Washington and Lee Law Review

Volume 39 | Issue 1 Article 9

Winter 1-1-1982

The Uniform Child Custody Jurisdiction Act And The Parental Kidnapping Prevention Act: Dual Response To Interstate Child Custody Problems

THE UNIFORM CHILD CUSTODY JURISDICTION ACT AND THE PARENTAL KIDNAPPING PREVENTION ACT: DUAL RESPONSE TO INTERSTATE CHILD CUSTODY PROBLEMS

The full faith and credit clause of the United States Constitution[1] insures that decisions courts render in one state receive equal recognition in the courts of other states.[2] The United States Supreme Court has upheld application of the full faith and credit clause in virtually every area of the law.[3] The Court, however, has been reluctant to extend

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[1] Article four of the United States 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." U.S. CONST. art. IV, § 1. Congress has implemented the full faith and credit clause by statute. 28 U.S.C. § 1738 (1976).

[2] The constitutional policies that the full faith and credit clause serves to advance are manifold. The United State Supreme Court has stated that full faith and credit promotes national unity by requiring interstate recognition of judicial decrees. *See* Sherrer v. Sherrer, 334 U.S. 343, 355 (1948). The emphasis of the full faith and credit clause on national unification buttresses principles of federalism that the Constitution supports. *See* Reese & Johnson, *The Scope of Full Faith and Credit to Judgments*, 49 COLUM. L. REV. 153, 178 (1949) [hereinafter cited as Reese & Johnson]. The full faith and credit clause imposes no substantive law on the states, but rather defers to states to develop their own policies, which the clause insures other states will respect. *Id.* Each state remains free to exercise discretion over its own courts, yet must recognize decrees of sister states. Johnson v. Muelberger, 340 U.S. 581, 585 (1951). Thus, full faith and credit precludes dissatisfied litigants from exploiting the federal structure of the government by pursuing their causes of action in other states after one state already has resolved the issues. Kovacs v. Brewer, 356 U.S. 604, 611 (1958). By mandating recognition of existing decrees, the full faith and credit clause dissuades losing parties from forum shopping. *Id.* Overall, full faith and credit has promoted stability and continuity in the law. *Id. See generally* Reese & Johnson, *supra* (discussion of scope and meaning of full faith and credit).

[3] *See, e.g.*, Durfee v. Duke, 375 U.S. 106, 109 (1963) (Nebraska quiet title decision entitled to full faith and credit in Missouri); First Nat'l Bank v. United Air Lines, 342 U.S. 396, 398 (1951) (Illinois required to recognize Utah wrongful death statute); John Hancock Ins. Co. v. Yates, 299 U.S. 178, 183 (1936) (state statutory provision in New York contract merited full faith and credit in Georgia); *see generally* Reese, *Full Faith and Credit to Foreign Equity Decrees*, 42 IOWA L. REV. 183, 187 (1957) [hereinafter cited as Reese].

The Supreme Court generally has not been as consistent in applying full faith and credit to the area of family law as it has been in construing the clause in other areas of the law. Reese, *supra*, at 187-88. The Court has not addressed the subject squarely in the context of adoption decrees. The only decision that mentions interstate recognition of adoptions is *Hood v. McGehee*, 237 U.S. 611, 615 (1915). Although the Court implied that full faith and credit extends to adoptions, the Court did not hold so expressly. *Id.* In *Hood*, the Court upheld a state's right to allow only children adopted within its borders to inherit land, while denying similar recognition to foreign adoptees. *Id.* The Court in *Hood* indicated that while full faith and credit may apply to the status of adoption, the clause does not extend necessarily to the rights incident to adoption, which local law governs. *Id.* One commentator has suggested that because the discrimination inherent in the distinction between in-

similar application of the clause to child custody decrees.[4]

Without guidance from the Supreme Court, states have differed widely in their approaches to interstate custody recognition, and many state courts have been unwilling to defer to their sister states' custody decrees.[5] State courts have issued conflicting custody decrees, causing jurisdictional competition among the states over custody disputes.[6] The disparity in state custody laws has affected adversely the families involved in several ways. Until recently, a child of divorcing parents has faced the prospect of an agonizing series of contests over his custody.[7] The inability of custodial parents to enforce custody decrees in uncooperative states has encouraged non-custodial parents to refuse to return their children after agreed visitation periods.[8] The availability of states willing to ignore foreign custody decrees has provided refuge for parental kidnappers who seize their children in violation of prior court orders.[9] The ones who suffer most from the increased litigation resulting

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trastate and interstate adoptions may no longer be constitutionally acceptable, *Hood v. McGehee* may be obsolete. Reese, *supra*, at 194.

The Supreme Court generally has upheld the application of full faith and credit to divorce decrees, beginning with *Williams v. North Carolina*, 317 U.S. 287 (1942) (*Willams I*). The Court has indicated that policies of national unity and certainty for marital status demand full faith and credit protection of divorce decrees. *Id.* at 301. The Court, however, has upheld a refusal of full faith and credit in a divorce case in which the state court lacked personal jurisdiction over one spouse, and in which the plaintiff spouse was not truly a "domiciliary" of the forum state. *See* Sherrer v. Sherrer, 334 U.S. 343, 356 (1948); Williams v. North Carolina, 325 U.S. 226, 239 (1945) (Williams II).

[4] The United States Supreme Court has considered whether child custody decrees are entitled to full faith and credit on four occasions. *See* Ford v. Ford, 371 U.S. 187 (1962); Kovacs v. Brewer, 356 U.S. 604 (1958); May v. Anderson, 345 U.S. 528 (1953); New York *ex rel.* Halvey v. Halvey, 330 U.S. 610 (1947). On each occasion, the Court declined to uphold full faith and credit for child custody decrees. *See* text accompanying notes 18-32 *infra*. In *Webb v. Webb*, the Supreme Court avoided the issue whether child custody decrees are entitled to full faith and credit. 451 U.S. 493, 495 (1981). Because neither party raised the constitutional question at the state trial, the Court held that the litigants could not contest the full faith and credit issue on appeal. *Id.* at 501-02.

