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DATE: January 28, 2002

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
JUDICIAL OVERSIGHT
ANALYSIS**

BILL #: HB 549
RELATING TO: Child Custody
SPONSOR(S): Representatives Cantens and Kallinger
TIED BILL(S): none

ORIGINATING COMMITTEE(S)/COUNCIL(S)/COMMITTEE(S) OF REFERENCE:

- (1) JUDICIAL OVERSIGHT
 - (2) CHILD & FAMILY SECURITY
 - (3) COUNCIL FOR SMARTER GOVERNMENT
 - (4)
 - (5)
-

I. SUMMARY:

THIS DOCUMENT IS NOT INTENDED TO BE USED FOR THE PURPOSE OF CONSTRUING STATUTES, OR TO BE CONSTRUED AS AFFECTING, DEFINING, LIMITING, CONTROLLING, SPECIFYING, CLARIFYING, OR MODIFYING ANY LEGISLATION OR STATUTE.

This bill provides that the court may require either party in a proceeding related to custody or visitation to post a bond or other security, upon the presentation of competent substantial evidence that there is a risk that one party may violate the court's order of visitation or custody, or upon the stipulation of the parties. The bill specifies what constitutes "competent substantial evidence" and provides a list of factors for the court to consider in assessing the need for a bond. If a bond is forfeited as the result of a material violation of a custody or visitation order, uses for the proceeds are specified.

This bill also adds an additional sanction that may be imposed upon a custodial parent by the court when that custodial parent refuses to honor a noncustodial parent's or grandparent's visitation rights without proper cause. The court would be able to order the custodial parent to post a bond or other security sufficient to cover certain specified costs associated with a visitation violation.

This bill does not appear to have a fiscal impact on state or local governments.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

- | | | | |
|-----------------------------------|------------------------------|--|---|
| 1. <u>Less Government</u> | Yes <input type="checkbox"/> | No <input checked="" type="checkbox"/> | N/A <input type="checkbox"/> |
| 2. <u>Lower Taxes</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. <u>Individual Freedom</u> | Yes <input type="checkbox"/> | No <input checked="" type="checkbox"/> | N/A <input type="checkbox"/> |
| 4. <u>Personal Responsibility</u> | Yes <input type="checkbox"/> | No <input checked="" type="checkbox"/> | N/A <input type="checkbox"/> |
| 5. <u>Family Empowerment</u> | Yes <input type="checkbox"/> | No <input checked="" type="checkbox"/> | N/A <input type="checkbox"/> |

For any principle that received a "no" above, please explain:

Requiring a parent to post a bond or other security as a deterrent to parental violation of a custody or visitation order does not encourage parents to be responsible for their own actions that may adversely affect the health and well-being of their child. It can also serve to undermine any sense of trust among members of a family that may be established through other less adversarial means.

B. PRESENT SITUATION:

History of Parental Child Abduction

It is now recognized that both social and legal factors have contributed to the continuing rise in the number of parental child abductions. The growth in the divorce rate and the increased mobility of families, coupled with the fact that children of divorced, separated, or never-married parents are too frequently used by one parent to retaliate against the other, have placed more children at risk of becoming victims of abduction by a parent.

Legally, in the past, a parent who kidnapped his or her own child was generally immune from any criminal sanctions. Parental immunity in these cases was present in both state and federal kidnapping laws which specially excluded parents from liability. Federal law on kidnapping provides that, "whoever unlawfully ... kidnaps, abducts, or carries away ... any person, except in the case of a minor by the parent thereof ..." See, 18 U.S.C. ' 1201 (1982).

Prior to the drafting and promulgation of the Uniform Child Custody Jurisdiction Act in 1968, a number of judicial loopholes contributed to the increasing number of parental abductions:

- M states were not required to give full faith and credit to custody orders of other states, resulting in conflicting decrees entered by different states;
- M courts were failing to consider custody orders res judicata, inviting modifications by courts in other states; and
- M courts could gain jurisdiction over a custody issue based solely on the physical custody of the child within the state.

