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### Child Custody - Jurisdiction and Procedure

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# Articles

## CHILD CUSTODY—JURISDICTION AND PROCEDURE

by  
Christopher L. Blakesley\*

### I. INTRODUCTION: HISTORY AND CONCEPTUAL BACKGROUND

Custody determinations traditionally have comprised a subcategory of litigation under the *Pennoyer v. Neff*<sup>1</sup> exception for proceedings relating to status.<sup>2</sup> Of course, states have the power to decide the status of their domiciliaries.<sup>3</sup> It was natural, therefore, for the courts and scholars of the nineteenth and early twentieth

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<sup>1</sup> 95 U.S. 714 (1877).

<sup>2</sup> *Id.* ("jurisdiction which every State possesses to determine the civil status. . . of all its inhabitants" extends to that status vis-a-vis nonresidents); Murchison, *Jurisdiction Over Persons, Things and Status*, 41 LA. L. REV. 1053, 1076 (1981). This categorization is necessary if one accepts *Pennoyer*'s structure. If custody cases are to fit into *Pennoyer*'s unified theory of state court jurisdiction, refusal to place custody within the status exception would require that it be placed within the principles relating to in personam or in rem jurisdiction. Murchison, *supra* at 1076 n.109. Further discussion of this topic is presented *infra* notes 283-338 and accompanying text.

<sup>3</sup> *Pennoyer*, 95 U.S. at 734; Murchison, *supra* note 2, at 1076; Ratner, *Child Custody in a Federal System*, 62 MICH. L. REV. 795-96 (1964); *see also* Williams v. North Carolina, 317 U.S. 287, 303 (1942) ("when a court of one state acting in accord with the requirements of procedural due process alters the marital status of one domiciled in that state . . . we cannot say its decree should be excepted from the full faith and credit clause"); Williams v. North Carolina, 325 U.S. 226 (1945) (regarding sister state's divorce decree, court not bound by, but must give proper weight to, sister state's determination that a person is a domiciliary thereof).

centuries to consider domicile the sole basis of jurisdiction in custody matters.<sup>4</sup> Gradually, judges and scholars began to challenge the notion that domicile was the sole basis and courts began to apply other bases, such as the child's presence in the state or personal jurisdiction over both parents.<sup>5</sup> One commentator suggests that the "true rule" with regard to jurisdiction "is the court's discretion exclusively governed by the child's welfare."<sup>6</sup>

In 1953, the United States Supreme Court announced that a court was required by the Constitution to have personal jurisdiction over the defendant in a custody action.<sup>7</sup> Until 1953, state courts were virtually free of federal limits to their power to set their own jurisdictional standards in custody cases. Since that date, the Supreme Court has not deigned to stir again the muddy waters of child custody jurisdiction, to impose jurisdictional limitations or to consider whether or not the Full Faith and Credit Clause applies to custody cases.<sup>8</sup>

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<sup>4</sup> 2 J. BEALE, CONFLICT OF LAWS § 144.3 (1935); H. GOODRICH, CONFLICT OF LAWS §132, at 358 (2d ed. 1938); RESTATEMENT, CONFLICT OF LAWS, § 117 (1934). *But see* Ehrenzweig, *Interstate Recognition of Custody Decrees: Law and Reason v. The Restatement*, 51 MICH. L. REV. 345, 347-48 (1953); Stansbury, *Custody and Maintenance Law Across State Lines*, 10 LAW & CONTEMP. PROBS. 819, 820-25 (1944) (arguing that the traditional perception failed to explain the decisions); Murchison, *supra* note 2, at 1076.

<sup>5</sup> *E.g.*, *In re Paul*, 78 Idaho 370, 304 P. 2d 641, 643 (1956) (court issued a temporary protective order per child's physical presence); *State ex rel. Jaroszewski v. Prestidge*, 249 Minn. 80, 81 N.W. 2d 705 (1957) (power to award custody based on presence of children in state); *see also* H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 11.5, at 320-21 (1968); Coombs, *Interstate Child Custody: Jurisdiction, Recognition, and Enforcement*, 66 MINN. L. REV. 711, 717 nn. 37-38 (1982); Murchison, *supra* note 2, at 1076-77. For additional cases and commentary supporting this proposition, *see generally* Ehrenzweig, *supra* note 4; Ratner, *supra* note 3, at 797 & nn. 37-38; Stansbury, *supra* note 4, at 824 nn. 32-35; Stumberg, *The Status of Children in the Conflict of Laws*, 8 U. CHI. L. REV. 42, 55-56 nn. 39-40 (1940). Note, *Jurisdictional Bases of Custody Decrees*, 53 HARV. L. REV. 1024, 1025 n.8 (1940).

<sup>6</sup> Ehrenzweig, *supra* note 4, at 357.

<sup>7</sup> *May v. Anderson*, 345 U.S. 528, 534 (1953); Coombs, *supra* note 5, at 736. For a criticism of *May v. Anderson* and its focus on one aspect of custody while completely ignoring all others, *see* H. CLARK, *supra* note 5, at § 11.5, p. 323 and Hazard, *May v. Anderson: Preamble to Family Law Chaos*, 45 VA. L. REV. 379 (1959). Further discussion of *May v. Anderson* is presented *infra* Section VII.

<sup>8</sup> Coombs, *supra* note 5, at 718; McGough & Hughes, *Chartered Territory: The Louisiana Experience With the Uniform Child Custody Jurisdiction Act*, 44 LA. L. REV. 19, 21 (1983). In 1982, the United States Supreme Court was presented with an opportunity to make a significant impact on interstate child custody jurisdiction law and state court jurisdiction

In this atmosphere of virtually no jurisdictional limitations, state courts were aggressive in asserting initial jurisdiction in custody cases without the presence of domicile.<sup>9</sup> Courts commonly asserted jurisdiction in cases in which it was clear that courts in other jurisdictions potentially had jurisdiction and an interest in asserting it. Some even asserted jurisdiction in those cases in which a court in another state had already asserted its jurisdiction.<sup>10</sup> In addition, courts that issued custody decrees invariably retained jurisdiction over the subject matter in order to be able to modify the decree if circumstances changed and so required.<sup>11</sup> The Full Faith and Credit Clause has been held to require only the same deference and same effect to a judgment of a sister state that a state gives to its own decrees or judgments.<sup>12</sup> Courts of states which had not rendered the initial custody judgment thus felt justified in asserting jurisdiction in order to modify a sister state's custody decree.<sup>13</sup> In 1947, the United States Supreme Court affirmed the notion that a custody judgment from a sister state is not due any more final or conclusive effect than it has in the law of the sister state; it is modifiable for changed circumstances.<sup>14</sup> Inconsistencies were the inevi-

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over non-domiciliary citizens generally. However, in this controversial case, *Eicke v. Eicke*, 399 So. 2d 1231 (La. Ct. App.), *cert. denied*, 406 So. 2d 607 (La. 1981), *cert. granted*, 456 U.S. 970 (1982), *cert. dismissed*, 459 U.S. 1139 (1983), where a Louisiana court of appeals chose to ignore a Texas custody decree, the United States Supreme Court accepted certiorari, only to dismiss it later, without hearing. For an excellent discussion of this case and the subject matter generally, see Coombs, *Custody Conflicts in the Courts: Judicial Resolution of the Old and New Questions Raised by Interstate Child Custody Cases*, 16 FAM. L.Q. 251, 252-68 (1982), and McGough & Hughes, *supra* this note.

<sup>9</sup> H. CLARK, *supra* note 5, § 11.5, at 320-21; Coombs, *supra* note 5, at 718; Stansbury, *supra* note 4, at 827.

<sup>10</sup> Coombs, *supra* note 5, at 718. *See, e.g.*, *Minick v. Minick*, 111 Fla. 469, 490, 149 So. 483, 492 (1933) (jurisdiction asserted despite potential jurisdiction elsewhere); *Omer v. Omer*, 108 Kan. 95, 97, 193 P. 1064, 1065 (1920) (jurisdiction asserted despite litigation already pending in another state); *Berlin v. Berlin*, 21 N.Y. 2d 371, 377, 235 N.E.2d 109, 112, 288 N.Y.S.2d 44, 48 (1967), *cert. denied*, 393 U.S. 840 (1968) (welfare of child best served by ignoring prior grant of custody to father by Maryland court and entering award of custody to mother).

<sup>11</sup> Murchison, *supra* note 2, at 1077.

<sup>12</sup> *Reynolds v. Stockton*, 140 U.S. 254, 264 (1891); Murchison, *supra* note 2, at 1077. The Full Faith and Credit Clause is set forth in U.S. CONST. art. IV, § 1.

<sup>13</sup> H. CLARK, *supra* note 5, § 11.5, at 323; Ehrenzweig, *supra* note 4, at 352; Murchison, *supra* note 2, at 1077.

<sup>14</sup> *New York ex rel. Halvey v. Halvey*, 330 U.S. 610, 614-15 (1947) (Florida custody

table result of courts' attempts to struggle with staid notions of jurisdiction in an era of tremendous mobility and in the face of the important need to protect children.<sup>15</sup>

A child's role in the custody adjudication process is significantly different from the role of a party to the lawsuit. Generally, the child plays a passive role, in contrast to the active role played by each of the adversaries. Nevertheless, the child always has a great interest in the outcome of the custody litigation, given the child's peculiar vulnerability and the fact that his or her fate is ultimately connected with the fortunes of the litigants.<sup>16</sup> Because of the child's vulnerable role in a custody dispute, and because of his or her lack of freedom of choice or movement, the rules traditionally applicable to jurisdiction in other cases are not appropriate in custody cases. Difficult cases are, of course, likely, whatever system is adopted.

There obviously was a need for states to develop an approach emphasizing restraint and comity in order to minimize potential conflicts and harm to children. Such restraint was advocated by scholars,<sup>17</sup> adopted first by California in *Sampsel v. Superior Court*,<sup>18</sup> and eventually adopted in theory by many other states, as

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decree was modifiable by a Florida court; hence, New York courts could also modify it. This case did not decide directly the question of the impact of the Full Faith and Credit Clause on custody cases.); see *Ford v. Ford*, 371 U.S. 187, 192 (1962); *Kovacs v. Brewer*, 356 U.S. 604, 608 (1958). See generally H. CLARK, *supra* note 5, § 11.5, at 323 n.31.

<sup>15</sup> H. CLARK, *supra* note 5, § 11.5, at 322; Ehrenzweig, *supra* note 4, at 345-49; Murchison, *supra* note 2, at 1076-77.

<sup>16</sup> While his or her parents are parties to the suit for dissolution and custody, the child has been described as "the subject of the custody dispute." Note, *Lawyering for the Child: Principles of Representation in Custody and Visitation Disputes Arising from Divorce*, 87 YALE L.J. 1126, 1129 (1978). "Empirical studies show great variation in the responses of children to the divorce of their parents, but the threat to a child's welfare introduced by divorce is not disputed." *Id.* at 1129-30 (footnote omitted). For additional commentary describing what is at stake for the child in a custody dispute as well as the need for independent representation, see Bersoff, *Representation for Children in Custody Decisions: All That Glitters is Not Gault*, 15 J. FAM. L. 27 (1976-1977) and *infra* notes 113-85, 242-82 and accompanying text.

<sup>17</sup> Stumberg, *supra* note 5, at 62.

<sup>18</sup> 32 Cal. 2d 763, 779, 197 P.2d 739, 750 (1948) (requiring the lower courts to defer to the courts of other states when those states have a more substantial interest in the child); see Coombs, *supra* note 5, at 719.

well as by the Restatement (Second) of the Conflict of Laws.<sup>19</sup> It became clear that even if one has clear rules relating to jurisdiction over custody questions, those rules may not always promote the best interests of a given child.<sup>20</sup> For example, at the time when domicile was the only basis for jurisdiction over a child, courts would find themselves without jurisdiction in cases in which it would have promoted the welfare of the child to assert jurisdiction. According to Professor Sanford Katz, "[t]he courts eventually concluded that the welfare of children demanded greater flexibility [than that offered by a strict domicile basis for jurisdiction], and other grounds for custody jurisdiction arose."<sup>21</sup> The courts of most states, however, did not really embrace the notion of deference and comity sufficiently to ameliorate the conflict and confusion.<sup>22</sup> This chaotic history, combined with the difficulty of the issues involved, caused the rules surrounding jurisdiction in custody matters to become the subject of considerable conflict, commentary and, lately, legislative action.<sup>23</sup> In addition, it is likely that chaos in the law

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<sup>19</sup> See RESTATEMENT (SECOND) OF CONFLICT OF LAWS, §79 (1971) (adopting the California approach and citing the wide acceptance of it among the states); *Berlin v. Berlin*, 21 N.Y.2d 371, 235 N.E.2d 109, 288 N.Y.S.2d 44 (1967); *In re Sagan*, 261 Pa. Super. 384, 396 A.2d 450, 453 (1978). See generally Coombs, *supra* note 5, at 719.

<sup>20</sup> For a detailed analysis of the "best interests of the child doctrine," see FAMILY LAW, *infra* note 54, at § 36:06.

<sup>21</sup> KATZ, CHILD SNATCHING: THE LEGAL RESPONSE TO THE ABDUCTION OF CHILDREN 13 (1981); see also R. LEFLAR, AMERICAN CONFLICTS LAW § 243, at 490-92 (3d ed. 1977) (criticizing the 1934 RESTATEMENT, CONFLICT OF LAWS rule that domicile is the only basis for custody jurisdiction). Inasmuch as a custody case focuses on what is best for the child, those situations in which a child is endangered demand the exercise of jurisdiction to protect the child, even though a court would not otherwise have jurisdiction over the parties. Both the UNIF. CHILD CUSTODY JURISDICTION ACT § 3(a)(3)(ii) commissioner's note, 9 U.L.A. 122-24 (1979), and the Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A (c)(2)(C)(ii) (1982), recognize this "emergency" jurisdiction, but limit it to serious emergencies. For a detailed analysis of the "best interests of the child doctrine," see FAMILY LAW, *infra* note 54, at § 36:06.

<sup>22</sup> Coombs, *supra* note 5, at 719.

<sup>23</sup> One commentator notes:

Child custody decisions afford no better than a quicksand foundation for analysis of jurisdiction [footnote omitted]. No two ever seem quite alike. Rules purporting to define judicial jurisdiction and to establish finality for prior decisions fade into thin air when they are contradicted by facts affecting the child's welfare. Such facts, and variant conclusions subjectively derived from them by triers of the facts, are as influential in multi-state cases as in one-state cases, with the result that choice-of-law rules are almost never mentioned and jurisdictional principles

actually provided an incentive for one parent to snatch children in the custody of the other parent and then take those children to another state in order to seek either an original decree of custody or a modification of one already awarded the other parent.<sup>24</sup> The problem of child-snatching has become pervasive. Estimates range from 25,000 to 100,000 incidents per year;<sup>25</sup> hence, the impetus for a uniform approach to and standard for jurisdiction in custody cases.

The Uniform Child Custody Jurisdiction Act<sup>26</sup> and the Parental Kidnapping Prevention Act<sup>27</sup> have been recent legislative re-

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are given merely incidental importance.

R. LEFLAR, *supra* note 21, § 243 at 490. *See, e.g.,* May v. Anderson, 345 U.S. 528 (1953); Sampsell v. Superior Court, 32 Cal. 2d 763, 197 P.2d 739 (1948); *see also* The Parental Kidnapping Prevention Act §§ 6-10, 28 U.S.C. § 1738A (1982); UNIF. CHILD CUSTODY JURISDICTION ACT §§ 1-28, 9 U.L.A. 116-170 (1979); Coombs, *supra* note 5; Hazard, *supra* note 7; KATZ, *supra* note 21; Murchison, *supra* note 2; Stansbury, *supra* note 4.

<sup>24</sup> KATZ, *supra* note 21, at 11-13.

<sup>25</sup> These estimates were made prior to the effective date of the Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A (1982). *Parental Kidnapping Prevention Act of 1979: Joint Hearing on S. 105 Before the Subcomm. on Crim. Justice of the Senate Comm. on the Judiciary and the Subcomm. on Child and Human Dev. of the Senate Comm. on Labor and Human Resources*, 96th Cong., 2d Sess. 113 (1980) (statement of Sara Keegan, former Coordinator of the Single Parent Family Program, Dep't. of Community Affairs, Providence, Rhode Island), *cited in* McGough & Hughes, *supra* note 8, at 24. As one commentator notes: "A completely accurate estimate of the extent of child-snatching is unavailable; but . . . [they range from 25,000 to 100,000 times per year], and quite possibly more, since parents who abduct their children do not advertise that information." KATZ, *supra* note 21, at 11.

<sup>26</sup> UNIF. CHILD CUSTODY JURISDICTION ACT §§ 1-28, 9 U.L.A. 116-170 (1979). The UCCJA has been adopted, at this writing, by 49 states and the District of Columbia and the Virgin Islands. Massachusetts promulgated a statute in 1984 which approximates the UCCJA and which has caused some commentators to consider Massachusetts now to be a UCCJA state. Freed & Walker, *Family Law in the Fifty States: An Overview*, 18 FAM. L. Q. 369, 428 (1985). While there are enough differences in the acts that Massachusetts may not, strictly speaking, be considered a UCCJA state, the duplication of vital language makes it clear that the heart of the UCCJA is embodied in the Massachusetts law. MASS. ANN. LAWS. ch. 209B (Michie/Law. Co-op 1981 & Supp. 1985). For a chart correlating the sections of the Massachusetts law with those of the UCCJA, see *infra* note 371.

For a detailed analysis of the UCCJA, see McGough & Hughes, *supra* note 8, at 24-34. *See also* B. CROUCH, INTERSTATE CUSTODY LITIGATION: A GUIDE TO USE AND COURT INTERPRETATION OF THE UNIFORM CHILD CUSTODY JURISDICTION ACT (1981); Bodenheimer, *Progress Under the Uniform Child Custody Jurisdiction Act and Remaining Problems: Punitive Decrees, Joint Custody, and Excessive Modifications*, 65 CALIF. L. REV. 978, 981-1000 (1977); Coombs, *supra* note 5, at 719-35.

<sup>27</sup> Parental Kidnapping Prevention Act §§ 6-10, 28 U.S.C. § 1738A (1982). The jurisdic-

sponses to the problem. The Hague Draft Convention on the Civil Aspects of International Child Abduction is an incipient international response.<sup>28</sup>

## II. INITIAL JURISDICTION

There are four classes of proceedings affecting the custody of a child: (1) divorce and dissolution of a marriage relationship; (2) guardianship law; (3) juvenile court and neglect laws; and (4) laws relating to termination of parental authority for adoption.<sup>29</sup> The Uniform Child Custody Jurisdiction Act was designed and intended by its drafters to apply to all of these various strands of legal action, as well as to any comparable actions available under the varying labels in the laws of the diverse jurisdictions in the Union.<sup>30</sup>

As Section I of this Article indicated, parental child-snatching was encouraged by the early jurisdictional problems in child custody matters.<sup>31</sup> This situation led the National Conference of Commissioners on Uniform State Laws to formulate the Uniform Child

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tional provisions of the Act are located at 28 U.S.C. § 1738A(c) (1982).

<sup>28</sup> This Convention was adopted at the Hague Conference on Private International Law in 1980. See Bodenheimer, *The Hague Draft Convention on International Child Abduction*, 14 FAM. L. Q. 99 (1980); Note, *Law and Treaty Responses to International Child Abductions*, 20 VA. J. INT'L. L. 669, 691-97 (1980).

<sup>29</sup> *Supra* Section I; Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, LAW AND CONTEMP. PROBS., Summer 1975, at 226, 227. Many jurisdictions apply the terms "neglect" and "dependency" interchangeably in their juvenile court law. See FAMILY LAW, *infra* note 54, at ch. 27. A "discernible trend" has been reported toward "reserving the term 'neglect' for willful parental misconduct and using 'dependency' for lack of proper care due to physical, mental or financial inability of the parent or due to the parent's death or absence." McGough & Hughes, *supra* note 8, at 27 n.45 (citing THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 27-28 (1967)).

<sup>30</sup> UNIF. CHILD CUSTODY JURISDICITON ACT § 2 commissioners' note, 9 U.L.A. 120 (1979). See McGough & Hughes, *supra* note 8, at 26. The late Professor Brigitte Bodenheimer, the drafter and reporter for the UCCJA, apparently agreed with this approach. See Bodenheimer & Neeley-Kvarme, *Jurisdiction Over Child Custody and Adoption After Shaffer and Kulko*, 12 U.C.D.L. REV. 229, 252-253 (1979).

There are differences among the various jurisdictions in the United States vis-a-vis inclusion of all of these classes of proceedings within their version of the UCCJA. These variations are discussed in detail in Section VII, *infra*.

<sup>31</sup> See *infra* text accompanying notes 283-338.

Custody Jurisdiction Act in 1968.<sup>32</sup> By mid-1984, the UCCJA was promulgated in every state in the Union, with the possible exception of Massachusetts.<sup>33</sup> The Act incorporates several not always correlative purposes. Consistent with its goal of promoting the best interests of children, the UCCJA complements substantive custody laws that have as their primary purpose this child-protection theme. In addition, or in attempted conjunction with this purpose, the Act is designed: (1) to "avoid jurisdictional competition and conflict with courts of other states in matters of child custody which . . . [result] in the shifting of children from state to state with harmful effects on their well-being"; (2) to promote cooperation among the courts of the various states, so that the one having the closest connection and the most significant evidence concerning the child's care, protection, training and personal relationships (and, thus, the best opportunity to decide the case in the interest of the child) will be able to do so; and (3) to deter parental abductions, forum shopping and repetitive litigation, so as to best promote stability of home environment and secure family relationships for the child.<sup>34</sup>

Initial jurisdiction over the custody of a child in a dissolution proceeding is determined in at least forty-nine of the fifty states, as well as the District of Columbia, by their version of the Uniform Child Custody Jurisdiction Act<sup>35</sup> and under federal law, in the Parental Kidnapping Prevention Act.<sup>36</sup> The UCCJA provides for a system of potentially concurrent jurisdiction, based on jurisdic-

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<sup>32</sup> UNIF. CHILD CUSTODY JURISDICTION ACT §§ 1-28, 9 U.L.A. 111-70 (1979).

<sup>33</sup> Some say that Massachusetts' 1984 custody jurisdiction law, MASS. ANN. LAWS., ch. 209B §§ 2(a)-(2)(d), 7, 7(e)(7), 7(a)(i)-(ii), 2(e) (Michie/Law. Co-op. 1981 & Supp. 1985), is a version of the UCCJA. *E.g.*, Freed & Walker, *supra* note 26, at 428. For a comparison of the Massachusetts sections with those of the UCCJA, see *infra* note 371.

<sup>34</sup> UNIF. CHILD CUSTODY JURISDICTION ACT, § 1, 9 U.L.A. 117 (1979). Some jurisdictions have adopted the UCCJA, omitting § 1 [purposes of the act]. *E.g.*, S.D. CODIFIED LAWS ANN., §§ 26-5A-1 to -26 (1984). *But cf.* Winkelman v. Moses, 279 N.W.2d 897, 899 (S.D. 1979) (stating that the Act should, nevertheless, be construed "to promote the general purposes as stated in [§ 1]."). See also VA. CODE, §§ 20-125 to -146 (1983). See generally W. WADLINGTON, CASES AND OTHER MATERIALS ON DOMESTIC RELATIONS 1253, 1254 (1984).

<sup>35</sup> UNIF. CHILD CUSTODY JURISDICTION ACT § 3, 9 U.L.A. 122-23 (1979). See *infra* notes 369-371 and accompanying text.

<sup>36</sup> Parental Kidnapping Prevention Act, §§ 6-10, 28 U.S.C. § 1738A (1982). The pertinent portions of the Act relating to jurisdiction are codified in 28 U.S.C. § 1738A(c) (1982).

tional requisites in descending preferential order and containing mechanisms which allow courts to decline the exercise of jurisdiction in order to avoid competition and to benefit the child in question.<sup>37</sup> Section 3 of the UCCJA and section 1738(c)(2)(A) of the PKPA provide the jurisdictional scheme.<sup>38</sup> Jurisdiction will be proper, pursuant to the following statutory limitations. First, the state asserting jurisdiction must be the child's "home-state"—the state in which the child has lived with one of his parents or a person acting as a parent for at least six months prior to the initiation of the action,<sup>39</sup> as long as one parent still lives in the state.<sup>40</sup> Thus, the home state remains such for six months after the child has been physically removed—the time it takes to establish another home state.<sup>41</sup> Second, jurisdiction is also available on the basis of the state's "significant connection" with the child custody issues involved in the case. Under this basis, jurisdiction will be appropriate if the following conditions are present: the state's assertion of jurisdiction is in the best interests of the child; the child, as well as at least one of his parents, have a significant connection with the state; and there exists within the state "substantial evidence concerning the child's present or future care, protection, training, and personal relationships."<sup>42</sup> Thus, "home-state" and "significant con-

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<sup>37</sup> See McGough & Hughes, *supra* note 8, at 28-29.

<sup>38</sup> UNIF. CHILD CUSTODY JURISDICTION ACT § 3, 9 U.L.A. 122-23 (1979).

<sup>39</sup> *Id.* at [§ 3(a)](1), 2(5), 9 U.L.A. 122-123, 119 (1968); Parental Kidnapping Prevention Act § 8(c)(2), 28 U.S.C. § 1738A(c)(2) (1982).

<sup>40</sup> Parental Kidnapping Prevention Act, § 8(c)(2), 28 U.S.C. § 1738A(c)(2) (1982).

<sup>41</sup> McGough & Hughes, *supra* note 8, at 29.

<sup>42</sup> UNIF. CHILD CUSTODY JURISDICTION ACT § 3(a)(2), 9 U.L.A. 122-23(1979); Parental Kidnapping Prevention Act § 8(a)(2)(B), 28 U.S.C. § 1738A(c)(2)(B) (1982). The interrelationship between the "home-state" and "significant connection" bases of jurisdiction is indicated by the commissioners' note to the UCCJA, quoted and discussed in McGough & Hughes, *supra* note 8, at 30 ("If this alternative test ['home-state' and 'significant connection'] produces concurrent jurisdiction in more than one state, the mechanisms provided in sections 6 [simultaneous proceedings] and 7 [inconvenient forum] are used to assure that only one state makes the custody decision.").

Some cases have held that the "best interests of the child test" is an independent and limiting criterion under § 3(a)(2) of the UCCJA, while others have held that children's best interests are served by the courts exercising jurisdiction if the two listed criteria [parents or one of them have significant connection to the state and there exists within the state "substantial evidence concerning the child's present or future care, protection, training, and personal relationships," UCCJA § 3(a)(2); 28 U.S.C. § 1738A(c)(2)(B)] are fulfilled. See KATZ, *supra* note 21, at 12-13. For a discussion of the application of the best interests of the child

nection" jurisdiction are the two basic categories of jurisdiction today.<sup>43</sup> Physical presence of the child, although desirable, is not necessary to support these sources of jurisdiction.<sup>44</sup> Two additional bases of initial jurisdiction are available, each of which requires the physical presence of the child.<sup>45</sup> If the child has been abandoned, or if there exists an emergency in which the child is neglected, abused or threatened with mistreatment or abuse,<sup>46</sup> jurisdiction

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standard as a substitute for jurisdictional criteria, see *supra* notes 20-23 and accompanying text and FAMILY LAW, *infra* note 54, at nn. 20-27 and accompanying text. Note that the Parental Kidnapping Prevention Act, § 8(c)(2)(B), 28 U.S.C. § 1738A(c)(2)(B)(ii) (1979 & Supp. 1985) and the Uniform Child Custody Jurisdiction Act, § 3(a)(2), 9 U.L.A. 122-23 (1979) expressly make the best interests of the child standard a jurisdictional criterion. *But see* E.E.B. v. D.A., 89 N.J. 595, 610, 446 A.2d 871, 879 (1982) ("[W]e conclude that UCCJA does not contemplate blind obedience to home state jurisdiction. The state to decide a child custody dispute is not necessarily the home state, but the one best positioned to make the decision based on the best interest of the child.").

In a case in which Texas had been the "home state" of the child in question prior to the child's arrival in Rhode Island and in which the child had been in Rhode Island for only two months prior to the action and was there due to the father unilaterally having removed him, the Rhode Island Supreme Court set aside the "home state" basis and decided that the Rhode Island courts had jurisdiction based on "significant connections" and "substantial evidence," despite a pending Texas custody action. The court stated:

[We] conclude that the UCCJA does not contemplate blind obedience to the home state jurisdiction. The state to decide a child custody dispute is not necessarily the home state, but the one best positioned to make the decision based on the best interest of the child.

Houtchens v. Houtchens, 488 A.2d 726, 730 (R.I. 1985) (quoting the New Jersey Supreme Court, E.E.B. v. D.A., 89 N.J. 595, 610, 446 A.2d 871, 879 (1982)).

<sup>43</sup> UNIF. CHILD CUSTODY JURISDICTION ACT § 3 commissioners' note, 9 U.L.A. 122-23 (1979).

<sup>44</sup> *Id.* at § 3(b), 9 U.L.A. 122 (1979). The PKPA has no subsections which correspond to UCCJA §§ 3(b) and 3(c), but the similarity of language and goals of the two acts indicate that the physical role played by presence of the child is the same under the PKPA.

Section 1738A(c)(2) of the Parental Kidnapping Prevention Act and § 3(a)(3) of the Uniform Child Custody Jurisdiction Act are nearly identical. Exceptions to their identical nature exist in 28 U.S.C. § 1738A(c)(2)(B)(i), UCCJA § 3(a)(3) and 28 U.S.C. § 1738A(c)(2)(E). In each exception, an addition is made to what exists in the counterpart. 28 U.S.C. § 1738A(c)(2)(B)(i) adds "it appears that no other state would have jurisdiction under subparagraph (A)" to the significant connection jurisdiction criterion. This is not in the UCCJA counterpart. Section 3(a)(3) of the UCCJA adds the following language to the end of the emergency jurisdiction criterion: "or is otherwise neglected [or dependant]." The PKPA counterpart has no such language. The PKPA, 28 U.S.C. § 1738A(c)(2)(E), adds a section establishing continuing jurisdiction. None of these distinctions appears to affect the status or importance of the need, or lack thereof, of the physical presence of the child.

<sup>45</sup> UNIF. CHILD CUSTODY JURISDICTION ACT § 3(b), 9 U.L.A. 122 (1979).

<sup>46</sup> *Id.* at § 3(a)(3), 9 U.L.A. 122; Parental Child Kidnapping Act § 8(c)(2)(C), 28 U.S.C.

may appropriately be asserted. Also, if it is in the best interests of the child, and if no other state may exercise jurisdiction under any of the mechanisms noted above, or if another state would have jurisdiction thereunder, but has declined to assert it because jurisdiction would be more appropriate in the forum state, the forum state may take jurisdiction.<sup>47</sup>

It is certainly conceivable that more than one state might be able to assert jurisdiction over the same case pursuant to these rules.<sup>48</sup> The commissioners' note to UCCJA Section 3 notes, "If this alternative test ['home-state' and 'significant connection'] 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." Section 6 relates to simultaneous proceedings in other states and section 7 relates to inconvenient forum. The UCCJA provides for resolution of concurrent jurisdiction problems. Section 6 provides that "a court of this State shall not exercise its jurisdiction under this Act if at the time of filing the petition a proceeding concerning the custody of the child was pending in a court of another state exercising jurisdiction sub-

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1738A(c)(2)(C) (1982).

<sup>47</sup> UNIF. CHILD CUSTODY JURISDICTION ACT § 3(a)(4), 9 U.L.A. 122-23 (1979); Parental Kidnapping Prevention Act § 8(c)(2)(D), 28 U.S.C. 1738A (c)(2)(D) (1982).

<sup>48</sup> UNIF. CHILD CUSTODY JURISDICTION ACT § 3 commissioners' note, 9 U.L.A. 122-23 (1979); *see also* Coombs, *supra* note 5, at 724 ("A state court's jurisdiction under the UCCJA to make initial custody decrees is litigated more often in cases of concurrent attempts by two states to assume and to exercise such jurisdiction."). For cases in which two or more states have asserted initial jurisdiction concurrently, *see, e.g., O'Neal v. O'Neal*, 329 N.W.2d 666 (Iowa 1983) (The Iowa Supreme Court declined to recognize an Arizona decree, because Arizona had not assumed jurisdiction "substantially in accordance with" the Iowa version of Section 3 of the UCCJA, IOWA CODE ANN. § 598.A13 (West 1981), and remanded for trial to determine, as an initial proceeding, the merits of the custody case.); *Gibson v. Gibson*, 429 So. 2d 877 (La. Ct. App. 1983) (The husband/father filed suit in Louisiana and the wife/mother filed suit in Virginia. The Louisiana court declined to assert jurisdiction on the ground that the jurisdictional criteria, LA. REV. STAT. ANN. § 13:1702 (West 1983), had not been met. The court mentioned that the husband had snatched the child from Virginia yet it did not deny jurisdiction by reason of conduct pursuant to the Uniform Child Custody Jurisdiction Act, § 8, 9 U.L.A. 142 (1968); *Bigelow v. Bigelow*, 119 Mich. App. 784, 327 N.W.2d 361 (1982) (Michigan court asserted jurisdiction based on priority in time); *Mitchell v. Mitchell*, 117 Misc. 2d 426, 458 N.Y.S.2d 807 (1982) (The concurrent proceedings were commenced within one hour and fifteen minutes of each other, one in Georgia and the other in New York. The New York court declined to exercise jurisdiction because the facts failed to meet either the "home state" or the "significant connection" tests.).

stantially in conformity with this Act, unless the proceeding is stayed by the court of the other state. . . ."<sup>49</sup> Jurisdiction may also be declined under section 7 grounds of forum non conveniens,<sup>50</sup> or pursuant to section 8, improper conduct (child-snatching) by the initiating parent, if this assertion is just and proper under the circumstances.<sup>51</sup> The commissioners who drafted the UCCJA noted that the scheme which was developed "to assure that only one state makes the custody decision,"<sup>52</sup> works so that jurisdiction "exists only if it is in the child's interest, not merely the interest or convenience of the feuding parties. . . ."<sup>53</sup>

The UCCJA takes on what in some circumstances might appear to be a schizophrenic nature. That stability of homelife is important to the well-being of a child is recognized by virtually all judges, commentators and social scientists.<sup>54</sup> Sometimes a court in a given case cannot promote the Act's clear policy of discouraging child-snatching without injuring that particular child's stability, e.g., by removing him from the custody of a parent who snatched him some significant period of time prior to the action.<sup>55</sup> While the tenor and spirit of the Act clearly discourage child-snatching and

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<sup>49</sup> UNIF. CHILD CUSTODY JURISDICTION ACT § 6, 9 U.L.A. 134 (1968).

