Comparativist Ruminations from the Bayou on Child Custody Jurisdiction: The UCCJA, the PKPA, and the Hague Convention on Child Abduction

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I. INTRODUCTION AND OVERVIEW

Interstate and international jurisdictional problems are often vexing. They are worse in matters of child custody. In the past, jurisdiction to obtain custody or to modify a custody decree required only presence or domicile. The United States population is transient and custody decisions are subject to modification. The volatility of child custody disputes and the tendency of parents to move to different and separate jurisdictions traditionally caused and continues to cause difficult problems for children, parents, and the legal system. Before the promulgation of the Uniform Child Custody Jurisdiction Act (UCCJA) and the Parental Kidnapping Prevention Act (PKPA), it was much worse. Courts were usually aggressive in an atmosphere of virtually no jurisdictional limitations to assert initial and modification child custody jurisdiction. This article will...
consider the law of child custody jurisdiction. I criticize quite vigorously the conventional wisdom that the UCCJA does not have to meet substantive due process standards. I will note situations in which it is extremely unfair, so that principles of substantive due process ought to apply. Some excellent scholars, Professor Bruch, for example, claim that the UCCJA provides a solution which allows the best possible place to litigate—a place with the most information about the child and possible custodial arrangements. None of these propositions is necessarily or always true: for instance, jurisdictional “tug of war” is not always prevented; the best possible place to litigate child custody issues is often avoided by a self-interested party, and in some circumstances the law is so unfair as to be unconstitutional. Jurisdictional “tugs-of-war” are to be avoided to protect children, but the current law does not always do this. Despite these problems, child custody jurisdiction law in the United States is better than it used to be and ought to apply internationally. Where the Hague Convention on Child Abduction does not apply, the UCCJA and the PKPA should apply to international circumstances. The UCCJA, despite some state court decisions to the contrary, does apply internationally. It fills the gaps left by the Hague Convention on Child Abduction.

A. Legislation & Treaties

The Uniform Child Custody Jurisdiction Act and the Parental Kidnapping Prevention Act are legislative responses to the child custody jurisdiction problem. The Hague Convention on the Civil Aspects of International Child Abduction and its enabling legislation, the International Child Abduction Remedies Act (ICARA), are incipient international responses. In addition, where the Hague Convention does not apply, I argue that the principles and rules of the UCCJA apply in child custody jurisdiction disputes in the international setting. The purposes and policies of the UCCJA and the PKPA ought to apply to a significant degree, with limitations indicated herein, to international circumstances. Although these laws are far from perfect, and even cause
problems in some circumstances, they do provide a uniform mechanism to
resolve jurisdictional child custody disputes and have eliminated some of the
chaos that existed prior to their promulgation. We will study each. We will
also consider the likelihood—I believe the reality—that they are unconstitutional
as applied in some circumstances.

B. Brief History and Conceptual Background of Child Custody Jurisdiction

1. Substantive Child Custody: An Historical and Comparative Excursus

   a. Conceptual and Historical Backdrop

Child custody proper must be understood before one can understand the
policies that underlie child custody jurisdiction. Child custody represents the
bundle of constituent rights and obligations pertaining to a child's domicile, care,
supervision, protection, and control. It includes the parental right and obligation
to make decisions about one's children's health, welfare and development. It
relates to the hotly-debated topic of "children's rights" versus parental

    Ct), app. denied, 668 A.2d 1119 (Pa. 1995) (applying UCCJA to international child custody disputes
and construing the definition of "state" to encompass foreign nations); Dincer v. Dincer, 666 A.2d
and applying the UCCJA internationally). E.g., decisions refusing to do so: Koons v. Koons, 615

   12. Greg Waller, Note, When the Rules Don't Fit the Game: Application of the Uniform Child
   Custody Jurisdiction Act and the Parental Kidnapping Prevention Act to Interstate Adoption

   237 (regarding legitimate children), 238-245 (concerning illegitimate children); see also La. Civ.
   Code arts. 246-361 (relating to tutorship); Robert H. Mnookin, Child Custody Adjudication: Judicial
   Function in the Face of Indeterminacy, 39 Law & Contemp. Probs. 226, 228 n.10 (1975). During
   the marriage of a child's parents in Louisiana law, child custody comes within the ambit of parental
   authority. See generally Louisiana Civil Code, Title VII, Ch. 5, of Parental Authority, La. Civ. Code
   arts. 99, 215-245, especially articles 216, 217, 218, 227. Louisiana Civil Code article 216 provides:
   "A child remains under the authority of his father and mother until his majority or emancipation.
   In case of difference between the parents, the authority of the father prevails." Article 217 states:
   "As long as the child remains under the authority of his father and mother, he is bound to obey them
   in every thing which is not contrary to good morals and the laws." Article 218 provides: "An
   unemancipated minor can not quit the parental house without the permission of his father and mother,
   who have the right to correct him, provided it be done in a reasonable manner." Article 227 states:
   "Fathers and mothers, by the very act of marrying, contract together the obligation of supporting,
   maintaining, and educating their children." Where the child's parents have either never married or
   where the marriage has broken down, custody rights and obligations fall under the law of tutorship.
   See generally Louisiana Civil Code, Title VIII, Ch. 1, Of Tutorship, La. Civ. Code arts. 246-362,
   and Louisiana Children's Code articles 309 (disputes over custody), 1432-1433 (mental health—protective custody), and 1510-1523 (voluntary transfer of custody). For a discussion of these
   articles, see the detailed discussion in Blakesley, Louisiana Family Law, supra note 1, Chs. 5-14, on
   Parent and Child.
authority over children and the right to rear them. The state traditionally has been considered to have no right to control parents or to tell them how to raise their children unless the children were found to be in immediate and serious danger. Parental prerogative has been sacrosanct and not to be infringed, especially in relation to teaching values and beliefs. It has even extended to issues of dress and food. This prerogative clearly is salutary for children and society when the parents are good; it also contains opportunity for abuse. Thus, tension and dissonance arise where parents come into play; where parents are suspected of grossly endangering their children's well-being in the exercise of their authority. This tension will be analyzed, focusing primarily on jurisdiction, but jurisdictional decisions implicate and impact on substantive interests. Analysis of substantive rights and interests of children and parents is necessary.

First, a brief overview. Some social scientists have actually called for licensing parents and for terminating the parental authority of potential abusers and neglectors. The United States Constitution, however, prevents this. The right to rear one's children is one of our basic liberty interests, with which the state cannot interfere, unless there exists compelling reasons and specific proof of the need to do so.


15. See the discussion of the tension between parental autonomy within the family and child protection, in Blakesley, Louisiana Family Law, supra note 1, Ch. 1.


17. See generally Santosky v. Kramer, 455 U.S. 745, 102 S. Ct. 1388 (1982); Bellomi, 443 U.S. at 638, 99 S. Ct. at 3040; Moore, 431 U.S. at 503-04, 99 S. Ct. at 1937-38; Yoder, 406 U.S. 205, 92 S. Ct. 1526; Ginsberg, 390 U.S. at 639, 88 S. Ct. at 1280; Pierce, 268 U.S. at 535, 45 S. Ct. at 573-74. See also Caban v. Mohammed, 441 U.S. 380, 99 S. Ct. 1760 (1979); Meyer v. Nebraska, 362 U.S. 390, 43 S. Ct. 625 (1922); In re Adoption of B.G.S., 556 So. 2d 545 (La. 1990) (relating to an unwed father's rights to block adoption of his illegitimate child). Although analytically, from a constitutional law point of view, the early cases (Pierce and Meyer, for example) are not fulfilling, because they were issued prior to the development of the strict scrutiny standard, subsequent decisions, such as Griswold v. Connecticut, 381 U.S. 479, 85 S. Ct. 1678 (1965), cited the early decisions, but provided no clear analytical framework and were influenced by other significant interests, such as privacy in procreation, free exercise of religion, or free speech. But see People v. Bennett, 501 N.W.2d 106, 108 (Mich. 1993) (requiring teacher certification is not a violation of due process, because "a parent's Fourteenth Amendment right to direct a child's education is not . . . fundamental, and, thus, the strict scrutiny test is unwarranted [unless the First Amendment is also involved]"), reversed, People v. DeJonge, 501 N.W.2d 127 (Mich. 1993). In DeJonge, the Michigan
belongs both to parent and child; each is generally better off with the other.18

These parent-child interests have been held variously to be grounded in substantive due process,19 equal protection,20 freedom of association, freedom of religion,21 and generally in the Ninth Amendment.22 The Georgia Supreme Court recently reiterated the due process interest: "[t]he freedom of personal choice in matters of family life is a fundamental liberty interest, protected by the U.S. Constitution, and that 'the right to the custody and control of one's child is a fiercely guarded right in our society and in our law. It is a right that should be infringed upon only under the most compelling circumstances.'"23 Scholars and courts currently are involved in a philosophical, often heated ideological, debate over child rearing and custody.24 Some argue that these interests are based on

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18. See, e.g., In re Melissa G., 261 Cal. Rptr. 894 (Cal. Ct. App. 1989); In re Jack H., 165 Cal. Rptr. 646, 652 (Cal. Ct. App. 1980) ("[i]nterference 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."); In re B.G.S., 556 So. 2d 545 (La. 1990).
21. E.g., Yoder, 406 U.S. at 215-19, 92 S. Ct. at 1533-34 (Amish parental objection to Wisconsin mandatory public education requirements); but cf. LeDoux v. LeDoux, 452 N.W.2d 1 (Neb. 1990) (ordering the father, a Jehovah's Witness, to refrain from exposing the children to practices inconsistent with the mother's religion, Catholicism); In re Jensen, 633 P.2d 1302 (Or. Ct. App. 1981) (The child's parents belonged to a religion which did not permit medical treatment, except for prayer and faith; the Oregon Supreme Court affirmed the lower court's placement of the child into the custody of the State Children's Services Division, so that treatment for the child's hydrocephalic condition could be provided over the parents' objection.).
22. Witte, supra note 17, at 193.
23. Watkins, 466 S.E.2d at 861 (Where there was no notice given in a divorce action that the State might terminate parental rights, it violated due process.) (citing Blackburn v. Blackburn, 292 S.E.2d 821 (1982) (quoting Santosky, 455 U.S. at 753, 102 S. Ct. at 1394-95); Brooks v. Parkerson, 454 S.E.2d 769 (Ga. 1995).
the individual's constitutional right to privacy." Others argue that they are based on a significant public or social policy to promote and protect the family as an institution. Others consider them to be founded on communitarian or relationship-based obligations. Some say we need to "redefine" or refocus the law; that we must move from a parental or family system based on individual rights, which are to promote parental possessivity and self-centeredness, to an "other-centric" family system promoting notions of benevolence and responsibility, and intended to reinforce parental dispositions toward generosity and "other directedness." Some historical development may provide perspective on the debate.
In Antiquity and the Middle Ages

Child custody has been an issue of significant concern throughout history. It was debated in Ancient Rome, among the Germanic, Anglo-Saxon, and Celtic tribes, during the Middle Ages, and throughout "modern" and "post-modern" times. Perspective requires a brief introductory backdrop. Under Ancient Roman, Germanic, and Feudalistic regimes, parental authority was vested absolutely in the patriarch. He had tremendous power. The Roman *patria potestas* was a charter from "la patrie" (Family, Tribe, Kingdom, Republic, Empire), giving rights and powers to the father, for the father and the family. The similar and related Germanic *mundium*, which was applied in the Germanic areas of Europe, in Anglo-Saxon England and central and northern France, was an operational legal concept embedded in custom and administered by the kinship group, and functioned as a *guideline* to protect children.29

i. The Germanic Mund or Mundium

The Germanic *mund or mundium* provided paternal power over children combined with a duty of protection. This law extended over the Continent, except in the *Pays du Droit Écrit* (the Southern portion of France, where written Roman Law obtained) to Anglo-Saxon England. The power of the patriarch was tremendous, but was tempered. For example, at one point in England, the wife was free to repudiate a marriage and to leave, taking her children and half of the marital property.30

ii. The French Adaptation

The Germanic trend developed in central France through the *droit coutumier* (customary law) which evolved from the French concept of *mainbournie*, meaning *mundium.*31 In southern France, on the other hand, where the written

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30. Henry H. Foster & Doris J. Freed, *Life with Father: 1978*, 11 Fam. L.Q. 321 n.2 (1978) (citing Dooms of Aethelbert, Nos. 799-81, stating that "if she [the wife] wish to go away with her children, let her have half of the property. If the husband wish to have them, (let her portion be) as one child. If she bears no child, let paternal kindred have the 'fich' and the 'morgengyfe.'"), Feudalism and "the church" later rendered the wife a "non-person." *Id.*
31. This term is a combination of main (ancient French for hand) and *bourg or borg* (ancient word for surety). Stoljar, supra note 29, at 42. This notion can be traced clearly from antiquity through the sixteenth century. The laws were initially codified in the twelfth century in a haphazard
law ruled (le pays du droit écrit), Roman law was followed.\textsuperscript{32} In French customary law, paternal authority or power (mundium or la puissance paternelle) belonged not only to the father, but also somewhat to the mother. Paternal power ended when a child was expressly or tacitly emancipated. Under le droit coutumier, paternal authority extended only to the child's person, not to his patrimony. In fact, the child's patrimony not only remained his own personal property, but the father, who had the right to administer the patrimony, did not have the right to the usufruct or legal enjoyment of the patrimony. Eventually, the French Code Civil incorporated the mundium form of child protection, as influenced by Roman and Canon law.

Notwithstanding the general protective and tempering of the mundium, the father, unless shown to have excessively abused his power, was free to control his family as he wished.\textsuperscript{33} Paternal authority, however, was checked. For example, the courts had the authority to require a father to emancipate his children if he mistreated them, contributed to their delinquency, or refused to support them. Thus, paternal authority in French droit coutumier was essentially an authority to protect. This rule and emphasis was later incorporated into the Civil Code. The Roman view, that parental authority existed as the absolute right of the father for the protection of himself and the family qua family, was never fully part of the French droit coutumier.\textsuperscript{34} Paternal power under both the droit coutumier and the written law prior to the revolutionary reforms was, nevertheless, extensive. Yet, it took revolutionary reforms to eliminate the paternal right to incarcerate his children as a measure of paternal correction. The reforms prohibited incarceration, unless the father received the approbation of a family council and the president of the district court.\textsuperscript{35}


32. Stoljar, supra note 29, at 50.
33. Id. at 26.
34. See Weill & Terré, supra note 31, at 459-62; Stoljar, supra note 29, at 50.
iii. Early Anglo-Saxon England

The Germanic *mundium* also ruled in Anglo-Saxon England. It was more protective of children than the early common law that arose with feudalism.

(a) Backsliding Under English Feudalism—Immense Patriarchal Power

Paternal power actually increased during feudalism, aided by the increased power of the church.\(^3^6\) The father had more power than under the Germanic *mundium*. The father was held to be his children's "natural guardian."\(^3^7\) Feudalism and the Church allowed the father nearly absolute power, making him the *paterfamilias* of the Common Law.\(^3^8\) The father was the symbol of and a tool for maintaining the "king's peace" and for ensuring the continuation of the structured property system.\(^3^9\) Patricide was equated to regicide and reaped the concomitant penalty.\(^4^0\) The father's extensive authority over his wife and children, including his right to custody, remained nearly absolute until the

\(^3^6\) See, e.g., Michael Grossberg, Governing the Hearth: Law and the Family in Nineteenth Century America 235-239 (1985) (suggesting that paternal preference was based on some sort of best interests of children). This really does not seem to be true.

\(^3^7\) Ernest Young, *The Anglo-Saxon Family Law*, in Essays in Anglo-Saxon Law 121, 151, 153 (1876). Later cases continued to support this notion. See M. Friedman, *The Parental Right to Control the Religious Education of the Child*, 29 Harv. L. Rev. 485, 491 n.28 (1916) (citing Stourton v. Stourton, 8 DeG. M. & G. 760, 771-72 (1857); Donohue v. Donohue, 1 S.R.D. 1, 18 N.S.W.W.N. 14, 18 (1901). See also In re Agar-Ellis, 24 Ch. D. 317, 337-38 (1883), where Lord Justice Bowen states: "It is not the benefit of the infant as conceived by the court, but it must be the benefit of the infant having regard to the natural law which points out that the father knows far better as a rule what is good for his children than a Court of Justice can." In re Meades, 5 Ir. R. Eq. 98 (1870), holds that the authority of the father to guide and govern the education of his child "is not to be abrogated or abridged without the most coercive reason." Friedman, *supra*, at 489 n.22. Lord Justice Lindley in In re Newton [1896] 1 Ch. 740, 748 states: "In no case, however, that I am aware of, where the father has been alive, has the court disregarded his wishes concerning the religious education of his children, unless, as in this case, he has been himself a man so ill-conditioned and of such bad conduct that the court thought fit altogether to deprive him of the custody of his children." Id. *See also* In re McGrath [1893] 1 Ch. 143; In re Scanlan, L.R. 40 Ch. D. 200 (1889); Skinner v. Orde, L.R. 4 P.C. 60 (1871); F. v. F. [1902] 1 Ch. 688; In re Montagu, L.R. 28 Ch. D. 82 (1884); In re Walsh, 13 L.R. Ir. 269 (1884).

\(^3^8\) Foster & Freed, *supra* note 30, at 325.


\(^4^0\) See Anonymous, *Hanging not Punishment Enough* (1701); Blakesley, Terrorism, Drugs, International Law & the Protection of Human Liberty, *supra* note 1, Chs. 1, 4; Le Peletier de St. Fargaux, *Archives Parlementaires* XXVI, 3 June 1791, at 720, *cited and discussed with others and analysis of cases*, in Michel Foucault, *Surveiller et Punir: Naissance de la Prison* 12-14 (1975) [*Discipline & Punish: The Birth of the Prison*].
celebrated Shelley's Case. Blackstone noted that the father had a "natural right" to the custody of his children, while the mother was "entitled to no power, but only to reverence and respect." The mother exercised authority, but only derivatively through the "empire of the father." The father had the "natural," primary right of association with his children, to control their "upbringing," and to benefit from their services. "Subject to certain exceptions, the father had absolute right both at common law and equity to determine the form of his children's education and religious training. His wishes had to be respected even after his death.