[5] *See* note 33 *infra*.

[6] One state court may award the mother custody in a divorce proceeding while another state grants custody to the father. *Compare* Stout v. Pate, 120 Cal. App. 2d 699, ____, 261 P.2d 788, 790 (1953), *cert. denied*, 347 U.S. 968 (1954) (ignoring Georgia's exercise of custody jurisdiction and upholding trial court custody modification on basis of children's presence in California) *with* Stout v. Pate, 209 Ga. 786, ____, 75 S.E.2d 748, 748 (1953) (letting stand divorce court custody modification based on changed circumstance of children's removal to California), *cert. denied*, 347 U.S. 968 (1954). *See Commissioners' Prefatory Note*, UNIFORM CHILD CUSTODY JURISDICTION ACT, *reprinted in* 9 UNIF. LAWS ANNOT. 113, 113-14 (West 1979) [hereinafter cited as *Commissioners' Note*].

[7] *See* text accompanying notes 33-40 *infra*.

[8] Bodenheimer, *Progress Under the Uniform Child Custody Jurisdiction Act and Remaining Problems: Punitive Decrees, Joint Custody, and Excessive Modifications*, 65 CALIF. L. REV. 978, 979 (1977) [hereinafter cited as Bodenheimer].

[9] *Id.* Although no precise figures are available, estimates of the number of annual parental kidnappings range from 25,000 to 100,000. *See Parental Kidnapping Prevention Act of 1979: Joint Hearings on S. 105 Before the Subcomm. on Criminal Justice of the*

from state custody law disparity are the children whose home lives are at stake. Not only do custody contests exacerbate already strained family relations, but the disputes also subject the children involved to emotional and psychological stress, potentially damaging to proper development.[10]

In a concerted effort to alleviate interstate custody problems, most states[11] now have adopted the Uniform Child Custody Jurisdiction Act (UCCJA),[12] which requires recognition of foreign custody decress conforming to the statute's jurisdictional provisions.[13] To close the remaining gaps in interstate custody recognition, Congress passed the Parental Kidnapping Prevention Act of 1980 (PKPA),[14] which extends full faith and credit to custody decrees in all states.[15] The combined federal and state effort promises to curtail significantly interstate custody problems. Several possible impediments, however, threaten to hamper the effectiveness of the two statutes.[16] How courts apply the acts ultimately will determine whether the legislation can succeed in reducing interstate custody disputes.

Senate Comm. on the Judiciary and the Subcomm. on Child and Human Development of the Senate Comm. on Labor and Human Resources, 96th Cong., 2d Sess. 6 (1980) (statement of Senator Malcolm Wallop) [hereinafter cited as *Hearings*].

[10] The National Conference of Commissioners on Uniform State Laws has noted that one need not have formal training in the behavioral sciences to know that a child requires a secure and stable home environment as well as continuity of affection. *Commissioners' Note, supra* note 6, at 112. For an explanation of how the psychological importance of proper child development relates to this area of the law, *see generally* A. WATSON, PSYCHIATRY FOR LAWYERS 196-206 (1978) (stability and continuity represent child's best interest); 1963 PROCEEDINGS, SECTION OF FAMILY LAW, A.B.A. in READINGS IN LAW AND PSYCHIATRY 316-22 (R. Allen, E. Feuster & J. Rubin eds. 1968) (emotional impact of custody decrees on child development); Plant, *The Psychiatrist Views Children of Divorced Parents*, 10 L. & CONTEMP. PROB. 807, 812-14 (1944) (children's need for security and continuity of affection).

[11] Although initial approval was slow, forty-six states now have enacted the Uniform Child Custody Jurisdiction Act (UCCJA), primarily in the last three years. S. KATZ, CHILD SNATCHING: THE LEGAL RESPONSE TO THE ABDUCTION OF CHILDREN 15 (1981) [hereinafter cited as KATZ]. Only Massachusetts, Mississippi, South Carolina, Texas, and the District of Columbia have not adopted the UCCJA. *Id.* Massachusetts, however, has adopted the basic elements of the UCCJA by judicial fiat. Murphy v. Murphy, 404 N.E.2d 69, 72-74 (Mass. 1980) (Massachusetts Supreme Judicial Court applied UCCJA principles in defining proper exercises of custody jurisdiction).

[12] UNIFORM CHILD CUSTODY JURISDICTION ACT, *reprinted in* 9 UNIF. LAWS ANNOT. 116 (West 1979); *see* text accompanying notes 50-62 *infra*. The National Conference of Commissioners on Uniform State Laws approved the UCCJA at its annual meeting in July 1968. *See* Bodenheimer, *The Uniform Child Custody Jurisdiction Act: A Legislative Remedy for Children Caught in the Conflict of Laws*, 22 VAND. L. REV. 1207, 1207 n.1 (1969) [hereinafter cited as *Legislative Remedy*].

[13] UNIFORM CHILD CUSTODY JURISDICTION ACT § 13, *reprinted in* 9 UNIF. LAWS ANNOT. 112 (West 1979).

[14] Pub. L. No. 96-611, 94 Stat. 3568 (codified at 18 U.S.C.A. § 1207, 28 U.S.C.A. § 1738A, 42 U.S.C.A. §§ 654, 663 (1980)); *see* text accompanying notes 70-77 *infra*.

[15] 28 U.S.C.A. § 1738A(a) (1980).

[16] *See* text accompanying notes 89-105 *infra*.