<sup>50</sup> *Id.* at § 7, 9 U.L.A. 137 (1968).

<sup>51</sup> *Id.* at § 8, 9 U.L.A. 142 (1968).

<sup>52</sup> UNIF. CHILD CUSTODY JURISDICTION ACT § 3 commissioners' note, 9 U.L.A. 123 (1968).

<sup>53</sup> *Id.* 9 U.L.A. 124; see McGough & Hughes, *supra* note 8, at 30.

<sup>54</sup> See C. BLAKESLEY, PARKER & WARDLE, FAMILY LAW IN THE UNITED STATES § 36:06 (1987) [hereinafter cited as FAMILY LAW].

<sup>55</sup> Compare *Vanneck v. Vanneck*, 49 N.Y.2d 602, 611, 404 N.E. 2d 1278, 1282, 427 N.Y.S.2d 735, 739 (1980) (holding that the failure of a trial court to communicate about and defer to a potential claim of jurisdiction in another state is reversible error, as being "contrary to the avowed purposes of the legislation adopted by both States"), discussed in McGough & Hughes, *supra* note 8, at 33; *Martin v. Martin*, 45 N.Y. 2d 739, 380 N.E.2d 305, 408 N.Y.S.2d 479, *reh'g denied*, 45 N.Y.2d 839, 381 N.E.2d 630 (1978) (stating that principles of comity require that another state's judgment, in regard to the award of custody, not be lightly cast aside) with *Matter of Custody of Ross*, 291 Or. 263, 281, 630 P.2d 353, 363-64 (1981) ("In the case of an abducted child whose whereabouts is concealed, where 'substantial evidence' of a child's present or future welfare for purposes of [Oregon's version of the UCCJA § 3(a)(2)] still exists in the decree state as well as in the forum state, . . . the decree state continues to have jurisdiction under the Act for a reasonable time following the abduction.") (overruling *Marriage of Settle*, 276 Or. 759, 556 P.2d 962, 968 (1976) ("When put to the test of a factual situation presenting an irreconcilable conflict between those two interests, we read the Act [UCCJA] as making predominate the best interests of the children before the court.")).

continuing litigation, the Act itself recognizes the paramount value of individual best interests of the child.

The UCCJA also provides a mechanism for facilitating communication among courts<sup>56</sup> and establishes a registry of custody decrees and communications to help prevent forum shopping and simultaneous assertions of jurisdictions.<sup>57</sup> The scheme is not perfect, of course. Forum shopping is still possible, as is the race to the courthouse. The statutory scheme essentially provides, in those situations in which the courts of two different states may have concurrent jurisdiction, that proper jurisdiction lies in the one in whose court the action was first filed, if this is in the best interest of the child.<sup>58</sup> While the court first petitioned may decline jurisdiction,<sup>59</sup> it appears to have been rare that courts have done so in cases of initial jurisdiction.<sup>60</sup>

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<sup>56</sup> UNIF. CHILD CUSTODY JURISDICTION ACT §§ 6(b)-(c), 20-2, 9 U.L.A. 134, 164-67.

<sup>57</sup> *Id.* at § 16, 9 U.L.A. 160.

<sup>58</sup> Section 6(a) of the Uniform Child Custody Jurisdiction Act provides:

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

9 U.L.A. 134. Thus, precedence is given to the action that is filed first. In those cases in which a child has been snatched prior to the filing of an action, the Uniform Child Custody Jurisdiction Act and the Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A(g), both will abide by the forum choice of the quickest party to the courthouse.

<sup>59</sup> For the bases established for declining to exercise jurisdiction, see UNIF. CHILD CUSTODY JURISDICTION §§ 3, 7, 8, 9 U.L.A. 122, 137, 142.

<sup>60</sup> See Coombs, *supra* note 5, at 724.

For example, when some courts in UCCJA states considered the question of jurisdiction under the Act when no prior foreign proceedings were pending and there were no prior foreign orders, they appeared unimpressed with claims that they lacked jurisdiction or should defer to the potential jurisdiction of another state. They instead resolved ambiguities in the statutory language and conflicts between the goals of the UCCJA in favor of their own jurisdiction. There are, however, relatively few reported cases of this kind.

*Id.*; see also *Etter v. Etter*, 43 Md. App. 395, 405 A.2d 760 (1979) (in case which Delaware had stayed its proceedings and Maryland had significant connection jurisdiction, the trial court did not abuse its discretion in declining to decline to exercise jurisdiction on forum non conveniens grounds; a significant aspect of the case is the Delaware court's adoption of the approach of the Oregon court as cited below); *Carson v. Carson*, 29 Or. App. 861, 565 P.2d 763 (1977) (This case, followed by the Delaware Supreme Court, calls for a three-step approach to jurisdiction: (1) Does the forum state have jurisdiction under section 3; namely,

Imperfect as it is, the UCCJA scheme is a significant improvement over the chaos of earlier times. The design of the UCCJA's mechanism to minimize inconsistent state decrees and to ameliorate the concurrent jurisdiction problem has been described as being like

[a] three-stage rocket: before a forum is authorized to proceed, the litigants must present information regarding the potential or actual pending jurisdiction of another state; the forum must then communicate with other potential forums; and finally, if the states having potential jurisdiction cannot agree upon which is to proceed, the deadlock is broken by an arbitrarily imposed priority-of-filing rule.<sup>61</sup>

At any rate, both the UCCJA and the PKPA mandate notice and an opportunity to be heard before a child custody determination can be made.<sup>62</sup>

There is some overlap in the law relating to custody after dissolution of marriage and the law of guardianship.<sup>63</sup> As noted above,

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"home state", "significant connection," child threatened by abandonment, abuse or neglect, either no other state has jurisdiction or one that does has declined to exercise it? (2) Are there pending proceedings in another state, within the ambit of UCCJA § 6? (3) Should the court decline to exercise jurisdiction because of UCCJA § 7, inconvenient forum? The Oregon court applied the five factors for determining forum non conveniens found in § 7(c).); *Commonwealth ex rel. Octaviano v. Dombrowski*, 434 A.2d 774 (Pa. Super. 1981) (holding it to be error for a trial court to decline to exercise jurisdiction upon forum non conveniens grounds because of misapplication of UCCJA 7(c) to the facts).

<sup>61</sup> McGough & Hughes, *supra* note 8, at 31 (citing Bodenheimer, *Interstate Custody: Initial Jurisdiction and Continuing Jurisdiction Under the UCCJA*, 14 FAM. L. Q. 203, 210-213 (1981)).

<sup>62</sup> UNIF. CHILD CUSTODY JURISDICTION ACT §§ 4, 5, 9 U.L.A.; Parental Kidnapping Prevention Act § 8(e), 28 U.S.C. § 1738A(e) (1982).

<sup>63</sup> See *supra* notes 29 and 30 and accompanying text. Parents are the natural guardians of their children and as such are their custodians. See the California Probate Code and Civil Code which are explicitly correlated. CAL. PROB. CODE, § 1514(b) (West 1981), provides that CAL. CIV. CODE, § 4600 (West 1983) [custody] applies in appointing a guardian. See, e.g., *Guardianship of M.S.W.*, 136 Cal. App. 3d 708, 186 Cal. Rptr. 430 (1982); *Whitlock v. Barrett*, 158 Ga. App. 100, 279 S.E.2d 244, 246-247 (1981) ("When appellant showed that she was the child's mother, that her parental rights had not been relinquished or forfeited 'in some regular proceeding authorized by law,' and that she was, therefore, the natural guardian of the child, the probate court was without jurisdiction to appoint someone else the guardian of the child's person."); see also *Matter of Guard. and Conserv. of Stremel*, 660 P.2d 952, 954 (Kan. 1983) ("Upon [the natural father's] death, legal custody of Timothy reverted to his natural mother."). Chapter 38 of the author's treatise provides additional

the UCCJA was designed by its drafters to apply to guardianship cases,<sup>64</sup> and it has been so held by case law in some jurisdictions.<sup>65</sup> The focus of and standard for deciding the merits of custody and guardianship cases are the "best interests of the child."<sup>66</sup> Yet, withstanding the design of the UCCJA drafters to have that Act apply, jurisdiction has often been tied by the courts to concepts of domicile and residence.<sup>67</sup> In addition, venue within a state may be fraught with many of the same problems that the UCCJA was formulated to ameliorate vis-a-vis interstate conflicts.<sup>68</sup> The significant problems regarding venue and the appointment of a guardian, however, probably occur in cases of modification rather than those of initial appointment. This is because venue may lie only in the county in which a ward resides.<sup>69</sup> Thus, it ought to be extremely

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information on guardianship, including the parental preference with regard thereto. See generally FAMILY LAW, *supra* note 54, at Chapter 38.

<sup>64</sup> See *supra* notes 29 and 30 and accompanying text.

<sup>65</sup> *Huston v. Granstaff*, 417 So. 2d 890 (La. App. 1982) (tutorship, the Louisiana counterpart to guardianship, held to come within the jurisdictional provisions of the Louisiana version of the Uniform Child Custody Jurisdiction Act, LA. REV. STAT. ANN. 13:1700 -1724 (1983)); *In re Guardianship of Wonderly*, 67 Ohio St. 2d 178, 423 N.E.2d 420 (1981) (The appointment of a guardian of a minor is a custody proceeding within the Ohio version of the UCCJA definitions section. OHIO REV. CODE ANN. §§ 3109.21(B) and 3109.21(C) (Page 1980). This provision is textually identical to UNIF. CHILD CUSTODY JURISDICTION ACT § 2, 9 U.L.A. 119 (1968)); *McGough & Hughes*, *supra* note 8, at 26.

<sup>66</sup> *Monroe v. Dallas*, 6 Ark. App. 10, 636 S.W.2d 881, 883 (1982) ("The Supreme Court [of Arkansas] has stated that the statute does not make an ironclad order of priority; instead, it leaves to the probate court's sound discretion the appointment of a guardian who would forward the best interests of the ward"); *Guardianship of M.S.W.*, 136 Cal. App. 3d 708, 186 Cal. Rptr. 430, 433 (1982) (applying the California Civil Code section relating to custody, CAL. CIV. CODE § 4600 (West 1983), to decide the merits of a guardianship proceeding, pursuant to the Probate Code, CAL. PROB. CODE § 1514(b) (West 1981)); *Dopps v. Dopps*, 636 S.W. 2d 723 (Tex. Civ. App. 1982) (affirming appointment of grandfather as guardian for his three grandchildren as in the best interests of the children).

<sup>67</sup> See CONN. GEN. STATS. § 45-45 (1981); LA. CODE CIV. PRO. ANN. art. 10 (4) (West 1960). *Monroe v. Dallas*, 6 Ark. App. 10, 636 S.W.2d 881, 883 (1982); *Matter of Estate of Cohn*, 95 Ill. App. 3d 204, 19 N.E.2d 951 (1981); *Matter of Guardian & Conserv. of Stremel*, 660 P.2d 952 (Kan. 1983) (citing KAN. STATS ANN. §§ 59-2203 and 59-3009 (1983)). But see *Huston v. Granstaff*, 417 So. 2d 890 (La. App. 1982) (where the court had no hesitation in applying the jurisdictional provisions of the Louisiana UCCJA); *McGough & Hughes*, *supra* note 8, at 26; N.Y. Surr. Ct. PROC. ACT § 1702 (McKinney 1967); WIS. STAT. § 880.03 (1980); *State ex rel. Klopotek v. Dist. Court*, 621 P.2d 223 (Wyo. 1980) (jurisdiction lies when a minor has no legal guardian and resides or has estate within the county).

<sup>68</sup> *McGough & Hughes*, *supra* note 8, at 25.

<sup>69</sup> See, e.g., *Whitlock v. Barrett*, 158 Ga. App. 100, 279 S.E.2d 244, 247 (1981); *State ex*

rare, if possible at all,<sup>70</sup> that two different states would both have initial jurisdiction, much less venue, to appoint a guardian over the person of a minor who is in need of a guardian.<sup>71</sup> Jurisdictional or venue disputes concerning guardianship are far more likely and common when they relate to attempts to change or modify guardianship.<sup>72</sup>

In cases in which the issue is termination of custody because the child has been subjected to or threatened with abuse, neglect, or abandonment, initial jurisdiction is based on section (a)(3) of the UCCJA and the PKPA pursuant to the *parens patriae* interest in protecting the child.<sup>73</sup> Judicial action is generally commenced in such cases by filing a petition or by transfer from another court in the district wherein venue lies.<sup>74</sup> Venue usually lies in the county in which the child resides or is found to be neglected, abused or abandoned.<sup>75</sup> This statutory jurisdiction is territorial in nature; it

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*rel. Klopotek v. Dist. Court*, 621 P.2d 223 (Wyo. 1980).

<sup>70</sup> See cases and statutes cited *supra* note 42.

<sup>71</sup> There is greater possibility for jurisdictional conflict in relation to a petition to remove or change a guardian. As with custody proceedings after divorce, a court may retain jurisdiction of a guardianship proceeding for future protection of a child. For example, *In re Guardianship of Wonderly*, 67 Ohio St. 2d 178, 423 N.E.2d 420 (1981), involved circumstances in which the grandparents, residents of Ohio, of two orphaned children who had been residing in Indiana with their testamentary guardians for eight years, filed a motion in Ohio to terminate guardianship. The will of the mother, who had died two years after the demise of her husband, appointed the Indiana guardians. The mother's will had been probated in Defiance County, Ohio. The probate court in Defiance County granted the grandparents' motion and was affirmed by the Court of Appeals. The Ohio Supreme Court reversed after finding that the UCCJA was applicable and that Ohio was an inconvenient forum. Jurisdiction to modify and the UCCJA are considered *infra* in Sections III and IV of this article.

<sup>72</sup> See *infra* Sections III and IV. It has been held that the UCCJA does not apply to intrastate jurisdictional problems relating to custody. *In re Marriage of Trough*, 631 P.2d 1183 (Colo. App. 1981). *Nelson v. Nelson*, 433 So. 2d 1015 (Fla. Dist. Ct. App. 1983); *Adams v. Adams*, 374 So. 2d 29 (Fla. Dist. Ct. App. 1979).

<sup>73</sup> See *supra* notes 45 and 46 and accompanying text; UNIF. CHILD CUSTODY JURISDICTION ACT § 3(a)(3), 9 U.L.A. 122; Parental Kidnapping Prevention Act § 8(c)(2)(C), 28 U.S.C. 1738A(c)(2)(C) (1982); Mnookin, *supra* note 29, at 240-241; see also FAMILY LAW, *supra* note 54, at ch.27 (material on *parens patriae*).

<sup>74</sup> *E.g.*, CAL. WELF. & INST. CODE §§ 325, 329 (West 1984); CONN. GEN. STAT. § 46b-142 (1981); GA. CODE ANN. § 15-11-25 (1985); ILL. REV. STAT. ch. 37, § 702-1-6 (1983); N.D. CENT. CODE §§27-20-8 to 11 (1974); N.Y. FAM. CT. ACT §§ 1015, 611, 614 (McKinney 1983); N.Y. SOC. SERV. § 384-b(3)(c) (McKinney 1983); WIS. STAT. §§ 48.24-25, -.185 (1979).

<sup>75</sup> *E.g.*, ARIZ. REV. STAT. ANN. § 8-206 (1984); CAL. WELF. & INST. CODE § 327 (West

is based upon the harm allegedly done to the child or threatened within the territory in which the statute is operative.<sup>76</sup>

Adoption, like custody and guardianship, is a determination of status. "Traditionally, the place whose law has jurisdiction to create a personal status is the place where the parties involved are domiciled."<sup>77</sup> Adoption is also a statutory procedure, so that the specific jurisdictional requirements of the particular statute involved must be satisfied.<sup>78</sup> As noted above, the UCCJA was designed to apply to jurisdiction problems relating to adoption<sup>79</sup> and has been held to apply to such problems.<sup>80</sup> It is true, however, that adoption is conceptually quite different from custody or guardianship because adoption involves a final and permanent ter-

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1984); CONN. GEN. STAT. §§ 46b-142(a) (1981); GA. CODE ANN. § 15-11-25 (1985); ILL. REV. STAT. ch. 37, §§ 702 to -6 (1983); KAN. STAT. ANN. § 38-811(a) (1973); N.Y. FAM. CT. ACT § 1015 (McKinney 1983); N.D. CENT. CODE § 27-20-11 (1974); WIS. STAT. § 48.185 (1979). Inasmuch as venue assumes jurisdiction, a venue statute which limits venue similarly limits jurisdiction.

<sup>76</sup> *E.g.*, CAL. WELF. & INST. CODE § 300 (West 1984); CONN. GEN. STAT. §§ 46b-120 (1981); GA. CODE ANN. § 15-11-5- to -6 (1985); ILL. REV. STAT. ch. 37, § 702-1 to -5 (1983); KAN. STAT. ANN. § 38-806(a) (1973); LA. REV. STAT. ANN. § 13:1570(A)(1) (West 1983); MO. REV. STAT. § 211.031(1)(1) - .031(1)(2) (1978); N.Y. FAM. CT. ACT §§ 1015, 1011, 1012, 611, 614 (McKinney 1983); N.Y. SOC. SERV. LAW § 384-b(3)(c)-(d) (McKinney 1983); N.D. CENT. CODE §§ 27-20-02 to -03 (1974); WIS. STAT. §§ 48.02, -.14, -.13, -.185 (1979); Texas has adopted a jurisdiction statute which is very similar to section 3 of the Uniform Child Custody Jurisdiction Act, 9 U.L.A. 122 (1968). *See* TEX. FAM. CODE ANN. § 14.045 (Vernon 1975). Protection of the child is not the only vital fact in determining jurisdiction.

Two recent Missouri cases have emphasized the statutory nature of neglect actions. *See In re W.F.J.*, 648 S.W.2d 210, 214 (Mo. App. 1983) ("The power given the juvenile court to terminate parental rights is purely statutory and without such legislation, the power would not exist.") (citing *In re F.L.H.*, 639 S.W.2d 241 (Mo. Ct. App. 1982)).

<sup>77</sup> R. LEFLAR, *supra* note 21, at 483. For a discussion on adoption, see FAMILY LAW, *supra* note 54, at ch. 12.

<sup>78</sup> R. LEFLAR, *supra* note 21, at 483. *See also In re Pima Cty. Juvenile Action*, No. B-8736, 132 Ariz. 583, 647 P.2d 1181 (Ct. App. 1982) (upholding the constitutionality of a residency requirement for the adopting person); *In re Adoption of Doe*, 89 N.M. 606, 555 P.2d 906 (Ct.App. 1976), *cert. denied*, 90 N.M. 7, 558 P.2d 619 (1976).

<sup>79</sup> *See supra* notes 29 and 30 and accompanying text.

<sup>80</sup> *See, e.g., In re Adoption of K.C.P.*, 432 So. 2d 620 (Fla. Dist. Ct. App. 1983) (the assertion of jurisdiction over an adoption case by a Florida court held to be improper wherein the putative father's suit for custody was pending in New York); *In re C.C.B.*, 164 Ga. App. 3, 296 S.E.2d 198 (1982); *In re T.C.M.*, 651 S.W.2d 525 (Mo. Ct. App. 1983) (assertion of jurisdiction where the child had continuously resided within the state for six months, within the meaning of § 3 of the Uniform Child Custody Jurisdiction Act, 9 U.L.A. 122 (1968)); *see also* CAL. CIV. CODE § 221 (West 1983).

mination of parental rights. Hence, the UCCJA jurisdictional bases may well be constitutionally inadequate for adoption or other termination of parental rights cases.

### III. JURISDICTION TO MODIFY CUSTODY DECREES

It has been stated that permanent or final custody awards do not exist.<sup>81</sup> In every jurisdiction of the United States, jurisdiction over the subject matter of a custody dispute and the parties is retained after custody has been awarded so that a petition for modification will be possible.<sup>82</sup> This is the traditional and the current rule.<sup>83</sup> Jurisdiction terminates when the child reaches the age of

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<sup>81</sup> *Cooper v. State*, 638 P.2d 174 (Alaska 1981) (error to dismiss with prejudice a petition for modification of a custody order); *In re K.P.B.*, 625 S.W.2d 629, 695 (Mo. Ct. App. 1981) ("Custody is not a permanent status but may be charged by a court of competent jurisdiction when dictated by the needs of the child as the welfare of the child is the court's primary concern." (citation omitted)); *In re Custody of Pearce*, 456 A.2d 597, 601 (Pa. Super. Ct. 1983) ("Custody orders are, of course, unique and never final . . . . The order to be entered will, therefore, be temporary in nature and subject to change if new circumstances occurring since the date of the last evidentiary hearing are determined to affect [the child's] welfare." (citation omitted)).

<sup>82</sup> See, e.g., UNIF. CHILD CUSTODY JURISDICTION ACT § 3, 9 U.L.A. 111-170 (1968), which provides for jurisdiction in an initial decree or modification decree (adopted in at least 49 states and Washington, D.C.); Parental Kidnapping Prevention Act § 8(d), 28 U.S.C. 1738A(d) (1982); CAL. CIV. CODE §§ 4351, 4600, 5152, 5163 (West 1983); MASS. GEN. LAWS ANN. ch. 209:37 (Massachusetts law provides for continuous jurisdiction to modify a custody award. Massachusetts is the sole state in the U.S. which has not formally adopted the UCCJA. Its law closely parallels the UCCJA, however. For a section by section comparison of the Massachusetts law and the UCCJA, see *infra* section IX.); *Totter v. Totter*, 183 F.2d 997 (D.C. Cir. 1950); *Boone v. Boone*, 150 F.2d 153 (D.C. Cir. 1945); *Flannery v. Stephenson*, 416 So. 2d 1034 (Ala. Civ. App. 1982) (construing 28 U.S.C. 1738A(d)); *Pflum v. Pflum*, 135 Ariz. 340, 660 P.2d 1231, 1232 (1982); *Trimble v. Trimble*, 276 Cal. App. 2d 813, 814-815, 81 Cal. Rptr. 334 (1969) (under former law); *Cherry v. Cherry*, 634 S.W.2d 423, 426 (Ky. 1982) ("the original award of care, custody and control of minors is subject to the control of the court and may be modified pursuant to KY. REV. STAT. § 403.340 upon a showing of a change of circumstances"); *Primm v. Primm*, 409 So. 2d 1288, 1289 (La. Ct. App. 1982); *Eschbach v. Eschbach*, 56 N.Y.2d 167, 451 N.Y.S.2d 658, 661, 436 N.E.2d 1260 (1982); *Hattoum v. Hattoum*, 441 A.2d 403, 407 (Pa. Super. Ct. 1982) ("No parental agreement, of course, can permanently determine the custody of children."). But see *Smith v. Superior Court*, 68 Cal. App. 3d 457-61, 137 Cal. Rptr. 348 (1977).

<sup>83</sup> R. LEFLAR, *supra* note 21, § 243, at 492 & n.14; H. CLARK, *supra* note 5, § 11.5, at 322 (1968) ("The traditional view of course was that jurisdiction over the person, once properly acquired in an action, is never lost until a final judgment is entered disposing of the litigation."); COOMBS, *supra* note 5, at 791-92 & nn. 462, 465. With regard to the non-final nature of custody decrees, see FAMILY LAW, *supra* note 54, at § 36:08; see, e.g., *Cox v. Cox*, 457 F.2d

1190, 1194-5 (2nd Cir. 1972) (The original divorce decree, granted in the Virgin Islands, was silent as to custody of child. Jurisdiction over the persons involved in the divorce case, namely Yoko Ono Cox Lennon and Anthony D. Cox, continued in the original court, pursuant to the legislation. Jurisdiction continued over the issue of custody, as well.); *Collier v. Collier*, 57 Ala. App. 208, 326 So. 2d 769, 770-71 (1976); *Pflum v. Pflum*, 135 Ariz. 304, 660 P.2d 1231, 1232 (1982); *Holt v. Holt*, 305 S.W.2d 545, 547 (Ark. 1957); *Edwards v. Palleschi*, 167 Cal. App. 2d 413, 334 P.2d 671, 674 (1959); *Fry v. Ball*, 544 P.2d 402, 406 (Colo. 1975); *O'Donnell v. O'Donnell*, 3 Conn. Cir. Ct. 316, 213 A.2d 466, 467 (1965); *Rice v. Rice*, 415 A.2d 1378, 1383 (D.C. Cir. 1980); *Bailey v. Malone*, 389 So. 2d 348, 349-50 (Fla. Dist. Ct. App. 1980); *Ponder v. Ponder*, 198 Ga. 781, 32 S.E. 801, 802 (1945). *But see* *Bannister v. Bannister*, 240 Ga. 513, 241 S.E.2d 247, 248 (1978) ("[A] decree awarding child custody is final and may not be modified or changed after the term in which it was rendered except upon a change in conditions affecting the welfare of the child . . .; any language contained in a judgment which purports to make the custody award temporary or retain jurisdiction in the court to amend or modify the award has no effect.") (The Georgia version of the UCCJA, GA. CODE § 19-9-1 to -64 (1985), became effective January 1, 1979); *Napoleon v. Napoleon*, 585 P.2d 1270, 1273 (Hawaii 1978); *Chislett v. Cox*, 102 Idaho 295, 629 P.2d 691, 694 (1981); *Beaulieu v. Carmack*, 66 Ill. App. 3d 943, 383 N.E.2d 1020, 1021 (1978); *State ex rel. Werthman v. Superior Court of Marion*, 448 N.E.2d 680, 683 (Ind. 1983); *Betzel v. Betzel*, 163 N.W.2d 551, 554 (Iowa 1968); *Nixon v. Nixon*, 596 P.2d 1238, 1241 (Kan. 1979); *Wiley v. Wiley*, 486 S.W.2d 51, 52 (Ky. Ct. App. 1972) (*But see* *Turley v. Griffin*, 508 S.W.2d 764 (Ky. Ct. App. 1974) (The court construed the Kentucky version of section 3 of the Uniform Child Custody Jurisdiction Act to require that the court of original jurisdiction exercise jurisdiction to modify only if, at the time of the suit to modify, the court satisfies the jurisdictional requirements of the Act. The court refused to allow jurisdiction to modify the original decree, by a Kentucky court, in a case in which the mother, who had been awarded custody, had moved out of the state with the child and had met the six-month (home state) residency requirement in another state.)); *Miller v. Miller*, 363 So. 2d 724, 725 (La. Ct. App. 1978); *Meyer v. Meyer*, 414 A.2d 236, 238 (Me. 1980); *Berlin v. Berlin*, 239 Md. 52, 210 A.2d 380, 382 (1965); *Hersey v. Hersey*, 271 Mass. 545, 171 N.E. 815, 817 (1930); *Adams v. Adams*, 100 Mich. App. 1, 298 N.W.2d 871, 877 (1980); *Ange v. Ange*, 334 N.W.2d 393, 396 (Minn. 1983); *Bradshaw v. Bradshaw*, 418 So. 2d 64 (Miss. 1982); *Matsel v. Akins*, 624 S.W.2d 180, 182 (Mo. Ct. App. 1981); *Burchett v. Burchett*, 572 S.W.2d 494, 497 (Mo. App. 1978); *Billings v. Billings*, 616 P.2d 1104, 1105 (Mont. 1980); *Nimmer v. Nimmer*, 203 Neb. 503, 279 N.W.2d 156, 158 (1979); *State v. First Judicial District Court of Ormsby County*, 61 Nev. 269, 125 P.2d 723, 725-26 (1942); *Potter v. Rosas*, 111 N.H. 169, 276 A.2d 922, 923 (1971); *Chase v. Chase*, 58 Misc. 2d 507, 296 N.Y.S.2d 229, 231 (1968); *Dishman v. Dishman*, 246 S.E.2d 819, 822 (N.C. Ct. App. 1978); *Nygord v. Dietz*, 332 N.W.2d 708, 709 (N.D. 1983); *Loetz v. Loetz*, 63 Ohio St. 2d 1, 2, 406 N.E. 2d 1093, 1094 (1980); *In re Price*, 528 P.2d 1107, 1109 (Okla. 1974); *Cope and Cope*, 49 Or. App. 301, 304, 619 P.2d 883, 885 (1980), *aff'd*, 291 Or. 412, 631 P.2d 781 (1981); *Commonwealth ex rel. Piggins v. Kifer*, 427 A.2d 185, 191-92 (Pa. Super. 1981) (construing Pennsylvania's version of the UCCJA, adopted in 1980, 42 PA. CONS. STAT. ANN. §§ 5341-5366 (Purdon 1981)); *Paolino v. Paolino*, 420 A.2d 830, 833 (R.I. 1980); *Clinkscapes v. Clinkscapes*, 134 S.E. 2d 216, 217 (S.C. 1963); *In re Habeck*, 69 N.W.2d 353, 356 (S.D. 1955); *State ex rel. Baker v. Turner*, 562 S.W.2d 435, 437 (Tenn. App. 1977); *Watts v. Watts*, 573 S.W.2d 864, 867 (Tex. Civ. App. 1978); *Smith v. Smith*, 564 P.2d 307, 309 (Utah 1977); *White v. White*, 450 A.2d 1108, 1110 (Vt. 1982); *Featherstone v. Brooks*, 258 S.E.2d 513, 515 (Va. 1979); *In re Marriage of Forsyth*, 14 Wash.

majority.<sup>84</sup> A California appellate court, however, has interpreted the Uniform Child Custody Jurisdiction Act, as adopted in California and forty-eight other states, to require that any court modifying a custody decree, even the court that issued the original custody decree in the same case, must establish, or reestablish, that it has jurisdiction, pursuant to the standards of the UCCJA, in order to modify this decree.<sup>85</sup> A concurring opinion in the same California decision argued that the UCCJA merely represents general guidelines to the proper exercise of jurisdiction, not a hard and fast standard.<sup>86</sup> The Uniform Child Custody Jurisdiction Act, as approved in virtually all jurisdictions in the United States,<sup>87</sup> provides that jurisdiction to modify a custody decree remains with the original court until the courts of a sister state meet the standard of jurisdiction found in the UCCJA or an equivalent statute, at which point there will be concurrent jurisdiction or jurisdiction solely in the new home state.<sup>88</sup> The Federal Parental Kidnapping Preven-

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App. 909, 913, 546 P.2d 117, 120 (1976); *Acord v. Acord*, 264 S.E.2d 848, 850 (W. Va. 1980); *Krause v. Krause*, 58 Wis. 2d 499, 508, 206 N.W.2d 589, 594 (1973).

<sup>84</sup> See, e.g., *Adams v. Adams*, 100 Mich. App. 1, 17, 298 N.W.2d 871, 877 (1980) ("In Michigan, jurisdiction over children of divorced parents remains in the court which granted the divorce until the youngest child attains the age of 18."); *Kennedy v. Kennedy*, 205 Neb. 363, 366-67, 287 N.W.2d 694, 696 (1980) ("Since Patrick has now reached his majority all disputes concerning his custody have become moot and do not require further consideration."). For further materials on the legal impact of reaching majority, see *FAMILY LAW*, *supra* note 54, at § 5:38.

<sup>85</sup> *Smith v. Superior Court*, 68 Cal. App. 3d 457, 461, 137 Cal. Rptr. 348 (1977); see also 2 *MARKEY, CALIFORNIA FAMILY LAW* § 22.14, at 22-33 (1983).

<sup>86</sup> *Smith v. Superior Court*, 68 Cal. App. 3d 457, 466, 137 Cal. Rptr. 348 (1977); see also 2 *MARKEY*, *supra* note 85.

<sup>87</sup> At least forty-nine states and the District of Columbia have adopted the Uniform Child Custody Jurisdiction Act as of this writing. Massachusetts may be considered the sole holdout, but even Massachusetts has promulgated a law very close to the UCCJA in its impact on jurisdiction. It is so similar to the UCCJA that some consider it now to be a UCCJA state. See *MASS. GEN. LAWS ANN.* ch. 209B (West 1977). For a discussion comparing the sections of the Massachusetts law with those of the UCCJA, see *infra* notes 370-71 and accompanying text. For a compilation of states which have adopted the UCCJA, see 9 *U.L.A.* 15 (Supp. 1983). In addition, see *D.C. CODE ANN.* §§ 16-4501 to -4524 (Supp. 1985); *MISS. CODE ANN.* §§ 93-23-1 to -47 (Supp. 1985); *TENN. CODE ANN.* §§ 36-6-201 to -225 (1984 & Supp. 1985); *TEX. FAM. CODE ANN.* §§ 11.51 to -.75 (Supp. 1986); *VT. STAT. ANN.* tit. 15, §§ 1031 to 1051 (Supp. 1985).