(b) The Fall of the "Paternal Preference Rule" and the Rise of the "Maternal Preference Rule"

The immensity of this paternal power began to "break down" somewhat in cases like Rex v. Deleval, and Blissits Case, where Lord Mansfield was able to exert some limiting common sense. Lord Mansfield began to break the yoke of the "paternal empire," in cases of clear and shocking abuse. In Deleval, Mansfield approved a writ of habeas corpus where a father had totally neglected his daughter and apparently had apprenticed her for prostitution. This troubled Lord Mansfield, who was prepared to act as parens patriae for the child, because of his belief that the father had conspired to place the daughter into prostitution. Mansfield's inroads notwithstanding, the power continued with a vengeance. In Rex v. de Manneville, for example, the court reaffirmed the father's paramount

41. See Shelley v. Westbrooke, 37 Eng. Rep. 850 (Ch. 1817), cited in Foster & Freed, supra note 30, at 325 n.21. In this case, the poet Shelley lost custody of his children because of his atheistic and immoral lifestyle and attitude. Id.
44. See Andrews v. Salt, 8 Ch. App. 622 (1873), cited and quoted in Foster & Freed, supra note 30, at 322 n.4.
49. Id. See also Blissits's Case, 98 Eng. Rep. 879 (K.B. 1773), cited in Foster & Freed, supra note 30, at 325 nn.23, 24, wherein Lord Mansfield anticipates "the best interests of the child" test. See also In re Clarke, L.R. 21 Ch. D. 817 (1882); In re O'Malleys, 8 Ir. Ch. 291 (1858); In re Grimes, 11 Ir. R. Eq. 465 (1877).
right to custody, denying the mother's habeas corpus request for her eight-month-old daughter and giving the father custody, despite evidence that the father had abused and neglected the mother and the child. The father simply, par noblesse oblige, "was entitled by law to the custody of his child." The court so held, even though the father, a French "enemy alien," had beat the mother and forced her away from the still-suckling child. He was awarded custody, despite his brutality and the fact that he was incarcerated at the time and the child would have to live with his mistress. Notwithstanding all of this, custody was awarded to the father.

(c) The Rise of Industrialization and the Fall of "Paternal Preference" and Concomitant Rise of the Maternal Preference Rule

Shelley's Case and the Industrial Revolution signified the demise of such massive paternal preference in England. Although Chancery slowly began to recognize the mother as "natural guardian" of her children, it was not until 1839 that Parliament took note. In 1839, Talford's [or Talfourd's] Act, culminating in a series of laws, modified the nearly absolute rule of paternal preference for legitimate children by providing that mothers had the right to custody of infants under seven years of age. In 1873, this law was further amended to give the mother the right to custody of children until majority. The maternal preference rule evolved from being a recognition of a child's interest, to a right and burden of the mother.

As we have seen, nations of the Roman-Germanic tradition have long recognized the parent's "natural right" to the custody of his or her children.
Historically, this meant that the father ruled. The Louisiana Civil Code, in its custody articles [both in former Article 146 and current Article 216], mandated a preference in favor of the father. This paternal preference, which was a legacy of Louisiana's Romanist heritage via France and Spain, was based on the notion that the father as patriarch of his family was the proper person, during the ongoing marriage, to decide disputes regarding child rearing. In 1888, however, the Louisiana Legislature, amending Louisiana Civil Code article 146, accorded the mother legislative preference over the father in custody disputes after legal separation or divorce. The evolution from a paternal to a maternal preference in custody proceedings was grounded in the religious and cultural perception that the correct person to care for a child was the child's mother.

The United States Supreme Court noted that a man's abilities to rear children were inferior to a woman's. Custody was seen as part of the "essential nature of [a mother's] maternal role." The Court, in Bradwell v. Illinois, affirmed the maternal preference rule: "[T]he constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. . . . The paramount destiny and mission of women are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator." Thus, during much of United States legal history, the maternal preference rule prevailed. Barring proof of unfitness or incapacity, the mother was deemed the person best suited by temperament, biology, and situation to care for her children, especially when they were of tender years. This "presumption" became a matter of convenience for men and courts. In 1888, the Louisiana Legislature accorded the biological mother legislative preference over the biological father in custody disputes.

63. Bradwell, 83 U.S. (16 Wall.) at 141.
64. La. Civ. Code art. 146 (1888). For additional analysis of the role of gender in custody determinations over history, see Blakesley, Louisiana Family Law, supra note 1, Ch. 12; N. Basch, In the Eyes of the Law: Women, Marriage, and Property in Nineteenth-Century New York (1982); Grossberg, supra note 36, at 283-84.
Thus, the mother was considered to be the “proper person” to raise children. The mother was considered to have a right and an obligation to have custody. Preference for the mother articulated in the pre-1977 Louisiana Civil Code, for example, extended to all custody proceedings. The presumption tracked the French presumption that the welfare of the children was best served by granting custody to the mother. Accordingly, Louisiana courts consistently awarded custody to the mother, unless she was found unfit.

Occasionally, the preference for the mother’s right was favored over the child’s need for stability. For example, in Estes v. Estes, a mother sought to obtain custody of her children from the father, who had them in his care for a while. Although the trial court did not determine that such a change would serve the better interests of the children, the Louisiana Supreme Court approved, noting that the mother had a greater right. Today, some insist that there is an essential difference between men and women and argue that this difference makes women better for custody. Much of the literature on child custody is not useful. Studies on the consequences of separation and the “broken home” do not provide much guidance of what to do for a given child. Many studies are dogmatically ideological.

65. Prior to its amendment in 1979, former Louisiana Civil Code article 146 (now 131) provided: “If there are any children of the marriage, whose provisional keeping is claimed by both the husband and wife, the suit being yet pending and undecided, it shall be granted to the wife... unless there should be strong reasons to deprive her of it, either in whole or in part.”

66. Fulco v. Fulco, 259 La. 1122, 1127, 254 So. 2d 603, 605 (La. 1971); Vidrine v. Demourelle, 363 So. 2d 943, 944 (La. App. 3d Cir. 1978); Broussard v. Broussard, 320 So. 2d 236, 238 (La. App. 3d Cir. 1975) (noting that it is not “unreasonable, capricious, or arbitrary” to give custody to the mother, because of the “simple fact that the day-to-day care of minor children has traditionally, in our society, been in the hands of the mother...” and the “obvious biological connexity” between the mother and child creates a relationship which “gives... a biological basis for the historical legal preference given the mother.”).

67. Fulco, 259 La. at 1127, 254 So. 2d at 605.

68. See Estes v. Estes, 261 La. 20, 24, 258 So. 2d 857, 859 (La. 1972); Tritico, supra note 59, at 883-84.

69. Estes, 261 La. at 24, 258 So. 2d at 859.

70. Id.

71. See, e.g., Phyllis Chesler, Mothers on Trial (1985); Martha Fineman, Dominant Discourse, supra note 24, at 765-68; Rena K. Uviller, Fathers’ Rights and Feminism: The Maternal Presumption Revisited, 1 Harv. Women’s L.J. 107 (1978).


B. Child Custody Jurisdiction: History, Conceptual Background, and Introduction of Some Problems

Custody determinations traditionally have comprised a subcategory of litigation under the *Pennoyer v. Neff* exception for proceedings relating to status. The United States Supreme Court, in *Pennoyer*, held that Due Process (Fifth Amendment and Fourteenth Amendment, section 1) and the Full Faith & Credit Clause (Article IV, section 2) established limits to a given state's authority to assert in personam jurisdiction over an out-of-state resident. *Pennoyer* simultaneously announced the "status" exception for an ex parte divorce. The term, "status," in this context, has been defined as "a personal quality or relationship, not temporary in its nature nor terminable at the mere will of the parties, with which third persons and the state are concerned." Similarly, "[t]he attributes and qualities attached to a person by operation of law, regardless of his own wishes, constitute his status in law." Status is "merely a convenient term to describe a combination of legal relations which may result from a fact situation, such as marriage or the legitimate birth of a child." The status exception arose because of the harshness of our domicile, marriage and divorce law: "[i]t would be a reproach to our legislation if a faithless husband . . . could, by leaving the State, deprive his abandoned wife of a power of obtaining a divorce at home." Neither the development of, nor the rationales for, the "status exception" properly apply to many family law matters, especially regarding child custody jurisdiction. Indeed, the opposite is true, if we are to take seriously the constitutionally fundamental right a parent has to rear his or her children. The *Pennoyer* court was concerned about fairness to the wife, who faced a serious incapacity to obtain a divorce. Indeed, she functionally was denied the ability to obtain one, as the husband had all the money and, thus, power and access to the legal system. So this concern was appropriate and salutary.

75. *Id.* at 734 ("jurisdiction which every State possesses to determine the civil status . . . of all its inhabitants" extends to that status vis-a-vis nonresidents); *Murchison*, *supra* note 2, at 1076. 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. *Id.* at 1076 n.109.
76. *E.g.*, *id.* at 722, 733 (notice required and service required while party is present physically within the state or that the party come voluntarily).
77. *Id.* at 734-35.
78. 2 Beale, *supra* note 2, § 119.1; *Restatement (First) of Conflict of Laws* § 119 (1934).
79. Raleigh C. Minor, *Conflict of Laws*; or, Private International Law § 68 (1901).
The due process clause protects against fundamental unfairness. In personam jurisdiction is one means to accomplish this. What is fundamentally unfair is not easy to determine, but the point of the due process clause in relation to in personam jurisdiction is or ought to be that one should not be required to litigate issues of significant import to any liberty interest, including those noted in International Shoe and Kulko, before courts where the context (including distance, lack of contacts, or other indicators of unfairness to the defendant) makes it so difficult such that it is fundamentally unfair. The right to rear one's child certainly fits this category.

The law on child custody jurisdiction has evolved. States have always had the authority to decide issues relating to the status of their domiciliaries. It was natural, therefore, for courts and scholars of the nineteenth and early twentieth centuries to consider domicile the sole basis of jurisdiction in custody matters. Gradually, courts began to apply other bases, such as the child's presence in the state or personal jurisdiction over both parents. One commentator suggested that the "true rule" with regard to custody jurisdiction "is the court's discretion exclusively governed by the child's welfare."

A child's role in a custody dispute is a further complication. The child is particularly passive and vulnerable, with a fate ultimately connected to the
fortunes of the litigants. Vulnerability is heightened where the parties are impassioned and adversarial. The child's vulnerability and lack of freedom of choice or movement, combined with the pain of separation and the significant parental interests, cause us to question the rules of jurisdiction. Serious harm may result from ongoing litigious strife, uncertainty, and, especially, abduction.

Ironically, the importance of children to parents and parents to children, the hard issues presented in custody cases, the combination of factors, and the traditional wide-open jurisdictional approach inevitably led to chaos, rampant child abduction, and unending litigious strife. This became endemic as courts of different states issued contradictory custody orders. Estimates ranged from 25,000 to 100,000 incidents of abduction per year. The "rule of seize and run" prevailed; hence, the impetus for a uniform approach and standard for jurisdiction in custody cases.

On the other hand, sometimes application of the UCCJA causes extremely unfair results and harm to children. It is worth asking whether it always comports with due process. It is surprising, and a source of dismay, that this issue has rarely been debated seriously or in any depth. Paradoxically, and notwithstanding its claimed purpose, ambiguities in the UCCJA in its variation

90. 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." Kim J. Landsman, 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 Donald N. Bersoff, Representation for Children in Custody Decisions: All That Glitters is Not Gault, 15 J. Fam. L. 27 (1976-77).

91. E.g., Fuge v. Uiterwyk, 613 So. 2d 717, 719 (La. App. 4th Cir. 1993) (Florida courts relinquished jurisdiction); same case, other issues, 653 So. 2d 707, 711 (La. App. 4th Cir. 1995) (lawyer father held in contempt and denied visitation for vicious ongoing litigation that harmed the children).

92. These estimates were made prior to the effective date of the PKPA. Arguments on the PKPA, before a 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 Lucy S. McGough & Anne R. Hughes, Charted Territory: The Louisiana Experience With the Uniform Child Custody Jurisdiction Act, 44 La. L. Rev. 19, 24 (1983). One commentator noted in 1981: "[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." Sanford Katz, Child Snatching: The Legal Response to the Abduction of Children 11 (1981).


among the states has allowed forum shopping, confusion, disputation, abuse of one parent, and harm to children. Although the UCCJA is interpreted differently by different states, the PKPA is quite clear. The PKPA, however, may not always provide the best solution for parents or children in some situations. We will explore these laws and their impact.

II. THE BASIC LAW ON CHILD CUSTODY JURISDICTION—A QUICK OVERVIEW

A. Purposes and Approach of the UCCJA & PKPA

1. General

The history and nature of child custody litigation made the need for a new jurisdictional approach abundantly clear. Difficult cases and harsh results are likely under whatever system or set of rules is adopted. Although parts are confusing and ambiguous, they at least begin to provide a uniform mechanism to resolve child custody jurisdiction disputes. Nevertheless, overall, they are helpful, although some seem to regard the UCCJA, the PKPA, and the Hague Convention as a panacea. These statutes, however, are far from perfect; they sometimes cause serious harm. In Fuge v. Uiterwyk, they worked as they should, when both Florida and Louisiana courts had a basis for jurisdiction, but communicated and Florida relinquished jurisdiction. Had Florida refused to relinquish jurisdiction, which it could have done under the law, it would have been extremely unfair to one parent and could have caused even more serious damage to the well-being of the children. In addition to judges doing what is right in their discretion, more thought is required to make the law and process less harsh.

The UCCJA began as a model act which became virtually universal state law. The PKPA, on the other hand, is federal law. The UCCJA seems to create a two-tier approach to determining jurisdiction. First, a general class of jurisdiction is established for custody cases. Second, the law provides a mechanism intended to "vest" jurisdiction in only one state at a time. These two propositions or issues of jurisdiction, 1) whether it exists, and 2) if so, ...
whether it should be declined, are separate and distinct. The UCCJA envisages that where concurrent jurisdiction exists, only one state should exercise that jurisdiction. The PKPA reinforces and clarifies these rules and requires full faith and credit.

The PKPA is designed to prevent child snatching and “to prevent interstate competition and conflicts” in custody disputes. It has the same purposes as the UCCJA. Being a federal law, covering the same subject matter and having the same policies as the UCCJA, the PKPA predominates. It preempts contrary state law and informs interpretation.

2. Purposes: The UCCJA and the PKPA Are to Limit, Not to Proliferate Jurisdiction

Neither the UCCJA nor the PKPA grant jurisdiction. They were designed actually to restrict a court’s traditional jurisdiction to hear custody or related matters. Their express elemental purposes are: to “[a]void jurisdictional competition and conflict” with other state courts, to promote cooperation among states and expand exchange of information; to assure that litigation occurs ordinarily in the state that has the more significant connection with the child and family and the more substantial evidence about the child’s welfare; discouraging continuing litigation; and to deter forum shopping, jurisdictional competition, and child abduction.” They require all states to honor prior custody orders.

The jurisdictional bases, therefore, should be read restrictively to limit jurisdic-
They are also supposed to promote the children's best interest, although this makes them inherently schizophrenic in many specific applications. They attempt to allow custody determinations to be made by the state which has the best perspective, best evidence and the most significant interest.

a. Deterring Child Abduction

The UCCJA, the PKPA, and the Hague Convention on Child Abduction all aim to prevent child abduction. Child abduction occurs when one parent breaches another's right to custody by removing the child from his "home state" or "habitual residence" and takes him to another jurisdiction, or when the parent retains the child in contravention of another's custodial rights or interests.

b. Litigating Custody in the Most Ideal Place

The acts attempt to ensure that child custody or related litigation occurs in the state that will best promote a proper decision. This is deemed to be the home state, where it is assumed that one will find the maximum amount of evidence on the child's interests. The "home state" is the place in which the child has lived with her legal custodian for at least six months. If there is no "home state," the second option is the state in which they have the most significant connection and the best evidence.

c. Avoiding Forum Shopping and Conflicting or Duplicative Litigation

These laws are also designed to avoid forum shopping, jurisdictional competition, and duplicative litigation. They establish a formula for determining which court among one or more state courts has jurisdiction, or, if more than one has jurisdiction, which should assert it.

d. Facilitating Communication

The UCCJA and the PKPA are also designed to facilitate and promote communication among courts which have or may have concurrent jurisdiction.

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111. Tabuchi v. Lingo, 588 So. 2d 795, 798 (La. App. 2d Cir. 1991) (reading significant connection/substantial evidence basis). The jurisdictional bases are discussed infra.

112. See my discussion of this schizophrenia in my article: Christopher L. Blakesley, Child Custody: Jurisdiction & Procedure, 35 Emory L.J. 291, 357-381 (1986).


Each component part of the law should be construed to promote these goals. They require all states to honor prior custody orders. A state has an affirmative duty to question its jurisdiction when it learns of an interstate dimension. A registry of custody decrees is established in each state. A court that receives information on possible ongoing custody litigation in another state should communicate with the appropriate court in the other state. When courts communicate to resolve conflicting jurisdiction they should keep a record, preferably a verbatim transcript.

C. The Parental Kidnapping Prevention Act (PKPA), 28 U.S.C. 1738A

1. The Need For and Promulgation of the PKPA

The United States Congress adopted the PKPA because the UCCJA had not worked as well as intended. In addition, when the PKPA was promulgated, only around fifty percent of the states had their own UCCJA. The federal law attempts to correct the problems, gaps, ambiguities, vagaries and inconsistencies that arose from the various state versions and interpretations of the UCCJA. Although several inconsistencies were resolved, some were not, and other problems were created. In addition, some state court decisions still ignore the PKPA or try to limit it to circumstances of child snatching.

2. Application of the PKPA

The PKPA does not confer jurisdiction in federal court to decide which of two conflicting state custody decrees is valid. Nor does it confer a private

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116. Jones v. Shadwich, 601 So. 2d 371, 372 (La. App. 5th Cir. 1992); Renno v. Evans, 580 So. 2d 945, 948 (La. App. 2d Cir. 1991); McGough & Hughes, supra note 93, at 28; Stuart v. Stuart, 516 So. 2d 1277 (La. App. 2d Cir. 1987); Ingram v. Ingram, 463 So. 2d 932 (La. App. 2d Cir. 1985).
117. See, e.g., authority in supra note 116. When this happens the law works quite well. See, e.g., Fuge v. Uiterwyk, 613 So. 2d 717 (La. App. 4th Cir. 1993).
119. This has worked as intended in many cases as courts become accustomed to the Acts. See, e.g., Kessenich v. Kessenich, No. FA-960532958, 1996 WL 383353 (Conn. Super. Ct. June 11, 1996); Renno, 580 So. 2d 945; Janik v. Janik, 542 So. 2d 615 (La. App. 5th Cir. 1989).
121. Russel M. Coombs, Progress Under the PKPA, 6 J. Amer. Acad. of Matrim. Law. 59, 62 n.15 (1990) (providing examples of variations and conflicting decisions); Blakesley, supra note 112, at 316-30.
cause of action in federal court for this purpose. It does determine which state court custody decisions are entitled to full faith and credit under Article IV, section 1 of the United States Constitution. A primary question is the extent to which the PKPA preempts the operation of a given state’s UCCJA. In addition, some state courts suggested in dicta that the PKPA directly applies only to modification actions. Whether true or not, the point is vacuous, because any judgment contrary to the PKPA is not owed full faith and credit and thus is quite worthless. There is a practical necessity to apply the PKPA to initial as well as modification custody cases.

Courts have sometimes incorrectly considered the PKPA to apply only when the circumstances include child abduction or wrongful retention. The PKPA, however, has the same purposes as the UCCJA. It applies to interstate child custody or related disputes just as the UCCJA. The PKPA provides that a “child custody determination” is consistent with the PKPA if: (1) the court rendering it has jurisdiction under its own laws; and (2) one of the following conditions exist: “(A) such state (i) is the home state of the child on the date of the commencement of the proceeding, or . . . (E) the court has continuing jurisdiction pursuant to subsection (d). . . .” Thus, if a state has jurisdiction under its own law [1738A(c)(1)], and has continuing jurisdiction pursuant to subsection (d), as required by 1738A(c)(2)(E), any order issued by that state is consistent with the PKPA, and is entitled to full faith and credit. Thus, the coverage and application of the PKPA are concomitant to that of the UCCJA.