Commentators credit the Supreme Court's failure to extend full faith and credit to child custody decrees as the principal source of interstate custody problems.[17] The Supreme Court first considered whether child custody rulings are entitled to full faith and credit in *New York ex rel. Halvey v. Halvey*.[18] Recognizing that child custody decrees are not ordinarily final but remain subject to trial court modification, the *Halvey* Court refused to demand that New York extend full faith and credit to a Florida custody decision.[19] The Court relied on Florida law permitting modification of initial custody on the basis of facts not considered in the original trial to hold that New York likewise could alter the Florida decree.[20] The Court was unwilling to require New York to uphold the Florida ruling because new evidence became available that the Florida court did not evaluate.[21] The Court's reasoning supports an exception to the general full faith and credit requirement when child custody decrees are subject to modification.[22]

In *May v. Anderson*,[23] the Supreme Court again declined to hold that the full faith and credit clause requires interstate recognition of custody decrees. While an Ohio court was willing to recognize a Wisconsin custody decree, the United States Supreme Court reversed because the Wisconsin court lacked personal jurisdiction over the mother.[24] The Supreme Court refused to require that Ohio grant full faith and credit to

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[17] *See, e.g., Legislative Remedy, supra* note 12, at 1210-15; Hazard, May v. Anderson: *Preamble to Family Law Chaos*, 45 VA. L. REV. 379, 390-95 (1959); Ratner, *Child Custody in a Federal System*, 62 MICH. L. REV. 795, 798-807 (1964); Note, Ford v. Ford: *Full Faith and Credit to Child Custody Decrees*, 73 YALE L.J. 134, 136-42 (1963).

[18] 330 U.S. 610 (1947). In *Halvey*, the day before the child's mother obtained a divorce and custody award in Florida, the father took the child without the mother's permission to New York. *Id.* at 611-12. The mother then sought a habeas corpus decree from a New York court to restore to her the permanent custody of the child consistent with the Florida decree. *Id.* at 612. Instead, the New York court refused to recognize the Florida proceeding and issued its own custody decision, modifying the original decree by granting the father specific visitation rights. *Id.*

[19] *Id.* at 613. In *Halvey*, Florida reserved the right to modify the custody decree later in light of changed circumstances. *Id.* The Supreme Court ruled that New York, likewise, could reexamine the circumstances surrounding the child's custody. *Id.* at 614.

[20] *Id.* at 612.

[21] *Id.* at 613-14.

[22] *Id.* at 614.

[23] 345 U.S. 528 (1953). In *May*, after the parents experienced marital problems in Wisconsin, they decided the mother and children should visit Ohio while the mother and father considered their future plans. *Id.* at 530. When the mother refused to return, the father sought a Wisconsin *ex parte* divorce and custody of the children. *Id.* Although the mother received service of process in Ohio, she failed to appear at the Wisconsin hearing. *Id.* at 531. Wisconsin allows out-of-state service in divorce actions, but such service is not available for child custody proceedings. *Id.* The father used the custody decree to obtain control of the children. *Id.* Later, when the children were visiting their mother, she refused to allow them to return to Wisconsin. *Id.* at 532. The father then obtained a writ of habeas corpus in Ohio to secure release of the children in accordance with the Wisconsin decree. *Id.*

[24] *Id.* at 534.

the Wisconsin decree because the mother was not domiciled, resident, or present in Wisconsin when the Wisconsin court decided the case.[25] Because the Court decided *May* on the narrower personal jurisdiction issue, the decision offers little insight into the Court's reasons for its denial of full faith and credit to custody rulings in other csaes.

The next Supreme Court decision considering the effect of one state's child custody decree in its sister states was *Kovacs v. Brewer*.[26] The *Kovacs* Court recognized another means by which states can escape upholding sister state's decrees. The Court endorsed the "change of circumstances" rule, which states may employ to avoid full faith and credit when a child's home environment has altered.[27] In endorsing the change of circumstances rule, the Court relied on the lack of finality of decisions in which changed circumstances require modification of the initial custody decree.[28]

In *Ford v. Ford*,[29] the Supreme Court again declined to hold that child custody decrees merit full faith and credit. The Supreme Court refused to require South Carolina to recognize a Virginia custody decree by which the trial court effectuated the parties' private settlement agreement.[30] The Court did not consider the Virginia decree binding because the trial court had not undertaken its own custody investigation.[31] The Court emphasized the public's strong interest in custody

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[25] *Id.* One member of the Supreme Court in *May* noted that the Court's decision permits state courts to uphold custody decrees of sister states on the basis of comity, which allows discretionary rather than mandatory recognition of foreign decrees. *Id.* at 535. (Frankfurter, J., concurring).

[26] 356 U.S. 604 (1958). In *Kovacs*, a New York divorce court granted custody to the child's paternal grandfather. *Id.* at 604-05. After the grandfather returned home with the child to North Carolina, the mother in New York succeeded in modifying the New York divorce decree to give her custody. *Id.* at 605. The mother then brought a habeas corpus proceeding in North Carolina to enforce the New York custody award. *Id.* The North Carolina court ignored the mother's pleas of changed circumstances justifying the child's transfer and found the grandfather sufficiently fit to retain custody of the child. *Id.* at 606.

[27] *Id.* at 608. The "change of circumstances" rule simply means that alteration in a child's home environment can provide a basis for realignment of custody. *See* Note, *Child Custody Decree—Interstate Recognition*, 49 IOWA L. REV. 1178, 1187-91 (1964).

[28] *Id.* Although the *Kovacs* Court accepted the change of circumstances rule, the record would not support a finding of changed circumstances and the Court remanded the case. *Id.*

[29] 371 U.S. 187 (1962). In *Ford*, after litigation over the custody of their children had begun, the parents settled their dispute privately, agreeing to divided custody of the children. *Id.* at 188. A Virginia court issued an order dismissing the case and acknowledged that the parties had reached accord. *Id.* Later, when the children were visiting their mother in South Carolina, she filed suit to obtain custody. *Id.* The father tried to prevent alteration of the Virginia agreement by pleading that the Virginia order was entitled to full faith and credit. *Id.* at 189. The trial court rejected the father's contention and awarded the mother more generous custody rights. *Id.* The South Carolina Supreme Court reversed the trial court and recognized the Virginia decree. *Id.* at 190.

[30] *Id.* at 194.

