in the other action, it may not stay enforcement of its support order because of the retention of jurisdiction for enforcement purposes by the court in the other action or proceeding.

Sec. 25.25.254. REGISTRATION OF FOREIGN SUPPORT ORDERS (a) If the duty of support is based on a support order of a court of competent jurisdiction in another state, the obligee may register that foreign support order in the superior court in the manner, with the effect, and for the purposes provided in secs. 254-258 of this chapter.

(b) The clerk of the court shall maintain a registry of foreign support orders in which he shall file the foreign support orders registered with the court.

(c) An obligee seeking to register a foreign support order in the superior court shall transmit to the clerk of the court (1) three certified copies of the order with all modifications of it, (2) one copy of the reciprocal enforcement of support Act of the state in which the order was made, and (3) a statement, verified and signed by the obligee, showing the last known mailing address of the obligor, the amount of support remaining unpaid, a description and the location of any property of the obligor available upon execution, and a list of the states in which the order is registered. Upon receipt of these documents, the clerk of the court shall file them in the registry of foreign support orders. The filing constitutes registration under this section. If permitted by a rule of the supreme court under sec. 130 of the chapter, no filing fee or payment of other costs may be required of the obligee.

(d) Promptly upon registration, the clerk of the court shall send by certified or registered mail to the obligor at the address given a notice of the registration with a copy of the registered support order and the mailing address of the obligee. He shall also docket the case and notify the child support enforcement agency of his action. The agency shall proceed to enforce the order.

Sec. 25.25.256. AGENCY TO REPRESENT OBLIGEE Upon request of the obligee, the child support enforcement agency shall represent the obligee in proceedings to register a foreign support order in this state.

Sec 25.25.258 EFFECT OF REGISTRATION; ENFORCEMENT PROCEDURES. (a) Upon registration, the foreign support order shall be treated in the same manner as a support order issued by the superior court. It has the same effect and is subject to the same procedures, defenses, and proceedings for re-opening, vacating, or staying as a support order of this state and may be enforced and satisfied in like manner.

(b) the obligor has 30 days after the mailing of notice of the registration in which to petition the court to vacate the registration or for other relief.

(c) At a hearing to enforce the registered support order, the obligor may present only matters that would be available to him as defenses in an action to enforce a foreign money judgment. If he shows to the court that an appeal from the order is pending or will be taken or that a stay of execution has been granted, the court shall stay

enforcement of the order until the appeal is concluded, the time for appeal has expired, or the order is vacated or otherwise modified, upon satisfactory proof that the obligor has furnished security for payment of the support ordered as required by the state in which the support order was issued. If he shows to the court any relevant ground upon which enforcement of a support order of this state may be stayed, the court shall stay enforcement of the order for an appropriate period if the obligor furnishes the same security for payment of the support ordered that is required for a support order of this state.

Sec. 25.25.260. UNIFORMITY OF INTERPRETATION. This chapter shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

Sec. 25 25.270. SHORT TITLE This chapter may be cited as the Uniform Reciprocal Enforcement of Support Act.

Title 12, Chapter 62 CODE OF CRIMINAL PROCEDURES

AS 12.62.020 COLLECTION AND STORAGE

(b) No information collected under the provisions of any of the following titles of the Alaska Statutes, except for information related to criminal offenses under those titles, may be collected or stored in criminal justice information systems;

- (1) AS 02, except chs. 20, 30 and 35;
- (2) AS 03 - AS 04;
- (3) AS 05, except chs. 20, 25, 30 and 35;
- (4) AS 06 - AS 10;
- (5) AS 13 - AS 15;
- (6) AS 17;
- (7) AS 18, except AS 18.60.120 - 18.60.175 and ch. 65;
- (8) AS 19 - AS 24;
- (9) AS 25, except ch. 25;
- (10) AS 26 - AS 27;
- (11) AS 29 - AS 32;
- (12) AS 34 - AS 46; and
- (13) AS 47, except chs. 10 and 23.

AS 12.62.070 DISCLOSURE OF TAX RETURNS AND REPORTS

(6) "law enforcement agency" means a public agency which performs as one of its principal functions activities pertaining to law enforcement and includes the child support enforcement agency created by AS 47.23.

Title 43, Chapter 5 REVENUE AND TAXATION

Sec 43.05.230 (a) Except in connection with official investigations or proceedings of the department, whether judicial or administrative, involving taxes due under this title, except in connection with official investigations or proceedings of the child support enforcement agency, whether judicial or administrative, involving child support obligations imposed or imposable under AS 25 or AS 47, and except as otherwise provided in this section, it is unlawful for an officer, employee or agent of the state to divulge the amount of income or the particulars set out or disclosed in a report or return made under this title.

****PLEASE NOTE****

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IS UNSUITABLE FOR FILMING. PLEASE REFER TO THE ALASKA
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"CHILD SUPPORT ENFORCEMENT"

9/30/78

U.S. DEPT. OF H, E & W

**REVISED UNIFORM RECIPROCAL ENFORCEMENT
OF SUPPORT ACT (1968)**

Drafted by the

**NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS**

and by it

**APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES**

at its

**ANNUAL CONFERENCE
MEETING IN ITS SEVENTY-SEVENTH YEAR
AT PHILADELPHIA, PENNSYLVANIA
JULY 22—AUGUST 1 1968**

WITH PREFATORY NOTES AND COMMENTS

**APPROVED BY THE AMERICAN BAR ASSOCIATION AT ITS
MEETING AT PHILADELPHIA, PENNSYLVANIA
AUGUST 7, 1968**

*see page 3, line 8
see page 14, secs 39 & 40*

**REVISED UNIFORM RECIPROCAL
ENFORCEMENT OF SUPPORT ACT (1968)**

PREFATORY NOTE

The Committee which acted for the National Conference of Commissioners on Uniform State Laws in preparing the Revised Uniform Reciprocal Enforcement of Support Act was as follows:

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Copies of all Uniform and Model Acts and other printed matter
issued by the Conference may be obtained from

**NATIONAL CONFERENCE OF COMMISSIONERS ON
UNIFORM STATE LAWS
645 North Michigan Avenue
Chicago, Illinois 60611**

The above Act is the result of changes made in 1968 by the National Conference of Commissioners on Uniform State Laws in the Uniform Reciprocal Enforcement of Support Act (as amended in 1958). Five new sections have been added to the former Act (Sections 21, 23, 27, 34 and 38), substantial changes have been made in 12 others (Sections 2(m), 11(b), 12, 15, 16(2), 18, 20, 30, 38, 39 and 40) and lesser changes, to improve the style or clarify the meaning, have been made in others (Sections 2, 8, 9, 14, 24 and 33). For these reasons the Conference decided to add the word "Revised" to the title of the Act.

The original Act was first approved and recommended for enactment in 1950. That Act was amended in 1952 and again in 1958. By 1957 it (or a substantially similar act) had been passed in all States, the District of Columbia, the Commonwealth of Puerto Rico and most of the other areas subject to the jurisdiction of the United States such as the insular possessions.

The Act itself creates no duties of family support but leaves this to the legislatures of the several states. The Act is concerned solely with the enforcement of the already existing duties when the person to whom a duty is owed is in one state and the person owing the duty is in another state (or under the Act as it has been adopted in a few states is in a different county of the same state).

Over the years many thousands of cases have been brought under the Act and many millions of dollars have been recovered. As a result the duty of family support is placed where it belongs, on the shoulders of the one who, under state law, owes the duty. The state is thus relieved from keeping on its relief rolls those, often in destitute circumstances, to whom the duty is owed.

The amendments of 1968, like previous ones, are designed to plug loop holes and cure defects in the enforcement procedure. Machinery for enforcement in many states is efficient. In a few states it is less so. Sometimes local officials have not fulfilled their duties. The present Act seeks to create ways and means of filling this gap (Sections 12, 18 and 29). Improved machinery for finding the obligor has been written into the Act (Section 17). The new Act has guidelines for the conduct of the trial in the responding state (Sections 21 and 23), for

cases where paternity is in issue (Section 27) or where there has been interference with visitation rights (Section 23) or where it may be desirable to take an appeal (Section 34). The procedure for registering and enforcing out-of-state support orders has been simplified (Sections 39 and 40).

For purposes of reference the following is a concordance of the section numbers in the Acts of 1950, 1952, 1958 and the Revised Act of 1968.

Act of 1950	Act of 1952	Act of 1958	Act of 1968
10	10	11	11
	11	12	12
	12	13	13
11	13	14	14
	14	15	15
	15	16	16
	16	17	17
12	17	18	18
	18	19	19
		21	20
			21
18	25	22	22
19	20	23	23
13	20	24	24
14	21	25	25
15	22	26	26
			27
16	23	27	28
17	24	28	29
		29	30
	27	30	31
	28	31	32
		32	33
			34
		33	35
		34	36
		35	37
			38
		36	39
		38	40
21	31	41	41
22	32	42	42
20	20	39	43

REVISED UNIFORM RECIPROCAL ENFORCEMENT OF SUPPORT ACT (1968)

PART 1—General Provisions

1 SECTION 1. [Purposes.] The purposes of this Act are to improve
2 and extend by reciprocal legislation the enforcement of duties of
3 support.

1 SECTION 2. [Definitions.]

2 (a) "Court" means the [here insert name] court of this State
3 and when the context requires means the court of any other state
4 as defined in a substantially similar reciprocal law.

5 (b) "Duty of support" means a duty of support whether im-
6 posed or imposable by law or by order, decree, or judgment of
7 any court, whether interlocutory or final or whether incidental
8 to an action for divorce, separation, separate maintenance, or
9 otherwise and includes the duty to pay arrearages of support past
10 due and unpaid.

11 (c) "Governor" includes any person performing the functions
12 of Governor or the executive authority of any state covered by
13 this Act.

14 (d) "Initiating state" means a state in which a proceeding
15 pursuant to this or a substantially similar reciprocal law is com-
16 menced. "Initiating court" means the court in which a proceeding
17 is commenced.

18 (e) "Law" includes both common and statutory law.

19 (f) "Obligee" means a person including a state or political sub-
20 division to whom a duty of support is owed or a person including
21 a state or political subdivision that has commenced a proceeding
22 for enforcement of an alleged duty of support or for registration
23 of a support order. It is immaterial if the person to whom a duty
24 of support is owed is a recipient of public assistance.

25 (g) "Obligor" means any person owing a duty of support or
26 against whom a proceeding for the enforcement of a duty of sup-
27 port or registration of a support order is commenced.

28 (h) "Prosecuting attorney" means the public official in the
29 appropriate place who has the duty to enforce criminal laws re-
30 lating to the failure to provide for the support of any person.

31 (i) "Register" means to [record] [file] in the Registry of
32 Foreign Support Orders.

33 (j) "Registering court" means any court of this State in which
34 a support order of a rendering state is registered.

35 (k) "Rendering state" means a state in which the court has
36 issued a support order for which registration is sought or granted
37 in the court of another state.

38 (l) "Responding state" means a state in which any responsive
39 proceeding pursuant to the proceeding in the initiating state is
40 commenced. "Responding court" means the court in which the
41 responsive proceeding is commenced.

42 (m) "State" includes a state, territory, or possession of the
43 United States, the District of Columbia, the Commonwealth of
44 Puerto Rico, and any foreign jurisdiction in which this or a sub-
45 stantially similar reciprocal law is in effect.

46 (n) "Support order" means any judgment, decree, or order of
47 support in favor of an obligee whether temporary or final, or sub-
48 ject to modification, revocation, or remission, regardless of the
49 kind of action or proceeding in which it is entered.

1 SECTION 3. [*Remedies Additional to Those Now Existing.*] The
2 remedies herein provided are in addition to and not in substitution
3 for any other remedies.

1 SECTION 4. [*Extent of Duties of Support.*] Duties of support
2 arising under the law of this State, when applicable under section
3 7, bind the obligor present in this State regardless of the presence
4 or residence of the obligee.

PART II—Criminal Enforcement

1 SECTION 5. [*Interstate Rendition.*] The Governor of this State
2 may

3 (1) demand of the Governor of another state the surrender of a
4 person found in that state who is charged criminally in this State
5 with failing to provide for the support of any person; or

6 (2) surrender on demand by the Governor of another state a
7 person found in this State who is charged criminally in that state
8 with failing to provide for the support of any person. Provisions
9 for extradition of criminals not inconsistent with this Act apply
10 to the demand even if the person whose surrender is demanded
11 was not in the demanding state at the time of the commission of
12 the crime and has not fled therefrom. The demand, the oath, and
13 any proceedings for extradition pursuant to this section need not
14 state or show that the person whose surrender is demanded has fled

15 from justice or at the time of the commission of the crime was in
16 the demanding state.

1 SECTION 6. [*Conditions of Interstate Rendition.*]

2 (a) Before making the demand upon the Governor of another
3 state for the surrender of a person charged criminally in this State
4 with failing to provide for the support of a person, the Governor
5 of this State may require any prosecuting attorney of this State
6 to satisfy him that at least [60] days prior thereto the obligee
7 initiated proceedings for support under this Act or that any
8 proceeding would be of no avail.

9 (b) If, under a substantially similar Act, the Governor of
10 another state makes a demand upon the Governor of this State
11 for the surrender of a person charged criminally in that state
12 with failure to provide for the support of a person, the Governor
13 may require any prosecuting attorney to investigate the demand
14 and to report to him whether proceedings for support have been
15 initiated or would be effective. If it appears to the Governor that
16 a proceeding would be effective but has not been initiated he may
17 delay honoring the demand for a reasonable time to permit the
18 initiation of a proceeding.

19 (c) If proceedings have been initiated and the person demanded
20 has prevailed therein the Governor may decline to honor the de-
21 mand. If the obligee prevailed and the person demanded is sub-
22 ject to a support order, the Governor may decline to honor the
23 demand if the person demanded is complying with the support
24 order.

PART III—Civil Enforcement

1 SECTION 7. [*Choice of Law.*] Duties of support applicable
2 under this Act are those imposed under the laws of any state
3 where the obligor was present for the period during which support
4 is sought. The obligor is presumed to have been present in the
5 responding state during the period for which support is sought
6 until otherwise shown.

1 SECTION 8. [*Remedies of State or Political Subdivision Fur-*
2 *nishing Support.*] If a state or a political subdivision furnishes
3 support to an individual obligee it has the same right to initiate
4 a proceeding under this Act as the individual obligee for the pur-
5 pose of securing reimbursement for support furnished and of ob-
6 taining continuing support.

1 SECTION 9. [*How Duties of Support Enforced.*] All duties of
2 support, including the duty to pay arrearages, are enforceable by

3 a proceeding under this Act including a proceeding for civil con-
4 tempt. The defense that the parties are immune to suit because
5 of their relationship as husband and wife or parent and child is
6 not available to the obligor.

1 SECTION 10. [*Jurisdiction.*] Jurisdiction of any proceeding
2 under this Act is vested in the [here insert title of court desired].

1 SECTION 11. [*Contents and Filing of [Petition] for Support;*
2 *Venue.*]

3 (a) The [petition] shall be verified and shall state the name
4 and, so far as known to the obligee, the address and circumstances
5 of the obligor and the persons for whom support is sought, and all
6 other pertinent information. The obligee may include in or attach
7 to the [petition] any information which may help in locating or
8 identifying the obligor including a photograph of the obligor, a
9 description of any distinguishing marks on his person, other names
10 and aliases by which he has been or is known, the name of his
11 employer, his fingerprints, and his Social Security number.

12 (b) The [petition] may be filed in the appropriate court of any
13 state in which the obligee resides. The court shall not decline or
14 refuse to accept and forward the [petition] on the ground that it
15 should be filed with some other court of this or any other state
16 where there is pending another action for divorce, separation,
17 annulment, dissolution, habeas corpus, adoption, or custody be-
18 tween the same parties or where another court has already issued
19 a support order in some other proceeding and has retained juris-
20 diction for its enforcement.

COMMENT

Wherever in this Act the word "petition" appears the word may be changed
to "complaint" or "declaration" or the like and the word "petitioner" may be
changed to "complainant" to conform to local usage.

1 SECTION 12. [*Officials to Represent Obligees.*] If this State is
2 acting as an initiating state the prosecuting attorney upon the
3 request of the court [a state department of welfare, a county
4 commissioner, an overseer of the poor, or other local welfare
5 officer] shall represent the obligee in any proceeding under this
6 Act. [If the prosecuting attorney neglects or refuses to represent
7 the obligee the [Attorney General] may order him to comply with
8 the request of the court or may undertake the representation.]
9 [If the prosecuting attorney neglects or refuses to represent the
10 obligee, the [Attorney General] [State Director of Public Wel-
11 fare] may undertake the representation.]

COMMENT

The first bracketed sentence is to be used in states where the Attorney General
has supervisory powers over the prosecuting attorney; whereas, the second
bracketed sentence is to be used if he does not have such powers.

1 SECTION 13. [*Petition for a Minor.*] A [petition] on behalf of a
2 minor obligee may be executed and filed by a person having legal
3 custody of the minor without appointment as guardian ad litem.

1 SECTION 14. [*Duty of Initiating Court.*] If the initiating court
2 finds that the [petition] sets forth facts from which it may be
3 determined that the obligor owes a duty of support and that a
4 court of the responding state may obtain jurisdiction of the obligor
5 or his property it shall so certify and cause 3 copies of the [peti-
6 tion] and its certificate and one copy of this Act to be sent to the
7 responding court. Certification shall be in accordance with the
8 requirements of the initiating state. If the name and address of
9 the responding court is unknown and the responding state has an
10 information agency comparable to that established in the initiating
11 state it shall cause the copies to be sent to the state information
12 agency or other proper official of the responding state, with a
13 request that the agency or official forward them to the proper
14 court and that the court of the responding state acknowledge their
15 receipt to the initiating court.

1 SECTION 15. [*Costs and Fees.*] An initiating court shall not
2 require payment of either a filing fee or other costs from the
3 obligee but may request the responding court to collect fees and
4 costs from the obligor. A responding court shall not require pay-
5 ment of a filing fee or other costs from the obligee but it may
6 direct that all fees and costs requested by the initiating court and
7 incurred in this State when acting as a responding state, including
8 fees for filing of pleadings, service of process, seizure of property,
9 stenographic or duplication service, or other service supplied to
10 the obligor, be paid in whole or in part by the obligor or by the
11 [state or political subdivision thereof]. These costs or fees do
12 not have priority over amounts due to the obligee.

1 SECTION 16. [*Jurisdiction by Arrest.*] If the court of this State
2 believes that the obligor may flee it may

3 (1) as an initiating court, request in its certificate that the
4 responding court obtain the body of the obligor by appropriate
5 process; or

6 (2) as a responding court, obtain the body of the obligor by

7 appropriate process. Thereupon it may release him upon his own
8 recognizance or upon his giving a bond in an amount set by the
9 court to assure his appearance at the hearing.

1 SECTION 17. *[State Information Agency.]*

2 (a) The [Attorney General's Office, State Attorney's Office,
3 Welfare Department or other Information Agency] is designated
4 as the state information agency under this Act, it shall

5 (1) compile a list of the courts and their addresses in this
6 State having jurisdiction under this Act and transmit it to the
7 state information agency of every other state which has adopted
8 this or a substantially similar Act. Upon the adjournment of
9 each session of the [legislature] the agency shall distribute
10 copies of any amendments to the Act and a statement of their
11 effective date to all other state information agencies;

12 (2) maintain a register of lists of courts received from other
13 states and transmit copies thereof promptly to every court in
14 this state having jurisdiction under this Act; and

15 (3) forward to the court in this State which has jurisdiction
16 over the obligor or his property petitions, certificates, and copies
17 of the Act it receives from courts or information agencies of
18 other states.

19 (b) If the state information agency does not know the location
20 of the obligor or his property in the state and no state location
21 service is available it shall use all means at its disposal to obtain
22 this information, including the examination of official records in
23 the state and other sources such as telephone directories, real
24 property records, vital statistics records, police records, requests
25 for the name and address from employers who are able or willing
26 to cooperate, records of motor vehicle license offices, requests made
27 to the tax offices both state and federal where such offices are able
28 to cooperate, and requests made to the Social Security Adminis-
29 tration as permitted by the Social Security Act as amended.

30 (c) After the deposit of 3 copies of the [petition] and certificate
31 and one copy of the Act of the initiating state with the clerk of
32 the appropriate court, if the state information agency knows or
33 believes that the prosecuting attorney is not prosecuting the case
34 diligently it shall inform the [Attorney General] [State Director
35 of Public Welfare] who may undertake the representation.

1 SECTION 18. *[Duty of the Court and Officials of This State as*
2 *Responding State.]*

3 (a) After the responding court receives copies of the [petition],
4 certificate, and Act from the initiating court the clerk of the

5 court shall docket the case and notify the prosecuting attorney of
6 his action.

7 (b) The prosecuting attorney shall prosecute the case diligently.
8 He shall take all action necessary in accordance with the laws of
9 this State to enable the court to obtain jurisdiction over the obligor
10 or his property and shall request the court [clerk of the court]
11 to set a time and place for a hearing and give notice thereof to
12 the obligor in accordance with law.

13 (c) [If the prosecuting attorney neglects or refuses to represent
14 the obligee the [Attorney General] may order him to comply with
15 the request of the court or may undertake the representation.] [If
16 the prosecuting attorney neglects or refuses to represent the obli-
17 gee, the [Attorney General] [State Director of Public Welfare]
18 may undertake the representation.]

COMMENT

The first bracketed sentence is to be used in states where the Attorney General
has supervisory powers over the prosecuting attorney; whereas, the second
bracketed sentence is to be used if he does not have such powers.

1 SECTION 19. *[Further Duties of Court and Officials in the Re-*
2 *sponding State.]*

3 (a) The prosecuting attorney on his own initiative shall use all
4 means at his disposal to locate the obligor or his property, and if
5 because of inaccuracies in the [petition] or otherwise the court
6 cannot obtain jurisdiction the prosecuting attorney shall inform
7 the court of what he has done and request the court to continue
8 the case pending receipt of more accurate information or an
9 amended [petition] from the initiating court.

10 (b) If the obligor or his property is not found in the [county],
11 and the prosecuting attorney discovers that the obligor or his
12 property may be found in another [county] of this State or in
13 another state he shall so inform the court. Thereupon the clerk
14 of the court shall forward the documents received from the court
15 in the initiating state to a court in the other [county] or to a
16 court in the other state or to the information agency or other
17 proper official of the other state with a request that the documents
18 be forwarded to the proper court. All powers and duties provided
19 by this Act apply to the recipient of the documents so forwarded.
20 If the clerk of a court of this State forwards documents to another
21 court he shall forthwith notify the initiating court.

22 (c) If the prosecuting attorney has no information as to the
23 location of the obligor or his property he shall so inform the
24 initiating court.

1 SECTION 20. [*Hearing and Continuance.*] If the obligee is not
2 present at the hearing and the obligor denies owing the duty of
3 support alleged in the petition or offers evidence constituting a
4 defense the court, upon request of either party, shall continue the
5 hearing to permit evidence relative to the duty to be adduced by
6 either party by deposition or by appearing in person before the
7 court. The court may designate the judge of the initiating court
8 as a person before whom a deposition may be taken.

1 SECTION 21. [*Immunity from Criminal Prosecution.*] If at the
2 hearing the obligor is called for examination as an adverse party
3 and he declines to answer upon the ground that his testimony may
4 tend to incriminate him, the court may require him to answer,
5 in which event he is immune from criminal prosecution with re-
6 spect to matters revealed by his testimony, except for perjury
7 committed in this testimony.

1 SECTION 22. [*Evidence of Husband and Wife.*] Laws attaching
2 a privilege against the disclosure of communications between hus-
3 band and wife are inapplicable to proceedings under this Act.
4 Husband and wife are competent witnesses [and may be com-
5 pelled] to testify to any relevant matter, including marriage and
6 parentage.

1 SECTION 23. [*Rules of Evidence.*] In any hearing for the civil
2 enforcement of this Act the court is governed by the rules of evi-
3 dence applicable in a civil court action in the _____ Court.
4 If the action is based on a support order issued by another court
5 a certified copy of the order shall be received as evidence of the
6 duty of support, subject only to any defenses available to an
7 obligor with respect to paternity (Section 27) or to a defendant
8 in an action or a proceeding to enforce a foreign money judgment.
9 The determination or enforcement of a duty of support owed to
10 one obligee is unaffected by any interference by another obligee
11 with rights of custody or visitation granted by a court.

1 SECTION 24. [*Order of Support.*] If the responding court finds
2 a duty of support it may order the obligor to furnish support or
3 reimbursement therefor and subject the property of the obligor to
4 the order. Support orders made pursuant to this Act shall require
5 that payments be made to the [clerk] [bureau] [probation de-
6 partment] of the court of the responding state. [The court and
7 prosecuting attorney of any [county] in which the obligor is
8 present or has property have the same powers and duties to en-

9 force the order as have those of the [county] in which it was
10 first issued. If enforcement is impossible or cannot be completed
11 in the [county] in which the order was issued, the prosecuting
12 attorney shall send a certified copy of the order to the prosecuting
13 attorney of any [county] in which it appears that proceedings to
14 enforce the order would be effective. The prosecuting attorney
15 to whom the certified copy of the order is forwarded shall pro-
16 ceed with enforcement and report the results of the proceedings
17 to the court first issuing the order.]

1 SECTION 25. [*Responding Court to Transmit Copies to*
2 *Initiating Court.*] The responding court shall cause a copy of all
3 support orders to be sent to the initiating court.