126. Id.
130. Mancusi v. Mancusi, 519 N.Y.S.2d 476, 478-79 (N.Y. Fam. Ct. 1987); Sheila L., 465 S.E.2d at 220; Sams v. Boston, 384 S.E.2d 151, 157 (W. Va. 1989): “[T]he . . . PKPA gives distinct priority to the state court exercising ‘home-state’ jurisdiction to enter an initial custody decree [over a state that bases its jurisdiction on a ‘significant connection’ and ‘substantial evidence’ test]. Therefore, the [PKPA] makes it judicially imprudent for a state court in one state to exercise jurisdiction to enter an initial custody decree when a state court in another state has ‘home-state’ jurisdiction and has not declined to exercise that jurisdiction; if conflicting decrees were issued, only the custody decree of the ‘home-state’ court would be entitled to full faith and credit . . . .”
The PKPA, the UCCJA, and Preemption: PKPA Preemption When State Law is Inconsistent—Supremacy Clause, Article 6, Clause 2 of the United States Constitution

Correlation of the UCCJA and the PKPA has confused some courts. The PKPA determines which state court custody decisions are entitled to full faith and credit under Article IV, section 1 of the United States Constitution. The extent to which the PKPA preempts the operation of a given state's UCCJA presents an important issue. Generally, if a state family law provision interferes with or causes major damage to clear and substantial federal interests, the federal law will preempt the specific state law. Thus, if a state law frustrates the overall purpose of the PKPA to encourage comity among states, it will be found to violate the Supremacy Clause.

The United States Supreme Court, in Maryland v. Louisiana, provided guidelines for inquiry concerning the Supremacy Clause. When a federal and a state law cover the same subject, have the same purpose, and conflict, federal law preempts state law wherever there is a conflict. Federal law, therefore, requires interpretation consistent with its provisions. Whenever serious discrepancies in application or interpretation arise, they should be reversed.

Preemption is intended in interstate custody disputes only when there are contradictory provisions or contradictory interpretations. The PKPA and UCCJA have congruent purposes, so operation of state statutes will not usually produce results inconsistent with the objectives of the federal law. One can hardly say that the UCCJA, in promoting its purpose to eliminate inconsistencies among

134. For more detailed analysis of PKPA preemption, see Blakesley, Louisiana Family Law, supra note 1, Ch. 13, § 13.15; Roger M. Baron, Federal Preemption in the Resolution of Child Custody Jurisdiction Disputes, 45 Ark. L. Rev. 885, 904 (1993).
137. U.S. Const. art VI, cl. 2; Archambault, 555 N.E.2d at 207 (citing Thompson, 484 U.S. at 516-20, 108 S. Ct. at 180-87).
former state child custody jurisdiction law, in preventing child-snatching and duplicative and continuous litigation, could be an obstacle to the accomplishment of the concomitant objectives of Congress in the PKPA. Indeed, the essential purpose of the PKPA is to ensure that there are no inconsistencies. Naturally, where there is a conflict the PKPA prevails. 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. Most cases attempt to reach a decision that is consistent with both statutes.

Thus, although it may be said that technically the PKPA does not always preempt, it certainly does so functionally. Given the PKPA's relationship with the various state UCCJAs, the overriding purpose of the federal and state statutory framework is "to prevent interstate competition and conflicts" relating to child custody and related matters, among the various United States jurisdictions. Thus, a state is required by the terms of the PKPA to enforce a sister state's custody determination rendered in accordance with the PKPA and its own UCCJA. A state has no authority to modify such an order, unless the sister state loses jurisdiction or declines to exercise it. Although the PKPA makes this clear, this is also the proper interpretation of the UCCJA as indicated by many state courts. After we analyze the basic jurisdictional scheme, we will consider whether in personam jurisdiction or other constitutional protections apply or whether the UCCJA suffices.

III. THE BASIC JURISDICTIONAL SCHEME—SOME DETAIL

A. The Nature of Jurisdiction Under the UCCJA: The UCCJA Provides Subject Matter Jurisdiction and is the Exclusive Method of Obtaining It in Child Custody Cases

Subject matter jurisdiction is required and may not be conferred by consent of the parties. It is a truism that a court must have subject matter jurisdiction to hear any case or issue an order. Although a party may submit voluntarily to a court's jurisdiction, subject matter jurisdiction is derived from the Constitution and substantive law, so it cannot be conferred by consent or waiver and


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a judgment issued by a court without proper jurisdiction is null. The UCCJA, as impacted by the federal PKPA, provides the exclusive state law source and method of establishing subject matter jurisdiction in interstate child custody cases. It is a judicial duty to examine subject matter jurisdiction sua sponte when the issue is not raised by the litigants. Absence of subject matter jurisdiction may be raised by the trial court or the parties at any stage of the proceedings. The PKPA nullifies any inconsistent legislation or interpretation. Neither confers jurisdiction by stipulation, agreement, or consent of the parties or the court.

(UCCJA is the sole determinant of subject matter jurisdiction in interstate custody cases, but not for issues of contempt; In re Hatcher, 505 N.W.2d 834 (Mich. 1993); Renno v. Evans, 580 So. 2d 945, 947-48 (La. App. 2d Cir. 1991); Hunt v. Hunt, 629 So. 2d 548, 551 (Miss. 1992); Blanco v. Tonniges, 511 N.W.2d 555 (Neb. Ct. App. 1994); Columb v. Columb, 633 A.2d 689 (Vt. 1993). A very limited number of jurisdictions, however, allow waiver of jurisdiction. Williams v. Williams, 16 Fam L. Rptr 1406 (July 3, 1990) (allowing waiver of jurisdiction). On the other hand, appearance only to contest UCCJA jurisdiction does not submit a person to the general jurisdiction of the court. McBride, 688 So. 2d at 859.

144. Fazio v. Fazio, 587 So. 2d 91 (La. App. 2d Cir. 1991); Renno, 580 So. 2d at 947; La. Code Civ. P. art. 3.


146. Renno, 580 So. 2d at 947.


148. Cf. Hopson, 168 Cal. Rptr. at 345; Zierenberg, 16 Cal. Rptr. at 241; Atkins, 623 So. 2d at 242; Renno, 580 So. 2d at 947; Counts, 494 So. 2d at 1277 (and Zenide, 27 Cal. Rptr. 2d at 705); Walters, 519 So. 2d 427; Edwards, 1983 WL 2414; Kirylik, 357 S.E.2d 449; cf. Kasper, 792 P.2d at 126; Hache, 451 A.2d at 972-73; Blakesley, Louisiana Family Law, supra note 1, Ch. 13; Elrod, supra note 145, at 609.

149. E.g., In re Hatcher, 505 N.W.2d 834 (Mich. 1993); Cordie, 538 N.W.2d at 216; Long v. Long, 439 N.W.2d 523 (N.D. 1989); cf. Dunn v. Dunn, 454 N.W.2d 34, 39 (N.D. 1991). A minority of jurisdictions have a "refined" (perhaps strained) perception of jurisdiction, although not without some appeal. It has been argued that viewing the UCCJA as providing subject matter jurisdiction is wrong and that if both parents consent, it ought to obtain. See Atwood, supra note 145, at 401. In addition, the Indiana Supreme Court held that the UCCJA jurisdiction is not subject matter, but
Estoppel is not an acceptable basis to establish subject matter jurisdiction.\(^{130}\)

**B. The Jurisdictional Bases**

The UCCJA establishes a system of concurrent and potentially conflicting jurisdiction. The bases are hierarchical and continuing jurisdiction prevails.\(^{151}\)

The law resolves potentially unending custody litigation by placing the bases of jurisdiction (except for emergency) in descending preferential order,\(^{152}\) and by providing for virtually exclusive continuing jurisdiction in the original decree state.\(^{153}\) In addition, to accommodate fairness and cooperation, mechanisms for communication\(^{154}\) and for declining jurisdiction were included.\(^{155}\) The key to resolving conflicts of jurisdiction is to have a rigid hierarchy, but also to include a mechanism for a court to decline to exercise its jurisdiction, even if it

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\(^{130}\) Williams, 555 N.E.2d at 145. An Illinois Appellate Court held that UCCJA jurisdiction refers to the "legislature's discretionary limit upon the exercise of existing jurisdiction and not to due process limits of subject matter or personal jurisdiction." Atwood, supra note 145, at 375 (discussing In re Marriage of Slate, 536 N.E.2d 894, 896 (III. App. Ct. 1989)). Proponents of these views seem to think that they promote children's interests, but this is doubtful, unless one adds due process precepts to the mix, as discussed above and below.


\(^{132}\) Home state jurisdiction predominates over significant connection jurisdiction. Emergency will trump either of those bases, but it is temporary. Finally, if no state has jurisdiction on the basis of UCCJA rules, the state in which the child and a party are domiciled may assert it. Some courts have claimed that there is no hierarchy, but they are clearly wrong on the face of the UCCJA itself and certainly when it is read along with the PKPA. See authority infra at notes 166, 173, 183-192.

\(^{133}\) See, e.g., McDow v. McDow, 908 P.2d 1049, 1051 (Alaska 1996) (a court may not modify another state's custody decree if the latter court retains jurisdiction); Kessenich v. Kessenich, No. FA-960532958, 1996 WL 383353 (Conn. Super. Ct. June 11, 1996) (The fact that Connecticut had become the home state and had most significant connection and most evidence were not sufficient for Connecticut courts to modify a Michigan custody decree, where former husband continued to live in Michigan—Michigan graciously declined jurisdiction resolving the problem.); Yurgel v. Yurgel, 572 So. 2d 1327, 1331 (Fla. 1990); Renno v. Evans, 580 So. 2d 945 (La. App. 2d Cir. 1991); Wilson v. Wilson, 465 S.E.2d 44 (N.C. Ct. App. 1996); G.S. v. Ewing, 786 P.2d 65, 68-71 (Okla. 1990); In re D.S.K., 792 P.2d 118, 129 (Utah Ct. App. 1990); Greenlaw v. Smith, 869 P.2d 1024, 1027 (Wash. 1994); Crites v. Alston, 837 P.2d 1061, 1070 (Wyo. 1992) ("'[H]ome state' status alone is not sufficient to confer modification jurisdiction on a state that was not the original decree state when one of the parties continues to reside in the original decree state."). But cf. In re Henry & Keppel, 922 P.2d 712, 713-14 (Or. App. 1996) (The residence of one of the parties and exercise of visitation rights are not sufficient to retain jurisdiction.).

is primary. If courts do what they ought to do, they will ask the families whether there is any ongoing child custody litigation or whether there is any indication that another state might have jurisdiction. The court should communicate with its counterpart in the other state.

"Inconvenient forum," and "unclean hands" (when a parent improperly or illegally removes a child from a state or commits some other wrongful act) are important features of the UCCJA, but they are not bases of jurisdiction. Courts should decide together which of the two ought to hear the case.

The UCCJA, the PKPA, and the Hague Convention apply only to those who have a right to custody. The UCCJA and the PKPA each prescribe four bases of jurisdiction: (1) home state; (2) significant connection, plus evidence regarding the best interest of the child; (3) emergency; and (4) default jurisdiction (no other state has jurisdiction or has declined it). This article will consider each of these bases in detail. The bases may overlap, so concurrent jurisdiction is common and conflicts of jurisdiction occur, often causing difficulties.

Although some language in various state UCCJAs is ambiguous, the inference of a specific hierarchy is easily drawn. The PKPA makes it absolutely clear. Many courts have recognized this hierarchy. The first jurisdictional basis is the "home state." Second is "significant connection and substantial evidence." Next, when the child is present and no other state has jurisdiction based on a law substantially similar to that of the forum state, the latter has jurisdiction by default. Each of these is trumped by emergency jurisdiction, although emergency jurisdiction is

162. This is in § III, infra.
163. E.g., the "home state" may not be the same state as the one in which the parties have "significant connections" and where there is "substantial evidence" about the child's best interest. La. R.S. 13:1702 (Supp. 1997). See, e.g., In re Joseph D., 23 Cal. Rptr. 2d 574 (Cal. Ct. App. 1994); In re Marriage of Alexander, 623 N.E.2d 921 (III. App. Ct. 1993); In re A.L.H., 630 A.2d 1288 (Vt. 1993).
165. Renno, 580 So. 2d at 948; Stuart v. Stuart, 516 So. 2d 1277, 1280 (La. App. 2d Cir. 1987).
rare, temporary, and requires extraordinary circumstances.

1. Home State Jurisdiction

UCCJA section 2(5) defines "home state" as the state in which the child has lived with his parents, parent, or person acting as parent (rightful custodian) for the six consecutive months immediately preceding the filing of the custody action or, in the case of a child less than six months old, the state in which the child lived from birth with any of the indicated parties. The date for measuring whether a state is home state is the date of the filing for custody. Home state

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168. E.g., Murphy v. Danforth, 913 S.W.2d 697, 702 (Ark. 1996) (no permanent modification should be made on basis of emergency; only for so long as it takes to travel with the child to proper forum); dialon v. Medellin, 409 So. 2d 570, 575 (La. 1982); In re Fischer, 666 So. 2d 724, 726 (La. App. 4th Cir. 1995); Atkins v. Atkins, 623 So. 2d 239 (La. App. 2d Cir. 1993); Renno, 580 So. 2d at 949; In re J.L.H., 507 N.W.2d 641, 647 (Neb. Ct. App. 1993); In re A.L.H. 630 A.2d 1288, 1291 (Vt. 1993) (permanent custody should not be determined on the basis of emergency jurisdiction); Sheila L. on Behalf of Ronald M.M. v. Ronald P.M., 465 S.E.2d 210 (W. Va. 1995). See also Shook v. Shook, 651 So. 2d 6 (Ala. Civ. App. 1994); McDow v. McDow, 908 P.2d 1049, 1052 (Alaska 1996) (emergency jurisdiction reserved for extraordinary circumstances); Trader v. Darrow, 630 A.2d 634, 638 (Del. 1993); Benda v. Benda, 565 A.2d 1121, 1124 (N.J. Super. Ct. App. Div. 1989); In re D.S.K., 792 P.2d 118, 127, 128 (Utah Ct. App. 1990); Brigitte M. Bodenheimer, Interstate Custody: Initial Jurisdiction and Continuing Jurisdiction under the UCCJA, 14 Fam. L.Q. 203, 225-26 (1981) ("This special power to take protective measures does not encompass jurisdiction to make permanent custody determinations or to modify the custody decree of a court with continuing jurisdiction."). (Professor Bodenheimer was the rapporteur for the UCCJA).


170. Bryant v. Bryant, No. 307677, 1996 WL 150159 (Conn. Super. Ct. Mar. 12, 1996) (Connecticut court holds that Florida is now home state, where child has been gone from Connecticut and is in Florida for several years); Lopez v. Lopez, 661 So. 2d 665, 667 (La. App. 2d Cir. 1995).

171. UCCJA § 2(5), 9 U.L.A. 133 (1988); see also S.M. v. A.S., 938 S.W.2d 910 (Mo. App. Ct. 1997) (holding that the court should apply a "totality of the circumstances" test to decide whether the absence was temporary or not).

172. The three approaches are: (1) simply the length of absence (e.g., Marriage of Schoeffel, 644 N.E.2d 827, 829 (Ill. App. Ct. 1994)); (2) whether the parties intended the absence to be temporary or permanent (Walt v. Walt, 574 So. 2d 205, 216 (E. Dist. Ct. App. 1991); Koons v. Koons, 615 N.Y.S.2d 563, 567 (N.Y. Sup. Ct. 1994)); (3) whether the totality of the circumstances indicate that the absence was temporary or permanent (S.M., 938 S.W.2d at 917; Jones v. Jones, 456 So. 2d 1109, 1113 (Ala. Cir. App. 1984); Joselit v. Joselit, 544 A.2d 59, 63 (Pa. Super. Ct. 1988)).
jurisdiction is primary; it predominates over "significant connection" jurisdiction. On the other hand, home state jurisdiction does not arise if one parent removes a child and fails to apprise the other parent of their whereabouts in order to gain the "home state advantage."

2. Significant Connection and Substantial Evidence: Second in Preferential Rank

a. General

Physical presence of the child, although desirable, is not necessary to support home state or significant connection jurisdiction. Significant connection jurisdiction applies only when maximum, rather than minimum, contacts exist. It is secondary to home state jurisdiction; if there is a home state, significant connection jurisdiction may be asserted only if the home state declines. If, however, there is no home state and the state which rendered the original custody decree has lost jurisdiction, the state with the most significant connection and most substantial evidence will have jurisdiction. The purpose of the "significant connection" basis is to allow jurisdiction in a state in which there is substantial contact with the child and evidence related to the child's well-being. Thus, a home state may decline jurisdiction if it sees that another state has more connection and better evidence to serve the decision and the best interest of the child; or significant connection jurisdiction might obtain in a previous home state, when a child has been moving around frequently and there is no current home state; or the child may have been in the forum state for six months or more, but not with a person to whom the child's custody has been awarded. But if the state which rendered the original custody decree


176. Renno, 580 So. 2d at 948.

177. This is clear in the PKPA; see Bryant v. Bryant, No. 307677, 1996 WL 150159 (Conn. Super. Ct. Mar. 12, 1996) (this basis is clearly second in rank); Renno, 580 So. 2d at 948 (citing § 1702(A)(2) and its Comment).


179. Lalond v. Monschein, 673 So. 2d 1075, 1078 (La. App. 3d Cir. 1996) (grandparents had cared for the child for two years, no party lived in original decree state, and both significant connection and substantial evidence were in Louisiana).

180. See, e.g., Guardianship of Gabriel W., 666 A.2d 505, 508-09 (Me. 1995); Brown v. Brown, 847 S.W.2d 496, 500 (Tenn. 1993).

