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TESTIMONY OF RONALD W. NELSON TO HOUSE JUDICIARY COMMITTEE
SB 18 – Uniform Child Abduction Prevention Act
March 8, 2007

Members of the Committee: Good afternoon. I am Ronald W. Nelson. I am a Johnson County lawyer who practices exclusively in the area of domestic relations. I've been involved in domestic relations issues for a number of years and had the pleasure of being involved in working on the re-write of the Kansas Child Custody statutes in 2000. I've written extensively for local, state and national publications and presented seminars to lawyers on various domestic relations issues. My clientele is fairly evenly split between representing men and women. I've handled a significant number of matters in both trial and appellate courts on significant domestic relations issues. My practice has especially focused on high conflict child-custody cases, which involve interstate and international child custody and support issues, and interstate and international child abduction cases. I am a Fellow in both the American Academy of Matrimonial Lawyers and the International Academy of Matrimonial Lawyers and I previously served on the Governing Board of the American Bar Association Family Law Section.

Today I am testifying in favor of passage of the Uniform Child Abduction Prevention Act (UCAPA), which is the subject of Senate Bill 18. This important bill addresses the growing problem of interstate and international child abduction by parents and others who seek to use the child as a pawn in their disputes. Although addressing these issues has not been nearly so chaotic as before passage of the Uniform Child Custody Jurisdiction Act in 1978 and the Uniform Child Custody Jurisdiction and Enforcement Act in 2000 (when parents had to travel from state-to-state-to-state filing one action after another to re-establish custody rights already established in one or more other jurisdictions), problems continue and the UCAPA seeks to address those problems.

Although “stranger” abductions and kidnappings are most publicized – and feared – by far the most common child abduction is parental child abduction, which often occurs when the parents separate or begin divorce proceedings but also which may occur in other periods of turmoil. A parent may remove or retain the child from the other seeking to gain an advantage in expected or pending child-custody proceedings or because that parent fears losing the child in those expected or pending child-custody proceedings; a parent may refuse to return a child at the end of an access visit or may flee with the child to prevent an access visit. Parental child abductions may be within the same city, within the state region or within the same country, or may be international. Studies performed for the U.S. Department of Justice's Office of Juvenile

Justice and Delinquency Prevention reported that in 1999, 53% percent of family abducted children were gone less than one week, and 21% were gone one month or more.¹

Historically, Kansas law has held that a parent cannot “kidnap” that parent’s own child. In the absence of temporary or final child custody orders, both parents have equal rights to the “custody” of their child and either one of them can take their child wherever they want – with or without the other parents consent or knowledge. The fact is, however, that as society has become more mobile; as long distance travel and communication has become easier and less expensive; as inter-faith, inter-national, inter-cultural marriages have become more common; as society has become more complex; and as the rights of mothers and fathers to time with their child have become more fact intensive; and as the outcomes of child custody decisions have become less predictable, the more often parents have sought to use extra-judicial methods of gaining advantage in those situations.

Even though strides have been made by limiting the State where child custody actions can be filed by passage of the Uniform Child Custody Jurisdiction Act and federal Parental Kidnapping Prevention Act and, more recently, by procedures for enforcement of temporary and final child custody orders by the Uniform Child Custody Jurisdiction and Enforcement Act, even more efficient and rapid remedies need to be instituted to protect children against being used as pawns in tragic interstate and international games of “custody-chess.”

The Uniform Child Abduction Prevention Act (UCAPA) is an important step to address the growing problem of parental abduction and protect the child from credible threats to do so. The UCAPA is modeled on effective measures already in effect in other arenas to address this issue: the Convention on the Civil Aspects of International Child Abduction, which was adopted by the Hague Convention on Private International Law², and Child Abduction Prevention Acts from other States in the United States.³ This new Act does not supersede any law, but provides additional resources and methods to prevent and address potential, threatened and actual family child abductions. The UCAPA does not provide “new” remedies, but provides one reference point for remedies already widely used, but which are often not known or understood by attorneys or judges dealing with these emergency abduction situations.

The UCAPA closely follows the Hague Convention on the Civil Aspects of International Child Abduction and the Uniform Child Custody Jurisdiction and Enforcement Act in its language.

- The UCAPA specifically states that only a state that has jurisdiction under the UCCJEA may enter an order implementing remedies. It prohibits a court in one state from exercising jurisdiction if a valid custody proceeding is already pending in another state and requires that states give full faith and credit to sister state decrees made in accordance with its principles – all

¹ , NISMART National Family Abduction Report, October 2002.

² The Hague Convention on the Civil Aspects of International Child Abduction is a multilateral treaty developed by the Hague Conference on Private International Law that provides an expeditious method to return a child taken from one member nation to another. Proceedings on the Convention concluded October 25, 1980 and the Convention entered into force between the signatory nations on December 1, 1983. The Convention is now in force between the United States and 55 other Nation-States.

³ See Ark. Stat. Ann. § 9-13-401-407 (2005); Cal. Fam. Code § 3048 (2004); Tex.Fam. Code §153.501- §153.503 (2003).

as is required by the federal Parental Kidnapping Prevention Act. While a State may enter a prevention order if the petitioning party alleges an “emergency,” that matter must immediately be referred to the State having appropriate jurisdiction under the UCCJEA as the “home state” or other significant connections if the child hasn’t resided in the State for six months. This Act equates a credible risk of abduction with threatened mistreatment or abuse for emergency jurisdiction purposes, but sets forth those allegations that must be made.