<sup>88</sup> *UNIF. CHILD CUSTODY JURISDICTION ACT* § 14, 9 *U.L.A.* 211 (1968); see also *Parental Kidnapping Prevention Act* § 8(f), 28 U.S.C. 1738(f). For an example of judicial construction of the UCCJA, see *Kioukis v. Kioukis*, 440 A.2d 894, 897-98 (Conn. 1981) ("The preference

tion Act<sup>89</sup> provides explicitly for continuing jurisdiction.<sup>90</sup> The jurisdiction of a court continues if the decree was made consistently with the provisions of the PKPA and the law of the state, assuming the state in question still provides for jurisdiction in its courts.<sup>91</sup> In addition to the jurisdictional requirements set forth in the Act, the PKPA requires that a state court have jurisdiction pursuant to its own law.<sup>92</sup> Thus, the PKPA provides that the court which initially makes the custody award continues to have jurisdiction, so long as its law so provides or so long as the child, or at least one of the parties,<sup>93</sup> continues to reside in that state.<sup>94</sup> Thus, although the PKPA and the UCCJA govern both initial and modification proceedings,<sup>95</sup> the notion of continuing jurisdiction remain-

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for continuing jurisdiction of the original state seeks to prevent parental resort to kidnapping to gain a more favorable judgment in a new forum . . . . The first state's exclusive jurisdiction, however, does not continue indefinitely. At some point the child's connections with the first state become too tenuous to satisfy the demands of [UCCJA § 3, 9 U.L.A., 122-23 (1968)].").

<sup>89</sup> 28 U.S.C. § 1738A (1982).

<sup>90</sup> 28 U.S.C. § 1738A (c)(2)(E), (d) (1982).

<sup>91</sup> 28 U.S.C. § 1738A (d) (1982).

<sup>92</sup> 28 U.S.C. § 1738A (c)(1) (1982).

<sup>93</sup> 28 U.S.C. § 1738A(b)(2)(1982) (defining contestant as "a person, including a parent, who has or claims custody or visitation rights").

<sup>94</sup> 28 U.S.C. § 1738A(c)(1), (d)(1982). Section 1738A (d) provides, "The jurisdiction of a court of a State which has made a child custody determination consistently with the provisions of this section continues as long as the requirement of subsection (c)(1) of this section continues to be met and such State remains the residence of the child of any contestant."

<sup>95</sup> See Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A(a)(1982), which provides, "The appropriate authorities of every State shall enforce according to its terms, and shall not modify except as provided in subsection (f) of this section, any child custody determination made consistently with the provisions of this section by a court of another state." Section 1738A(b)(3) of the Act provides further: "Custody determination means a judgment, decree or other order of a court providing for the custody or visitation of a child, and includes permanent and temporary orders, and initial orders and modifications . . . ." See also 28 U.S.C. §§ 1738A(b)(2), (c)(1), (d); *Tufares v. Wright*, 98 N.M. 8, 644 P.2d 522 (1982) (The New Mexico court applied the PKPA to a modification suit. The court refused to assert jurisdiction to modify a Utah decree which had earlier modified the original New Mexico decree.); *Quenzer v. Quenzer*, 653 P.2d 295 (Wyo. 1982) (The Wyoming Court applied the PKPA to assert jurisdiction to modify a Texas court's decree, on the ground that the Texas decree had not been made consistently with the PKPA.). Section 3(a) of the Uniform Child Custody Jurisdiction Act, 9 U.L.A. 122 (1979) states: "A court of this state which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree . . . ." See, e.g., *Hafer v. Superior Court, County of San Diego*, 126 Cal. App. 3d 856, 862, 179 Cal. Rptr. 132, 135 (1981) ("[I]n order to have present modification jurisdiction, the court must find a jurisdictional basis as de-

ing in the court which issued the original decree is an important part of the jurisdictional picture.<sup>96</sup>

fined in the UCCJA . . . ." (citations omitted)); *Szmyd v. Szmyd*, 641 P.2d 14 (Alaska 1982); *Brown v. Brown*, 104 Mich. App. 621, 305 N.W.2d 272 (1981); *Walsh v. Walsh*, 117 Misc. 2d 815, 458 N.Y.S.2d 835 (1983); *see also supra* notes 85-89 and accompanying text.

<sup>96</sup> *Kumar v. Superior Court of Santa Clara County*, 32 Cal. 3d 689, 696, 186 Cal. Rptr. 772, 652 P.2d 1003, 1007 (1982):

In other words, the continuing jurisdiction of the prior court is exclusive. Other states do not have jurisdiction to modify the decree. They must respect and defer to the prior state's jurisdiction . . . Exclusive continuing jurisdiction is not affected by the child's residence in another state for six months or more. Although the new state becomes the child's home state, significant connection jurisdiction continues in the state of the prior decree where the court record and other evidence exists and where one parent or another contestant continues to reside. *Only when the child and all parties have moved away is deference to another state's continuing jurisdiction no longer required.*

(emphasis in original) (citing Bodenheimer, *Interstate Custody: Initial Jurisdiction and Continuing Jurisdiction Under the UCCJA*, 14 FAM. L.Q. 203 (1981)). *See Bloodgood v. Whigham*, 408 So. 2d 122, 124 (Ala. Civ. App. 1981) ("The [UCCJA] encourages continuing jurisdiction by the court which initially determined custody, so long as that court has not lost jurisdiction [under UCCJA § 3, 9 U.L.A. 122 (1979)] or has declined jurisdiction."); *Moore v. Perez*, 428 So. 2d 113, 115 (Ala. Civ. App. 1983) (upheld a trial court's decision not to assert continuing jurisdiction pursuant to the Parental Kidnapping Prevention Act); *Landa v. Norris*, 313 N.W.2d 423, 425 (Minn. 1981) (recognized the continuing jurisdiction of an Ohio court); *Stafford v. Stacey*, 115 Misc. 2d 291, 292, 453 N.Y.S.2d 992, 994 (1982) (The New York court declined to exercise jurisdiction, after its determination that "the Virginia Court still [had] jurisdiction over this matter and [i]t [had] not declined to exercise such jurisdiction."). The Uniform Child Custody Jurisdiction Act provides:

If a court of another state has made a custody decree, a court of this state shall not modify that decree, unless (1) it appears to the court of this state that the court which rendered the decree does not now have jurisdiction under jurisdictional prerequisites substantially in accordance with this Act or has declined to assume jurisdiction to modify the decree and (2) the court of this state has jurisdiction.

UNIF. CHILD CUSTODY JURISDICTION ACT § 14, 9 U.L.A. 153 (1979). Following the effective date of some version of the Uniform Child Custody Jurisdiction Act in various states, the courts in those states held that the court issuing the original decree of custody retains jurisdiction to modify it. *See, e.g., Pflum v. Pflum*, 135 Ariz. 304, 660 P.2d 1231 (1982); *Fry v. Ball*, 544 P.2d 402 (Colo. 1975); *Bailey v. Malone*, 389 So. 2d 348 (Fla. Dist. Ct. App. 1980); *Napoleon v. Napoleon*, 59 Hawaii 619, 585 P.2d 1270 (1978); *Chislett v. Cos*, 102 Idaho 295, 629 P.2d 691 (1981); *State ex rel. Werthman v. Superior Court of Marion*, 448 N.E.2d 680 (Ind. 1983); *Nixon v. Nixon*, 226 Kan. 218, 596 P.2d 1238 (1979); *Meyer v. Meyer*, 414 A.2d 236 (Me. 1980); *Ange v. Ange*, 334 N.W.2d 393 (Minn. 1983); *Matsel v. Akins*, 624 S.W.2d 180 (Mo. Ct. App. 1981); *Billings v. Billings*, 616 P.2d 1104 (Mont. 1980); *Nygord v. Dietz*, 332 N.W.2d 708 (N.D. 1983); *Cope v. Cope*, 49 Or. App. 301, 619 P.2d 883, *aff'd*, 291 Or. 412, 631 P.2d 781 (1981); *Paolino v. Paolino*, 420 A.2d 830 (R.I. 1980); *White v. White*, 141 Vt. 499, 450 A.2d 1108 (1982). In addition, *Pflum*, *Chislett*, *Matsel*, *Nygord*, and *White* were all decided after the effective date of the Parental Kidnapping Prevention Act. The author is

Some commentators have noted a split of authority on the issue of whether continuing jurisdiction of the court issuing the original decree remains an important aspect of custody law.<sup>97</sup> For example, it is interesting to contrast the perception and development of the law relating to continuing jurisdiction found in two representative states, Colorado and Kentucky. In 1972, a Kentucky court of appeals expressly held that jurisdiction to award custody continues in the court of initial jurisdiction, even if the custodian and the child move from the state.<sup>98</sup> Less than two years later, another Kentucky court of appeals construed a jurisdiction section of the Kentucky Code, which was essentially identical to § 3 of the UCCJA,<sup>99</sup> to require the termination of the jurisdiction of a Kentucky court that rendered the initial decree when the six-months residence requirement for "home-state" jurisdiction was met in another state.<sup>100</sup> This later case seems consistent with the preference for home-state jurisdiction, a preference that appears to be part of the policy of the PKPA.<sup>101</sup> In 1970, a Colorado appellate court disapproved of a trial court's assertion of the continuing jurisdiction rationale, stating that jurisdiction had to follow domicile.<sup>102</sup> After the enactment of the Colorado version of the UCCJA, however, the Colorado Supreme Court stated:

Under this statutory scheme [that of the UCCJA], it is a basic principle that a custody decree rendered by the court of

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persuaded by the argument of the New Mexico Supreme Court that the effective date of the PKPA is the date of its enactment, December 28, 1980. Although the act which included the PKPA, Pub. L. No. 96-611 (1980), 94 Stat. 3566, mentions an effective date of July 1, 1981, this date appears to refer to the amendments made in that bill to the Social Security Act. *See State ex rel. Valles v. Brown*, 97 N.M. 327, 639 P.2d 1181, 1183 (1981) (New Mexico had no jurisdiction to alter a Washington child custody decree.). *See generally* Coombs, *supra* note 8, at 270-71.

<sup>97</sup> I. McCahey, Kaufman, Kraut & Zett, *CHILD CUSTODY & VISITATION LAW AND PRACTICE* [hereinafter cited as *CHILD CUSTODY*] § 4.02 [3][d], at 4-44 to -46 (1983).

<sup>98</sup> *Wiley v. Wiley*, 486 S.W.2d 51, 52 (Ky. App. 1972).

<sup>99</sup> UNIF. CHILD CUSTODY JURISDICTION ACT § 3, 9 U.L.A. 122 (1979).

<sup>100</sup> *Turley v. Griffin*, 508 S.W.2d 764, 766 (Ky. App. 1974).

<sup>101</sup> *See* Parental Kidnapping Prevention Act §8(c)(2)(B), 28 U.S.C. § 1738A (c)(2)(B) (1982).

<sup>102</sup> *Meller v. Smyth*, 479 P.2d 981, 982 (Colo. App. 1970) ("When a child's domicile is changed, he may no longer be subject to the exclusive control of the court which first awarded his custody . . .").

one state, which had jurisdiction at the time the decree was entered, is entitled to recognition by all other states . . . .

A corollary principle is that if the state which rendered the custody decree still has jurisdiction, another state cannot modify the decree . . . .

Thus, . . . a Colorado court must recognize and refrain from modifying a custody decree of another state where the sister state had jurisdiction at the time its decree was entered and has continuing jurisdiction at the time the action to modify is instituted in this state.<sup>103</sup>

Thus, in this regard, the enactment of the UCCJA had precisely the opposite effect in Colorado and in Kentucky.

In the past, when asked to modify a custody decree of a sister state, courts reversed the usual order of inquiry and decided the merits of the case—what would be in the best interests of the child—rather than first deciding whether they had or should assert jurisdiction.<sup>104</sup> Even since the promulgation of the UCCJA and the PKPA, there remains a tension between the policy of protecting the best interests of the child and that of eliminating parental child abduction. Both the PKPA and the UCCJA offer more than one basis of jurisdiction over a custody issue.<sup>105</sup> The idea persists that some flexibility in jurisdictional bases is needed to allow

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<sup>103</sup> Fry v. Ball, 544 P.2d 402, 405-406 (Colo. 1975).

<sup>104</sup> See KATZ, *supra* note 21, at 12-13 (1981).

Another jurisdictional problem was that courts in custody cases reversed the usual order of the issues before them. Normally, a court must establish that it has jurisdiction before moving on to any factual issues. But in child custody cases, if the court felt that the child's welfare required that it hear the case and render a decree, the court did so, resting its exercise of jurisdiction precisely on the facts pleaded by one of the parents. As a matter of law, however, it was typically held that jurisdiction rested on whatever contacts might have existed in the case between the child, parents, and the state. If the court felt that exercising jurisdiction was necessary *for the child*, and believed it could issue a decree that would be effective, it did.

*Id.* (footnotes omitted) (emphasis in original); R. LEFLAR, *supra* note 21, at 492 ("The child's welfare, as such, is actually the best touchstone for adjudication and perhaps even for jurisdictional fact."); see, e.g., *In re Rodgers*, 100 Ariz. 269, 273, 413 P.2d 744, 748 (1966); *In re Burns*, 49 Hawaii 20, 39, 407 P.2d 885, 892 (1965); see also CLARK, *supra* note 5, § 11.5, at 325, nn. 44-46 and accompanying text.

<sup>105</sup> See *supra* Section II, and *infra* Sections IV and IX.

courts to protect the best interests of the child.<sup>106</sup> The need for flexibility, combined with the multiple bases of jurisdiction within the UCCJA and the PKPA and with the current status of the Full Faith and Credit Clause in relation to custody litigation,<sup>107</sup> creates a sort of schizophrenic aura about these laws. These various considerations provide a given court with the tools it needs to assert jurisdiction by substituting the "best interests of the child test" for jurisdictional rules.<sup>108</sup> While this substitution has some justification in the language and approach of the UCCJA—the central goal, after all, is to protect children—flexibility can also lead to disruption of the stability of a child's environment.<sup>109</sup> Thus, the drafters of the UCCJA and the PKPA attempted to provide the flexibility necessary to allow courts to protect children, while limiting incentives for abduction and its concomitant disruption for the abducted child.<sup>110</sup> It should be noted that both the PKPA and the

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<sup>106</sup> See Parental Kidnapping Prevention Act § 8(c)(2)(B), 28 U.S.C. § 1738A(c)(2)(B) (1982); UNIF. CHILD CUSTODY JURISDICTION ACT § 3(a)(2) commissioners' note, 9 U.L.A. 124 (1979); R. LEFLAR, *supra* note 21, § 243, at nn. 11-13 and § 244, at n. 12 and accompanying text. The flexibility diminishes the impact on elimination of child-snatching. A detailed discussion of this issue is presented *infra* section IX.

<sup>107</sup> For a discussion of the the Full Faith and Credit Clause and its impact on custody litigation, see *infra* Section VII.

<sup>108</sup> See KATZ, *supra* note 21, at 11-13 (1981), and detailed discussion in Section IX (effectuality), *infra*.

<sup>109</sup> KATZ, *supra* note 21, at 11-13. Compare *Marriage of Settle*, 276 Or. 759, 771, 556 P.2d 962, 968 (1976) ("When put to the test of a factual situation presenting an irreconcilable conflict between those two interests, we read the Act [UCCJA] as making predominate the best interests of the children before the court."), *overruled in In re Ross*, 291 Or. 263, 630 P.2d 353, 363-64 (1981) ("In the case of an abducted child whose whereabouts is concealed, where 'substantial evidence' of a child's present or future welfare for purposes of [Oregon's version of section 3(a)(2) of the Uniform Child Custody Jurisdiction Act] still exists in the decree state as well as in the forum state, . . . the decree state continues to have jurisdiction under the act for a reasonable time following the abduction . . ." (footnote omitted)) with *Vanneck v. Vanneck*, 49 N.Y.2d 602, 611, 404 N.E.2d 1278, 1282, 427 N.Y.S.2d 735, 739 (1980) (the failure of a trial court to communicate with and to defer to a potential claim of jurisdiction in another state is reversible error, as being "contrary to the avowed purposes of the legislation adopted by both states."), *discussed in* *McGough & Hughes*, *supra* note 8, at 33; *Martin v. Martin*, 45 N.Y.2d 739, 744, 408 N.Y.S.2d 479, 380 N.E.2d 305, *reh'g denied*, 45 N.Y.2d 839, 381 N.E.2d 630 (1978) (there is nothing more important than the best interests of the child; therefore, jurisdiction issues must go beyond the documents into factual inquiry).

<sup>110</sup> UNIF. CHILD CUSTODY JURISDICTION ACT § 1 & commissioners' note, 9 U.L.A. 117 (1979); Findings and Purposes [of the PKPA], 94 Stat. 3568-69 (1980); *cf.* Bodenheimer, *supra* note 28, at 204.

UCCJA expressly include the "best interests of the child" as a basis of jurisdiction.<sup>111</sup> Whether or not the potential for abuse has been minimized successfully is not clear at this time.<sup>112</sup>

#### IV. VARIATIONS AMONG THE STATE VERSIONS OF THE CHILD CUSTODY JURISDICTION ACT

Although the Uniform Child Custody Jurisdiction Act<sup>113</sup> is usually discussed as though it were one set of statutes, it is actually

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<sup>111</sup> Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A(c)(2)(B)(ii); UNIF. CHILD CUSTODY JURISDICTION ACT § 3(a)(2), 9 U.L.A. 122 (1979) (note that this applies to the "significant connection" category of jurisdiction); *Walsh v. Walsh*, 117 Misc. 2d 815, 821, 458 N.Y.S.2d 835, 839 (1983) (The court determined that it is in the best interests of the child that the New York courts assume jurisdiction because the child had a "significant connection" with New York and because of the presence of "substantial evidence" that the child would return.); *Settle v. Settle*, 276 Or. 759, 771, 556 P.2d 962, 968 (1976) ("When put to the test of a factual situation presenting an irreconcilable conflict between those two interests [best interests of the child and preventing abduction], we read the Act [UCCJA] as making predominate the best interests of the children before the court."), *overruled in In re Ross*, 291 Or. 263, 630 P.2d 353, 363-364 (1981) ("In the case of an abducted child whose whereabouts is concealed, where 'substantial evidence' of a child's present or future welfare for purposes of [Oregon's version of the UCCJA, § 3(a)(2)] still exists in the decree state as well as in the forum state, . . . the decree state continues to have jurisdiction under the act for a reasonable time following the abduction." (footnote omitted)); *Quenzer v. Quenzer*, 653 P. 2d 295 (Wyo. 1982) (the court asserted jurisdiction on the basis that (1) the forum state has jurisdiction and (2) the decree state did not exercise jurisdiction consistently with the provisions of the PKPA). *Compare In re Hopson*, 110 Cal.App. 3d 884, 895, 905, 168 Cal. Rptr. 345, 353 (1980) (The inclusion of the "best interests" test in the UCCJA's "significant connection" jurisdictional criterion [UCCJA §3(a)(2)] was made to limit the exercise of jurisdiction. The court pointed out that jurisdiction under this section of the Act is to be exercised only when it is in the best interests of the child. However, the court found, "that the best interest of the children will be served by the California court making a custody determination after a full and complete hearing on the facts.") *with Allison v. Superior Court of Los Angeles County*, 99 Cal. App. 3d 993, 160 Cal. Rptr. 309 (1980) (The Superior Court of Los Angeles County does not mention the "best interests of the child" in construing the same statute as the *Hopson* court, *supra*.) For a discussion of the statutory bases of jurisdiction over custody questions, see *FAMILY LAW*, *supra* note 54, at § § 36:01 - 36:02.

<sup>112</sup> See authority cited *supra* note 106.

<sup>113</sup> UNIF. CHILD CUSTODY JURISDICTION ACT §§ 1-28, 9 U.L.A. 116-170 (1979). The UCCJA has been adopted, at this writing, by 49 states and the District of Columbia and the Virgin Islands. In addition, Massachusetts promulgated a statute in 1984, MASS. ANN. LAWS ch. 209B (Michie/Law Coop. 1981 & Supp. 1985) (located in MASS. LEG. SERVICE, No. 6, 1983, ch. 680, at 1638-44) which approximates the UCCJA and which has caused some commentators to consider Massachusetts now to be a UCCJA state. See *Freed & Walker*, *supra* note 26, at 428.

While there are enough differences in the acts that Massachusetts may not, strictly speak-

fifty different sets.<sup>114</sup> There are some significant variations among the various state versions. These should be noted. The variations discussed in this section should be read with the relevant sections of the UCCJA.

With regard to UCCJA §2 (Definitions or Scope of Coverage), Connecticut expressly excludes "any matter properly within the jurisdiction of any court of probate" from the scope of a "custody determination" and a "custody proceeding."<sup>115</sup> Two states, New Hampshire and New York, expressly exclude adoption from their definitions of "custody proceeding."<sup>116</sup> Montana and the District of Columbia expressly include adoption in their definitions of "custody proceeding."<sup>117</sup> The rest of the states make no mention of whether or not adoption is covered by their acts. New Hampshire excludes child protective proceedings, neglect and termination of parental rights from the definition of "custody proceeding."<sup>118</sup> Nevada includes in its definition of "contestant" under §2 of its UCCJA<sup>119</sup> native American tribes, as defined by the Indian Child Welfare Act of 1978.<sup>120</sup>

There are several interesting variations in UCCJA §3 (Jurisdiction). Alaska omits §3(a)(2), the "significant connection" jurisdic-

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ing, be considered a UCCJA state, the duplication of vital language makes it clear that the heart of the UCCJA is embodied in the Massachusetts law. For a chart correlating the sections of the Massachusetts law with those of the UCCJA, see *infra* Section IX.

For a detailed analysis of the UCCJA, see MCGOUGH & HUGHES, *supra* note 8, at 24-34; COOMBS, *note* 5; CROUCH, *INTERSTATE CUSTODY LITIGATION: A GUIDE TO USE AND COURT INTERPRETATION OF THE UNIFORM CHILD CUSTODY JURISDICTION ACT* (1981); Bodenheimer, *Progress Under the Uniform Child Custody Jurisdiction Act and Remaining Problems: Punitive Decrees, Joint Custody, and Excessive Modifications*, 65 CALIF. L. REV. 978 (1977).

<sup>114</sup> See CHILD CUSTODY, *supra* note 97, § 4.02 [3][d] (1983) for a breakdown of the variations among the states. Massachusetts, Mississippi, Texas and the District of Columbia each recently adopted some version of the Act. See MASS. GEN. LAWS ANN. ch. 20913 (West 1977); MISS. CODE ANN. § 93-23 - 37(1) (1973 & 1985 supp.); TEX. FAM. CODE ANN. § 11.53 et seq. (1975); D.C. CODE ANN. § 16-4519 (1973 & Supp. VII 1980).

<sup>115</sup> CONN. GEN. STAT. § 46b-92 (1981).

<sup>116</sup> N.H. REV. STAT. ANN. § 458-A:2 (III) (1983); N.Y. DOM. REL. LAW § 75-c(3) (McKinney 1977 & 1986 Supp.).

<sup>117</sup> D.C. CODE ANN. § 16-4502(2) (1973 & Supp. VII 1980); MONT. CODE ANN. § 40-7-103.

<sup>118</sup> N.H. REV. STAT. ANN. § 458-A:2 (III) (1983).

<sup>119</sup> NEV. REV. STAT. § 125A.040(1) (1983).

<sup>120</sup> 25 U.S.C. §§ 1901, et. seq.

tional criterion, altogether.<sup>121</sup> Alaska also refers to its "child in need of aid" statute<sup>122</sup> instead of adopting the criteria set forth in UCCJA §3(a)(3) which covers that subject. Kentucky adds essentially a venue section to its UCCJA.<sup>123</sup> Montana adds a similar provision and also adds a notice and opportunity to be heard provision.<sup>124</sup> Nevada's law requires Nevada courts to defer to the jurisdiction of a native American tribe<sup>125</sup> pursuant to the Indian Child Welfare Act of 1978.<sup>126</sup> Oklahoma adds a section requiring that the "best interests of the child" be the controlling criterion for awarding custody.<sup>127</sup> Pennsylvania adds a requirement for an investigation of the home of the person to whom custody is to be awarded, to be carried out by a county child welfare agency.<sup>128</sup> Tennessee limits the emergency jurisdiction of UCCJA §3(a)(3),<sup>129</sup> empowering the court only to make a temporary emergency based decree for a period of sixty days or less.<sup>130</sup> Texas adds a section that limits the exercise of the "continuing jurisdiction" criterion in cases in which the child and custodial parent have established a new home state.<sup>131</sup> Both Texas and Tennessee follow the PKPA in limiting the existence of "significant connection jurisdiction" to factual situations in which no state has "home-state" jurisdiction.<sup>132</sup>

With regard to UCCJA §4, "notice and opportunity to be heard," relating to persons found within the forum state, Missouri requires verified pleadings.<sup>133</sup> New York and New Hampshire regard any person who has been given notice and an opportunity to

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<sup>121</sup> ALASKA STAT. § 25.30.020 (1983).

<sup>122</sup> ALASKA STAT. § 47.10.290 (1985).

<sup>123</sup> KY. REV. STAT. § 403.420(4).

<sup>124</sup> MONT. CODE ANN. § 40-7-104, which refers in turn to §40-4-211.

<sup>125</sup> NEV. REV. STAT. § 125A.050(e) (1983).

<sup>126</sup> 25 U.S.C. §§ 1901 et. seq.

<sup>127</sup> OKLA. STAT. Tit. 10, § 1605(D) (1971 & Supp. 1978).

<sup>128</sup> PA. CONS. STATS. ANN. § 5344(5).

<sup>129</sup> Emergency jurisdiction under the UCCJA is discussed in Section II of this article.

<sup>130</sup> TENN. CODE ANN. § 36-1304.

<sup>131</sup> TEX. FAM. CODE ANN. § 11.53(d) (Vernon 1975 & 1986 Supp.).

<sup>132</sup> TENN. CODE ANN. § 36-1303(2); TEX. FAM. CODE ANN. § 11.53(a)(2) (Vernon 1975 & 1986 Supp.).

<sup>133</sup> MO. ANN. STAT. § 452.455 (Vernon 1977).

be heard as a "party" to the proceeding.<sup>134</sup> UCCJA §5, relating to notice to persons outside the state, defers to local law.<sup>135</sup> Maryland omits this section. Louisiana provides for the appointment of an attorney to represent the party who cannot be served and has not appeared.<sup>136</sup> Colorado provides for payment of the costs of notice by publication by the court when a party is indigent.<sup>137</sup> South Carolina provides for a shortening of the notice period in an emergency or abandonment situation.<sup>138</sup> Nevada's notice section does not apply at all if the Indian Child Welfare Act imposes a different requirement.<sup>139</sup>

UCCJA §6, which refers to simultaneous proceedings in other states, has given rise to differing versions. Both Maryland and Michigan make express exception to this section in cases in which the child has been abandoned or is in an emergency situation to the effect that local jurisdiction will obtain.<sup>140</sup> Nevada's statute provides that a court shall not exercise its jurisdiction if a proceeding is pending in a court of another state which is exercising jurisdiction substantially in conformity with the UCCJA or the Indian Child Welfare Act of 1978.<sup>141</sup> New York omits the requirement which was established to enable courts to determine whether there is ongoing or pending action in another jurisdiction.<sup>142</sup> Nebraska requires that the parties be given the substance of any communication or exchange of information between two courts, and that they be given a reasonable opportunity to respond.<sup>143</sup>

The UCCJA provision for "inconvenient forum," §7, has been

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<sup>134</sup> N.H. REV. STAT. § 458-A:4 (1983); N.Y. DOM. REL. LAW § 75-e (McKinney 1977 & 1986 Supp.).

<sup>135</sup> Note also that there are differing time requirements under UCCJA §5(b), and its variations among the states. The practitioner, therefore is directed to the relevant notice and opportunity to be heard statutes in his or her own jurisdiction, as well as to the requirements of due process, analyzed in Section VII, *infra*.

<sup>136</sup> LA. REV. STAT. § 1704 (West 1977 & 1986 Supp.).

<sup>137</sup> COLO. REV. STAT. § 14-13-106 (1970 & 1985 Supp.).

<sup>138</sup> S.C. CODE ANN. § 20-7-792(b) (Law Co-op. 1985).

<sup>139</sup> NEV. REV. STAT. § 125A.100 (1983).

<sup>140</sup> MD. FAM. LAW CODE ANN. § 16, 189 (1957); MICH. COMP. LAWS § 600.656 (1970).

<sup>141</sup> NEV. REV. STAT. § 125A.060 (1983).

<sup>142</sup> N.Y. DOM. REL. LAW. § 75-g (1974 & 1985 Supp.).

<sup>143</sup> NEB. REV. STAT. § 43-1207.

modified in several jurisdictions. The District of Columbia adds the phrase, "or any of the provisions of the Parental Kidnapping Prevention Act of 1980," to its UCCJA §7(c)(5), which relates to declining jurisdiction if its exercise would contravene any of the purposes of the UCCJA.<sup>144</sup> Missouri law omits UCCJA §7(c), which provides for determination of whether or not its courts would be an inconvenient forum, in consideration of whether it is in the interest of the child that another state assume jurisdiction. Missouri law replaces this, simply by adding a requirement to §7(b) that a court may make a determination of inconvenient forum, upon its own motion or that of other stated persons, and that in this determination it shall consider the "best interests of the child."<sup>145</sup> Nevada provides for transfer pursuant to the Indian Child Welfare Act of 1978, if the Act so requires.<sup>146</sup> Tennessee provides for the appointment of a guardian *ad litem* for the child, if the court thinks it appropriate.<sup>147</sup>

Under the rubric of UCCJA §8, where jurisdiction may be declined due to the conduct of the parties, four states, California, Nevada, Utah and Washington, have added a requirement that, in circumstances in which the court declines to exercise jurisdiction based upon petitioner's conduct, the person in the other state, having legal custody, be notified and given an opportunity to request return of the child or to request that petitioner appear with the child in a custody proceeding in the other state. This, of course, adds to the kit of tools courts have at their disposal to enforce custody decrees and to prevent abduction of children.<sup>148</sup> Pennsylvania weakens the enforcement aspect of its declination for parental conduct statute by adding an opportunity for petitioner to show that conditions in the custodial home are harmful to the child.<sup>149</sup> This is consistent with the child-protection mode of the

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<sup>144</sup> D.C. CODE ANN. § 16-4507 (1981 & 1985 Supp.).

<sup>145</sup> MO. ANN. STAT. § 452.470 (Vernon 1977).

<sup>146</sup> NEV. REV. STAT. § 125A.070 (1983).

<sup>147</sup> TENN. CODE ANN. § 36-1308(a).

<sup>148</sup> CAL. CIV. CODE ANN. §§ 5157 (3) and (4) (West 1983); NEV. REV. STAT. §§ 125A.080 (3) and (4) (1983); UTAH CODE ANN. §§ 78-45c-8 (3) and (4) (1979 & 1983 Supp.); WASH. REV. CODE §§ 26.27.080 (3) and (4) (1974).

<sup>149</sup> PA. CONS. STATS. ANN. § 5349.

UCCJA and indicates its schizophrenic nature.<sup>150</sup>

Section 9 of the UCCJA provides for information under oath to be submitted to the court. Both New Hampshire and New York waive the pleading and affidavit requirement of this section in a suit for divorce or nullity of a marriage if: (a) neither party is in default; and (b) the issue of custody is uncontested. New York makes further exception in cases in which a court finds it necessary to protect the child or in which a special care home (as defined in subdivision 31 of section 2 of the New York Social Services Law) is involved.<sup>151</sup> Texas law waives the pleading and affidavit requirements of this section if all contestants are residing in Texas.<sup>152</sup>

With regard to UCCJA §10, relating to additional parties, Illinois requires that the potential additional party "*either have physical custody or claim custody or visitation rights, pursuant to an existing court order.*"<sup>153</sup>

Section 11 of the UCCJA provides for the appearance of parties and the child. Four states authorize a court to issue an arrest warrant for the party who is ordered to appear and does not do so, in those situations wherein the party cannot be served, or when it appears that the order to appear will be otherwise ineffective.<sup>154</sup> Illinois and Missouri provide for the appointment of a guardian *ad litem* or counsel for the child.<sup>155</sup>

Section 14 of the UCCJA provides for modification of out-of-state custody decrees.<sup>156</sup> Missouri law omits §14(b), which, under the standard UCCJA, requires a court of the state to give due con-

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<sup>150</sup> For a discussion of the schizophrenic nature of the UCCJA, see Section II of this article, *supra* at notes 52-53 and accompanying text, and Section III, *supra* at notes 104-112 and accompanying text.

<sup>151</sup> N.H. REV. STATS. ANN. § 458-A:9(IV) (1983); N.Y. DOM. REL. LAW 75-j (4 and 5) (McKinney 1977 & 1986 Supp.).

<sup>152</sup> TEX. FAM. CODE ANN. § 11.59(a) (Vernon 1975 & 1986 Supp.).

<sup>153</sup> ILL. REV. STAT. ch. 40, § 2111 (emphasis added).