181. See, e.g., Douglas v. Douglas, 528 So. 2d 699 (La. App. 2d Cir. 1988) (child had been in
has lost jurisdiction and no other state is home state, the state with the most significant connection and most substantial evidence will have jurisdiction.\textsuperscript{182}

\begin{itemize}
  \item[b.] Home State Jurisdiction is Primary
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The “significant connection” basis \textit{only} applies when there is no “home state.”\textsuperscript{183} Thus, the Louisiana First Circuit Court of Appeal was \textit{wrong} to hold that when both home state and significant connection jurisdiction obtain, a state with the latter need not defer to the home state.\textsuperscript{184} In this case, Louisiana was the home state, but both Maine and Louisiana had “significant connections and substantial evidence” regarding the child’s best interest. Although it is quite right that a court may decline jurisdiction under such circumstances and to defer to the other state,\textsuperscript{185} it is incorrect to suggest that home state jurisdiction is not predominant. Neither Maine law nor its courts could require Louisiana to decline jurisdiction. The PKPA makes it clear that home state prevails, unless that state defers to the other.\textsuperscript{186} On the other hand, if the state which rendered the original custody decree has lost or declined jurisdiction and no other state is home state, the state with the most significant connection and most substantial evidence will have jurisdiction.\textsuperscript{187}

The PKPA leaves no doubt that “home state jurisdiction” has priority. The only exceptions are emergency jurisdiction and continuing jurisdiction, which is retained by the state that rendered the original custody order,\textsuperscript{188} as long as one party remains in that state, it has not relinquished jurisdiction, and its law provides jurisdiction under the facts.\textsuperscript{189} “Significant connection” jurisdiction

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\textsuperscript{182} Refer to the discussion of PKPA preemption and home state predominance accompanying supra notes 133-142 and 183-192.
\textsuperscript{183} In re Pearsall v. Smith, 673 So. 2d 1075, 1077 (La. App. 3d Cir. 1996) (Grandparents had cared for the child for two years, no party lived in original decree state, and both significant connection and substantial evidence were in Louisiana.).
\textsuperscript{185} \textit{See} Devillier v. Smith, 665 So. 2d 71, 73 (La. App. 1st Cir. 1995).
\textsuperscript{186} \textit{See}, e.g., J.D.S. v. Franks, 893 P.2d 732 (Ariz. 1995).
\end{flushleft}
is expressly available only when there is no home state or the decree state declines or loses jurisdiction. On this point, the West Virginia Supreme Court noted:

"[t]he Federal [PKPA] gives distinct priority to the state court exercising "home-state" jurisdiction to enter an initial custody decree [over a state that bases its jurisdiction on a "significant connection" and "substantial evidence" test]. . . . Therefore, the [PKPA] makes it judicially imprudent for a state court in one state to exercise jurisdiction to enter an initial custody decree when a state court in another state has "home-state" jurisdiction and has not declined to exercise that jurisdiction; if conflicting decrees were issued, only the custody decree of the "home-state" court would be entitled to full faith and credit. . . ."

Where a child is living in a state with a person who has physical, but not legal, custody, the state with the more substantial evidence about the child's well-being is not the home state and does not have jurisdiction. Although it might be the better place to decide custody, it would not be able to take jurisdiction, unless the home state declines or has lost it and there is no other state with jurisdiction. This is one of the circumstances in which the UCCJA and the PKPA may be unfair, unjust, and harmful to the child.


190. PKPA, 28 U.S.C. § 1738A (c)(2)(A), (E), (D) (1994); see e.g., Blanco v. Tonniges, 511 N.W.2d 555 (Neb. 1994) (continuing jurisdiction of the original awarding state is exclusive and a defect in the law does not allow parties unilaterally to waive jurisdiction, unless the court in the decree state relinquishes it); Bowen v. Shurtleff, 629 N.E.2d 478 (Ohio Ct. App. 1993); Brown v. Brown, 847 S.W.2d 496 (Tenn. 1993); Greenlaw v. Smith, 869 P.2d 1024 (Wash. 1994) (Washington courts retain modification jurisdiction, even though the party awarded custody moved to California legally and properly some nine years earlier, thus, making California the "home state").


3. Emergency Jurisdiction

a. What Constitutes an Emergency?

Emergency jurisdiction is available when it is necessary to protect a child, present in the state, from abuse, threatened abuse, mistreatment or neglect.193 It was shown that the mother drank to the point of intoxication on a daily basis. She did not rise in the morning until after the children had dressed themselves, prepared breakfast and left for school. She earned no income. She often "borrowed" the eldest daughter's babysitting money. She used foul language. She would not allow the children to attend church. She usually left the children alone from 6:00 p.m. until midnight.195 A Louisiana Court of Appeal heard testimony from a child's paternal grandparents and paternal aunt that they had often seen unsanitary and filthy conditions in the home. There was some evidence of abuse and inattentive health care. This was held sufficient for emergency jurisdiction in Louisiana.196 On the other hand, a finding on non-marital cohabitation is insufficient.197

Child Abuse Proceedings: The UCCJA generally applies in child abuse proceedings.198 It was applied under a South Dakota Child Abuse Act when, during his children's visit, a father brought an action after suspecting abuse by their non-resident mother.199

b. When May It Be Invoked—Dangers and Abuses?

Emergency jurisdiction is important to protect children, but, unless courts are careful, it is easily abused. When this basis is abused, children and parents are

195. Id. at 1280.
197. Id. at 1280.
199. Zappitello, 458 N.W.2d at 784; Curtis, 789 P.2d at 724; but see Orange County, 571 N.Y.S.2d 824.
abused. Two bases of jurisdiction require the physical presence of the child: emergency jurisdiction and when no other state has jurisdiction.\textsuperscript{200} The commissioners who wrote the model UCCJA emphasized that emergency jurisdiction was meant to be applied only in serious emergencies: "[t]his extraordinary jurisdiction is reserved for extraordinary circumstances."\textsuperscript{201} Although the UCCJA authorizes use of "emergency powers in cases of genuine, immediate, substantial, threatened physical [or sexual] harm to the child . . . those powers are limited . . . and temporary.\textsuperscript{202} Courts, of course, must not take lightly allegations that a child is in danger, yet courts must be careful.

Extremely liberal application of emergency jurisdiction would be license to unscrupulous would-be custodial parents to take their children and make false allegations of emergency in a state in which a "satisfactory" custody decision may result.\textsuperscript{203} Asserting jurisdiction on the unsubstantiated and self-serving claim of emergency encourages the very evils that the UCCJA and the PKPA were promulgated to combat. Thus, more than a conclusory allegation is required.' Even if a court has doubts about the legitimacy of the claim of emergency, once it decides that one exists and a foreign court has obtained emergency jurisdiction, it must defer to that state's courts.\textsuperscript{206} When there are allegations that the child has been abandoned, neglected, abused, abandoned, or threatened with harm, jurisdiction should be asserted to protect the child.\textsuperscript{207} The ease with which such allegations are made and their frequency in custody disputes presents a dilemma. The frequency of false allegations and the fact that expansive application of emergency jurisdiction erodes the anti-child-snatching purposes of the law. To allow emergency jurisdiction to be abused would

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\item 201. UCCJA § 3 (commissioners' note), 9 U.L.A. 124 (1988).
\item 203. E.g., Murphy, 915 S.W.2d at 702 (no permanent modification should be made on basis of emergency; only for so long as it takes to travel with the child to proper forum); In re Shoshana B., 41 Cal. Rptr. 2d at 120, 121; Flores v. Saunders, 674 So. 2d 767, 768 (Fla. Dist. Ct. App. 1996); In re M.M., 474 S.E.2d 53 (Ga. App. 1996); In re E.A. & N.A., 552 N.W.2d 135, 136, 138 (Iowa 1996); In re Fischer, 666 So. 2d 724, 725 (La. App. 4th Cir. 1995); Dillon, 409 So. 2d at 575; Harris v. Simmons, 676 A.2d 944, 950-51 (Md. Ct. Spec. App. 1996); S.L. v. R.C.M., 872 S.W.2d 573 (Mo. Ct. App. 1994); cf. Renno v. Evans, 580 So. 2d 945, 949 (La. App. 2d Cir. 1991).
\item 204. See Ex Parte J.R.W., 667 So. 2d 74 (Ala. 1994); as modified, rev'd on other grounds, 667 So. 2d 88 (Ala. 1995); Sheila L. on Behalf of Ronald M.M. v. Ronald P.M., 465 S.E.2d 210, 222 (W. Va. 1995).
\end{itemize}
“thwart the very purposes for which the PKPA [and the UCCJA were enacted and would] cause havoc... given the frequency with which allegations of abuse, particularly allegations of sexual abuse, become part of child custody litigation.”

Because it is so tempting for a parent to abduct a child, then to allege an emergency or danger of imminent harm in an attempt to justify the act and to obtain jurisdiction, it is important to construe emergency jurisdiction carefully and rigorously. One jurisprudential attempt at solution has been to require that any alleged emergency be serious, significant, immediate, and based on credible evidence. Also, jurisdiction is temporary. It must be asserted at the time there is a danger to the child and applies only if and when the child

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208. Ex Parte J.R.W., 667 So. 2d 74 (Ala. 1994), as modified, rev'd on other grounds, 667 So. 2d 88 (Ala. 1995); Lemond v. Lemond, 413 N.E.2d 228, 245 (Ind. 1980) (per curiam) (“Only where there is substantial evidence, not simply conclusory assertions of an emergency, can emergency jurisdiction... be [properly invoked.”); Sheila L., 465 S.E.2d at 222; David C. Minneman, Annotation, Abandonment and Emergency Jurisdiction of the Court under § 3(a)(3) of the UCCJA and the PKPA, 5 A.L.R. 4th 788, 806-07 (1992).

209. E.g., Curtis v. Curtis, 574 So. 2d 24, 29 (Miss. 1990) (noting that it was well aware of “the national problem of interstate parental child kidnapping...[and, therefore, has] strongly enjoined that our chancery courts turn a deaf ear to the pleas of those who wrongfully bring children into this state”) (citing Laskosky v. Laskosky, 504 So. 2d 726 (Miss. 1987); Owens v. Huffman, 481 So. 2d 231, 239, 243, 245-46 (Miss. 1985), among other cases). Curtis held that bringing a child into Mississippi in contravention of a valid out-of-state custody decree prevents the timing of “home state” jurisdiction to begin and also requires that the evidence of “significant connection” and well-being of the child be extant as of the time the child was brought to the state. Curtis, 574 So. 2d at 30.

210. See, e.g., Murphy v. Danforth, 915 S.W.2d 697, 702 (Ark. 1996) (must be genuine emergency, may only be temporary—enough time to travel with child to proper forum to seek permanent modification); Dillon v. Medellin, 409 So. 2d 570, 575 (La. 1982); Curtis, 574 So. 2d at 31 (error to continue to exercise jurisdiction after it became apparent that there was no clear and present danger to children); Smith-Helstrom v. Yonker, 544 N.W.2d 93, 99-100 (Neb. 1996) (emergency jurisdiction limited and temporary, designed to protect the child from abuse); Curtis v. Curtis, 789 P.2d 717, 723 (Utah Ct. App. 1990) (emergency jurisdiction continues only so long as to find proper forum); In re A.L.H., 630 A.2d 1288 (Vt. 1993) (emergency jurisdiction continues only so long as to find proper forum).

has urgent, immediate, and serious needs requiring assertion of jurisdiction.\textsuperscript{212} It obtains until arrangements are made to allow the state with home state or significant connection jurisdiction to hear the case, so long as that is consistent with the well-being of the child.\textsuperscript{213} In these limited circumstances emergency jurisdiction will trump all the others.

Jurisdiction is retained by the state that had jurisdiction in the first place, even if there is an emergency.\textsuperscript{214} The other state takes temporary jurisdiction, to be applied until arrangements can be made to protect the child for the litigation to occur where the evidence of the conduct and the child's best interest exists.\textsuperscript{215} Courts, therefore, should strictly construe the emergency jurisdiction provision\textsuperscript{216} and apply it sparingly.\textsuperscript{217} The Colorado Supreme Court noted:

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212. Renno, 580 So. 2d at 949 (citing Dillon, 409 So. 2d 570). See also other authority in supra note 119.

213. See e.g., Dillon, 409 So. 2d 570; Atkins, 623 So. 2d 239; Renno, 580 So. 2d at 949; Stuart v. Stuart, 516 So. 2d 1277 (La. App. 2d Cir. 1987); J.L.H. v. J.H., 507 N.W.2d 641 (Neb. Ct. App. 1993); In re A.L.H., 630 A.2d 1288 (Vt. 1993) (permanent custody should not be determined on the basis of emergency jurisdiction); Sheila L., 465 S.E.2d 210. See also Trader v. Darrow, 630 A.2d 634, 638 (Del. 1993); Benda v. Benda, 565 A.2d 1121, 1124 (N.J. Super. Ct. App. Div. 1989); D.S.K. v. Kasper, 792 P.2d 118, 127, 128 (Utah Ct. App. 1990); Bodenheimer, supra note 168, at 225 ("This special power to take protective measures does not encompass jurisdiction to make permanent custody determinations or to modify the custody decree of a court with continuing jurisdiction.") (Professor Bodenheimer was the rapporteur for the UCCIA).


216. E.g. Severio P. v. Donald Y., 490 N.Y.S.2d 439, 444 (N.Y. Fam. Ct. 1985) (the UCCJA in the area of emergency jurisdiction will be strictly construed; "It must be shown that the child will be harmed physically or emotionally if jurisdiction is not exercised . . .").

217. KLW v. TWC, 586 So. 2d 4 (Ala. Civ. App. 1991); Brock v. District Court, 620 P.2d 11, 15 (Colo. 1980) (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. 1986); Milenkovic v. Milenkovic, 416 N.E.2d 1140, 1146 (Ill. App. Ct. 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); Piedimonte v. Nissen, 817 S.W.2d 260 (Mo. Ct. App. 1991); Hache v. Riley, 451 A.2d 971, 975 (N.J. 1982) (emergency jurisdiction confers only a temporary jurisdiction to make protective measures); Mitchell v. Mitchell, 458 N.Y.S.2d 807, 810 (N.Y. Sup. Ct. 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. Ct. 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); Sheila L. on Behalf of Ronald M.M. v. Ronald P.M., 465 S.E.2d 210 (W. Va. 1995); Renno v. Evans, 580 So. 2d 945 (La. App. 2d Cir. 1991); In re A.E.H., 468 N.W.2d 190 (Wis. 1991). Justice Calogero 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
"[t]he 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." 218

Of course, courts must take care to protect children within their borders. Thus, some jurisdictions construe the emergency provision liberally, focusing attention on the potentially dire consequences of declining jurisdiction. 219 If it turns out that no emergency actually existed jurisdiction should be relinquished in deference to the home state or the state of the initial award. 220 Notwithstanding a correct decision by a lower court to assume emergency jurisdiction to protect a child, it is error to exercise subject matter jurisdiction after it should reasonably have become apparent that there was no longer any clear and present danger to the children that could arise from permitting adjudication in the courts of the state that issued the initial custody decree. 221

Courts in states facing a potential emergency should contact their counterparts in sister states to discuss the proper place to protect the children. Attention should be focused on certain factors: (1) whether another state is or recently had been the child's home state; (2) whether another state has a closer connection with the child and his or her family or with the child and one or more of the contestants; (3) whether substantial evidence concerning the child's present or future care, protection, training, and personal relationships is more readily available in another state; (4) whether the parties have agreed on another forum which is no less appropriate; and (5) whether the exercise of jurisdiction by a court of this state would contravene any of the purposes of the UCCJA. 222

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." Dillon, 409 So. 2d at 575. See generally Blakesley, Louisiana Family Law, supra note 1, §§ 13.11, 13.17.

220. Id.
221. See id. The Court also held that the courts have no power under the Protection From Domestic Abuse Act to render decisions inconsistent with the UCCJA. See also Murphy v. Danforth, 915 S.W.2d 697, 702 (Ark. 1996) (explaining that no permanent modification to a custody order should be made on the basis of emergency; only for so long as it takes to travel with the child to the proper forum) (The trial court correctly refused emergency jurisdiction.); Dillon, 409 So. 2d at 575; In re Fischer, 666 So. 2d 724, 725 (La. App. 4th Cir. 1995); Atkins v. Atkins, 623 So. 2d 239 (La. App. 2d Cir. 1993); Renno, 580 So. 2d at 949; In re J.L.H., 507 N.W.2d 641, 647 (Neb. Ct. App. 1993); In re A.L.H. 630 A.2d 1288, 1291 (Vt. 1993) (permanent custody should not be determined on the basis of emergency jurisdiction); Sheila L, 465 S.E.2d at 223. See also Shook v. Shook, 651 So. 2d 6 (Ala. Civ. App. 1994); McDow v. McDow, 908 P.2d 1049, 1051 (Alaska 1996) (emergency jurisdiction reserved for extraordinary circumstances); Trader v. Darrow, 630 A.2d 634, 638 (Del. 1993); Benda v. Benda, 565 A.2d 1121, 1124 (N.J. Super. Ct. App. Div. 1989); Kasper v. Kasper, 792 P.2d 118, 127, 128 (Utah Ct. App. 1990); Bodenheimer, supra note 168, at 225-26.
222. Renno, 580 So. 2d at 948.
c. Where Must the Emergency Exist?

In 1982, the Louisiana Supreme Court suggested in dicta that an emergency condition must exist in the asylum state, before the emergency jurisdiction will allow Louisiana to hear the case. The Louisiana Supreme Court has since modified this position somewhat. In 1985, it deemed the provision for emergency jurisdiction applicable when "the child is physically present in this state and has been subjected to mistreatment or abuse which necessitates the exercise of emergency jurisdiction," and "a prima facie case supporting the exercise of jurisdiction has been established." In 1990, it held that a "Louisiana court normally would not have jurisdiction based on mistreatment of the child which occurred in Canada. . . . However, if the situation is so extreme that the immediate safety of the child is threatened by a return to Canada, then the Louisiana court has jurisdiction to take evidence to this limited extent." 

d. Emergency Jurisdiction and Collateral Attack

Can a parent in one state collaterally attack, in that state, the decision of a court in a sister state to assert emergency jurisdiction? A Minnesota Court of Appeal held that a domiciliary of Minnesota, the home state of the child, has the authority to question whether a Louisiana trial court properly exercised emergency jurisdiction. A collateral attack, however, is limited only to a finding that the matter of jurisdiction was fully and fairly litigated and finally decided in the court that originally rendered the decision.

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225. Burr v. Boone, 477 So. 2d 692 (La. 1985) (noting that, "[u]nlike the hypothetical situation described . . . in Dillon v. Medellin, [supra] . . ., a prima facie case supporting the exercise of jurisdiction has been established.").

226. Kelly, 567 So. 2d at 594 (citing Stuart v. Stuart, 516 So. 2d 1277 (La. App. 2d Cir. 1987), and limiting Dillon v. Medellin, 409 So. 2d 570 (La. 1982) to situations in which a child is not in need of immediate protection); Renno, 580 So. 2d at 949.


e. Emergency Jurisdiction and the PKPA

The PKPA provides for emergency jurisdiction in an initial custody situation, but not for actions to modify extant custody orders, when one of the parties remains in the state that rendered the original order. This is consistent with the idea that emergency jurisdiction is temporary. A court may not modify an extant custody order, even if it has emergency jurisdiction, unless it satisfies the two prongs of the PKPA modification test: (1) the second (forum) state must have jurisdiction as would permit it to make an initial custody determination; and (2) the first state must have lost or deferred its jurisdiction. This is consistent with and reinforces the UCCJA rule that emergency jurisdiction is temporary.

4. Default or "Vacuum" Jurisdiction—When No Other State Has Jurisdiction or Has Relinquished It

The fourth basis of jurisdiction also requires the child’s presence in the state. Louisiana Revised Statutes 13:1702(A)(4) provides: "[If] it appears that no other

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229. PKPA, 28 U.S.C. § 1738A (c)(2)(C) (1994), provides that "[a] child custody determination made by a court of a State is consistent with the provisions of this section only if—(1) such court has jurisdiction under the law of such State; and (2) one of the following conditions is met: . . . (C) the child is physically present . . . and . . . it is necessary in an emergency to protect the child."