[31] *Id.*

dispute resolution and refused to consider the parties' accord as dispositive, even though the Virginia court had approved the agreement.[32]

The Supreme Court's failure to state a clear position on the application of full faith and credit to child custody decrees has promoted uncertainty in the states' interpretation of the clause.[33] By creating exceptions to full faith and credit, the Court in effect has encouraged local jurisdictions to give less credence to the custody rulings of their sister states.[34] In so holding, the Court grants the disgruntled loser in child custody proceedings a chance to seek judicial modification of custody in the courts of sister states.[35] In view of the Court's position, the losing parent in a child custody case has little incentive not to abduct his children and search for a more favorable forum.[36] Even if a parent elects not to take the drastic step of snatching his children from their court-designated home, the Court's position fails to dissuade the losing parent in a custody case from exploiting visitation periods in an attempt to regain custody in a sister state.[37]

The most destructive aspect of the Supreme Court's failure to resolve the constitutional dispute over the extraterritorial effect of custody decrees is its impact on the stability and continuity of the displaced child's home life.[38] A child emotionally torn by his parents' estrangement may suffer further trauma if a custody action succeeds in uprooting him and transplanting him in a new environment.[39] Witnessing

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[32] *Id.* at 192.

[33] While most states have recognized the applicability of full faith and credit to child custody, many state courts have found ways of avoiding deference to their sister states' custody decisions. *See, e.g.*, DeHart v. Layman, 536 P.2d 789, 792 (Alaska 1975) (best interest of child may require relitigation); Nehra v. Uhlar, 168 N.J. Super. 187, 194, 402 A.2d 264, 268 (1979) (mere passage of time justifies reexamination); Levine v. Tommasi, 54 A.D.2d 974, 975, 389 N.Y.S.2d 114, 115-16 (1976) (inadequate trial court inquiry into child's welfare deserves reconsideration). Rather than apply full faith and credit, still other state courts rely on the vaguer doctrine of comity, which allows discretionary rather than mandatory recognition of foreign decrees. *See, e.g.*, Fawkes v. Fawkes, 360 So.2d 719, 720 (Ala. Civ. App.), *cert. denied*, 360 So.2d 721 (Ala. 1978) (refusing to offer comity to sister state decree); Lindsey v. Lindsey, 200 So.2d 643, 643-44 (Fla. Dist. Ct. App. 1967) (extending comity recognition to foreign-state decree); Metz v. Morley, 29 A.D.2d 462, 464-65, 289 N.Y.S.2d 364, 367 (1968) (granting comity in absence of full faith and credit). The concept of comity is that courts of one state should uphold decrees of other states, not as a matter of right, but out of deference and mutual respect. Nowell v. Nowell, 408 S.W.2d 550, 553 (Tex. Civ. App. 1966), *cert. denied*, 389 U.S. 847 (1967). Without the constitutional mandate that undergirds full faith and credit, comity has proven to be a vague and inconsistent guideline for interstate recognition of custody decrees. *See* KATZ, *supra* note 11, at 69.

[34] Bodenheimer, *supra* note 8, at 981.

[35] *Id.* at 982.

[36] Note, *Prevention of Child Stealing: The Need for a National Policy*, 11 LOYOLA L. A. L. REV. 829, 829 (1978) [hereinafter cited as *Child Stealing*].

[37] *Id.* at 835.

[38] H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 326 (1968).

[39] *Id.*

a bitter divorce is harmful enough to a child. A child's exposure to further dispute in a custody case is cause for damaging guilt and anguish for many children.[40]

The strong public policy reasons for maintaining custody decrees free from modification[41] raise the question why the Supreme Court has elected not to uphold full faith and credit in this area of the law. One explanation is that when the Court decided the four cases[42] involving interstate custody recognition, the justices generally believed that allowing periodic examination and realignment of a child's home served the best interest of the child.[43] Only recently has the gap in communications between the behavioral sciences and the law closed sufficiently to alert legal commentators to the fact that stability and security are the most essential elements in a child's proper development.[44] Legal scholars now know that repeated shifting of a child's home may be more harmful to a child's emotional well-being than enduring a home life under less than optimal conditions.[45] The Supreme Court's failure definitively to recognize full faith and credit for custody decrees probably reflects more a misconception of how best to serve the interests of children than a lack of sensitivity by the Court.[46] Regardless of the reason for the Court's denial of full faith and credit protection for custody decrees, the effect of the Court's decisions has been to encourage forum shopping,[47] promote interstate jurisdictional competition,[48] and disrupt the home life of countless children.[49]

In order to alleviate interstate custody problems, the National Conference of Commissioners on Uniform State Laws approved the Uniform Child Custody Jurisdiction Act in 1968.[50] The UCCJA attempts to mini-

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[40] *Id.*

[41] *See* text accompanying notes 8-10 *supra.*

[42] *See* note 4 *supra.*

[43] *See Commissioners' Note, supra* note 6, at 113.

[44] *See Legislative Remedy, supra* note 12, at 1212.

[45] The National Conference of Commissioners on Uniform State Laws has noted that courts have tended to overemphasize the need for flexibility of custody decrees at the expense of the child's need for stability. *Commissioners' Note, supra* note 6, at 113. *See also Child Stealing, supra* note 36, at 833.

[46] One commentator has suggested that deference to Congress may explain the Supreme Court's reluctance to demand full faith and credit for custody cases. Currie, *Full Faith and Credit, Chiefly to Judgments: A Role for Congress*, SUP. CT. REV. 89, 110 (1964). Given the heavy policy considerations involved, the Court may have considered Congress a more appropriate forum for determining whether to mandate interstate recognition of custody decrees. *Id.*

[47] *See* Bodenheimer, *supra* note 8, at 979.