<sup>154</sup> CAL. CIV. CODE ANN. § 5161(1); NEV. REV. STAT. § 125A.140 (2) (1983); UTAH CODE ANN. § 78-45c-11(1) (1979 & 1985 Supp.); WASH. REV. CODE § 26.27.110(i) (1974).

<sup>155</sup> ILL. REV. STAT. ch. 40, § 2112(a) (counsel); MO. ANN. STAT. § 452.490(4) (Vernon 1977) (guardian *ad litem*).

<sup>156</sup> Jurisdiction to modify an out-of-state custody decree is analyzed in Section III, *supra*.

sideration to the transcript of the record and other documents of all previous proceedings submitted to it, when the court is considering modification of another state's custody decree.<sup>157</sup>

With regard to the section 15 of the UCCJA, which relates to filing and enforcement of out-of-state custody decrees, Georgia requires that the copy of the decree filed be certified and exemplified.<sup>158</sup> Louisiana permits the court to place a child in the temporary custody (for fifteen days, unless extended by the court, but not to exceed sixty days) of the Department of Health and Human Resources if: (1) a certified copy of a decree of another state is filed; and (2) there is a showing of probable cause to believe that the person with physical custody is likely to flee the jurisdiction. This temporary custody will be maintained pending a determination of the filed decree's validity.<sup>159</sup> North Carolina substitutes the term "exemplified" for "certified."<sup>160</sup> Texas law adds "[o]n payment of proper fees" to the beginning of its section.<sup>161</sup>

For the registry of out-of-state custody decrees and pleadings, UCCJA §16, Georgia and North Carolina substitute "certified and exemplified" for "certified."<sup>162</sup> Maine provides that the "State Court Administrator" shall maintain the registry, rather than the "clerk of each District Court, Family Court . . . ."<sup>163</sup> Michigan substitutes "circuit and probate court" for "District Court, Family Court . . . ."<sup>164</sup> New York omits this section altogether.

Six states have included language requiring payment of fees, in section 17, concerning certifying and sending copies of custody decrees.<sup>165</sup> Both New Hampshire and New York limit the group of

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<sup>157</sup> MO. ANN. STAT. § 452.500 (Vernon 1977).

<sup>158</sup> GA. CODE § 74-516(a).

<sup>159</sup> LA. REV. STAT. ANN. tit. 13, § 1714(c) (West 1977 & 1986 Supp.).

<sup>160</sup> N.C. GEN. STAT. § 50A-15(a).

<sup>161</sup> TEX. FAM. CODE ANN. § 11.65 (Vernon 1975 & 1986 Supp.).

<sup>162</sup> GA. CODE § 74-517; N.C. GEN. STAT. § 50A-16(1).

<sup>163</sup> ME. REV. STAT. ANN. § 817.

<sup>164</sup> MICH. COMP. LAWS ANN. § 600.666 (1970).

<sup>165</sup> ALASKA STAT. ANN. § 25.30.160 (1985); MO. ANN. STAT. § 452.520 (Vernon 1977); N.H. REV. STAT. ANN. § 458-A:16 (1983); N.Y. DOM. REL. LAW § 75-q (McKinney 1977 & 1986 Supp.); R.I. GEN. LAWS § 15-14-18; TEX. FAM. CODE ANN. § 11.67 (Vernon 1975 & 1986 Supp.).

persons who may request a copy of a custody decree. In New Hampshire, only a court of another state, a party to the custody proceeding, the attorney for a party, or a representative of the child may make such a request.<sup>166</sup> In New York, the group is limited to a court of another state, a party, an attorney for a party, or a representative of the child.<sup>167</sup> Although both New Hampshire and New York include language requiring payment of a fee for copies of certified decrees, each limits its impact by including the phrase "if any." Missouri substitutes the term "may" [certify and forward] for "shall" [certify and forward], suggesting that some discretion exists in the court, although no decisions on this point have been recorded to date.<sup>168</sup>

New York and Vermont exclude the provision in section 18 for taking testimony in another state. This allows a court to make its own motion to have testimony taken in another state.<sup>169</sup> Colorado requires the court to pay the costs of having testimony taken in another state when the court issues an order for such testimony *sua sponte*.<sup>170</sup>

Section 19 of the UCCJA provides that a court may request a court of another state to hold a hearing to adduce evidence or order a party to produce evidence or have social studies made regarding custody. It also allows courts to issue orders to appear. New Jersey provides that the appearance of a party under section 19 of the UCCJA shall not constitute waiver of the party's right to contest jurisdiction.<sup>171</sup> Vermont limits the court to requesting a hearing, the forwarding of certified copies of a hearing and evidence adduced therein and otherwise adduced.<sup>172</sup> With regard to the assessment of costs incurred under this section, fourteen states vary the language of their statutes from that of the UCCJA. Both Alaska and Colorado require a finding of indigency for the costs to

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<sup>166</sup> N.H. REV. STAT. ANN. § 458-A:16 (1983).

<sup>167</sup> N. Y. DOM. REL. LAW § 75q (McKinney 1977 & 1986 Supp.).

<sup>168</sup> MO. ANN. STAT. § 452.395 (Vernon 1977).

<sup>169</sup> N. Y. DOM. REL. LAW § 75-r (McKinney 1977 & 1986 Supp.); VT. STAT. ANN. tit. 15, § 1046 (1974 & 1985 Supp.).

<sup>170</sup> COLO. REV. STAT. ANN. § 14-13-119 (1970 & 1985 Supp.).

<sup>171</sup> N.J. STAT. ANN. § 2A:34-47(c) (West Supp. 1985).

<sup>172</sup> VT. STAT. ANN. tit. 15, § 1047(a) (1974 & 1985 Supp.).

be paid by the court<sup>173</sup> or by the state.<sup>174</sup> Several states delete the clause allowing payment by the county or state for expenses relating to these hearings or studies, noted in section 19, subsection (a) or (b) or both.<sup>175</sup> The District of Columbia deletes the language allowing the county or state to pay in subsection (a) but adds a subsection (c) which incorporates the "or will otherwise be paid" language of subsection (b) and causes it to apply to subsection (a) as well.<sup>176</sup> Ohio, in its subsection (a), provides that costs of services may be assessed against the parties or be paid by the county and taxed as costs in the case.<sup>177</sup> Texas adds the phrase, "as costs of court," to the end of subsection (a).<sup>178</sup>

With regard to assistance to courts of other states, section 20, ten states omit the language permitting social studies for use in a custody proceeding in another state.<sup>179</sup> Three states will forward the results of their assistance to the out-of-state court pursuant to subsection (a) only when they have received payment from the requesting court.<sup>180</sup> Pursuant to subsection (c) of section 20, California and Washington allow the issuance of an arrest warrant against a person having physical custody of the child in circumstances in which that person has been ordered to appear and has failed to do

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<sup>173</sup> ALASKA STAT. § 25.30.180 (1985).

<sup>174</sup> COLO. REV. STAT. § 14-13-120 (1970 & 1985 Supp.).

<sup>175</sup> HAWAII REV. STAT. § 583 (deletes language from subsection (a)); LA. REV. STAT. ANN. § 1718(A) (West 1977 & 1986 Supp.) (deletes language from subsection (a)); MO. ANN. STAT. § 40-10-20(a) (Vernon 1977) (subsection (a)); N.Y. DOM. REL. LAW. § 75-s (subsection (a)) (McKinney 1977 & 1986 Supp.); S.C. CODE ANN. § 20-7-820 (Law Co-op. 1985) (deletes language from subsections (a) and (b)). Both Mississippi and Utah delete this language, but allow payment by the state upon a finding of indigency. MISS. CODE ANN. § 93-23-37(1) (1973 & 1985 Supp.); UTAH CODE ANN. § 78-45c-19(1) (1979 & 1985 Supp.).

<sup>176</sup> D.C. CODE ANN. § 16-4519 (1981 & 1985 Supp.).

<sup>177</sup> OHIO REV. CODE ANN. § 1309.34(A) (Page 1979 & 1984 Supp.).

<sup>178</sup> TEX. FAM. CODE ANN. § 11.69(a) (Vernon 1975 & 1986 Supp.).

<sup>179</sup> ALA. CODE § 30-3-40(a) (1983); ARIZ. REV. STAT. ANN. § 8-420(A) (1974 & 1985 Supp.); CAL. CIV. CODE. § 5169(1) (West 1983); IDAHO CODE § 5-1020(a) (1979); NEV. REV. STAT. § 125A, 230(1) (1983); N.H. REV. STAT. ANN. § 458-A:19(I) (1983); N.Y. DOM. REL. LAW § 75-5(1) (McKinney 1977 & 1986 Supp.); S.D. CODIFIED LAWS ANN. § 26-5-37 (1983); UTAH CODE ANN. § 78-45c-20(1) (1979 & 1985 Supp.); VT. STAT. ANN. tit. 15 § 1048(a) (1974 & 1985 Supp.).

<sup>180</sup> ALASKA STAT. § 25-30-190(a) (1985); COLO. REV. STAT. ANN. § 14-13-121(1) (1970 & 1985 Supp.); MO. ANN. STAT. § 452.535(1) (Vernon 1977) (which also provides that the transcripts and other documents *may* be forwarded, and expressly provides for discretion of the assisting court).

so or who cannot be served or if it appears that the order to appear will be ineffective by itself.<sup>181</sup> Vermont omits subsection (c), which allows the requested state to order a person in its borders to appear in a custody proceeding in another state.<sup>182</sup>

Some jurisdictions require prepayment for preservation and forwarding of documents under section 21.<sup>183</sup> Alaska and Colorado require the court of another state requesting court records and documents pursuant to section 22 to send payment before they will be sent. Colorado will pay for the costs if they are assessed against a party and that party is determined by the Colorado court to be indigent.<sup>184</sup> Michigan and Oregon omit section 22.

Ohio, Oregon and South Dakota have omitted section 23, which relates to international application. The District of Columbia, Florida, New Jersey, New Mexico, North Carolina, Ohio, Oregon, Vermont, Virginia, and Washington have not promulgated section 24, relating to calendar priority. Florida, Minnesota, Mississippi, Nebraska, New Mexico, Ohio, Oregon, Tennessee, Texas, Utah, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming have chosen not to promulgate section 25, which relates to severability.<sup>185</sup>

#### V. COMPARISON OF THE UNIFORM CHILD CUSTODY JURISDICTION ACT AND THE PARENTAL KIDNAPPING PREVENTION ACT<sup>186</sup>

The jurisdictional criteria of the Parental Kidnapping Prevention Act<sup>187</sup> and the Uniform Child Custody Jurisdiction Act<sup>188</sup> are similar.<sup>189</sup> Section 2 of the UCCJA<sup>190</sup> and subsection (b) of the

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<sup>181</sup> CAL. CIV. CODE § 5169 (3) (West 1983); WASH. REV. CODE ANN. §§26, 27, 200(3) (1961 & 1985 Supp.).

<sup>182</sup> VT. STAT. ANN. § 1048 (1974 & 1985 Supp.).

<sup>183</sup> ALASKA STAT. § 25-30-200 (1985); MO. ANN. STAT. § 452.540 (Vernon 1977).

<sup>184</sup> ALASKA STAT. § 25-30-210 (1985); COLO. REV. STAT. § 14-13-123 (1970 & 1985 Supp.).

<sup>185</sup> UNIF. CHILD CUSTODY JURISDICTION ACT § 25, 9 U.L.A. 111-170 (1979).

<sup>186</sup> For a more elaborate comparison of these acts, see *infra* Section VI.

<sup>187</sup> Parental Kidnapping Prevention Act § 8, 28 U.S.C. § 1738A (1982).

<sup>188</sup> 9 U.L.A. 111-170 (1979). For a discussion of the differing state variations, see *supra* Section IV.

<sup>189</sup> This comparison is of 28 U.S.C. 1738A and 9 U.L.A. 111-170.

<sup>190</sup> UNIF. CHILD CUSTODY JURISDICTION ACT § 2, 9 U.L.A. 119-120 (1979).

PKPA<sup>191</sup> define terms. The PKPA defines a "child" as a person under eighteen years of age.<sup>192</sup> The UCCJA does not define the term "child" in its definitional section;<sup>193</sup> however, section 21 provides for the preservation of documents prepared or submitted pursuant to the Act until the child has reached the age of eighteen or twenty-one years, depending on the local law defining majority.<sup>194</sup> The definitions of "contestant" in the two acts are basically the same.<sup>195</sup> In defining "custody determination," the PKPA expressly includes permanent and temporary orders, while section 2(2) of the UCCJA includes any "court decision and court orders and instructions."<sup>196</sup> The UCCJA expressly excludes from the scope of "custody determination" decisions concerning child support or other matters relating to the monetary obligation of any person, whereas the PKPA contains no such language.<sup>197</sup> The UCCJA defines "custody proceeding" to include any proceeding in which custody is an issue; the PKPA does not define it at all.<sup>198</sup> The PKPA does not define "decree" or "custody decree," whereas the UCCJA does.<sup>199</sup> There are no significant differences in the definitions of "home state,"<sup>200</sup> "modification" or "modification de-

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<sup>191</sup> 28 U.S.C. § 1738A(b) (1982).

<sup>192</sup> 28 U.S.C. § 1738A(b)(1) (1982).

<sup>193</sup> UNIF. CHILD CUSTODY JURISDICTION ACT § 2, 9 U.L.A. 119-120 (1979).

<sup>194</sup> *Id.* at § 21, 9 U.L.A. 165 (1979); CHILD CUSTODY, *supra* note 97, ch. 3, app. A, at pp. 3A-157 to -159 (1983) (eight states provide for an age above eighteen in their version of UCCJA § 21. The effect of the Supremacy Clause of the United States Constitution on the operation of federal and state statutes is considered *infra* Sections VI and VII.

<sup>195</sup> 28 U.S.C. § 1738A(b)(2); UNIF. CHILD CUSTODY JURISDICTION ACT § 2(1), 9 U.L.A. 120 (1979).

<sup>196</sup> 28 U.S.C. § 1738A(b)(3); UNIF. CHILD CUSTODY JURISDICTION ACT § 2(2), 9 U.L.A. 120 (1979).

<sup>197</sup> UNIF. CHILD CUSTODY JURISDICTION ACT ] 2(2), 9 U.L.A. 120 (1979); 28 U.S.C. § 1738A(b)(3).

<sup>198</sup> UNIF. CHILD CUSTODY JURISDICTION ACT § 2(3), 9 U.L.A. 120 (1979).

<sup>199</sup> *Id.* at § 2(4), 9 U.L.A. 120 (1979).

<sup>200</sup> 28 U.S.C. 1738A(4) and UNIF. CHILD CUSTODY JURISDICTION ACT § 2(5), 9 U.L.A. 120 (1979). Any difference in the definition of "home state" would have a significant impact on the results of cases. For discussion of differences in case results when the UCCJA versus the PKPA is applied, see *infra* Section VI. In litigation, it would be significant to note any difference in the definition of "home state" in the statutes of the relevant jurisdictions. See discussion comparing the various versions of the UNIFORM CHILD CUSTODY JURISDICTION ACT, *supra* Section IV.

cree,"<sup>201</sup> "person acting as a parent,"<sup>202</sup> "physical custody,"<sup>203</sup> and "state."<sup>204</sup>

Section 3 of the UCCJA and the PKPA [28 U.S.C. 1738A(c)] establish jurisdictional criteria to guide individual courts.<sup>205</sup> Under both acts, "home-state" jurisdiction obtains when the child has been living with a parent or a person acting as a parent in the state for six consecutive months, temporary absences not being deducted from the count, as of the date of the proceeding's commencement.<sup>206</sup> In both acts, "home-state" jurisdiction also obtains if a state has been the home state of the child for six months prior to the date on which a custody proceeding is commenced, even when a child has been absent from the state due to his removal or retention by a person claiming his custody, or so long as a parent, or person acting as a parent, continues to live in the forum state.<sup>207</sup> The PKPA clearly makes "home-state" jurisdiction superior to other bases of jurisdiction,<sup>208</sup> while the UCCJA does not appear to do so as clearly.<sup>209</sup> The PKPA provides for significant connection jurisdiction<sup>210</sup> only if no other state would have "home-state" jurisdiction<sup>211</sup>

UCCJA sections 13 and 14, relating to recognition and modification of other state custody decrees, correspond to 28 U.S.C. §§1738A(a) and (f). Essentially, a court is not to exercise jurisdiction if there is a proceeding pending or likely to become pending in another state, so long as it appears that the court exercising juris-

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<sup>201</sup> 28 U.S.C. § 1738A(b)(5); UCCJA §§ 2(7), 7.

<sup>202</sup> 28 U.S.C. § 1738A(b)(6); UCCJA § 2(9).

<sup>203</sup> 28 U.S.C. 1738A(b)(7); UCCJA § 2(8).

<sup>204</sup> 28 U.S.C. § 1738A(b)(8); UCCJA § 2(10).

<sup>205</sup> 28 U.S.C. § 1738A(c); UCCJA § 3. For a discussion of these provisions, see *supra* Sections II and III.

<sup>206</sup> 28 U.S.C. § 1738A(c)(2)(A)(i); UCCJA § 3(a)(1)(i).

<sup>207</sup> 28 U.S.C. § 1738A(c)(2)(A)(ii); UCCJA § 3(a)(1)(ii).

<sup>208</sup> 28 U.S.C. § 1738A(c)(2)(B)(i); see also CHILD CUSTODY, *supra* note 97, § 4.02[3][c], at 4-35 to -44.

<sup>209</sup> UCCJA § 3; see CHILD CUSTODY, *supra* note 97, at 4-35 to -44.

<sup>210</sup> 28 U.S.C. § 1738A(c)(2)(B); UCCJA § 3(a)(2). The significant connection criterion for jurisdiction is discussed *supra* Section II.

<sup>211</sup> 28 U.S.C. § 1738A(c)(2)(B)(ii); see also CHILD CUSTODY, *supra* note 97, § 4.03[1], at 4-65.

diction is doing so properly under each act.<sup>212</sup> More detailed discussion and comparison of the UCCJA and the PKPA with regard to initial jurisdiction and jurisdiction to modify is presented in Sections II, III, VI and VIII of this article, respectively.

The UCCJA provides more detailed instructions to a court than does the PKPA.<sup>213</sup> The PKPA encourages courts to give priority to custody matters,<sup>214</sup> whereas section 24 of the UCCJA, a section omitted by several states, provides that calendar priority shall be given to custody cases upon the request of a party to a proceeding that raises a question of the existence or exercise of jurisdiction.<sup>215</sup> The PKPA authorizes assessment of all fees and costs against the losing party in a case, if that party is found to have engaged in wrongful conduct (e.g., abduction or interference with custodial rights) or if the court deems it appropriate.<sup>216</sup> The UCCJA authorizes assessment of costs in cases of hearings and studies in another state,<sup>217</sup> orders to appear,<sup>218</sup> cases of persons violating a custody decree of another state,<sup>219</sup> cases of appearance with the child<sup>220</sup> in which jurisdiction is declined by reason of the party's conduct,<sup>221</sup> or those of clearly inappropriate or inconvenient forum.<sup>222</sup> The details of procedure in custody jurisdiction cases appear only in the UCCJA.<sup>223</sup> This is to be expected inasmuch as

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<sup>212</sup> 28 U.S.C. § 1738A(g); UCCJA § 6(a).

<sup>213</sup> See, e.g., UCCJA § 6(b), which provides that the court shall examine the pleadings and other information required by section 9 (which mandates that contestants inform the court of known proceedings past and present) and that the court consult the child custody registry provided for in UCCJA § 16. Both UCCJA §§ 6(B) and 6(C) require communication with the foreign court if the court knows, or has reason to believe, another proceeding is pending.

<sup>214</sup> 28 U.S.C. § 1738A, as amended in Pub. L. No., 96-611, § 8 (c)(1), 94 Stat. 3571 (1980).

<sup>215</sup> UNIF. CHILD CUSTODY JURISDICTION ACT § 24.

<sup>216</sup> Pub. L. No. 96-611, § 8(c)(2), 94 Stat. 3571.

<sup>217</sup> UNIF. CHILD CUSTODY JURISDICTION ACT § 19.

<sup>218</sup> *Id.*

<sup>219</sup> *Id.* at § 15(b).

<sup>220</sup> *Id.* at § 11(c).

<sup>221</sup> *Id.* at § 8(c).

<sup>222</sup> *Id.* at § 7(g).

<sup>223</sup> For a discussion of section 6 of the Uniform Child Custody Jurisdiction Act, see *supra* notes 212-13 and accompanying text. See also UCCJA § 9 (information under oath to be submitted to the court.) Given the fact that family law is a subject traditionally con-

family law is traditionally a matter of state concern. Due process, notice and opportunity to be heard are addressed in both the PKPA and the UCCJA.<sup>224</sup> The PKPA requires notice and opportunity to be heard for contestants, parents whose parental rights have not been terminated, and any person with physical custody of the child.<sup>225</sup> The requirements are the same in the UCCJA,<sup>226</sup> however the UCCJA addresses these requirements in greater detail for those persons who are outside the state.<sup>227</sup> In such cases notice must be given in a manner reasonably calculated to reach such persons. Four options for delivery are provided in the UCCJA: (1) personal delivery; (2) delivery in the manner prescribed by the law in the place where the service is made; (3) certified mail; or (4) as directed by the court, including publication if other means are ineffective.<sup>228</sup> Notice is not required for cases in which the party submits to the jurisdiction of the court.<sup>229</sup>

The UCCJA, not the PKPA, provides specific criteria for declining jurisdiction on the basis of forum non conveniens<sup>230</sup> and misconduct, such as abduction, by one of the parties.<sup>231</sup> A court may decline to exercise jurisdiction pursuant to either of these bases;<sup>232</sup> the decision to decline jurisdiction on these bases is within the discretion of the court. Section 7 of the UCCJA (inconvenient forum) allows the court to decline jurisdiction pursuant to a motion of a party, motion of a representative of a child or on its own motion.<sup>233</sup> The factors to be weighed include:

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trolled by state law, the details of procedure and substance essentially would not be appropriate in a federal statute such as the PKPA.

<sup>224</sup> 28 U.S.C. § 1738A(3); UCCJA §§ 4, 5. A discussion of the requirements of due process and their effect on jurisdiction in custody cases is presented *infra* notes 283-338 and accompanying text.

<sup>225</sup> 28 U.S.C. § 1738A(e).

<sup>226</sup> UNIF. CHILD CUSTODY JURISDICTION ACT § 4, 9 U.L.A. (1979)

<sup>227</sup> *Id.* at § 5.

<sup>228</sup> *Id.* at § 5(a).

<sup>229</sup> *Id.* at § 5(d).

<sup>230</sup> *Id.* at § 7.

<sup>231</sup> *Id.* at § 8.

<sup>232</sup> *Id.* at §§ 7(a), 8(a). Of course, both sections assume that the jurisdiction requirements of § 3 have been met before the court's discretion to decline jurisdiction is even triggered.

<sup>233</sup> UNIF. CHILD CUSTODY JURISDICTION ACT § 7(b), 9 U.L.A. (1979).

(1) If another state is or recently was the child's home state; (2) if another state has a closer connection with the child and his family or with the child and one or more of the contestants; (3) if substantial evidence concerning the child's present or future care, protection, training and personal relationships is more readily available in another state; (4) if the parties have agreed on another forum which is no less appropriate; and (5) if the exercise of the jurisdiction by a court of this state would contravene any of the purposes stated in section 1.<sup>234</sup>

Section 7 also provides for inter-court communications,<sup>235</sup> gives some latitude to the court so that dismissal of the action will not result in further jurisdictional problems,<sup>236</sup> provides for punishment by requiring payment of the other parties' costs in cases in which a party has knowingly tried to bring an action in an inappropriate forum,<sup>237</sup> and recognizes the divisible divorce.<sup>238</sup> Section 8 of the UCCJA also provides for payment of another party's expenses in appropriate cases.<sup>239</sup> With regard to courts' ability to take action in cases of a contestant's having violated a custody decree, section 8 provides that the court *shall not exercise* jurisdiction in cases in which a party has improperly removed or retained the child from the lawful physical custodian unless it is in the best interests of the child to do so.<sup>240</sup> The court has more discretion in cases of other types of violations of custody decrees.<sup>241</sup>

## VI. THE PKPA, THE UCCJA, AND PREEMPTION

Inasmuch as the Parental Kidnapping Prevention Act is a federal law and the Uniform Child Custody Jurisdiction Act is state law, a primary question is the extent to which the PKPA preempts the operation of a given state's UCCJA, pursuant to the

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<sup>234</sup> *Id.* at § 7(c).

<sup>235</sup> *Id.* at § 7(d), (h), (i).

<sup>236</sup> *Id.* at § 7(e).

<sup>237</sup> *Id.* at § 7(g).

<sup>238</sup> *Id.* at § 7(f).

<sup>239</sup> *Id.* at § 8(c).

<sup>240</sup> *Id.* at § 8(b) (emphasis added).

<sup>241</sup> *Id.* at § 8(a), (b).

Supremacy Clause of the United States Constitution.<sup>242</sup> The United States Supreme Court, in the case of *Maryland v. Louisiana*,<sup>243</sup> provided guidelines for inquiry concerning the Supremacy Clause. The Court noted that the test for establishing congressional intent to preempt may be shown by: 1) a scheme of federal regulation which is so pervasive that the inference arises that Congress left no room for state action in the particular area; 2) the existence of a federal interest so dominant as to preclude state law on the same subject; 3) a showing that operation of state law in the area would produce results inconsistent with the objectives of the federal law; 4) a situation in which compliance with both federal and state law is impossible, to the extent that this situation exists; 5) a showing that the state law presents an obstacle to the accomplishment of the full objectives and purposes of Congress.<sup>244</sup> It does not appear that Congress intended, on the basis of any of these criteria, to have the PKPA preempt the state UCCJAs.

It is clear, for example, from the coverage of the two statutes that preemption was not intended; the PKPA omits matters covered in the UCCJA.<sup>245</sup> To indicate a few examples of matters not covered in the PKPA, but covered in the UCCJA, the PKPA does not establish a federal forum non conveniens doctrine,<sup>246</sup> nor does it even mention a registry of custody decrees and proceedings,<sup>247</sup> nor procedures for interstate inter-court communications.<sup>248</sup>

The law of child custody, like other areas of family law, is one

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<sup>242</sup> U. S. CONST. art VI, § 2.

<sup>243</sup> 451 U.S. 725, 746-47 (1981).

<sup>244</sup> *Id.*

<sup>245</sup> See the discussion and comparison *infra* Section V; see also Coombs, *supra* note 5, at 822-834.

<sup>246</sup> See UNIF. CHILD CUSTODY JURISDICTION ACT § 7 (forum non conveniens provision).

<sup>247</sup> *Id.* at § 16.

<sup>248</sup> *Id.* at §§ 6, 7. Other examples of provisions found in the UCCJA but missing from the PKPA include the obligation of a contestant to furnish information to the court, *id.* at § 9, provisions relating to the taking of testimony and conducting of hearings in another state, *id.* at §§ 18, 19, and orders to appear and to appear with the child, *id.* at § 11. Professor Coombs gives an excellent comparative analysis of the listed purposes of the PKPA and the UCCJA in the context of the issue of federal occupation of the legislative field. Coombs, *supra* note 5, at 823-25. Coombs also gives an excellent analysis of the legislative history to show that the PKPA was enacted with the intent to have the law play only a limited role. *Id.*

which is traditionally governed by state law.<sup>249</sup> The United States Supreme Court has stated: "Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the [state] legislature."<sup>250</sup> It has reiterated: "[t]he whole subject of the domestic relations of husband and wife . . . belongs to the laws of the states and not to the laws of the United States."<sup>251</sup>

The congruence of the purposes of the PKPA and the UCCJA<sup>252</sup>

<sup>249</sup> *McCarty v. McCarty*, 453 U.S. 210, 220 (1981); *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979); *In re Burrus*, 136 U.S. 586, 593-94 (1890).

<sup>250</sup> *Maynard v. Hill*, 125 U.S. 190, 205 (1888). For a discussion of the extent to which this is true, see *FAMILY LAW*, *supra* note 54, at ch.2.

<sup>251</sup> *McCarty*, 453 U.S. at 220 (quoting *Hisquierdo*, 439 U.S. at 581 and *In re Burrus*, 136 U.S. at 593-94); see also *Boddie v. Conn.*, 401 U.S. 371, 376 (1971); *Labine v. Vincent*, 401 U.S. 532, *reh'g denied*, 402 U.S. 990 (1971).

<sup>252</sup> Professor Coombs states that "each of the stated purposes [of the PKPA] is a very close paraphrase of one of the nine stated purposes of the UCCJA." Coombs, *supra* note 5, at 824. Section 1 of the Act provides:

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

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

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

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

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

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

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

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

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

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

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

indicates that the operation of the state statutes is not likely to produce results inconsistent with the objectives of the federal law.<sup>253</sup> Certainly, one can hardly say that the UCCJA, in its purpose to eliminate inconsistencies in state law relating to jurisdiction over child custody, and in preventing child-snatching and duplicative and continuous litigation, could be an obstacle to the accomplishment of the full objectives and purposes of Congress in

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section.

UNIF. CHILD CUSTODY JURISDICTION ACT § 1, 9 U.L.A. 116-17 (179). The general purposes of the Parental Kidnapping Prevention Act, Pub. L. No. 96-611, 94 Stat. 3569 (1980), are set forth in section 7(c) of that Act and are correlated with the corresponding subsections of UCCJA § 1(a) below in order to illustrate the similarities in the stated purposes of the two acts:

PKPA §7(c)	UCCJA §1(a)
(1)	(2)
(2)	(8)
(3)	(7)
(4)	(4)
(5)	(1)
	(5)

<sup>253</sup> The three UCCJA purposes to which there is no PKPA match are not inconsistent with federal law. UCCJA § 1(a)(3) states that a general purpose of the UCCJA is to "assure that litigation concerning the custody of a child takes place ordinarily in the state with which the child and his family have the closest connection and where significant evidence . . . is most readily available, and that courts of this state decline the exercise of jurisdiction when the child and his family have a closer connection with another state." This is consistent with the jurisdictional criteria of the PKPA, 28 U.S.C. 1738A(c)(2)(A), (B) (1982) and with Pub. L. No. 96-611, § 7(c)(1), 94 Stat. 3569 (1980). UCCJA §1(a)(5) seeks to "deter abductions and other unilateral removals of children undertaken to obtain custody awards." The consistency of these purposes is evident. Under the heading of "Findings and Purposes," Pub. L. No. 96-611, §§ 7(a)(3), 7(b), 94 Stat. 1368-69 (1980), the PKPA leaves no doubt that child-snatching is a major evil that the Act is designed to prevent. Furthermore, § 10(a) of the PKPA applies the criminal sanctions of 18 U.S.C. § 1073 [flight to avoid prosecution or giving testimony] to cases involving child-snatching by parents. UCCJA § 1(a)(9) states that one purpose of the Act is to "make uniform the law of those states which enact it." This purpose is specific to the UCCJA, which was developed to be adopted by many jurisdictions which prior to their adoption of the Act were inconsistent with each other as to their law and practice regarding parental child-snatching.

Moreover, the PKPA is a full faith and credit statute, not a uniform act. This would suggest that it was not designed to make the state laws uniform, but rather to aid in the enforcement of state law and state decrees.

In addition to the additions to titles 18 and 28 of the United States Code, the PKPA contains provision for use of the Parent Locator Service, 42 U.S.C. §§ 654 (17), 663 (1976 & West Supp. 1985).

the PKPA.<sup>254</sup> It is possible that in a given specific case the application of the PKPA and the UCCJA to the same set of facts might produce different results,<sup>255</sup> and some courts have so held.<sup>256</sup> In one New York case, the mother, who lived in Connecticut, had custody of the son, age 14, pursuant to a New York custody decree. The child had run away from his mother's home and had gone to his father in New York. The New York court noted that it had jurisdiction over the custody question pursuant to UCCJA §3(a)(2), with its criteria such as a significant connection between state and parent or one contestant and the child as well as substantial evidence regarding the child's present and future care and protection, but felt that the PKPA "pre-empted the law with regard to the requisite contacts required before jurisdiction can be exercised in custody matters."<sup>257</sup> Since Connecticut was the "home state" of the child, the New York court reasoned that the latter lacked subject matter jurisdiction.<sup>258</sup>

Interestingly, it appears that the New York court had continuing jurisdiction, pursuant to the UCCJA, since it had awarded the initial custody decree. Nevertheless, the New York court held that it actually lacked continuing jurisdiction under the PKPA, 28 USC § 1738A(d), because Connecticut was now the "home state." PKPA subsection (d) provides that continuing jurisdiction is subject only to the requirements that: A) the original decree was made consistently with the provisions of the PKPA; B) the court continues to have jurisdiction "under its own state law;" and C) the state remains the residence of the child or of any contestant. The New York court might as well have been able to prevent the Connecticut court from asserting jurisdiction in the case, on the basis of §§13 and 14 of the UCCJA. Sections 13 and 14 prevent a state from modifying a custody decree of another state that has made its

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<sup>254</sup> Thus if we take the stated purposes of the PKPA as true, the fact that each is mirrored in a subsection of the UCCJA indicates congruence of purpose.

<sup>255</sup> *E.g.*, *Mebert v. Mebert*, 111 Misc. 2d 500, 444 N.Y.S.2d 834 (1981); *cf.* William R.B. v. Cynthia B., 108 Misc. 2d 920, 439 N.Y.S.2d 265 (1981) (deferring to continuing jurisdiction of Connecticut). These cases are discussed *infra* notes 256-260 and accompanying text.