1 SECTION 26. [*Additional Powers of Responding Court.*] In
2 addition to the foregoing powers a responding court may subject
3 the obligor to any terms and conditions proper to assure compli-
4 ance with its orders and in particular to:

5 (1) require the obligor to furnish a cash deposit or a bond of
6 a character and amount to assure payment of any amount due;

7 (2) require the obligor to report personally and to make pay-
8 ments at specified intervals to the [clerk] [bureau] [probation
9 department] of the court; and

10 (3) punish under the power of contempt the obligor who
11 violates any order of the court.

1 SECTION 27. [*Paternity.*] If the obligor asserts as a defense that
2 he is not the father of the child for whom support is sought and it
3 appears to the court that the defense is not frivolous, and if both
4 of the parties are present at the hearing or the proof required in
5 the case indicates that the presence of either or both of the parties
6 is not necessary, the court may adjudicate the paternity issue.
7 Otherwise the court may adjourn the hearing until the paternity
8 issue has been adjudicated.

1 SECTION 28. [*Additional Duties of Responding Court.*] A re-
2 sponding court has the following duties which may be carried out
3 through the [clerk, [bureau] [probation department] of the
4 court:

5 (1) to transmit to the initiating court any payment made by
6 the obligor pursuant to any order of the court or otherwise; and

7 (2) to furnish to the initiating court upon request a certified
8 statement of all payments made by the obligor.

1 SECTION 29. [Additional Duty of Initiating Court.] An initiating
2 court shall receive and disburse forthwith all payments made
3 by the obligor or sent by the responding court. This duty may be
4 carried out through the [clerk] [bureau] [probation department]
5 of the court.

1 SECTION 30. [Proceedings Not to be Stayed.] A responding
2 court shall not stay the proceeding or refuse a hearing under this
3 Act because of any pending or prior action or proceeding for
4 divorce, separation, annulment, dissolution, habeas corpus, adop-
5 tion, or custody in this or any other state. The court shall hold a
6 hearing and may issue a support order pendente lite. In aid thereof
7 it may require the obligor to give a bond for the prompt prosecu-
8 tion of the pending proceeding. If the other action or proceeding
9 is concluded before the hearing in the instant proceeding and the
10 judgment therein provides for the support demanded in the [peti-
11 tion] being heard the court must conform its support order to the
12 amount allowed in the other action or proceeding. Thereafter the
13 court shall not stay enforcement of its support order because of the
14 retention of jurisdiction for enforcement purposes by the court in
15 the other action or proceeding.

1 SECTION 31. [Application of Payments.] A support order made
2 by a court of this State pursuant to this Act does not nullify and
3 is not nullified by a support order made by a court of this State
4 pursuant to any other law or by a support order made by a court
5 of any other state pursuant to a substantially similar act or any
6 other law, regardless of priority of issuance, unless otherwise speci-
7 fically provided by the court. Amounts paid for a particular period
8 pursuant to any support order made by the court of another state
9 shall be credited against the amounts accruing or accrued for the
10 same period under any support order made by the court of this
11 State.

1 [SECTION 32. [Effect of Participation in Proceedings.] Participa-
2 tion in any proceeding under this Act does not confer jurisdiction
3 upon any court over any of the parties thereto in any other
4 proceeding.]

1 [SECTION 33. [Intrastate Application.] This Act applies if both
2 the obligee and the obligor are in this State but in different [count-
3 ties]. If the court of the [county] in which the [petition] is filed
4 finds that the [petition] sets forth facts from which it may be
5 determined that the obligor owes a duty of support and finds that

6 a court of another [county] in this State may obtain jurisdiction
7 over the obligor or his property, the clerk of the court shall send
8 the [petition] and a certification of the findings to the court of the
9 [county] in which the obligor or his property is found. The clerk
10 of the court of the [county] receiving these documents shall notify
11 the prosecuting attorney of their receipt. The prosecuting attorney
12 and the court in the [county] to which the copies are forwarded
13 then shall have duties corresponding to those imposed upon them
14 when acting for this State as a responding state.]

1 SECTION 34. [Appeals.] If the [Attorney General] [State Di-
2 rector of Public Welfare] is of the opinion that a support order is
3 erroneous and presents a question of law warranting an appeal in
4 the public interest, he may

5 (a) perfect an appeal to the proper appellate court if the sup-
6 port order was issued by a court of this State, or
7 (b) if the support order was issued in another state, cause the
8 appeal to be taken in the other state. In either case expenses of
9 appeal may be paid on his order from funds appropriated for his
10 office.

PART IV-Registration of Foreign Support Orders

1 SECTION 35. [Additional Remedies.] If the duty of support is
2 based on a foreign support order, the obligee has the additional
3 remedies provided in the following sections.

COMMENT

The language of the last sentence is permissive and so does not preclude other
arrangements for the payment of the expenses of appeal. If it is thought desirable
to spell out particular methods of payment this may be done.

1 SECTION 36. [Registration.] The obligee may register the for-
2 eign support order in a court of this State in the manner, with the
3 effect, and for the purposes herein provided.

1 SECTION 37. [Registry of Foreign Support Orders.] The clerk
2 of the court shall maintain a Registry of Foreign Support Orders
3 in which he shall [file] foreign support orders.

1 SECTION 38. [Official to Represent Obligee.] If this State is
2 acting either as a rendering or a registering state the prosecuting
3 attorney upon the request of the court [a state department of
4 welfare, a county commissioner, an overseer of the poor, or other
5 local welfare official] shall represent the obligee in proceedings
6 under this Part.

7 [if the prosecuting attorney neglects or refuses to represent the
8 obligee, the [Attorney General] may order him to comply with the
9 request of the court or may undertake the representation.] [If the
10 prosecuting attorney neglects or refuses to represent the obligee,
11 the[Attorney General] [State Director of Public Welfare] may
12 undertake the representation.]

COMMENT

The first bracketed sentence is to be used in states where the Attorney General has supervisory powers over the prosecuting attorney; whereas, the second bracketed sentence is to be used if he does not have such powers.

1 SECTION 39. [Registration Procedure; Notice.]

2 (a) An obligee seeking to register a foreign support order in a
3 court of this State shall transmit to the clerk of the court (1)
4 three certified copies of the order with all modification thereof, (2)
5 one copy of the reciprocal enforcement of support act of the state
6 in which the order was made, and (3) a statement verified and
7 signed by the obligee, showing the post office address of the obligee,
8 the last known place of residence and post office address of the
9 obligor, the amount of support remaining unpaid, a description
10 and the location of any property of the obligor available upon
11 execution, and a list of the states in which the order is registered.
12 Upon receipt of these documents the clerk of the court, without
13 payment of a filing fee or other cost to the obligee, shall file them
14 in the Registry of Foreign Support Orders. The filing constitutes
15 registration under this Act.

16 (b) Promptly upon registration the clerk of the court shall send
17 by certified or registered mail to the obligor at the address given
18 a notice of the registration with a copy of the registered support
19 order and the post office address of the obligee. He shall also
20 docket the case and notify the prosecuting attorney of his action.
21 The prosecuting attorney shall proceed diligently to enforce the
22 order.

1 SECTION 40. [Effect of Registration; Enforcement Procedure.]

2 (a) Upon registration the registered foreign support order shall
3 be treated in the same manner as a support order issued by a
4 court of this State. It has the same effect and is subject to the
5 same procedures, defenses, and proceedings for reopening, vacat-
6 ing, or staying as a support order of this State and may be enforced
7 and satisfied in like manner.

8 (b) The obligor has [20] days after the mailing of notice of the
9 registration in which to petition the court to vacate the registra-

10 tion or for other relief. If he does not so petition the registered
11 support order is confirmed.

12 (c) At the hearing to enforce the registered support order the
13 obligor may present only matters that would be available to him
14 as defenses in an action to enforce a foreign money judgment. If
15 he shows to the court that an appeal from the order is pending or
16 will be taken or that a stay of execution has been granted the court
17 shall stay enforcement of the order until the appeal is concluded,
18 the time for appeal has expired, or the order is vacated, upon satis-
19 factory proof that the obligor has furnished security for payment
20 of the support ordered as required by the rendering state. If he
21 shows to the court any ground upon which enforcement of a sup-
22 port order of this State may be stayed the court shall stay enforce-
23 ment of the order for an appropriate period if the obligor furnishes
24 the same security for payment of the support ordered that is re-
25 quired for a support order of this State.

1 SECTION 41. [Uniformity of Interpretation.] This Act shall be
2 so construed as to effectuate its general purpose to make uniform
3 the law of those states which enact it.

1 SECTION 42. [Short Title.] This Act may be cited as the Revised
2 Uniform Reciprocal Enforcement of Support Act (1968).

1 SECTION 43. [Severability.] If any provision of this Act or the
2 application thereof to any person or circumstance is held invalid,
3 the invalidity does not affect other provisions or applications of
4 the Act which can be given without the invalid provision or appli-
5 cation, and to this end the provisions of this Act are severable.

UNIFORM CHILD CUSTODY JURISDICTION ACT

Drafted by the

**NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS**

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT IN ALL THE STATES

at its

**ANNUAL CONFERENCE
MEETING IN ITS SEVENTY-SEVENTH YEAR
AT PHILADELPHIA, PENNSYLVANIA
JULY 22-AUGUST 1, 1968**

**WITH
PREFATORY NOTE AND COMMENTS**

**APPROVED BY THE AMERICAN BAR ASSOCIATION AT ITS
MEETING AT PHILADELPHIA, PENNSYLVANIA
AUGUST 7, 1968**

UNIFORM CHILD CUSTODY JURISDICTION ACT

PREFATORY NOTE

There is growing public concern over the fact that thousands of children are shifted from state to state and from one family to another every year while their parents or other persons battle over their custody in the courts of several states. Children of separated parents may live with their mother, for example, but one day the father snatches them and brings them to another state where he petitions a court to award him custody while the mother starts custody proceedings in her state; or in the case of illness of the mother the children may be cared for by grandparents in a third state, and all three parties may fight over the right to keep the children in several states. These and many similar situations constantly arise in our mobile society where family members often are scattered all over the United States and at times over other countries. A young child may have been moved to another state repeatedly before the case goes to court. When a decree has been rendered awarding custody to one of the parties, this is by no means the end of the child's migrations. It is well known that those who lose a court battle over custody are often unwilling to accept the judgment of the court. They will remove the child in an unguarded moment or fail to return him after a visit and will seek their luck in the court of a distant state where they hope to find—and often do find—a more sympathetic ear for their plea for custody. The party deprived of the child may then resort to similar tactics to recover the child and this "game" may continue for years, with the child thrown back and forth from state to state, never coming to rest in one single home and in one community.

The harm done to children by these experiences can hardly be overestimated. It does not require an expert in the behavioral sciences to know that a child, especially during his early years and the years of growth, needs security and stability of environment and a continuity of affection. A child who has never been given the chance to develop a sense of belonging and whose personal attachments when beginning to form are cruelly disrupted, may well be crippled for life, to his own lasting detriment and the detriment of society.

This unfortunate state of affairs has been aided and facilitated rather than discouraged by the law. There is no statutory law in this area and the judicial law is so unsettled that it seems to offer nothing but a "quicksand foundation" to stand on. See Leflar, *American Conflicts*

The Committee which acted for the National Conference of Commissioners on Uniform State Laws in preparing the Uniform Child Custody Jurisdiction Act was as follows:

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Law 585 (1968). See also Clark, Domestic Relations 320 (1968). There is no certainty as to which state has jurisdiction when persons seeking custody of a child approach the courts of several states simultaneously or successively. There is no certainty as to whether a custody decree rendered in one state is entitled to recognition and enforcement in another; nor as to when one state may alter a custody decree of a sister state.

The judicial trend has been toward permitting custody claimants to sue in the courts of almost any state, no matter how fleeting the contact of the child and family was with the particular state, with little regard to any conflict of law rules. See Leflar, American Conflicts Law 585-6 (1968) and Leflar, 1967 Annual Survey of American Law, Conflict of Laws 20 (1968). Also, since the United States Supreme Court has never settled the question whether the full faith and credit clause of the Constitution applies to custody decrees, many states have felt free to modify custody decrees of sister states almost at random although the theory usually is that there has been a change of circumstances requiring a custody award to a different person. Compare *People ex rel. Halvey v. Halvey*, 330 U.S. 610, 67 S. Ct. 903, 91 L. Ed. 1133 (1947); and see Comment, Ford v. Ford: Full Faith and Credit To Child Custody Decrees? 73 Yale L. J. 134 (1963). Generally speaking, there has been a tendency to over-emphasize the need for fluidity and modifiability of custody decrees at the expense of the equal (if not greater) need, from the standpoint of the child, for stability of custody decisions once made. Compare Clark, Domestic Relations 326 (1968).

Under this state of the law the courts of the various states have acted in isolation and at times in competition with each other; often with disastrous consequences. A court of one state may have awarded custody to the mother while another state decreed simultaneously that the child must go to the father. See *Stout v. Pate*, 209 Ga. 786, 75 S.E. 2d 718 (1953) and *Stout v. Pate*, 120 Cal. App. 2d 699, 201 P. 2d 788 (1953), cert. denied in both cases 347 U.S. 968, 74 S. Ct. 744, 776, 98 L. Ed. 1109, 1110 (1954); *Monis v. Monis*, 142 Cal. App. 2d 527, 298 P. 2d 710 (1956); and *Sharpe v. Sharpe*, 77 Ill. App. 2d 295, 222 N.E. 2d 310 (1966). In situations like this the litigants do not know which court to obey. They may face punishment for contempt of court and perhaps criminal charges for child stealing in one state when complying with the decree of the other. Also, a custody decree made in one state one year is often overturned in another jurisdiction the next year or some years later and the child is handed over to another family, to be repeated as long as the feud continues. See *Com. ex rel. Thomas v. Gillard*, 203 Pa. Super. 95, 108 A.2d 377 (1964); *In Re Guardianship of Rodgers*, 100 Ariz. 269, 413 P. 2d 774 (1966); *Berlin v. Berlin*, 239 Md. 62, 210 A. 2d 387 (1965); *Berlin v. Berlin*, 21 N.Y. 2d 371, 235 N.E.

2d 109 (1967), cert. denied 37 L.W. 3123 (1968); and *Batchelor v. Fulcher*, 415 S.W. 2d 828 (Ky. 1967).

In this confused legal situation the person who has possession of the child has an enormous tactical advantage. Physical presence of the child opens the doors of many courts to the petitions and often assures him of a decision in his favor. It is not surprising then that custody claimants tend to take the law into their own hands, that they resort to self-help in the form of child stealing, kidnapping, or various other schemes to gain possession of the child. The irony is that persons who are good, law-abiding citizens are often driven into these tactics against their inclinations; and that lawyers who are reluctant to advise the use of maneuver of doubtful legality may place their clients at a decided disadvantage.

To remedy this intolerable state of affairs where self-help and the rule of "seize-and-run" prevail rather than the orderly processes of the law, uniform legislation has been urged in recent years to bring about a fair measure of interstate stability in custody awards. See Ratner, Child Custody in a Federal System, 62 Mich. L. Rev. 795 (1964); 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); and Ehrenzweig, The Interstate Child and Uniform Legislation: A Plea for Extra-Litigious Proceedings, 64 Mich. L. Rev. 1 (1965). In drafting this Act, the National Conference of Commissioners has drawn heavily on the work of these authors and has consulted with other leading authorities in the field. The American Bar Association has taken an active part in furthering the project.

The Act is designed to bring some semblance of order into the existing chaos. It limits custody jurisdiction to the state where the child has his home or where there are other strong contacts with the child and his family. See Section 3. It provides for the recognition and enforcement of out-of-state custody decrees in many instances. See Sections 13 and 15. Jurisdiction to modify decrees of other states is limited by giving a jurisdictional preference to the prior court under certain conditions. See Section 14. Access to a court may be denied to petitioners who have engaged in child snatching or similar practices. See Section 8. Also, the Act opens up direct lines of communication between courts of different states to prevent jurisdictional conflict and bring about interstate judicial assistance in custody cases.

The Act stresses the importance of the personal appearance before the court of non-residents who claim custody, and of the child himself, and provides for the payment of travel expenses for this purpose. See Section 11. Further provisions insure that the judge receives necessary out-of-state information with the assistance of courts in other states. See Sections 17 through 22.

Underlying the entire Act is the idea that to avoid the jurisdictional conflicts and confusions which have done serious harm to innumerable children, a court in one state must assume major responsibility to determine who is to have custody of a particular child; that this court must reach out for the help of courts in other states in order to arrive at a fully informed judgment which transcends state lines and considers all claimants, residents and nonresidents, on an equal basis and from the standpoint of the welfare of the child. If this can be achieved, it will be less important which court exercises jurisdiction but that courts of the several states involved act in partnership to bring about the best possible solution for a child's future.

The Act is not a reciprocal law. It can be put into full operation by each individual state regardless of enactment of other states. But its full benefits will not be reaped until a large number of states have enacted it, and until the courts, perhaps aided by regional or national conferences, have come to develop a new, truly "inter-state" approach to child custody litigation. The general policies of the Act and some of its specific provisions apply to international custody cases.

UNIFORM CHILD CUSTODY JURISDICTION ACT

1 SECTION 1. [Purposes of Act; Construction of Provisions.]

2 (a) The general purposes of this Act are to:

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

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

10 (3) assure that litigation concerning the custody of a child
11 take place ordinarily in the state with which the child and his
12 family have the closest connection and where significant evidence
13 concerning his care, protection, training, and personal relations-
14 ships is most readily available, and that courts of this state
15 decline the exercise of jurisdiction when the child and his family
16 have a closer connection with another state;

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

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

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

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

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

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

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

COMMENT

Because this uniform law breaks new ground not previously covered by legisla-
tion, its purposes are stated in some detail. Each section must be read and applied
with these purposes in mind.

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

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

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

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

13 (4) "decree" or "custody decree" means a custody determina-
14 tion contained in a judicial decree or order made in a custody
15 proceeding, and includes an initial decree and a modification
decree;

16 (5) "home state" means the state in which the child imme-
17 diately preceding the time involved lived with his parents, a
18 parent, or a person acting as parent, for at least 6 consecutive
19 months, and in the case of a child less than 6 months old the state
20 in which the child lived from birth with any of the persons men-
21 tioned. Periods of temporary absence of any of the named
22 persons are counted as part of the 6-month or other period;

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

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

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

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

34 (10) "state" means any state, territory, or possession of the
35 United States, the Commonwealth of Puerto Rico, and the Dis-
36 trict of Columbia.

COMMENT

Subsection (3) indicates that "custody proceeding" is to be understood in a broad sense. The term covers habeas corpus actions, guardianship petitions, and other proceedings available under general state law to determine custody. See Clark, *Domestic Relations* 570-582 (1968).

Other definitions are explained, if necessary, in the comments to the sections which use the terms defined.

1 SECTION 3. [Jurisdiction.]

2 (a) A court of this State which is competent to decide child
3 custody matters has jurisdiction to make a child custody deter-
4 mination by initial or modification decree if:

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

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

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

23 (4) (i) it appears that no other state would have jurisdiction
24 under prerequisites substantially in accordance with paragraphs
25 (1), (2), or (3), or another state has declined to exercise juris-
26 diction on the ground that this State is the more appropriate
27 forum to determine the custody of the child, and (ii) it is in the
28 best interest of the child that this court assume jurisdiction.

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

33 (c) Physical presence of the child, while desirable, is not a pre-
34 requisite for jurisdiction to determine his custody.

COMMENT

Paragraphs (1) and (2) of subsection (a) establish the two major bases for jurisdiction. In the first place, a court in the child's home state has jurisdiction, and secondly, if there is no home state or the child and his family have equal or stronger ties with another state, a court in that state has jurisdiction. If this alternative test produces concurrent jurisdiction in more than one state, the mechanisms provided in sections 6 and 7 are used to assure that only one state makes the custody decision.

"Home state" is defined in section 2(5). A 6-month period has been selected in order to have a definite and certain test which is at the same time based on a

reasonable assumption of fact. See Ratner, *Child Custody in a Federal System*, 62 Mich. L. Rev. 795, 818 (1964) who explains:

"Most American children are integrated into an American community after living there six months; consequently this period of residence would seem to provide a reasonable criterion for identifying the established home."

Subparagraph (ii) of paragraph (1) extends the home state rule for an additional six-month period in order to permit suit in the home state after the child's departure. The main objective is to protect a parent who has been left by his spouse taking the child along. The provision makes clear that the stay-at-home parent, if he acts promptly, may start proceedings in his own state if he desires, without the necessity of attempting to base jurisdiction on paragraph (2). This changes the law in those states which required presence of the child as a condition for jurisdiction and consequently forced the person left behind to follow the departed person to another state, perhaps to several states in succession. See also subsection (c).

Paragraph (2) comes into play either when the home state test cannot be met or as an alternative to that test. The first situation arises, for example, when a family has moved frequently and there is no state where the child has lived for 6 months prior to suit, or if the child has recently been removed from his home state and the person who was left behind has also moved away. See paragraph (1), last clause. A typical example of alternative jurisdiction is the case in which the stay-at-home parent chooses to follow the departed spouse to state 2 (where the child has lived for several months with the other parent) and starts proceedings there. Whether the departed parent also has access to a court in state 2, depends on the strength of the family ties in that state and on the applicability of the clean hands provision of section 8. If state 2, for example, was the state of the matrimonial home where the entire family lived for two years before moving to the "home state" for 6 months, and the wife returned to state 2 with the child with the consent of the husband, state 2 might well have jurisdiction upon petition of the wife. The same may be true if the wife returned to her parents in her former home state where the child had spent several months every year before. Compare *Willmore v. Willmore*, 273, Minn. 537, 143 N.W. 2d 630 (1966), cert. denied 385 U.S. 898 (1966). While jurisdiction may exist in two states in these instances, it will not be exercised in both states. See sections 6 and 7.

Paragraph (2) of subsection (a) is supplemented by subsection (b) which is designed to discourage unilateral removal of children to other states and to guard generally against too liberal an interpretation of paragraph (2). Short-term presence in the state is not enough even though there may be an intent to stay longer, perhaps an intent to establish a technical "domicile" for divorce or other purposes.

Paragraph (2) perhaps more than any other provision of the Act requires that it be interpreted in the spirit of the legislative purposes expressed in section 1. The paragraph was phrased in general terms in order to be flexible enough to cover many fact situations too diverse to lend themselves to exact description. But its purpose is to limit jurisdiction rather than to proliferate it. The first clause of the paragraph is important: jurisdiction exists only if it is in the child's interest, not merely the interest or convenience of the feuding parties, to determine custody in a particular state. The interest of the child is served when the forum has optimum access to relevant evidence about the child and family. There must be maximum rather than minimum contact with the state. The submission of the parties to a forum, perhaps for purposes of divorce, is not sufficient without additional factors establishing closer ties with the state. Divorce jurisdiction does not necessarily include custody jurisdiction. See Clark, *Domestic Relations* 578 (1968).

Paragraph (3) of subsection (a) retains and reaffirms *parens patriae* jurisdiction, usually exercised by a juvenile court, which a state must assume when a child is in a situation requiring immediate protection. This jurisdiction exists when a child has been abandoned and in emergency cases of child neglect. Presence of the child in the state is the only prerequisite. This extraordinary jurisdiction is reserved for extraordinary circumstances. See *Application of Lang*, 9 App. Div. 2d 401, 193 N.Y.S. 2d 703 (1959). When there is child neglect without emergency or abandonment, jurisdiction cannot be based on this paragraph.

Paragraph (4) of subsection (a) provides a final basis for jurisdiction which is subsidiary in nature. It is to be resorted to only if no other state could, or would, assume jurisdiction under the other criteria of this section.

Subsection (c) makes it clear that presence of the child is not a jurisdictional requirement. Subsequent sections are designed to assure the appearance of the child before the court.

This section governs jurisdiction to make an initial decree as well as a modification decree. Both terms are defined in section 2. Jurisdiction to modify an initial or modification decree of another state is subject to additional restrictions contained in sections 8(b) and 14(a).

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

COMMENT

This section lists the persons who must be notified and given an opportunity to be heard to satisfy due process requirements. As to persons in the forum state, the general law of the state applies; others are notified in accordance with section 5. Strict compliance with sections 4 and 5 is essential for the validity of a custody decree within the state and its recognition and enforcement in other states under sections 12, 13, and 15. See *Restatement of the Law Second, Conflict of Laws, Proposed Official Draft* sec. 69 (1967); and compare *Armstrong v. Manso*, 380 U.S. 545, 85 S. Ct. 1187, 14 L. Ed. 2d 62 (1965).

- 1 SECTION 5. [*Notice to Persons Outside this State; Submission*
- 2 *to Jurisdiction.*]
- 3 (a) Notice required for the exercise of jurisdiction over a person
- 4 outside this State shall be given in a manner reasonably calculated
- 5 to give actual notice, and may be:
- 6 (1) by personal delivery outside this State in the manner
- 7 prescribed for service of process within this State;
- 8 (2) in the manner prescribed by the law of the place in which
- 9 the service is made for service of process in that place in an
- 10 action in any of its courts of general jurisdiction;

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

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

15 (b) Notice under this section shall be served, mailed, or de-
16 livered, [or last published] at least [10, 20] days before any hear-
17 ing in this State.

18 (c) Proof of service outside this State may be made by affidavit
19 of the individual who made the service, or in the manner prescribed
20 by the law of this State, the order pursuant to which the service
21 is made, or the law of the place in which the service is made. If
22 service is made by mail, proof may be a receipt signed by the
23 addressee or other evidence of delivery to the addressee.

24 (d) Notice is not required if a person submits to the jurisdiction
25 of the court.