[48] *Id.*

[49] *Id.*

[50] *See* notes 11-12 *supra.* The National Conference of Commissioners on Uniform State Laws is an organization of lawyers, judges, and law professors. *See* 9 UNIF. LAWS ANNOT. iii-iv (West 1979). Each state selects members to draft and encourage enactment of laws offering solutions to problems common to all states. *Id.*

mize relitigation by vesting custody jurisdiction in the original state court, which then becomes the "custody court" for a particular case.[51] The UCCJA seeks to reduce interstate jurisdictional competition by restricting the courts eligible to become the custody court.[52] The UCCJA limits custody jurisdiction to four narrow grounds. A court can exercise jurisdiction if the state is the child's "home state" under the statute,[53] if the child and at least one parent have strong ties to the state and sufficient evidence about the child's family life is available,[54] if the child is present in the state and in danger,[55] or if no other state assumes jurisdiction in the case.[56]

After a custody proceeding has commenced in one state, the UCCJA precludes other states that have adopted the UCCJA from exercising jurisdiction.[57] Once the court issues a custody decree, the UCCJA requires that all states operating under provisions of the UCCJA recognize the decision.[58] The UCCJA makes recognition of custody decrees issued in compliance with its provisions a statutory comity obligation.[59] Comity derives not from constitutional authority but from the deference that states extend to the court decrees of sister states.[60] By relying on the doctrine of comity rather than full faith and credit, the UCCJA avoids potential conflicts with the Supreme Court position that the Constitution does not require interstate custody recognition.[61] Statutory

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[51] The term "custody court" refers to the one court vested with the responsibility of rendering custody determinations in a particular case. *See* Note, *Stemming the Proliferation of Parental Kidnapping: New York's Adoption of the Uniform Child Custody Jurisdiction Act*, 45 BROOKLYN L. REV. 89, 91 n.16 (1978) [hereinafter cited as *Parental Kidnapping*].

[52] *See Commissioners' Note, supra* note 6, at 114. Once a court has assumed custody jurisdiction, it retains jurisdiction over the case so long as the court satisfies the jurisdictional prerequisites. *See* text accompanying notes 102-05 *infra*.

[53] The UCCJA prescribes that the prefered custody jurisdiction is the child's home state. UNIFORM CHILD CUSTODY JURISDICTION ACT § 3(a)(1), *reprinted in* 9 UNIF. LAWS ANNOT. 116 (West 1979). The UCCJA defines "home state" as a state in which the child has lived for at least six consecutive months prior to the custody proceedings. *Id.* § 2(5).

[54] A state unable to satisfy the home state test may adjudicate custody of a child living within its borders less than six months provided the parent and child have significant contacts with the state. *Id.* § 3(a)(2). The court also must have sufficient access to relevant information about the child's family and upbringing. *Id.*

[55] A state may act on an emergency basis to protect a child who is present in the state and whose custodial parent has abandoned, threatened, abused, or mistreated him. *Id.* § 3(a)(3).

[56] Should no other state be able or willing to exercise jurisdiction under the other three provisions of the uniform act, the UCCJA allows a state to assume jurisdiction in order for the custody case to receive a hearing somewhere. *Id.* § 3(a)(4).

[57] *Id.* § 13.

[58] *Id.*

[59] *Id., see* note 33 *supra* (discussion of comity doctrine).

[60] Nowell v. Nowell, 408 S.W.2d 550, 553 (Tex. Civ. App. 1966), *cert. denied*, 389 U.S. 847 (1967).

[61] One member of the Supreme Court has indicated that despite the Court's unwillingness to require full faith and credit, states remain free to recognize sister states' custody

comity adopted on a uniform basis offers much stronger support for interstate custody recognition than the vaguer, discretionary comity concept courts employed prior to the UCCJA.[62] Although initial lack of familiarity with the UCCJA produced questionable interpretations,[63] the UCCJA should succeed in reducing multiple litigation of custody decrees.[64] The UCCJA also should contribute to the reduction in the number of parental abductions of children.[65]

Several potential weaknesses threaten to limit the effectiveness of the UCCJA. The UCCJA's dependence on judicial interpretation may place too much discretion in the hands of state judges whose treatment of the statute may differ.[66] Inconsistent judicial application may dilute the uniformity the UCCJA seeks to promote. In addition, the failure of even a few states to enact the UCCJA has provided refuge for child abductors to escape the interstate recognition of child custody under the UCCJA.[67] The first problem should dissipate as state judges become more familiar with the UCCJA.[68] The United States Congress acted to overcome the second UCCJA weakness when it adopted the Parental Kidnapping Prevention Act of 1980 (PKPA),[69] closing the remaining gaps in the extraterritorial effect of custody decrees.

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decrees based on comity. May v. Anderson, 345 U.S. 528, 535 (1953) (Frankfurter, J., concurring); *see* KATZ, *supra* note 11, at 6. The UCCJA, therefore, probably would conform to the Supreme Court's position. *Id.* at 75. No court yet has considered a challenge to the constitutionality of the UCCJA on full faith and credit grounds. *Id.* Because the uniform act requires interstate recognition without intruding on the Supreme Court's territory, however, the UCCJA likely would withstand constitutional challenge. *Id.*

[62] *See* KATZ, *supra* note 11, at 6.

[63] Bodenheimer, *supra* note 8, at 985; *see, e.g.*, Nelson v. District Court, 186 Colo. 381, ____, 527 P.2d 811, 813-14 (1974) (upholding tenuous jurisdictional connection with forum state); Giddings v. Giddings, 228 N.W.2d 915, 917-18 (N.D. 1975) (trial court overlooked UCCJA notice provisions).

[64] *See Parental Kidnapping, supra* note 51, at 123.

[65] *See* Bodenheimer, *supra* note 8, at 985-87.

[66] *Id.* at 985. Judicial interpretation of UCCJA jurisdictional provisions may become a critical factor in determining whether the act can survive due process challenge. *See* text accompanying notes 89-93 *infra*.

[67] *Hearings, supra* note 9, at 144 (statement of Russell M. Coombs).

[68] *Id.* As state judges begin to recognize the interrelationship among the states that the UCCJA promotes, their interpretations of UCCJA provisions should become more consistent.

[69] Pub. L. No. 96-611, 94 Stat. 3568 (codified at 18 U.S.C.A § 1073, 28 U.S.C.A. § 1738A, 42 U.S.C.A. §§ 654, 663 (1980)). In the last week of its second session, the 96th Congress passed the Wallop Bill, named after its principal author and proponent Senator Malcolm Wallop, as a rider to the Pneumonococcal Vaccine Medical Coverage Act, which President Carter signed on December 28, 1980.