<sup>256</sup> See cases cited *supra* note 255.

<sup>257</sup> *Mebert*, 111 Misc. 2d at 508, 444 N.Y.S. 2d 834, 839-40.

<sup>258</sup> *Id.*

determination pursuant to statutes substantially similar to the UCCJA, unless that latter state no longer has jurisdiction or has declined to exercise it.

In another New York case,<sup>259</sup> an action to modify a Connecticut custody decree, a New York court deferred to the continuing jurisdiction of Connecticut. The New York court found that, although New York was now the "home state" of the child, the PKPA confers continuing jurisdiction upon the state that issued the decree. This decision is consistent with the UCCJA. Sections 13 and 14 of that Act make it clear that jurisdiction to modify a decree of another state, even if it exists, *shall* not be exercised unless the rendering court no longer has jurisdiction based on law consistent with the Act or has declined to exercise it. Strangely, the New York court determined that the Connecticut court did not appear to "have jurisdiction to modify its decree, and that this [New York] court has jurisdiction. However, application of the . . . [PKPA] alters this result . . . ." It is true that New York had jurisdiction. Apart from that conclusion, however, if the Connecticut courts no longer had jurisdiction, the New York court's decision to defer to Connecticut jurisdiction, because it felt that the PKPA compelled it to do so, is an erroneous reading of both the PKPA and the UCCJA. UCCJA §§ 13 and 14 require that, if the initial decree state retains jurisdiction, it must decline to exercise it before another state with jurisdiction (New York in this case) exercises its own jurisdiction. Moreover, the PKPA requires that a state have jurisdiction before another state with jurisdiction will be prevented from modifying the former decree.<sup>260</sup>

A situation in which there may be inconsistent results under the two statutes is presented in the following hypothetical. Suppose that husband and wife lived in state A during a ten-year marriage to which two children were born. After husband and wife separated, wife removed the children to a city just across the border in state B, ten miles from their former marital domicile. Husband remained in their former domicile. If six months later, husband filed

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<sup>259</sup> William R.B. v. Cynthia B., 108 Misc. 2d 920, 439 N.Y.S.2d 265 (1981).

<sup>260</sup> UNIF. CHILD CUSTODY JURISDICTION ACT, §§ 13, 14; PKPA, 28 U.S.C. § 1738A(d) (1982).

an action for divorce and custody in state A, where the family had lived for ten years, there might be a question under the UCCJA as to whether state A would have jurisdiction under §3(a)(2) (parent and child have significant connection with state and there remains substantial evidence regarding child's present and future well-being) or whether state B would have jurisdiction pursuant to §3(a)(1) (home-state). The PKPA clearly resolves this problem in favor of state B.<sup>261</sup>

Generally, the problem of preemption does not arise, but the preemption perspective would require the PKPA to control in cases of inconsistency with state law.<sup>262</sup> In reality, most cases attempt to reach a decision that is consistent with both statutes. Some courts use language suggesting inconsistency and preemption by the federal act when this concern is not really necessary. This problem is exemplified by the analyses of *Mebert v. Mebert* and of *William R.B. v. Cynthia B.*<sup>263</sup> discussed above.<sup>264</sup> The New York decision in *Blazek v. Blazek*,<sup>265</sup> however, applies the continuing jurisdiction notion found in the PKPA, 28 U.S.C. 1738A(d), and states that the Act preempts the field. In reality, both the PKPA, 28 U.S.C. §1738A(d), and UCCJA § § 13 and 14 provide that if the

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<sup>261</sup> Compare Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A(c)(2) (home state—no mention of significant connection) with UNIF. CHILD CUSTODY JURISDICTION ACT § 3(a)(1), (2).

<sup>262</sup> *Blazek v. Blazek*, 119 Misc. 2d 141, 462 N.Y.S.2d 557, 558 (1983); see also Foster & Freed, *Child-Custody Decrees—Jurisdiction*, N.Y.L.J., April 24, 1981, at 1, col. 1 (cited and discussed in Coombs, *supra* note 5, at 823 n.648 and accompanying text. Notwithstanding the errors made by the courts in the *Mebert* and *William R.B.* cases, they were both correct, from what might be called the preemptionist point of view, in their determination that the PKPA must control in their given situations, in situations in which, as the courts saw it, compliance with both the UCCJA and the PKPA was not possible, in that the two acts called for differing results. CHILD CUSTODY, *supra* note 97, § 4.01[3], at 4-24 ("The [PKPA] has wrought sweeping changes in jurisdiction in interstate custody proceedings and establishes a policy of federal preemption.").

<sup>263</sup> *Mebert*, 111 Misc. 2d 500, 444 N.Y.S.2d 834 (1981); *William R.B.*, 108 Misc. 2d 920, 439 N.Y.S.2d 265 (1981); *Pierce v. Pierce*, 197 Mont. 16, 640 P.2d 899, 903-04 (1982) (In a suit to modify a foreign custody decree, the Montana Supreme Court applied the PKPA and the UCCJA to reverse the lower court, which had found that Montana lacked jurisdiction. The court used the state law together, holding that the PKPA incorporates the UCCJA by reference and elevates state law to a federal level.).

<sup>264</sup> See discussion *supra* notes 255-59 and accompanying text.

<sup>265</sup> *Blazek v. Blazek*, 119 Misc. 2d 141, 462 N.Y.S.2d 557.

state of initial decree no longer has or declines to assert jurisdiction under its own law, another state with jurisdiction may assert it. In *Blazek*, the New York court exercised jurisdiction based on the "significant connection" jurisdiction section (UCCJA §3(a)(2)) of New York's version of the UCCJA, and the PKPA, 28 USC §1738A (c)(2)(B)(i), even though the PKPA provides that the significant connection criterion may be applied only where there is no home state, and Indiana was in fact the home state of the child.<sup>266</sup> The more appropriate section to have applied was the continuing jurisdiction section, cited initially. This section provides that once a custody decision has been made, jurisdiction continues in the issuing court as long as the child or one of the contestants remains a resident of the state.<sup>267</sup> This position is consistent with the UCCJA sections on modification of an initial custody decree.<sup>268</sup> Some states take the position that the PKPA and the UCCJA accommodate each other. Indeed, some have held that the PKPA incorporates the UCCJA by reference and elevates state law to a federal level.<sup>269</sup>

It is true that the law of many states has changed since the promulgation of the PKPA. New Mexico provides a common example: "[t]he long line of New Mexico cases which permits a New Mexico court to modify an out-of-state issued child custody decree based solely on the physical presence of the child and a substantial change of circumstances is preempted by the PKPA."<sup>270</sup> In reality, the UCCJA requires the same result.<sup>271</sup> It appears that, generally, the need for preemption is not well-established, and most situations may be resolved efficiently and consistently under both the PKPA and the UCCJA.

By contrast to the PKPA/UCCJA preemption question, the In-

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<sup>266</sup> *Id.* at 142, 462 N.Y.S.2d at 558. The PKPA, 28 U.S.C. § 1738A(c)(2)(B)(i), provides the significant connection jurisdiction obtains when ". . . it appears that no other State would have jurisdiction under subparagraph (A) [home state] . . . ."

<sup>267</sup> 28 U.S.C. § 1738A(c)(2)(E).

<sup>268</sup> UNIF. CHILD CUSTODY JURISDICTION ACT §§ 13, 14. The jurisdictional criteria of state law are important in both initial and modification proceedings because of subsection (C)(1) of the PKPA, which provides that the court of a state has jurisdiction if "such court has jurisdiction under the law of such State . . . ."

<sup>269</sup> *Pierce v. Pierce*, 640 P.2d 899 (Mont. 1982).

<sup>270</sup> *State ex rel. Valles v. Brown*, 97 N.M. 327, 330, 639 P.2d 1181, 1184 (1981).

<sup>271</sup> UNIF. CHILD CUSTODY JURISDICTION ACT §§ 13, 14.

dian Child Welfare Act of 1978<sup>272</sup> presents a strong case for federal preemption. The Indian Child Welfare Act does not necessarily apply to custody after divorce,<sup>273</sup> but it does provide: "An Indian tribe shall have jurisdiction, exclusive as to any state, over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe . . . ."<sup>274</sup>

Applying the criteria of *Maryland v. Louisiana*<sup>275</sup> to the Indian Child Welfare Act, we find a scheme of federal regulation concerning native Americans which encompasses all of title 25 of the United States Code. We also find a special constitutional mandate<sup>276</sup> that gives rise to a federal interest which may be considered dominant.<sup>277</sup> The language of the Act indicates that state control over native American children has been unsatisfactory<sup>278</sup> and Indian tribe jurisdiction shall be exclusive as to any state.<sup>279</sup> The case law indicates the necessity of compliance with federal law in this area.<sup>280</sup> While both the Indian Child Welfare Act and the UCCJA were intended to set up a special set of procedures to protect a specific class of children,<sup>281</sup> the PKPA, by contrast, was designed

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<sup>272</sup> 25 U.S.C. §§ 1901 - 1923 (1982).

<sup>273</sup> 25 U.S.C. § 1903(1).

<sup>274</sup> 25 U.S.C. § 1911(a). Section 1903(1) defines "child custody proceeding" to include foster care placement, termination of parental rights, pre-adoptive and adoptive placement. *See also* Malatterre v. Malatterre, 293 N.W. 2d 139, 145 (N.D. 1980) ("from the definition of the term 'child custody proceeding' as found in the Act, it appears that [the Indian Child Welfare Act of 1978] does not apply to the award of custody of a child or children to one or the other parent as the result of a divorce proceeding.").

<sup>275</sup> *Maryland v. Louisiana*, 451 U.S. at 725. This case and the criteria it presents for determination on preemption are discussed *supra* notes 243-44 and accompanying text.

<sup>276</sup> 25 U.S.C. § 1901(1).

<sup>277</sup> 25 U.S.C. § 1901 (congressional findings).

<sup>278</sup> 25 U.S.C. § 1901(5).

<sup>279</sup> 25 U.S.C. § 1911(a).

<sup>280</sup> *In re K.A.B.E.*, 325 N.W.2d 840, 842 (S.D. 1982) ("As we have so recently stated, the provisions of the Indian Child Welfare Act of 1978 (ICWA), . . . must be complied with in Indian child custody proceedings." (citations omitted)); *E.A. v. State*, 623 P.2d 1210, 1215 n.13 (Alaska 1981) ("Where the Act applies, the state court has a duty to exercise its jurisdiction over actions brought thereunder, since to decline jurisdiction in such a case would violate the supremacy clause of the federal constitution." (citations omitted)); Nevada's version of the UCCJA makes several references to and incorporations of the ICWA. NEV. REV. STAT. §§ 125A.020 - .250 (1983).

<sup>281</sup> *See* 25 U.S.C. §§ 1901, 1902; *see also* 1978 U. S. CODE CONG. & AD. NEWS, vol. 6, at 7530-68.

to fill the lacunae left by the operation of existing state law and help promote the same purposes as state law.<sup>282</sup>

Thus, the Supremacy Clause does not require federal preemption in the child custody setting; the PKPA and the various state UCCJAs function in a correlative and complementary fashion.

## VII. FULL FAITH AND CREDIT, DUE PROCESS, THE UNIFORM CHILD CUSTODY JURISDICTION ACT AND THE PARENTAL KIDNAPPING PREVENTION ACT

Before the advent of the recently enacted Uniform Child Custody Jurisdiction Act<sup>283</sup> and the Parental Kidnapping Prevention Act,<sup>284</sup> the application of the Full Faith and Credit Clause of the Constitution<sup>285</sup> to custody cases was unclear.<sup>286</sup> The United States Supreme Court has pointedly avoided the issue, even when deciding the four cases reaching the Court that seemed to require a decision on custody and interstate recognition.<sup>287</sup> The Court appeared more concerned about noting what full faith and credit did not cover, rather than what it did cover.<sup>288</sup> Full faith and credit was not owed a custody determination unless jurisdiction had, in

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<sup>282</sup> See Coombs, *supra* note 5, at 825-826.

<sup>283</sup> UNIF. CHILD CUSTODY JURISDICTION ACT, 9 U.L.A. 111-170 (1979). Legislation similar to the UCCJA has been adopted in at least forty-nine states. Even Massachusetts, the last "hold-out" among the states, has promulgated a law substantially similar to the UCCJA. MASS. GEN. LAWS. ANN. § 209B (West 1977).

<sup>284</sup> Parental Kidnapping Prevention Act, Pub. L. No. 96-611, §§ 6-10, 94 Stat. 3568-73 (Dec. 28, 1980). The most pertinent part for purposes of this section is found in 28 U.S.C. 1738A.

<sup>285</sup> U. S. CONST. art. IV § 1; 28 U.S.C. 1738(A). An introductory and general discussion of this topic is presented *infra* Section I.

<sup>286</sup> See Ratner, *supra* note 3, at 807 ("The protection afforded a custody decree by the full faith and credit clause is uncertain."); Coombs, *supra* note 5, at 794 ("In response to the lack of Supreme Court guidance, state courts have adopted various interpretations of the full faith and credit clause and statute." (footnote omitted)); CHILD CUSTODY, *supra* note 97, §§ 5, 5.01 [1], at 5-5 to -16.

<sup>287</sup> New York *ex rel.* Halvey v. Halvey, 330 U.S. 610 (1947); May v. Anderson, 345 U.S. 528 (1953); Kovacs v. Brewer, 356 U.S. 604 (1958); Ford v. Ford, 371 U.S. 187 (1962). For an examination of these cases, see Coombs, *supra* note 5, at 793-798; KATZ, *supra* note 21, at 56-61; Ratner, *supra* note 3, at 798-807; Comment, *Ford v. Ford: Full Faith and Credit to Child Custody Decrees?*, 73 YALE L.J. 134 (1963).

<sup>288</sup> KATZ, *supra* note 21, at 57.

the first instance, been proper, and unless there had been no changed circumstances affecting the best interests of the child; a custody decree was thus essentially transitory in nature.<sup>289</sup>

Of course, a custody decision must be made upon proper jurisdiction before it is owed full faith and credit. Except in *May v. Anderson*,<sup>290</sup> the Court has eschewed any clarification of what sort of jurisdictional bases would be sufficient in a custody case. *May v. Anderson* held, in a plurality decision, that personal jurisdiction over the parties is required in a custody matter. Justice Frankfurter's concurring opinion in *May v. Anderson* has had significant impact on state law relating to custody disputes and has exacerbated division among the state courts and the proliferation of child custody cases.<sup>291</sup> Justice Frankfurter argued that the Full Faith and Credit Clause and its principles of federalism were not as important as the primary state role in serving the best interests of children in a custody setting. He felt that state custody decisions ought to be followed by other states on the basis of comity, not full faith and credit.<sup>292</sup> The state courts' tendency to favor their own jurisdiction, coupled with the "best interest of the child" as a jurisdictional issue, encouraged relitigation of custody cases.

*May v. Anderson* and the Court's general avoidance of clarification on the related issues of full faith and credit and jurisdiction in custody matters, thus caused confusion among the various jurisdictions and freed state courts to disregard custody decisions of other states based on changed circumstances, or based on the child's presence or domicile in the state, or even when two or more persons interested in the custody of the child were personally subject to state jurisdiction.<sup>293</sup> The avoidance of clarification by the Supreme Court and the state law which developed in the resulting

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<sup>289</sup> *Kovacs v. Brewer*, 356 U.S. at 612; H. CLARK, *supra* note 5; KATZ, *supra* note 21, at 56.

<sup>290</sup> *May v. Anderson*, 345 U.S. at 528.

<sup>291</sup> KATZ, *supra* note 21, at 58, 59.

<sup>292</sup> *May v. Anderson*, 345 U.S. at 535; *see also* KATZ, *supra* note 21, at 58. Justice Jackson's dissent in *May v. Anderson* also had a lasting impact in that it provided the germ from which the notion of "home state" in the UCCJA grew. *May v. Anderson*, 345 U.S. at 536; *see* UCCJA §§ 2(5), 3(a)(1); KATZ, *supra* note 21, at 58.

<sup>293</sup> CHILD CUSTODY, *supra* note 97, § 5.01[1], at 5-5 to -6.

vacuum, encouraged continuing litigation, child snatching, and forum shopping.<sup>294</sup> It set the stage for the flood of child custody cases that has arisen over the past few decades.<sup>295</sup> This avoidance by the Supreme Court, and the resulting confusion, has been criticized by scholars in this field.<sup>296</sup> The need for a resolution of the jurisdictional problems and an end to the significant ascension of child abductions, continuing litigation, and forum shopping caused thereby was evident.<sup>297</sup> The UCCJA and PKPA<sup>298</sup> represent the legislative response.

The UCCJA has been characterized as a codification of the law of comity, although neither the term "full faith and credit" nor the term "comity" is used in the Act. It is designed to overcome the legacy of the Supreme Court abnegation in the child custody arena.<sup>299</sup> Interestingly, the UCCJA pointedly eschews any perception that it is a codification of the Full Faith and Credit Clause.<sup>300</sup> Indeed, any state law mandating full faith and credit might be unconstitutional, given the express grant of authority to Congress by the pertinent constitutional clause.<sup>301</sup> Moreover, Congress has now

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<sup>294</sup> *Id.* at 5-6.

<sup>295</sup> KATZ, *supra* note 21, at 61; *see also* Coombs, *supra* note 8.

<sup>296</sup> *See* articles and works cited *supra* notes 286, 287 and 289.

<sup>297</sup> Professor Coombs stated:

[T]hroughout the first two-thirds of this century, states commonly refused to recognize and enforce one another's custody decrees. By the 1960's, the law of custody enforcement and modification was viewed as a flawed part of the interstate system of justice and as a serious social problem—an inducement to lawless self-help by parents and a danger to the welfare of children. Development of the UCCJA was, among other things, a response to these concerns. Its provisions designed to require interstate enforcement of decrees and to bar their interstate modification were perhaps even more central to the Act than were the provisions limiting initial jurisdiction.

Coombs, *supra* note 5, at 798 (footnotes omitted); *see also* Bodenheimer, *The Uniform Child Custody Jurisdiction Act*, 3 FAM. L. Q. 304 (1969).

<sup>298</sup> UNIF. CHILD CUSTODY JURISDICTION ACT § 1 (purposes); PKPA § 7 (findings and purposes), Pub. L. No. 96-611, § 7, 94 Stat. 3568-69; *see also* KATZ, *supra* note 21, at 15-16.

<sup>299</sup> KATZ, *supra* note 21, at 73-75.

<sup>300</sup> *Id.* at 74 (citing commissioners' notes to UCCJA § 14).

<sup>301</sup> The Constitution provides:

Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. *And the Congress may by general laws prescribe the manner in which such Acts, Records and Proceedings shall be proved, and the effect thereof.*

exercised its authority to act in promulgating the PKPA.<sup>302</sup> The PKPA is, on its face, a full faith and credit statute.

Notwithstanding the advent of the UCCJA and the PKPA, serious practical and conceptual problems remain with regard to jurisdiction and procedure in the realm of child custody jurisprudence, for instance, the role of due process and full faith and credit. Also, in an arena now dominated as it is by statute, the practical problem of correlating the UCCJA and the PKPA is significant, as is the concomitant question of whether these acts are working efficiently to achieve their stated goals.<sup>303</sup> These problems are discussed in detail in Sections V and IX. For now, some further examination of the interrelationship between statutory and constitutional law in the child custody setting is in order.

It has been suggested that the issue of full faith and credit has been made irrelevant by statutory developments;<sup>304</sup> that the state UCCJAs' mandate, as a matter of statutory recognition of comity, and the PKPA, as a matter of federal statutory mandate, occupy the field and establish the complete scheme for recognizing sister state decrees of custody. Another explanation is that, since the requirements of the statutes satisfy the requirements of the Full Faith and Credit Clause, independent inquiry into the constitutional requisites is usually superfluous.<sup>305</sup> Although the UCCJA

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U.S. CONST. art. IV, § 1 (emphasis added).

<sup>302</sup> 28 U.S.C. §§ 1738, 1738A. One commentator has stated:

The U.S. Supreme Court has simply and repeatedly said that decrees are not entitled to full faith and credit the minute the circumstances [of a custody case] change, but that the states are free to extend comity recognition. First, an interpretation that the Act requires the granting of full faith and credit places a state court in direct opposition to the Supreme Court custody cases. The Act [UCCJA] is designed specifically to avoid this confrontation . . .

KATZ, *supra* note 21, at 74 (citing commissioners' notes to UCCJA § 13, which state: "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. This section (13) declares as a matter of state law, that custody decrees of sister states will be recognized and enforced.").

<sup>303</sup> For a discussion of the interrelationship of the UCCJA and the PKPA, see *supra* Section V. See *infra* Section IX for the issues related to the achievement of the stated goals.

<sup>304</sup> Coombs, *supra* note 5, at 834 (citing KATZ, *supra* note 21, at 74-75).

<sup>305</sup> Professor Coombs indicates that the Full Faith and Credit Clause requires some interstate issue preclusion. Coombs, *supra* note 5, at 81518, 83435. Interpretation of *New*

and the PKPA do require recognition of foreign custody judgments, the requirement that the party seeking modification prove changed circumstances enforces the issue preclusion aspects of full faith and credit.<sup>306</sup> Formal interstate claim preclusion is not applicable to custody actions, because modification actions are viewed as actions independent of the action that resulted in the decree that is to be modified.<sup>307</sup>

As noted above, the *May v. Anderson* plurality opinion advanced a legacy of ambiguity regarding the seeming requirement of in personam jurisdiction in custody cases.<sup>308</sup> The PKPA and the UCCJA allow custody to be adjudicated even though one parent, or other contestant, is not subject to the in personam jurisdiction of the court.<sup>309</sup> If in personam jurisdiction is necessary as a matter of due process, the acts are unconstitutional unless due process requirements can be otherwise met within the jurisdictional stric-

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*York ex rel. Halvey, Kovacs and Ford* (all cited *supra* note 287) also suggests that, unless circumstances have changed significantly since the initial custody decree, no issue remains which has not already been litigated. See *Katz*, *supra* note 21, at 61; see also authorities cited *supra* note 287. The PKPA and the UCCJA also provide the same issue preclusion in that they require recognition of foreign decrees. See UCCJA §§ 1214; PKPA, 28 U.S.C. §§ 1738A(a),(f).

<sup>306</sup> One necessary consequence of the rule that custody judgments be given the same effect in a foreign state as in the decree state is that of interstate issue preclusion. The requirement of showing changed circumstances inherently includes issue preclusion, because the issues previously litigated would still determine the outcome, in the absence of changed circumstances. Thus, in terms of the ordering of inquiries, it must be placed sequentially after the determination of jurisdiction, since issue preclusion is dealt with at the trial process. See UCCJA § 12, 9 U.L.A. (1968); Coombs, *supra* note 5, at 815-18.

<sup>307</sup> Coombs, *supra* note 5, at 799.

<sup>308</sup> 345 U.S. 528 (1953). See discussion *supra* notes 290-97 and accompanying text.

<sup>309</sup> For example, where husband and wife (*H and W*) separate and *H* moves to another state and establishes a new domicile, while *W* remains with the children in the state from which *H* departed, *W* may bring a custody action in the state in which she remains, as long as she has been there with the child for six months and it is the home state under the UCCJA and the PKPA. Such home state jurisdiction to determine custody will obtain, pursuant to the PKPA, 28 U.S.C. § 1738A(c)(2)(a) (1982), and UCCJA § 3(a)(1), even if there are no sufficient "minimum contacts" to render *H* subject to the in personam jurisdiction of the court. Jurisdiction would also obtain in the following circumstances: *H* and *W* separate in state *A*; *H* moves with the children to state *B*. After six months residence in state *A*, *H* may file suit there for custody and jurisdiction will attach, even though *W* has never been to the state and has no contacts or caused any effect there.

tures of the two acts.<sup>310</sup> In *Shaffer v. Heitner*,<sup>311</sup> the Supreme Court hinted that custody cases may fall within a "status" exemption to the requirement of personal jurisdiction. Thus, until the Supreme Court clearly rules otherwise, many state courts will provide that due process does not require in personam jurisdiction over the defendant in a custody case.<sup>312</sup> A Washington Court of Appeals in 1983 articulated this position:

Ronald additionally contends the trial court's exercise of jurisdiction over the custody proceedings violated his due process rights since the court lacked *in personam* jurisdiction. We find a petitioner need not demonstrate minimum contacts under *International Shoe* between the absent parent and the forum in custody proceedings under the UCCJ[A]. Rather,

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<sup>310</sup> Professor Katz reports that states, in the aftermath of *May v. Anderson*, 345 U.S. 528, "were careful to obtain jurisdiction in personam over both parents if at all possible . . . ." Katz, *supra* note 21, at 59. See also Coombs, *supra* note 5, at 735-64 (the special nature of custody proceedings may, in some cases, justify a broad determination of due process, encompassing the interests of the forum state, the individual, and the interstate judicial system). But see UNIF. CHILD CUSTODY JURISDICTION ACT § 12 commissioners' note, 9 U.L.A. 150 (Master ed. 1979) ("There is no requirement for technical personal jurisdiction, on the traditional theory that custody determinations, as distinguished from support actions . . ., are proceedings in rem or proceedings affecting status."). Cf. *Shaffer v. Heitner*, 433 U.S. 186, at 208 n.30 (1977) (adjudications of "status" not necessarily inconsistent with the standard of "fairness" for a failure to meet the test of *International Shoe*).

<sup>311</sup> *Shaffer v. Heitner*, 433 U.S. at 208 n. 30.

<sup>312</sup> See *Sholty v. Carruth*, 126 Ariz. 458, 459, 616 P.2d 918, 919 (1980); *In re Marriage of Leonard*, 122 Cal. App. 3d 443, 449, 175 Cal. Rptr. 903, 912 (1981) ("Therefore, we hold today that the requirements of due process of law under the [f]ourteenth [a]mendment are met in a child custody proceeding when, in a court having subject matter jurisdiction over the dispute, the out-of-state parent is given notice and opportunity to be heard . . . . Personal jurisdiction over the out-of-state parent is not required to make a binding custody determination, entitled to recognition by other states under both the UCCJA . . . and the standards of the Full Faith and Credit Clause of the United States Constitution."); *In re Hudson*, 434 N.E. 2d 107, 119 (Ind. App. 1982); *Pratt v. Pratt*, 431 A.2d 405, 409 (R.I. 1981); *Boisvert v. Boisvert*, 143 Vt. 445, 447, 466 A.2d 1184, 1185 (1983) ("The UCCJA generally concerns subject matter jurisdiction, not personal jurisdiction."); *Hudson v. Hudson*, 35 Wash. App. 822, 837, 670 P.2d 287, 295 (1983). But see *In re Rita and Michael N.*, 122 Misc. 2d 1, 5, 467 N.Y.S. 2d 998, 1000 (1983) ("A custody proceeding in the Family Court requires jurisdiction over both parents wherever they reside . . . ."), and *Pasqualone v. Pasqualone*, 63 Ohio St. 2d 96, 103, 406 N.E. 2d 1121, 1126-27 (1980) (necessity of "minimum contacts" as determined under *International Shoe* and *Shaffer*), both discussed and quoted *infra* note 318 and accompanying text.

Should there be a requirement of due process that has arguably not been met in a previous custody action, the inquiry as to this issue must take place before statutory inquiry under the PKPA and the UCCJA may be made. If it turns out that there has been a due process violation in the prior action, the foreign decree is not entitled to recognition as a "custody decree" under the acts.

custody is in effect an adjudication of a child's status, which falls under the status exception of *Shaffer v. Heitner* . . . . A court may therefore adjudicate custody under the UCCJ[A] without acquiring personal jurisdiction over an absent party given reasonable attempts to furnish notice of proceedings.<sup>313</sup>

This is not a universal view, however. For example, in a 1980 decision,<sup>314</sup> the Ohio Supreme Court did not feel that the UCCJA obliged Ohio's courts to refuse jurisdiction on a custody matter that had already been decided in an Illinois decision. The Ohio Court did not feel so obliged, because Illinois had not adopted all of the jurisdictional and other sections of the UCCJA essential to its proper operation, and, therefore, did not have law which is "substantially in conformity with this Act [UCCJA § 14]." Thus, the court asserted jurisdiction, citing *May v. Anderson*,<sup>315</sup> *Shaffer v. Heitner*,<sup>316</sup> and *Kulko v. Superior Court*,<sup>317</sup> and stating:

In a custody case . . . [as compared to a case limited to divorce], as in a child support or alimony case, it is not fair and reasonable to allow one party to bind the other party on the basis of his unilateral acts. A court must balance the conflicting interests. Although the contacts required to allow a court to make a binding custody order may not need to be as great as those required to order a payment, more contact is required than would be required in a divorce action. In this sense, *May*, in requiring jurisdiction over the person, survives today as good law.

The presence of the child and one spouse in Illinois is not enough, in and of itself, to give an Illinois court jurisdiction over the other spouse in a custody action."<sup>318</sup>

The United States Supreme Court recently turned down the opportunity to decide a full faith and credit issue in dismissing cer-

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<sup>313</sup> *Hudson*, 35 Wash. App. at 833, 670 P.2d at 293.

<sup>314</sup> *Pasqualone v. Pasqualone*, 63 Ohio St. 2d 96, 406 N.E.2d 1121 (1980).

<sup>315</sup> 345 U.S. 528 (1953).

<sup>316</sup> 433 U.S. 186 (1977).

<sup>317</sup> 436 U.S. 84 (1978).

<sup>318</sup> *Pasqualone*, 63 Ohio St.2d at 103, 406 N.E. 2d at 1126-27; see also *In re Rita and Michael N.*, 122 Misc. 2d at 5, 467 N.Y.S. 2d at 1000 (custody proceeding requires jurisdiction over both parents).

tiorari in *Eicke v. Eicke*.<sup>319</sup> It has been suggested that the practical impact of this dismissal of certiorari is that the statutory law will now control the issue of full faith and credit.<sup>320</sup> If this is so, the Full Faith and Credit Clause remains important in custody cases only in relation to issue preclusion.<sup>321</sup>

If jurisdiction in interstate child custody suits should not be determined according to the traditional rules of in rem or in personam jurisdiction,<sup>322</sup> it is possible that due process requires some sort of connection or nexus between the forum and the subject matter of the case. Such a standard would not consider the subject matter of a custody case to be a *res*, as that term of art is generally used, but would rather consider the contacts between the forum, the various contestants, and the child.<sup>323</sup> The extent or nature of due process requirements may not yet be determined,<sup>324</sup> but, if it should be found that due process has been violated, American jurisprudential notions of fair play and justice would not hold the person whose rights were violated to the determination of issues in that action.<sup>325</sup> Consideration of due process, even in relation to the jurisdiction of the court, precedes consideration of the statutory criteria, because a decree in violation of due process is not entitled to recognition. It may be that the strictures of due process are met by the connections evidenced by the statutory requirements for ju-

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<sup>319</sup> *Eicke v. Eicke*, 399 So. 2d 1231 (La. App. 1980), *cert. denied*, 406 So. 2d 607 (La. 1981), *cert. granted*, 456 U.S. 970 (1982), *cert. dismissed*, 459 U.S. 1139 (1983). For an analysis of the *Eicke* case, see McGough & Hughes, *supra* note 8 at 20-24; Coombs, *supra* note 8, at 252-68; Bruch, *Interstate Child Custody Law and Eicke: A Reply to Professor Coombs*, 16 FAM. L. Q. 277 (1982).

<sup>320</sup> McGough & Hughes, *supra* note 8, at 24; *see also* Giddings v. Giddings, 228 N.W. 2d 915, 918 (N.D. 1975) (since the constitutional issue of full faith and credit was not before the court, the best interests of the child required judgment under the UCCJA), and discussion *supra* note 305.

<sup>321</sup> *See supra* notes 304-07 and accompanying text.

<sup>322</sup> McGough & Hughes, *supra* note 8, at 19.

<sup>323</sup> *See* Coombs, *supra* note 5, at 735-64, especially 762-64 ("likely invalidation of some UCCJA applications").

<sup>324</sup> *Id.* at 735-42. *But see* Hudson, 35 Wash. App. at 833, 670 P.2d at 293 ("Rather, custody is in effect an adjudication of a child's status, which falls under the status exception of *Shaffer v. Heitner* . . . . A court may therefore adjudicate custody under the UCCJ[A] without acquiring personal jurisdiction over an absent party given reasonable attempts to furnish notice of the proceedings.").