COMMENT

Section 201 of the Uniform Interstate and International Procedure Act has been followed to a large extent. See 9B U.L.A. 315 (1966). If at all possible, actual notice should be received by the affected persons; but efforts to impart notice in a manner reasonably calculated to give actual notice are sufficient when a person who may perhaps conceal his whereabouts, cannot be reached. See *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950) and *Schroeder v. City of New York*, 371 U.S. 208, 83 S. Ct. 279, 9 L. Ed. 2d 255 (1962).

Notice by publication in lieu of other means of notification is not included because of its doubtful constitutionality. See *Mullane v. Central Hanover Bank and Trust Co.*, *supra*; and see Hazard, *A General Theory of State-Court Jurisdiction*, 1965 Supreme Court Rev. 241, 277, 286-87. Paragraph (4) of subsection (a) lists notice by publication in brackets for the benefit of those states which desire to use published notices in addition to the modes of notification provided in this section when these modes prove ineffective to impart actual notice.

The provisions of this section, and paragraphs (2) and (4) of subsection (a) in particular, are subject to the caveat that notice and opportunity to be heard must always meet due process requirements as they exist at the time of the proceeding.

1 SECTION 6. [Simultaneous Proceedings in Other States.]

2 (a) A court of this State shall not exercise its jurisdiction under
3 this Act if at the time of filing the petition a proceeding concerning
4 the custody of the child was pending in a court of another state
5 exercising jurisdiction substantially in conformity with this Act,
6 unless the proceeding is stayed by the court of the other state
7 because this State is a more appropriate forum or for other reasons.

8 (b) Before hearing the petition in a custody proceeding the court
9 shall examine the pleadings and other information supplied by the
10 parties under section 9 and shall consult the child custody registry

11 established under section 16 concerning the pendency of pro-
12 ceedings with respect to the child in other states. If the court has
13 reason to believe that proceedings may be pending in another state
14 it shall direct an inquiry to the state court administrator or other
15 appropriate official of the other state.

16 (c) If the court is informed during the course of the proceeding
17 that a proceeding concerning the custody of the child was pending
18 in another state before the court assumed jurisdiction it shall stay
19 the proceeding and communicate with the court in which the other
20 proceeding is pending to the end that the issue may be litigated in
21 the more appropriate forum and that information be exchanged in
22 accordance with sections 19 through 22. If a court of this state has
23 made a custody decree before being informed of a pending pro-
24 ceeding in a court of another state it shall immediately inform that
25 court of the fact. If the court is informed that a proceeding was
26 commenced in another state after it assumed jurisdiction it shall
27 likewise inform the other court to the end that the issues may be
28 litigated in the more appropriate forum.

COMMENT

Because of the havoc wreaked by simultaneous and competitive jurisdiction which has been described in the Prefatory Note, this section seeks to avoid jurisdictional conflict with all feasible means, including novel methods. Courts are expected to take an active part under this section in seeking out information about custody proceedings concerning the same child pending in other states. In a proper case jurisdiction is yielded to the other state either under this section or under section 7. Both sections must be read together.

When the courts of more than one state have jurisdiction under sections 3 or 14, priority in time determines which court will proceed with the action, but the application of the inconvenient forum principle of section 7 may result in the handling of the case by the other court.

While jurisdiction need not be yielded under subsection (a) if the other court would not have jurisdiction under the criteria of this Act, the policy against simultaneous custody proceedings is so strong that it might in a particular situation be appropriate to leave the case to the other court even under such circumstances. See subsection (3) and section 7.

Once a custody decree has been rendered in one state, jurisdiction is determined by sections 8 and 14.

1 SECTION 7. [Inconvenient Forum.]

2 (a) A court which has jurisdiction under this Act to make an
3 initial or modification decree may decline to exercise its jurisdiction
4 any time before making a decree if it finds that it is an inconve-
5 nient forum to make a custody determination under the circum-
6 stances of the case and that a court of another state is a more
7 appropriate forum.

8 (b) A finding of inconvenient forum may be made upon the

9 court's own motion or upon motion of a party or a guardian ad
10 litem or other representative of the child.

11 (c) In determining if it is an inconvenient forum, the court shall
12 consider if it is in the interest of the child that another state assume
13 jurisdiction. For this purpose it may take into account the follow-
14 ing factors, among others:

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

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

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

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

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

25 (d) Before determining whether to decline or retain jurisdiction
26 the court may communicate with a court of another state and
27 exchange information pertinent to the assumption of jurisdiction
28 by either court with a view to assuring that jurisdiction will be
29 exercised by the more appropriate court and that a forum will be
30 available to the parties.

31 (e) If the court finds that it is an inconvenient forum and that
32 a court of another state is a more appropriate forum, it may dis-
33 miss the proceedings, or it may stay the proceedings upon condition
34 that a custody proceeding be promptly commenced in another
35 named state or upon any other conditions which may be just and
36 proper, including the condition that a moving party stipulate his
37 consent and submission to the jurisdiction of the other forum.

38 (f) The court may decline to exercise its jurisdiction under this
39 Act if a custody determination is incidental to an action for divorce
40 or another proceeding while retaining jurisdiction over the divorce
41 or other proceeding.

42 (g) If it appears to the court that it is clearly an inappropriate
43 forum it may require the party who commenced the proceedings to
44 pay, in addition to the costs of the proceedings in this State, nec-
45 essary travel and other expenses, including attorneys' fees, incurred
46 by other parties or their witnesses. Payment is to be made to the
47 clerk of the court for remittance to the proper party.

48 (h) Upon dismissal or stay of proceedings under this section the
49 court shall inform the court found to be the more appropriate
50 forum of this fact, or if the court which would have jurisdiction in
51 the other state is not certainly known, shall transmit the informa-

52 tion to the court administrator or other appropriate official for
53 forwarding to the appropriate court.

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

COMMENT

The purpose of this provision is to encourage judicial restraint in exercising jurisdiction whenever another state appears to be in a better position to determine custody of a child. It serves as a second check on jurisdiction once the test of sections 3 or 14 has been met.

The section is a particular application of the inconvenient forum principle, recognized in most states by judicial law, adapted to the special needs of child custody cases. The terminology used follows section 84 of the Restatement of the Law Second, Conflict of Laws, Proposed Official Draft (1967). Judicial restrictions or exceptions to the inconvenient forum rule made in some states do not apply to this statutory scheme which is limited to child custody cases.

Like section 6, this section stresses interstate judicial communication and cooperation. When there is doubt as to which is the more appropriate forum, the question may be resolved by consultation and cooperation among the courts involved.

Paragraphs (1) through (5) of subsection (c) specify some, but not all, considerations which enter into a court determination of inconvenient forum. Factors customarily listed for purposes of the general principle of the inconvenient forum (such as convenience of the parties and hardship to the defendant) are also pertinent, but may under the circumstances be of secondary importance because the child who is not a party is the central figure in the proceedings.

Part of subsection (e) is derived from Wis. Stat. Ann., sec. 202.19 (1).

Subsection (f) makes it clear that a court may divide a case, that is, dismiss part of it and retain the rest. See section 1.05 of the Uniform Interstate and International Procedure Act. When the custody issue comes up in a divorce proceeding, courts may have frequent occasion to decline jurisdiction as to that issue (assuming that custody jurisdiction exists under sections 3 or 14).

Subsection (g) is an adaptation of Wis. Stat. Ann., sec. 202.20. Its purpose is to serve as a deterrent against "frivolous jurisdiction claims," as G.W. Foster states in the Revision Notes to the Wisconsin provision. It applies when the forum chosen is seriously inappropriate considering the jurisdictional requirements of the Act.

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

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

6 (b) Unless required in the interest of the child, the court shall
7 not exercise its jurisdiction to modify a custody decree of another
8 state if the petitioner, without consent of the person entitled to

9 custody, has improperly removed the child from the physical
10 custody of the person entitled to custody or has improperly re-
11 tained the child after a visit or other temporary relinquishment
12 of physical custody. If the petitioner has violated any other
13 provision of a custody decree of another state the court may
14 decline to exercise its jurisdiction if this is just and proper under
15 the circumstances.

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

COMMENT

This section incorporates the "clean hands doctrine," so named by Ebrenzweig, *Interstate Recognition of Custody Decrees*, 51 Mich. L. Rev. 345 (1953). Under this doctrine courts refuse to assume jurisdiction to reexamine an out-of-state custody decree when the petitioner has abducted the child or has engaged in some other objectionable scheme to gain or retain physical custody of the child in violation of the decree. See *Fain, Custody of Children, The California Family Lawyer* I, 530, 546 (1961); *Ex Parte Mullins*, 20 Wash. 2d 419, 174 P. 2d 790 (1916); *Crocker v. Crocker*, 122 Colo. 49, 219 P. 2d 311 (1950); and *Leathers v. Leathers*, 102 Cal. App. 2d 768, 328 P. 2d 853 (1958). But when adherence to this rule would lead to punishment of the parent at the expense of the wellbeing of the child, it is often not applied. See *Smith v. Smith*, 135 Cal. App. 2d 100, 286 P. 2d 1009 (1955) and *In re Guardianship of Rodgers*, 100 Ariz. 269, 413 P. 2d 744 (1966).

Subsection (a) extends the clean hands principle to cases in which a custody decree has not yet been rendered in any state. For example, if upon a de facto separation the wife returned to her own home with the children without objection by her husband and lived there for two years without hearing from him, and the husband without warning forcibly removes the children one night and brings them to another state, a court in that state although it has jurisdiction after 6 months may decline to hear the husband's custody petition. "Wrongfully" taking under this subsection does not mean that a "right" has been violated—both husband and wife as a rule have a right to custody until a court determination is made—but that one party's conduct is so objectionable that a court in the exercise of its inherent equity powers cannot in good conscience permit that party access to its jurisdiction.

Subsection (b) does not come into operation unless the court has power under section 14 to modify the custody decree of another state. It is a codification of the clean hands rule, except that it differentiates between (1) a taking or retention of the child and (2) other violations of custody decrees. In the case of illegal removal or retention refusal of jurisdiction is mandatory unless the harm done to the child by a denial of jurisdiction outweighs the parental misconduct. Compare *Smith v. Smith* and *In re Guardianship of Rodgers, supra*; and see *In re Walter*, 228 Cal. App. 2d 217, 39 Cal. Rptr. 243 (1964) where the court assumed jurisdiction after both parents had been guilty of misconduct. The qualifying word "improperly" is added to exclude cases in which a child is withheld because of illness or other emergency or in which there are other special justifying circumstances.

The most common violation of the second category is the removal of the child from the state by the parent who has the right to custody, thereby frustrating the exercise of visitation rights of the other parent. The second sentence of subsection

(b) makes refusal of jurisdiction entirely discretionary in this situation because it depends on the circumstances whether non-compliance with the court order is serious enough to warrant the drastic sanction of denial of jurisdiction.

Subsection (c) adds a financial deterrent to child stealing and similar reprehensible conduct.

1 SECTION 9. [Information under Oath to be Submitted to the 2 Court.]

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

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

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

15 (3) he knows of any person not a party to the proceedings
16 who has physical custody of the child or claims to have custody
17 or visitation rights with respect to the child.

18 (b) If the declaration as to any of the above items is in the
19 affirmative the declarant shall give additional information under
20 oath as required by the court. The court may examine the parties
21 under oath as to details of the information furnished and as to
22 other matters pertinent to the court's jurisdiction and the dis-
23 position of the case.

24 (c) Each party has a continuing duty to inform the court of any
25 custody proceeding concerning the child in this or any other state
26 of which he obtained information during this proceeding.

COMMENT

It is important for the court to receive the information listed and other pertinent facts as early as possible for purposes of determining its jurisdiction, the joinder of additional parties, and the identification of courts in other states which are to be contacted under various provisions of the Act. Information as to custody litigation and other pertinent facts occurring in other countries may also be elicited under this section in combination with section 23.

1 SECTION 10. [Additional Parties.] If the court learns from in-
2 formation furnished by the parties pursuant to section 9 or from
3 other sources that a person not a party to the custody proceeding
4 has physical custody of the child or claims to have custody or

5 visitation rights with respect to the child, it shall order that person
6 to be joined as a party and to be duly notified of the pendency of
7 the proceeding and of his joinder as a party. If the person joined
8 as a party is outside this State he shall be served with process or
9 otherwise notified in accordance with section 5.

COMMENT

The purpose of this section is to prevent re-litigations of the custody issue when these would be for the benefit of third claimants rather than the child. If the immediate controversy, for example, is between the parents, but relatives inside or outside the state also claim custody or have physical custody which may lead to a future claim to the child, they must be brought into the proceedings. The courts are given an active role here as under other sections of the Act to seek out the necessary information from formal or informal sources.

1 SECTION 11. [Appearance of Parties and the Child.]

2 [(a) The court may order any party to the proceeding who is in
3 this State to appear personally before the court. If that party has
4 physical custody of the child the court may order that he appear
5 personally with the child.]

6 (b) If a party to the proceeding whose presence is desired by the
7 court is outside this State with or without the child the court may
8 order that the notice given under section 5 include a statement
9 directing that party to appear personally with or without the child
10 and declaring that failure to appear may result in a decision
11 adverse to that party.

12 (c) If a party to the proceeding who is outside this State is di-
13 rected to appear under subsection (b) or desires to appear person-
14 ally before the court with or without the child, the court may
15 require another party to pay to the clerk of the court travel and
16 other necessary expenses of the party so appearing and of the child
17 if this is just and proper under the circumstances.

COMMENT

Since a custody proceeding is concerned with the past and future care of the child by one of the parties, it is of vital importance in most cases that the judge has an opportunity to see and hear the contestants and the child. Subsection (a) authorizes the court to order the appearance of these persons if they are in the state. It is placed in brackets because states which have such a provision—not only in their juvenile court laws—may wish to omit it. Subsection (b) relates to the appearance of persons who are outside the state and provides one method of bringing them before the court; sections 19(b) and 20(b) provide another. Subsection (c) helps to finance travel to the court which may be close to one of the parties and distant from another; it may be used to equalize the expense if this is appropriate under the circumstances.

1 SECTION 12. [Binding Force and Res Judicata Effect of Custody
2 Decree.] A custody decree rendered by a court of this State which
3 had jurisdiction under section 3 binds all parties who have been
4 served in this State or notified in accordance with section 5 or who
5 have submitted to the jurisdiction of the court, and who have been
6 given an opportunity to be heard. As to these parties the custody
7 decree is conclusive as to all issues of law and fact decided and as
8 to the custody determination made unless and until that determi-
9 nation is modified pursuant to law, including the provisions of this
10 Act.

COMMENT

This section deals with the intra-state validity of custody decrees which provides the basis for their interstate recognition and enforcement. The two prerequisites are (1) jurisdiction under section 3 of this Act and (2) strict compliance with due process mandates of notice and opportunity to be heard. There is no requirement for technical personal jurisdiction, on the traditional theory that custody determinations, as distinguished from support actions (see section 2(2) *supra*), are proceedings in rem or proceedings affecting status. See Restatement of the Law Second, Conflict of Laws, Proposed Official Draft, sections 69 and 79 (1967); and James, Civil Procedure 613 (1965). For a different theory reaching the same result, see Hazard, A General Theory of State-Court Jurisdiction, 1965 Supreme Court Review 241. The section is not at variance with *May v. Anderson*, 345 U.S. 528, 73 S. Ct. 844, 97 L. Ed. 1221 (1953), which relates to interstate recognition rather than in-state validity of custody decrees. See Ehrensweig and Louieell, Jurisdiction in a Nutshell 76 (2d ed. 1968); and compare Reese, Full Faith and Credit to Foreign Equity Decrees, 42 Iowa L. Rev. 183, 195 (1957). On *May v. Anderson*, *supra*, see comment to section 13.

Since a custody decree is normally subject to modification in the interest of the child, it does not have absolute finality, but as long as it has not been modified, it is as binding as a final judgment. Compare Restatement of the Law Second, Conflict of Laws, Proposed Official Draft, section 109 (1967).

1 SECTION 13. [Recognition of Out-of-State Custody Decrees.]

2 The courts of this State shall recognize and enforce an initial or
3 modification decree of a court of another state which had assumed
4 jurisdiction under statutory provisions substantially in accordance
5 with this Act or which was made under factual circumstances
6 meeting the jurisdictional standards of the Act, so long as this
7 decree has not been modified in accordance with jurisdictional
8 standards substantially similar to those of this Act.

COMMENT

This section and sections 14 and 15 are the key provisions which guarantee a great measure of security and stability of environment to the "interstate child" by discouraging re-litigations in other states. See Section 1, and see Ratner, Child Custody in a Federal System, 62 Mich. L. Rev. 706, 823 (1964).

Although the full faith and credit clause may perhaps not require the recognition of out-of-state custody decrees, the states are free to recognize and enforce them. See Restatement of the Law Second, Conflict of Laws, Proposed Official Draft, section 109 (1907), and see the Prefatory Note, *supra*. This section declares as a matter of state law, that custody decrees of sister states will be recognized and enforced. Recognition and enforcement is mandatory if the state in which the prior decree was rendered 1) has adopted this Act, 2) has statutory jurisdictional requirements substantially like this Act, or 3) would have had jurisdiction under the facts of the case if this Act had been the law in the state. Compare Comment, *Ford v. Ford: Full Faith and Credit to Child Custody Decrees?* 73 Yale L.J. 134, 148 (1963).

"Jurisdiction" or "jurisdictional standards" under this section refers to the requirements of section 3 in the case of initial decrees and to the requirements of sections 3 and 14 in the case of modification decrees. The section leaves open the possibility of discretionary recognition of custody decrees of other states beyond the enumerated situations of mandatory acceptance. For the recognition of custody decrees of other nations, see section 23.

Recognition is accorded to a decree which is valid and binding under section 12. This means, for example, that a court in the state where the father resides will recognize and enforce a custody decree rendered in the home state where the child lives with the mother if the father was duly notified and given enough time to appear in the proceedings. Personal jurisdiction over the father is not required. See comment to section 12. This is in accord with a common interpretation of the inconclusive decision in *May v. Anderson*, 345 U.S. 628, 73 S. Ct. 840, 97 L. Ed. 1221 (1953). See Restatement of the Law Second, Conflict of Laws, Proposed Official Draft, section 70 and comment thereto, p. 208 (1967). Under this interpretation a state is permitted to recognize a custody decree of another state regardless of lack of personal jurisdiction, as long as due process requirements of notice and opportunity to be heard have been met. See Justice Frankfurter's concurring opinion in *May v. Anderson*; and compare Clark, *Domestic Relations* 323-26 (1968), Goodrich, *Conflict of Laws* 274 (4th ed. by Scoles, 1964); Stumberg, *Principles of Conflict of Laws* 325 (3rd ed. 1963); and Comment, *The Puzzle of Jurisdiction in Child Custody Actions*, 38 U. Colo. L. Rev. 541 (1966). The Act emphasizes the need for the personal appearance of the contestants rather than any technical requirement for personal jurisdiction.

The mandate of this section could cause problems if the prior decree is a punitive or disciplinary measure. See Ehrenzweig, *Inter-state Recognition of Custody Decrees*, 51 Mich. L. Rev. 345, 370 (1963). If, for example, a court grants custody to the mother and after 5 years' of continuous life with the mother the child is awarded to the father by the same court for the sole reason that the mother who had moved to another state upon remarriage had not lived up to the visitation requirements of the decree, courts in other states may be reluctant to recognize the changed decree. See *Berlin v. Berlin*, 21 N.Y. 2d 371, 235 N.E. 2d 100 (1967); and *Stout v. Pate*, 120 Cal. App. 2d 699, 361 P. 2d 788 (1953); Compare *Moniz v. Moniz*, 142 Cal. App. 2d 527, 298 P. 2d 710 (1956). Disciplinary decrees of this type can be avoided under this Act by enforcing the visitation provisions of the decree directly in another state. See Section 15. If the original plan for visitation does not fit the new conditions, a petition for modification of the visiting arrangements would be filed in a court which has jurisdiction, that is, in many cases the original court. See section 14.

1 SECTION 14. [Modification of Custody Decree of Another State.]

2 (a) If a court of another state has made a custody decree, a

3 court of this State shall not modify that decree unless (1) it ap-
4 pears to the court of this State that the court which rendered the
5 decree does not now have jurisdiction under jurisdictional prere-
6 quisites substantially in accordance with this Act or has declined to
7 assume jurisdiction to modify the decree and (2) the court of this
8 State has jurisdiction.

9 (b) If a court of this State is authorized under subsection (a)
10 and section 8 to modify a custody decree of another state it shall
11 give due consideration to the transcript of the record and other
12 documents of all previous proceedings submitted to it in accordance
13 with section 22.

COMMENT

Courts which render a custody decree normally retain continuing jurisdiction to modify the decree under local law. Courts in other states have in the past often assumed jurisdiction to modify the out-of-state decree themselves without regard to the preexisting jurisdiction of the other state. See *People ex rel. Halvey v. Halvey*, 330 U.S. 610, 67 S. Ct. 903, 91 L. Ed. 1133 (1947). In order to achieve greater stability of custody arrangements and avoid forum shopping, subsection (a) declares that other states will defer to the continuing jurisdiction of the court of another state as long as that state has jurisdiction under the standards of this Act. In other words, all petitions for modification are to be addressed to the prior state if that state has sufficient contact with the case to satisfy section 3. The fact that the court had previously considered the case may be one factor favoring its continued jurisdiction. If, however, all the persons involved have moved away or the contact with the state has otherwise become slight, modification jurisdiction would shift elsewhere. Compare Ratner, *Child Custody in a Federal System*, 62 Mich. L. Rev. 795, 821-2 (1964).

For example, if custody was awarded to the father in state 1 where he continued to live with the children for two years and thereafter his wife kept the children in state 2 for 6-1/2 months (3-1/2 months beyond her visitation privileges) with or without permission of the husband, state 1 has preferred jurisdiction to modify the decree despite the fact that state 2 has in the meantime become the "home state" of the child. If, however, the father also moved away from state 1, that state loses modification jurisdiction interstate, whether or not its jurisdiction continues under local law. See Clark, *Domestic Relations* 322-23 (1968). Also, if the father in the same case continued to live in state 1, but let his wife keep the children for several years without asserting his custody rights and without visits of the children in state 1, modification jurisdiction of state 1 would cease. Compare *Brengle v. Hurst*, 408 S. W. 2d 418 (Ky. 1966). The situation would be different if the children had been abducted and their whereabouts could not be discovered by the legal custodian for several years. The abductor would be denied access to the court of another state under section 8(b) and state 1 would have modification jurisdiction in any event under section 3(a) (4). Compare *Crocker v. Crocker*, 122 Colo. 49, 210 P. 2d 311 (1950).

The prior court has jurisdiction to modify under this section even though its original assumption of jurisdiction did not meet the standards of this Act, as long as it would have jurisdiction now, that is, at the time of the petition for modification.

If the state of the prior decree declines to assume jurisdiction to modify the

decree, another state with jurisdiction under section 3 can proceed with the case. That is not so if the prior court dismissed the petition on its merits.

Respect for the continuing jurisdiction of another state under this section will serve the purpose of this Act only if the prior court will assume a corresponding obligation to make no changes in the existing custody arrangement which are not required for the good of the child. If the court overturns its own decree in order to discipline a mother or father, with whom the child had lived for years, for failure to comply with an order of the court, the objective of greater stability of custody decrees is not achieved. See Comment to section 13 last paragraph, and cases there cited. See also *Sharpe v. Sharpe*, 77 Ill. App. 295, 222 N.E. 2d 340 (1966). Under section 15 of this Act an order of a court contained in a custody decree can be directly enforced in another state.

Under subsection (b) transcripts of prior proceedings if received under section 22 are to be considered by the modifying court. The purpose is to give the judge the opportunity to be as fully informed as possible before making a custody decision. "Our court will seldom have so much of the story that another's inquiry is unimportant" says Paulsen, *Appointment of a Guardian in the Conflict of Laws*, 45 Iowa L. Rev. 212, 226 (1960). See also Ehrenzweig, *The Interstate Child and Uniform Legislation: A Plea for Extra-Litigious Proceedings*, 64 Mich. L. Rev. 1, 6-7 (1965); and Ratner, *Legislative Resolution of the Interstate Custody Problem: A Reply to Professor Currie and a Proposed Uniform Act*, 38 S. Cal. L. Rev. 183, 202 (1965). How much consideration is "due" this transcript, whether or under what conditions it is received in evidence, are matters of local, internal law which are not affected by this interstate act.

1 SECTION 15. [*Filing and Enforcement of Custody Decree of*
2 *Another State.*]

3 (a) A certified copy of a custody decree of another state may be
4 filed in the office of the clerk of any [District Court, Family Court]
5 of this State. The clerk shall treat the decree in the same manner
6 as a custody decree of the [District Court, Family Court] of this
7 State. A custody decree so filed has the same effect and shall be
8 enforced in like manner as a custody decree rendered by a court of
9 this State.

10 (b) A person violating a custody decree of another state which
11 makes it necessary to enforce the decree in this State may be
12 required to pay necessary travel and other expenses, including
13 attorneys' fees, incurred by the party entitled to the custody or
14 his witnesses.

COMMENT

Out-of-state custody decrees which are required to be recognized are enforced by other states. See section 13. Subsection (a) provides a simplified and speedy method of enforcement. It is derived from section 2 of the Uniform Enforcement of Foreign Judgments Act of 1904, 9A U.L.A. 486 (1965). A certified copy of the decree is filed in the appropriate court, and the decree thereupon becomes in effect a decree of the state of filing and is enforceable by any method of enforcement available under the law of that state.