The effective date of the new statute is a source of dispute. In *In re Ross*, which cited but did not rely on the federal law, the court mentioned that the statute became effective when President Carter signed the bill on December 28, 1980. 630 P.2d 353, 362 n.20 (Or. 1981). The court in *Shermer v. Cornelius*, however, which also referred to but did not apply the statute, indicated that Congress drafted the legislation to take effect on July 1, 1981. 278 S.E.2d 349, 351 n.1 (W. Va. 1981). The pneumonococcal vaccine provisions of the statute

The PKPA requires state courts to enforce without modification sister states' custody decrees that conform to the Act.[70] By demanding interstate recognition of custody decisions, congressional sponsors intended the PKPA to discourage forum shopping, reduce jurisdictional competition, deter parental kidnapping, and promote stable homes.[71] The PKPA adopts language the Uniform Child Custody Jurisdiction Act employs to define the prerequisites to exercises of custody jurisdiction recognizable under the statute.[72] State child custody determinations are consistent with the PKPA and eligible for full faith and credit protection provided the state court has jurisdiction under its own laws and meets one of several conditions. For interstate recognition to apply, the state issuing the decree must have been the home state of the child for the previous six months.[73] If no state meets the home state jurisdictional prerequisite, a state may exercise custody jurisdiction when the child is present in a state with which he and a parent have a significant connec-

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clearly became effective July 1, 1981. 42 U.S.C.A. § 1395 note (1980). Congress did not include parental kidnapping in the original bill but added the provisions later by amendment. 126 CONG. REV. S16,506 (daily ed. Dec. 13, 1980). Thus, Congress may not have intended the effective date provision to apply to the parental kidnapping sections of the statute.

In addition to the full faith and credit provisions, the Act expands the federal Parent Locator Service of the Department of Health and Human Services. 42 U.S.C.A. §§ 654, 663 (1980). The Parental Kidnapping Prevention Act (PKPA) amends the Social Security Act to add the function of locating the kidnapping parent and child to the present duty of the Parent Locator Service to track down absent parents to enforce child support payments. *Id.*

The federal Parent Locator Services relies on data that the Social Security Administration, the Veterans Administration, the Department of Transportation, the General Services Administration, the Department of Defense, and the Internal Revenue Service supply. 42 U.S.C. § 653 (1976); *see* Shutter, *Parental Kidnapping Prevention Act—Panacea or Toothless Tiger*, 55 FLA. B.J. 479, 480 (1981) [hereinafter cited as Shutter]. The information that the PKPA provides is available to "authorized persons" as the statute defines. The list of "authorized persons" does not include the custodial parent. Rather, the parent must apply to the court with jurisdiction, to the state attorney, to a U.S. attorney, or to state or federal law enforcement agencies to receive information on the whereabouts of the kidnapping parent or child. Shutter, *supra*, at 480.

The new statute also extends the Fugitive Felon Act to assist states in their felony prosecutions of parental kidnappers. 18 U.S.C.A. § 1073 (1980). The Fugitive Felon Act offers the resources of the Justice Department to locate and apprehend fugitives from state justice. 18 U.S.C. § 1073 (1976). Upon a showing of probable cause that the fugitive has fled the state to avoid prosecution, a federal warrant will issue and the Justice Department may assist in returning the fleeing parent and child to the state. *See* Shutter, *supra*, at 480-81.

Absent from the PKPA is a provision originally a part of the measure, making parental kidnapping across state lines a federal crime. *Id.* at 480. Parental kidnapping is specifically exempt from federal prosecution under the so-called Lindbergh Act. 18 U.S.C. § 1201(a) (1976).

[70] 28 U.S.C.A. § 1738A(a) (1980).

[71] *See* PARENTAL KIDNAPPING PREVENTION ACT, Pub. L. No. 96-611 § 7(c), 94 Stat. 3568 (1980) (legislative purposes).

[72] 28 U.S.C.A. § 1738A(c)(2) (1980).

[73] *Id.* § 1738A(c)(2)(A). Congress derived the definition of "home state" directly from the Uniform Child Custody Jurisdiction Act. *See* note 53 *supra*.

tion and sufficient evidence about the child's family is available.[74] The PKPA also recognizes custody decrees based on a state's exercise of emergency jurisdiction when the child is present in the state and in danger.[75] Finally, the federal statute requires states to recognize decrees that a state issues when no other state is willing or able to assume jurisdiction.[76] Once a state court assumes custody jurisdiction, the state may continue to exercise jurisdiction over the case so long as the state meets the jurisdictional prerequisites.[77]

One principal reason for federal legislation in the area of custody recognition was to prevent states not enacting the Uniform Child Custody Jurisdiction Act from becoming havens for child abductors.[78] As long as even a few states chose not to enact the UCCJA, parents would have continued to have an incentive to seize their children and flee to non-UCCJA states in search of more favorable custody rulings.[79] Passage of the federal statute alleviates the child snatching problem by requiring that custody decrees that courts render in one state receive equal recognition in the courts of the remaining states.[80] The PKPA is likely to deter potential child snatchers by eliminating the incentive for forum shopping.

In addition to requiring interstate recognition of custody decrees, the federal statute will help reduce the effect of state by state deviations from the UCCJA language.[81] By making enforcement of sister states' custody decisions a federal obligation, the PKPA makes the federal judicial system available to promote uniform interpretation of the law.[82] Inherent in the federal judiciary is the capacity to encourage statutory uniformity, which is difficult to achieve through the myriad of state courts.

The full faith and credit clause of the Constitution specifically empowers Congress to prescribe the effect state judicial decisions will have

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[74] 28 U.S.C.A. § 1738A(c)(2)(B) (1980).

[75] *Id.* § 1738A(c)(2)(C).

[76] *Id.* § 1738A(c)(2)(D).

[77] *Id.* § 1738A(d). *See* text accompanying notes 102-105 *infra.*

[78] *See Hearings, supra* note 9, at 12 (statement of Senator Malcolm Wallop).