<sup>325</sup> KATZ, *supra* note 21, at 28-29.

isdiction under the UCCJA and the PKPA, so long as there is proper notice and opportunity to be heard.<sup>326</sup>

On the other hand, it appears that the strictures of the UCCJA and the PKPA are not sufficient to meet due process, at least in some circumstances. For example, the UCCJA is drafted broadly enough to cover any child custody action, including one between parents or nonparents (parent versus grandparents, for example). It might be true, as a rule of thumb, that when one parent and the child reside in, or have significant connection with, a jurisdiction, that state may have jurisdiction to determine the custody rights affecting the child and the non-resident parent. Yet, it certainly would be dubious to suggest, just because the UCCJA is satisfied, that due process is also satisfied in a custody dispute involving forum state grandparents (or other nonparents) and out-of-state parents. Moreover, it may be suggested that the Supreme Court meant what it said in *May v. Anderson*<sup>327</sup>—that in personam jurisdiction is (or at least was) required before a court can deprive a parent of custody over his or her child. Since *Shaffer v. Heitner*,<sup>328</sup> the labels “in personam” and “in rem” have not been important. What is important is that in all cases in which a state attempts to assert jurisdiction over non-resident defendants, the “minimum contacts” due process standard must be satisfied. *Kulko v. Superior Court*<sup>329</sup> reinforces this notion. Footnote 30 of the *Shaffer* decision should be read with reference to divorce jurisdiction, i.e., indicating that the rule of *Williams v. North Carolina*<sup>330</sup>—that domicile of one spouse is constitutionally sufficient to confer jurisdiction on a state court to dissolve a marriage, even though the other spouse is a non-resident—is still good law. Jurisdiction over one spouse is sufficient because it is the marital *status* of the par-

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<sup>326</sup> *In re Felix C.*, 116 Misc. 2d 300, 305, 455 N.Y.S. 2d 234, 238 (1982) (“[E]ven if Puerto Rico’s statutory requirements for personal jurisdiction were satisfied, it does not follow that there was compliance with the PKPA or UCCJA. A basic right subsumed under the panoply of due process is notice and an opportunity to be heard. This requirement is engrafted onto every statute respecting jurisdiction.”).

<sup>327</sup> 345 U.S. 528 (1953).

<sup>328</sup> 433 U.S. 186 (1977).

<sup>329</sup> 436 U.S. 84 (1978).

<sup>330</sup> *Williams I*, 317 U.S. 287, 298-9 (1942); *Williams II*, 325 U.S. 226, 232 (1945).

ties that is at issue. In *Estin v. Estin*,<sup>331</sup> *Vanderbilt v. Vanderbilt*,<sup>332</sup> and *May v. Anderson*,<sup>333</sup> the Supreme Court created the notion of the so-called "divisible divorce," distinguishing constitutional jurisdiction to dissolve a marriage (arising from domicile, as in *Williams v. North Carolina*) from jurisdiction to award custody, support, alimony, etc. In the latter three instances, "in personam," to apply the old term, is required. The purpose of the *Shaffer* decision was to *extend* the minimum contacts test to allow constitutionally sufficient jurisdiction in accordance with due process. It would be ironic, indeed, to read footnote 30 of *Shaffer* as suggesting that the Court meant to overturn one of its prior decisions, *May v. Anderson*, in which it had already extended the minimum contacts test to the arena of custody disputes. Finally, domicile may be a constitutionally adequate basis for jurisdiction in divorce, because of the nature of the action—the marital *status* of the parties being at issue and the fact that the relief sought only affects this status and relationship. Certainly, having one of the parties (who carries the status/relationship with her) before the court and the interest of the state in the marital status of its domiciliaries is sufficient. A custody determination, on the other hand, does not only affect the marital status or relationship between the two adult parties to each other, but each to their relationship, status, and right to rear their child. Thus, domicile of one contestant and the child (who is legally incapable of choosing such domicile) is not an adequate basis for terminating the relationship between the absent non-resident parent and the child. Whether the UCCJA provisions are a sufficient addition to accommodate due process is still open to debate.

It is clear that due process demands notice and opportunity to be heard.<sup>334</sup> Both the UCCJA<sup>335</sup> and the PKPA<sup>336</sup> provide for these

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<sup>331</sup> 334 U.S. 541, 544-45 (1948).

<sup>332</sup> 354 U.S. 416, 417 (1957).

<sup>333</sup> 345 U.S. 528 (1953).

<sup>334</sup> KATZ, *supra* note 21, at 28-29; Coombs, *supra* note 5, at 766-70; *see also infra* notes 224-29 and accompanying text.

<sup>335</sup> UNIF. CHILD CUSTODY JURISDICTION ACT §§ 4 & 5.

<sup>336</sup> PKPA, 28 U.S.C. § 1738A(e)(1982). Professor Coombs discusses the possibility that the PKPA requires notice to be given to those with actual possession of the child in question, even though they have no cognizable claim to custody. He feels, however, that the

requirements. The acts are silent on their effect on the last in time rule.<sup>337</sup> Scholars in the field have differing views as to whether the traditional last in time rule operates in the interstate child custody arena.<sup>338</sup>

### VIII. THE UCCJA AND THE PKPA: SOME PRACTICAL ISSUES AND MISCELLANEOUS PROBLEMS

#### A. *Timing*

Both the UCCJA and the PKPA provide that a court shall not exercise its jurisdiction if there is a custody proceeding concerning the children at issue pending in another state when the action is begun.<sup>339</sup> Obviously, the point at which an action is considered to have commenced is crucial in this jurisdictional scheme. The point at which a proceeding is commenced, however, varies from state to state. In most states, an action is commenced upon the filing of a petition.<sup>340</sup> While in other states, the action is commenced upon

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PKPA probably requires notice only if a person's claim to custody is cognizable. Coombs, *supra* note 5, at 768-70.

<sup>337</sup> See Ginsburg, *Judgments in Search of Full Faith and Credit: The Last-In-Time Rule for Conflicting Judgments*, 82 HARV. L. REV. 798 (1969) ("Under traditional res judicata doctrine, where there are conflicting judgments and each would be entitled to preclusive effect if it stood alone, the last in time controls in subsequent litigation." (citing RESTATEMENT OF JUDGMENTS § 42 (1942))).

<sup>338</sup> See Coombs, *supra* note 5, at 846-47. It certainly seems that the Supreme Court missed an excellent opportunity to clarify this issue when it dismissed certiorari in *Eicke*.

<sup>339</sup> PKPA, 28 U.S.C. § 1738A(g); UCCJA § 6(a), 9 U.L.A. 134 (Master ed. 1979). See also Coombs, *supra* note 5, at 773-74 (1982), which provides an analysis of the two provisions noted herein, and the possibility of differing outcomes depending on which one applies. Note also that other issues of timing may arise. For example, in UCCJA § 3 and PKPA subsection (c)(2), the finding of "home state" jurisdiction may depend upon the date the action is commenced.

<sup>340</sup> *Lopez v. District Court*, 199 Colo. 207, 211, 606 P.2d 853, 855 (1980) (interpreting California rule); *Bonnis v. Bonnis*, 420 So.2d 104, 107 (Fla. App. 1982); *Abbott v. Abbott*, 52 Ill. App. 3d 728, 730, 367 N.E.2d 1073, 1074 (1977) (citing predecessor to current statute); ALA. R. CIV. P. 3; ALASKA R. CIV. P. 3; ARK. R. CIV. P. 3, ARIZ. R. CIV. P. 3, 6(f) (abatement if service by publication within one year of filing complaint); 1 CAL. CIV. PROC. CODE § 350 (West 1982); COLO. R. CIV. P. 3(a); DEL. CODE ANN. tit. 13 § 721 (1974); D.C. CODE ANN. § 11-946 (1981) (adopting Federal Rules of Civil Procedure); FLA. R. CIV. P. 1.050; GA. CODE ANN. § 9-11-3 (1981); HAWAII REV. STAT. ANN. 580-2; IDAHO CODE § 5-228 (1979); ILL. ANN. STAT. ch. 40 § 411(a) (Smith-Hurd 1980); IND. CT. R., TR. PROC. R. 3; IOWA R. CIV. P. 48; KAN. STAT. ANN. § 60-203 (1983); KY. REV. STAT., CIV. R., Rule 3 (1983); LA. CODE CIV. PROC. ANN. art. 421 (West 1960); ME. REV. STAT. ANN. tit. 14 § 553 (1964) (earlier of service of process or

service of process.<sup>341</sup> Special rules apply in a few states.<sup>342</sup> Although there is little authority directly on point, it is logical that the law of the state in which an action has been filed should determine the date of commencement of that action for purposes of the UCCJA or the PKPA.<sup>343</sup>

### *B. Application of the PKPA*

Some states have applied the PKPA to circumstances which occurred or began prior to the effective date of that legislation.<sup>344</sup> Generally, courts seem to have accepted, in their application of the PKPA, that the PKPA was meant to work with, not replace, state

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filing of complaint); MD. RULES PROC. 170; MASS. GEN. LAWS ANN., R. CIV. P., Rule 3 (1982); MICH. COMP. LAWS ANN. § 600.1901 (West 1981); MO. R. CIV. P. 53.01; MONT. R. CIV. P. 3; NEV. R. CIV. P. 3; N.J.R. CT. 4:2-2; N.C. GEN. STAT. § 1A-1, Rule 3; OHIO R. CIV. P. 3(A); ORE. R. CIV. P. 3; 42 PA. CONS. STAT. ANN. Rule 31920.3 (Supp. 1983-84); P.R.R. CIV. P.T. 32, App. 3, Rule 2; R.I. R. CIV. P. 3; S.C. R. PRAC. FAM. CT. 5; TENN. R. CIV. P. 3; TEX. R. CT. 22; UTAH R. CIV. P. 3; VT. R. CIV. P. 3; VA. CODE § 16:1-260(A), Rule 3.3 (1982); WASH. CIV. R. SUP. CT. 4.1; W. VA. R. CIV. P. 3; WIS. R. CIV. P. 801.02; WYO. R. CIV. P. 3. Note that service commences upon filing under the federal rules. FED. R. CIV. P. 3. In Arizona, Ohio, and Wyoming, action commences upon filing if service occurs within a specified period of time, ranging from 60 days (Wyoming) to one year (Arizona). Mississippi's status is clouded by a battle between the legislature and the judiciary over the power to promulgate and approve rules of civil procedure.

<sup>341</sup> Valley Cable Vision, Inc. v. P.U.C., 175 Conn. 30, 33, 392 A.2d 485, 487 (1978) (not a custody case); Potter v. Potter, 104 Misc. 2d 930, 934, 430 N.Y.S.2d 201, 204 (1980); CONN. GEN. STAT. ANN. § 52-45A, -45B; N.Y. CIV. PRAC. LAW § 304 (McKinney 1972).

<sup>342</sup> MINN. R. CIV. P. 3.01 (action commences upon service or delivery to serving officer if service occurs within sixty days); N.D. CENT. CODE ANN. § 28-01-38 (1974), N.D. R. CIV. P. 3 (same rule; plaintiff must intend service).

<sup>343</sup> Potter, 430 N.Y.S. 2d at 204.

<sup>344</sup> See, e.g., Mitchell v. Mitchell, 437 So. 2d 122, 125 (Ala. Civ. App. 1982) (PKPA effective before final judgment); Pierce v. Pierce, 640 P.2d 899 (Mont. 1982) (PKPA was enacted during pleadings; defendant permitted to amend response) TuFares v. Wright, 98 N.M. 8, 644 P.2d 522, 523 (1982) ("With respect to federal laws, the general rule is that a court should apply the law in effect at the time it renders its decision. In other words, once a federal law is enacted, it applies to cases then pending."); E.E.B. v. D.A., 89 N.J. 595, 446 A.2d 871 (1982) (action instituted September 29, 1980); Leslie L.F. v. Constance F., 110 Misc. 2d 86, 441 N.Y.S.2d 911, 913-914 (1981) (action commenced June 8, 1979). But see Kumar v. Superior Court, 32 Cal. 3d 689, 701, 186 Cal. Rptr. 772, 780 (1982) (refusing to apply PKPA in pending case). There was even some dispute as to the actual effective date of the PKPA. E.E.B. v. D.A., 89 N.J. at 605 n.4, 446 A.2d at 876-77 n.4. Because of the passage of time, most custody cases pending when the PKPA became effective have been resolved.

law.<sup>345</sup> Although the PKPA is a logical point of first inquiry, reference to state law is mandated by the very language and structure of the Act.<sup>346</sup>

Although the PKPA appears to be playing a significant role in the realm of child custody disputes,<sup>347</sup> it must be remembered that

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<sup>345</sup> The terms of the PKPA itself require reference to state law. *See, e.g.*, 28 U.S.C.(c)(1). The decision to exercise jurisdiction is a matter for state law, as the PKPA contains no provisions comparable to UCCJA §§ 7, 8. *Mitchell*, 437 So. 2d at 125 ("The federal Act does not, and, constitutionally, probably could not, provide the procedure to be followed in enforcement proceedings in state courts."). Parts V and VI of this article discuss this in detail. *See also* *Neger v. Neger*, 93 N.J. 15, 37, 459 A.2d 628, 640 (1983) ("Moreover, the Wallop Act [the PKPA] does not expressly prohibit a state under its laws from enforcing a custody decree that is not enforceable under the federal act."); *Serna v. Salazar*, 98 N.M. 648, 651 P.2d 1292 (1982); *Tufares v. Wright*, 98 N.M. 8, 644 P.2d 522 (1982) (using New Mexico law in conjunction with the Act); *State ex rel. Valles v. Brown*, 97 N.M. 327, 336, 639 P.2d 1181, 1186 (1981) ("A state maintains jurisdiction over a child custody decree when it has jurisdiction under its own laws . . . and satisfies any one of the five jurisdictional requirements [of the PKPA]" (emphasis in original)); *Pierce*, 640 P.2d at 904-05 (Act incorporates Montana law); *Patricia R. v. Andrew W.*, 121 Misc. 2d 103, 467 N.Y.S. 2d 322 (1983) (relying on both state law and the PKPA, although the PKPA controls where conflicting); *Walsh v. Walsh*, 117 Misc. 2d 815, 458 N.Y.S. 2d 835 (1984) (relying on state law in conjunction with the federal Act); *Leslie L.F.*, 441 N.Y.S.2d at 913, 916-22 (despite court references to preemption, state law is not forgotten nor inapplicable); *Boyd v. Boyd*, 653 S.W.2d 732, 734 (Tenn. App. 1983) (initial analysis is to determine whether Tennessee has jurisdiction under state law); *McGee v. McGee*, 656 S.W.2d 891 (Tex. Ct. App. 1983) (PKPA applied to determine whether Texas may modify Mississippi decree, but extent of trial court discretion to modify father's visitation rights is matter for state law); *Quenzer v. Quenzer*, 653 P.2d 295 (Wyo. 1982) (PKPA determined Texas decree not entitled to full faith and credit; Wyoming UCCJA determined Wyoming had jurisdiction to render custody order).

California's stance is unclear. The latest case, *In re Ratshin*, 144 Cal. App. 3d 974, 192 Cal. Rptr. 891 (1983), does not mention the PKPA, but cites *Kumar*. The *Kumar* court made only cursory mention of the PKPA, chose the later of two possible effective dates, and refused to apply it to cases then pending. With this background, California may not subsume its UCCJA into the PKPA.

<sup>346</sup> 28 U.S.C. 1738A(c) *passim* (1982); *see, e.g.*, 28 U.S.C. 1738A(c)(1) for specific language. *See* the discussion on the Supremacy Clause and preemption in Sections VI and VII of this article and material regarding the order of inquiry, *infra* notes 352-63 and accompanying text.

<sup>347</sup> *See generally* the New Mexico and New York cases cited *supra* in notes 344-45. In *Valles*, 97 N.M. at 330, 639 P. 2d at 1184, the court stated: "Thus, the long line of New Mexico cases which permits a New Mexico court to modify an out-of-state issued child custody decree based solely on the physical presence of the child and the substantial change of circumstance is preempted by the PKPA." The New York courts also refer to preemption. *See, e.g.*, *Patricia R.*, 121 Misc. 2d at 107, 467 N.Y.S. 2d at 325. *See also Mitchell*, 437 So. 2d at 125 ("Hence, it [the PKPA] applied to this case and, in any conflicting areas, takes preference over the [UCCJA] . . ."). *But see* Digest, *Parental Kidnapping, Child Steal-*

jurisdiction to award custody initially, as well as intrastate modifications, are matters for state law. Ostensibly, the PKPA is a full faith and credit statute and cannot apply to an initial proceeding. Further, by its very terms, the application of section 1738A(a) of the PKPA is limited to foreign decrees: "The appropriate authorities of every State shall enforce according to its terms, and shall not modify except as provided in subsection (f) of this section, any child custody determination made consistently with the provisions of this section by a court of another State."<sup>348</sup> The UCCJA, on the other hand, applies to all custody matters, as the broad language from section 3(a) indicates: "A court of this State which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree, if [the jurisdictional criteria of sections 3(a)(1), (2), (3) or (4) are met]."<sup>349</sup> Upon a modification of a foreign decree, a matter purely for the rendering state's law, the jurisdictional principles of the PKPA are applied to test and determine whether the initial decree was "made consistently with the provisions of this section by a court of another State."<sup>350</sup> Although the PKPA would not apply to an initial decree in state A, upon filing of a petition for modification in state B, the jurisdiction of state A at the time of the previous action will be tested by the criteria of 28 U.S.C. 1738A(c) to determine whether "[a] child custody determination made by a court of a State is consistent with the provisions of this section . . . ."<sup>351</sup>

### C. *Solving a Custody Jurisdiction Problem*

When one is faced with a custody jurisdiction issue, logically, the first question is whether it is an initial or modification proceeding. If it is an initial proceeding, state laws will govern. Reference to

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*ing, and The Parental Kidnapping Prevention Act (PKPA)*, 7 J. Juv. L., No. 2, 246, 253 (1983) ("In other words, the PKPA is viewed by the state courts of Wyoming and New Mexico in light of the Full Faith and Credit Clause and no further, even though the PKPA would appear by its terms to contain standards for the state courts to follow.").

<sup>348</sup> 28 U.S.C. 1738A(a) (1982).

<sup>349</sup> UNIF. CHILD CUSTODY JURISDICTIONAL ACT § 3(a).

<sup>350</sup> 28 U.S.C. § 1738A(a) (1982).

<sup>351</sup> 28 U.S.C. § 1738A(c) (1982).

section 3 of the UCCJA is in order. If it is a modification proceeding, we must know whether the decree to be modified is foreign/out-of-state, or domestic/intrastate. If it is an intrastate modification, reference is to state law (i.e., sections 3 and 12 of the UCCJA), as well as to state standards for change of circumstances in custody cases and to PKPA subsection (d) (continuing jurisdiction).<sup>352</sup> If it is an interstate modification, first reference is to the PKPA.<sup>353</sup> The reason for postulating the PKPA as a point of first inquiry in this situation is that the first thing to be done is to determine the status of the prior decree unless emergency jurisdiction is invoked.<sup>354</sup> One looks to subsections (a), (c) and (f) of the PKPA for this purpose. Pursuant to subsection (a), in order for the prior decree to be accorded full faith and credit, the prior foreign

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<sup>352</sup> See *Boyd v. Boyd*, 653 S.W.2d 732 (Tenn. App. 1983) (Procedurally, this case involved an attempt to modify in a Tennessee court a five-year-old Tennessee decree, although Tennessee courts no longer had jurisdiction according to Tennessee law. Although the court quoted from the PKPA, the fact that Tennessee law no longer provided jurisdiction over the case was determinative. At the time of the modification action, the child and custodial parent had been living in New York for several years. The Tennessee judge, upon a motion for rehearing, held that Tennessee no longer had continuing jurisdiction under PKPA subsection (d) because Tennessee law made it clear that jurisdiction no longer obtained. The interrelationship and correlation of the PKPA and state UCCJA is apparent.); *Blazek v. Blazek*, 119 Misc. 2d 141, 462 N.Y.S. 2d 557 (1983) (The New York court applied PKPA subsection (d) to establish continuing jurisdiction in a case in which the father of the child was seeking to modify the original decree which had been made in New York, in 1979, giving the mother of the child custody. Between 1979, when custody was awarded to the mother, and 1982, when the instant action was brought, the mother and children had moved, first to Texas for two months, then to Indiana, where they had been to establish Indiana as the "home state." Nevertheless, the New York court felt that it had continuing jurisdiction.).

<sup>353</sup> But see *McGough & Hughes*, *supra* note 8, at 62 (1983) ("The result of this combination is that a court must determine the existence of its jurisdiction under the UCCJA, and then look to the federal act to determine whether the exercise of that jurisdiction will entitle the resulting decree to recognition." (footnotes omitted)) and *supra* note 347 (quotation from Digest).

<sup>354</sup> Cases which have treated the PKPA first in these circumstances include: *Mitchell*, 437 So.2d 122; *Pierce*, 640 P.2d 899; *E.E.B.*, 446 A.2d 871; *TuFares*, 664 P.2d 522; *Patricia R.*, 467 N.Y.S.2d 322; *Walsh*, 458 N.Y.S. at 837 ("Before applying the UCCJA, reference to the . . . [PKPA] . . . must be made since the PKPA not only establishes a policy of Federal preemption but also by virtue of the supremacy clause of the United States Constitution, it must be accorded priority."); *Quenzer*, 653 P.2d 295. But see *Serna*, 651 P.2d 1292 (four-and-a-half months after deciding *TuFares*, the New Mexico court reversed the order of consideration).

decree must have been made consistently with PKPA standards.<sup>355</sup> Under subsection (c)(1), reference to the law of the decree state is required,<sup>356</sup> and then application of (c)(2) to determine whether those requirements (home state, significant connection, etc.) are met.<sup>357</sup>

In order to modify a decree, reference to PKPA subsection (f) is required. First, it must be determined that the petitioned court has jurisdiction to hear the matter at all. Although this would appear to be a matter for state law, in order for the decree to be made to command full faith and credit among the sister states it must be rendered in compliance with subsection (c) of the PKPA. This is not inconsistent with the state UCCJA. As above, reference to state law under (c)(1) as well as application of the standards of subsection (c)(2) of the PKPA will be needed.

Under subsection (f)(2) of the PKPA, it must also be determined that the decree court no longer has jurisdiction or that the decree court has declined to exercise jurisdiction. Although reference to PKPA subsection (c) seems logical, it also seems logical to resort to the law of the decree states, *i.e.*, UCCJA section 3, in such circumstances as suggested by (c)(1). PKPA subsection (c) is addressed to consistency within the provisions of the PKPA itself. Moreover, the existence of PKPA subsections (c)(2)(E) and (d) suggest an intention to add continuing jurisdiction to the list of bases of jurisdiction.<sup>358</sup> An application of state (UCCJA) law and PKPA continuing jurisdiction is desirable in resolving problems relating to modification.

Once having determined that the decree state does still have jurisdiction in a case, reference to other proceedings in the decree state court or communication pursuant to UCCJA sections 7(d), 16, 20, 21, and 22, will be required to determine whether or not

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<sup>355</sup> *E.g.*, *Quenzer*, 653 P.2d at 299 (often cited as an example of proper application of the threshold inquiry); *see, e.g.*, *Digest*, *supra* note 347, at 249-52.

<sup>356</sup> *See* UNIF. CHILD CUSTODY JURISDICTION ACT § 3, 9 U.L.A. 122 (1968).

<sup>357</sup> *Id.* § 3; Parental Kidnapping Prevention Act of 1980, 28 U.S.C. 1738A(c)(2). *See* discussion *supra* in Sections II and III of this Article.

<sup>358</sup> *See* *Boyd v. Boyd*, 653 S.W.2d 732 (Tenn. Ct. App. 1983).

that court has declined to exercise jurisdiction.<sup>359</sup> UCCJA section 9 requires information relating to the parties' obligation to provide information of any other proceedings in any state relating to custody of the child in question, which ought to be helpful in this stage of the process.

Courts have expressed their perception of the nature of their inquiry required by the PKPA and the UCCJA as being two-fold: first, do we have jurisdiction; second, should we exercise it.<sup>360</sup> The UCCJA provides most of the answers for the second question, while it is the PKPA and the UCCJA together which provide the answers for the first.

Subsection (g) of the PKPA does require a court to abstain from the exercise of jurisdiction where there is a proceeding pending in another state at the time of the commencement of the action in the instant state, so long as the state in which the action is pending has exercised jurisdiction in a manner consistent with the PKPA.<sup>361</sup> Here, reference to PKPA subsection (c) is necessary.

Even if the PKPA does not mandate abstention, the state court may choose not to exercise jurisdiction on state law grounds: first, UCCJA section 6—simultaneous proceedings in other states; second, UCCJA section 7—forum non conveniens; or third, UCCJA section 8—wrongful conduct (child-snatching) by a party. It should be recalled that principles of comity allow a state to recognize and/or enforce a foreign decree not necessarily entitled to such enforcement under law by applying the above analysis.<sup>362</sup>

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<sup>359</sup> See *Pierce*, 640 P.2d at 904 (The Montana Supreme Court admonished its district court for having "prematurely resorted to informal communication with the Franklin Circuit Court of Kentucky to facilitate the jurisdictional decision-making process," expressing the view that such communication under UCCJA §7 was reserved for the situation in which two states have concurrent jurisdiction and a decision as to the appropriate forum must be made.).

<sup>360</sup> *Neger*, 459 A.2d 628, is a very good case analyzing the application of the two acts. "Moreover, the Wallop Act [the PKPA] does not expressly prohibit a state under its law from enforcing a custody decree that is not enforceable under the federal act." *Id.* at 640.

<sup>361</sup> For a case in which the court found that the courts of another state were not exercising jurisdiction under law which is substantially "in conformity with this [the UCCJA] Act," see *Pasqualone v. Pasqualone*, 63 Ohio St 2d 96, 406 N.E.2d 1121, 1126-28 (1980).

<sup>362</sup> UCCJA § 12, 13 and 15; *Neger v. Neger*, 459 A.2d 628 (1983).

Once the decision to exercise jurisdiction has been made, state law governs the procedure. For example, use of the information gathered pursuant to UCCJA section 9 is governed by UCCJA sections 6, 7, 10, and 11. Statutes concerning communication and cooperation with foreign courts as well as record keeping are provided in the various state versions of the UCCJA. The order of inquiry applied by the courts of the various states may diverge from the analysis presented herein.<sup>363</sup> It should be noted that the order of inquiry as between the state UCCJA and the PKPA usually will not influence the outcome of the merits of the case, but may simply reflect the deference given the PKPA by the state courts.

#### *D. Expenses and Penalties*

One very practical problem in the arena of child custody adjudication is the matter of deterring wrongful conduct. Obviously, this was one of the purposes of both the UCCJA and the PKPA. In addition to the jurisdictional implications of one's wrongful conduct (courts refuse jurisdiction), both acts authorize the assessment of expenses against a party who has, by his or her conduct, forced another party to incur expense in the enforcement of that party's rights.<sup>364</sup> Of course, fines may be assessed pursuant to state criminal statutes relating to parental kidnapping or custodial interference.<sup>365</sup> A parent may also have a remedy for tortious inter-

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<sup>363</sup> *E.g.*, *Ratshin*, 192 Cal. Rptr. 891 (discussing *Kumar* but not the PKPA itself, possibly because it was felt inapplicable to pending proceedings); *Kumar*, 177 Cal. Rptr. 763 (made only cursory mention of the PKPA; see discussion *supra* note 345); *Serna*, 651 P.2d 1291, (which considered state law first, then the PKPA to determine whether it would affect the result); *McGee*, 651 S.W.2d 891 (court first determined jurisdiction under pre-UCCJA state law, then considered whether Mississippi decree was entitled to full faith and credit under the PKPA).

<sup>364</sup> See PKPA, PUB. L. No. 96-611, § 8(c), 94 Stat. 3566, 3571 (1980); UNIF. CHILD CUSTODY JURISDICTION ACT, § 7[g], 8(c), 15(b), 9 U.L.A. 138, 142, 158 (1968); see also UCCJA §§ 11(c) and 20(c) (concerning payment of expenses for a party who is outside the state and is directed, or wishes, to appear, with or without the child, if it is just and proper under the circumstances) and § 19(a) (concerning cost of hearing and studies in another state).

<sup>365</sup> *E.g.*, ALA. CODE §§ 13A-6-45, 13A-5-11 (1982 & Supp. 1985) (fine for class C felony not to exceed \$5,000.00); ALASKA STATS. ANN. §§ 11.41.320, 11.41.330 (1983), 12.55.035 (1984) (Class C felony, not to exceed \$50,000.00; Class A misdemeanor, not to exceed \$5,000.00); CAL. PENAL CODE § 278.5 (West 1986) (fines up to \$10,000.00); ILL. ANN. STATS. ch.38, §§ 10-

ference with lawful custody. Such a remedy allows the injured party to recoup financial losses and recover for loss of companionship of the child, as well as to punish the offending abductor and third parties who have aided or abetted the abductor.<sup>366</sup> These remedies have not been established in all jurisdictions.<sup>367</sup>

## IX. THE UCCJA AND THE PKPA—EFFECTUALITY

In the past, one of the problems which faced the UCCJA was the fact that it had not been adopted universally among American jur-

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5, 1005-9-1 (Smith-Hurd Supp. 1985) (fines up to \$10,000.00); MONT. CODE ANN. § 45-5-304 (Supp. 1984) (fines not to exceed \$50,000.00); N.Y. Penal Law §§ 135.45, 135.50, 80.00, 80.05 (McKinney 1975 & Supp. 1986) (class E felony, fines not to exceed \$5,000.00; class A misdemeanor, fines not to exceed \$1,000.00); TEX. PENAL CODE ANN §§ 25.03, 12.34 (fines not to exceed \$5,000.00); See Comment, *The Tort of Custodial Interference—Toward a More Complete Remedy to Parental Kidnappings*, 1983 U. ILL. L. REV. 229, 237-240.

<sup>366</sup> See *Lloyd v. Loeffler*, 694 F.2d 489 (7th Cir. 1982); Digest, *supra* note 347, at 246-249 and Comment, *supra* note 365.

<sup>367</sup> 28 U.S.C. § 1738A(d)(1982). Cases on point include diversity suits, *e.g.*, *Lloyd v. Loeffler*, 694 F.2d 489 (7th Cir. 1982) (which allowed recovery against abducting parents and maternal grandparents, as the likely result from the application of Wisconsin law); *Wasserman v. Wasserman*, 671 F.2d 832 (4th Cir. 1982), *cert. den.*, 459 U.S. 1014 (1983) (which held that the domestic relations exception to diversity jurisdiction was inapplicable to such custody suits and remanded); *Bennett v. Bennett*, 682 F.2d 1039 (D.C. Cir. 1982) (held the domestic relations exception to be inapplicable and that the district court could grant retrospective monetary relief); *Fenslage v. Dawkins*, 629 F.2d 1107 (5th Cir. 1980) (allowed recovery under Texas civil conspiracy law); *Kajtazi v. Kajtazi*, 488 F. Supp. 15 (E.D.N.Y. 1978) (allowed recovery based upon New York law of false imprisonment and intentional infliction of mental distress) as well as state cases, *e.g.*, *Wood v. Wood*, 338 N.W.2d 123, 124 (Iowa 1983) ("The claim for interference with custody rights appears to have been recognized in every jurisdiction which has addressed the issue."); *Gibson v. Gibson*, 15 Cal.App. 3d 943, 93 Cal. Rptr. 617 (1971); *Rosefield v. Rosefield*, 221 Cal. App. 2d 431, 435-437, 34 Cal. Rptr. 479, 483 (1963); *Spencer v. Terebelo*, 373 So. 2d 200, 202 (La. App. 1979), *pet. for review denied*, 376 So. 2d 960 (La. 1979); *Brown v. Brown*, 338 Mich. 492, 498, 61 N.W.2d 656, 659 (1963); *Kipper v. Vokolek*, 546 S.W.2d 521, 525 (Mo. App. 1977); *LeGrenade v. Gordon*, 46 N.C. App. 329, 331-32, 264 S.E. 2d 757, 758-59, *appeal on pet. for discret. review dismissed*, 300 N.C. 557, 270 S.E.2d 109 (1980); *rev. rem.*, 60 N.C. App. 692, 299 S.E.2d 809 (1983); *McBride v. Magnuson*, 282 Or. 433, 436, 578 P.2d 1259, 1259-60 (1978); *McEvoy v. Helikson*, 277 Or. 781, 706-9, 562 P.2d 540, 543-4 (1977); *Sheltra v. Smith*, 136 Vt. 472, 474-75, 392 A.2d 431 (1978).

In most of the above cited state cases, the specific tort alleged was not custodial interference. Rather, the conduct of interfering with custody of a child, or abduction, gave rise to another tort, such as intentional infliction of emotional or mental distress or civil conspiracy. Thus, the pleadings must be structured in accordance with the established practice in each jurisdiction.

isdictions. This was said to leave custody "havens," analogous to divorce mills, in both Massachusetts and some of the territories.<sup>368</sup> This criticism no longer hits the mark. To date, at least forty-nine states, the District of Columbia and the Virgin Islands have adopted the UCCJA.<sup>369</sup> Massachusetts, which by 1984 had been the lone state to hold out, has recently enacted legislation that provides the same jurisdictional standards as the UCCJA.<sup>370</sup> While there remain sufficient differences that Massachusetts may not, strictly speaking, be a UCCJA state, the duplication of vital language makes it evident that the heart of the UCCJA is embodied in the new Massachusetts law.<sup>371</sup> Moreover, the PKPA has elimi-

<sup>368</sup> Lansing & Sherman, *The Legal Response to Child Snatching*, 7 J. Juv. L. 16, 22 (1983); Comment, *Parental Kidnapping: Can the Uniform Child Custody Jurisdiction Act and Federal Parental Kidnapping Prevention Act of 1980 Effectively Deter It?*, 20 DUQUESNE L. REV. 43, 61-62 (1981).

<sup>369</sup> See discussion *supra* in Section IV of this article. The Virgin Islands UCCJA is found in V. I. CODE ANN., tit. 16 §§ 115-39 (Supp. 1985). The UCCJA is only applicable to interstate, not intrastate (inter-county) custody disputes; See *In re Trough*, 631 P.2d 1183, 1185 (Colo. Ct. App. 1981); *Adams v. Adams*, 374 So. 2d 29, 30 (Fla. Dist. Ct. App. 1979) rev. 385 So. 2d 688 (Fla. Dist. Ct. App. 1980); *Nelson v. Nelson*, 433 So. 2d 1015, 1019-20 (Fla. Dist. Ct. App. 1983).