The authority to enforce an out-of-state decree does not include the power to

modify it. If modification is desired, the petition must be directed to the court which has jurisdiction to modify under section 14. This does not mean that the state of enforcement may not in an emergency stay enforcement if there is danger of serious mistreatment of the child. See Ratner, *Child Custody in a Federal System*, 62 Mich. J. Rev. 795, 832-33 (1964).

The right to custody for periods of visitation and other provisions of a custody decree are enforceable in other states in the same manner as the primary right to custody. If visitation privileges provided in the decree have become impractical upon moving to another state, the remedy against automatic enforcement in another state is a petition in the proper court to modify visitation arrangements to fit the new conditions.

Subsection (b) makes it clear that the financial burden of enforcement of a custody decree may be shifted to the wrongdoer. Compare 2 *Armstrong*, *California Family Law* 328 (1966 Suppl.), and *Crocker v. Crocker*, 195 F. 2d 236 (1952).

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

- 4 (1) certified copies of custody decrees of other states received
- 5 for filing;
- 6 (2) communications as to the pendency of custody proceedings
- 7 in other states;
- 8 (3) communications concerning a finding of inconvenient
- 9 forum by a court of another state; and
- 10 (4) other communications or documents concerning custody
- 11 proceedings in another state which may affect the jurisdiction of
- 12 a court of this State or the disposition to be made by it in a
- 13 custody proceeding.

COMMENT

The purpose of this section is to gather all information concerning out-of-state custody cases which reaches a court in one designated place. The term "registry" is derived from section 35 of the Uniform Reciprocal Enforcement of Support Act of 1958, 9C U.L.A. 61 (1967 Suppl.) Another term may be used if desired without affecting the uniformity of the Act. The information in the registry is usually incomplete since it contains only those documents which have been specifically requested or which have otherwise found their way to the state. It is therefore necessary in most cases for the court to seek additional information elsewhere.

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

1 SECTION 18. [*Taking Testimony in Another State.*] In addition
2 to other procedural devices available to a party, any party to the

3 proceeding or a guardian ad litem or other representative of the
4 child may adduce testimony of witnesses, including parties and
5 the child, by deposition or otherwise, in another state. The court
6 on its own motion may direct that the testimony of a person be
7 taken in another state and may prescribe the manner in which and
8 the terms upon which the testimony shall be taken.

COMMENT

Sections 18 to 22 are derived from sections 301 and 302 of the Uniform Interstate and International Procedure Act, 9B U.L.A. 305, 321, 326 (1966); from ideas underlying the Uniform Reciprocal Enforcement of Support Act; and from Ehrensweig, *The Interstate Child and Uniform Legislation: A Plea for Extrajudicial Proceedings*, 64 Mich. L. Rev. 1 (1955). They are designed to fill the partial vacuum which inevitably exists in cases involving an "interstate child" since part of the essential information about the child and his relationship to other persons is always in another state. Even though jurisdiction is assumed under sections 3 and 7 in the state where much (or most) of the pertinent facts are readily available, some important evidence will unavoidably be elsewhere.

Section 18 is derived from portions of section 301 of the Uniform Interstate and International Procedure Act, 9B U.L.A. 305, 321. The first sentence relates to depositions, written interrogatories and other discovery devices which may be used by parties or representatives of the child. The procedural laws of the state where the device is used are applicable under this sentence. The second sentence empowers the court itself to initiate the gathering of out-of-state evidence which is often not supplied by the parties in order to give the court a complete picture of the child's situation, especially as it relates to a custody claimant who lives in another state.

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

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

13 (b) A court of this State may request the appropriate court of
14 another state to order a party to custody proceedings pending in
15 the court of this State to appear in the proceedings, and if that
16 party has physical custody of the child, to appear with the child.
17 The request may state that travel and other necessary expenses
18 of the party and of the child whose appearance is desired will be
19 assessed against another party or will otherwise be paid.

COMMENT

Section 19 relates to assistance sought by a court of the forum state from a court of another state. See comment to section 18. Subsection (a) covers any kind of evidentiary procedure available under the law of the assisting state which may aid the court in the requesting state, including custody investigations (social studies) if authorized by the law of the other state. Under what conditions reports of social studies and other evidence collected under this subsection are admissible in the requesting state, is a matter of internal state law not covered in this interstate statute. Subsection (b) serves to bring parties and the child before the requesting court, backed up by the assisting court's contempt powers. See section 11.

1 SECTION 20 [*Assistance to Courts of Other States.*]

2 (a) Upon request of the court of another state the courts of this
3 State which are competent to hear custody matters may order a
4 person in this State to appear at a hearing to adduce evidence or
5 to produce or give evidence under other procedures available in
6 this State [or may order social studies to be made for use in a
7 custody proceeding in another state]. A certified copy of the tran-
8 script of the record of the hearing or the evidence otherwise ad-
9 duced [and any social studies prepared] shall be forwarded by the
10 clerk of the court to the requesting court.

11 (b) A person within this State may voluntarily give his testi-
12 mony or statement in this State for use in a custody proceeding
13 outside this state.

14 (c) Upon request of the court of another state a competent court
15 of this State may order a person in this State to appear alone or
16 with the child in a custody proceeding in another state. The court
17 may condition compliance with the request upon assurance by the
18 other state that state travel and other necessary expenses will be
19 advanced or reimbursed.

COMMENT

Section 20 is the counterpart of section 19. It empowers local courts to give help to out-of-state courts in custody cases. See comments to sections 18 and 19. The references to social studies have been placed in brackets so that states without authorization to make social studies outside of juvenile court proceedings may omit them if they wish. Subsection (b) reaffirms the existing freedom of persons within the United States to give evidence for use in proceedings elsewhere. It is derived from section 302 (b) of the Interstate and International Procedure Act, 9B U.L.A. 327 (1966).

1 SECTION 21. [*Preservation of Documents for Use in Other*
2 *States.*] In any custody proceeding in this State the court shall
3 preserve the pleadings, orders and decrees, any record that has been
4 made of its hearings, social studies, and other pertinent documents

5 until the child reaches [18, 21] years of age. Upon appropriate
6 request of the court of another state the court shall forward to the
7 other court certified copies of any or all of such documents.

COMMENT

See comments to sections 18 and 19. Documents are to be preserved until the child is old enough that further custody disputes are unlikely. A lower figure than the ones suggested in the brackets may be inserted.

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

COMMENT

This is the counterpart of section 21. See comments to sections 18, 19, and 14(b).

1 SECTION 23. [*International Application.*] The general policies of
2 this Act extend to the international area. The provisions of this
3 Act relating to the recognition and enforcement of custody decrees
4 of other states apply to custody decrees and decrees involving legal
5 institutions similar in nature to custody institutions rendered by
6 appropriate authorities of other nations if reasonable notice and
7 opportunity to be heard were given to all affected persons.

COMMENT

Not all the provisions of the Act lend themselves to direct application in international custody disputes; but the basic policies of avoiding jurisdictional conflict and multiple litigation are as strong if not stronger when children are moved back and forth from one country to another by feuding relatives. Compare *Application of Laag*, 9 App. Div. 2d 401, 193 N.Y.S. 2d 763 (1959) and *Swindle v. Bradley*, 210 Ark. 903, 403 S.W. 2d 63 (1966).

The first sentence makes the general policies of the Act applicable to international cases. This means that the substance of section 1 and the principles underlying provisions like sections 6, 7, 8, and 14(a), are to be followed when some of the persons involved are in a foreign country or a foreign custody proceeding is pending.

The second sentence declares that custody decrees rendered in other nations by appropriate authorities (which may be judicial or administrative tribunals) are recognized and enforced in this country. The only prerequisite is that reasonable notice and opportunity to be heard was given to the persons affected. It is also to be understood that the foreign tribunal had jurisdiction under its own law rather than under section 3 of this Act. Compare *Statement of the Law Board, Con-*

lict of Laws, Proposed Official Draft, sections 10, 92, 98, and 109(2) (1967). Compare also Goodrich, *Conflict of Laws* 390-93 (4th ed., Scoles, 1964).

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

COMMENT

Judicial time spent in determining which court has or should exercise jurisdiction often prolongs the period of uncertainty and turmoil in a child's life more than is necessary. The need for speedy adjudication exists, of course, with respect to all aspects of child custody litigation. The priority requirement is limited to jurisdictional questions because an all encompassing priority would be beyond the scope of this Act. Since some states may have or wish to adopt a statutory provision or court rule of wider scope, this section is placed in brackets and may be omitted.

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

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

1 SECTION 27. [*Repeal.*] The following acts and parts of acts are
2 repealed:
3 (1)
4 (2)
5 (3)

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

UNIFORM MARRIAGE AND DIVORCE ACT

Drafted by the

**NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS**

and by it

**APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES**

at its

**ANNUAL CONFERENCE
MEETING IN ITS SEVENTY-NINTH YEAR
AT ST. LOUIS, MISSOURI
AUGUST 1-7, 1970**

WITH AMENDMENTS APPROVED 1971 AND AUGUST 2, 1973

**WITH
PREFATORY NOTES AND COMMENTS**

**APPROVED BY THE AMERICAN BAR ASSOCIATION AT ITS MIDYEAR
MEETING, FEBRUARY 8, 1974**

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UNIFORM MARRIAGE AND DIVORCE ACT

PREFATORY NOTE

When the National Conference of Commissioners on Uniform State Laws was formed in 1892, two of the major subjects named as appropriate for uniform laws were commercial paper and marriage and divorce. A law on the former was soon achieved; it was not until August 6, 1970, when the Conference first promulgated this Act, that agreement was reached on a measure combining the two latter subjects. In the intervening years some dozen statutes were approved dealing with various aspects of one or the other. None of them received substantial acceptance by the states.

The activity resulting in the present draft started with the 1965 report of the Special Committee on Uniform Divorce and Marriage Laws, co-chaired by Leonard G. Brown and Bernard Hellring, recommending exploration of the possibility of non-fault divorce laws, the procurement of financial resources to finance research and the recruitment of advisors from all relevant areas of society. The Conference received this proposal with great favor. The next year was devoted to a search for funds and to other promotional work. The Conference continued its approval. Grants in aid were secured from the Ford Foundation and from the United States Department of Health, Education and Welfare. Professor Robert J. Levy of the University of Minnesota was engaged as reporter to supervise research and preliminary drafting. In 1967, Professor Herma H. Kay of the University of California was added as co-reporter. On the request of the Committee, in accordance with the established requirement of consultation with appropriate American Bar Association authorities, the Family Law Section of that Association appointed a Liaison Committee, consisting of Honorable Morris N. Hartman, Chairman, Clarence Kolwyck, Esq., later Chairman [while dissenting from the product, he made many valuable contributions], Honorable Florence M. Kelley, Professor Henry H. Foster, Jr., James P. Hart, Jr., Esq., Goffrey Munter, Esq. The Committee also had the assistance of a Board of Advisors and of a Board of Consultants who were chosen because of their special experience in areas of family law or because of their training in social and behavioral sciences having a particular relevance to the family. The draft was developed and approved by the Conference in the light of the advice given by these qualified and experienced Advisors and Consultants, in 1970, and certain alterations were made in 1971, as the result of additional

helpful suggestions from representatives of the Family Law Section of the American Bar Association.

A review of the legal and nonlegal literature on marriage and divorce suggests that, although the experts may be divided on other issues, there is virtual unanimity as to the urgent need for basic reform in both areas: not only of specific provisions but of the entire conceptual structure. The traditional conception of divorce based on fault has been singled out particularly, both as an ineffectual barrier to marriage dissolution which is regularly overcome by perjury, thus promoting disrespect for the law and its processes, and as an unfortunate device which adds to the bitterness and hostility of divorce proceedings. In recent years, persistent demands for reform finally have been heeded. Statutory reform has been accomplished in countries so diverse as England and Italy and in a number of American states as well. Although less attention has been given to the anachronisms of marriage law, the need for modernization of state regulatory patterns in the light of a new approach to divorce is undeniable.

Without undermining the state's interest in the stability of marriages, the Act greatly simplified pre-marital regulation. In addition, the list of "prohibited" marriages has been greatly reduced. Most important, the Act changes the traditional sanctions applied to such marriages. At present, most state regulatory statutes enforce marriage prohibitions by permitting one of the parties (or a parent, in case of youthful marriage) to a prohibited marriage to seek an annulment. It has long been recognized, however, that annulments often are sought for personal or family reasons typically having nothing to do with the purpose the marriage prohibition was designed to serve. The marriage prohibitions therefore serve mainly to provide a legal device alternative to divorce under appropriate conditions. But because annulled marriages are considered "void ab initio," annulments have retroactively deprived spouses of financial support and status. An even harsher sanction, the designation of some prohibited marriages as "void," often deprives innocent spouses of social insurance benefits, workmen's compensation claims, wrongful death recoveries, and the financial benefit of property passing as part of the deceased spouse's estate. This Act has eliminated completely the notion of "void" marriages; has minimized the number of prohibited marriages; and, while permitting a declaration of invalidity in circumscribed cases, has created a procedure which permits courts to refuse to make the decree retroactive. The Act's simplified marriage regulations and cir-

cumscribed annulment doctrines require most spouses who desire the termination of their marriage to proceed under the dissolution provisions of the Act rather than the invalidity provisions. This result is proper; if the complaint is that the marriage is no longer viable, termination rather than a declaration of invalidity is the appropriate remedy.

In its provisions on dissolution of marriage, the Act has totally eliminated the traditional concept that divorce is a remedy granted to an innocent spouse, based on the marital fault of the other spouse which has not been connived at, colluded in, or condoned by the innocent spouse. Consideration was given to alternative methods of creating a non-fault device for terminating marriages, including the ground of voluntary separation for a period of time, now recognized by many states. The Conference came finally to the conclusion, also reached in England, California and Iowa, (and, since the Act was promulgated, in a number of other states) that the legal dissolution of a marriage should be based solely on a finding that factually the marriage is irretrievably broken. This standard will redirect the law's attention from an unproductive assignment of blame to a search for the realities of the marital situation.

The Act's elimination of fault notions extends to its treatment of maintenance and property division. The distribution of property upon the termination of a marriage should be treated, as nearly as possible, like the distribution of assets incident to the dissolution of a partnership. The Act authorizes the division of the property belonging to either spouse, or to both spouses, as the primary means of providing for the future financial needs of the spouses, as well as of doing justice between them. Where the property is insufficient for the first purpose, the Act provides that an award of maintenance may be made to either spouse under appropriate circumstances to supplement the available property. But, because of its property division provisions, the Act does not continue the traditional reliance upon maintenance as the primary means of support for divorced spouses. Standards are set up to guide the court in apportioning property and in awarding maintenance.

The custody and support provisions of the Act emphasize the interest of children rather than the wishes of their parents. Fault notions, which occasionally have decided both custody and financial issues, were deliberately and expressly excised. The custody provisions of the Act restate and clarify existing law, both substantive and procedural, and seek to discourage continuing litigation involving children. Provision is made, under appropriate

circumstances, for the appointment of an attorney to represent the child's interests in litigation affecting him directly.

Throughout the Act an effort has been made to reduce the adversary trappings of marital litigation. Thus procedural modifications have been introduced affecting the title of the proceedings and the form of the pleadings; the parties are permitted to file a joint petition for dissolution and the basis chosen for dissolution does not lend itself to recriminatory disputes; and the parties are encouraged to make amicable settlements of their financial affairs and voluntary provisions for the custody of their children.

Although the Conference itself decided not to provide, as part of the Act, a uniform system of obtaining statistical information, consideration of the Act should provide the occasion for each state to make a fresh examination of the legislation, recommended by the Bureau of Vital Statistics, which would permit the gathering of uniform national statistics on marriage and divorce. See U. S. Department H. E. W., Marriage Statistics Analysis 35 (Statistical Series 21, No. 16, 1968); Jacobson, American Marriage and Divorce, 16 (1959).

The Uniform Marriage and Divorce Act is promulgated as one interlocking and interdependent piece of legislation. Because of the terms upon which resources were granted, and, still more, because of the interrelationships involved, the draft presents a unified proposal for a code of marriage and divorce. However, it is realized that local statutory structure, or varied views as to policy may lead some legislatures to prefer to deal with the two subjects in separate bills. The structure of the Act in separable parts facilitates such a separation. Thus a state which desired to enact the marriage portion separately could change the short title (§ 101) to "Uniform Marriage Act." In § 102(b), it could use only purposes (1) and (2). The state then would enact Part II of the Act, only, but would also adopt such portions of Part V (§§ 501-505) as are appropriate. Likewise, if enactment of the dissolution provisions alone were desired, the appropriate short title would be "Uniform Divorce Act," and in § 102(b) the purpose clauses (3), (4) and (5) of § 102(b) would be used. The parts to be adopted would be III, IV, and so much of V as would be appropriate.

It should be kept in mind that the hy-lines preceding each section are bracketed, since many states' legislative rules do not permit the incorporation of such material in bills that are presented for introduction. Each draftsman will have to follow the rule prevailing in his own state.

UNIFORM MARRIAGE AND DIVORCE ACT

PART I GENERAL PROVISIONS

1 SECTION 101. [Short Title.] This Act may be cited as the
2 "Uniform Marriage and Divorce Act."

COMMENT

This is the customary "short title" clause, which may be placed in such order in the bill for enactment as the legislative practice of the state prescribes. Note, also, that it may be adjusted, as necessary, if parts of the measure are introduced as separate bills, in accordance with the statement in the prefatory note.

1 SECTION 102. [Purposes: Rules of Construction.] This
2 Act shall be liberally construed and applied to promote its
3 underlying purposes, which are to:

4 (1) provide adequate procedures for the solemnization
5 and registration of marriage;

6 (2) strengthen and preserve the integrity of marriage
7 and safeguard family relationships;

8 (3) promote the amicable settlement of disputes that
9 have arisen between parties to a marriage;

10 (4) mitigate the potential harm to the spouses and their
11 children caused by the process of legal dissolution of
12 marriage;

13 (5) make reasonable provision for spouse and minor
14 children during and after litigation; and

15 (6) make the law of legal dissolution of marriage
16 effective for dealing with the realities of matrimonial
17 experience by making irrevocable breakdown of the
18 marriage relationship the sole basis for its dissolution.

COMMENT

This sets forth the underlying purposes and objectives of the measure, as a foundation for construction of the Act. As indicated in the prefatory note, the enumeration of underlying purposes of the Act which are appropriate to legislation on marriage or divorce, respectively, may be utilized separately, if it is desired to place the marriage or divorce parts of the act in different divisions of the state statutes. On the use of such purpose provisions as guides to statutory construction, see Merrill, Uniformly Correct Construction of Uniform Laws, 40 Am. Bar Assoc. Jour. 545, 546 (1953) with citation of cases. None of the enumerations of purposes is intended to exclude, in construction and application, the consideration of other purposes spelled out in provisions of the Act.

1 SECTION 103. [Uniformity of Application and Construc-
2 tion.] This Act shall be so applied and construed as to ef-
3 fectuate its general purpose to make uniform the law with
4 respect to the subject of this Act among those states which
5 enact it.

COMMENT

This is the standard Conference provision on uniformity and construction in aid thereof. This means that, once a provision has been judicially construed, courts of other states should follow that construction unless convinced by overwhelming demonstration that the pristine rendition unquestionably was in error. See *Commercial Nat. Bank v. Canal-Louisiana Bank*, 239 U. S. 620, 628, 60 L. Ed. 417, 421, 35 S. Ct. 194, 197 (1916).

PART II MARRIAGE

1 SECTION 201. [Formalities.] Marriage is a personal rela-
2 tionship between a man and a woman arising out of a civil
3 contract to which the consent of the parties is essential. A
4 marriage licensed, solemnized, and registered as provided in
5 this Act is valid in this state. A marriage may be contracted,
6 maintained, invalidated, or dissolved only as provided by law.

COMMENT

The effect of this section is to validate all marriages performed in the enacting state in accordance with its provisions. The provision does not necessarily invalidate marriages performed in the state which are not "licensed, solemnized, and registered" in accordance with this Act. For example, although an applicant for a marriage license may have given a false name to the clerk (see section 202(a)), the general policy favoring the validity of marriages would require that the marriage be held valid. This position is in accord with the case law. See *Clark, Domestic Relations* 41 (1968). Indeed, because Section 208 narrowly circumscribes the traditional annulment remedy, formal errors committed during the licensing, solemnization, or registration process could not be raised under that section.

In accordance with established usage, marriage is required to be between a man and a woman. These terms refer to all persons authorized by the Act to marry, and are not confined to those who have attained the legal age of majority. *Cochran v. State*, 91 Ga. 763, 185 S. E. 16 (1893); *Thomas v. Navas*, 47 Haw. 605, 393 P. 2d 615 (1964); *State v. Burt*, 75 N. H. 64, 71 A. 30, Ann. Cas. 1012A, 232 (1908); *Kenyon v. Peo.*, 26 N. Y. 203, 51 Am. Dec. 177 (1863) (per Balton, J.); *Blackburn v. State*, 22 Ohio St. 102 (1871); *Massa v. State*, 37 Ohio App. 632, 175 N. E. 219 (1930); *State v. Seiler*, 106 Wis. 340, 82 N. W. 167 (1908). The general course of decision holds that not every deviation from formal prescribed procedures renders a marriage subject to successful attack. Substantial compliance, in the light of attendant circumstances and statutory policy, results in a sustainable marriage. *Wallace v. Screws*, 227 Ala. 183, 149 So. 229 (1923); *Russell v. Tagliavere*, 163 So. 44 (La. App. 1934); *Knapp v. Knapp*, 140 Md. 203, 131 A. 329 (1926); *Johnson v. Johnson*, 214 Minn. 462, 8 N. W. 2d 620 (1943); *Hartman v. Valier & Spies*

Milling Co., 356 Mo. 424, 202 S. W. 2d 1 (1947); *Christensen v. Christensen*, 144 Neb. 763, 14 N. W. 2d 613 (1944); *Ponina v. Leland*, 454 P. 2d 16 (Nev. 1969); *Portwood v. Portwood*, 109 S. W. 2d 615 (Tex. Civ. App. 1937) (writ of error dismissed or refused). As to attacks on marriages which, though performed in accordance with the formal requirements of the Act, are either prohibited or are not permitted by the regulatory provisions of Section 202-207, consult Section 208, and comment thereto.

This section additionally emphasizes the legal concept of marriage as a civil contractual status, in distinction from any religious significance also attached thereto. In prescribing that a "marriage may be contracted, maintained, invalidated or dissolved only as provided by law," it does not preclude giving effect to the statutes and decisions of jurisdictions other than the enacting state.

1 SECTION 202. [Marriage License and Marriage Certificate.]

2 (a) The [Secretary of State, Commissioner of Public
3 Health] shall prescribe the form for an application for a
4 marriage license, which shall include the following infor-
5 mation:

6 (1) name, sex, occupation, address, social security num-
7 ber, and date and place of birth of each party to the pro-
8 posed marriage;

9 (2) if either party was previously married, his name,
10 and the date, place, and court in which the marriage was
11 dissolved or declared invalid or the date and place of
12 death of the former spouse;

13 (3) name and address of the parents or guardian of
14 each party;

15 (4) whether the parties are related to each other and,
16 if so, their relationship; and

17 (5) the name and date of birth of any child of which
18 both parties are parents, born before the making of the ap-
19 plication, unless their parental rights and the parent and
20 child relationship with respect to the child have been ter-
21 minated.

22 (b) The [Secretary of State, Commissioner of Public
23 Health] shall prescribe the forms for the marriage license,
24 the marriage certificate, and the consent to marriage.

COMMENT

The Act assumes that each state will adapt its existing marriage licensing statute so that it conforms to the substantive regulatory provisions of the Act. Such statutes vary substantially from state to state; and there is no special interest in obtaining uniformity as to the form utilized for marriage licenses and registrations. This section permits the state to forego legislative regulation by leaving the elaboration of forms to an appropriate state official. States unwilling to break completely with past legislative patterns nonetheless may want to review, modernize, and simplify legislation delineating

license and registration forms. The inclusion of social security numbers will facilitate the enforcement of duties of support, if this later becomes necessary. The information regarding prior marriages and their termination, as well as the information concerning children of whom both applicants are parents, similarly will prove helpful in a variety of situations making investigation appropriate. Information as to occupation may be useful to a determination of whether an underage marriage should be approved (Section 205), or in passing on issues as to maintenance, support, property division, or child custody. The name of a party who has been married previously of course should be that which he or she bore during that marriage.

1 SECTION 203. [License to Marry.] When a marriage appli-
2 cation has been completed and signed by both parties to a
3 prospective marriage and at least one party has appeared
4 before the [marriage license] clerk and paid the marriage
5 license fee of [\$————], the [marriage license] clerk shall
6 issue a license to marry and a marriage certificate form upon
7 being furnished:

8 (1) satisfactory proof that each party to the marriage
9 will have attained the age of 18 years at the time the
10 marriage license is effective, or will have attained the age
11 of 16 years and has either the consent to the marriage of
12 both parents or his guardian, or judicial approval; [or, if
13 under the age of 16 years, has both the consent of both
14 parents or his guardian and judicial approval;] and

15 (2) satisfactory proof that the marriage is not pro-
16 hibited; [and]

17 [(3) a certificate of the results of any medical exami-
18 nation required by the laws of this State].

COMMENT

To avoid inconvenience when one of the parties to the prospective marriage is residing, temporarily or permanently, outside the state, the Act requires that only one of the parties appear personally before the clerk to provide the information required by this section. Both parties must have signed the application. It is not intended that the state should create a new office to handle marriage license applications; the title of the official presently charged with the responsibility should be substituted for the bracketed phrase "[marriage license] clerk" wherever it appears in this Part. Each state should insert in the brackets its marriage license fee.

