Opposition to HB 1121

HB 1121 adopts the Uniform Child Abduction Prevention Act into Title 26 RCW. Upon brief analysis of the bill, this memo *recommends that this bill not be adopted*.

Summary

- Does not require a judicial search of relevant databases to determine if either the petitioner or respondent has a history of domestic violence, stalking, or child abuse or neglect.
- The factors to support a court's finding of a credible risk of abduction are overly broad, vague, and encompass normal acts for which there are common and reasonable explanations as to why a parent might engage in those activities (for example, activities routine for a parent to take in the context of a separation and divorce: terminating a lease, closing bank accounts, obtaining medical, education, or medical records).
- The narrowing of geographic regions expands the discretion of the court to issue ex parte custody orders when a safe parent has family residing in another state, is from another state, etc. Further, it is a well-known tactic by abuser parents to "isolate" their victims from family and friends – including that an abuser parent will relocate the victim parent to a state other than the one in which the victim's family and friends reside to maximize their influence and control.
- The "cultural ties" language – "lack of" to the United States, and "has strong" for another country – is a fundamentally racially and culturally insensitive factor. Generally, this factor weighs strongly against protective parents of color and even more strongly against immigrants to the United States who maintain relationships and ties to their place of origin.
- The bill shifts the burden of proof to a survivor parent if an abuser petitions. The current version of the bill is being marketed as making explicit that if there are any indicia of domestic violence, the abuser will not be able to use this law to prevent the victim from escaping to safety for the victim and the victim's child. However, the bill does not say *how* it does not apply.
- Includes negative implications for survivor parents to be ordered to disclose contact and residential information to their abusers.
- Invites further abusive custody litigation in our family court systems by granting another pre- and post-trial cause of action an abuser can bring to shift the burden and focus away from his domestic violence and onto the actions and relationships of a survivor parent.
- Attorneys' fees provision does not mitigate the potential harm that may result from the filing of an abduction prevention order which far exceeds the financial cost to survivor parents (many self-represented).
- Seeks to impose punishment upon a parent prior to the commission of any wrongful or illegal act.
- The need for this bill is questionable.

HB 1121 Proposed Procedure

For one, the UCAPA applies to **pre-decree** family court cases. Meaning, if a court finds sufficient evidence of a "credible risk of abduction", a court may, on its own motion, order abduction prevention measures, even in cases where no custodial or primary residential placement decisions have been made:

> "If a petition under this chapter contains allegations and the court finds that there is credible risk that the child is imminently likely to be wrongfully removed, the court may issue an ex parte warrant to take physical custody of the child."

Sec. 9(1). If an ex parte warrant is issued, the bill requires law enforcement officers to take custody of the child immediately. Sec. 9(2(b). It also requires the court to provide a "safe interim placement of the child pending further order of the court." Sec. 9(2)(d).

Generally, to determine whether the credible-risk-of-abduction standard is met under UCAPA, the court must consider evidence of thirteen factors, which include whether the respondent:

> (a) has previously abducted or attempted to abduct the child;
> (b) has threatened to abduct the child;
> (c) except for planning activities related to providing for the safety of a party or the child while avoiding or attempting to avoid domestic violence, has recently engaged in activities that may indicate a planned abduction, including: (i) abandoning employment; (ii) selling a primary residence; (iii) terminating a lease; (iv) closing bank or other financial management accounts . . . ; (v) applying for a passport or visa or obtaining travel documents for the respondent, a family member, or the child; or (vi) seeking to obtain the child's birth certificate or school or medical records lacks strong familial, financial, emotional, or cultural ties to the state or the United States;
> (d) has engaged in domestic violence, stalking, or child abuse or neglect;
> (e) has refused to follow a child custody determination;
> (f) lacks strong familial, financial, emotional, or cultural ties to the state or the United States;
> (g) has strong familiar, financial, emotional, or cultural ties to another state or country;
> (h) Is likely to take the child to a country that: (i) 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; (ii) Is a party to the Hague Convention on the Civil Aspects of International Child Abduction but: (A) The Hague Convention on the Civil Aspects of International Child Abduction is not in force between the United States and that country; (B) Is noncompliant according to the most recent compliance report issued by the United States department of state; or (C) Lacks legal mechanisms for immediately and effectively enforcing a return order under the