<sup>370</sup> MASS. ANN. LAWS Ch. 209B (Law Co-op. Supp. 1985).

<sup>371</sup> For example, compare UNIF. CHILD CUSTODY JURISDICTION ACT § 3, 9 U.L.A. 122 (1968); *id.* § 6(a) at 134; *id.* § 7 at 137; *id.* § 8 at 142; and *id.* § 14(a) at 153 with MASS. ANN. LAWS Ch. 209B §§ 2(a)-(c) (Law Co-op 1985); *id.* § 2(d); *id.* § 7; *id.* § 7(e)(7) and § 7(a)(i)-(ii); and § 2(e), respectively. See also Freed & Walker, *Family Law in the Fifty States: An Overview*, 18 FAM. L.Q. 369, 428 (1985) (considers the Massachusetts Act to be an adoption of the UCCJA).

#### Correlation of the UCCJA and Massachusetts Law

UCCJA §	Mass. Ann. Laws Ch. 209B
1	§2
2	1 (all numbers not preceded by a "§" symbol are sub-parts of §1)
3	2(a), (b) and (c)
4	5
5	6
6(a)	2(d)
7	7
8	7(e)(7) & 7(a)(i), (ii)
9	3
10	4(a), (b)
11	8
12	

nated the likelihood of this problem to a great extent, because it applies nationwide.<sup>372</sup> Thus, the "custody haven" problem is no longer a grave one.

Another criticism of the UCCJA focuses on its tenor and language. It has been criticized as being too flexible, and having some extremely vague sections. This is said to allow varying interpretations that, in turn, allow a continuation of the centrifugal tendencies of the various jurisdictions, destroying uniformity. This weakness does diminish the Act's capacity to definitively resolve the age-old problems of judicial home-state favoritism and the substitution of the "best interest of the child" inquiry for jurisdictional inquiry. These problems in turn tend to promote continuing custody litigation as well as child-snatching and forum shopping.<sup>373</sup> Although this criticism is apt, some of the difficulty is caused by

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14(a)	2(e)
15	12
16	
17	
18	9
19	10
20	11
21	13
22	
23	14
24	
25	
26	Section 1

Corresponding sections may differ to a degree, but they perform the same function and purpose.

<sup>372</sup> 28 U.S.C. § 1738A(b)(8)(1982): "'State' means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a territory or possession of the United States."

<sup>373</sup> Lansing & Sherman, *supra* note 368; KATZ, CHILD SNATCHING: THE LEGAL RESPONSE TO THE ABDUCTION OF CHILDREN 31-32 (1981) ("One major weakness is that the Act relies too much on judicial discretion. Several actions [sic] are written in vague language; as a result, they are capable of several interpretations, depending on the court." (footnotes omitted)). Coombs, *supra* note 5, at 723-24 (1982) ("The flexibility built into these jurisdictional standards does not, however, only facilitate the courts' selection among the U.C.C.J.A.'s competing policies. It also provides opportunities for courts to establish precedents that vary from state to state and that thereby undermine the apparent uniformity of jurisdictional rules among U.C.C.J.A. states. It more importantly provides a state substantial freedom to indulge a parochial preference for its own initial jurisdiction.").

state court misinterpretation of language which is susceptible to more uniform and proper understanding, given the purposes and spirit of the Act. Here again, the advent of the PKPA is salutary, mandating, as it does, an end to many of the states' centrifugal tendencies.<sup>374</sup> For example: first, the PKPA is a federal statute and is supreme over state law in cases of conflict or inconsistent result;<sup>375</sup> second, the PKPA mandates that a decree based upon significant-connection jurisdiction is not consistent with the Act if another state would have home-state jurisdiction;<sup>376</sup> third, the PKPA specifies the criteria for the existence of continuing jurisdiction and includes the two-part test of subsection (f) for modification of foreign decrees.<sup>377</sup> These notions are proper, even under the language of the UCCJA,<sup>378</sup> but the PKPA tends to reinforce the proper view.

Another criticism has been that the UCCJA does not provide a mechanism to assist in finding a kidnapping spouse and a kidnapped child, although the PKPA does allow the use of the Federal Parent Locator Service.<sup>379</sup> Also, the UCCJA lacks criminal sanctions to penalize a parent who has snatched his or her child.<sup>380</sup> Nevertheless, the PKPA makes 18 U.S.C. 1073 applicable to cases in which a parent crosses state or international boundaries to escape prosecution under the applicable state felony statutes,<sup>381</sup> and most states now have promulgated criminal statutes which provide for punishment sufficient to classify child-snatching as a felony.<sup>382</sup>

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<sup>374</sup> Parental Kidnapping Prevention Act of 1980, Pub. L. No. 96-611 §§ 6-10, 94 Stat. 3568, codified at 28 U.S.C. 1738A, 42 U.S.C. 654(17), 663 (1982).

<sup>375</sup> See discussion *supra* in Section VII.

<sup>376</sup> 28 U.S.C. 1738A(c)(2)(B) (1982).

<sup>377</sup> 28 U.S.C. 1738A(f) (1982); "A court may modify a determination of the custody of the same child made by a court of another State, if (1) it has jurisdiction to make such a child custody determination; and (2) the court of the other State no longer has jurisdiction, or it has declined to exercise such jurisdiction to modify such determination."

<sup>378</sup> For an excellent decision analyzing the UCCJA, especially regarding this aspect, see *Neger v. Neger*, 93 N.J. 15, 459 A.2d 628 (1982).

<sup>379</sup> PKPA § 9, 42 U.S.C. §§ 654 (17), 663.

<sup>380</sup> KATZ, *supra* note 373, at 32-33.

<sup>381</sup> Pub. L. 96-611, § 10, 94 Stat. 3573 (1980).

<sup>382</sup> The following statutes penalize child-snatching as a felony: ALA. ANN. § 13A-6-45 (Supp. 1985); ALASKA STAT. § 11.41.320 (1983) (if the child is removed from the state); ARIZ. REVISED STAT. ANN. § 13-1302 (1978 & Supp. 1985); ARK. STAT. ANN. §§ 41-2416 (Supp. 1985)

The combination of the UCCJA and the PKPA appear to be better at promoting the policies of eliminating child-snatching, fo-

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(if the child is removed from the state); CAL. PEN. CODE §§ 278.5 (West Supp. 1986) (if imprisonment in the state prison is imposed, in the discretion of the trial court); CONN. GEN. STAT. § 53a-97 (1985) (if the child is subject to risk of harm or removed from the state); DEL. CODE ANN., tit. 11 § 785 (Supp. 1984) (if the child is removed from the state); Fla. Stat. § 787.04 (1976 & Supp. 1985); GA. CODE ANN. § 16-5-45 (1984) (The first two intrastate offenses are misdemeanors. The third offense is a felony. Interstate interference with custody is a felony.); HAWAII REV. STAT. § 707-726 (Supp. 1982) (if child removed from state); Criminal Code of 1961, ILL. ANN. STAT. § 10-5 (Smith-Hurd Supp. 1985); IND. CODE. § 35-42-3-3(a)(3) (1982) (removal of the child from the state is an element of the offense); IOWA CODE § 710.6 (1979); KANS. STAT. ANN. § 21-3422a (Supp. 1985); ME. REV. STATS. tit. 17-A § 303 (1983) (class C crime); MASS. GEN. LAWS ANN. ch.265 § 26A (Supp. 1985) (If the safety of the child is endangered or if the child is removed from the state it is a felony. Otherwise, child-snatching is a misdemeanor.); MICH. COMP. LAWS § 750.350a (if the child is removed from the state for more than 24 hours); MO. STAT., § 45-5-304; NEB. REV. STAT. § 28-316 (1979) (if the intent is to deprive the lawful custodian of custody, where the custodian has custody pursuant to the court order); NEV. REV. STAT. §200.359; N. H. REV. STAT. ANN. §633:4 (if the child is removed from the state); N. J. STAT. ANN. § 2c:13-4 (West 1982) (maximum penalty is \$7,500.00 fine or 18 months imprisonment). N.J. STAT. ANN. 2c:43-3, -6 (West 1982) (The New Jersey provisions do not use the word felony); N. M. STAT. ANN. § 30-4-4 (1984) (if the child is removed from the state); NEW YORK PENAL LAW § 135.50 (McKinney 1986) (if the intent was to remove the child from the state or if the child was exposed to danger); N.C. GEN. STAT. § 14-320.1 (Supp. 1985) (if the child is removed from the state); N.D. CENTURY CODE, § 14-14-22.1 (1981) (if the child is removed from the state); Okla. Stat. tit. 10 § 1627 (1981); ORE. REV. STAT. §§ 163.245 (1985) R.I. GEN. LAWS § 11-26-1.1 (1981) (existing decree, removal from the state); S.C. CODE ANN., § 16-17-495 (Law Co-op. 1985) (removal of child from the state); S.D. CODIFIED LAWS ANN., § 22-19-10 (Supp. 1985) (removal of child from the state); TENN. CODE ANN. § 39-2-303; TEXAS PENAL CODE ANN. § 25.03 (removal from the state) (Vernon 1974); UTAH CODE ANN., § 76-5-303 (Supp. 1985) (removal from the state); VERMONT STAT. ANN. tit. 13 § 2451 (Supp. 1985); VA. CODE § 18.2-47 (1982) (parent abductor who removes the child from the state); WASH. REV. CODE § 9A.40.060 (Supp. 1984); WIS. STAT. ANN. §§ 946.71, 946.715 (1982 & Supp. 1985); WYO. STAT., § 6-2-204 (1983).

In most states listed, child-snatching is a felony only if the child is removed from the state. Other states make child-snatching a misdemeanor, while a few states have no such statute. State statutes which make child-snatching or custodial interference a misdemeanor include: KY. REV. STAT. § 509.070 (1985) (custodial interference is a felony unless the child is returned voluntarily by the defendant). LA. REV. STAT. ANN. § 14.45.1 (West Supp. 1986); MD. FAM. LAW CODE ANN. §§ 9-304, -305 (although the section calls the offense a felony (even where the maximum penalty is 30 days in jail and a \$250.00 fine) in all degrees of the crime, the statute is included in this category because no penalty can exceed a \$1,000.00 fine and 1 year imprisonment); MINNESOTA STAT. ANN., § 609.26 (West Supp. 1986) (maximum penalty is imprisonment for not more than one year and one day and fine of \$1,000.00); OHIO REV. CODE ANN. § 2919.23 (Page 1982); 18 PA. CONS. STAT. § 2904 (1982).

It should also be noted that many states have more than one degree of child abduction offenses; one being a felony, usually including removal of the child from the state, and the other being a misdemeanor. *See, e.g.*, GA. CODE ANN. § 16-5-45 (1984); and MASS. ANN. LAWS, ch. 265 § 26A (Law Co-op. Supp. 1985).

rum shopping, and continuous re-litigation of child custody than the UCCJA alone,<sup>383</sup> although problems still remain. Indeed, many questions must still be answered before one may assess the effectuality of the legislative scheme to resolve the problems of child custody jurisdiction.

To what extent is parental misconduct in the child custody arena (e.g., child-snatching, parental kidnapping or refusal to return the child after visitation) deterred by the acts? Commentators seem to be optimistic on this point,<sup>384</sup> but in reality there seems to be little way accurately to assess the impact on deterrence without undertaking an immense task of data collection and empirical research.<sup>385</sup> Such research has yet to be completed.

Another way of attempting to measure the effectuality of the UCCJA and the PKPA is to focus on court opinions to see to what degree judges are recognizing that their courts do not have jurisdiction and to what degree they are refusing to exercise jurisdiction when they have it and a parent has engaged in wrongful conduct. Cases seem to indicate that state courts are, indeed, responding positively on all counts.<sup>386</sup> Note, however, that reported

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<sup>383</sup> See notes 368-382 *supra*, and accompanying text, as well as Comment, *supra* note 368, at 69-70.

<sup>384</sup> KATZ, *supra* note 373, at 30 ("The UCCJA has already had a beneficial effect in the problem areas of child-snatching and interesting [sic] custody disputes."). Bodenheimer, *Interstate Custody: Initial Jurisdiction and Continuing Jurisdiction Under the UCCJA*, 14 FAM. L. Q. 203, 226 (1981) ("This article shows that there is a distinct forward movement, a sincere attempt on the part of many courts to implement the Act so as to stop the 'guerrilla warfare in child custody litigation' . . ." (citation omitted)). Comment, *supra* note 368, at 69 ("The Uniform Child Custody Jurisdiction Act and the Parental Kidnapping Prevention Act of 1980 together have the potential for providing an effective deterrent to parental kidnapping, and should go far toward preventing the harm done to children by overzealous parents who would resort to extra-legal means of obtaining custody.").

<sup>385</sup> KATZ, *supra* note 373, at 31 ("Since it is impossible to count the number of cases not brought because of the UCCJA, it is difficult to assess the Act's effectiveness in preventing them . . . . [I]t is impossible to count the number of cases not brought because of the UCCJA . . . . [T]he reduction in the number of child snatchings cannot be conclusively proved . . . .").

<sup>386</sup> Here follows a list of cases involving parental misconduct from various states, in which, unless otherwise indicated, the court declined to exercise jurisdiction: *Mitchell v. Mitchell*, 437 So. 2d 122 (Ala. Civ. App. 1982) (Although the decision was properly phrased in terms of lack of jurisdiction, because Texas was the "home state," the father's abduction was mentioned as the sole reason the child was absent from Texas. The end result was that

cases are appellate decisions, which represent only a small portion

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the abducting parent's efforts to avoid enforcement of an adverse, out-of-state decree were thwarted.); *Bloodgood v. Whigham*, 408 So. 2d 122 (Ala. Civ. App. 1981); *Morgan v. Morgan*, 666 P.2d 1026 (Alaska 1983) (Although the court reversed and remanded with directions to dismiss on the basis of the fact that Alaska was viewed as an inconvenient forum, the mother had wrongfully retained the children in violation of a temporary order of a Virginia court. One potential problem in this case is the court's statement in reversing the trial court's determination that the father had earlier wrongfully transported the children from Washington to Virginia: "Thus, at the time he left Washington with the children, no court had taken jurisdiction over the dispute and both parents were equally entitled to custody. Rod Morgan's conduct was, therefore, not 'wrongful' within the meaning of [UCCJA §89a] . . . ." *Id.* at 1029. This implied that no wrongful conduct may take place prior to the institution of formal legal action.); *Rodriguez v. Saucedo*, 621 S.W.2d 874 (Ark. Ct. App. 1981); *Blosser v. Blosser*, 616 S.W.2d 29 (Ark. Ct. App. 1981); *McNeal v. Mahoney*, 117 Ariz. 543, 574 P.2d 31 (1977) (although a pre-Arizona UCCJA decision, the jurisdiction statute under which the case was decided was taken almost entirely from UCCJA § 3); *Both v. Superior Ct.*, 121 Ariz. 381, 590 P.2d 920 (1979); *In re Ben-Yehoshua*, 91 Cal. App. 3d 259, 154 Cal. Rptr. 80 (1979) (the wrongful conduct of the father in snatching the children in California and taking them to Israel could not create subject matter jurisdiction in California when the children had never lived in California, except for approximately one month, and had no significant connection with California); *In re Hopson*, 110 Cal. App. 3d 884, 168 Cal. Rptr. 345, 355-356 (1980) (In refusing to enforce a Tennessee decree, the court cited Cal. Civ. Code § 5157 (UCCJA § 8). "The fact that Tennessee not only opened its doors to him, but also granted his motion, despite his overt actions in flouting the law, compels us to apply the clean hands doctrine of section 5157 in denying recognition of the Tennessee judgment . . . . We conclude that given the clear purpose and policy of the UCCJA to deter childnapping, the Tennessee court failed to comport with jurisdictional standards substantially in accordance with the UCCJA."). *Brock v. District Court of County of Boulder*, 620 P.2d 11 (Colo. 1980); *In re Custody of Johnson*, 634 P.2d 1034 (Colo. Ct. App. 1981); *Bonis v. Bonis*, 420 So. 2d 104, 107 (Fla. Dist. Ct. App. 1982) ("[A]n allegation or showing of child-snatching by one of the parents is not an independent statutory basis for jurisdiction, thus, contrary to appellee's assertion, it will not guide resolution of the issues presented here." (footnote omitted)); *Zuccaro v. Zuccaro*, 407 So. 2d 389 (Fla. Dist. Ct. App. 1981); *Trujillo v. Trujillo*, 378 So. 2d 812 (Fla. Dist. Ct. App. 1980) (The court, upon finding that the father abducted the child and that Florida has no jurisdiction to decide the matter, directed that the mother's petition for habeas corpus be granted.); *Detko/Roberts v. Stikelether*, 370 So. 2d 383 (Fla. Dist. Ct. App. 1979); *Etzion v. Evans*, 247 Ga. 390, 276 S.E. 2d 577, 578 (1981) (The first sentence of the opinion reads: "The State of Georgia is not a sanctuary for child snatchers."); *Godwin v. Godwin*, 104 Ill. App. 3d 790, 433 N.E. 2d 310, 312 (1982) (The mother had removed the child to Florida without the court's permission, after the original decree. The court stated, "One of the stated purposes of the Act is to deter such unilateral action by a parent. If a court lost its jurisdiction because of such actions, the respondent would subvert the clear intention of the General Assembly as well as profit from her own misbehavior." (citation omitted)); *In re Marriage of Thompson*, 96 Ill. 2d 67, 70 Ill. Dec. 214, 449 N.E.2d 88 (1983) (Although the father was guilty of child-snatching, in violation of a Michigan court order, the mother's attorney failed to request reference to the Michigan courts until closing arguments were being made. The court refused to find error in the trial court's exercise of jurisdiction.); *Lewis v. Canty*, 115 Ill. App. 3d 306, 450 N.E.2d 864 (1983)

of the number of custody cases, let alone custody disputes in gen-

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(wrongful removal of the child from Illinois could not divest the Illinois courts of jurisdiction); *Barcus v. Barcus*, 278 N.W.2d 646 (Iowa 1979); *Wood v. Graham*, 633 S.W.2d 404 (Ky. 1982); *Gibson v. Gibson*, 429 So. 2d 877 (La. App. 1983); *Huston v. Granstaff*, 417 So. 2d 890 (La. Ct. App. 1982) (upheld an award of attorney fees and expenses based upon La. Rev. Stat. 13:1714(B) (UCCJA § 14)); *Hust v. Whitehead*, 416 So. 2d 639 (La. Ct. App. 1982) (upheld an award of expenses and attorney's fees assessed against a child abductor although the appellate court did so on the authority of Louisiana's version of UCCJA § 7 (La. Rev. Stat. 13:1706(G)); *Buchanan v. Malone*, 415 So. 2d 259 (La. Ct. App. 1982); *Hadley v. Hadley*, 394 So. 2d 769, 773 (La. Ct. App. 1981) (There was conflicting testimony as to whether the mother's retention of the child was in knowing violation of Rhode Island decrees. However, the court emphasizes the discretionary nature of Louisiana's version of UCCJA § I ("[T]he court may decline to exercise jurisdiction if this is just and proper under the circumstances.")); *Green v. Green*, 87 Mich. App. 706, 276 N.W.2d 472, 475 (1978) (Although the father had removed the child from Texas before the initial decree of the Texas court, the Michigan court exercised jurisdiction. The court held that removal or retention before a court determination cannot be "wrongful" in the UCCJA § 8 sense of that word. The court also stated that, ". . . [t]he court should not decline jurisdiction under the clean hands principle to punish the parent at the expense of the child," and cited the maligned case of *Settle v. Settle*, 276 Or. 759, 556 P.2d 962 (1976). This may have been one of those cases of good law versus good result in an individual case.); *Timmings v. Timmings*, 628 S.W. 2d 724 (Mo. App. 1982) (mother moved to Iowa after the parents divorced and the mother had been given custody, subject to specific rights of the father to visitation and temporary custody; even though the move resulted in denial of the father's rights for some three years before the mother was found, the court declined to exercise jurisdiction on the ground that a party's wrongful conduct cannot confer jurisdiction on a state); *Pierce v. Pierce*, 640 P.2d 899 (Mont. 1982) (The Montana Supreme Court reversed a trial court's holding which denied the exercise of jurisdiction on the basis that Kentucky had continuing jurisdiction, and that the mother had improperly retained the child after a visit. The state Supreme Court did not believe the child was "improperly" retained, directing trial courts to examine the circumstances surrounding the retention of the child to decide the issue of impropriety. This, coupled with the direction to trial courts to balance the child's best interest against the policies of deterring forum shopping and parental kidnapping, signals child snatchers that they may go to Montana with the children and have some chance of success in keeping them.); *Stevens v. Stevens*, 177 N.J. Super. 167, 425 A.2d 1081 (1981); *Schaeffer v. Schaeffer*, 100 Misc. 2d 118, 420 N.Y.S. 2d 700, 703 (Fam. Ct. Act, 1979); *In re Potter*, 377 N.E. 2d 536 (Ohio Ct. of Common Pleas 1978) (The court refused to exercise jurisdiction to modify a foreign decree because of the wrongful conduct of the father. The court did choose to exercise jurisdiction to enforce the foreign ruling so that the father had to return the children.); *In re Custody of Ross*, 291 Or. 263, 630 P.2d 353 (1981) (court to exercise jurisdiction even though the child had been living with the abducting parent for 21 months following the abduction, thus, overruling *Settle v. Settle*, 276 Or. 759, 556 P.2d 962 (1976); *Com. ex rel. Zaubi v. Zaubi*, 492 Pa. 183, 423 A.2d 333 (1980) (The father abducted his children in Denmark, in violation of a Denmark court's order. The Pennsylvania court properly refused to exercise jurisdiction, absent a showing that conditions in the custodial household were physically or emotionally harmful to the children.); *Ryan v. Ryan*, 301 N.W.2d 675 (S.D. 1981) (Abduction of the child, and removal from the state, without notice, knowledge or consent of the other parent, has no effect upon the residency of the child for

eral. Note also that the UCCJA itself distinguishes the situation in which a parent abducts his or her child when there is no extant judicial decree of custody from those in which such a decree exists.<sup>387</sup> This suggests one of the more significant problems in this area: that a parent who "snatches his or her children and runs," before the onset of any litigation or court proceedings on child custody, may benefit from this misconduct.<sup>388</sup> Also, in many cases, both parents are guilty of misconduct. In such cases the courts at-

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jurisdictional purposes.); *Winkelman v. Moses*, 279 N.W.2d 897, 899 (S.D. 1979) (A noncustodial parent may not qualify under the six month requirement of "home state" jurisdiction by abducting the child.); *Shermer v. Cornelius*, 278 S.E. 2d 349 (W. Va. 1981); *In re R.J.G.*, 107 Wis. 2d 704, 321 N.W. 2d 354 (1982) (although mother changed her residence to Wisconsin without permission of the Arizona court when the Arizona decree required such permission, the court held that Wisconsin was the home state of the children).

<sup>387</sup> UCCJA § 8. If a petitioner for an initial decree has wrongfully taken the child, the court *may* decline to exercise jurisdiction. But, the Court *shall not* exercise jurisdiction, unless required in the best interests of the child, if a petitioner for a modification has improperly abducted the child.

<sup>388</sup> See *Morgan v. Morgan*, 666 P.2d 1026, 1029 (Alaska 1983) ("We conclude that the superior court erred in holding that Rod Morgan 'wrongfully' transported the children from Washington to Virginia. Custody proceedings were not instituted until after Rod Morgan returned to Virginia. Thus, at the time he left Washington with the children, no court had taken jurisdiction over the dispute and both parents were equally entitled to custody. Rod Morgan's conduct was therefore not 'wrongful' within the meaning of AS 25.30.070(a), and the superior court should have declined to exercise its jurisdiction under AS 25.30.050(a)."). *Contra Williams v. Zacher*, 35 Or. App. 129, 581 P.2d 91, 94 (1978). ("The term 'wrongfully' encompasses unconscionable conduct even though the conduct does not involve the violation of any legal right or duty."); *Green v. Green*, 87 Mich. App. 706, 276 N.W.2d 472, 475 (1979).

Many of the statutes cited in note 382, *supra*, are not applicable unless a court order exists. See ARK. STAT. ANN. § 41-2416 (Supp. 1985) CAL. PENAL CODE § 278.5 (West Supp. 1986); HAWAII REV. STAT. § 707-726 (Supp. 1982); Criminal Code of 1961, ILL. ANN. STAT. § 10-5 (Smith-Hurd Supp. 1985); IND. CODE § 35-42-3-3(a)(3) (1982); IOWA CODE § 710.6; LA. REV. STAT. ANN. § 45.1 (West Supp. 1986); MD. FAM. LAW CODE ANN. §§ 9-304, -305, MINN. STAT. ANN. § 609.266; NEB. REV. STAT. § 28-316 (1979) (it is a felony if there is a court order, a misdemeanor, if not); NEV. REV. STAT. § 200.359 (1979); N.C. GEN. STAT. § 14-320.1 (Supp. 1985); N.D. CENTURY CODE. § 14-14-22.1 (1981); OKLA. STAT. tit. 10 § 1627 (1981); R.I. GEN. LAWS. § 11-26-1.1 (1981); S.C. CODE ANN. § 16-17-495 (Law Co-op. 1985); S.D. CODIFIED LAWS ANN. § 22-19-1-10 (Supp. 1986); UTAH CODE ANN. § 76-5-303 (Supp. 1985); VA. CODE § 18.2-47 (1982); WIS. STAT. ANN. §§ 946.71, 946.715 (1982 & Supp. 1985) (The Wisconsin child abduction statute applies when there is a court order or when the abductor has been served with process in an action.); TEXAS PENAL CODE ANN. § 25.03 (Vernon 1974) (The Texas child abduction statute applies when there is a court order or when the abductor knows that an action has been filed.). *But see* WASH. REV. CODE § 9A.40.060 (Supp. 1984) (applying expressly even where "no lawful custody order has been entered").

tempt to reach a quick and acceptable decision as to the proper forum, so that the matter of custody may be decided and the misconduct stopped.<sup>389</sup> The notion of deterrence plays a strange role in the child custody sphere. Once penalized, either by assessment of expenses or by having a claim dismissed, or by a court's refusal to exercise jurisdiction due to parental misconduct, one might expect the offending parent would be deterred from further misconduct. So many powerful emotional factors are involved, however, including an often sincerely held belief that the misconduct is necessary to avert harm to the child, that the usual theory of specific deterrence may not function. General deterrence will not occur until parents' attorneys can conclusively advise that parental kidnapping is unlikely to achieve anything. The law, as applied by the courts in some jurisdictions and in some fact situations, has not made that clear enough.

The existence of state variations of the UCCJA tends to limit the effectiveness of the Act, in that some of these variations tend to limit the applicability of the state law to certain custody situations. These variations are found most often in the definitions in section 2. Often, variations also exist concerning applicability of the UCCJA to probate matters, neglect or termination of parental rights, and adoption.<sup>390</sup>

The disclosure requirements of UCCJA section 9 provide another opportunity for state variance. In Georgia, for example, section 9 is a procedural matter and treated as part of the pleading process.<sup>391</sup> Ohio, on the other hand, has denominated such disclos-

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<sup>389</sup> *In re Leonard*, 122 Cal. App. 3d 443, 175 Cal. Rptr. 903 (1981) (where both parents of the child were guilty of child-snatching, the best interests of the child dictated that the sanctions of UCCJA § 8 not be applied); *O'Neal v. O'Neal*, 329 N.W.2d 666 (Iowa 1983) (best interests of the child require that the issue of custody be litigated, and that the "yo-yo" effect be stopped); *Massey v. Massey*, 89 A.D.2d 566, 452 N.Y.S.2d 101 (1982).

<sup>390</sup> See *Pittman v. George*, 424 So. 2d 1200 (La. Ct. App. 1982) (which upheld the assertion of jurisdiction by a trial court under factual circumstances which would not have justified the court asserting jurisdiction had the UCCJA been in effect in Louisiana at that time. The rationale was that the UCCJA is not applicable to those proceedings commenced before its effective date, but which were continuing in an appellate court at the time of its promulgation. Thus, there may be a short-term hiatus during which inconsistent results will subsist.).

<sup>391</sup> *Gambrell v. Gambrell*, 246 Ga. 516, 517-18, 272 S.E.2d 70, 72-73 (1980) (to date, the

ure "a mandatory jurisdictional requirement . . . ." <sup>392</sup>

The interstate/intercourt communication requirement provided in sections 6 and 7 of the UCCJA has great potential for reducing the awarding of conflicting custody decrees. Moreover, it allows the decision to be made in the most appropriate forum.<sup>393</sup> It appears that courts are utilizing such communication to this advantage and that appellate courts are advocating its use.<sup>394</sup> Of course, some ex-

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case has not been cited on this point).

<sup>392</sup> *Pasqualone v. Pasqualone*, 3 Ohio. St. 2d 96, 406 N.E.2d 1121 (1980); *Paltrow v. Paltrow*, 37 Md. App. 191, 376 A.2d 1134 (1977) (finding no reversible error in a trial court's granting of a motion *ne recipiatur*, although it is felt that it would have been better to dismiss the suit, because of proceedings on the custody issue pending in another state. The wife in the case had omitted to include in her pleadings the information concerning the other proceeding. The issue of the procedural versus the jurisdictional impact of this requirement was left unresolved.).

<sup>393</sup> *Foster & Freed, Family Law in the Fifty States: An Overview*, 17 FAM. L. Q. 365, 369 (1984) ("Still another due process issue which may arise derives from the 'simultaneous proceedings' provision of UCCJA § 6, which requires communication between courts. It is one thing for judges to exchange pleasantries and to inform each other as to pending proceedings. It is something else for judges to get into the merits of the case or to the credibility of the parties. The latter situation raises the problem of secret evidence or communications; especially where no record is made of the conversation, and there is no opportunity for refutation. Such procedure, in the hands of a prejudiced judge, smacks of the Star Chamber. To prevent abuse, it might be wise to amend UCCJA § 6 to require that all such communications be recorded and made part of the record."); *Allen v. Allen*, 634 P.2d 609, 615 (Hawaii 1981) ("[W]e hold that at least the substance of the conversation should be placed in the record and made available to the contestants for their information.") (this case related to UCCJA § 7, a telephone call).

<sup>394</sup> *Morgan v. Morgan*, 666 P.2d 1026, 1029-30 (Alaska 1983) ("The superior court further erred in failing to communicate with the Virginia court before rendering its jurisdictional decision in this case. Although the trial court did send an inquiry to the Virginia courts, . . . the Alaska proceedings should have been stayed pending communication with Virginia."); *Rexford v. Rexford*, 631 P.2d 475, 479 (Alaska 1980); *Mort v. Mort*, 365 So.2d 194 (Fla. App. 1978) (Although it was not error for the Florida court to request the Pennsylvania court's assistance, it was error for the two courts to dually exercise jurisdiction. Jurisdiction should be exercised in one court alone.); *Allen v. Allen*, 634 P.2d 609, 615 (Haw. Ct. App. 1981) ("We think the UCCJA authorizes and encourages such communication."); *Paltrow v. Paltrow*, 37 Md. App. 191, 376 A.2d 1134 (1977) (The lower court had communicated with the Oregon court.); *Green v. Green*, 87 Mich. App. 706, 711, 276 N.W.2d 472, 474 (1978) ("In determining whether to decline or retain jurisdiction, the Texas and Michigan judges admirably followed the procedures prescribed by the [UCCJA] . . . , including the suggestion in subsection [7(d)] that the courts communicate and exchange pertinent information." (footnote omitted)); *E.E.B. v. D.A.*, 89 N.J. 595, 446 A.2d 871 (1982) (encourages communication as the better practice, even where, as in UCCJA § 7, it is not a requirement); *William L. v. Michele P.*, 99 Misc. 2d 346, 416 N.Y.S.2d 477 (1979) (family court communi-

ceptions exist.<sup>395</sup> There is a danger to intercourt communication that needs to be signalled. Foster and Freed have done so:

Still another due process issue which may arise derives from the simultaneous proceedings provision of UCCJA section 6, which requires communication between courts. It is one thing for judges to exchange pleasantries and to inform each other as to the pending proceedings. It is something else for judges to get into the merits of the case or to the credibility of the parties. The latter situation raises the problem of secret evidence or communications; especially where no record is made of the conversation, and there is no opportunity for refutation. Such procedure, in the hands of a prejudiced judge, smacks of the Star Chamber. To prevent abuse, it might be wise to amend UCCJA §6 to require that all such communications be recorded and made part of the record.<sup>396</sup>

Flexibility inheres in the "significant connection" basis of jurisdiction, which, facially, may provide a state with the statutory wherewithal to make parochial decisions on jurisdiction, although such

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cated with Mississippi court in deciding not to exercise jurisdiction on forum non conveniens grounds); *Vanneck v. Vanneck*, 68 A.D.2d 591, 417 N.Y.S.2d 258 (1979), *aff'd*, 49 N.Y.2d 602, 427 N.Y.S.2d 735, 404 N.E.2d 1278 (1979) (modified, affirmed and remanded to superior court so that communication with Connecticut court could be had to find an appropriate forum); *Latch v. Latch*, 305 S.E.2d 564, 566 (N.C. App. 1983) (agreed with lower court's finding that it had jurisdiction based upon UCCJA § 3(a)(4), where Pennsylvania court had written a letter to the defendant stating that it was relinquishing jurisdiction to the North Carolina court).