According to the National Incidence Studies of Missing, Abducted, Runaway, and Thrownaway Children (NISMAART) conducted by the U.S. Department of Justice and released in 1990, the yearly estimates of each type of "missing child" are:

M Family Abductions - 354,100

- M Nonfamily Abductions - 3,200 to 4,600
- M Attempted Nonfamily Abductions - 114,600
- M Runaways - 450,700
- M Throwaways - 127,100
- M Lost, Injured, or Otherwise Missing - 438,200

The 354,100 children involved in family abductions includes all children who were victims of both serious and minor incidents. These are situations where a family member either took a child in violation of a custody order or agreement or failed to return a child at the end of a legal or agreed upon period of visitation, with the child being gone at least overnight. There is a subset within this category of missing children of 163,200 children involved in events of a more serious nature, those that without intervention, may lead to further endangerment or risk of harm to the child. These events include attempts to conceal the abduction or the location of the child or to prevent contact with the child, the transporting of a child out of state, or the intent to either keep the child indefinitely or to permanently alter custodial privileges. It should be noted, however, according to the National Center for Missing and Exploited Children, the vast majority of the "minor" incidents are resolved within hours and nearly half of the remaining incidents last between 2 days and a week. Some additional findings of this group include:

- M these situations are typically situations in which there is a parental abduction during a dissolution or custody dispute;
- M 53% of these children were living in single parent homes and 24% were living with a parent who was remarried or had a live-in partner;
- M 41% of these incidents occurred during an ongoing relationship and another 41% not until 2 or more years later;
- M 50% occurred in the South;
- M 60% of the incidents violated custody orders with the rest violating mutual understandings;
- M Episodes were about evenly divided between taking a child from home and failing to return a child following visitation;
- M only 2% of the incidents involved taking children from daycare or school; and
- M parents knew where their children were most of the time in 48% of the cases and 17% did not know at all.

Since the late 1960s, all states have adopted the Uniform Child Custody Jurisdiction Act, although not all, including Florida, have adopted its successor, the Uniform Child Custody Jurisdiction and Enforcement Act. Many states have also enacted statutes providing for either civil or criminal remedies, or both, for parental interference with custody. Additionally, there are three major federal statutes that address the issue of parental child abduction and provide a mechanism for returning children who have been abducted by a parent to their state of residence:

- M The Uniform Child Custody Jurisdiction Act of 1968 (UCCJA), 9 U.L.A. ' 115 (1988).
- M The Parental Kidnapping Prevention Act of 1980 (PKPA), 28 U.S.C. ' 1738A (1994).
- M The Hague Convention on the Civil Aspects of International Child Abduction opened for signature on October 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89.

Each of these statutes has specific provisions to assist the legal system in resolving situations created when a parent takes a child across state or national lines.

The Uniform Child Custody Jurisdiction Act

Before 1968, a parent who was separated or divorced and abducted a child had an excellent chance of being awarded custody of that child. State courts had almost unlimited discretion to refuse to recognize or enforce custody decrees from other states or countries and those same courts were inclined to give substantial weight to the presence of the child in the state when making

determinations related to custody. Parents were thus encouraged to “forum shop” and were rewarded by the courts for doing so.

In recognition of this problem, the National Conference of Commissioners on Uniform State Laws (NCCUSL) promulgated the Uniform Child Custody Jurisdiction Act (UCCJA) to create a national standard to deter the abduction of a child by a parent. By restricting jurisdiction of custody issues to the courts of a single state, efforts to litigate custody matters simultaneously in more than one jurisdiction were frustrated. Jurisdiction, under the UCCJA, can be established in one of four ways:

- M if the state is the child’s home state at the time a proceeding is commenced;
- M if the child and his or her parent have significant connections with the state;
- M if the state has emergency jurisdiction because the child has been abandoned, mistreated, abused, or neglected; or
- M if the state assumes jurisdiction because no other state has jurisdiction or another state has declined jurisdiction because it is in the best interest of the child.

By prohibiting a court in another state from assuming jurisdiction once an action has commenced, the UCCJA encourages cooperation between states. The UCCJA, adopted in Florida in 1977 (see Chapter # 77-433, Laws of Florida), became law in all 50 states by 1981 and has proven to be a substantial deterrent to interstate parental abductions. Despite the success of the UCCJA, parental abduction continues to persist and parents still obtain conflicting custody orders from different states. In a two year study begun in 1990, the Office of Juvenile Justice and Delinquency Prevention identified many problems in the arena of interstate custody issues, including:

- M Lack of procedures for identifying out-of-state custody proceedings or orders;
- M Confusion among states regarding continuing modification jurisdiction and emergency jurisdiction;
- M Lack of effective enforcement procedures; and
- M Lack of uniformity in state variations of the UCCJA.