230. E.g., K LW v. TWC, 586 So. 2d 4, 4-5 (Ala. Civ. App. 1991) (holding that the Alabama courts are bound by the PKPA to enforce a sister state’s custody determination rendered consistently with the PKPA, and that Alabama has no authority to modify such an order, even when there is evidence of an emergency, because “the PKPA does not recognize an emergency as granting modification authority.”); Stanley v. State, 567 So. 2d 310, 312 (Ala. Civ. App. 1990) (“[t]he PKPA does not recognize an emergency as granting modification authority; rather, it expressly states that a sister state’s judgment can only be modified as provided in § 1738A(f).”)

231. See e.g., In re S.L., A.C., D.C., R.A. & L.P. v. R.M.C., 872 S.W.2d 573 (Mo. Ct. App. 1994); cf. Renno v. Evans, 580 So. 2d 945, 950 (La. App. 2d Cir. 1991) (emergency jurisdiction would be approved based on extreme circumstances, but temporary, and trial court should have communicated with “home state,” Michigan, to decide which court would be preferable); Breneman v. Breneman, 284 N.W.2d 804, 807 (Mich. Ct. App. 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); Nazar, 474 N.W.2d 206 (holding that a Minnesota Court can question the Louisiana court’s assertion of emergency jurisdiction, but not if established emergency jurisdiction is valid); Vorpahl v. Lee, 298 N.W.2d 222, 225 (Wis. Ct. App. 1980) (“The trial court . . . based its exercise of jurisdiction on sec. 822.03(1)(e). 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, supports the trial court’s finding that the children were neglected and dependent.”).

state would have jurisdiction under prerequisites substantially in accordance with Paragraphs (1), (2), or (3), or another state has declined to exercise jurisdiction on the ground that this state is the more appropriate forum to determine the custody of the child, (ii) it is in the best interest of the child that this court assume jurisdiction.\textsuperscript{233}

C. Continuing Jurisdiction and Default Jurisdiction

1. The Nature and Primacy of Continuing Jurisdiction

The state in which the original custody order was rendered retains jurisdiction, as long as a party (contestant) remains there and minimal contacts with the child continue, unless and until it either relinquishes or loses jurisdiction under its own laws.\textsuperscript{234} The PKPA has been held by the United States Supreme Court to require state courts to give full faith and credit to custody decrees of sister states, so long as the decree to be enforced has been entered in compliance with the PKPA.\textsuperscript{235} A decree entered upon a statute inconsistent with the PKPA, or the UCCJA, or rendered without considering those acts or inconsistently with them, is not owed full faith and credit.\textsuperscript{236} Once a court of one state renders a custody decree consistent with these acts, there are only limited exceptions permitting another state to modify that decree.\textsuperscript{237} Modification is possible only

\textsuperscript{233} See e.g., Dillon v. Medellin, 409 So. 2d 570, 575 (La. 1982); Fuge v. Uiterwyk, 653 So. 2d 707 (La. App. 4th Cir. 1995).

\textsuperscript{234} Id. at 741-43; 28 U.S.C. § 1738A(c)(2)(A), (E), (d) (1994); see also D.B. v. P.B., 692 So. 2d 856 (Ala. Civ. App. 1997); Murphy v. Woerner, 748 P.2d 749, 750-51 (Alaska 1988); Blanco v. Tonniges, 511 N.W.2d 555, 558 (Neb. 1994) (continuing jurisdiction of the original awarding state is exclusive and a defect in the law does not allow parties unilaterally to waive jurisdiction, unless the court in the decree state relinquishes it); Ganz v. Rust, 690 A.2d 1113, 1118 (N.J. Super. Ct. App. Div. 1997) (the PKPA has been held by the United States Supreme Court to require state courts to give full faith and credit to custody decrees of sister states, so long as the decree to be enforced has been entered in compliance with the PKPA); Bowen v. Shurtliff, 629 N.E.2d 478 (Ohio Ct. App. 1993); Brown v. Brown, 847 S.W.2d 496 (Tenn. 1993); G.S. v. Ewing, 786 P.2d 65, 68-71 (Okla. 1990); Greenlaw v. Smith, 869 P.2d 1024 (Wash. 1994) (holding that Washington courts retain modification jurisdiction, even though the party awarded custody moved to California legally and properly some nine years earlier, thus, making California the "home state."); Michalik v. Michalik, 494 N.W.2d 391, 397 (Wis. 1992). Cf. Lalonde v. Monschein, 673 So. 2d 1075, 1077 (La. App. 3d Cir.) (stating that jurisdiction of state which rendered initial decree is lost when all parties have left the state), reversed without explanation, Lalonde v. Monschein, 675 So. 2d 1061 (1996) (if no other state has jurisdiction, this reversal seems incorrect); Bock v. Graves, 804 S.W.2d 6, 9 (Ky. 1991); Cann v. Howard, 850 S.W.2d 57, 59 (Ky. Ct. App. 1993). Their laws must be consistent with the UCCJA and the PKPA.


\textsuperscript{236} Ganz, 690 A.2d at 1117; cf. Durfee v. Duke, 375 U.S. 106, 110-11, 84 S. Ct. 242, 244-45 (1963) (stating that a decision or order made without subject matter jurisdiction may be collaterally attacked).

\textsuperscript{237} UCCJA § 14, 9 U.L.A. 292 (1988). See, e.g., Kessenich v. Kessenich, No. FA 960532955,
if the decree state has lost or relinquished jurisdiction. UCCJA sections 13 and 14 make this clear and the PKPA reinforces this rule. Jurisdiction is lost if, at the time the action to modify is filed, none of the jurisdictional prerequisites of the Act can be met. A state does not automatically lose jurisdiction when it ceases to be the home state. If one parent continues to reside in the original decree state, it retains jurisdiction. As long as jurisdiction has not been broken by wrongful conduct such as failing to exercise visitation privileges or wrongfully retaining the child and is not relinquished by state law or courts, the decree state retains exclusive continuing jurisdiction to modify its custody decree.

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243. Id.

state becomes home state, especially when it has been home state for a significant period of time.\textsuperscript{245}

Some courts have misconstrued the law.\textsuperscript{246} Some have held, for example, that the UCCJA allows a court to modify another state's custody order if it has become home state.\textsuperscript{247} The language of the UCCJA is not as clear on this point as that of the PKPA, discussed below, but it is clear enough. Section 13 provides that: "[T]he courts of this state shall recognize and enforce an initial or modification decree of a court of another state which had assumed jurisdiction under statutory provisions substantially in accordance with this Act . . . ."\textsuperscript{248} Section 14 elaborates: "(a) [I]f 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 rules substantially similar to the UCCJA] or has declined to assume jurisdiction to modify the decree and (2) the court of this State has jurisdiction. . . ." The Commentary to Section 14 states that "[i]n order to achieve greater stability of custody arrangements and avoid forum shopping, . . . other states will defer to the continuing jurisdiction of the court of another state as long as that state has jurisdiction under the standards of this Act. In other words, all petitions for modification are to be addressed to the prior state if that state has sufficient contact with the case to satisfy [the UCCJA jurisdictional requirements] . . . ."\textsuperscript{249}

The PKPA makes the preeminence of continuing jurisdiction quite clear. Maximum rather than minimum contacts with the state are required by the UCCJA for initial custody awards.\textsuperscript{250} On the other hand, to retain exclusive jurisdiction to modify the decree, minimum or slight contact with the state is all

\textsuperscript{245} Ganz, 690 A.2d at 1117.

\textsuperscript{246} See, e.g., Kean v. Kean, 577 So. 2d 1152 (La. App. 1st Cir. 1991) (holding that PKPA did not apply because there had been no abduction).

\textsuperscript{247} See, Coombs, supra note 122, at 2398.


that is required.\textsuperscript{251} The PKPA is even more explicit, clearly delimiting the circumstances under which a court may modify another state’s custody decree.\textsuperscript{252} The PKPA creates a general rule similar to that found in the UCCJA, but more clearly indicated.

Jurisdiction over custody, therefore, is retained by the initial awarding court, so that a petition for modification will be possible.\textsuperscript{253} Preeminence of continuing jurisdiction is required by the PKPA and reinforced by the Supremacy Clause of the United States Constitution.\textsuperscript{254} The PKPA’s language is more specific than that of the UCCJA in limiting modification jurisdiction. The PKPA clearly eliminates the possibility of concurrent application or dueling jurisdiction by conferring exclusive modification jurisdiction upon the state which rendered the initial decree.\textsuperscript{255} It provides: “[t]he 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 [requiring that the law of that state continue to provide jurisdiction consistent with the PKPA] continues to be met and such State remains the residence of the child or of any contestant.”\textsuperscript{256}

Jurisdiction to modify is determined at the time of filing the motion. The PKPA explicitly provides that jurisdiction continues in the state where the initial custody order was rendered in compliance with the PKPA, as long as the child or any contestant continues to live in that state and that state’s law or courts do not relinquish jurisdiction.\textsuperscript{257} For retention of jurisdiction, the state’s laws must so provide in conformity with the PKPA.\textsuperscript{258} The PKPA provides that a “child custody determination” is consistent with the PKPA, if (1) the court rendering it has jurisdiction under its own laws, and (2) one of the following conditions exist: “(A) such state (i) is the home state of the child on the date of the commencement of the proceeding, or . . . (E) the court has continuing jurisdiction pursuant to subsection (d) . . . .” Thus, if a state has jurisdiction under its own law [1738A(c)(1)], and has continuing jurisdiction pursuant to

\begin{itemize}
\item \textsuperscript{254} U.S. Const. art. 6, cl. 2.
\item \textsuperscript{255} E.g., McDow, 908 P.2d 1049; Renno v. Evans, 580 So. 2d 945 (La. App. 2d Cir. 1991); In re D.S.K., 792 P.2d 118, 129 (Utah Ct. App. 1990).
\item \textsuperscript{256} PKPA, 28 U.S.C. § 1738A (d) (1994). See, e.g., Crites v. Alston, 837 P.2d 1061, 1070 (Wyo. 1992) (“[H]ome state status alone is not sufficient to confer modification jurisdiction on a state that was not the original decree state when one of the parties continues to reside in the original decree state.”).
\item \textsuperscript{257} PKPA, 28 U.S.C. § 1738A (c)(2)(E), (d) (1994); McDow, 908 P.2d 1049 and authority cited therein.
\item \textsuperscript{258} PKPA, 28 U.S.C. § 1738(A)(C)(1) (1994); Billingsley v. Billingsley, No. 96-3028, 1997 WL 136551, at *2 (Fla. Dist. Ct. App. Mar. 27, 1997) (If a court has taken jurisdiction in a manner inconsistent with the UCCJA or PKPA, another state that properly has jurisdiction may assert it).
\end{itemize}
subsection (d), as required by 1738A(c)(2)(E), any order issued by that state is consistent with the PKPA, and is entitled to full faith and credit. No state may usurp jurisdiction and modify an extant custody order while the original rendering state retains jurisdiction. The Louisiana UCCJA 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. . . ." Once a state exercises jurisdiction consistently with the provisions of the PKPA, no other state may exercise jurisdiction, even if it would have been empowered to take jurisdiction in the first instance; all states must accord full faith and credit to the first state's custody decree. The effect of PKPA, sections 1738A(d) and 1738A(f), is to limit custody jurisdiction to the first state to properly enter a custody order, so long as the above-noted two sets of requirements are met.

Continuing jurisdiction is an essential part of the jurisdictional scheme. Thus, PKPA, 28 U.S.C. § 1738A(a) provides, "[t]he 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) provides further: "[c]ustody determination means a judgment, decree or other order of a court providing for the custody or visitation


262. Michalik, 494 N.W.2d at 394.

263. Id. at 395 (citing Thompson v. Thompson, 484 U.S. 174, 177, 108 S. Ct. 513, 515 (1988); P.C. v. C.C., 468 N.W.2d 190, 208-09 (Wis. 1991).

264. Id.
of a child, and includes permanent and temporary orders, and initial orders and modifications. . . ."\(^{265}\) In other words, each state's courts owe full faith and credit to the other state's custody orders made in accordance with the UCCJA and the PKPA.\(^{266}\)

The Supreme Court of Alaska recently held that: "[u]nder the combined impact of [the UCCJA and the PKPA], the [Alaska court] may not modify the Washington custody decree if the Washington court which issued it retains [jurisdiction]."\(^{267}\) The Court also correctly applied Washington law to determine whether Washington retained jurisdiction.\(^{268}\) Similarly, the Washington Supreme Court held that a "court which enters a child custody decree continues to have jurisdiction to modify that decree so long as one of the parties remains in the state and so long as the child's contact with the state continues to be more than slight."\(^{269}\) The UCCJA has "a strong presumption that the decree state will continue to have modification jurisdiction until it loses all or almost all connection with the child."\(^{270}\) It was insufficient to displace a Michigan court's continuing jurisdiction, even where Connecticut had become home state and had the most significant connection and most substantial evidence.\(^{271}\)

Louisiana Revised Statutes 13:1712 and 1713 are typical promulgations of UCCJA articles 13 and 14, pertaining to recognition and modification of other state custody decrees, and correspond to 28 U.S.C. § 1738A(a) and (f) [the PKPA]. A court shall not 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 jurisdiction is doing so properly under each act.\(^{272}\) This rule is


\(^{268}\) McDow, 908 P.2d at 1051 ("[w]hether the Washington court still has jurisdiction to modify its decree is necessarily a question of Washington law (citing Bock v. Bock, 824 P.2d 723, 724 (Alaska 1992)).")


\(^{270}\) Greenlaw, 869 P.2d at 1033 (quoting Kumar v. Superior Court, 652 P.2d 1003, 1009 (Cal. 1982)).


\(^{272}\) PKPA, 28 U.S.C. § 1738A(g) (1994); La. R.S. 13:1705(A) (1983). Cf. Miller v. Miller, 602 So. 2d 330, 334-35 (La. App. 4th Cir. 1992) (finding that even though Indiana had become the home state, Louisiana retained significant connection to the children and one of the parents who resided in Louisiana. Also, since there was an extant custody order in Louisiana and one of the parties remained here, jurisdiction continued in Louisiana. Also, since the mother had wrongfully removed the children to Indiana, this requires Indiana courts to refuse to assert jurisdiction, which they had done); Ashburn v. Ashburn, 661 N.E.2d 39, 42 (Ind. Ct. App. 1996). Cf. Garrett v. Garrett, 478 S.E.2d 584, 584-85 (Ga. 1996).
consistent with the policy of preventing continuing litigation in states with concurrent jurisdiction, but may be unfair to given parties, including the child. Jurisdiction in the original awarding state may be lost or declined, allowing another state to assert it.273 Jurisdiction is lost, for example, when the child and all of the parties move away from the original state.274 Some courts hold that they will not retain jurisdiction when they cease to be the home state, especially if another has been home state for quite a while.275 An Oregon appellate court recently held that the fact that a party remained in the original decree state and had continued to exercise visitation rights was not sufficient for that state to retain continuing jurisdiction or to prevent another state from modifying the original decree.276 It is not appropriate, however, for a state to oust another from continuing jurisdiction, and the Oregon Supreme Court reversed, recognizing the correct rule.277 The new home state may assert jurisdiction only after the state that rendered the original order has a law which provides that it loses jurisdiction or the courts of that state relinquish jurisdiction.278 A state may not usurp jurisdiction to modify, even when it has become home state and has the most significant connection with the child and the better evidence relating to the child’s best interests.279

Rigorous continuing jurisdiction does prevent competing jurisdiction and ongoing litigation for modification, but it sometimes is extremely unfair and


274. Cf. Fuge v. Uiterwyk, 653 So. 2d 707 (La. App. 4th Cir. 1995); Payne v. Weker, 917 S.W.2d 201, 204 (Mo. Ct. App. 1996) (stating that the state retains jurisdiction where one parent continues to reside there; it loses jurisdiction generally, when all parties have been gone for more than six months).

275. It is the prerogative of a state to decline jurisdiction under these circumstances, especially when the other state has been home state for a long period of time. Ganz v. Rust, 690 A.2d 1113 (N.J. Super. Ct. App. Div. 1997). See recent incorrect interpretation (albeit dictum) of the Georgia Supreme Court, in Garrett, 478 S.E.2d at 584-85 (which strained and incorrectly read the PKPA and the UCCJA, because of the unjust and inappropriate results that derive therefrom).


278. Bryant, 1996 WL 150159, at *4-5; Payne, 917 S.W.2d at 204 (state retains jurisdiction where one parent continues to reside there, but this is not conclusive and the state loses jurisdiction when another becomes home state).

279. UCCJA, § 14, 9 U.L.A. 292 (1988); PKPA, 28 U.S.C. § 1738A(c)(2)(A), (B) (1994). See, e.g., Blanco, 511 N.W.2d 555 (continuing jurisdiction of the original awarding state is exclusive and a defect in the law does not allow parties unilaterally to waive jurisdiction, unless the court in the decree state relinquishes it); Brown v. Brown, 847 S.W.2d 496 (Tenn. 1993); Greenlaw v. Smith, 869 P.2d 1024, 1027 (Wash. 1994) (Washington courts retain modification jurisdiction, even though the party awarded custody moved to California legally and properly some nine years earlier, thus, making California the "home state.").
causes problems. It has frustrated some courts which recognize its inconsistency, in certain circumstances, with the best interests of a given child and with due process fairness. In frustration, these courts sometimes strain to read the language to allow the home state or even the significant connection jurisdiction to prevail. The frustration and the decisions are understandable, but they are incorrect and inconsistent with the language and spirit of the acts.

When original jurisdiction is lost or declined by the initial decree state, it generally obtains in the state in which the child resides with the custodial parent, in the significant jurisdiction state, or even the state in which the child resides with a non-custodial caretaker, if no other state has jurisdiction. This will not be true, however, if one of the parties unlawfully removed the child from the legal custody of the other or committed some other wrongful act.

Whether the initial state retains jurisdiction is a matter of that state's law, as long as it is consistent with the UCCJA and the PKPA. The legislature, of course, may provide that jurisdiction ceases when some event occurs. Thus, the Connecticut Supreme Court recognized that although it would

280. See, e.g., recent incorrect interpretation (albeit dictum) of the Georgia Supreme Court, in Garrett v. Garrett, 478 S.E.2d 584, 584-85 (Ga. 1996) (which strained and incorrectly read the PKPA and the UCCJA, because of the unjust and inappropriate results that derive therefrom).

281. Cf Garrett, 478 S.E.2d at 584-85 (which held that Alabama law had to apply under these circumstances, but noted in dicta that Alabama law, which provided that the Alabama court retained jurisdiction as long as one of the parties remained in the state, was inconsistent with the UCCJA and the PKPA).

282. UCCJA § 3(a)(2), (4), 9 U.L.A. 143-44 (1988); Lalonde v. Monschein, 673 So. 2d 1075, 1077 (La. App. 3d Cir.) (grandparents had cared for the child for two years, no party lived in original decree state, and both significant connection and substantial evidence were in Louisiana), reversed with no explanation in 675 So. 2d 1061 (1996). Unless another state has jurisdiction consistent with the UCCJA, this seems incorrect.