[79] *Id.* at 144 (statement of Russell M. Coombs).

[80] 28 U.S.C.A. § 1738A(a) (1980).

[81] Some states adopting the UCCJA have varied the language of the statute that the National Conference of Commissioners on Uniform State Laws prescribed. *Hearings, supra* note 9, at 144. Variations in UCCJA provisions may undercut the uniformity and consistency necessary for states to give equal treatment to interstate enforcement and jurisdiction questions. *Id.; see, e.g.,* MD. CHANCERY ANN. CODE art. 16 § 188(a) (1981) (deviating from UCCJA emergency jurisdiction language); MICH. COMP. LAWS ANN. §§ 600, 656 (1981) (extending greater deference to sister states' exercises of custody jurisdiction).

[82] State courts occasionally have interpreted the basic provisions of the UCCJA inconsistently. *Hearings, supra* note 9, at 144 (statement of Russell M. Coombs). *Compare* Gaines v. Gaines, 566 S.W.2d 814, 817-18 (Ky. 1978) (exercise of custody jurisdiction was erroneous) *with* Williams v. Zacher, 35 Or. App. 129, ____, 581 P.2d 91, 96 (1978) (failure to assume custody jurisdiction held improper).

in the courts of other states.[83] Thus, Congress was acting within the bounds of its constitutional mandate when it defined the effects of child custody decrees.[84] To the extent that the Supreme Court's reluctance to extend full faith and credit to child custody decrees reflects a desire to defer policy considerations to Congress,[85] the Court probably would uphold Congress' exercise of this authority.[86]

The PKPA involves the federal government in the field of child custody in only a minimal way. The statute avoids imposing criteria on the states for use in making custody determinations.[87] Rather, the PKPA merely requires recognition in sister states of custody decrees meeting the prescribed jurisdictional prerequisites. The statute thus allows

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[83] U.S. CONST. art. IV, § 1; *see Parental Kidnapping Prevention Act of 1979: Addendum to Joint Hearings on S.105 Before the Subcomm. on Criminal Justice of the Senate Comm. on the Judiciary and the Subcomm. on Child and Human Development of the Senate Comm. on Labor and Human Resources*, 96th Cong., 2d Sess. 267 (1980) (statement of Russell M. Coombs). *See also Hearings, supra* note 9, at 140 (statement of Wallace Mlyniec and Nancy Lyn Hiestand).

[84] *See* Ratner, *Child Custody in a Federal System*, 62 MICH. L. REV. 795, 827 n.153 (1964).

[85] *See* note 46 *supra.*

[86] One potential constitutional question the Court may have to address is whether the congressional requirement of full faith and credit has the capacity to preempt state custody law. In order for a federal statute to supersede state law, Congress must express a "clear and manifest" purpose that the legislation do so. Rice v. Sante Fe Elevator Corp., 331 U.S. 218, 230 (1947). Congress may evidence intent to preclude state initiative in several ways. The pervasiveness of the statute may indicate the desire that the act operate exclusive of state law. *Id.* The national interest in the subject may be so strong that the federal law predominates over the state legislation. *Id.* The federal policy also may conflict with state policy to such an extent that the federal statute prevails over state law. *Id. See generally* H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 435 (1953) [hereinafter cited as WECHSLER]; Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489 (1954).

In view of the inherent recognition in the PKPA that states should continue to exercise custody jurisdiction and render custody decisions, Congress did not intend for the federal statute to preempt substantive state custody law. *Hearings, supra* note 9, at 146-47 (statement of Russell M. Coombs). The federal statute specifically refers to the continued role of the states in determining child custody. 18 U.S.C.A. § 1738A (1980). The PKPA is not an all-encompassing law, but merely an enforcement mechanism for state law. *Hearings, supra* note 9, at 146-47 (statement of Russell M. Coombs). Although the federal law provides procedures for interstate enforcement of custody decrees, the statute defers to the states to continue to determine substantive child custody policy. *Id.* Congress intended the state and federal governments to work in tandem to reduce the number of child abductions. *Id.* at 15 (statement of Senator Malcolm Wallop).

Federal legislation is often intersticial in character, filling in gaps and supplementing state law. WECHSLER, *supra*, at 435. Congress designed the PKPA merely to aid the states in receiving recognition of their custody decrees by closing the doors to the remaining haven states that have failed to enact the UCCJA. *See Hearings, supra* note 9, at 15 (statement of Senator Malcolm Wallop).

[87] *Hearings, supra* note 9, at 140 (statement of Wallace Mlyniec and Nancy Lyn Hiestand).

states to maintain their traditional role in defining substantive child custody issues.[88]

One possibility that may remain under both the UCCJA and PKPA for escaping interstate custody recognition is the one the Supreme Court left open in *May v. Anderson*.[89] The unwillingness of the *May* Court to require full faith and credit for custody decrees rendered without jurisdiction over both parents may provide a basis for courts to refuse custody recognition. Because neither statute requires the presence of both parents for child custody adjudication,[90] the legislation may be subject to attack on the ground that the acts violate fourteenth amendment due process protections.[91] Support for a personal jurisdiction challenge is also available in *Kulko v. Superior Court*.[92] In *Kulko*, the Court held that a forum state must have personal jurisdiction over an individual to enforce a child support judgment against him, even though the forum is the domicile of the child and the custodial parent.[92] If the Court maintains its *May* and *Kulko* positions, a successful jurisdictional challenge may offer one avenue for circumventing the federal and state legislation.

Several reasons suggest why the Court may not adhere to its *May* and *Kulko* positions in applying the new legislation. Although the Court in *May* refused to make full faith and credit mandatory for custody decrees rendered without personal jurisdiction over both parents,[94] the Court implied that states could uphold foreign-state decrees on the basis of comity.[95] The Court may distinguish *Kulko* because the case involved enforcement of a money judgment, not determination of status, which is at issue in custody cases.[96] The Supreme Court has suggested the need for an exception to the personal jurisdiction requirement for status

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[88] *Id.* While the federal statute allows states to retain control over custody decisions, the PKPA does represent a policy determination that permanent custody decrees serve the best interest of children by promoting a stable home environment. PARENTAL KIDNAPPING PREVENTION ACT, Pub. L. No. 96-611 § 7(c)(5), 94 Stat. 3568 (1980) (legislative purposes).