In response to the study, varying and conflicting state law interpretation of the UCCJA, and the impact of federal law, the NCCUSL revisited the UCCJA (See Patricia M. Hoff, *The ABC’s of the UCCJEA: Interstate Child-Custody Practice Under the New Act*, 32 *Fam. L. Q.* 267 (1998)). The resulting Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) was unanimously adopted by the NCCUSL in 1997. The act received approval from the American Bar Association House of Delegates in 1998 and revises the UCCJA to conform to the Parental Kidnapping Prevention Act (PKPA) and the Violence Against Women Act (VAWA), 18 U.S.C. ‘ ‘ 2265-2266. The UCCJEA clearly gives initial jurisdiction to the “home state” jurisdiction over a “significant contact” jurisdiction” and defines a foreign country as a “state” for purposes of the act. To date, the UCCJEA has been enacted in 27 states and was introduced as legislation in 9 additional states, including Florida, in 2001 (The UCCJEA has also been introduced as legislation in Florida in 1999, 2000 and 2002).

The Parental Kidnapping Prevention Act

In 1980, Congress enacted the Parental Kidnapping Prevention Act (PKPA), 28 U.S.C. ‘ 1738A., which provides the federal enforcement mechanism for ensuring that states honor custody determinations in other states. The most important provision requires courts in every state to enforce, rather than modify, custody and visitation orders entered by courts already exercising jurisdiction. The PKPA differs from the UCCJA in that it does not require courts in the United States to give full faith and credit to foreign custody orders and for that reason, it provides no remedy international custody cases. The UCCJEA does require that courts in the United States recognize and enforce foreign custody orders and, in addition, the federal International Parental Kidnapping

Crime Act of 1993, 18 U.S.C. ' 1204, makes it a federal criminal offense for a parent to wrongfully remove or detain a child outside the United States when the Hague Convention cannot be implemented.

The Hague Convention

In 1988, the United States, signed the Hague Convention on the Civil Aspects of International Child Abduction, (42 U.S.C. ' 11601 et seq.), designed to ensure that abducted children are returned to the country of habitual residence. The Convention is not an extradition remedy, but is a civil remedy for abduction. Subsequently, in 1988, Congress enacted the International Child Abduction Remedies Act (ICARA) to implement and maintain uniform international interpretation of the Convention in the United States. The Hague Convention has been successful in securing the safety of wrongfully removed children, but is hampered in it's success until more countries become signatories.

Florida Law

Florida adopted the UCCJA in 1977 (see ' ' 61.1302-61.1348, Florida Statutes). In addition, Florida law provides criminal penalties for:

- M Kidnapping; kidnapping of child under age 13, aggravating circumstances (' 787.01, Florida Statutes);
- M False imprisonment; false imprisonment of child under age 13, aggravating circumstances (' 787.02, Florida Statutes);
- M Interference with custody (' 787.03, Florida Statutes); and
- M Removing minors from state or concealing minors contrary to state agency order or court order (' 787.04, Florida Statutes).

In instances where a custodial parent interferes with visitation rights of the noncustodial parent or grandparents, Florida law currently provides for sanctions against the custodial parent. Section 61.13(4)(c), Florida Statutes, states:

When a custodial parent refuses to honor a noncustodial parent's or grandparent's visitation rights without proper cause, the court shall, after calculating the amount of visitation improperly denied, award the noncustodial parent or grandparent a sufficient amount of extra visitation to compensate the noncustodial parent or grandparent, which visitation shall be ordered as expeditiously as possible in a manner consistent with the best interests of the child and scheduled in a manner that is convenient for the person deprived of visitation. In ordering any makeup visitation, the court shall schedule such visitation in a manner that is consistent with the best interests of the child or children and that is convenient for the noncustodial parent or grandparent. In addition, the court:

- M May order the custodial parent to pay reasonable court costs and attorney's fees incurred by the noncustodial parent or grandparent to enforce their visitation rights or make up improperly denied visitation;
- M May order the custodial parent to attend the parenting course approved by the judicial circuit;
- M May order the custodial parent to do community service if the order will not interfere with the welfare of the child;
- M May order the custodial parent to have the financial burden of promoting frequent and continuing contact when the custodial parent and child reside further than 60 miles from the noncustodial parent;

- M May award custody, rotating custody, or primary residence to the noncustodial parent, upon the request of the noncustodial parent, if the award is in the best interests of the child; or
- M May impose any other reasonable sanction as a result of noncompliance.