If both parties to the marriage have reached the age of 18, neither parental nor judicial consent is required to obtain a license. A number of states have already adopted this position; and it is consistent with the trend in federal as well as state law to lower to 18 the age at which persons are permitted to vote and to make autonomous decisions about important matters affecting their lives. A party under 18 must have consent of both of his parents to the marriage, if both are living and have capacity to consent. If one of his parents is unavailable, or if either or both of his parents refuses to consent, judicial approval must be obtained pursuant to

the provisions of Section 205. The Act requires judicial as well as parental consent to the marriage if one of the parties is below the age of 16. The provision respecting the issuance of a license for marriage to persons under the age of 16 is bracketed, to signify that states having a policy against marriage by persons so young may omit that provision, without doing violence to the concept of uniformity. The standard governing judicial approval is provided in Section 205.

"Satisfactory proof" of age and of required consent includes such methods as may be prescribed under Section 202(b) in the license form, or any other proof that should satisfy a reasonable official exercising unarbitrary judgment. See *United States v. Lee Huen*, 118 Fed. 442, 457 (N. D. N. Y. 1902).

Subsection (3) is bracketed because the Conference concluded that the traditional forms of premarital medical examination, now required by the marriage laws of most of the states, need not be preserved. The premarital medical examination requirement serves either to inform the prospective spouses of health hazards that may have an impact on their marriage, or to warn public health officials of the presence of venereal disease. For the latter purpose, the statutes have been proved to be both avoidable and highly inefficient. See Monahan, *State Legislation and Control of Marriage*, 2 *Journal of Family Law* 30, 34-35 (1962). Moreover, the cursory blood test which satisfies the requirements of most states provides very little service to the prospective spouses themselves. If a state decides to preserve its traditional premarital examination, a reference to its statute should be included in the cross-reference to this section.

1 SECTION 204. [License, Effective Date.] A license to marry
2 becomes effective throughout this state 3 days after the date
3 of issuance, unless the [————] court orders that the li-
4 cense is effective when issued, and expires 180 days after it
5 becomes effective.

COMMENT

A relatively short premarital waiting period has been chosen. The information available suggests that longer waiting periods do not discourage potentially unstable marriages; and, at any event, are often waived by judges. The other major function served by a waiting period, to discourage or eliminate the "dare" and "gin" marriages, can be accomplished by the three day delay required by this section. See *Ellsby, Marriage or Divorce?*, 22 *U. Kan. City L. Rev.* 9, 17 (1953). Each state should insert in the brackets the name of the appropriate court. The 180 day limit on the effectiveness of the license is for the convenience of engaged couples who need to plan for wedding dates long in advance. Obviously, this limit applies to all licenses.

1 SECTION 205. [Judicial Approval.]
2 (a) The [————] court, after a reasonable effort has
3 been made to notify the parents or guardian of each under-
4 aged party, may order the [marriage license] clerk to issue
5 a marriage license and a marriage certificate form:
6 [(1)] to a party aged 16 or 17 years who has no parent

7 capable of consenting to his marriage, or whose parent or
8 guardian has not consented to his marriage; [or
9 (2) to a party under the age of 16 years who has the
10 consent of both parents to his marriage, if capable of
11 giving consent, or his guardian].
12 (b) A marriage license and a marriage certificate form
13 may be issued under this section only if the court finds that
14 the underaged party is capable of assuming the responsibili-
15 ties of marriage and the marriage will serve his best inter-
16 est. Pregnancy alone does not establish that the best interest
17 of the party will be served.
18 (c) The [————] court shall authorize performance of
19 a marriage by proxy upon the showing required by the
20 provisions on solemnization.

COMMENT

The court given responsibility for approving youthful marriages should be identified in the statute. Many states, continuing existing practice, will assign this to the juvenile court; in other states, the probate court is used and in still others the designated court is a family court or the trial court of general jurisdiction. In accordance with the decision taken in Section 203, in respect to marriages of persons under 16 years of age, the provision concerning issuance to such persons has been bracketed.

The Act deliberately avoids detailing procedural rules to govern the judicial proceedings it establishes unless some special procedural device is essential to accomplish a substantive result sought by the Act. Thus, subsection (a) requires only that the court make a "reasonable effort" to notify the parents that an underaged party has sought judicial approval of a marriage license. (As to what constitutes reasonable effort to notify a person, see Merrill on Notice, Chapters 13, 14 and 19.) Since a party under the age of 16 years needs the consent of both his parents, if they are alive and have capacity to consent, as well as judicial approval, the court clerk will have to notify both parents when the judicial proceeding is commenced. But when a person aged 16 or 17 seeks judicial approval because one of his parents refuses to consent, the court can approve the application if the parent cannot be located or even if a recalcitrant parent avoids receiving formal notification.

The legal standard for judicial approval requires the judge to estimate the capacity of the underaged party to assume the responsibility of marriage and to determine whether the marriage would serve the best interest of that party. The judge obviously will want to obtain personal information about the other party to the prospective marriage as well; but the statute does not permit the judge to refuse his approval because he believes the marriage would not serve the best interest of the party over 18. The substantive standard necessarily is somewhat vague. Nonetheless, a number of considerations are implicit in the language and structure of the subsection: since judicial approval is a substitute for parental consent for 16 and 17 year old applicants, such applicants cannot be denied judicial approval solely because a parent or parents have refused to consent to the marriage; although the prospective wife's pregnancy is not alone a sufficient ground

for judicial approval, neither does the subsection mean that the judge may withhold approval solely because the prospective wife (whether she or her prospective spouse is the applicant) is pregnant. Pregnancy is one, but only one, of the relevant considerations the judge will weigh in determining the applicant's best interest. Although the standard is the same whether the applicant is between the ages of 16 and 18 or is under the age of 16, the judge will no doubt investigate younger applicants more thoroughly. The provision indicates that the judge will be abusing his discretion if he were to decide that no 16 or 17 year old is mature enough to marry.

1 SECTION 206. [Solemnization and Registration.]

2 (a) A marriage may be solemnized by a judge of a court
3 of record, by a public official whose powers include solemniza-
4 tion of marriages, or in accordance with any mode of
5 solemnization recognized by any religious denomination,
6 Indian Nation or Tribe, or Native Group. Either the person
7 solemnizing the marriage, or, if no individual acting alone
8 solemnized the marriage, a party to the marriage, shall
9 complete the marriage certificate form and forward it to the
10 [marriage license] clerk.

11 (b) If a party to a marriage is unable to be present at the
12 solemnization, he may authorize in writing a third person to
13 act as his proxy. If the person solemnizing the marriage is
14 satisfied that the absent party is unable to be present and
15 has consented to the marriage, he may solemnize the mar-
16 riage by proxy. If he is not satisfied, the parties may petition
17 the [————] court for an order permitting the marriage
18 to be solemnized by proxy.

19 (c) Upon receipt of the marriage certificate, the [marriage
20 license] clerk shall register the marriage.

21 (d) The solemnization of the marriage is not invalidated
22 by the fact that the person solemnizing the marriage was
23 not legally qualified to solemnize it, if either party to the
24 marriage believed him to be so qualified.

COMMENT

Subsection (a) lists the officials permitted to solemnize marriage. The clause, "no individual acting alone", was designed to take account of the increasing tendency of marrying couples to want a personalized ceremony without traditional church, religious or civil trappings. This provision authorizes one of the parties to such a marriage ceremony to complete the marriage certificate form and forward it to the appropriate official for registration. The phrase, "Native Group", was added to take account of indigenous or other aboriginal cultural groups who do not consider themselves to be nations or Tribes, such as some of the native groups found in Alaska and Hawaii.

Subsection (b) authorizes the solemnization of marriage by proxy. During World War II, special proxy marriage statutes were enacted to facilitate marriages when one of the prospective spouses could not be present because of military responsibilities. Although it is not expected that proxy marriages will be common, there are many reasons why, in individual cases, couples may prefer such a ceremony. So long as the marriage license procedure has been followed and the official performing the ceremony has no reason to doubt the intentions of the absent prospective spouse, there is no reason why a proxy marriage should be prohibited. As to the form of proxy, any written document in the well-known form of a proxy such as is used in other serious transactions suffices. Compare *State v. Anderson*, 239 Ore. 200, 396 P. 2d 558 (1964). The proceeding for an order authorizing proxy marriage is special, and may be informal, so long as the two conditions precedent to solemnization by proxy are demonstrated to the court's judicial satisfaction. If the official solemnizing the marriage is not satisfied that the absent party has consented to the marriage, he may refuse to perform the ceremony until the parties obtain a court order authorizing the marriage by proxy. [Section 205(b).]

Subsection (c) does not deal with the subject of procuring a copy of the registration of the marriage. This will be governed by the law of each state as to the procurement of certified copies of public records. A state that does not provide for the registration of marriages should make provision therefor upon adoption of this Act, either through a special statute or by administrative rule.

Subsection (d) states definitely what probably would be the meaning of the section without it. However, it probably is wise to remove any possibility of misconception.

- 1 SECTION 207. [Prohibited Marriages.]
2 (a) The following marriages are prohibited:
3 (1) a marriage entered into prior to the dissolution of
4 an earlier marriage of one of the parties;
5 (2) a marriage between an ancestor and a descendant,
6 or between a brother and a sister, whether the relationship
7 is by the half or the whole blood, or by adoption;
8 (3) a marriage between an uncle and a niece or between
9 an aunt and a nephew, whether the relationship is by the
10 half or the whole blood, except as to marriages permitted
11 by the established customs of aboriginal cultures.
12 (b) Parties to a marriage prohibited under this section
13 who cohabit after removal of the impediment are lawfully
14 married as of the date of the removal of the impediment.
15 (c) Children born of a prohibited marriage are legitimate.

COMMENT

The Act eliminates most of the traditional marriage prohibitions and, consistent with the national trend, eliminates all affinity prohibitions. Only bigamous and incestuous marriages are prohibited. The Act follows the trend of permitting first cousin marriages, but

uncle-niece and aunt-nephew marriages are prohibited unless such marriages are permitted by the established custom of aboriginal cultures. The phrase, "aboriginal cultures", is based on language employed in government documents. It is used to denote a cultural practice recognized by the original or earliest known inhabitants of a region (see Random House Dictionary's illustration: "aboriginal customs"). The intent is to save those special customs of Indian tribes, of Alaskan natives of various ethnic origins, and of Polynesians, which may not accord with the incest taboos of Western culture. Rhode Island, in considering this section, must take into account the effect of R. I. Gen. Laws (1956) § 16-1-4, in order to determine whether the Uniform Act, in this respect, should be conformed to local policy. See *In re May's Estate*, 305 N. Y. 486, 114 N. E. 2d 4 (1957). Marriages of brothers and sisters by adoption are prohibited because of the social interest in discouraging romantic attachments between such persons even if there is no genetic risk. The adoption provision is addressed directly to avoiding questions as to the impact of adoption on marriage law, since the adoption statutes in many states have not expressly resolved the issue. Cf. 6 & 7 Eliz., 2 c. 5 § 13 (3) (1958). The Act does not prohibit uncle-niece and aunt-nephew marriages where an adoption has created the relationship.

Subsection (b) is intended to cure a defect arising under the laws of many states. For one reason or another, many persons, whose marriages are invalid because of prohibitions, neglect to contract formal marriages after the impediment is removed. If they reside in a state where common law marriage is recognized, there is no problem. But, in other jurisdictions serious harm can result to legitimate interests of the surviving partner, of a sort which the legislators very likely would not have sanctioned had the possibility occurred to them. This subsection is intended to protect those interests.

Subsection (c) enacts the general modern trend to treat the offspring of prohibited marriages as legitimate.

- 1 SECTION 208. [Declaration of Invalidity.]
2 (a) The [] court shall enter its decree declaring
3 the invalidity of a marriage entered into under the following
4 circumstances:
5 (1) a party lacked capacity to consent to the marriage
6 at the time the marriage was solemnized, either because of
7 mental incapacity or infirmity or because of the influence
8 of alcohol, drugs, or other incapacitating substances, or a
9 party was induced to enter into a marriage by force or
10 duress, or by fraud involving the essentials of marriage;
11 (2) a party lacks the physical capacity to consummate
12 the marriage by sexual intercourse, and at the time the
13 marriage was solemnized the other party did not know of
14 the incapacity;
15 (3) a party [was under the age of 16 years and did not
16 have the consent of his parents or guardian and judicial
17 approval or] was aged 16 or 17 years and did not have the

18 consent of his parents or guardian or judicial approval; or
19 (4) the marriage is prohibited.

20 (b) A declaration of invalidity under subsection (a) (1)
21 through (3) may be sought by any of the following persons
22 and must be commenced within the times specified, but in no
23 event may a declaration of invalidity be sought after the
24 death of either party to the marriage:

25 (1) for a reason set forth in subsection (a) (1), by
26 either party or by the legal representative of the party
27 who lacked capacity to consent, no later than 90 days after
28 the petitioner obtained knowledge of the described con-
29 dition;

30 (2) for the reason set forth in subsection (a) (2), by
31 either party, no later than one year after the petitioner
32 obtained knowledge of the described condition;

33 (3) for the reason set forth in subsection (a) (3), by
34 the underaged party, his parent or guardian, prior to the
35 time the underaged party reaches the age at which he
36 could have married without satisfying the omitted re-
37 quirement.

Alternative A

38 [(c) A declaration of invalidity for the reason set forth in
39 subsection (a) (4) may be sought by either party, the legal
40 spouse in case of a bigamous marriage, the [appropriate
41 state official], or a child of either party, at any time prior
42 to the death of one of the parties.]

Alternative B

43 [(c) A declaration of invalidity for the reason set forth
44 in subsection (a) (4) may be sought by either party, the
45 legal spouse in case of a bigamous marriage, the [appropri-
46 ate state official] or a child of either party, at any time, not
47 to exceed 5 years following the death of either party.]

48 (d) Children born of a marriage declared invalid are
49 legitimate.

50 (e) Unless the court finds, after a consideration of all
51 relevant circumstances, including the effect of a retroactive
52 decree on third parties, that the interests of justice would
53 be served by making the decree not retroactive, it shall
54 declare the marriage invalid as of the date of the marriage.
55 The provisions of this Act relating to property rights of the
56 spouses, maintenance, support, and custody of children on
57 dissolution of marriage are applicable to non-retroactive
58 decrees of invalidity.

COMMENT

This section is designed to replace the traditional law of annulment of marriage. Some of the common grounds for annulment, such as fraud, have been abolished completely. Others have been restated to avoid unnecessary overlap with the dissolution sections.

This section states the circumstances under which the marriage may be terminated by a "declaration of invalidity," and establishes the "defenses" to each of the bases for a declaration. Subsection (b) states a general policy against declarations of invalidity after the death of either party to the marriage, and subsection (e) states a policy in favor of applying the dissolution provisions of Part III to the spouses' financial affairs following a declaration of invalidity.

Subsection (a)(1) states that declaration of invalidity may be obtained where there is proof that one of the parties to the marriage lacked capacity to consent to the marriage because of emotional illness or other mental disturbance or because of the incapacitating effect of alcohol or drugs. In the case of drugs and alcohol, the court is entitled to be somewhat skeptical about a claim of incapacity because of the protective features of the three day waiting period required by Section 204. Courts construing the "lacks capacity to consent" language of Subsection (a)(1) will undoubtedly continue to apply existing stringent standards by holding that a declaration of invalidity is appropriate only if the petitioner offers clear and definite evidence that one of the spouses lacked "sufficient mental capacity to understand intelligently the marriage contract . . . and the obligations it imposed upon him." *Ertel v. Ertel*, 313 Ill. App. 326, 40 N. E. 2d 85 (1942). The proceeding must be commenced within ninety days after petitioner discovered the existence of the condition. [Subsection (h)(1).] If a party was incapacitated by drugs or alcohol, the "statute of limitations" would of necessity begin to run shortly after the ceremony; thus, most claims of invalidity on such grounds will be stale a few months after the marriage. A declaration of invalidity may come later if one of the spouses is mentally retarded, has other mental infirmity, or is emotionally unstable; but the court would properly be skeptical if the petitioner asserted, after a substantial period of cohabitation, that he had discovered, only within the preceding three months, his spouse's lack of capacity, on their wedding day, to consent.

Subsection (a)(2) authorizes a declaration of invalidity if one of the spouses was unable to consummate the marriage by sexual intercourse, so long as the other spouse did not know of the condition at the time of the ceremony and if the proceeding is instituted within a year after the petitioner obtains knowledge of the condition. The one year period is provided to permit couples some time to try to adjust to a marriage under these circumstances without running the risk that a declaration of invalidity would be precluded. Since the marriage cannot be invalidated after the death of either spouse, and since the spouses' finances can be adjusted as if a divorce had been granted under subsection (e), there is no reason to compel the spouses to make a more rapid decision about continuing the marriage. In the absence of proof of extraordinary circumstances, such as a marriage by proxy or some enforced separation of the spouses prior to cohabitation, the court would be warranted in assuming that the one year period begins shortly after the ceremony rather than at some later date.

The phrase, "obtained knowledge of the described condition," in subsec-

tion (b) (1) and (2), is intended to mean awareness of the event, including information from a reliable source. In light of the public interest favoring promptness in bringing the petition, "knowledge" should be construed to include the possession of information sufficient to arouse inquiry concerning the existence of the condition. See Merrill, Notice § 4 (1952).

Subsection (a) (3) provides that, if one of the spouses was under the age of 18 at the time of the ceremony and married without satisfying the consent requirements of Section 203 or Section 205, that party or his parent or guardian may obtain a declaration of invalidity. There are, however, two important limitations to this ground for a declaration of invalidity: (1) a party to the marriage who was over 18, or a party under the age of 18 who had fulfilled the requirements of Section 203 or Section 205, is not entitled to a declaration of invalidity because there is no reason to permit that party to invalidate a marriage he was authorized to contract; (2) the underaged party or his representative is not entitled to a declaration of invalidity when he reaches the age of 18 (or 17, if he had parental consent and lacked only approval from the appropriate judicial officers). The brackets about the provision concerning persons aged under 18 carry out the options extended under Section 203.

The provisions of subsection (b), stating that no declaration of invalidity may be "sought" after the death of either party is intended to prohibit such a collateral attack upon the marriage, in lieu of a declaration, in all proceedings, including probate proceedings. Moreover, the use of the word "sought" rather than "commenced" implies that the death of a party to the marriage at any time before the entry of final judgment would terminate a proceeding attacking the marriage. The underlying policy reasons for this principle are clear: the traditional "void marriage" doctrine often imposed unwise and unfair penalties on innocent "spouses" in stable family situations long after the questioned marriage had occurred. The penalties serve no effective deterrent purpose, but cause severe economic dislocations; a spouse may be denied workmen's compensation and social security benefits, or even a share in a spouse's estate, after the marriage has been terminated by the death of the other spouse, despite the fact that the surviving spouse had no reason to suspect the invalidity of the marriage.

Alternative A of subsection (c) applies this principle to marriages prohibited by Section 207. A declaration of invalidity of a prohibited marriage may be obtained by either party to the marriage, by the legal spouse in bigamous marriages, by the appropriate state official, or by a child of one of the parties—but only prior to the death of one of the parties to the marriage. Alternative B would permit a declaration of invalidity by the same parties at any time up to five years after the death of either party to the marriage. A state considering the adoption of Alternative B should consider whether authorizing post-death collateral attacks on prohibited marriages is worth whatever deterrent effect the provision may have, when the only consequence of a successful attack will be to disturb settled financial relationships.

Subsection (e) authorizes the court to treat declarations of invalidity as what they have in fact become—substitutes for divorce. After considering all relevant circumstances, especially the impact of a retroactive decree upon the spouses, their children and other third parties, the court may make the decree not retroactive and may then apply the provisions of Part III in dis-

tributing the parties' property and in determining maintenance and child support. Even if the decree is made retroactive, the court may have to distribute property acquired by the spouses during the marriage. In the past this has been accomplished by analogy to partnership law. Cf. N. H. Rev. Stat. Ann. § 458:10 (1955); Clark, Domestic Relations 136 (1968).

1 [SECTION 209. [Putative Spouse.] An person who has
2 cohabited with another to whom he is not legally married in
3 the good faith belief that he was married to that person is a
4 putative spouse until knowledge of the fact that he is not
5 legally married terminates his status and prevents acquisi-
6 tion of further rights. A putative spouse acquires the rights
7 conferred upon a legal spouse, including the right to main-
8 tenance following termination of his status, whether or not
9 the marriage is prohibited (Section 207) or declared invalid
10 (Section 208). If there is a legal spouse or other putative
11 spouses, rights acquired by a putative spouse do not super-
12 sede the rights of the legal spouse or those acquired by other
13 putative spouses, but the court shall apportion property,
14 maintenance, and support rights among the claimants as
15 appropriate in the circumstances and in the interests of
16 justice.]

COMMENT

The best known method used by the courts to protect the "marital" interests of persons who have established a stable family relationship which cannot be recognized as a marriage (a marriage which is labelled "void" under current law, perhaps, or parties who have cohabited as husband and wife without marrying ceremonially) is the common law marriage doctrine. See Section 211. But a variety of other equitable doctrines have also been utilized—one or another can be found in almost every state—to preserve, if not the status, the financial incidents of valid marriage in such circumstances. See, e.g., Weyrauch, Informal and Formal Marriage—An Appraisal of Trends in Family Organization, 28 U. Chi. L. Rev. 88 (1960); *Danes v. Smith*, 30 N. J. Super. 292, 104 A. 2d 465 (1954). In the absence of doctrines such as these, many persons who in good faith consider themselves married, and who have established and maintained over a long period a stable family relationship, would be denied both the economic and status incidents of marriage. This section makes it clear that the Act was not intended to abolish such doctrines. In addition, it codifies one of the equitable doctrines which has proved, in California and other experience, to be especially useful. For illustrations of the application of the putative spouse doctrine in California, see Comment, Rights of the Putative and Meretricious Spouse in California, 60 Calif. L. Rev. 806 (1962). Cases from other jurisdictions illustrative of the putative spouse concept include *Walker v. Walker*, 330 Mich. 332, 47 N. W. 2d 633, 31 A. L. R. 2d 1260 (1951) and annotation; *Chiamond v. Chiamond*, 211 Miss. 740, 62 So. 2d 621 (1951); *Harone v. Harone*, 207 Ore. 26, 294 P. 2d 609 (1956); *Brandt v. Brandt*, 216 Ore. 423, 333 P. 2d 887 (1958); *Buck v. Buck*, 19 Utah 2d 161, 427 P. 2d 954 (1967).

It is possible for a person to have more than one putative spouse at the same time, since good faith is the test. In addition, a putative spouse and a legal spouse may be able to claim from a single estate or from other funds legally available to a spouse. A common situation of the latter type might involve a bigamous marriage in which the second spouse was never married or had been divorced. In such cases, the court is instructed to apportion property and the other financial incidents of marriage between the legal and the putative spouse, or among putative spouses. A fair and efficient apportionment standard is likely to be the length of time each spouse cohabited with the common partner. For illustrative cases, see *Estate of Ricci*, 201 Cal. App. 2d 146; 19 Cal. Rptr. 739 (1962); *Sousa v. Freitas*, 19 Cal. App. 3d 660; 89 Cal. Rptr. 485 (1970). Because the codification of any particular equitable doctrine designed to protect the financial interests of innocent parties is bound to be controversial, this section has been bracketed. Passage of the Act without this section should not, therefore, be taken to imply a legislative judgment adverse to continuing development of this or similar doctrines by the case law.

The adoption of this section is most desirable (1) to provide legislative foundation for achieving the obviously just results provided by the putative spouse doctrine; (2) to spell out specifically the rights conferred upon a putative spouse; (3) to state specifically when the status of putative spouse terminates; (4) to eliminate any distinction which some courts might attempt between prohibited marriages and those which merely are subject to declaration of invalidity; (5) to provide specifically for equitable apportionment, on the basis of justice and the special circumstances of each case, either where there are a legal spouse and a putative spouse, or where there are several putative spouses. Some judges have expressed difficulties in this regard, but the standard is a workable one which the courts are accustomed to apply in many fields, and there is a body of available authority to afford guidance, as indicated previously in this Comment.

- 1 SECTION 210. [Application.] All marriages contracted
- 2 within this State prior to the effective date of this Act, or
- 3 outside this State, that were valid at the time of the contract
- 4 or subsequently validated by the laws of the place in which
- 5 they were contracted or by the domicile of the parties, are
- 6 valid in this State.

COMMENT

This section serves two purposes. It insures that the Act's marriage regulations will not be used to invalidate marriages contracted before it takes effect. More importantly, it codifies the emerging conflicts principle that marriages valid by the laws of the state where contracted should be valid everywhere, even if the parties to the marriage would not have been permitted to marry in the state of their domicile. See Restatement Second of Conflict of Laws, Section 283 [Proposed Official Draft (1969)]. However, the section expressly fails to incorporate the "strong public policy" exception of the Restatement and hence may change the law in some jurisdictions. This section will preclude invalidation of many marriages which would have been invalidated in the past.

The Conference has withdrawn its approval of the Uniform Marriage Evasion Act. This section and the provisions of Section 207 are inconsistent with that Act. A state adopting this Act should repeal the earlier one, if it exists therein.

Alternative A

- 1 [SECTION 211. [Validity of Common Law Marriage.]
- 2 Common law marriages are not invalidated by this Act.]

Alternative B

- 1 [SECTION 211. [Invalidity of Common Law Marriage.]
- 2 Common law marriages contracted in this State after the
- 3 effective date of this Act are invalid.]