A purpose of the UCAPA is to preserve whatever status quo custody arrangement existed for the child prior to the time of the alleged wrongful removal or retention and to deter a parent from crossing boundaries in search of a more sympathetic court – which is the same purpose as the Hague International Convention. An additional purpose is to preserve jurisdiction in that place which has the closest connection with the family and child. As stated by one court regarding Hague proceedings:

Every family dispute has its own unique set of facts, and the case before us certainly is no different. However, there is a central core of matters at which The Hague Convention was aimed: situations where one parent attempts to settle a difficult family situation, and obtain an advantage in any possible future custody struggle, by returning to the parent's native country, or country of preferred residence. That is exactly what happened here.⁴

The UCAPA defines “abduction” in the same way it is used in the Hague Convention on the Civil Aspects of International Child Abduction; that is, as “the wrongful removal or wrongful retention of a child.” Case law under the Hague Convention has indicated the term does not require that the removal was “intentionally” wrongful in order to qualify as a “wrongful retention or removal” – it is sufficient that the removal or retention deprive another joint holder of rights of the continued exercise of that right. “The conduct made actionable by the Convention – the wrongful removal or retention of children – is wrongful not in a criminal sense but in a civil sense.”⁵ Thus, for the removal or retention to be wrongful, it is enough to show that the rights of custody were either being exercised or that they would have been exercised if not for the actions of the person alleged to have wrongfully removed or retained the children.⁶ “Generally speaking, ‘wrongful removal’ refers to the act of keeping the child without the consent of the person who was actually exercising custody of the child. ‘Wrongful retention’ refers to the act of keeping the child without the consent of the person who was actually exercising custody. The archetype of this conduct is the refusal by the noncustodial parent to return a child at the end of an authorized visitation period.”⁷ A “wrongful removal or retention” of a child occurs within the meaning of the Convention when an action is taken by one parent in contravention to the rights of a person or institution under the law of the State of the child’s habitual residence.⁸ The Hague Convention Explanatory Note makes clear that:

. . . the removal of a child by one of the joint holders without the consent of the other, is . . . wrongful, and this wrongfulness derives in this particular case, not from some action in breach of a particular law, but from the fact that such action

⁴ *Friedrich v. Friedrich*, 983 F.2d 1396, 1402 (6th Cir. 1993):

⁵ *Legal Analysis of the Hague Convention*, 51 Fed.Reg. 10494, 10505 (1986).

⁶ Hague Convention, Article 3.

⁷ *Legal Analysis of the Hague Convention*, 51 Fed.Reg. 10494, 10503 (1986).

⁸ Hague Convention, Article 3.

has disregarded the rights of the other parent which are also protected by law, and has interfered with their normal exercise. The Convention's true nature is revealed most clearly in these situations: it is not concerned with establishing the person to whom custody of the child will belong at some point in the future, nor with the situations in which it may prove necessary to modify a decision awarding joint custody on the basis of facts which have subsequently changed. It seeks, more simply, to prevent a later decision on the matter being influenced by a change of circumstances brought about through unilateral action by one of the parties.⁹

- The UCAPA spells out many remedies that are already available, although they are not widely known by lawyers or judges, to deal with domestic or international parental abductions, all of which are cumulative, including:

- imposition of travel restrictions that require that a party traveling with the child outside designated geographical area provide the other party with specific designated information;

- prohibitions against the removal of the child from the State, the United States, or another geographic area without the court's permission or that of the petitioner;

- prohibitions against removing the child from school or a child-care facility or from approaching the child at any location other than a site designated for supervised parenting time;

- require registration of the child-custody order in another state to which the child will travel before that travel is allowed;

- require surrender of or placement of restrictions upon the child's passport or obtaining a new or replacement passport or visa;

- require that the respondent obtain an order from the relevant foreign country containing identical child-custody provisions as those contained in the child-custody order issued in the United States.

- imposing conditions, restrictions, or supervision on the exercise of custody or visitation.

- require that the respondent post a bond or other security to serve as a financial deterrent to abduction, with the proceeds used to pay for the reasonable expenses of recovery of the child, including reasonable attorneys fees and costs if there is an abduction; and

- issue a warrant to take physical custody of the child;

- direct law enforcement to take any action reasonably necessary to locate the child, obtain return of the child, or enforce a custody determination.

These remedies are already, for the most part, available under existing law. However, it is important that statute set for those remedies available because of the chaotic situations under which these actions will most likely arise.

⁹ Elisa Perez-Vera, *Explanatory Report: Hague Conference on Private International Law*, in 3 Acts and Documents of the Fourteenth Session ("Explanatory Report"), ¶ 71, at 447-48.

As previously stated, a significant portion of my practice involves cases in which interstate or international jurisdictional issues are present and, as a result, I've handled a large number of cases in which threatened or actual parental child abduction is a concern. In those cases, rapid and effective action is critical. Child abduction is child abuse. A parent's attempt to "take the law into their own hands" by spiriting their child away from the other parent – without any authority from anyone other than their own sense of what is "right" harms their child and expresses contempt for ordered society. They seek not what is best for their child, but to impose what they want without regard to any independent or objective assessment of that situation. Numerous psychological studies show the harm visited upon the children by these unilateral acts.¹⁰

I strongly urge the Committee pass out the Uniform Child Abduction Prevention Act. It is an important act to protect children from becoming embroiled in an already tense situation that threatens to cause irreparable and unfathomable harm on the family and the subject children.

Thank you.

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¹⁰ See e.g. Forehand, et al., CHILD ABDUCTION: PARENT AND CHILD FUNCTIONING AFTER RETURN. *Clinical Pediatrics* 28(7):311-316; The Impact of Parental Abduction on Children: A Review of the Literature, *AMERICAN JOURNAL OF ORTHOPSYCHIATRY* 62(4):599-206.