> Hague Convention on the Civil Aspects of International Child Abduction; (iii) Poses a risk that the child's physical or emotional health or safety would be endangered in the country because of specific circumstances relating to the child or because of human rights violations committed against children; (iv) Has laws or practices that would: (A) Enable the respondent, without due cause, to prevent the petitioner from contacting the child; (B) Restrict the petitioner from freely traveling to or exiting from the country because of the petitioner's gender, gender identity, sexual orientation, nationality, marital status, or religion; or (C) Restrict the child's ability legally to leave the country after the child reaches the age of majority because of a child's gender, gender identity, sexual orientation, nationality, or religion; (v) Is included by the United States department of state on a current list of state sponsors of terrorism; (vi) Does not have an official United States diplomatic presence in the country; or (vii) Is engaged in active military action or war, including a civil war, to which the child may be exposed;
> (i) Is undergoing a change in immigration or citizenship status that would adversely affect the respondent's ability to remain in the United States legally;
> (j) Has had an application for United States citizenship denied;
> (k) Has forged or presented misleading or false evidence on government forms or supporting documents to obtain or attempt to obtain a passport, a visa, travel documents, a social security card, a driver's license, or other government-issued identification card or has made a misrepresentation to the United States government; (l) Has used multiple names to attempt to mislead or defraud; or
> (m) Has engaged in any other conduct the court considers relevant to the risk of abduction.
> (2) If the court finds during a hearing on a petition under this chapter that the respondent's conduct was intended to avoid domestic violence or imminent harm to the child or the respondent, the court shall not issue an abduction prevention order.

The bill **does not clarify how many of these factors are required to be present for a court to find sufficient evidence to suggest a credible risk of abduction**. Petitioners may also offer relevant evidence that does not explicitly fall into UCAPA's predetermined categories, which the judge is allowed to consider. Sec. 9(1)(m).

Under UCAPA, if the court ultimately decides that a sufficient number of the above-referenced factors have been met and that it is in the child's best interest to enter an abduction prevention order, it can impose travel restrictions on the respondent by limiting him or her to a specific geographic area. This could be a domestic travel restriction, international travel restriction, or both.

It can also limit the respondent's visitation rights or require supervised visitation (including in pre-decree cases), require the respondent to post a bond or other security sufficient to serve as a financial deterrent to abduction, and require the respondent to take an informative class discussing the harmful effects of abduction on children.

Discussion

First, Section 9 of this bill essentially allows for ex parte custody orders to be made. While subsection (4) permits a court, when "feasible", to order a **search of relevant databases of the national crime information center system and similar state databases to determine if either the petitioner or respondent has a history of domestic violence, stalking, or child abuse or neglect**, **it does not require it.** Nor could it hardly be considered an adequate investigation by the court to order removal of a child based on allegations of an abuser petitioner against a survivor respondent when this is a legal cause of action that can be initiated prior to the court investigating the behaviors of parents and well before a court can reasonably be expected to investigate and enter findings and limitations against an abuser parent under 26.09.191.

Second, the bill provides no definition of "credible risk of abduction," but rather contains a long list of factors that a court may consider in determining whether there is a credible risk of abduction. The more factors are present in a case, the higher the probability a judge will find a credible risk of abduction. However, **the factors to support a court's finding of a credible risk of abduction are overly broad, vague, and encompass normal acts for which there are common and reasonable explanations as to why a parent might engage in those activities**. **As such, they invite a wide degree of flexibility for allegations to be made based on evidence that is consistent with the actions of a survivor parent, a parent conducting routine affairs, or a parent in strife and adjusting to the myriad disruptions of divorce with children.** For example, the factor "has previously abducted" or attempted to abduct" could mean that a parent took the child on a day that was not their agreed upon residential time or failed to deliver the child to the other parent for unspecified (protective, nondisclosed) reasons, including that the child refused visitation with their abuser parent. Similarly, other actions included under Section 7 are actions a parent is expected to or are **routine for a parent to take in the context of a separation and divorce: terminating a lease, closing bank accounts, obtaining medical, education, or medical records**. With regard to retrieving child records, most parents are advised to retrieve their child's records by their attorneys in advance of or in preparation for a trial strategy.