COMMENT

These alternatives are presented because the line of cleavage in the states, between those which consider the common law marriage to be a highly useful social institution and those which insist that all marriages *de jure* should be contracted in accordance with prescribed statutory formalities, proved impossible to erase. In view of this basic conflict as to policy, the Conference concluded that there was no hope of achieving uniformity of enactment, no matter which rule was adopted. Accordingly, the alternative versions of this section permit each state to make its decision in accordance with its own view as to policy, and to change its law at any time desired without destroying the effect of its adoption of the Uniform Act. Alternative A would preserve common law marriage in the form it has already taken by judicial decision. Alternative B would make clear that common law marriages contracted in the adopting state in the future are to not be recognized. The alternatives are a signal to the state legislatures that this issue should be re-examined even if the state is one of those which has already abolished common law marriage.

PART III DISSOLUTION

- 1 SECTION 301. [Application of [Rules of Civil Practice] to
- 2 Proceedings under this Act.]
- 3 (a) The [Rules of Civil Practice] apply to all proceedings
- 4 under this Act, except as otherwise provided in this Act.
- 5 (b) A proceeding for dissolution of marriage, legal sep-
- 6 aration, or declaration of invalidity of marriage shall be
- 7 entitled "In re the Marriage of _____ and _____."
- 8 A custody or support proceeding shall be entitled "In re the
- 9 (Custody) (Support) of _____."
- 10 (c) The initial pleading in all proceedings under this Act
- 11 shall be denominated a petition. A responsive pleading shall
- 12 be denominated a response. Other pleadings, and all plead-
- 13 ings in other matters under this Act, shall be denominated
- 14 as provided in the [Rules of Civil Practice].

15 (d) In this Act, "decree" includes "judgment."
16 (c) A decree of dissolution or of legal separation, if made,
17 shall not be awarded to one of the parties, but shall provide
18 that it affects the status previously existing between the
19 parties in the manner decreed.

COMMENT

The basic philosophy of this part of the draft is to utilize the procedural systems of the several states, so far as possible, in divorce litigation. However, in certain respects, the change from "fault" to "no-fault" basis dictates the use of terms and of procedures different from those which have become thoroughly associated with fault-orientation, in order to impress bench and bar with the break from past concepts.

The internal brackets in the catchline and the bracketing of "Rules of Practice" throughout the section indicate the bill draftsman's responsibility to use whatever term fits his state's procedural law.

Subsection (a) makes the state's normal procedural rules applicable to proceedings under this Act, except where it specifically provides otherwise. Procedural provisions in the Act include subsections (b) and (c) of Section 301; Section 304; Section 311; Section 314; Section 316; Section 403; Section 406 and Section 410.

Subsection (b) incorporates suggestions made by several writers that substitution of a neutral case title ("In re the Marriage of _____ and _____") for the customary adversary title ("_____ v. _____"), will help to reduce the hostile atmosphere of marital actions. The Act adopts this suggestion and extends it to independent custody and support proceedings. A custody or support proceeding commenced as part of a proceeding for dissolution or legal separation need not be separately entitled.

Subsection (c), like subsection (b), is intended to reduce the adversary trappings of family cases by substituting a "proceeding" for the customary "action" and denominating the pleadings "petition" and "response" rather than "complaint" and "answer." Similar provisions are West's Ann. Calif. Civ. Code (1970) §§ 4503, 4504; Iowa General Assembly, 1970 Regular Session H. F. 1156. The practice in states that already use a "petition" for the initial pleading in all civil cases will not be affected by this subsection.

Subsection (d) is designed to prevent any confusion from variance in terms.

Subsection (e) emphasizes the nonadversary philosophy by providing, in accordance with the practice of some states, that decrees of dissolution or separation shall not be awarded to either party. Instead they are to specify the change in the status of the parties.

Since the Rules of Civil Practice are made applicable to proceedings under the Act, such procedural tools as discovery procedures, bills of particulars, etc., may be required in proper cases. Obviously, the nonadversary nature of the proceedings make such tools inappropriate to the issue of irretrievable breakdown and the court should not permit their use. In matters of property division, the propriety of separation or maintenance agreements, and of provision for children, these tools may be extremely useful, and are not precluded by the Act, if they are found in the state's arsenal of procedural

1 SECTION 302. [Dissolution of Marriage; Legal Separation.]

2 (a) The [_____] court shall enter a decree of dissolu-
3 tion of marriage if:

4 (1) the court finds that one of the parties, at the time
5 the action was commenced, was domiciled in this State, or
6 was stationed in this State while a member of the armed
7 services, and that the domicile or military presence has
8 been maintained for 90 days next preceding the making
9 of the findings;

10 (2) the court finds that the marriage is irretrievably
11 broken, if the finding is supported by evidence that (i) the
12 parties have lived separate and apart for a period of more
13 than 180 days next preceding the commencement of the
14 proceeding, or (ii) there is serious marital discord adversely
15 affecting the attitude of one or both of the parties toward
16 the marriage;

17 (3) the court finds that the conciliation provisions of
18 Section 305 either do not apply or have been met;

19 (4) to the extent it has jurisdiction to do so, the court
20 has considered, approved, or provided for child custody,
21 the support of any child entitled to support, the mainte-
22 nance of either spouse, and the disposition of property; or
23 has provided for a separate later hearing to complete these
24 matters.

25 (b) If a party requests a decree of legal separation rather
26 than a decree of dissolution of marriage, the court shall grant
27 the decree in that form unless the other party objects.

COMMENT

Subsection (a) lists the three findings that a court must make before it has jurisdiction to enter a decree of dissolution of marriage: first, it must find that one party to the marriage has established an appropriate connection with the state; second, it must find that the marriage is irretrievably broken; and finally, to the extent it has jurisdiction to do so, it must have considered and passed on the issues of custody, support, maintenance, and property disposition. If the court lacks jurisdiction to act upon any of the matters listed in subsection (a) (3), without acting upon that matter, it may enter a decree of dissolution of marriage. Thus, if the court is acting upon the petition of one spouse only and the other spouse is not subject to the personal jurisdiction of the court, the court lacks jurisdiction to decide issues relating to maintenance, *Vanderbilt v. Vanderbilt*, 364 U.S. 416, 1 L. Ed. 2d 1456, 77 S.Ct. 1360 (1957); *Estin v. Estin*, 334 U.S. 541, 92 L. Ed. 1561, 68 S.Ct. 1213, 1 A. L. R. 2d 1412 (1948), or the distribution of property not before the court, see *Fall v. Eastin*, 215 U.S. 1, 64 L. Ed. 65, 30 S.Ct. 3, 23 L.RANS 924, 17 Ann. Cas. 853 (1909); and may not have jurisdiction, acting alone, to decide issues relating to support, consult the Uniform Reciprocal

Enforcement of Support Act, or child custody, *May v. Anderson*, 345 U.S. 628, 97 L. Ed. 1221, 73 S.Ct. 840 (1953), consult the Uniform Child Custody Jurisdiction Act. In such a case, the court has jurisdiction only to dissolve the marriage and it may enter its decree of dissolution after making the findings set forth in subsection (a) (1) and (2).

The 90 day period of subsection (a) (1) is intended to be continuous and to apply both to domiciliaries and to members of the armed services. It may be started at any time, but it must exist at the commencement of the action and it must have been maintained for 90 days next preceding the findings by the court. Obviously, dependent upon circumstances, it may commence, effectively, sometime before the initiation of the action. One who has just entered the forum state may commence the proceeding immediately, thus enabling the court to enter such temporary orders as are necessary to protect the rights of the parties. Since the test is domicile, the party need not remain physically present throughout the 90 day period, so long as he has acquired no new domicile. Similarly, a member of the armed forces might be outside the boundary lines, if he remained "stationed" therein. A showing that either party satisfies the 90 day requirement is sufficient; hence a petitioner may utilize fulfillment of the 90 day period by the respondent.

Subsection (a) (2) embodies the basic shift from fault to no-fault grounds for dissolution of the marriage which is the primary object of this part of the Act. Many terms might have been used to characterize the concept. "Irretrievably broken" was chosen because this has become a term of common use in the literature of divorce reform, and so has gained a significant meaning upon which judges may rely for guidance. It is closely related to the standards recently adopted in California ("irremediable breakdown") and in Iowa ("breakdown of the marriage relationship . . . no reasonable likelihood that the marriage can be preserved") and equates to the doctrinal result attained under the concept of incompatibility, *Newman v. Newman*, 391 P. 2d 902 (Okla. 1964) ("irremediable rift . . . such a conflict of personalities as to destroy the legitimate ends of matrimony and the possibility of reconciliation"). Two guidelines are set up for evidence sufficient to support a finding that the marriage is irretrievably broken: (i) that the parties have lived separate and apart for more than 180 days next preceding the commencement of the proceeding for dissolution; (ii) that there exists "serious marital discord adversely affecting the attitude of one or both of the parties toward the marriage." These provisions satisfy the desire of those who wish to have specific guidelines to assist the court in determining what is irretrievable breakdown. At the same time, the second provision retains all the judicial discretion to weigh all the evidence bearing upon the death of the marriage which was envisioned in the original draft of this section as approved by the Conference in St. Louis in 1970.

Subsection (a) (3) prescribes that the court must find specifically either that the conciliation provisions of Section 303 do not apply or that they have been met. This guards against overlooking the Act's policy to encourage conciliation procedures in situations where there is promise of success.

The phrase, "considered, approved, or provided for," in subsection (a) (4) is intended to confer upon the court the authority to refuse to make any award, if the evidence justifies an outright denial, as well as the authority to make such allotment as the facts require. To avoid any doubt, the court is authorized expressly to provide for a later hearing to complete action on these

matters, if necessary. Probably this would be within the general scope of judicial authority in most states.

Subsection (b) means that the court may not grant a decree of legal separation over the objection of one of the parties. In cases where both parties are before the court, if one party requests a decree of legal separation and the other party requests a decree of dissolution, the court lacks jurisdiction to enter a decree of legal separation. If only one party is before the court and the court lacks personal jurisdiction over the other party, the court may enter a decree of legal separation at the petitioner's request. A similar provision is found in the California Family Law Act of 1969, California Civil Code section 4508(b).

1 SECTION 303. [Procedure; Commencement; Pleadings;
2 Abolition of Existing Defenses.]

3 (a) All proceedings under this Act shall be commenced as
4 provided by the [Rules of Civil Practice].

5 (b) The verified petition in a proceeding for dissolution of
6 marriage or legal separation shall allege that the marriage
7 is irretrievably broken and shall set forth:

8 (1) the age, occupation, and length of residence in this
9 State of each party;

10 (2) the date of the marriage and the place at which it
11 was registered;

12 (3) that the jurisdictional requirements of Section 302
13 exist and the marriage is irretrievably broken in that either
14 (i) the parties have lived separate and apart for a period of
15 more than 180 days next preceding the commencement of
16 the proceeding or (ii) there is serious marital discord ad-
17 versely affecting the attitude of one or both of the parties
18 toward the marriage, and there is no reasonable prospect
19 of reconciliation;

20 (4) the names, ages, and addresses of all living chil-
21 dren of the marriage and whether the wife is pregnant;

22 (5) any arrangements as to support, custody, and visita-
23 tion of the children and maintenance of a spouse; and

24 (6) the relief sought.

25 (c) Either or both parties to the marriage may initiate
26 the proceeding.

27 (d) If a proceeding is commenced by one of the parties,
28 the other party shall be served in the manner provided by
29 the [Rules of Civil Practice] and within [30] days after the
30 date of service may file a verified response.

31 (e) Previously existing defenses to divorce and legal sep-
32 aration, including but not limited to condonation, conniv-
33 ance, collusion, recrimination, insanity, and lapse of time,

34 are abolished.

35 (f) The court may join additional parties proper for the
36 exercise of its authority to implement this Act.

COMMENT

Subsection (a) provides for commencement of proceedings in whatever way is required by the local practice rules or act.

Subsection (b) lists the necessary allegations of the petition. Other appropriate allegations may be included at the pleader's discretion. Residence, of course, has the meaning "domicil," as this is made the basis of jurisdiction in Section 302 (a) (1) and the comment thereto. If a petitioner is a member of the armed services, the allegation of residence in the state is satisfied by an allegation of the length of time petitioner has been stationed within the state as provided in Section 302 (a) (1). "Occupation" means vocation, not avocation. If the petitioner has grounds for relying upon both (i) and (ii) in support of the allegation of irretrievable breakdown, he may allege them conjunctively, and, if the proof supports either one, he will be entitled to his decree under Section 302. Subsection (b) (6) does not require the parties to allege their arrangements as to property division, since, under Section 306, they may choose to keep these arrangements private. In such cases, the court's duty under Section 302 (a) (3) to consider, approve, or make provision for property disposition may be satisfied by inquiring of both parties whether they have freely arrived at a mutually satisfactory disposition of their property.

Subsection (c) permits joint initiation of the proceeding by both spouses, thereby shifting from the traditional doctrine of the law forbidding so-called collusive divorce.

Subsection (d) provides for service of process, petition, or notice, as the case may be, in the manner prescribed by local practice rules or codes, but requires a verified response, if any, and prescribes its filing within 30 days after date of service. This is another of the procedures designed to affirm the variance of the non-fault divorce procedure from the traditional litigation based on fault grounds.

Subsection (e) abolishes the traditional defenses to divorce and legal separation. A state that recognizes other defenses should add those to the list in this subsection and again in the specific repealer, Section 504 (3). The intention is that the sole defense, other than jurisdictional defenses, to dissolution of marriage or legal separation will be that the marriage is not irretrievably broken.

Subsection (f) is designed to insure to the court full authority to cause additional parties to be joined, whenever necessary to the complete effectuation of any of its duties or functions in administering the Act. Under the procedures of some states, it appears that it is necessary to provide expressly for this authority. The method for serving these new parties will be any method available under the state's general procedural rules or statutes.

1 SECTION 301. [Temporary Order or Temporary Injunc-
2 tion.]

3 (a) In a proceeding for dissolution of marriage or for
4 legal separation, or in a proceeding for disposition of prop-
5 erty or for maintenance or support following dissolution of

6 the marriage by a court which lacked personal jurisdiction
7 over the absent spouse, either party may move for temporary
8 maintenance or temporary support of a child of the marriage
9 entitled to support. The motion shall be accompanied by an
10 affidavit setting forth the factual basis for the motion and
11 the amounts requested.

12 (b) As a part of a motion for temporary maintenance or
13 support or by independent motion accompanied by affidavit,
14 either party may request the court to issue a temporary
15 injunction for any of the following relief:

16 (1) restraining any person from transferring, encum-
17 bering, concealing, or otherwise disposing of any property
18 except in the usual course of business or for the necessi-
19 ties of life, and, if so restrained, requiring him to notify
20 the moving party of any proposed extraordinary expendi-
21 tures made after the order is issued;

22 (2) enjoining a party from molesting or disturbing the
23 peace of the other party or of any child;

24 (3) excluding a party from the family home or from
25 the home of the other party upon a showing that physical
26 or emotional harm would otherwise result;

27 (4) enjoining a party from removing a child from the
28 jurisdiction of the court; and

29 (5) providing other injunctive relief proper in the cir-
30 cumstances.

31 (c) The court may issue a temporary restraining order
32 without requiring notice to the other party only if it finds
33 on the basis of the moving affidavit or other evidence that
34 irreparable injury will result to the moving party if no order
35 is issued until the time for responding has elapsed.

36 (d) A response may be filed within [20] days after service
37 of notice of motion or at the time specified in the temporary
38 restraining order.

39 (e) On the basis of the showing made and in conformity
40 with Sections 308 and 309, the court may issue a temporary
41 injunction and an order for temporary maintenance or sup-
42 port in amounts and on terms just and proper in the cir-
43 cumstance.

44 (f) A temporary order or temporary injunction:

45 (1) does not prejudice the rights of the parties or the
46 child which are to be adjudicated at subsequent hearings
47 in the proceeding;

48 (2) may be revoked or modified before final decree on a

49 showing by affidavit of the facts necessary to revocation or
50 modification of a final decree under Section 316; and
51 (3) terminates when the final decree is entered or when
52 the petition for dissolution or legal separation is volun-
53 tarily dismissed.

COMMENT

Subsection (a) permits motions for temporary maintenance and temporary support in three kinds of proceedings, (1) dissolution of marriage; (2) legal separation; and (3) independent proceedings for maintenance, support, or property disposition following an *ex parte* dissolution of the marriage granted in another, earlier proceeding. Motions for temporary custody are covered by Section 403.

Subsection (b) is intended to permit the court to restrain either spouse or a third party, including a bank or other institutional holder of property, from dealing with the property in the manner specified, or to take other action which might involve serious mental or physical harm to a party or to one of the children. It also is intended to authorize the court to prevent the removal of a child from its jurisdiction, and to grant any other injunctive relief necessary to proper judicial functioning under the Act. In some states, the local rules of practice may require that third parties be made parties to the proceeding in order to accomplish this goal.

Subsection (c) authorizes a limited *ex parte* practice which permits the court, upon a showing that irreparable injury would otherwise result, to issue a temporary restraining order without notice to the other party. The order becomes effective upon service on the other party and will remain effective until discharged by the court. It is anticipated that an early hearing date will be set on an order to determine whether the temporary restraining order should be continued or made permanent so that the other party may be heard as soon as possible on the merits. A provision similar to subsections (b) and (c) appears in the California Family Law Act of 1969 (California Civil Code, section 4359, as amended, 1970).

Each state should insert its own time limit in subsection (d), bearing in mind that the matter should be handled with dispatch and that the court may make an order shortening time on a proper showing.

Subsection (f) (1) is intended to make clear that the amount established for temporary support or maintenance will not prejudice the parties at later hearings held to determine the amount of permanent support or maintenance. If the parties and their attorneys are able to agree on amounts for temporary payments without having to worry that these amounts will establish a precedent of need or ability to pay at later hearings, such adversary maneuvering and its consequent result of suspicion and bitterness may be avoided.

1 Section 305. [Irretrievable Breakdown.]

2 (a) If both of the parties by petition or otherwise have
3 stated under oath or affirmation that the marriage is irre-
4 trievably broken, or one of the parties has so stated and the
5 other has not denied it, the court, after hearing, shall make a
6 finding whether the marriage is irretrievably broken.

7 (b) If one of the parties has denied under oath or affirma-
8 tion that the marriage is irretrievably broken, the court shall
9 consider all relevant factors, including the circumstances that
10 gave rise to filing the petition and the prospect of reconcilia-
11 tion, and shall:

12 (1) make a finding whether the marriage is irretriev-
13 ably broken; or

14 (2) continue the matter for further hearing not fewer
15 than 30 nor more than 60 days later, or as soon thereafter
16 as the matter may be reached on the court's calendar, and
17 may suggest to the parties that they seek counseling. The
18 court, at the request of either party shall, or on its own
19 motion may, order a conciliation conference. At the ad-
20 journed hearing the court shall make a finding whether
21 the marriage is irretrievably broken.

22 (c) A finding of irretrievable breakdown is a determin-
23 ation that there is no reasonable prospect of reconciliation.

COMMENT

This section, with others, embodies a new approach to dissolution of marriage. It provides that the only basis upon which a marriage may be dissolved is that a court has found that the marriage has broken down irretrievably. The traditional grounds for divorce, which assumed that one party had been at fault by committing an act giving rise to a cause of action for divorce, are abolished. The legal assignment of blame is here replaced by a search for the reality of the marital situation: whether the marriage has ended in fact. The public policy embodied in this section was recognized in *DeBurgh v. DeBurgh*, 39 Cal. 2d 854, 863-44, 250 P. 2d 688, 801 (1952) (Traynor, J.): "when a marriage has failed and the family has ceased to be a unit, the purposes of family life are no longer served and divorce will be permitted." California, Iowa, and other states have adopted the non-fault approach to marriage dissolution proposed by this section.

This section makes the determination of whether the marriage is irretrievably broken, in all cases, a matter for determination by the court, "after hearing," which means "upon evidence." *Shields v. Utah Idaho Central R. R. Co.*, 305 U.S. 177, 83 L. Ed. 111, 58 S. Ct. 100 (1934); *Juster News v. Christian*, 214 Minn. 108, 7 N.W. 2d 801 (1943); *State ex. rel. Elliot v. State Road Com.*, 100 W. Va. 421, 131 S.E. 7 (1925). In procedural terms, it distinguishes two types of cases. In the group of cases covered by subsection (a), the only evidence presented to the court suggests the allegation of the petition that the marriage is irretrievably broken. Either both parties have so stated whether in the petition or by oral or written testimony before the court, or one party has done so without objection from the other. In this group of cases, the court must make a finding "after hearing" whether the marriage is irretrievably broken. The *Condon* is included, even so in this category of cases, that the determination of breakdown should be a judicial function rather than a conclusive presumption arising from the parties' testimony or from the petition. This decision accords with the position taken in

California and in Iowa. The alternative of adjournment, provided by subsection (b) for cases in which there is a dispute as to whether the marriage is irretrievably broken, is not available in these cases. In most cases falling under the terms of subsection (a), it is anticipated that the court will find that the marriage is irretrievably broken because there will be no evidence before the court that might support a contrary finding. In rare cases, however, the court may not find the evidence credible. In such cases, the court normally will permit the parties to produce other evidence that the court may find persuasive. For this purpose, normal practice will permit the parties to request that the hearing be continued for a short time. Power to continue is implicit in the power to hear.

Subsection (b) covers the situation in which the parties are in dispute as to whether their marriage is irretrievably broken. In these circumstances, the court is directed to consider the factors relevant to marital breakdown, including the petitioner's reasons for seeking a dissolution of the marriage and the prospect that the parties may achieve a reconciliation, and to decide forthwith or at an adjourned hearing whether the marriage is irretrievably broken.

Because the defense of recrimination and other concepts associated with fault are abolished by the Act (sections 303(e) and 503), the court may not refuse to find that the marriage has broken down irretrievably merely because of petitioner's conduct during the marriage. If the court decides to adjourn the matter as provided in subsection (b) (2), it may suggest that the parties seek counseling during the period of adjournment. The waiting period must be no shorter than thirty days and, if possible in light of the court's calendar, no longer than sixty days after the previous hearing. The court must make its final decision as to whether the marriage is irretrievably broken at the adjourned hearing. The section does not contemplate more than one adjourned hearing, although certainly a hearing not completed at one session may be continued. The power of either party, or of the court, to require a conciliation conference, is in aid of the policy to encourage conciliation, and, in appropriate cases, resort to counseling, without invoking the controversial tool of compulsory counseling.

Section 306 intentionally makes no distinction between childless marriages and those with minor children. If the parties establish that their marriage has broken down irretrievably, the court is not authorized to make a contrary finding because of the impact of a dissolution of the marriage upon the minor children. Under former law, if the parties established the existence of a ground for divorce and no defenses existed, the court lacked jurisdiction to deny the divorce simply because of its views about divorce or the impact of divorce on minor children. There is no intention to change this rule. The court's power in this regard is limited to seeing that provision has been made for the custody and support of minor children as contemplated by Section 302(a) (3).

Because it is expected that the parties themselves will be the primary source of evidence as to irretrievable breakdown, the Act has eliminated any requirement of corroboration.

The Conference took no position as to whether a family court should be established as an adjunct to the Act, because it felt that the subject was one in which uniformity was not essential, and, indeed, that uniformity by statute would be impossible, in view of differing state constitutional provisions. The

Act does not forbid the creation of a family court, or the use of a family court division within a court having jurisdiction over divorce and related subjects.

Subsection (c) insures that the court, in finding irretrievable breakdown, will consider whether there is any reasonable prospect of reconciliation. The remedy for a determination of any relevant fact issue, contrary to the evidence, is afforded by the usual channels of appeal.

1 SECTION 306. [Separation Agreement.]

2 (a) To promote amicable settlement of disputes between
3 parties to a marriage attendant upon their separation or the
4 dissolution of their marriage, the parties may enter into a
5 written separation agreement containing provisions for dis-
6 position of any property owned by either of them, mainte-
7 nance of either of them, and support, custody, and visitation
8 of their children.

9 (b) In a proceeding for dissolution of marriage or for
10 legal separation, the terms of the separation agreement,
11 except those providing for the support, custody, and visita-
12 tion of children, are binding upon the court unless it finds,
13 after considering the economic circumstances of the parties
14 and any other relevant evidence produced by the parties, on
15 their own motion or on request of the court, that the separa-
16 tion agreement is unconscionable.

17 (c) If the court finds the separation agreement uncon-
18 scionable, it may request the parties to submit a revised
19 separation agreement or may make orders for the disposition
20 of property, maintenance, and support.

21 (d) If the court finds that the separation agreement is not
22 unconscionable as to disposition of property or maintenance,
23 and not unsatisfactory as to support:

24 (1) unless the separation agreement provides to the
25 contrary, its terms shall be set forth in the decree of dis-
26 solution or legal separation and the parties shall be ordered
27 to perform them, or

28 (2) if the separation agreement provides that its terms
29 shall not be set forth in the decree, the decree shall identify
30 the separation agreement and state that the court has
31 found the terms not unconscionable.

32 (e) Terms of the agreement set forth in the decree are
33 enforceable by all remedies available for enforcement of a
34 judgment, including contempt, and are enforceable as con-
35 tract terms.

36 (f) Except for terms concerning the support, custody, or
37 visitation of children, the decree may expressly preclude or

38 limit modification of terms set forth in the decree if the sep-
39 aration agreement so provides. Otherwise, terms of a separa-
40 tion agreement set forth in the decree are automatically modi-
41 fied by modification of the decree.