Custody Bonds

There are currently three companies in the nation providing custody bonds, one of which is in Florida. Accredited Bonds in Winter Park, Florida helped develop custody bonds at the request of the National Center for Missing and Exploited Children. Bonds are provided in amounts ordered by a court and individuals required to post such a bond are charged a premium which is a percentage of the bond amount. The premium charged is 10 percent for the first year, 8 percent for the second year, 6 percent for the third year, 4 percent for the fourth year, 2 percent for each year thereafter. In addition, the bond company collateralizes the difference in value between the bond amount and the premium paid. To date, Accredited bonds has sold 2 bonds ordered by Florida courts.

C. EFFECT OF PROPOSED CHANGES:

This bill provides that the court may require either party in a proceeding related to custody or visitation to post a bond or other security, upon the presentation of competent substantial evidence that there is a risk that one party may violate the court's order of visitation or custody or upon the stipulation of the parties. The bill specifies what constitutes "competent substantial evidence" and provides a list of factors for the court to consider in assessing the need for a bond. If a bond is forfeited as the result of a material violation of a custody or visitation order, uses for the proceeds are specified.

This bill also adds an additional sanction that may be imposed upon a custodial parent by the court when that custodial parent refuses to honor a noncustodial parent's or grandparent's visitation rights without proper cause. The court may order the custodial parent to post a bond or other security sufficient to cover certain specified costs associated with a visitation violation.

D. SECTION-BY-SECTION ANALYSIS:

Section 1. Amends ' 61.13, Florida Statutes, relating to custody and support of children and parental visitation rights, to provide that the court may order a custodial parent to post a bond or other security sufficient to pay specified costs when a custodial parent refuses to honor a noncustodial parent or grandparent's visitation rights.

The section also provides that the court may require either party in a proceeding related to custody or visitation to post a bond or other security, upon the presentation of competent substantial evidence that there is a risk that one party may violate the court's order of visitation or custody or upon the stipulation of the parties. The section specifies what constitutes "competent substantial evidence" and a list of factors for the court to consider in assessing the need for a bond. If a bond is forfeited as the result of a material violation of a custody or visitation order, uses for the proceeds are specified.

Section 2. Provides for an effective date of upon becoming law.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

See fiscal comments.

D. FISCAL COMMENTS:

While this bill has the potential to produce revenue for bond companies and have an adverse affect on parents ordered to post a custody bond, the impact is indeterminate at this time.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill will not reduce the authority of municipalities and counties to raise revenues.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill will not reduce the state tax shared with counties and municipalities.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

None.

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B. RULE-MAKING AUTHORITY:

None.

C. OTHER COMMENTS:

Currently, the state and federal legal systems provide one of the most comprehensive deterrents to parental abduction possible through the use of the complementary provisions of the UCCJA, the PKPA, the provisions of the Hague Convention, and criminal and civil sanctions. Unfortunately, none of these laws prevents child abduction from occurring. They are all responses after an abduction has taken place. The concept of using child custody bonds as a "preemptive strike" is too new and so few have been put in place, that there is no data to indicate whether they are or will be an effective preventative.

The National Center for Missing and Exploited Children, in conjunction with the ABA Center on Children and the Law, has recommended that parents consider requesting that a number of provisions be included in custody agreements to help prevent parental abductions. The posting of a custody bond is only one of those recommendations.

Providing another sanction against custodial parents by amending ' 61.13(4)(c), Florida Statutes, does nothing to eliminate an unfairness that has been inherent in this particular section of the law since its inception. Anecdotally, there are as many, if not more, noncustodial parents who interfere with visitation than custodial parents, with no complementary statutory remedies available to them.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

N/A

VII. SIGNATURES:

COMMITTEE ON JUDICIAL OVERSIGHT:

Prepared by:

Staff Director:

Carol Preston

Nathan L. Bond, J.D.