283. See UCCJA § 8(b), 9 U.L.A. 251 (1988); La. R.S. 13:1707(b) (1983): "[T]he court shall not exercise its jurisdiction to modify a custody decree of another state if the petitioner, without consent of the person entitled to custody, has improperly removed the child from the physical custody of the person entitled to custody or has improperly retained the child after a visit or other temporary relinquishment of physical custody." This declinatory provision is discussed infra. See also Jones v. Jones, 925 P.2d 1339 (Alaska 1996); Young v. Young, 670 So. 2d 689 (La. App. 3d Cir. 1996).


normally have jurisdiction where one of the parties to a Connecticut custody order remained in Connecticut, its law required relinquishment of jurisdiction when another state had become "home state."\textsuperscript{286}

2. \textit{A Sad, But Ultimately Favorably Decided Case: Fuge v. Uiterwyk}

A long, drawn-out affair of rancorous litigation and decided abuse of the legal system to the detriment of the children through manipulation of jurisdictional rules is all too representative. Happily, a Florida court ultimately deferred to Louisiana courts to save the children. A Florida court had properly and authoritatively exercised jurisdiction to divorce a couple and awarded custody in a consent judgment which ordered "shared custody." The judgment allowed the mother to come to New Orleans with the children. The sad train of litigation provides some valuable insight into child custody jurisdiction law and its dangers as well as its proper resolution. Ultimately Louisiana, which became the home state, was able to assert jurisdiction only because the Florida decree court which had primary jurisdiction declined to assert it. The courts in this litigation recognized the development of some important rules relating to child custody and visitation.

Louisiana had long since become the children's home state.\textsuperscript{287} Ms. Fuge filed in Louisiana to increase alimony and child support, to modify the Florida custody order, and to have Mr. Uiterwyk held in contempt for failure to pay alimony or support, and for his failure to abide by an injunction against his bringing custody and visitation proceedings in Florida.\textsuperscript{288} Mr. Uiterwyk filed an exception to Louisiana's jurisdiction on the basis of the UCCJA and the PKPA.\textsuperscript{289} The Louisiana courts correctly held that Florida would normally be the only state whose courts could properly assert jurisdiction as the state that rendered the original order. Notwithstanding the fact that Louisiana had become the "home state" by this time, Louisiana's courts would not be able to assert jurisdiction but for the fact that the Florida court had declined to do so.\textsuperscript{290} Louisiana courts clearly could not have done so, except for the Florida relinquishment.

Even though Louisiana had become home state and had significant connection and substantial evidence, Florida retained jurisdiction. We have seen

\textsuperscript{286} Bryant v. Bryant, No. 307677, 1996 WL 150159 (Conn. Super. Ct. 1996); see also Payne v. Weker, 917 S.W.2d 201 (Mo. Ct. App. 1996) (state retains jurisdiction where one parent continues to reside there, but this is not conclusive and the state loses jurisdiction when another becomes home state).

\textsuperscript{287} See Fuge v. Uiterwyk, 653 So. 2d 707 (La. App. 4th Cir. 1995) and Fuge v. Uiterwyk, 613 So. 2d 717 (La. App. 4th Cir. 1993) (This is the decision that focuses most especially on the jurisdictional issues.).

\textsuperscript{288} Fuge, 613 So. 2d at 722, 723.


\textsuperscript{290} Fuge, 613 So. 2d at 720.
how the UCCJA and PKPA read together make it clear that once a custody order is rendered properly under a state law substantially similar to the UCCJA, that state retains jurisdiction as long as one of the parties remains there and the state has not lost or relinquished jurisdiction under its law. The original Florida consent judgment had provided that the mother could come to Louisiana and that Florida would relinquish jurisdiction after one year. Thus, inasmuch as the mother had come to Louisiana and more than a year had passed, Florida had “deferred” to Louisiana jurisdiction. Notwithstanding the fact that the father had remained in Florida where the original decision had been rendered, Louisiana properly had jurisdiction, not because a new home state had arisen or because the more significant connections existed in Louisiana, but because Florida had relinquished jurisdiction.

The Fourth Circuit, in Fuge, correctly noted in dicta that home state generally predominates, but that continuing jurisdiction of another state prevails if the law is substantially similar to the UCCJA (now all states). This trumps home state or significant connection jurisdiction. The PKPA which applies by definition to these circumstances leaves no doubt. The PKPA, preempting any inconsistent law or interpretation, in effect requires state courts to interpret ambiguous language in their UCCJA to be consistent with the PKPA. Fuge signals what attorneys must do to protect their clients in relation to jurisdiction, which, unfortunately, oftentimes becomes the dispositive substantive factor.

3. Continuing Jurisdiction in the International Arena

The preeminence of continuing jurisdiction even applies to international cases where a custody order has been rendered under a law consistent with the UCCJA. Courts ought to apply the UCCJA generally to international cases. Although there is divergent opinion on this point, the trend is to

293. Fuge, 613 So. 2d at 718.
295. In re Stephanie M., 867 P.2d 706 (Cal. 1994); Ruppen v. Ruppen, 614 N.E.2d 577 (Ind. Ct. App. 1993) (deferred to Italy); In re Fischer, 666 So. 2d 724, 725 (La. App. 4th Cir. 1995); Koester v. Montgomery, 886 S.W.2d 432 (Tex. Ct. App. 1994) (UCCJA applies internationally, at least as far as due process notice and similar requirements are concerned). We will consider the international aspect of child custody jurisdiction infra.
apply the Act.\textsuperscript{297} Although the definition of "states" which are subjects of the UCCJA includes: "any state, territory, or possession of the United States, the Commonwealth of Puerto Rico, and the District of Columbia . . . \textsuperscript{298} the policies and purposes of the law clearly are broad enough to be applicable internationally.\textsuperscript{299}

For example, in a California decision, \textit{In re Stephanie M.},\textsuperscript{300} a California Family Court, affirmed by the Appellate Court, held that the California courts had jurisdiction, under the UCCJA, to determine the custody of a minor Mexican national.\textsuperscript{301} The minor, although a Mexican national, had resided in California for several years with her parents, also Mexican nationals. The Court stated that one of the primary purposes of the UCCJA is to "avoid the disruption to the life of a child involved in relitigation of custody matters. . . [O]nce a custody order is entered by a court with jurisdiction under [the UCCJA], that court has continuing exclusive jurisdiction [which prevails over any other basis]."\textsuperscript{302} The court also held that no treaty or other source of international law precludes California courts from asserting jurisdiction in a case properly brought. California was "home state" and the state "with the most significant connection" to the parents and the child and substantial evidence relating to the child's well-being. A Pennsylvania Court held that the term "state" in section 2 (10) may apply to foreign nations as well.\textsuperscript{303} Some courts construe the UCCJA to apply internationally only when a foreign custody order is at issue.\textsuperscript{304} Other states, as we have indicated, apply the general policies and purposes to all custody jurisdiction disputes, including those in the international context.\textsuperscript{305} The latter seems to be the better approach. The debate over international application is presented below in section X.

UCCJA internationally). See general discussion of the application of UCCJA principles to international cases, infra at Section X.


\textsuperscript{300} \textit{In re Stephanie M.}, 867 P.2d 706 (Cal. 1994), \textit{cert. denied sub nom. See also} Mendez v. San Diego County Dep't of Soc. Servs., 513 U.S. 937, 115 S. Ct. 337 (1994).

\textsuperscript{301} \textit{Id.}

\textsuperscript{302} \textit{Id.}


IV. Scope or Coverage of the UCCJA & Interaction with PKPA—Adoption, Termination of Parental Rights, Guardianship (Tutorship), and Visitation

A. General

The PKPA and the UCCJA govern interstate child custody disputes in virtually any form. The PKPA is not limited to abduction cases; it covers the same subject matter as the UCCJA. There is some disagreement among the states over whether the UCCJA covers termination of parental rights, guardianship, and adoption. A strong majority of states, however, consider these proceedings to be covered. Some related subsidiary issues, such as


308. See, e.g., In re Baby Girl Clausen, 501 N.W.2d at 196 (applying the UCCJA to the adoption); In re Baby Girl J., 1992 WL 139363, at *6 ("We find nothing in the UCCJA indicating a parent's action to withdraw her consent to the adoption of her child is a custody proceeding within the meaning of the UCCJA."); But see La. Ch.C. art. 310; J.D.S. & J.L.S. v. Franks, 893 P.2d 732 (Ariz. 1995). Most other states also consider adoption to be covered by the UCCJA. J.D.S. & J.L.S. v. Superior Court, 893 P.2d 749 (Ariz. Ct. App. 1994) (The UCCJA applies rather than the interstate placement compact); Brossoit, 36 Cal. Rptr. 2d 919 (guardianship); State ex rel Torres, 848 P.2d 592 (adoption is subject to UCCJA).

309. E.g., J.D.S., 893 P.2d 749 (the UCCJA applies rather than the interstate placement compact); Brossoit, 36 Cal. Rptr. 2d 919 (guardianship); Foster v. Stein, 454 N.W.2d 244 (Mich. Ct. App. 1990); In re Adoption & Change of Name of Weathersby, 833 P.2d 1297, 1299 n.4 (Or. Ct. App. 1992) ("[W]e join the majority of states, which have reached the conclusion that adoption proceedings and the jurisdictional conflicts related thereto come within the coverage of the UCCJA."); (citing In re Adoption of B.E.W.G., 549 A.2d 1286 (Pa. Super. Ct. 1988)); In re Termination of Parental Rights of Steven C., 486 N.W.2d 572, 573 (Wis. Ct. App. 1992); Ex rel Torres, 848 P.2d 592 (adoption is subject to UCCJA). See generally Annotation: What Types of Proceedings or Determinations are Governed by the Uniform Child Custody Jurisdiction Act (UCCJA) or the Parental KidnAPPING Prevention Act (PKPA), 78 ALR 4th 1028, 1047-50 (1990).
contempt, have been held by some courts not to be covered.\textsuperscript{310} Child abuse cases, in which custody is also at issue, are covered.\textsuperscript{311}

The PKPA rectifies any conflict in interpretation because, as federal law covering the same subject matter, it controls. The PKPA restates the UCCJA jurisdictional provisions, principles and elements, and mandates that the states give full faith and credit to sister state custody decrees.\textsuperscript{312} The Supremacy Clause also requires that where there is a conflict of policy or interpretation between the UCCJA and the PKPA, the latter preempts and controls.\textsuperscript{313}

B. Termination of Parental Authority and Adoption

In custody cases, as opposed to those on termination and adoption, parental rights and relationships generally are not fully severed.\textsuperscript{314} Even in custody proceedings, let alone those on adoption and termination, substantive due process is implicated.\textsuperscript{315} Joint custody or at least continuing visitation are often available in custody arrangements. Custody orders are open to modification. Thus, a parent is not necessarily legally "cut off" from his child as in adoption. Input into, even legal authority over, the child's life may continue. Adoption is even more clearly laden with due process implications; it is definitive and irrevocable. No residual rights or interests remain. Adoption permanently severs all parental rights, authority, and generally terminates the parent-child relationship. Yet, this important event is often determined in the guise of jurisdiction, where no consideration is given at all to constitutional and moral issues. It is

(majority of states consider adoption and termination of parental rights to be covered).

310. \textit{E.g.}, Snisky v. Whisenhut, 864 S.W.2d 875 (Ark. Ct. App. 1993) (\textit{reaffirmed} Atkins v. Atkins, 623 So. 2d 239 (La. App. 2d Cir. 1993), but held that non-child custody or related issues—visitation, adoption, etc.—the PKPA does not apply); Dyer v. Surratt, 466 S.E.2d 584 (Ga. 1996). \textit{But see} Gladden v. Whaley, No. CA 94-1199, 1995 WL 734093 (Ark. Ct. App. Dec. 6, 1995) (holding that the PKPA will preemt, if the contempt issue is combined with a PKPA type issue, such as visitation).


312. PKPA, 28 U.S.C. § 1738(A) (1994). The jurisdictional bases are listed in the PKPA as triggers for and conditions of enforcement of custody orders. Courts, however, must give full faith and credit to properly-issued sister state custody orders. This makes the PKPA functionally a jurisdictional statute. \textit{See} Waller, \textit{supra} note 12, at 283.


315. \textit{Id. Cf.} Brooks v. Parkerson, 454 S.E.2d 769 (Ga. 1995) (quoting In re Suggs, 291 S.E.2d 233, 235 (Ga. 1982), to the effect that the parental right to rear their children is fundamental and "should be infringed only under the most compelling circumstances."). \textit{See also} Blackburn v. Blackburn, 292 S.E.2d 821, 825-26 (Ga. 1982) (quoting Santosky v. Kramer, 455 U.S. 745, 753, 102 S. Ct. 1388, 1394 (1982)).
also clear that even custody decisions have a significant impact on, and significantly interfere with, the parent-child relationship for the one who is not the primary custodian.\textsuperscript{316}

The Louisiana Supreme Court noted that, \textit{in the limited setting of adoption}, the court should prefer an adult who has a significant psychological relationship with the child from the \textit{child's} perspective (the "psychological parent") over any other claimant (including a natural parent).\textsuperscript{317} This is a wholesale adoption (so to speak) of the psychoanalytical institution, "the psychological parent."\textsuperscript{318} Many courts apply it virtually as a shibboleth in custody decisions or even adoption proceedings, even claiming that "[t]here is little disagreement within the profession of child psychology as to the existence of the phenomenon of the child psychological parent relationship and its importance to the development of the child."\textsuperscript{319} Yet, this "doctrine" is not correct merely because it emanated from renown psychoanalysts.\textsuperscript{320} Even within the community of psychiatrists and psychologists, there is serious debate over the "psychological parent" and what is best for a child in the family dissolution context.\textsuperscript{321} The "psychological parent doctrine" is controversial, even within the social, behavioral, and medical sciences, and much of the dire consequences indicated by its proponents (when the "psychological parent" is not awarded custody) are not supported by the data.\textsuperscript{322} The Group for the Advancement of

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\textsuperscript{316} Watkins, 466 S.E.2d at 861-62. The scheme has been held not to apply to disputes over unborn children. \textit{E.g.}, Wilner v. Prowda, 601 N.Y.S.2d 518 (N.Y. Sup. Ct. 1993) (holding that the court had no subject matter jurisdiction to order mother of unborn child not to move out of state).

\textsuperscript{317} In \textit{re J.M.P.}, 528 So. 2d 1002, 1012-17 (La. 1988) (noting, at p. 1013, that "to award custody to a person who is a 'stranger' to the child would unnecessarily risk harming the child where the other claimant has, on a continuing, day-to-day basis, fulfilled the child's psychological needs for a parent as well as his physical need.") (emphasis added).

\textsuperscript{318} Goldstein et al., \textit{supra} note 73, at 19 (promoting a psychoanalytic vision of the best interests of the child).


\textsuperscript{321} \textit{See, e.g.}, authority in \textit{supra} note 233.

\textsuperscript{322} Waters & Noyes, \textit{supra} note 320, at 505 (The psychoanalytic view of parent-child relationships is extremely controversial within the social, behavioral, and medical sciences and much of the dire consequences indicated by the so-called psychological parent theory are not supported by the data.); Peggy Davis, \textit{Use and Abuse of the Power to Sever Family Bonds}, in \textit{Symposium: The Impact of Psychological Parenting on Child Welfare Decision-Making}, 12 N.Y.U. Rev. L. & Soc. Change 485, 557 (1983-84); Guggenheim, \textit{supra} note 14, at 549 (The psychological parenting theory as espoused in Goldstein, et al., sometimes used, if not as a pretext, as a justification for seizure of children from those people who have the least political power in the U.S.; it also provides unintended
Psychiatry's prestigious Committee on the Family produced a volume on this subject, noting:

The evidence and our own experience lead us to what can be called the family perspective on divorce and custody. Briefly, that perspective rests on the following concepts. A couple that comes together to form a family and raise children creates for those children something that is more than the sum of its parts—more than the dyadic relations one-on-one with mother and separately with father. We find no evidence for the existence of a single "psychological parent" with whom the tie is critically more important than with the rest of the network.

The relationships with mother and father, and with grandparents and others as well, constitute an emotional universe that, especially in the early years, forms a pattern for the child's later relations.

If, in the crisis of divorce, one part of that universe is cut off, labeled as bad, and becomes unavailable, there will be adverse consequences for the child's view of himself and of the people he will relate to later in life.

Even if the person who is cut off is a very ambivalently held parent with whom contact is difficult and painful, our experience and the evidence convince us that the later ability to put that relationship in emotional perspective is better served through contact than through separation.  

There is not much doubt that disruption of the parent-child relationship carries significant risk and may do serious harm. The disagreement relates to how great the risk is and how much harm may be done. However valuable it might be, the psychoanalytic vision of the "psychological parent" should not be definitive; it should not provide a shibboleth for a judge or allow psychoanalysts to make the legal decision. Nevertheless, the analysis should occur. But it never does in the jurisdictional setting; even worse in the jurisdictional setting the bases of jurisdiction become a shibboleth for a shibboleth.


324. See In re J.M.P., 528 So. 2d 1002, 1015 (La. 1988). For further discussion of this in relation to adoption, see Blakesley, Louisiana Family Law, supra note 1, Chs. 5, 8, 12; Davis, supra note 322, at 557 ("In sum, the inconclusiveness of separation research undermines the notion that the continuity of care is entitled to the nearly single-minded focus it has been given in our efforts to reform foster care systems." (emphasis added)); see also Peggy C. Davis, Law, Science, and History: Reflections Upon "In the Best Interests of the Child," 86 Mich. L. Rev. 1096 (1988).
C. Visitation & Guardianship

The UCCJA is applicable to visitation and guardianship (tutorship) cases. Also, like in custody cases, the court that issued the original custody order (whether temporary or permanent) retains jurisdiction as long as one of the parties remains in the state, until its law terminates its jurisdiction or until the court relinquishes it.

VI. CONSTITUTIONAL ANALYSIS

A. Overview of Initial Constitutional Questions

I. Custody Jurisdiction, Due Process and In Personam Jurisdiction

Until 1953, when May v. Anderson was decided, there were virtually no limitations on state court jurisdiction over custody. Jurisdiction was based on presence of the child and domicile. The benefit of this was a superficial simplicity, although in many ways it was too simple, failing to recognize the legitimate interests of other states in the child's care and welfare. In this permissive atmosphere, state courts were aggressive in asserting initial and modification jurisdiction in custody cases, even in cases in which it was clear that courts in other states actually had already asserted jurisdiction.


330. Clark, supra note 5, at 320-21; Coombs, supra note 88, at 718; Stansbury, supra note 2, at 827.

331. Coombs, supra note 88, at 718. See, e.g., Minick v. Minick, 149 So. 483, 492 (Fla. 1933) (jurisdiction asserted despite potential jurisdiction elsewhere); Omer v. Omer, 193 P. 1064, 1065
The child custody arena was awash in inconsistent decisions and competing jurisdiction. Uncertainty prevailed and litigation, sometimes vicious and devastating to both parents and children, was rampant. Clearly, there was a need for something to be done.