Third, factors (f) and (g) narrows the geographic region for familial, financial, emotional, or cultural ties to apply to another state other than the state in which that parent resides. Considering today's global economy, the ease and accessibility of movement across state lines, and the reality that a vast majority of parents have family members that reside in other states, the bill's **narrowing of geographic region expands the discretion of the court to issue ex parte custody orders when a safe parent has family residing in another state, is from another state, is employed by a company that is headquartered or based in another state, or owns real estate or interest in real estate or commercial property or assets in another state.** These otherwise routine-aspects-of-daily-life findings could be argued as evidence of a credible risk that the child is imminently likely to be wrongfully removed by that parent**. Further, it is a well-known tactic by abuser parents to "isolate" their victims from family and friends – including that an abuser parent will relocate the victim parent to a state other than the one in which the victim's family and friends reside to maximize their influence and control**.

Additionally, the "**cultural ties" language – "lack of" to the United States, and "has strong" for another country – is a fundamentally racially and culturally insensitive factor**. There is also no guidance for how a judge should apply that factor to support his finding. For example, a parent might be born abroad, maintain cultural practices and fluency in a language other than English, decorate, dress, or adorn themselves consistent with their cultural preference, all of which could be taken as evidence to support a finding in favor of this factor. **Generally, this factor weighs strongly against protective parents of color and even more strongly against immigrants to the United States who maintain relationships and ties to their place of origin**.

Fourth, the purpose of the bill is to prevent the wrongful removal or retention of a child and not to hinder legitimate relocations or justifiable activities undertaken to protect a parent or child. However, when introduced several years ago, survivors of domestic violence provided feedback that the bill would give abusers a tool to have domestic violence victims arrested when victims tried to escape abuse by leaving the state together with their child. According to the Substitute House Bill Report, **the current version of the bill is being marketed as making explicit that if there are any indicia of domestic violence**, **the abuser will not be able to use this law to prevent the victim from escaping to safety for the victim and the victim's child**. Upon review, Section 7(c) "activities" indeed does not apply to "planning activities related to providing for the safety of a party of the child while avoiding or attempting to avoid domestic violence[.]" However, the **bill does not say *how* it does not apply**. For example, because the bill contains **a presumption in favor of the petitioner, an abuser can still file a petition under this bill, at which point the burden of proof is shifted onto the survivor parent** to show that their alleged abduction-planning activities are instead actions to protect or escape the abusive parent, or otherwise actions taken that are normal activities of daily life. Under the bill, it appears a survivor parent is required to make that to their abuser, as this bill otherwise provides no safeguards or mechanisms that protect the survivor parent from making risky or harmful disclosures relating to theirs and their child's safety, including information relating to any safety plan they may be putting into place.

Fifth, if a court enters an abduction prevention order, it is granted the discretion to include not only travel restrictions in that order, but also may include, for the benefit and knowledge of the petitioning parent, the travel itinerary of the child, a list of physical addresses and telephone numbers at which the child can be reached, and copies of all travel documents which often contain the residential address of the parent against whom the order has been entered. The **negative implications for survivor parents to be ordered to disclose contact and residential information to their abusers** runs counter to our state's progress on enacting further protections for victims of domestic violence and abuse.

Lastly, this bill will **almost certainly invite further abusive custody litigation in our family court systems by granting another pre- and post-trial cause of action an abuser can bring to shift the burden and focus away from his domestic violence and onto the actions and relationships of a survivor parent**. It allows one parent a means to effectively gain sole custody of a child and have restrictions and limitations imposed on another parent's residential time prior to a family court investigation and finding for limitations, including for restraining orders, and well before

any scheduled trial to determine a final parenting plan. Additionally, the bill attempts to penalizes the misuse of this law by requiring payment of attorneys' fees and costs. However, that remedy comes after the harm, and the **harm that may result from the filing of an abduction prevention order far exceeds the financial cost to survivor parents**, many of whom are pro se litigants lacking the means to successfully rebut allegations of intended abduction of their children, in addition to the myriad other allegations that are quite often made by abusive parents against protective survivor parents in family court.

On a final note, this bill **seeks to impose punishment upon a parent prior to the commission of any wrongful or illegal act**. In our state, this bill was first introduced in 2009 and 2010 and failed both times. To date, only a handful of states (15) have adopted this bill, primarily due to concerns that it violates our nation's tradition of enacting punishment *after*, and not before, the commission of a crime, improperly shifts the burden of proof of innocence onto the accused, and because each state, including WA, contains its own set of laws that relate to criminal kidnapping of children (in addition to laws that are applicable to international kidnapping.) **The need for this bill is therefore questionable**, especially in light of the concerns briefly addressed in this memo. For the reasons stated herein, this memo concludes with a recommendation that this bill not be adopted.