COMMENT

An important aspect of the effort to reduce the adversary trappings of marital dissolution is the attempt, made by Section 306, to encourage the parties to reach an amicable disposition of the financial and other incidents of their marriage. This section entirely reverses the older view that property settlement agreements are against public policy because they tend to promote divorce. Rather, when a marriage has broken down irretrievably, public policy will be served by allowing the parties to plan their future by agreeing upon a disposition of their property, their maintenance, and the support, custody, and visitation of their children.

Subsection (b) undergirds the freedom allowed the parties by making clear that the terms of the agreement respecting maintenance and property disposition are binding upon the court unless those terms are found to be unconscionable. The standard of unconscionability is used in commercial law, where its meaning includes protection against one-sidedness, oppression, or unfair surprise (see section 2-302, Uniform Commercial Code), and in contract law, *Scott v. U. S.*, 12 Wall. (U. S.) 443 (1870) ("contract . . . unreasonable and unconscionable but not void for fraud") *Stiefel v. McCullough*, 97 Ind. App. 123, 174 N. E. 823 (1931); *Terre Haute Coopers v. Hrancome*, 203 Miss. 403, 35 So. 2d 637 (1948); *Carter v. Boone County Trust Co.*, 338 Mo. 629, 92 S. W. 2d 647 (1936). It has been used in cases respecting divorce settlements or awards. *Bell v. Bell*, 150 Colo. 174, 371 P. 2d 773 (1962) ("the division of property is manifestly unfair, inequitable and unconscionable"). Hence the act does not introduce a novel standard unknown to the law. In the context of negotiations between spouses as to the financial incidents of their marriage, the standard includes protection against overreaching, concealment of assets, and sharp dealing not consistent with the obligations of marital partners to deal fairly with each other.

In order to determine whether the agreement is unconscionable, the court may look to the economic circumstances of the parties resulting from the agreement, and any other relevant evidence such as the conditions under which the agreement was made, including the knowledge of the other party. If the court finds the agreement not unconscionable, its terms respecting property division and maintenance may not be altered by the court at the hearing.

The terms of the agreement respecting support, custody, and visitation of children are not binding upon the court even if these terms are not unconscionable. The court should perform its duty to provide for the children by careful examination of the agreement as to these terms in light of the standards established by Section 309 for support and by Part IV for custody and visitation.

Subsection (c) envisages that, if the court finds the agreement unconscionable, it will afford the parties the opportunity to negotiate further. If they are unable to arrive at an agreement that is not unconscionable, the court, on motion of either party, may decide the issues of property disposition, support, and maintenance in light of the standards established in Section 307

through 309. The court's power to make orders for the custody and visitation of the children is set forth in Part IV.

Subsection (d) permits the parties, in drawing the separation agreement, to choose whether its terms shall or shall not be set forth in the decree. In the former event, the provisions of subsection (c), making these terms enforceable through the remedies available for the enforcement of a judgment, but retaining also the enforceability of them as contract terms, apply. This represents a reversal of the policy of the original 1970 Act, which required a choice between "merging" the agreement in the judgment and retaining its character as a contract. Strong representations as to the undesirability of such a choice, in the light of foreign doctrines as to the enforceability of judgments, as compared with contract terms, in this area of the law, made by persons and groups whose expertise entitled them to respect, led the Conference, in 1971, to change its former decision.

There still remains a place for agreements the terms of which are not set forth in the decree, if the parties prefer that it retain the status of a private contract, only. In this instance, the remedies for the enforcement of a judgment will not be available, but the court's determination, in the decree, that the terms are not unconscionable, under the ordinary rules of *res adjudicata*, will prevent a later successful claim of unconscionability. Such an agreement, unless its terms expressly so permit, will not be modifiable as to economic matters. Other subjects, relating to the children, by subsection (b) do not bind the Court.

Subsection (f) allows the parties to agree that their provisions as to maintenance and property division will not be modifiable or can be modified only in accordance with the terms of the agreement, even though those terms are included in the decree. If the court finds that these are not unconscionable, it may include them in its decree. The effect of including in the decree a provision precluding or limiting modification of the terms respecting maintenance or property division is to make the decree nonmodifiable or modifiable only in the limited way as to those terms. Subsection (f) thus permits the parties to agree that their future arrangements may not be altered except in accord with their agreement. Such an agreement maximizes the advantages of careful future planning and eliminates uncertainties based on the fear of subsequent motions to increase or decrease the obligations of the parties. However, as stated in the subsection, this does not apply to provisions for the support, custody, or visitation of children.

Concerning the effect of a decree as a lien on the property of the spouse against whom it is rendered, the Conference took the position that the general laws of the state, as to judgment liens, would apply. However, in jurisdictions with special statutes respecting the liens created by decrees for support, maintenance, and the like, care should be taken in preparing the regular section not to disturb provisions it is desired to retain.

Alternative A

- 1 [SECTION 307. [Disposition of Property.]
- 2 (a) In a proceeding for dissolution of a marriage, legal
- 3 separation, or disposition of property following a decree of
- 4 dissolution of marriage or legal separation by a court which
- 5 lacked personal jurisdiction over the absent spouse or lacked
- 6 jurisdiction to dispose of the property, the court, without

7 regard to marital misconduct, shall, and in a proceeding for
8 legal separation may, finally equitably apportion between the
9 parties the property and assets belonging to either or both
10 however and whenever acquired, and whether the title thereto
11 is in the name of the husband or wife or both. In making
12 apportionment the court shall consider the duration of the
13 marriage, any prior marriage of either party, any antenuptial
14 agreement of the parties, the age, health, station, occupation,
15 amount and sources of income, vocational skills, employability,
16 estate, liabilities, and needs of each of the parties, custodial
17 provisions, whether the apportionment is in lieu of or in addi-
18 tion to maintenance, and the opportunity of each for future
19 acquisition of capital assets and income. The court shall also
20 consider the contribution or dissipation of each party in the
21 acquisition, preservation, depreciation, or appreciation in
22 value of the respective estates, and as the contribution of a
23 spouse as a homemaker or to the family unit.

24 (b) In the proceeding, the court may protect and promote
25 the best interests of the children by setting aside a portion
26 of the jointly and separately held estates of the parties in a
27 separate fund or trust for the support, maintenance, educa-
28 tion, and general welfare of any minor, dependent, or incom-
29 petent children of the parties.]

Alternative II

1 [SECTION 307. *(Disposition of Property.)* In a proceeding
2 for dissolution of the marriage, legal separation, or disposi-
3 tion of property following a decree of dissolution of the mar-
4 riage or legal dissolution by a court which lacked personal
5 jurisdiction over the absent spouse or lacked jurisdiction to
6 dispose of the property, the court shall assign each spouse's
7 separate property to that spouse. It also shall divide commu-
8 nity property, without regard to marital misconduct, in just
9 proportions after considering all relevant factors including:

10 (1) contribution of each spouse to acquisition of the
11 marital property, including contribution of a spouse as
12 homemaker;

13 (2) value of the property set apart to each spouse;

14 (3) duration of the marriage; and

15 (4) economic circumstances of each spouse when the
16 division of property is to become effective, including the
17 desirability of awarding the family home or the right to
18 live therein for a reasonable period to the spouse having
19 custody of any children.]

COMMENT

Alternative A, which is the alternative recommended generally for adop-
tion, proceeds upon the principle that all the property of the spouses, however
acquired, should be regarded as assets of the married couple, available for
distribution among them, upon consideration of the various factors enu-
merated in subsection (a). It will be noted that among these are health,
vocational skills and employability of the respective spouses and these con-
tributions to the acquisition of the assets, including allowance for the contri-
bution thereto of the "homemaker's services to the family unit." This last is
a new concept in Anglo-American law.

Subsection (b) affords a way to safeguard the interests of the children
against the possibility of the waste or dissipation of the assets allotted to a
particular parent in consideration of being awarded the custody or support
of a child or children.

Alternative B was included because a number of Commissioners from
community property states represented that their jurisdictions would not
wish to substitute, for their own systems, the great hotchpot of assets created
by Alternative A, preferring to adhere to the distinction between community
property and separate property, and providing for the distribution of that
property alone, in accordance with an enumeration of principles, resembling,
so far as applicable, to those set forth in Alternative A.

1 SECTION 308. *(Maintenance.)*

2 (a) In a proceeding for dissolution of marriage, legal sepa-
3 ration, or maintenance following a decree of dissolution of
4 the marriage by a court which lacked personal jurisdiction
5 over the absent spouse, the court may grant a maintenance
6 order for either spouse, only if it finds that the spouse seek-
7 ing maintenance:

8 (1) lacks sufficient property to provide for his reason-
9 able needs; and

10 (2) is unable to support himself through appropriate
11 employment or is the custodian of a child whose condition
12 or circumstances make it appropriate that the custodian
13 not be required to seek employment outside the home.

14 (b) The maintenance order shall be in amounts and for
15 periods of time the court deems just, without regard to mari-
16 tal misconduct, and after considering all relevant factors in-
17 cluding:

18 (1) the financial resources of the party seeking main-
19 tenance, including marital property apportioned to him, his
20 ability to meet his needs independently, and the extent to
21 which a provision for support of a child living with the
22 party includes a sum for that party as custodian;

23 (2) the time necessary to acquire sufficient education or
24 training to enable the party seeking maintenance to find
25 appropriate employment;

- 26 (3) the standard of living established during the mar-
 27 riage;
 28 (4) the duration of the marriage;
 29 (5) the age and the physical and emotional condition
 30 of the spouse seeking maintenance; and
 31 (6) the ability of the spouse from whom maintenance
 32 is sought to meet his needs while meeting those of the
 33 spouse seeking maintenance.

COMMENT

Section 308 (a) authorizes the court to order maintenance to either spouse in three kinds of proceedings: (1) dissolution of marriage; (2) legal separation; and (3) independent proceedings for maintenance following an earlier proceeding for dissolution of the marriage by a court which lacked personal jurisdiction over the absent spouse and thus could not affect maintenance [see comment to Section 302 (a)]. In all three kinds of proceedings the court may award maintenance only if both findings listed in (1) and (2) are made. The dual intention of this section and Section 307 is to encourage the court to provide for the financial needs of the spouses by property disposition rather than by an award of maintenance. Only if the available property is insufficient for the purpose and if the spouse who seeks maintenance is unable to secure employment appropriate to his skills and interests or is occupied with child care may an award of maintenance be ordered.

Assuming that an award of maintenance is appropriate under subsection 308(a), the standards for setting the amount of the award are set forth in subsection 308(b). Here, as in Section 307, the court is expressly admonished not to consider the misconduct of a spouse during the marriage. Instead, the court should consider the factors relevant to the issue of maintenance, including those listed in subdivisions (1)-(6).

- 1 SECTION 309. [*Child Support.*] In a proceeding for dis-
 2 solution of marriage, legal separation, maintenance, or child
 3 support, the court may order either or both parents owing a
 4 duty of support to a child to pay an amount reasonable or
 5 necessary for his support, without regard to marital miscon-
 6 duct, after considering all relevant factors including:
 7 (1) the financial resources of the child;
 8 (2) the financial resources of the custodial parent;
 9 (3) the standard of living the child would have enjoyed
 10 had the marriage not been dissolved;
 11 (4) the physical and emotional condition of the child
 12 and his educational needs; and
 13 (5) the financial resources and needs of the noncustodial
 14 parent.

COMMENT

This section does not set forth the conditions under which a parent owes a duty of support to a child. Principles affecting duties of support occur else-

where in the Act, as well as in the other statutes or the common law of the State. Rather, the intent is merely to indicate the factors which a court should consider in setting the amount of support to be paid by either the mother or the father or both. The provision authorizing an order requiring either or both parents to pay child support permits the court to order the custodial parent to contribute to the child's support as well, or to insure that property or payment set aside to the custodial parent for child support are used for that purpose. "Child" includes any child recognized by the laws of the state as "living" or "in being", and, also, a child by adoption. The Section authorizes the issue of child support to be raised in independent proceedings for dissolution of marriage or legal separation.

- 1 SECTION 310. [*Representation of Child.*] The court may
 2 appoint an attorney to represent the interests of a minor or
 3 dependent child with respect to his support, custody, and
 4 visitation. The court shall enter an order for costs, fees, and
 5 disbursements in favor of the child's attorney. The order
 6 shall be made against either or both parents, except that, if
 7 the responsible party is indigent, the costs, fees, and dis-
 8 bursements shall be borne by the [appropriate agency].

COMMENT

This section authorizes the court to appoint an attorney to represent a minor or dependent child in a proceeding for the dissolution of marriage, legal separation, or any other proceeding which involves the child's support, custody, or visitation. The attorney is not a guardian ad litem for the child, but an advocate whose role is to represent the child's interests. The section intentionally does not authorize the child or his attorney to be heard on the issue of whether the marriage of his parent or parents has broken down irretrievably. The appointment may be made by the court on motion of either parent or by the court on its own motion. It is expected that the authority given the court by this section will be exercised primarily in contested cases, but rare or unusual circumstances may make the appointment appropriate in formally uncontested matters.

- 1 SECTION 311. [*Payment of Maintenance or Support to*
 2 *Court.*]
 3 (a) Upon its own motion or upon motion of either party,
 4 the court may order at any time that maintenance or support
 5 payments be made to the [clerk of court, court trustee, pro-
 6 bation officer] as trustee for remittance to the person en-
 7 titled to receive the payments.
 8 (b) The [clerk of court, court trustee, probation officer]
 9 shall maintain records listing the amount of payments, the
 10 date payments are required to be made, and the names and
 11 addresses of the parties affected by the order.
 12 (c) The parties affected by the order shall inform the

13 [clerk of court, court trustee, probation officer] of any
14 change of address or of other condition that may affect the
15 administration of the order.

16 (d) If a party fails to make a required payment, the [clerk
17 of court, court trustee, probation officer] shall send by regis-
18 tered or certified mail notice of the arrearage to the obligor.
19 If payment of the sum due is not made to the [clerk of court,
20 court trustee, probation officer] within 10 days after sending
21 notice, the [clerk of court, court trustee, probation officer]
22 shall certify the amount due to the [prosecuting attorney].
23 The [prosecuting attorney] shall promptly initiate contempt
24 proceedings against the obligator.

25 (e) The [prosecuting attorney] shall assist the court on
26 behalf of a person entitled to receive maintenance or support
27 in all proceedings initiated under this section to enforce
28 compliance with the order. The person to whom maintenance
29 or support is awarded may also initiate action to collect
30 arrearages.

31 (f) If the person obligated to pay support has left or is
32 beyond the jurisdiction of the court, the [prosecuting attor-
33 ney] may institute any other proceeding available under the
34 laws of this State for enforcement of the duties of support
35 and maintenance.

COMMENT

This section establishes a procedure for payment of support or maintenance orders through a court officer and for enforcement by the appropriate prosecuting attorney. The section is modeled on similar provisions in North Dakota, Wisconsin, and other states and is intended to make use of the state's remedy of civil contempt as an effective device for the enforcement of support and maintenance. Under subsection (f), the person to whom a decree for maintenance or support is awarded also may initiate action to collect arrearages. In this action the person might be represented by personal counsel, by a legal aid society or other public agency, or, by a "friend of the court", as envisioned by the Uniform Reciprocal Enforcement of Support Act. Subsection (f) correlates this procedure with the Uniform Reciprocal Enforcement of Support Act so that enforcement can be obtained even though the obligor is beyond the jurisdiction of the court.

1 SECTION 312. [Assignments.] The court may order the
2 person obligated to pay support or maintenance to make an
3 assignment of a part of his periodic earnings or trust income
4 to the person entitled to receive the payments. The assign-
5 ment is binding on the employer, trustee, or other payor of
6 the funds 2 weeks after service upon him of notice that it has

7 been made. The payor shall withhold from the earnings or
8 trust income payable to the person obligated to support the
9 amount specified in the assignment and shall transmit the
10 payments to the person specified in the order. The payor
11 may deduct from each payment a sum not exceeding [\$1.00]
12 as reimbursement for costs. An employer shall not discharge
13 or otherwise discipline an employee as a result of a wage or
14 salary assignment authorized by this section.

COMMENT

This section is modeled on similar provisions in Wisconsin and California and provides an additional method of assuring that obligations for support and maintenance will be met when due. The Section goes beyond existing law in authorizing an assignment of trust income as well as periodic earnings. In states which permit spendthrift trusts, for purposes of support and maintenance, to be attacked, this section will also apply to spendthrift trusts. Each state should insert in the bracket the sum it deems sufficient to meet the cost to the payor of deducting the sums due from each payment. The validity of the obligation imposed on the payor of funds is clearly supported by analogy to garnishment, and to cases such as *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 96 L.Ed. 469, 72 S.Ct. 405 (1952).

1 SECTION 313. [Attorney's Fees.] The court from time to
2 time after considering the financial resources of both parties
3 may order a party to pay a reasonable amount for the cost
4 to the other party of maintaining or defending any proceed-
5 ing under this Act and for attorney's fees, including sums
6 for legal services rendered and costs incurred prior to the
7 commencement of the proceeding or after entry of judgment.
8 The court may order that the amount be paid directly to the
9 attorney, who may enforce the order in his name.

COMMENT

The purpose of this section is to authorize the payment of costs and a reasonable fee by one party to the other party's attorney if the court, after considering the financial resources available to both parties, determines the order to be necessary. The section extends authority to make several orders for costs and fees at different stages of the proceedings, and permits an attorney to enforce the order directly.

1 SECTION 314. [Decree.]
2 (a) A decree of dissolution of marriage or of legal separa-
3 tion is final when entered, subject to the right of appeal. An
4 appeal from the decree of dissolution that does not challenge
5 the finding that the marriage is irretrievably broken does not
6 delay the finality of that provision of the decree which dis-
7 solves the marriage beyond the time for appealing from that

8 provision, and either of the parties may remarry pending
9 appeal.

10 (b) No earlier than 6 months after entry of a decree of
11 legal separation, the court on motion of either party shall
12 convert the decree to a decree of dissolution of marriage.

13 (c) The Clerk of Court shall give notice of the entry of a
14 decree of dissolution or legal separation:

15 (1) if the marriage is registered in this State, to the
16 [marriage license] clerk of the [county, judicial district]
17 where the marriage is registered who shall enter the fact
18 of dissolution or separation in the [Registry of Marriage];
19 or

20 (2) if the marriage is registered in another jurisdiction,
21 to the appropriate official of that jurisdiction, with the re-
22 quest that he enter the fact of dissolution in the appropri-
23 ate record.

24 (d) Upon request by a wife whose marriage is dissolved or
25 declared invalid, the court may, and if there are no children
26 of the parties shall, order her maiden name or a former name
27 restored.

COMMENT

Subsection (a) abolishes interlocutory periods in those states which have them. The decree of dissolution or separation will be effective when entered subject to the right of appeal. The second sentence of subsection (a) is intended to authorize an appeal from a decree of dissolution which does not challenge the decree insofar as it is based on a finding that the marriage is irretrievably broken. In such cases, either party is free to remarry as soon as the time for taking appeal has expired, despite the fact that an appeal which does not challenge the dissolution may be pending.

Subsection (b) permits either party to a proceeding for legal separation to move, six months after entry of the decree, to convert the decree of legal separation into a decree of dissolution of marriage. The section does not authorize the court to deny the motion. In such cases, the court will enter its order that the original decree be deemed a decree of dissolution of marriage, as of the date the motion for conversion is made.

Subsection (c) establishes a procedure for the registration of a decree of dissolution of marriage or of legal separation in the place where the marriage was originally registered. The purpose of this subsection is to aid in the often difficult problem of proving whether a marriage has been terminated.

Subsection (d) expressly authorizes restoration of the maiden name or any former name of a wife, upon dissolution of a marriage or declaration of its invalidity. By the better authority, this power exists in the court without express provision. *Reinken v. Reinken*, 351 Ill. 400, 619 (1933); *IV. v. H.*, 100 N. J. Super. 24, 210 A. 2d 501 (1968); *Day v. Day*, 137 Ore. 169, 1 P. 2d 123 (1931); *Hartman v. Chumley*, 206 S. W. 2d 444 (Tex. Civ. App. 1924). This provision reserves all doubt as to judicial power. Whether the provision as to

the power being exercised "upon request by the wife" precludes action by the court upon its own initiative in a proper instance may be a matter for judicial construction. One ill-reasoned opinion so holds, as to the words if the wife "so desires". *Terrell v. Terrell*, 352 S. W. 2d 105 (Ky. 1961). The less preemptive language of this provision, in connection with the general principle of the Act that the rules of practice shall govern procedure generally, point to the conclusion that, in an appropriate instance, the court might exercise a proper judicial discretion to order restoration of name without wifely request.

1 SECTION 315. [Independence of Provisions of Decree or
2 Temporary Order.] If a party fails to comply with a provi-
3 sion of a decree or temporary order or injunction, the obliga-
4 tion of the other party to make payments for support or
5 maintenance or to permit visitation is not suspended; but he
6 may move the court to grant an appropriate order.

COMMENT

This section is intended to abolish self-help remedies, now all too common in family litigation, whereby one party withholds support or maintenance payments to force the other party to comply with visitation orders and vice-versa. Disputes of this kind should be settled by the court. The "he" in the last clause of the section refers to the "other party."

1 SECTION 316. [Modification and Termination of Provisions
2 for Maintenance, Support and Property Disposition.]

3 (a) Except as otherwise provided in subsection (f) of Sec-
4 tion 306, the provisions of any decree respecting mainte-
5 nance or support may be modified only as to installments ac-
6 cruing subsequent to the motion for modification and only
7 upon a showing of changed circumstances so substantial and
8 continuing as to make the terms unconscionable. The pro-
9 visions as to property disposition may not be revoked or
10 modified, unless the court finds the existence of conditions
11 that justify the reopening of a judgment under the laws of
12 this state.

13 (b) Unless otherwise agreed in writing or expressly pro-
14 vided in the decree, the obligation to pay future maintenance
15 is terminated upon the death of either party or the remar-
16 riage of the party receiving maintenance.

17 (c) Unless otherwise agreed in writing or expressly pro-
18 vided in the decree, provisions for the support of a child are
19 terminated by emancipation of the child but not by the death
20 of a parent obligated to support the child. When a parent
21 obligated to pay support dies, the amount of support may be
22 modified, revoked, or commuted to a lump sum payment, to
23 the extent just and appropriate in the circumstances.

COMMENT

Subsection (a) makes each installment under an order for periodic support or maintenance final and non-modifiable when it falls due. The accrued installments cannot be modified retroactively, and future installments can be modified only as to those falling due after a motion for modification has been filed. The purpose of thus making each installment final and non-modifiable when it becomes due is to give each past due installment the status of a final judgment entitled to full faith and credit in other states pursuant to the decisions of the Supreme Court in *Lynde v. Lynde*, 181 U.S. 183, 45 L.Ed. 810, 21 S.Ct. 655 (1901); *Sistare v. Sistare*, 218 U.S. 1, 54 L.Ed. 905, 30 S.Ct. 682, 28 L.RANS 1068, 20 Ann. Cas. 261 (1910); *Barber v. Barber*, 323 U.S. 77, 89 L.Ed. 82, 65 S.Ct. 137, 157 A.L.R. 163 (1944); and *Griffin v. Griffin*, 327 U.S. 220, 90 L.Ed. 635, 68 S.Ct. 556 (1945). The Supreme Court has not yet held that future installments are entitled to full faith and credit, but at least one state court has done so [*Light v. Light*, 12 Ill. 2d 602, 147 N. E. 2d 34 (1958)] and another state has extended voluntary recognition to future installments [*Worthley v. Worthley*, 44 Cal. 2d 465, 283 P. 2d 19 (1955)]. See the comment to Section 306(d) with respect to international enforcement.

Except where the decree, incorporating the agreement of the parties, provides to the contrary (see Section 306(f)), future installments may be modified, but the person seeking modification must show that circumstances have changed since the date of the original order so that the order is unconscionable at the time the motion is made and will continue to be unconscionable unless modified. This strict standard is intended to discourage repeated or insubstantial motions for modification. In accordance with presently existing law, the provisions of the decree respecting property disposition may not be altered unless the judgment itself can be reopened for fraud or otherwise under the laws of the state. There is no intention to change this law. If the judgment was rendered by another state, normal full faith and credit law would allow it to be reopened in the forum state if it can be reopened under the laws of the rendering state.

Subsection (b) authorizes the parties to agree in writing or the court to provide in the decree that maintenance will continue beyond the death of the obligor or the remarriage of the obligee. In the absence of such an agreement or provision in the decree, this section sets the termination date for the obligation to pay future maintenance.

Subsection (c) is designed to permit the parties to agree in writing or the court to provide in the decree that the obligation of each parent to support the child will extend beyond the child's emancipation and to permit parents, on occasion of a legal separation or dissolution of marriage, to agree that the child support provisions of the decree will terminate upon the death of a parent who has provided for the child in his will. In the absence of such an agreement or provision in the decree, this section terminates the obligation of a parent to support a child, only upon the child's emancipation. The parent's death does not terminate the child's right to support, and the court may make an appropriate order establishing the obligation of the deceased parent's estate to the child. Section 316(c), read in connection with Section 308, authorizes a support order against the estate of a parent who had received property for the child's support or did not accrue to the child's benefit by virtue of the parent's death.

To avoid indefinite delay in the settlement of estates, there may be modification or commutation to a lump sum payment "to the extent just and appropriate in the circumstances." Any person interested, including a creditor or an attorney for the child (Section 310), may move the court for the appropriate order.

