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BILL



ANALYSIS

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Senate Bill 743 (as introduced 10-11-11)
Sponsor: Senator Rick Jones
Committee: Judiciary

Date Completed: 5-29-12

CONTENT

The bill would create the "Uniform Child Abduction Prevention Act" to do the following:

- Allow a court to order abduction prevention measures in a child-custody proceeding if evidence established a credible risk of the child's abduction (that the child would be taken or retained in violation of custody or visitation rights).
- Allow a petition for abduction prevention measures to be filed in a court with jurisdiction to make a child-custody determination under the Uniform Child-Custody Jurisdiction and Enforcement Act.
- Specify information that a petition would have to contain.
- Specify factors that a court would have to consider in determining whether there was a credible risk of abduction.
- Allow a court to enter an order in response to a petition, and specify information that the order would have to include.
- Require a court to enter an abduction prevention order if, at a hearing on the petition or on the court's own motion, it found that there was a credible risk of abduction.
- Specify restrictions, requirements, and prohibitions that an abduction prevention order could include.
- Allow a court to take physical custody of a child, including directing the use of law enforcement to locate and obtain the child, to prevent imminent abduction.

- Allow a court to issue an ex parte warrant to take physical custody of a child, if the court found that there was a credible risk of a child's imminent wrongful removal.
- Identify the duration of an abduction prevention order.

Abduction Prevention Measures

The bill would allow a court, on its own motion, to order abduction prevention measures in a child-custody proceeding if the court found that the evidence established a credible risk of abduction of the child. A party to a child-custody determination, or another individual or entity having a right under the law of this State or another state to seek a child-custody determination for the child, could file a petition seeking abduction prevention measures to protect the child under the proposed Act.

A prosecutor or the Attorney General could seek a warrant to take physical custody of a child under the Act or other appropriate prevention measures.

"Child" would mean an unemancipated individual under 18 years of age. "Abduction" would mean the wrongful removal or wrongful retention of a child. "Wrongful removal" would mean the taking of a child that breaches rights of custody or visitation given or recognized under Michigan law. "Wrongful retention" would mean the keeping or concealing of a child that breaches rights of custody or visitation given or recognized under Michigan law.

"Child-custody proceeding" would mean a proceeding in which legal custody, physical custody, or visitation with respect to a child is at issue, including a proceeding for divorce, dissolution of marriage, separation, neglect, abuse, dependency, guardianship, paternity, termination of parental rights, or protection from domestic violence.

"Child custody determination" would mean a judgment, decree, or other order of a court providing for the legal custody, physical custody, or visitation with respect to a child. The term would include a permanent, temporary, initial, or modification order.

Petition for Abduction Prevention Measures

A petition under the proposed Act could be filed only in a court that had jurisdiction to make a child-custody determination with respect to the child at issue under the Uniform Child-Custody Jurisdiction and Enforcement Act (MCL 722.1101-722.1406, referred to below as the Uniform Act). A Michigan court would have temporary emergency jurisdiction under that Act, if the court found a credible risk of abduction.

A petition under the Act would have to be verified and include a copy of any existing child-custody determination, if available. The petition would have to specify the risk factors for abduction, including the relevant factors outlined in the bill (and described below). Subject to the Uniform Act, if reasonably ascertainable, the petition would have to contain all of the following:

- The child's name, date of birth, and gender.
- The child's customary address and current physical location.
- The respondent's identity, customary address, and current physical location.
- A statement of whether a prior action to prevent abduction or domestic violence had been filed by a party or other individual or entity having custody of the child, and the date, location, and disposition of the action.
- A statement of whether a party to the proceeding had been arrested for a crime related to domestic violence, stalking, or child abuse or neglect, and the date, location, and disposition of the case.
- Any other information required to be submitted to the court for a child-

custody determination under the Uniform Act.

In determining whether there was a credible risk of abduction of a child, the court would have to consider any evidence that the petitioner or respondent had done any of the following or that any of the following applied to the petitioner or respondent:

- Previously abducted or attempted to abduct the child.
- Threatened to abduct the child.
- Engaged in domestic violence, stalking, or child abuse or neglect.
- Refused to follow a child-custody determination.
- Lacked strong familial, financial, emotional, or cultural ties to Michigan or the United States.
- Had strong familial, financial, emotional, or cultural ties to another state or country.
- Was undergoing a change in immigration or citizenship status that would adversely affect the respondent's ability to remain in the U.S. legally.
- Had an application for U.S. citizenship denied.
- Had forged or presented misleading or false evidence on government forms or supporting documents to obtain or attempt to obtain a passport, visa, travel documents, Social Security card, driver license, or other government-issued ID card or had made a misrepresentation to the U.S. government.
- Had used multiple names to attempt to mislead or defraud.
- Had engaged in any other conduct the court considered relevant to the risk of abduction.