[89] *See* text accompanying notes 23-25 *supra*.

[90] The preferred "home state" jurisdiction under the UCCJA requires that the child and only one parent must be present within the state for the prescribed time period. UNIFORM CHILD CUSTODY JURISDICTION ACT § 2(5). Likewise, the jurisdictional definition of "home state" in the Parental Kidnapping Prevention Act recognizes custody adjudications when only one parent is present within the state. 28 U.S.C.A. § 1738A(b)(4) (1980).

[91] The due process clause provides that states must follow proper judicial procedures to safeguard the interests of the parties. U.S. CONST. amend. XIV, § 1.

[92] 436 U.S. 84 (1978).

[93] *Id.* at 91-92.

[94] 345 U.S. 528, 534 (1953).

[95] *Id.* at 535 (Frankfurter, J., concurring).

[96] The UCCJA treats child custody cases as status proceedings, similar to divorce and adoption cases. *See* Bodenheimer & Neeley-Kvarme, *Jurisdiction Over Child Custody and Adoption After Shaffer and Kulko*, 12 U. CAL. D.L. REV. 229, 246 (1979) [hereinafter cited as Bodenheimer & Neeley-Kvarme].

determinations.[97] Moreover, the stringent notice requirement incorporated in the legislation should satisfy the fundamental concerns of due process, sufficient notice, and opportunity to be heard.[98]

Several state cases have presented the due process question in the context of the UCCJA,[99] but the problem also may confront the PKPA.[100] At present, courts that believe the UCCJA satisfies due process despite the Act's failure to require personal jurisdiction over both parents appear to be prevailing.[101] How courts resolve the conflict between mandatory recognition of custody decrees and lack of personal jurisdiction over both parents may determine the ultimate success of the combined federal and state efforts.

Another area of potential controversy is the conflict between the continuing jurisdiction provision included in both the federal and state acts. Both statutes attempt to limit custody jurisdiction by allowing the original forum state to continue to exercise jurisdiction after the initial decree.[102] The two acts differ, however, in whose law decides whether the original forum retains jurisdiction. Under the UCCJA the second state looks to its own laws to determine whether to defer to the first forum's exercise of jurisdiction.[103] By contrast, under the PKPA the second forum must examine the laws of the first forum as well as the provisions of the federal statute to decide whether to assume jurisdiction.[104] In reviewing the jurisdictional question, a court in a UCCJA state now

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[97] Shaffer v. Heitner, 433 U.S. 186, 208 n.30 (1977).

[98] *See* Bodenheimer & Neeley-Kvarme, *supra* note 96, at 239-40.

[99] Most courts reject the due process challenge to the UCCJA. *See, e.g., In re* Marriage of Leonard, 122 Cal. App. 3d 443, 458, 175 Cal. Rptr. 903, 911 (Ct. App. 1981) (upholding UCCJA despite lack of personal jurisdiction); Goldfarb v. Goldfarb, 246 Ga. 24, 27-28, 268 S.E.2d 648, 651 (1980) (supporting UCCJA against personal jurisdiction attack); Yearta v. Scroggins, 245 Ga. 831, 832, 268 S.E.2d 151, 153 (1980) (extending comity recognition to custody decree despite failure to meet full faith and credit personal jurisdiction requirement). At least one state, however, has held that the UCCJA failure to insist on personal jurisdiction violates due process. Pasqualone v. Pasqualone, 63 Ohio St. 96, ____, 406 N.E.2d 1121, 1126-27 (1980).

[100] The court in *In re Marriage of Leonard* indicated that, although the PKPA was not applicable to the case, the court considered the due process issues presented by the PKPA and the UCCJA to be essentially the same. 122 Cal. App. 3d 443, 460 n.10, 175 Cal. Rptr. 903, 912 n.10 (Cal. App. 1981). The court suggested that personal jurisdiction is not necessary to merit the benefits of full faith and credit. *Id.* (dicta).

[101] *See* note 99 *supra.*

[102] UNIFORM CHILD CUSTODY JURISDICTION ACT § 14; 28 U.S.C.A. § 1738A(f) (1980).

[103] To determine whether a state may modify another state's prior custody decree, the UCCJA provides that the second forum must conclude according to its own standards that the first forum no longer retains jurisdiction. UNIFORM CHILD CUSTODY JURISDICTION ACT § 14.

[104] Under the PKPA, a state may not modify a sister state's initial custody decree unless the second state can demonstrate that it has sufficient jurisdiction and that the first state no longer retains or has declined to exercise jurisdiction. 28 U.S.C.A. § 1738(A)(f) (1980).

must consider the laws of both the first forum and the second forum before its assumption of jurisdiction merits universal recognition.[105]

The nearly complete adoption of the UCCJA coupled with the passage of the PKPA should curtail significantly parental attempts to circumvent existing custody decrees. Whether obtained through full faith and credit or comity, interstate recognition of custody rulings will undercut the incentive for non-custodial parents to use self-help to evade custody determinations. Although experience with the legislation remains, the combined impact of the state and federal statutes should deter parental kidnapping, dissuade forum shopping, reduce interstate jurisdictional competition, and promote more stable home environments.

GAINES H. CLEVELAND

[105] The court in *Fowler v. Fowler* applied both the UCCJA and the PKPA to hold that New York could modify a prior California custody decree. 7 FAM. L. REP. (BNA) 2679 (N.Y. Fam. Ct. 1981). The court examined both the laws of California, the original forum, and New York, the modifying state, to determine whether California retained jurisdiction. *Id.* Both the PKPA and the UCCJA provide that before a state may modify a sister state's prior custody decree, the second state must establish its own right to exercise jurisdiction over the case. *See* notes 103-104 *supra.*