PART IV CUSTODY

1 SECTION 101. [Jurisdiction; Commencement of Proceed-
2 ing.]

3 (a) A court of this State competent to decide child custody
4 matters has jurisdiction to make a child custody determina-
5 tion by initial or modification decree if:

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

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

20 (3) the child is physically present in this State and (i)
21 has been abandoned or (ii) it is necessary in an emergency
22 to protect him because he has been subjected to or threat-
23 ened with mistreatment or abuse or is neglected or de-
24 pendent; or

25 (4) (i) no other state has jurisdiction under prerequi-
26 sites substantially in accordance with paragraphs (1),
27 (2) or (3), or another state has declined to exercise juris-
28 diction on the ground that this State is the more appro-
29 priate forum to determine custody of the child, and (ii) it
30 is in his best interest that the court assume jurisdiction.

31 (b) Except under paragraphs (3) and (4) of subsection
32 (a), physical presence in this State of the child, or of the
33 child and one of the contestants, is not alone sufficient to con-
34 fer jurisdiction on a court of this State to make a child cus-
35 tody determination.

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

38 (d) A child custody proceeding is commenced in the
39 [————] court:

40 (1) by a parent, by filing a petition

41 (i) for dissolution or legal separation; or

42 (ii) for custody of the child in the [county, judicial
43 district] in which he is permanently resident or found;

44 or

45 (2) by a person other than a parent, by filing a petition
46 for custody of the child in the [county, judicial district] in
47 which he is permanently resident or found, but only if he
48 is not in the physical custody of one of his parents.

49 (e) Notice of a child custody proceeding shall be given to
50 the child's parent, guardian, and custodian, who may appear,
51 be heard, and file a responsive pleading. The court, upon a
52 showing of good cause, may permit intervention of other in-
53 terested parties.

COMMENT

The provisions of the Act concerning custody adjudication are integrated with the provisions of the Uniform Child Custody Jurisdiction Act, promulgated by the Conference in 1968. The latter Act deals with judicial jurisdiction to adjudicate a custody case when more than one state has an interest in the litigation. The Uniform Marriage and Divorce Act governs the substantive and procedural aspects of custody adjudication once the court has decided that it can and should hear the case on the merits. States considering the adoption of this Act should also consider adopting the Uniform Child Custody Jurisdiction Act. If that Act is adopted in the state, subsections (a), (b) and (c), which are intended to track the interstate jurisdictional sections of that Act, should be omitted, and the remaining subsections should be relettered, accordingly.

The court authorized to hear custody cases has not been identified. In many states the legislature will want to consider the establishment of a Family Court for these purposes; in other states the trial court of general jurisdiction will be named.

Subsection (d) makes an important distinction between custody disputes commenced by parents and those commenced by some other person interested in a particular child. A custody proceeding is commenced automatically whenever one of the parents files for a dissolution of legal separation under Part III. Also, a parent may commence a custody proceeding without filing a petition for dissolution or legal separation. On the other hand, subsection (d) (2) makes it clear that if one of the parents has physical custody of the child, a non-parent may not bring an action to contest that parent's right to continuing custody under the "best interest of the child" standard of Section 402. If a non-parent (a grandparent or an aunt or uncle, perhaps) wants to acquire custody, he must commence proceedings under the far more stringent standards for intervention provided in the typical Juvenile Court Act. In

short, this subsection has been devised to protect the "parental rights" of custodial parents and to insure that intrusions upon those rights will occur only when the care the parent is providing the child falls short of the minimum standard imposed by the community at large—the standard incorporated in the neglect or delinquency definitions of the state's Juvenile Court Act. Once a custody proceeding is commenced, the court should be able to hear the views of all interested persons; Subsection (d) therefore authorizes the judge to permit intervention by relatives who would not have been allowed to commence an action.

1 SECTION 402. [Best Interest of Child.] The court shall de-
2 termine custody in accordance with the best interest of the
3 child. The court shall consider all relevant factors including:

4 (1) the wishes of the child's parent or parents as to his
5 custody;

6 (2) the wishes of the child as to his custodian;

7 (3) the interaction and interrelationship of the child
8 with his parent or parents, his siblings, and any other per-
9 son who may significantly affect the child's best interest;

10 (4) the child's adjustment to his home, school, and com-
11 munity; and

12 (5) the mental and physical health of all individuals in-
13 volved.

14 The court shall not consider conduct of a proposed custo-
15 dian that does not affect his relationship to the child.

COMMENT

This section, excepting the last sentence, is designed to codify existing law in most jurisdictions. It simply states that the trial court must look to a variety of factors to determine what is the child's best interest. The five factors mentioned specifically are those most commonly relied upon in the appellate opinions; but the language of the section makes it clear that the judge need not be limited to the factors specified. Although none of the familiar presumptions developed by the case law are mentioned here, the language of the section is consistent with preserving such rules of thumb. The preference for the mother as custodian of young children when all things are equal, for example, is simply a shorthand method of expressing the best interest of children—and this section enjoins judges to decide custody cases according to that general standard. The same analysis is appropriate to the other common presumptions: a parent is usually preferred to a non-parent; the existing custodian is usually preferred to any new custodian because of the interest in assuring continuity for the child; preference is usually given to the custodian chosen by agreement of the parents. In the case of modification, there is also a specific provision designed to foster continuity of custodians and discourage change. See Section 409.

The last sentence of the section changes the law in those states which continue to use fault notions in custody adjudication. There is no reason to encourage parties to spy on each other in order to discover marital (most commonly, sexual) misconduct for use in a custody contest. This provision

makes it clear that unless a contestant is able to prove that the parent's behavior in fact affects his relationship to the child (a standard which could seldom be met if the parent's behavior has been circumspect or unknown to the child), evidence of such behavior is irrelevant.

1 SECTION 403. [Temporary Orders.]

2 (a) A party to a custody proceeding may move for a tem-
3 porary custody order. The motion must be supported by an
4 affidavit as provided in Section 410. The court may award
5 temporary custody under the standards of Section 402 after
6 a hearing, or, if there is no objection, solely on the basis of
7 the affidavits.

8 (b) If a proceeding for dissolution of marriage or legal
9 separation is dismissed, any temporary custody order is
10 vacated unless a parent or the child's custodian moves that
11 the proceeding continue as a custody proceeding and the
12 court finds, after a hearing, that the circumstances of the
13 parents and the best interest of the child requires that a
14 custody decree be issued.

15 (c) If a custody proceeding commenced in the absence of
16 a petition for dissolution of marriage or legal separation
17 under subsection (1) (i) or (2) of Section 401 is dismissed,
18 any temporary custody order is vacated.

COMMENT

Subsection (a) encourages trial courts to issue temporary custody orders without formal hearing whenever possible. Since the hearing itself may be a traumatic event for both parents (and therefore for their children, indirectly), the trial court is authorized to make temporary orders on the basis of affidavits alone unless one of the parties files formal objection to that procedure. In most cases, it is expected that trial judges will award temporary custody to the existing custodian so as to minimize disruption for the child.

Subsection (b) states an important principle designed to foster values supporting family privacy. If a petition for dissolution or legal separation is dismissed voluntarily, there is no reason for the court to hold a special hearing and make a special (and extraordinary) finding before making any substantive custody decision. In most cases, then, if the dissolution petition is dismissed, the parties, whether or not they reconcile, will determine for themselves who should be the child's custodian. If the child's circumstances warrant concern for his physical or emotional security, the standard for community intervention expressed in the state's Juvenile Court Act should be the measure applied to the family. The divorce court can always alert juvenile court or welfare department staff informally that a problem may exist.

1 SECTION 404. [Interviews.]

2 (a) The court may interview the child in chambers to
3 ascertain the child's wishes as to his custodian and as to
4 visitation. The court may permit counsel to be present at the

5 interview. The court shall cause a record of the interview to
6 be made and to be part of the record in the case.

7 (b) The court may seek the advice of professional per-
8 sonnel, whether or not employed by the court on a regular
9 basis. The advice given shall be in writing and made avail-
10 able by the court to counsel upon request. Counsel may ex-
11 amine as a witness any professional personnel consulted by
12 the court.

COMMENT

This section, and the two which follow, are designed to permit the court to make custodial and visitation decisions as informally and non-contentiously as possible, based on as much relevant information as can be secured, while preserving a fair hearing for all interested parties.

The general rule is that the judge may interview the child in chambers. It is often important for the judge to discover the attitudes and wishes of the child, and there is no reason to subject the child to the formality of the courtroom and the unpleasantness of cross-examination. This provision does not require the judge to permit counsel to be present at the interview, but he must make some kind of record of the interview (using a court reporter or a tape recorder) so that counsel for all parties will have access to the substance of the interview. Similarly, the judge may call informally on experts in a variety of disciplines without subjecting them, in the first instance, to the formal hearing process. But the experts' advice should be available to counsel for the parties so that the judge's decision will not be based on secret information; and the parties should be able to examine the expert as to the substance of his advice to the judge.

1 SECTION 405. [Investigations and Reports.]

2 (a) In contested custody proceedings, and in other cus-
3 tody proceedings as a parent or the child's custodian so re-
4 quests, the court may order an investigation and report con-
5 cerning custodial arrangements for the child. The investiga-
6 tion and report may be made by [the court social service
7 agency, the staff of the juvenile court, the local probation or
8 welfare department, or a private agency employed by the
9 court for the purpose].

10 (b) In preparing his report concerning a child, the investi-
11 gator may consult any person who may have information
12 about the child and his potential custodial arrangements.
13 Upon order of the court, the investigator may refer the child
14 to professional personnel for diagnosis. The investigator may
15 consult with and obtain information from medical, psychi-
16 atric, or other expert persons who have served the child in
17 the past without obtaining the consent of the parent or the
18 child's custodian; but the child's consent must be obtained

19 if he has reached the age of 16, unless the court finds that he
20 lacks mental capacity to consent. If the requirements of sub-
21 section (c) are fulfilled, the investigator's report may be re-
22 ceived in evidence at the hearing.

23 (c) The court shall mail the investigator's report to coun-
24 sel and to any party not represented by counsel at least 10
25 days prior to the hearing. The investigator shall make avail-
26 able to counsel and to any party not represented by counsel
27 the investigator's file of underlying data, and reports, com-
28 plete texts of diagnostic reports made to the investigator
29 pursuant to the provisions of subsection (b), and the names
30 and addresses of all persons whom the investigator has con-
31 sulted. Any party to the proceeding may call the investigator
32 and any person whom he has consulted for cross-examina-
33 tion. A party may not waive his right of cross-examination
34 prior to the hearing.

COMMENT

The Act steers a middle course between those courts which prohibit a custody investigation unless both parties stipulate to it and those statutes which permit the judge to order an investigation in every case. It is obvious that custody investigations, whether made by a member of the court's staff or by a public or private agency employed for that purpose, can be useful aids to the court. But most custody dispositions are consensual decisions of the parents, and there is no reason to permit the judge to order an investigation in such cases unless one of the spouses, although agreeing to the disposition, wants some further inquiry made. Under these circumstances, the court can order an investigation even if the other spouse opposes it. Similarly, in contested cases, where the judge's need for independent investigation is greatest, a custody study can be ordered even if both spouses are opposed.

The provisions of subsections (b) and (c) detail the procedural aspects of custody investigations and reports. They assure that investigations will be conducted with due regard to fair hearing values, while encouraging investigators to provide accurate information to the court.

1 SECTION 406. [Hearings.]

2 (a) Custody proceedings shall receive priority in being set
3 for hearing.

4 (b) The court may tax as costs the payment of necessary
5 travel and other expenses incurred by any person whose
6 presence at the hearing the court deems necessary to deter-
7 mine the best interest of the child.

8 (c) The court without a jury shall determine questions of
9 law and fact. If it finds that a public hearing may be detri-
10 mental to the child's best interest, the court may exclude the

11 public from a custody hearing, but may admit any person
12 who has a direct and legitimate interest in the particular
13 case or a legitimate educational or research interest in the
14 work of the court.

15 (d) If the court finds it necessary to protect the child's
16 welfare that the record of any interview, report, investigation,
17 or testimony in a custody proceeding be kept secret, the court
18 may make an appropriate order sealing the record.

COMMENT

This section further details procedural aspects of custody hearings. Sub-
section (c) changes the law in those states which now permit a jury to
determine child custody. Subsection (d) authorizes the court to protect the
child by preventing unnecessary publicity if it finds that sealing the record
is necessary for the child's welfare. Although this authority restricts access
to public records, the evil of limitation is clearly outweighed by the public
interest in the protection of children.

1 SECTION 407. [Visitation.]

2 (a) A parent not granted custody of the child is entitled to
3 reasonable visitation rights unless the court finds, after a
4 hearing, that visitation would endanger seriously the child's
5 physical, mental, moral, or emotional health.

6 (b) The court may modify an order granting or denying
7 visitation rights whenever modification would serve the best
8 interest of the child; but the court shall not restrict a par-
9 ent's visitation rights unless it finds that the visitation would
10 endanger seriously the child's physical, mental, moral, or
11 emotional health.

COMMENT

With two important exceptions, this section states the traditional rule for
visitation rights. The general rule implies a "best interest of the child"
standard. Although the judge should never compel the noncustodial parent
to visit the child, visitation rights should be arranged to an extent and in
a fashion which suits the child's interest rather than the interest of either
the custodial or noncustodial parent. The empirical data on post-divorce
living arrangements suggests that, if the judge can arrange visitation with
a minimum of contest, most parties will eventually reach an accommodation
and the bitterness accompanying the divorce will gradually fade. The section
does make clear, however, that the judge must hold a hearing and make an
extraordinary finding to deprive the noncustodial parent of all visitation
rights. To preclude visitation completely, the judge must find that visitation
would endanger "seriously the child's physical, mental, moral, or emotional
health." These words are intended to mesh with other uniform legislation.
See Uniform Juvenile Court Act, Section 47. Although the standard is
necessarily somewhat vague, it was deliberately chosen to indicate its string-
ency when compared to the "best interest" standard traditionally applied.

to this problem. The special standard was chosen to prevent the denial of visitation to noncustodial parent on the basis of moral judgments about parental behavior which have no relevance to the parent's interest in or capacity to maintain a close and benign relationship to the child. The same onerous standard is applicable when the custodial parent tries to have the noncustodial parent's visitation privileges restricted or eliminated.

1 SECTION 408. [Judicial Supervision.]

2 (a) Except as otherwise agreed by the parties in writing
3 at the time of the custody decree, the custodian may deter-
4 mine the child's upbringing, including his education, health
5 care, and religious training, unless the court after hearing,
6 finds, upon motion by the noncustodial parent, that in the
7 absence of a specific limitation of the custodian's authority,
8 the child's physical health would be endangered or his emo-
9 tional development significantly impaired.

10 (b) If both parents or all contestants agree to the order,
11 or if the court finds that in the absence of the order the
12 child's physical health would be endangered or his emotional
13 development significantly impaired, the court may order the
14 [local probation or welfare department, court social service
15 agency] to exercise continuing supervision over the case to
16 assure that the custodial or visitation terms of the decree
17 are carried out.

COMMENT

This section states an important rule designed to promote family privacy and to prevent intrusions upon the prerogatives of the custodial parent at the request of the noncustodial parent. In general, the custodial parent should be, and in this section is designated as, the person responsible for post-divorce decisions concerning the upbringing of the child. If the parents agree in writing about a particular problem such as the child's religious upbringing, the court may enforce the agreement subject to constitutional constraints. *Lynch v. Ahlenhopp*, 248 Iowa 68, 78 N. W. 2d 491 (1956). But in the absence of parental agreement the court should not intervene solely because a choice made by the custodial parent is thought by the noncustodial parent (or by the judge) to be contrary to the child's best interest. To justify such an intervention, the judge must find that the custodial parent's decision would "endanger the child's physical health or significantly impair his emotional development"—a standard patently more onerous than the "best interest" test. The standard would leave to the custodial parent such decisions as whether the child should go to private or public school, whether the child should have music lessons, what church the child should attend. The court could intervene in the decision of grave behavioral or social problems such as refusal by a custodian to provide medical care for a sick child.

Subsection (b) pursues the family privacy theme by significantly limiting the judge's authority to order supervision of the child and the custodial parent. To be sure, there are situations in which an objective umpire is

needed to facilitate post-divorce adjustment to the custody and visitation decree. But in these situations both parents will usually recognize the need and agree to supervision. If the parents cannot agree to supervision, however, it should not be ordered unless the judge finds some extraordinary need for it. Thus, the provision adopts a more stringent standard than the normal "best interest" standard.

1 SECTION 409. [Modification.]

2 (a) No motion to modify a custody decree may be made
3 earlier than 2 years after its date, unless the court permits it
4 to be made on the basis of affidavits that there is reason to
5 believe the child's present environment may endanger seri-
6 ously his physical, mental, moral, or emotional health.

7 (b) If a court of this State has jurisdiction pursuant to
8 the Uniform Child Custody Jurisdiction Act, the court shall
9 not modify a prior custody decree unless it finds, upon the
10 basis of facts that have arisen since the prior decree or that
11 were unknown to the court at the time of entry of the prior
12 decree, that a change has occurred in the circumstances of
13 the child or his custodian, and that the modification is neces-
14 sary to serve the best interest of the child. In applying these
15 standards the court shall retain the custodian appointed pur-
16 suant to the prior decree unless:

- 17 (1) the custodian agrees to the modification;
- 18 (2) the child has been integrated into the family of the
19 petitioner with consent of the custodian; or
- 20 (3) the child's present environment endangers seriously
21 his physical, mental, moral, or emotional health, and the
22 harm likely to be caused by a change of environment is
23 outweighed by its advantages to him.

24 (c) Attorney fees and costs shall be assessed against a
25 party seeking modification, if the court finds that the modifi-
26 cation action is vexatious and constitutes harassment.

COMMENT

Most experts who have spoken to the problems of post-divorce adjustment of children believe that insuring the decree's finality is more important than determining which parent should be the custodian. See Watson, *The Children of Armageddon: Problems of Custody Following Divorce*, 21 *Syracuse L. Rev.* 85 (1960). This section is designed to maximize finality (and thus assure continuity for the child) without jeopardizing the child's interest. Because any emergency which poses an immediate threat to the child's physical safety usually can be handled by the juvenile court, subsection (a) prohibits modification petitions until at least two years have passed following the initial decree, with a "safety valve" for emergency situations. To discourage the noncustodial parent who tries to punish a former spouse by

frequent motions to modify, the subsection includes a two-year waiting period following each modification decree. During that two-year period, a contestant can get a hearing only if he can make an initial showing, by affidavit only, that there is some greater urgency for the change than that the child's "best interest" requires it. During the two-year period the judge should deny a motion to modify, without a hearing, unless the moving party carries the onerous burden of showing that the child's present environment may endanger his physical, mental, moral, or emotional health.

Subsection (b) in effect asserts a presumption that the present custodian is entitled to continue as the child's custodian. It does authorize modifications which serve the child's "best interest;" but this standard is to be applied under the principle that modification should be made only in three situations: where the custodian agrees to the change; where the child, although formally in the custody of one parent, has in fact been integrated into the family of the petitioning parent (to avoid encouraging noncustodial kidnapping, this ground requires the consent of the custodial parent); or where the noncustodial parent can prove both that the child's present environment is dangerous to physical, mental, moral, or emotional health and that the risks of harm from change of environment are outweighed by the advantage of such a change to the child. The last phrase of subsection (b) (3) is especially important because it compels attention to the real issue in modification cases. Any change in the child's environment may have an adverse effect, even if the noncustodial parent would better serve the child's interest. Subsection (b) (3) focuses the issue clearly and demands that presentation of evidence relevant to the resolution of that issue.

Subsection (c) provides an additional sanction against venal and harassing attempts to relitigate custody.

1 SECTION 410. [*Affidavit Practice.*] A party seeking a tem-
2 porary custody order or modification of a custody decree
3 shall submit together with his moving paper an affidavit
4 setting forth facts supporting the requested order or modifi-
5 cation and shall give notice, together with a copy of his affi-
6 davit, to other parties to the proceeding, who may file oppos-
7 ing affidavits. The court shall deny the motion unless it finds
8 that adequate cause for hearing the motion is established by
9 the affidavits, in which case it shall set a date for hearing
10 on an order to show cause why the requested order or modi-
11 fication should not be granted.

COMMENT

This section establishes a procedure for seeking temporary custody or a modification of a custody decree by motion supported with affidavits. The procedure is designed to result in denial of the motion without a hearing unless the court finds that the affidavits establish adequate cause for holding a hearing. The procedure will thus tend to discourage contests over temporary custody and prevent repeated or insubstantial motions for modification.

PART V EFFECTIVE DATE AND REPEALER

1 SECTION 501. [*Time of Taking Effect.*] This Act shall take
2 effect [-----].

1 SECTION 502. [*Application.*]

2 (a) This Act applies to all proceedings commenced on or
3 after its effective date.

4 (b) This Act applies to all pending actions and proceed-
5 ings commenced prior to its effective date with respect to
6 issues on which a judgment has not been entered. Pending
7 actions for divorce or separation are deemed to have been
8 commenced on the basis of ir retrievable breakdown. Evi-
9 dence adduced after the effective date of this Act shall be in
10 compliance with this Act.

11 (c) This Act applies to all proceedings commenced after
12 its effective date for the modification of a judgment or order
13 entered prior to the effective date of this Act.

14 (d) In any action or proceeding in which an appeal was
15 pending or a new trial was ordered prior to the effective
16 date of this Act, the law in effect at the time of the order
17 sustaining the appeal or the new trial governs the appeal,
18 the new trial, and any subsequent trial or appeal.

COMMENT

The purpose of this section is to indicate the application of the Act to new and pending proceedings. Subsection (a) makes the Act applicable to new proceedings; all those commenced on or after its effective date.

Subsection (b) states the applicability of the Act to proceedings that were pending at the trial court level prior to its effective date. The Act will apply to all pending actions and proceedings; but if a judgment has already been entered as to a specific issue, that judgment will not be superseded thereby. For example, if the state recognizes an interlocutory judgment of divorce, in all cases in which interlocutory judgments have been entered prior to the effective date, the interlocutory judgments would not be affected by the Act. The Act would abolish, however, the interlocutory waiting period so that a decree of dissolution of marriage could be entered immediately after its effective date in a pending but unadjudicated action.

The second sentence of subsection (b) makes unnecessary amendment of the pleadings in pending actions for divorce, but the provisions of this Act will apply at any hearing held after its effective date.

Subsection (c) makes the Act applicable to proceedings commenced after its effective date for the modification of orders or judgments entered prior to its effective date only if the previously entered judgment or order would have been modifiable under prior law. Thus, if a prior order for child custody, support, visitation, or maintenance would have been modifiable under the state's prior law, then those orders may be modified under this Act in accordance with the standards established by this Act. But if a prior judgment

dividing marital property or awarding lump sum alimony would not have been modifiable under prior law, those judgments are not subject to reopening for change under this Act, even though the standards for property division are different under this Act. In an event, judgments awarding marital property are not modifiable under this Act (see Section 316(a)). On the other hand, an order that would have been modifiable under prior law may cease to be modifiable under this Act. For example, in states where maintenance is retroactively modifiable as to unpaid installments, installments accruing after the effective date of this Act will not be retroactively modifiable under Section 316(a).

Subsection (d) provides that this Act does not apply to appeals that had been perfected and thus were pending at its effective date, to new trials ordered prior to its effective date, or to any subsequent appeals or new trials resulting from these pending appeals or new trials. The purpose of this provision is to allow the correction on appeal or in a new trial of errors made in applying the law in effect at the time of the original hearing pursuant to that law. Changing the rules on appeal or at the new trial seems unfair to the party prejudiced by the error. A similar provision was included in the California Family Law Act of 1969.

1 SECTION 503. [Severability.] If any provision of this Act
2 or application thereof to any person or circumstance is held
3 invalid, the invalidity does not affect other provisions or
4 applications of the Act which can be given effect without the
5 invalid provision or application, and to this end the provi-
6 sions of this Act are severable.

1 SECTION 504. [Specific Repealer.] The following acts and
2 all other acts and parts of acts inconsistent herewith are
3 hereby repealed: [Here should follow the acts to be specif-
4 ically repealed, including any acts regulating:

- 5 (1) marriage, including grounds for annulment and pro-
6 visions for void marriages;
- 7 (2) existing grounds for divorce and legal separation;
- 8 (3) existing defenses to divorce and legal separation,
9 including but not limited to condonation, connivance, collu-
10 sion, recrimination, insanity, and lapse of time; and
- 11 (4) alimony, child support, custody, and division of
12 spouses' property in the event of a divorce and judicial pro-
13 ceedings designed to modify the financial or custody provi-
14 sions of divorce decrees].

1 SECTION 505. [General Repealer.] Except as provided in
2 Section 506, all acts and parts of acts inconsistent with this
3 Act are hereby repealed.

1 SECTION 506. [Laws Not Repealed.] This Act does not re-

- 2 peal: [Here should follow the acts not to be repealed, includ-
3 ing any acts regulating or prescribing:
- 4 (1) the contents of and forms for marriage licenses and
5 methods of registering marriages and providing for license
6 or registration fees;
- 7 (2) the validity of premarital agreements between
8 spouses concerning their marital property rights;
- 9 (3) marital property rights during a marriage or when
10 the marriage terminates by the death of one of the spouses;
- 11 (4) the scope and extent of the duty of a parent to sup-
12 port a child of the marriage;
- 13 (5) custody of and support duty owed to an illegitimate
14 child;
- 15 (6) the Uniform Child Custody Jurisdiction Act; and
- 16 (7) any applicable laws relating to wage assignments,
17 garnishments, and exemptions other than those providing
18 for family support and maintenance].