The court also would have to consider evidence that the petitioner or respondent had recently engaged in activities that could indicate a planned abduction, including any of the following:

- Abandoning employment.
- Selling a primary residence.
- Terminating a lease.
- Closing bank or other financial management accounts, liquidating assets, hiding or destroying financial documents, or conducting any unusual financial activities.
- Applying for a passport or visa or obtaining travel documents for the

respondent, a family member, or the child.

- Seeking to obtain the child's birth certificate or school or medical records.

In addition, the court would have to consider evidence that the petitioner or respondent was likely to take the child to a country to which any of the following apply:

- The country is not a party to the Hague Convention on the Civil Aspects of International Child Abduction and does not provide for the extradition of an abducting parent or for the return of an abducted child.
- The country is a party to Hague Convention but the Convention is not in force between the U.S. and that country, the country is noncompliant according to the most recent report of the U.S. Department of State, or the country lacks legal mechanisms for immediately and effectively enforcing a return order under the Hague Convention.
- The country would pose a risk that the child's physical or emotional health or safety would be endangered because of specific circumstances relating to the child or because of human rights violations committed against children.
- The country is included by the U.S. State Department on a current list of state sponsors of terrorism.
- The country does not have an official U.S. diplomatic presence.
- The country is engaged in active military action or war, including a civil war, to which the child could be exposed.

This also would apply to a country that has laws or practices that would enable the respondent, without due cause, to prevent the petitioner from contacting the child; restrict the petitioner from freely traveling to or exiting from the country because of the petitioner's gender, nationality, marital status, or religion; or restrict the child's ability legally to leave the country after he or she reached the age of majority because of his or her gender, nationality, or religion.

In a hearing on a petition filed under the proposed Act, the court would have to consider any evidence that the respondent believed in good faith that his or her conduct was necessary to avoid imminent harm to the child or himself or herself and any other evidence that could be relevant to whether

the respondent could be permitted to remove or retain the child.

Abduction Prevention Order

If a petition were filed under the proposed Act, the court could enter an order. If entered, the order would have to include all of the following:

- The basis of the court's exercise of jurisdiction.
- The manner in which notice and opportunity to be heard were given to the people entitled to notice of the proceeding.
- A detailed description of each party's custody and visitation rights and residential arrangements for the child.
- A provision stating that a violation of the order could subject the violating party to civil and criminal penalties.
- Identification of the child's country of habitual residence at the time of the issuance of the order.

If, at a hearing on a petition or on the court's own motion, the court found after reviewing the evidence that there was a credible risk of abduction of the child, the court would have to enter an abduction prevention order. The order would have to include the provisions required under the Act and measures and conditions that were reasonably calculated to prevent abduction of the child, giving due consideration to the custody and visitation rights of the parties. The court would have to consider the child's age, potential harm to the child from an abduction, the legal and practical difficulties of returning the child to the jurisdiction if abducted, and the reasons for the potential abduction, including evidence of domestic violence, stalking, or child abuse or neglect.

An abduction prevention order could include one or more of the following:

- An imposition of travel restrictions requiring a party traveling with the child outside a designated area to provide the other party with the child's travel itinerary, a list of physical addresses and telephone numbers at which the child could be reached at specified times, and copies of all travel documents.
- A requirement that a party register the order in another state as a prerequisite

to allowing the child to travel to that state.

- On the petitioner's request, a requirement that the respondent obtain an order from the relevant foreign country containing terms identical to the child-custody determination issued in the U.S.

An order also could include prohibitions against removing the child from Michigan, the U.S., or another area without court permission or the petitioner's written consent; removing or retaining the child in violation of a child-custody determination; removing the child from school, child care, or a similar facility; or approaching the child at any location other than a site designated for supervised visitation.

In addition, with regard to the child's passport, an order could include a direction that the petition place the child's name in the U.S. State Department's Child Passport Issuance Alert Program; a requirement that the respondent surrender to the court or the petitioner's attorney any passport issued in the child's name; and a prohibition against the respondent's applying on behalf of the child for a new or replacement passport or visa.

As a prerequisite to exercising custody or visitation, an abduction prevention order could include a requirement that the respondent provide one or more of the following:

- To the U.S. State Department Office of Children's Issues and the relevant foreign consulate or embassy, an authenticated copy of the order detailing passport and travel restrictions for the child.
- To the court, proof that the respondent had provided that information to the State Department and relevant foreign office and/or an acknowledgment in a record from the relevant foreign consulate or embassy that no passport application had been made, or passport issued, on behalf of the child.
- To the petitioner, proof of registration with the U.S. embassy or other U.S. diplomatic presence in the destination country and with the central authority of the Hague Convention, if the convention were in effect between the U.S. and the

destination country, unless one of the parties objected.