<sup>395</sup> *Webb v. Webb*, 245 Ga. 650, 653, 266 S.E.2d 463, 465 (1980) (not only did neither the Georgia nor the Florida courts communicate with each other, but each court had knowledge of the other proceeding and failed to communicate; further, the Supreme Court of Georgia affirmed the lower court's exercise of jurisdiction, even where a contrary decree had been entered in Florida after the father had filed the action in Georgia); *Pierce v. Pierce*, 640 P.2d 899 (Mont. 1982) (The case held it to be error for the district court prematurely to resort to informal communication with the Kentucky court. It is true that the lower Montana court had not, at the time of the communication, determined whether it had jurisdiction at all. The Supreme Court may be technically correct, but it also criticized the lower court for what seems to be a good faith effort to determine whether or not a valid decree was in force at the time the Montana proceeding arose.).

<sup>396</sup> Foster & Freed, *supra* note 393, at 369. See *Allen v. Allen*, 634 P.2d 609, 615 (Haw. 1981) ("[W]e hold that at least the substance of the conversation should be placed in the record and made available to the contestants for their information.") (this case related to UCCJA § 7, a telephone call).

would be counter to the spirit and structure of the UCCJA.<sup>397</sup> Some state judiciaries have shown restraint and made decisions promoting the purposes of the Act.<sup>398</sup> Other states have conflicting decisions among their appellate courts regarding whether they are going to have a broad definition of the "significant connection" basis of jurisdiction.<sup>399</sup> Some clearly have opted for the parochial "forum state" preference.<sup>400</sup>

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<sup>397</sup> See the discussion of "significant connection" basis for jurisdiction in Sections II and III of this article.

<sup>398</sup> *Hafer v. Superior Court, City of San Diego*, 126 Cal. App. 3d 856, 179 Cal.Rptr. 132 (1981); *In re Ben-Yehoshua*, 91 Cal. App. 3d 259, 266, 154 Cal. Rptr. 80, 84 (1979) ("Based upon the record herein it is readily apparent that the children in this case did not have the requisite significant relationship to this state and that Israel was the state having the maximum contacts."); *Allen v. Allen*, 64 Hawaii 553, 645 P.2d 300 (1982); *In re Holman*, 77 Ill. App. 3d 732, 396 N.E.2d 331 (1979); *Bacon v. Bacon*, 293 N.W.2d 819, 821 n.3 (Mich. App. 1980) (maximum contacts required for significant connection jurisdiction); *Serna v. Salazar*, 98 N.M. 648, 651 P.2d 1292 (1982) (laudable for its consideration of California case law in applying UCCJA § 14 and PKPA subsection (f) to a petition to modify a California decree); *Sullivan v. Sullivan*, 87 A.D.2d 42, 451 N.Y.S.2d 851 (1982) (required maximum contacts with the state in order for significant connection jurisdiction to lie); *Holland v. Holland*, 286 S.E.2d 895, 898 (N.C. App. 1982) ("The 'substantial' evidence required by [UCCJA § 3(a)(2)] . . . must be such as would enable the trial court to look to sources within the state that could address each of the statutory aspects of the child's interest, care, protection, training and personal relationships."); *In re Ross*, 291 Or. 263, 630 P.2d 353 (1981) (An improperly abducted or retained child cannot be said to develop significant connections where the child's presence is due to the abduction.).

<sup>399</sup> *Compare Mondy v. Mondy*, 395 So.2d 193, 195 (Fla. Dist. Ct. App. 1981) ("The statutory provision 'does not require that the child's only 'significant connection' be with the State of Florida in order for jurisdiction of the Florida court to attach. It only requires that the child have a 'significant connection' with this state.'" (citation omitted)) *with Brown v. Tan*, 395 So.2d 1249, 1252 (Fla. Dist. Ct. App. 1981) (significant connection was not found, although both the mother and child were present in Florida, the mother was a domiciliary of Florida and the original divorce decree was made in Florida; the child's home was in Singapore and he was in Florida only for a visit). *See generally* *Cata v. McKnight*, 401 So. 2d 1221, 1222 (La. Ct. App. 1981) (properly affirmed trial court's deference to Oklahoma courts, but stated, "Inasmuch as the children are now living in Louisiana with their father, there is a 'significant connection' with this state"); *Hadley v. Hadley*, 394 So. 2d 769, 771-72 (La. Ct. App. 1981) (carefully set out the facts which established a significant connection to Louisiana and cited UCCJA § 1(a)(3)); *Moore v. Moore*, 379 So. 2d 1153, 1155-1156 (La. Ct. App. 1980) (carefully followed UCCJA § 14 in modifying foreign decree; used the term "maximum contact" in relation to significant connection jurisdiction).

<sup>400</sup> *See Webb v. Webb*, 245 Ga. 650, 652, 266 S.E.2d 463, 465 (1980) (that Florida court entered final judgment establishing prior Georgia decree awarding custody to wife did not preempt Georgia court's jurisdiction to award custody to husband). *See also* *Brokus v. Brokus*, 420 N.E.2d 1242, 1246 (Ind. App. 1981) (holding Indiana trial court's assumption of jurisdiction in child custody proceeding correct upon finding that an action pending in an-

The emergency jurisdiction provision of section 3(a)(3) of the UCCJA was meant to be applied only in serious emergencies, as the commissioners to the UCCJA noted in their comments to section 3: "This extraordinary jurisdiction is reserved for extraordinary circumstances."<sup>401</sup> The Colorado Supreme Court noted:

The exercise of *parens patriae* jurisdiction should be limited to those cases where there is substantial evidence of a grave emergency affecting the immediate welfare of the child . . . . Generally, judicial relief in such cases should not extend beyond the issuance of temporary protective orders pending the application to the court of the rendering state for appropriate modification of the custody decree.<sup>402</sup>

Some jurisdictions have awarded permanent jurisdiction pursuant to emergency jurisdiction.<sup>403</sup> Applying emergency jurisdiction too broadly will be corrosive of the anti-child-snatching purposes of

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other state was not being held in substantial conformity with the UCCJA) (Although this case may have reached a proper result, the court sets a dangerous precedent by partly basing its decision on the theory that an Ohio court lacked jurisdiction because of lack of "substantial compliance" with the UCCJA. *Id.* at 1248); *Pierce v. Pierce*, 197 Mont. 16, 640 P.2d 899, 904-06 (Mont. 1982) (reversal of trial court's holding that Montana lacked jurisdiction justified by result of communications under UCCJA § 7 and evidence that Kentucky jurisdiction no longer continued; case remanded, requiring the trial judge to exercise jurisdiction unless child's best interests would not be injured). *Cf. Quenzer v. Quenzer*, 653 P.2d 295, 299 (Wyo.), *cert. denied*, 460 U.S. 1041 (1982) (The court denied full faith and credit to a Texas decree. This case promotes a possibly dangerous precedent in its broad interpretation of the "consistent with the provisions of this section" language of the PKPA. While it may be true that the Texas decree was not entitled to full faith and credit under the PKPA, the Texas decree predated the enactment of the PKPA).

<sup>401</sup> UNIF. CHILD CUSTODY JURISDICTION ACT § 3 commissioners' note, 9 U.L.A. 124 (Master ed. 1979).

<sup>402</sup> *Brock v. District Court*, 620 P.2d 11, 14 (Colo. 1980) (citations omitted).

<sup>403</sup> *Breneman v. Breneman*, 92 Mich. App. 336, 342, 284 N.W.2d 804, 807 (1979) (after child's testimony of beatings established emergency jurisdiction, the court went beyond issuing a temporary order and changed custody permanently to petitioning father.); *Vorpahl v. Lee*, 99 Wis. 2d 7, 298 N.W.2d 222, 225 (1980). ("The trial court . . . based its exercise of jurisdiction on sec. 822.03(1)(c). This section provides that if a child is physically present in the state and is, in some way, neglected or dependent, the court may assume jurisdiction. In the present case, the trial court correctly determined that it could exercise jurisdiction under this section. Because of the mother's abduction of them, both children were present in this state and were placed in need of the court's intervention to determine the question of custody and to provide for their protection. Furthermore, the alleged instances of abuse, which occurred in their father's home, supported the trial court's finding that the children were neglected and dependent.").

the Act. It is important to construe this section narrowly, especially in light of the fact that the child-snatching parent often attempts to justify his act by alleging an emergency or danger of imminent harm, so as to acquire a basis for jurisdiction. Courts do seem to be applying this section sparingly.<sup>404</sup>

It has been suggested that a special rule, not requiring recognition of punitive decrees, should be followed.<sup>405</sup> A punitive decree is

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<sup>404</sup> See *Brock*, 620 P.2d at 15 (child's hyperactivity and adjustment disorder, without evidence of physical or emotional abuse, did not warrant emergency jurisdiction); *Nelson v. Nelson*, 433 So. 2d 1015, 1018 (Fla. Dist. Ct. App. 1983); *Milenkovic v. Milenkovic*, 93 Ill. App. 3d 204, 214, 416 N.E.2d 1140, 1146 (1981) (example of proper exercise of emergency jurisdiction, wherein father had shot and killed mother during pendency of divorce action, and court awarded temporary custody to a neighbor); *Hache v. Riley*, 186 N.J. Super. 119, 128, 451 A.2d 971, 975 (1982) (emergency jurisdiction confers only a temporary jurisdiction to make protective measures); *Mitchell v. Mitchell*, 117 Misc. 2d 426, 431, 458 N.Y.S.2d 807, 810 (1982) ("The 'emergency' basis for acquiring jurisdiction requires that the petitioner demonstrate that the subject child will somehow suffer emotionally or physically if jurisdiction is not exercised."); *Magers v. Magers*, 645 P.2d 1039, 1042 (Okla. App. 1982) (court properly affirmed the action of the trial court in assuming emergency jurisdiction and granting the father temporary custody on condition that he file an action in Texas, where the alleged abuse occurred).

Justice Cologero of the Louisiana Supreme Court summarized use of the emergency jurisdiction as follows:

We construe this emergency provision as permitting a state, otherwise without jurisdiction over a visiting child or her non-resident mother, to take jurisdiction in a custody matter only if the *immediate* needs of the child require it because the child has been abandoned or otherwise mistreated, abused, or neglected. The statute contemplates that *conditions in the asylum state* and the immediacy of those conditions will provide both the necessity and the justification for the asylum state's assuming jurisdiction over a custody matter not otherwise within its province. Such a situation is not presented by Dr. Medellin's petition to the Texas court. We do not construe LA. R. S. 13:1702(A)(3) to mean that a child visiting an asylum state may be found to be in an emergency state of mistreatment, abuse, neglect or dependency because of allegations concerning conditions purportedly existing in the home state, conditions more appropriately and conveniently subject to the scrutiny of the courts of the domicile state.

*Dillon v. Medellin*, 409 So.2d 570, 575 (La. 1982).

<sup>405</sup> Bodenheimer, *Progress Under the Uniform Child Custody Jurisdiction Act and Remaining Problems: Punitive Decrees, Joint Custody, and Excessive Modifications*, 65 CALIF. L. REV. 978, 1003-09 (1977) ("Punitive decrees, decrees transferring custody to the other parent when a parent has left the local jurisdiction or otherwise has disregarded a court's authority on a custody matter, should be abolished as they restrict interstate movement and often cause the very problems that the UCCJA was meant to correct."); but see Donnigan, *Child Custody Jurisdiction: The Policy Against Abduction*, 19 GONZ. L. REV. 1, 13 (1983) (criticizing the rule of non-recognition of punitive decrees).

one transferring custody to the non-offending parent, when the other has removed the child from a jurisdiction or has done something else in violation of a court's order or authority. Some courts have followed this special rule, even though it contains a potential for abuse if not narrowly construed.<sup>406</sup>

The concept of continuing jurisdiction still remains valid, but a problem arises as to when it ceases to exist or should not be exercised.<sup>407</sup> There is divergence of opinion among the states as to where continuing jurisdiction ought to end.<sup>408</sup>

The amount of respect given a decree from a foreign nation varies from state to state and from fact situation to fact situation,

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<sup>406</sup> See *In re Lemond*, 182 Ind. App. 626, 395 N.E.2d 1287, 1291 (1979) (decree awarding custody to mother in Hawaii not "punitive"); *Slidell v. Valentine*, 298 N.W.2d 599, 605 (Iowa 1980) ("[A] punitive decree, issued in response to a custodial parent's flight with the child from a jurisdiction, is not favored unless it is 'just and proper under the circumstances.'" (citation omitted)); *Spaulding v. Spaulding*, 460 A.2d 1360, 1367 (Me. 1983) ("This principle, however, is narrow; foreign decrees are punitive only if a sister state changes or awards custody, without regard to the best interest of the child, solely to punish one parent for disregarding its authority."); *Holt v. District Court*, 626 P.2d 1336, 1344 (Okla. 1981) ("Generally, however, temporary custody orders, because of their temporary nature, should not be deemed punitive." (footnote omitted)); *Brooks v. Brooks*, 20 Or. App. 43, 50, 530 P.2d 547, 551 (1975) (order held punitive as effort to discipline mother for interference with father's visitation right, and thus subject to judicial inquiry).

<sup>407</sup> See, e.g., *Palm v. Superior Court*, 97 Cal. App. 3d 456, 474-79, 158 Cal. Rptr. 786, 796-800 (1979) (Staniforth, J., dissenting) (dissent on the extent of the continuing jurisdiction of a foreign court).

<sup>408</sup> Cf. *Moore v. Perez*, 428 So. 2d 113, 115 (Ala. Civ. App. 1983) (court held that continuing jurisdiction existed even after another state had become the home state but affirmed the trial court's refusal to exercise this jurisdiction); *Palm v. Superior Court*, 97 Cal. App. 3d 456, 469, 158 Cal. Rptr. 786, 793 (1979) (jurisdiction of foreign court may continue even after the home state has become California); *McCarron v. District Court*, 671 P.2d 953 (Colo. 1983) (en banc) (continuing jurisdiction ends if all parties have moved away or if significant connections with the state have eroded); *Hegler v. Hegler*, 383 So. 2d 1134, 1136 (Fla. Dist. Ct. App. 1980) ("The fact that the original decree was entered in Florida does not prevent loss of jurisdiction if the children have resided elsewhere for 6 months."); *Steadman v. Steadman*, 393 So. 2d 1282, 1283 (La. Ct. App. 1980) (continuing jurisdiction did not exist where children and custodial parent were not present in the state); *Serna v. Salazar*, 98 N.M. 648, 650, 651 P.2d 1292, 1294 (1982) (applied California law—*In re Steiner*, 89 Cal. App. 3d 363, 152 Cal. Rptr. 612 (1979)—to find that California had lost significant contacts with the child); *Fernandez v. Rodriguez*, 97 Misc. 2d 353, 358, 411 N.Y.S.2d 134, 138 (1978) (Puerto Rico lost continuing jurisdiction when it no longer would have jurisdiction under jurisdictional prerequisites substantially in conformance with the UCCJA); *In re Reynolds*, 2 Ohio App. 3d 309, 441 N.E.2d 1141, 1144-45 (1982) (continuing jurisdiction ends when UCCJA § 3 is no longer satisfied).

although the available cases show a willingness to recognize foreign decrees based on laws which comport with or approximate UCCJA standards.<sup>409</sup>

## X. CONCLUSION

### A. *Constitutional Implications In General*

The conflict that has marked the history of the law relating to jurisdiction over questions of child custody has prompted debate over the proper means for reconciling competing policy interests. Is it possible to promote the best interests of a child in a custody battle while, at the same time, furthering a policy designed to counter the phenomenon of child-snatching? Child-snatching became a significant by-product of competing state assertions of jurisdiction and the judiciaries' desire to protect the interests of the children. Child-snatching became a feature of our society, in which divorce and mobility over great distances are common and accepted. The law tended to reward the parent who snatched his or her child because the courts were jealous of their authority to determine what was best for the individual child. While all agreed that child-snatching was bad for children as a class, each state, nevertheless, tended to promote the phenomenon. The resulting chaos led to the promulgation of the Uniform Child Custody Jurisdiction Act and the Parental Kidnapping Prevention Act. This leg-

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<sup>409</sup> *Plas v. Superior Court*, 155 Cal. 3d 1008, 202 Cal. Rptr. 490, 495-96 (1984) (where both French court and California court had proceedings pending concerning custody of a child: (1) the California Court lacked jurisdiction under UCCJA § 3; and (2) even if it had jurisdiction, the proper procedure was to communicate with the French court and stay the California proceedings; the court treated this in the same manner as a dispute between two American states, although some extra deference seemed to be given the French court); *Miller v. Superior Court*, 22 Cal. 3d 923, 151 Cal. Rptr. 6 (1978) (Australian court order was enforceable in California where it was temporary, and therefore not punitive, and involved no deprivation of reasonable notice and opportunity to be heard); *Al-Fassi v. Al-Fassi*, 433 So. 2d 664, 666-67 (Fla. Ct. App. 1983) (court refused to recognize Bahamian decree where Bahamian court had no jurisdiction over the parties under jurisdictional prerequisites substantially in accordance with the UCCJA); *Com ex rel Zaubi v. Zaubi*, 492 Pa. 183, 423 A.2d 333, 334 (1980) ("We agree with the Superior Court that the Act compels Pennsylvania courts not only to recognize valid custody decrees from foreign nations but also to decline to accept jurisdiction to modify custody decrees in the absence of a showing, based on evidence not previously considered, of conditions in the custodial household that are physically or emotionally harmful to the children.")

isolation, while far from perfect, is to be applauded for its requirements designed to deter child-snatching.

Our society retains a basic schizophrenia, however, regarding matters of child custody. While all agree that child-snatching is generally harmful to children and ought to be discouraged, commentators and legislation have essentially failed to recognize that, on a given occasion, a child may actually benefit. Hence, the dilemma: do we promote a policy that is best for children in general, even though enforcement in individual cases may be harmful? Removal of the child from the snatching parent and punishing that parent might deter child-snatching generally, although one must ask if a parent who sincerely believes that it is necessary to protect his or her child will be deterred. On the other hand, removal of the child from a loving parent who has had physical custody, albeit through improper means, may actually harm the child by causing even more turmoil and disruption.

Legislation, such as the UCCJA, which attempts to accommodate both policies is, therefore, schizophrenic. Courts will invariably interpret the same legislation in differing ways, depending on the policy seen as paramount. When a court decides it cannot risk harm to the child by sending the child to another state for a determination on its best interests, it detracts from the policy of deterring child-snatching. Thus, even with the advent of the UCCJA, the jurisdictions have been troubled by these competing policies. While the legislation shaped policy by expressing a preference in favor of suppression of child-snatching, the law has not resolved the conflict inherent in the nature of child custody litigation.

The interrelationship between the UCCJA and the PKPA may be helpful in determining which of the competing policy interests will prevail. Although preemption may not strictly obtain, the federal legislation may provide insight to resolve perceived inconsistencies between the two statutes. The PKPA clearly favors the preeminence of deterrence of child-snatching, elimination of competing jurisdiction, and ending interminable litigation. While severe problems of interpretation and application persist, the combination of the PKPA and the various state versions of the UCCJA provide a policy perspective and a means to resolve some of the

longstanding chaos, and to promote the best interests of children as a class, while attempting to eliminate child-snatching. Thus, when another court has initial jurisdiction over a custody matter, a court of a jurisdiction in which the child is physically present generally will not have or must not assert jurisdiction to decide what is in that child's best interest. It is for the original court with continuing jurisdiction to decide. This strict approach, however, ignores the moral, social and constitutional dilemma based on the reality that in some cases the very act of having the original court decide that question will be harmful to the child. Moreover, this approach may be unconstitutional in that it favors the state interest in preventing child-snatching (or the constitutional interests of the legal custodian) over those of the child by legislative fiat, without a due process balancing. This view of the law resolves the schizophrenia, but does so in an unacceptable manner. Balancing of interests is required and will allow the benefits of the legislation to prevail while protecting the interests of the child. It is necessary, however, to recognize that children have constitutional rights, that a child has an interest in his or her own custody litigation which must be balanced against each parent's interest in custody and society's interest in preventing child-snatching. The child's interest in each case should be weighed and balanced against those competing interests.

Inconsistencies in the law are symptoms of the larger problem of society's ambivalence regarding children and children's rights. The question of children's rights in society and under the Constitution is important and controversial. It also implicates legal analysis in the child custody setting, although courts have avoided this. Instead of avoiding the question of the child's constitutional interest involved in litigation of issues relating to child custody and jurisdiction to determine child custody, the courts ought to face the problem squarely. The United States Supreme Court has recognized that children have constitutional rights, although perhaps not coextensive with those of adults. The Court has noted that children have rights, for example, to due process,<sup>410</sup> to free

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<sup>410</sup> *In re Gault*, 387 U.S. 1 (1967).

speech,<sup>411</sup> and to bodily integrity.<sup>412</sup> Parents have a constitutionally protected right to rear (have custody of) their children with whom they have established a child-rearing relationship.<sup>413</sup> Children of those parents must have a concomitant or similar constitutional interest in being reared by the person with whom they have established a sense of love, security and stability.<sup>414</sup> These interests have been expressed in terms of substantive due process,<sup>415</sup> equal protection,<sup>416</sup> and even in association with the freedom of religion.<sup>417</sup>

### *B. Children's Constitutional Interests in the Custody Arena*

Parents and children have constitutionally protected rights and interests, and society has an interest in promoting all of the individual family members' interests as well as the protection of the family as an important social entity. Children's constitutional rights and interests have been recognized. In 1969, the Supreme

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<sup>411</sup> *Tinker v. Des Moines School District*, 393 U.S. 503, 506 (1969).

<sup>412</sup> *H.L. v. Matheson*, 450 U.S. 398 (1981); *Bellotti v. Baird* (II), 443 U.S. 622, 647 (1979); *Carey v. Population Services Int'l.*, 431 U.S. 678, 693 (1977); *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 72-74 (1976).

<sup>413</sup> *E.g.*, *Santosky v. Kramer*, 455 U.S. 745, 753-54 (1982); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925); *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977) (citing history of cases raising due process considerations on this issue); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *FAMILY LAW*, *supra* note 54, at chapter 2.

<sup>414</sup> *See, e.g., In re Jack H.*, 106 Cal. App. 3d 257, 267, 165 Cal. Rptr. 646, 652 (1980) ("...interference with the fundamental liberty of a child to be raised by his or her parents cannot constitutionally be countenanced by a mere showing of neglect").

<sup>415</sup> *See cases cited supra* note 413.

<sup>416</sup> *Caban v. Mohammed*, 441 U.S. 380, 388-89 (1979).

<sup>417</sup> It has been asserted that it would be a violation of the Establishment Clause of the United States Constitution (article I of the Bill of Rights) to give preference to any set of beliefs or lack thereof, in awarding custody. Two situations which would permit inquiry into religion in the custody context would be: (1) where the child has actual religious needs already developed which must be met or respected, and (2) where the parent's religious beliefs might pose a threat of harm to the child. *See, e.g., Fisher v. Fisher*, 118 Mich. App. 227, 324 N.W.2d 582, 585 (1982) ("In considering which of two parents shall be awarded custody of their children, the court must maintain its constitutionally mandated neutrality with respect to the merits of the religious beliefs of the parties."); *Provencal v. Provencal*, 451 A.2d 374, 378 (N.H. 1982) ("Although the report [of the child's guardian ad litem] referred to religious considerations, it was not constitutionally repugnant, because it refrained from evaluating the merits of different religious beliefs.").

Court recognized that children had individual constitutional rights and declared: "[s]tudents in school as well as out of school are 'persons' under our Constitution . . . possessed of fundamental rights which the State must respect."<sup>418</sup> Certainly, the regulations in question in the *Tinker* case were directed to prohibiting the "speech" of the students, not the parents. The Supreme Court focused on and supported separate and individual student rights to free speech.<sup>419</sup> Even given the fact that a child's right to free speech is not co-extensive with that of adults,<sup>420</sup> the right is recognized and due process standards must be met when a law impacts on this right. Certainly, the minor's right to personal bodily integrity has been recognized, with the same implications.<sup>421</sup> Moreover, each time a child's rights have been considered less expansive than those of an adult, it has been based on a view that the restriction was in the best interest of the child.<sup>422</sup>

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<sup>418</sup> *Tinker v. Des Moines School District*, 393 U.S. 503, 511 (1969). Some commentators have suggested that *Tinker* fits among the parental authority cases, such as *Pierce* and *Meyer*, in that, because the parents were behind the children's decision to wear armbands to protest the Vietnam War, so as to instigate litigation, the decision to uphold the students' right to free speech was a reaffirmation of the parental constitutional right to "teach and influence their children against state claims that would limit the exercise of such parental prerogatives." B. Hafen, *Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth To Their "Rights,"* 1976 B.Y.U.L. REV. 605, 646 (1976). See also Garvey, *Child, Parent, State, and the Due Process Clause: An Essay on the Supreme Court's Recent Work*, 51 S. CAL. L. REV. 769, 784 (1978). On the other hand, it has been suggested that the *Tinker* decision is essentially a children's rights decision, which only incidentally protected parental prerogatives. Wingo & Freytag, *Decisions Within the Family: A Clash of Constitutional Rights*, 67 IOWA L. REV. 401, 414-16 (1982).

<sup>419</sup> Wingo & Freytag, *supra* note 418, at 415-16.

<sup>420</sup> See, e.g., *Ginsberg v. New York*, 390 U.S. 629 (1968) (children could be deprived of the right to purchase material which would not be considered "obscene" for adults, although the court pointed out that the statute did not prohibit parents from purchasing any materials they wished for their children).

<sup>421</sup> E.g., *H.L. v. Matheson*, 450 U.S. 398, 409 (1981); *Bellotti v. Baird (II)*, 443 U.S. 622, 647 (1979); *Carey v. Population Services Int'l.*, 431 U.S. 678, 693 (1977); *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 72-74 (1976).

<sup>422</sup> E.g., *Ginsberg*, 390 U.S. 639-40; In *Wisconsin v. Yoder*, 406 U.S. 205 (1972), it seems that Justice Douglas' worry, expressed in his dissent, that a child who was not willing to forgo secondary education for religious beliefs would be forced to do so if her parents so desired, was vindicated. The children in that case were willing to go along with their parents' wishes. If a child desired a secondary education, despite her parents' objections due to religious reasons, it is likely that the child's and the state's interests in education would prevail in the balance.

There is no doubt that children have constitutional rights, that they have a constitutional interest in the custody proceeding and in the determination of jurisdiction to decide custody. This being so, it is necessary that any court making the determination of jurisdiction over a custody matter, even when there has been child-snatching, must balance the interests involved. The UCCJA and the PKPA must be read to include this due process balancing. Such a reading will still allow the interests in avoiding child abduction to be promoted, but the goal of protecting interests of children, which is, after all, the purpose of the acts, will not be lost. The Supreme Court has not been equivocal in recognizing that children have constitutional rights or in requiring due process analysis when those rights are impacted by the law. The child's interest in being reared by the person with whom he or she has established a loving and secure relationship may not be interfered with unless there are strong indications that the continued relationship may not be in the best interests of the child or unless there are found equally strong reasons to interfere with it. Virtually all mental health professionals agree that depriving a child of her relationship with those she loves will harm the child, unless there are extreme circumstances, such as child abuse or continued serious strife in the family.<sup>423</sup> The danger of damage to a given child caused by the jurisdictional decision may be deemed less important in a given case than the interest in preventing child-snatching, but the balancing must be done.

Thus, the UCCJA and the PKPA must be read to include this due process balancing. The rights and interests of the child, the parents, the family and the state are called into competition by a custody dispute. Sometimes even the question of which court has jurisdiction to determine custody triggers the tension. Each parent often has an interest in, and desire for exclusive custody. On the other hand, the court must protect the best interests of the child,

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<sup>423</sup> GOLDSTEIN, FREUD & SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* 113-133 (2d ed. 1979); Scott & Derdeyn, *Rethinking Joint Custody*, 45 OHIO STATE L.J. 455, 488-90 (1984); Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477, 550-57 (1984); Wexler, *Rethinking the Modification of Child Custody Decrees*, 94 YALE L.J. 757, 789-92 (1985). See also 19 COLUM. J. L. & SOC. PROBS. No. 2, LAW AND SOC. PROBS. (1985), which provides a symposium on problems related to dissolution.

certainly including those of constitutional dimension. The rights and interests involved in the custody determination have constitutional as well as psychological implications. Thus, it is necessary for the courts making a decision impacting on those interests to balance them against each other. Thus, even in the context of jurisdiction to decide custody, if the refusal to hear a case due to child abduction by one of the parents will injure the child (because the child has been with the abducting parent for a significant period), the court cannot properly make its decision to refuse jurisdiction, and a statute cannot automatically deny jurisdiction, unless a balancing of interests occurs.

A decision which will cause such disruption in a child's life and such possible damage to her psyche must be balanced against the state's interest in deterring child abduction, as well as against the other parent's constitutional interest in rearing his or her child. Thus, although important state interests lie behind the UCCJA and the PKPA, it is inappropriate to allow decisions rejecting or denying jurisdiction over a custody decision when such a decision will impact on a child's constitutional right in the custody arena. It may be that the balancing of the state's interest in deterring child-snatching, punishing the abducting parent, and putting an end to seemingly interminable litigation will outweigh the damage to an individual child, but the balancing should be done. Where constitutional interests are in question, a court must balance those interests in a principled manner so as to render a proper decision. If the child's constitutional interest in not being deprived of the security of his relationship with the parent who has reared him for a significant period of time is implicated by a jurisdictional determination, the Constitution requires a balancing to be undertaken.<sup>424</sup>

Due process in other arenas of less significance than the well-being of children has required balancing. Balancing is required under *International Shoe*<sup>425</sup> and *World-wide Volkswagen*,<sup>426</sup>

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<sup>424</sup> See, e.g., Bodenheimer, *Interstate Custody: Initial Jurisdiction and Continuing Jurisdiction under the OCCJA*, FAM. L. QUARTERLY 203 (1981) (courts should not ignore the impact of the jurisdictional decision on the individual child).

<sup>425</sup> *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945).

<sup>426</sup> *World-wide Volkswagen v. Woodson*, 444 U.S. 286, 292 (1980).

wherein the interests of the defendant, the plaintiff, and the state of domicile or residence are balanced. The interest of the parents, the child and the states concerned ought to be balanced in the child custody setting. This balancing would accommodate the interests of all concerned, since the *International Shoe* fairness standard is relative and flexible. Society's interest in thwarting child-snatching would go into the balance. It would also accommodate *Kulko*,<sup>427</sup> *Shaffer*,<sup>428</sup> *Denckla*,<sup>429</sup> *Burger King*,<sup>430</sup> and similar decisions. Most of all, it would accommodate *May v. Anderson*,<sup>431</sup> and allow fairness and due process even in cases of an absent parent.

Besides, some courts have recognized the right of plaintiffs in civil litigation to sue, when the alternative is to travel a great distance to litigate their rights (e.g., from California to France).<sup>432</sup> Another decision provided that where defendants were numerous and scattered over several states, it was important and necessary for the court (in New York) to exercise jurisdiction.<sup>433</sup> Thus, these and other decisions suggest some jurisdictional bases, such as necessity and fairness, to obtain for parties to litigation. If balancing of litigants' interests is appropriate, it certainly should be appropriate for jurisdiction also to obtain in cases when a child's best interest and constitutional rights are implicated, even though child-snatching might have been involved. Certainly, if a court would not compel a plaintiff in a civil monetary action to travel to France to litigate, or if it is considered necessary to assert jurisdiction when parties are spread over several states, a court should be required to balance interests when its decision on jurisdiction may cause a child to be removed from the custody of a parent (even one who has snatched him) and require what might be lengthy litigation in another state, especially when the resulting disruption may be detrimental to the child.

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<sup>427</sup> *Kulko v. Superior Court*, 436 U.S. 84 (1978).

<sup>428</sup> *Shaffer v. Heitner*, 433 U.S. 186 (1977).

<sup>429</sup> *Hanson v. Denckla*, 357 U.S. 235 (1958).

<sup>430</sup> *Burger King Corporation v. Rudzewicz*, 105 S.Ct. 2174 (1985).

<sup>431</sup> 345 U.S. 528 (1953).

<sup>432</sup> *Regie Nationale des Usines Renault v. Superior Court*, 208 Cal. App. 2d 702, 25 Cal.Rptr. 530, 531 (1962); see also *Mullane v. Central Hanover Bank and Trust*, 339 U.S. 306, 313-14 (1950).

<sup>433</sup> *Mullane*, 339 U.S. at 313-14.

The balancing approach articulated in this article will accommodate the interests of all concerned. The standard is relative and flexible, so as to accommodate *Kulko v. Superior Court*,<sup>434</sup> *Shaffer v. Heitner*,<sup>435</sup> and other due process decisions in the civil procedure arena. It will also accommodate the policy of the UCCJA and the PKPA to deter child abduction.

This article has raised questions about the efficiency and constitutionality of the current law relating to child custody jurisdiction. It provides jurists, scholars, and practitioners with an approach to perceive adroitly the significant policy problems posed by, and the practical solutions available in, the child custody arena. It provides a practical format for successful litigation of the jurisdiction problem. Also, perhaps, it provides an impetus for further study and thought toward resolution of the significant problems still facing our society.

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<sup>434</sup> See *supra* note 427.

<sup>435</sup> See *supra* note 428.