The 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."332 The states needed to develop an approach emphasizing restraint and comity in order to minimize potential conflicts and harm to children. This was advocated by some scholars,333 adopted by some courts,334 and by the Restatement (Second) of the Conflict of Laws.335 Courts of most states, however, did not really embrace the idea of deference, comity, or restraint sufficiently to ameliorate conflict and confusion.336 This chaotic history, combined with the difficulty of the issues involved, caused considerable confusion, conflicting legislation, decisional law, and commentary over child custody jurisdiction.337 In fact, the chaos actually provided an incentive for one parent to snatch children in the custody of the other parent and then take the children to another state to seek or to modify custody.338 Thus, even if one has seemingly clear rules on jurisdiction-over-custody questions, those rules seem to be a two-edged sword as to what is best
for a given child caught in the maelstrom.\textsuperscript{339} For example, at the time when domicile was the only basis for jurisdiction over a child, courts which had the greatest opportunity to protect the welfare of the child did not have jurisdiction. Sincere advocates for a particular vision of "the best interests of the child" sometimes damaged children and parents. Interest groups, promoting independent agendas, caused harm.

3. The Feds to the Rescue?—The Domestic Relations Exception and Related Problems

The so-called "domestic relations exception" has had a confused history. Neither the judiciary nor the commentators have uniformly embraced any consistent rule.\textsuperscript{340} Scholars disagree and federal circuits conflict over its content and application.\textsuperscript{341} The United States Supreme Court has not issued any clear guidance in more than fifty years. Even the decision on the scope of the PKPA in Thompson v. Thompson\textsuperscript{342} was tentative and did not help much. The Thompson Court tried to reconcile the nature of the PKPA's preemptive jurisdiction and the various state versions of the UCCJA,\textsuperscript{343} hoping to resolve the issues while avoiding the domestic relations fray by maintaining staunch abstention doctrine.\textsuperscript{344} The Supreme Court held that "[the PKPA] is most

\textsuperscript{339} For detailed analysis of the "best interests of the child doctrine," see Blakesley, Louisiana Family Law, supra note 1, Chs. 8, 12.
\textsuperscript{341} See id.
\textsuperscript{343} See Ira H. Lurvey, Good Intentions, Bad Law, 18 Fam. Adv. (No.2) 10 (Fall 1995).
\textsuperscript{344} The "abstention doctrine had its origin in Barber v. Barber, 62 U.S. (21 How.) 582 (1858). It is where the federal system will abstain voluntarily from asserting jurisdiction, when that would "interfere with state policy in an important matter of local concern." See Ankenbrandt v. Richards, 504 U.S. 689, 112 S. Ct 2206 (1992) (reaffirming and limiting the domestic relations exception to certain "core cases," but not elucidating which were the "core cases" nor providing boundaries for jurisdiction). The "fountainhead" of the exception is dictum, reiterated at the beginning of the Barber decision. Barber, 62 U.S. (21 How.) at 584 ("[W]e disclaim altogether any jurisdiction in the courts of the United States upon the subject of divorce, or for the allowance of alimony, either as an original proceeding in chancery or as an incident to divorce . . . "). This was dictum, because the Court took jurisdiction. The three dissenters, who disagreed with taking jurisdiction at all, ruminated over their belief that there were certain matters, especially those relating to the family, that were the special enclaves of state authority. The Barber dictum was reinforced in In re Burrus, 136 U.S. 586, 10 S. Ct. 850 (1890); see also Younger v. Harris, 401 U.S. 37, 91 S. Ct. 746 (1971); Burford v. Sun Oil Co., 319 U.S. 315, 63 S. Ct. 1098, reh'g denied, 320 U.S. 214, 63 S. Ct. 1442 (1943); Simms v. Simms, 75 U.S. 162, 20 S. Ct. 58 (1889); Farkas v. D'Oca, 857 F. Supp 300 (S.D.N.Y. 1994); 1A [Part 2] Moore's Federal Practice ¶ 0.203[2]. For analysis of the abstention doctrine in the family law arena, see Thomas E. Baker, A Catalogue of Judicial Federalism in the United States, 46 S.C. L. Rev. 835 (1995); Blakesley, Louisiana Family Law, supra note 1, §§ 12-13; Ann C. Dailey, Federalism and Families, 143 U. Pa. L. Rev. 1787 (1995); Stein, supra note 340, at 669; Anthony B. Ullman, Note, The Domestic Relations Exception to Diversity Jurisdiction, 83
naturally construed to furnish a rule of decision for [state] courts to use in adjudicating custody disputes and not to create an entirely new cause of action. It held that the PKPA provides no federal jurisdiction and establishes no federal cause of action. Federal courts are not to resolve interstate jurisdictional disputes over child custody.

The UCCJA has ambiguous language which state courts are left to resolve. They do so inconsistently. Thompson provided that the PKPA is supreme; the PKPA controls state law where there is conflict and indicates proper interpretation of state UCCJAs, but no federal courtroom was made available to interpret conflicts, disputes, or divergent interpretations. Although many courts finally understand and accept federal interpretive control, some still do not. Thompson has caused lobbying and some internecine warfare among various factions of the family law bar. Some want to generate new federal legislation expanding the scope of the PKPA to provide a federal cause of action and to resolve jurisdictional disputes among states. Others urge termination of PKPA supremacy and concomitant preemption, allowing the various UCCJAs to play on equal footing.

The law has provided some deterrence of child abduction. While still rampant, it now may incur serious penalties. In addition to causing a state court to refuse jurisdiction, it is now a federal felony. In addition, it is generally extraditable. This means that the foreign nation with which the United States has an extradition treaty is obligated to extradite the abductor parent back to the United States. A positive effect of this, discussed more fully below, relates to the international application of the UCCJA. Since the international law of extradition applies, the policies and elements of the PKPA and the state UCCJA are appropriately applicable, on the basis of a fortiori logic. Also, abduction has been held to provide a basis for a Section 1983 claim.


345. Thompson, 484 U.S. at 183, 108 S. Ct. at 518; Lurvey, supra note 343, at 10.
346. Thompson, 484 U.S. at 183, 108 S. Ct. at 518.
347. Lurvey, supra note 343, at 10.
349. E.g., Kean v. Kean, 577 So. 2d 1152 (La. App. 1st Cir. 1991).
351. Id.
352. Id.
354. See Blakesley, The International Legal System: Cases and Materials Chs. 1, 3 (4th ed. 1995); Blakesley, Terrorism, Drugs, International Law and the Protection of Human Liberty, supra note 1, Ch. 4.
355. See generally Blakesley, Terrorism, Drugs, International Law & the Protection of Human Liberty, supra note 1, Ch. 4 (on extradition).
356. See infra discussion in Section X of this article.
357. See generally Blakesley, Terrorism, Drugs, International Law & the Protection of Human
example, in 1993, a federal district court held that it had jurisdiction to hear a mother's claim under Section 1983 against her former husband and the police who helped him to abduct the couple's child from school, even though the father had obtained a temporary court order to obtain custody. At the hearing, however, no violation of the mother's rights was established. These remedies and deterrents of child abduction are valuable and positive.

B. The Sanctity of the Parental Parent-Child Relationship—Scrutiny of the Termination of Parental Rights and Authority: The Parent-Child Relationship is Fundamental and Sacrosanct

In 1981, the United States Supreme Court held (5-4) that, despite the fundamental nature of the right to rear one's children, the due process clause does not require that counsel be provided to indigent parents. The decision, however, was based on the nature of the right to counsel, applicable only to loss-of-liberty in the criminal setting, rather than on due process and parental-child interests. Justice Blackmun, dissenting, argued, nevertheless, that parents have an absolute due process right to counsel in termination proceedings, because of the fundamental nature of what is at risk. The dissent and majority agreed with the Court's past decisions that this interest is fundamental, reemphasiz-
ing that it is "among those essential to the orderly pursuit of happiness by free
men." It occupies "a unique place in our legal culture, given the centrality
of family life as the focus for personal meaning and responsibility. . . ."364

In 1982, this time for the majority in Santosky v. Kramer, Justice Blackmun
reiterated the importance of parental right to rear and the parent-child relation-
ship.363 He held that clear and convincing evidence is required for a state to
sever this "fundamental liberty interest".

In Lassiter, it was "not disputed" that intervention to terminate the
relationship between [a parent] and [the] child must be accomplished by
procedures meeting the requisites of the Due Process Clause . . . . The
absence of dispute reflected this Court's historical recognition that
freedom of personal choice in matters of family life is a fundamental
liberty interest protected by the Fourteenth Amendment . . . . [This
interest] in the care, custody, and management of their child does not
evaporate simply because they have not been model parents or have lost
temporary custody. . . .367

Yet, this interest is often ignored, even lost without a moment's consideration,
in the jurisdictional setting, under circumstances in which it is next to impossible
to litigate in a fair setting. We will now analyze this failure to consider the
constitutional impact of the UCCJA.

C. The United States Supreme Court Has Avoided the Fray Since 1953

Until 1953, state courts were virtually free of federal limits to their power
to set their own jurisdictional standards in custody cases. In 1953, the Court
announced that the Constitution required personal jurisdiction over the defendant
in custody actions.368 May has been criticized for holding that a state did not
owe another state's custody decisions full faith and credit.369 It has also been
criticized harshly with the claim that the Court considered children's interest in
stability to be inferior to those of their parents,370 and treated children like a

363. Id. at 38, 101 S. Ct. at 2165.
364. Id.
366. Id. at 753, 769, 102 S. Ct. at 1394-95, 1403.
367. Id. at 753, 102 S. Ct. at 1394-95 (footnotes omitted). See also Burge v. City of San

Francisco, 262 P.2d 6, 12 (Cal. 1953), where Chief Justice Traynor eloquently makes the same point.

Also, Justice Dennis, formerly of the Louisiana Supreme Court and now on the federal Fifth Circuit
Court of Appeals, reiterated the point that the right is a "commanding one." In re A.C., 643 So. 2d
719, 726 (La. 1994) (emphasis added) (vigorous dissent by Dennis, J.) (citing Blakesley, Louisiana
Family Law, supra note 1, at § 8.37), on rehearing, 643 So. 2d 743 (1994).
368. May v. Anderson, 345 U.S. 528, 534, 73 S. Ct. 840, 844 (1953); Coombs, supra note 88,
at 736. For criticism of May v. Anderson, see Bruch, supra note 6, at 1051.
369. See Leslie J. Harris et al., supra note 329, at 767, and authority cited therein.
370. Megan Clark, Note, A Proposal to End Jurisdictional Competition in Parent/Non-Parent
plot of ground, chattels or cash.\textsuperscript{371} Valid reasons for criticism of \textit{May} exist,\textsuperscript{372} including substituting mere conclusion for analysis, some insensitivity to children's interests, and ignorance of how custody cases work,\textsuperscript{373} perhaps even on the requirement of \textit{in personam} jurisdiction but not on the judicial duty to insist on substantive due process in these cases. On that, all it did is to say that the issue of child custody and the welfare of children are at least as important as monetary issues, and jurisdiction ought to meet the same standards of fairness. Since 1953 the Court has not deigned to stir again the muddy waters of child custody jurisdiction. We argue that they should be stirred again and suggest that in some circumstances the \textit{UCCJA} and \textit{PKPA} do more harm than good and may be unconstitutional.

Many decisions simply assume constitutionality of the \textit{UCCJA}, simply parroting the policy choice of the \textit{UCCJA} drafters without critical scrutiny.\textsuperscript{374} For example, a California appellate court, in \textit{Marriage of Leonard},\textsuperscript{375} which is blindly followed by many decisions in other states, held that \textit{in personam} jurisdiction is not required in \textit{UCCJA} matters. These decisions assume simply that \textit{Shaffer v. Heitner}\textsuperscript{376} held that neither \textit{in personam} jurisdiction nor "minimum contacts" are required in the so-called "status" cases.\textsuperscript{377} Many state courts have plainly refused to follow \textit{May} or have interpreted it restrictively.\textsuperscript{378} \textit{Shaffer}, however, simply exempts matters of status, of necessity, from a unitary standard of jurisdiction.\textsuperscript{379} Also, \textit{Shaffer} merely noted that "[w]e do not suggest that jurisdictional doctrines... governing adjudications of status... are...
inconsistent with the standard of fairness . . . " Some language in Shaffer might allow an inference that it allows derogation from in personam jurisdiction in status cases, but the holding does just the opposite! Shaffer held that "minimum contacts" are not required, but did not hold that in personam jurisdiction is not required. Even if Shaffer had not called for other means of providing for in personam jurisdiction in "status" cases, it is not a custody decision and clearly ought to be distinguished.

Shaffer does not bear out the suggestion that it allows custody jurisdiction decisions without due process fairness. Shaffer has a progeny of at least twelve major opinions from the United States Supreme Court and more below, which have produced at best an unsatisfactory body of law that is extremely difficult for jurisdiction scholars to organize, synthesize, and comprehend. If the decisions trouble the experts, they must represent a genuine thicket for those who deal with jurisdictional issues only occasionally. Reading Shaffer to except child custody matters from the requirement of some form of in personam jurisdiction or other substantive due process fairness is not within Shaffer's holding and is inconsistent with constitutional law and policy relating to both child protection and parental authority and interests. There may be other ways to establish in personam jurisdiction, more congenial to the purposes of child custody and which will still promote UCCJA values.

We saw how the United States Supreme Court, in May v. Anderson, held that in personam jurisdiction is required for custody cases. This decision has never been overruled, although it has been criticized by commentators. In fact, the Court reinforced May in Burnham v. Superior Court. Justice Scalia's plurality opinion in Burnham, joined by Chief Justice Rehnquist and

382. See discussion of these matters infra.
384. May v. Anderson, 345 U.S. 528 (1953) (holding that if in personam jurisdiction is required for a court to make an impact on a person's vested property interests, a fortiori, it should be applicable to significant impacts on a parent's liberty interest in rearing his or her child).
387. Id. at 607, 110 S. Ct. at 2109.
Justice Kennedy, suggests that they uphold May v. Anderson's\textsuperscript{388} rule that matters of child custody require personal jurisdiction.\textsuperscript{389} Some academics have criticized this view,\textsuperscript{390} but their criticism seems to be based on a belief that values the protection of "children" in the abstract and deterrence of child-snatching over protection of any particular child. Thus, they are willing to accept the reality that sometimes a child in a given custody dispute will be injured, for the better good of children in general. A given child is expendable for the "good" of children and society. Ultimately, this is immoral nonsense. It ignores a real constitutional and personal imperative protecting both a child's and the parents' interest in having a legal relationship, unless serious harm to the particular child will result therefrom. A jurisdictional statute should not be used to violate these interests.

D. Status Exceptions and Child Custody Jurisdiction—Another Reading of Shaffer

In 1979, Professors Bodenheimer and Kneely-Kvarme noted that:

\textit{Shaffer} acknowledged some exceptions to the \textit{International Shoe} standard, including some "status" determinations . . . . Status has been defined as a "relationship between two persons, which is . . . not terminable at the mere will of either and with which the State is concerned. Marriage is a status . . . and so too is the relationship of parent and child, whether natural or adoptive. Accordingly, the Restatement [(2d)] of Conflict of Laws [§§ 69-79 (1971)] and legal literature classify child custody proceedings and adoptions as status proceedings.\textsuperscript{391}

The concept of "status" in a child custody proceeding implies more than the state's concern with the relationship of the parties. It encompasses the right and obligation of the state in its \textit{parens patriae} role to consider the welfare of a child.\textsuperscript{392} It also encompasses the primordial and constitutional interest of parents to rear their children and that this is generally also in the children's best interest.

The California court in \textit{Leonard},\textsuperscript{393} however, cited the drafters of the \textit{UCCJA} as authority for the proposition that the \textit{UCCJA} is more important than the parent-child relationship. This assumes that application of the \textit{UCCJA} is a

\textsuperscript{388} May v. Anderson, 345 U.S. 528, 73 S. Ct. 840 (1953).
\textsuperscript{389} \textit{Burnham}, 495 U.S. 604, 110 S. Ct. 2105 (requiring significant connection with the state for an absent parent or \textit{transient} jurisdiction over a parent who is served process while in the state).
\textsuperscript{390} E.g., Bruch, \textit{supra} note 6, at 1051 (citing Scoles & Hay, \textit{supra} note 385, at 526); and Bodenheimer, \textit{supra} note 385, at 1232-34; Ramer, \textit{supra} note 385, at 381-88.
\textsuperscript{391} Bodenheimer and Neeley-Kvarme, \textit{supra} note 385, at 246.
\textsuperscript{392} Id. (other citations omitted).
virtual concomitant of the best interest of the child and due process. That assumption is a substantial and debatable leap of faith. There is more reasonable authority for the proposition that the parent-child relationship is constitutionally fundamental and is also in the best interest of the child. It is evident that custody decisions significantly interfere with family life, even ultimately lead to termination of parental access and authority. Rigorous due process standards, therefore, should apply. To assume away summarily the entire constitutional analysis does disservice to children, to parents, and to the purposes of the UCCJA. Thus, the decisions that allow jurisdiction without any due process analysis misread Shaffer v. Heitner in many important and dangerous ways.

E. The Constitution and the Scope of the UCCJA

Litigious tugs-of-war over children are no good. The UCCJA and the PKPA were designed to stop them and have helped. Notwithstanding the success and improvement in the law, we have noted applications of the UCCJA and the PKPA which are unfair and unconstitutional. Although the "best interest of the child standard" does not have constitutional dimensions, parental interest in rearing their children does. Because of this, the constitutionality and fairness


395. See Blakesley, Louisiana Family Law, supra note 1, Chs. 1, 5, 8, 12, 13.


397. Id.; cf. Brooks v. Parkerson, 454 S.E.2d 769, 772 (Ga. 1995) (quoting In re Suggs, 291 S.E.2d 233 (Ga. 1982), to the effect that the parental right to rear their children is fundamental and "should be infringed upon only under the most compelling circumstances."). See also Blackburn, 292 S.E.2d at 825 (quoting Santosky, 455 U.S. at 753, 102 S. Ct. at 1394-95).


399. Analysis of the history leading up to the need for the UCCJA follows below.

400. See Reno v. Flores, 507 U.S. 292, 304, 113 S. Ct. 1439, 1448 (1993) (holding that the best interest of the child standard, in the setting of parental vs. foster care and custody, "is not an absolute and exclusive constitutional criterion for the government's exercise of the custodial responsibilities that it undertakes, which must be reconciled with many other responsibilities.").

of the UCCJA and the PKPA must be addressed. Constitutional questions may be asked and answered in a manner consistent with the best interest of the child and possibly even with the UCCJA. It remains possible that a law could be written that could satisfy the purposes of the UCCJA, the PKPA and due process. As they now are read, they do not! The UCCJA, the PKPA, and child custody jurisdiction generally do not immediately call constitutional issues to mind. They should. What is best for a given child presents controversial and controverted issues in the substantive custody hearing and even within and among the social, behavioral, and medical sciences. The literature on what is best for particular children after separation of parents is not satisfactory. Studies on the consequences of separation and the “broken home” do not provide much guidance.

Many studies are blatantly dogmatic and ideological. Such dogmatism and ideology has seeped into aspects of UCCJA application. I argue in this section that constitutional issues and risks arise in many UCCJA decisions. It is dangerous to allow the important interest of child rearing to be interrupted or destroyed under the guise of a jurisdictional decision. Yet this happens. Protecting children in custody matters substantively is based on the “best interests of the child” test. This is a noble goal, but the vagueness and subjectivity inherent in this standard make it risky as a guidepost. The issue is difficult enough to resolve in the substantive arena; the difficulty and harm are exacerbated when effectively done in the guise of jurisdiction. When the ultimate impact on the children and the functional conclusion to the issue occurs in a jurisdictional setting, the problem becomes insidious and ever more troublesome.