- A written waiver under Federal law (5 USC 552a), popularly known as the Privacy Act, with respect to any document, application, or other information pertaining to the child authorizing its disclosure to the court and the petitioner.

The court also could impose conditions on the exercise of custody or visitation that did one or more of the following:

- Limited visitation or required that visitation with the child by the respondent be supervised until the court found that supervision was no longer necessary, and ordered the respondent to pay the costs of supervision.
- Required the respondent to post a bond or provide other security to serve as a financial deterrent to abduction, the proceeds of which could be used to pay for the reasonable expenses of recovery of the child, including reasonable attorney fees and costs if there were an abduction.
- Required the respondent to obtain education on the potentially harmful effects to the child from abduction.

To prevent imminent abduction of a child, a court could do one or more of the following:

- Issue a warrant to take physical custody of the child under the proposed Act or other law of this State.
- Direct the use of law enforcement to take any action reasonably necessary to locate the child, obtain return of the child, or enforce a custody determination under the Act or other law of the State.
- Grant any other relief allowed under Michigan law.

The remedies provided in the Act would be cumulative and would not affect the availability of other remedies to prevent abduction.

Ex Parte Warrant

If a petition under the proposed Act alleged and the court found that there was a credible risk that the child was imminently likely to be wrongfully removed, the court could issue an ex parte warrant to take physical custody of the child. (Ex parte is

without notice to, or appearance of, the opposing party.)

The respondent to the petition would have to be given an opportunity to be heard at the earliest possible time after the ex parte warrant was executed, but not later than the next judicial day unless a hearing on that date was impossible. If a hearing on the next judicial day were impossible, the court would have to hold the hearing on the first judicial day possible.

An ex parte warrant to take physical custody of a child would have to do all of the following:

- Recite the facts on which a determination of a credible risk of imminent wrongful removal of the child was based.
- Direct law enforcement officers to take physical custody of the child immediately.
- State the date and time for the hearing on the petition.
- Provide for the safe interim placement of the child pending further order of the court.

If feasible, before issuing an ex parte warrant and before determining the placement of the child after the warrant was executed, the court could order a search of the relevant databases of the National Crime Information Center system and similar state databases to determine if either the petitioner or the respondent had a history of domestic violence, stalking, or child abuse or neglect.

A petition and warrant would have to be served on the respondent when or immediately after the child was taken into physical custody. A warrant to take physical custody of a child, issued by this State or another state, would be enforceable throughout Michigan. If the court found that a less intrusive remedy would not be effective, it could authorize law enforcement officers to enter private property to take physical custody of the child. If required by exigent circumstances, the court could authorize law enforcement officers to make forcible entry at any hour.

If the court found, after a hearing, that a petitioner sought an ex parte warrant for the purpose of harassment or in bad faith, the

court could award the respondent reasonable attorney fees, costs, and expenses.

The proposed Act would not affect the availability of relief allowed under other law of this State.

Duration of Abduction Prevention Order

An abduction prevention order would remain in effect until the earliest of the following:

- The time stated in the order.
- The emancipation of the child.
- The child's attaining 18 years of age.
- The time the order was modified, revoked, vacated, or superseded by a court with jurisdiction under the Uniform Act or other applicable law of this State.

Scope of the Act

In applying and construing the proposed Act, a court would have to consider the need to promote uniformity of the law with respect to its subject matter among states that enacted the Uniform Child Abduction Prevention Act.

The bill specifies that the proposed Act would modify, limit, and supersede the Federal Electronic Signatures in Global and National Commerce Act (15 USC 7001-7031), but would not modify, limit, or supersede Section 7001(c) or authorize electronic delivery of any of the notices described in Section 7003(b) of that Act. (Section 7001(c) deals with consumer disclosures and consent to electronic records. Section 7003(b) addresses exceptions from the electronic records requirements, including court orders or notices, or official court documents required to be executed in connection with court proceedings.)

The bill also specifies that Sections 110-112 of the Uniform Child-Custody Jurisdiction and Enforcement Act apply to cooperation and communications among courts in proceedings under the Uniform Child Abduction Prevention Act. (Those sections allow a Michigan court to communicate with a court in another state concerning a child-custody proceeding; allow a party to a child-custody proceeding to offer testimony of witnesses who are located in another state; and allow a Michigan court to request the

appropriate court of another state to conduct certain proceedings.)

Legislative Analyst: Patrick Affholter

FISCAL IMPACT

The bill would have an indeterminate, but likely negligible, fiscal impact on State and local government. To the extent that the uniform standards included in the bill increased the administrative workloads of various courts, local units of government could incur increased costs. Local law enforcement entities also could incur additional costs if the bill resulted in an increase in the number of ex parte bench warrants that must be executed.

Fiscal Analyst: Dan O'Connor

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.