Today, the UCCJA of most states covers adoption and termination proceedings. The Louisiana Children’s Code article 307, for example,
provides that a court exercising juvenile jurisdiction shall have exclusive original jurisdiction over adult parties in cases involving the care, custody, or control of a child, including adoption. Many of the worst problems in the child custody jurisdiction arena arise in cases of jurisdiction to terminate parental authority and adoption. The model UCCJA did not indicate whether it applied to adoption, but the drafters did note that it was intended to cover “habeas corpus actions, guardianship petitions, and other proceedings available under general state law to determine custody.”

Even though due process requirements are stronger for adoption and termination of parental authority, courts have considered the requirements of the UCCJA to be the only prerequisite to jurisdiction. Therefore, in personam jurisdiction or some other due process protection are not required, despite the reality that the substantive decision is often determined, at least functionally, at the jurisdictional stage. It ought to be clear that the parent-child relationship is important enough that it should not be decided at the jurisdictional level. Yet this is done continually, with virtually no consideration of the constitution, personal impact, or wisdom of doing so.

The Supreme Court of Hawaii, however, recognized the necessity of in personam jurisdiction at least where termination of parental rights is at stake for a non-domiciliary. The Court explained the “general rule” that in personam jurisdiction over a nonresident parent is not required for certain “status” determinations, such as custody under the UCCJA, so long as the nonresident parent receives sufficient notice and opportunity to be heard. This “status” exception was explained by the Texas Supreme Court, which noted that “a family relationship is among those matters in which the forum state has such a strong interest that its courts may reasonably make an adjudication affecting that relationship even though one of the parties to the relationship may have had no personal contacts with the forum state.” It seems clear, therefore, that, because of their functionally substantive impact on fundamental interests, the UCCJA and the PKPA are unconstitutional as applied in certain circumstances, at least where it is virtually impossible for a party to litigate custody in the place in which jurisdiction obtains under the Act. Yet that individual’s right to rear his or her children and the children’s right to be reared by them are no less at stake than they are for the person who is in the “jurisdictional state” who has all

408. In re Marriage of Leonard, 175 Cal. Rptr 903 (Cal. Ct. App. 1981) is typical. See also La. Ch.C. art. 310 (applying the UCCJA to termination cases).
410. So procedural due process is generally the only concern. Id. (citing, e.g., Balestrieri v. Maliska, 622 So. 2d 561, 563, and n.1 (Fla. Dist. Ct. App. 1993)); In re Marriage of Leonard, 175 Cal. Rptr. at 912; In re S.A.V., 837 S.W.2d 80, 84 (Tex. 1992); Martinez v. Reed, 490 So. 2d 303, 306 n.1 (La. App. 4th Cir. 1986).
the benefits of litigating at home. The constitutionality of these laws, nevertheless, has generally been assumed by courts and scholars without much analysis. A few states have solved this part of the problem, by providing that subjecting oneself to UCCJA jurisdiction does not implicate a person to the court’s general personal jurisdiction.

Failure to balance interests is probably unconstitutional when jurisdiction is allowed under circumstances that make it impossible or extremely difficult and clearly unfair for the out-of-state party to litigate. The unfairness is even more serious because the party’s relationship with his children are at stake. The party is coerced to choose to submit to jurisdiction in a state that has no in personam jurisdiction. Then he is required to travel long distances, to expend immense sums, and to submit to litigation in a state (often a hostile forum) in which he has never had any contact, and has few or no evidentiary or support resources. Custody and many other substantive issues are determined in an extremely unfair setting. Such circumstances would not meet the standards of International Shoe for litigation of monetary issues or even of Kulko v. Superior Court for child support litigation. Yet, it is considered appropriate in child custody cases, despite the holding of May v. Anderson which held that in personam jurisdiction was required. Yet, generally, jurisdiction to adjudicate child custody or visitation does not require in personam jurisdiction or any substantive due process analysis. The decisions that have addressed jurisdiction and due process have generally held that in personam jurisdiction requires “minimum contacts” based upon cases such as International Shoe and Kulko v. Superior Court. It could be argued that they substantiate May.

If the parent chooses to fight for custody of his or her children, his appearance, in many states, triggers full-blown in personam jurisdiction for litigation of other issues (child support, alimony, property division, for example) in a place in which litigation would not have been allowed for reasons of due

412. See infra discussion at notes 428-430 and accompanying text. Some courts have actually held that in personam jurisdiction is not required if the UCCJA applies. E.g. Balestriari v. Maliska, 622 So. 2d 561, 562 (Fla. Dist. Ct. App. 1993) (holding that personal jurisdiction not required under UCCJA, but interprets in personam jurisdiction to be based solely on “minimum contacts”); In re Marriage of Leonard, 175 Cal. Rptr. at 912; In re M.L.K., 768 P.2d 316 (Kan. Ct. App. 1988) (termination of parental rights case—this is clearly wrong, but contains a comprehensive discussion of the issue).


417. See, e.g., Fitzgerald, 46 Cal. Rptr. 2d at 564 (but to hear other issues such as finances, etc., it will be required that the nonresident parent raise it); William P. Hogoboom et al., California Practice Guide: Family Law § 4:19.5 (1996).


Forcing a parent to choose between losing access to his children, by not litigating custody, or litigating custody in a hostile forum and thereby triggering in personam jurisdiction, is inappropriate. Thus, the courts hold that this submission to jurisdiction to argue custody (when the jurisdictional state has jurisdiction per the UCCJA) allows consideration of at least some, if not all, incidental issues. Obviously, making a special appearance to argue against jurisdiction does not submit a person to the court's general jurisdiction to allow consideration of other issues. Some incidental matters perhaps may properly be considered. For example, child support may provide an interesting issue which may be related enough to child custody to allow in personam jurisdiction when child custody or visitation are litigated pursuant to the UCCJA, at least in some circumstances. The Alaska Supreme Court held in 1997 that:

Alaska is currently exercising personal jurisdiction over [the father] under the UCCJA and PKPA for child custody and visitation-related issues. Texas [the state that issued the original custody and support orders] no longer has jurisdiction over any issues since all parties have moved away. Given the interrelatedness of custody and visitation with child support issues, given that all parties have left the marital domicile, and given that [the father] is already before the Alaska courts [per the UCCJA], it would not violate "traditional notions of fair play and

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420. See, e.g., Yount v. Mulle, 470 S.E.2d 647, 649 (Ga. 1996) ("Here, the party contesting personal jurisdiction of the Georgia court is the plaintiff, who made the ... choice to avail himself of the courts of this state ... Having invoked this state's jurisdiction ... he could not then renounce it for a related cause unfavorable to him ... [child support] ... The fact that the UCCJA may have prescribed that [he] ... bring the action ... in Georgia ... does not alter this."); Tataragasi v. Tataragasi, 477 S.E.2d 239, 245 (N.C. Ct. App. 1996) (pursuant to UCCJA, personal jurisdiction over defendant not required). See also McCaffery v. Green, 931 P.2d 407, 413-14 (Alaska 1997) (holding that at least the support issue may be addressed, as it is so intertwined with the UCCJA, and the mother had no other place in which to address the support issue—thus distinguishing Kulko v. Superior Court, 436 U.S. 84, 98 S. Ct. 1690 (1978)—but making a broader statement in dicta that the exercise of UCCJA jurisdiction implicates in personam jurisdiction); Balestrieri v. Maliska, 622 So. 2d 561, 563-64 (Fla. Dist. Ct. App. 1993) (in personam jurisdiction is not required, if the UCCJA applies); Department of Human Servs. v. Pavlovich, 932 P.2d 1080, 1086 (Okla. 1996). Cf. In re Marriage of Harper, 764 P.2d 1283, 1287 (Mont. 1988) (trial court must determine jurisdiction over custody or visitation pursuant to the UCCJA, but may still determine child support issues). But see Puhman v. Turner, 874 P.2d 291, 295, 297 (Alaska 1994) (holding that being forced into court to enforce a visitation judgment does not create contacts for jurisdiction over other issues); and dissenting opinion on McCaffery, 931 P.2d at 408, 412 (arguing that it is incorrect to suggest that the existence of UCCJA jurisdiction affects the fairness analysis under the Fourteenth Amendment). But see Fitzgerald, 46 Cal. Rptr. 2d at 564 (where this problem is solved by providing that subjecting oneself to UCCJA jurisdiction does not implicate a person to the court's general personal jurisdiction).

substantial justice” to exercise personal jurisdiction over [him] on child support issues. . . . 422

The UCCJA and the PKPA, therefore, may cause harsh, unfair results to both parents and children. Should in personam jurisdiction be required in matters of child custody jurisdiction? Are the UCCJA and the PKPA worthy substitutes? We will also consider what the full impact of the Full Faith and Credit Clause ought to be in custody cases.423 The Full Faith and Credit Clause requires only that a state give the same deference and effect to a sister state’s law or judgments that it gives to its own.424 As we have seen in the historical parts of this article, courts of states to which children had been removed felt justified in asserting jurisdiction, even to modify a sister state’s custody decree.425 Inconsistencies were the inevitable result of attempts to struggle with staid notions of jurisdiction in an era of tremendous mobility and rampant family strife.426

Perhaps in personam jurisdiction may be put aside if a state has a compelling interest to do so that outweighs a parent’s fundamental interest in rearing his or her child.427 Such a decision, however, comports with due process balancing. When balancing does occur, it must include analysis of the particular circumstances and evaluation of the compelling state interest as weighed against the individual parental interest in rearing her child and the child’s fundamental interest in being reared by her parent. This is virtually never done.

422. McCaffery, 931 P.2d at 415.
423. Coombs, supra note 88, at 718; McGough & Hughes, supra note 93, at 21. 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 over non-domiciliary citizens generally. However, in this controversial case, Eicke v. Eicke, 399 So. 2d 1231 (La. App. 3d Cir.), cert. denied, 406 So. 2d 607 (1981), cert. granted, 456 U.S. 970, 102 S. Ct. 2232 (1982), cert. dismissed, 459 U.S. 1139, 103 S. Ct. 776 (1983), where a Louisiana court of appeal chose to ignore a Texas custody decree, the United States Supreme Court accepted certiorari, only to dismiss it later, without hearing.
424. Reynolds v. Stockton, 140 U.S. 254, 264, 11 S. Ct. 773, 776 (1891); Murchison, supra note 2, at 1077. The Full Faith and Credit Clause is found in Article IV, section 1 of the United States Constitution. See also Ford v. Ford, 371 U.S. 187, 192, 83 S. Ct. 273, 276 (1962); New York v. Halvey, 330 U.S. 610, 614-15, 67 S. Ct. 903, 905-06 (1947) (Florida custody 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); Lewis v. Lewis, 404 So. 2d 1230, 1232 (La. 1981).
425. Blakesley, Louisiana Family Law, supra note 1, Ch.13; Clark, supra note 5, § 12.5, at 458; Ehrenzweig, supra note 2, at 352; Murchison, supra note 2, at 1077.
426. Clark, supra note 5, § 12.5; Ehrenzweig, supra note 2, at 345-49; Murchison, supra note 2, at 1076-77.
F. The Need for a Constitutional Requirement of In Personam Jurisdiction or Some Alternative Due Process Protection

The policies underlying due process and, perhaps, in personam jurisdiction are pertinent to the interests involved in both the custody and custody jurisdiction setting. It is worth spending some time at least considering whether some form of in personam jurisdiction is appropriate and constitutionally necessary, or whether there is a proper alternative sufficient to satisfy substantive due process. A hypothetical scenario may help to illustrate. Suppose a couple, married and domiciled in Alaska with three children, break up. Suppose one party legally leaves Alaska with the children without an award of custody. She comes to live in Louisiana, where she stays for six months and files for divorce and custody. Louisiana is the “home state,” hence the UCCJA and the PKPA allow Louisiana courts to award custody, even without personal jurisdiction over the non-resident parent. The award may be ex parte, as long as the Alaska parent receives proper notice. The parent who remained in Alaska faces a “Hobsen’s Choice.” He must submit to Louisiana jurisdiction if he wishes to fight for custody.

Otherwise he faces a default judgment. If he has never been to Louisiana and has no contacts or support there, it is unfair to force the “Hobsen’s Choice” and the litigation would be unfair. In addition, submitting to Louisiana jurisdiction to fight for custody allows other issues incidental to divorce (alimony, property division, etc.) to be decided by the Louisiana court, which otherwise would not have jurisdiction to do so because it would be so unfair. It is surprising that in personam jurisdiction or some due process fairness alternative is not required.428 Generally, however, the due process issues have been left largely unanalyzed by most courts and commentators.429 On the other hand, a few courts have recently held that while child custody and visitation jurisdiction arise through the UCCJA and do not depend on in personam jurisdiction, a nonresident parent can appear in the forum court to contest custody or visitation without subjecting himself to the court’s general personal jurisdiction.430 This resolves the problem of being required to litigate other issues, which could not be litigated but for the UCCJA. It does not resolve the unfairness of

428. See, e.g., Yount v. Mulle, 470 S.E.2d 647, 649 (Ga. 1996) ("[T]he party contesting personal jurisdiction of the Georgia court is the plaintiff, who made the choice to avail himself of the courts of this state.... Having invoked the state’s jurisdiction.... he could not then renounce it for a related cause unfavorable to him [child support].... The fact that the UCCJA may have prescribed that [he] bring the action in Georgia... does not alter this."); Tataragi v. Tataragi, 477 S.E.2d 239, 245 (N.C. Ct. App. 1996) (personal jurisdiction over defendant not required).

429. Cf. Bruch, supra note 6; but see Blakesley, supra note 112, at 347-49.

430. Fitzgerald v. Wilson, 46 Cal. Rptr. 2d 558, 564 (Cal. Ct. App. 1995) (raising a point other than a UCCJA point will concede in personam jurisdiction and amount to a general appearance); Balestrieri v. Maliska, 622 So. 2d 561 (Fla. Dist. Ct. App. 1993) (in personam jurisdiction is not required if the UCCJA applies); Department of Human Servs. v. Paulovich, 932 P.2d 1080 (Okla. 1996). See also Hogoboom et al., supra note 417, § 3:139, § 4:19.5.
requiring a person to litigate a fundamental matter like custody and the parent-child relationship in a distant place where the party has no contact or support.

VII. EXPECTING TOO MUCH AND PROVIDING TOO LITTLE?—DOES THE UCCJA PROVIDE PERSONAL JURISDICTION? DOES IT ELIMINATE THE NEED FOR PERSONAL JURISDICTION? CONSTITUTIONAL FLAWS IN THE UCCJA AND THE PKPA AS THEY ARE APPLIED

A. General

We have seen that the UCCJA and the PKPA are seriously flawed when they are read to allow a court to render a default custody judgment when there is no personal jurisdiction or other substantive due process protections. In addition to being inherently unfair, this creates a power in the "jurisdictional" parent (often obtained merely by being the winner of the race to the courthouse) to control litigation, the child and the other parent. It may be abused, harming everyone concerned. This power allows, perhaps promotes, obduracy and recalcitrance. Thus, the UCCJA and the PKPA may be harmful, violate their foundational principles, and are unconstitutional in certain circumstances. No decision has so declared.

A summary of the overly optimistic claims and incorrect assumptions about these laws is in order. Some of the best scholars in the arena, who are right to promote the UCCJA so zealously for the value it has, also should question whether it is as good as it ought to be. They correctly note that the UCCJA has been assumed constitutional by the courts.41 This is true as we have seen; the courts have merely and amazingly assumed their constitutionality without serious analysis. The laudable goals such as deterring child-snatching and avoiding constant jurisdictional wrangling seem to overwhelm careful scrutiny of the mechanism designed to promote them. The policies are laudable, but the law must be questioned, as applied to some circumstances. In fact, the UCCJA and the PKPA have not fully attained the wishes of the drafters as to these righteous and laudable goals.

B. Some of the Overly Optimistic Assessments and Some Errors

1. Incorrect Application of the "Status Exception"

It is assumed without question that the UCCJA meets due process concerns and standards based on the confusing ideas in Shaffer v. Heitner's footnote 30,
which indicates that the "status exception" be applied to child custody jurisdiction cases.\textsuperscript{432} It is as if if the UCCJA is seen as a substitute for substantive due process or that the latter is not required.\textsuperscript{433} This does not even follow from \textit{Shaffer}'s footnote 30, which simply states that: "[the majority] does not suggest that jurisdictional doctrines other than those discussed in the text, such as the particularized rules governing adjudications of status, are inconsistent with the standard of fairness."\textsuperscript{434} This dictum provides no authority for the proposition adhered to by the staunch advocates of UCCJA status quo—that the UCCJA under all circumstances is so wise and good for children and society that it either automatically comports with or does not have to comport with rules of in personam jurisdiction and due process.\textsuperscript{435} This assumption is erroneous and dangerous both to parents and to children. First, the language in the footnote was dictum. Second, it does not even say what they claim it says. Finally, the law does not fulfill its original purposes as well as it could, but it does violate fundamental interests of parents and children in the circumstances discussed in this instant article.

Professor Bruch is among the best of the excellent scholars who argue that due process requirements are either automatically met or do not need to be met in the child custody jurisdiction arena. She argues, for example, that the UCCJA is constitutional and that it is appropriate to ignore due process requirements in favor of avoiding a "jurisdictional tug-of-war" to protect children.\textsuperscript{436} She also argues that the UCCJA provides a solution which allows "the best possible place to litigate—a place with the most information about the child and possible custodial arrangements."\textsuperscript{437} This may be how it ought to be; it might have been the intent of Professor Bodenheimer (Rapporteur) and the other drafters.\textsuperscript{438} This assessment, however, is more optimistic than real.

The language of the UCCJA and PKPA do not even suggest this. For example, the “home state” basis of jurisdiction predominates over the “best-interest,” “significant connection,” and “substantial evidence” bases.\textsuperscript{439} Thus, the optimistic claim is untrue, even on the face of the law; often the “ideal” place, where the most evidence is available for the best interest of the child, is not the jurisdictional place. Jurisdiction is often obtained on the basis of being the first to file.\textsuperscript{440} In initial custody actions, where there is concurrent jurisdic-

\begin{itemize}
\item \textsuperscript{432} \textit{Bruch}, \textit{ supra} note 6, at 1051-52. The “status exception” will be discussed below.
\item \textsuperscript{433} \textit{Bruch}, \textit{ supra} note 6, at 1051-52.
\item \textsuperscript{434} \textit{Shaffer} v. \textit{Heimert}, 433 U.S. 186, 208 n.30, 97 S. Ct. 2569, 2582 n.30 (1977).
\item \textsuperscript{435} \textit{See}, e.g., \textit{Bruch}, \textit{ supra} note 6, at 1051-52 (citing Scoles & Hay, \textit{ supra} note 385, § 15.39, at 544; \textit{Bodenheimer} & \textit{Neely-Kvarme}, \textit{ supra} note 385, at 240-41.
\item \textsuperscript{436} \textit{Bruch}, \textit{ supra} note 6, at 1051.
\item \textsuperscript{437} \textit{Bruch}, \textit{ supra} note 6, at 1051.
\item \textsuperscript{438} \textit{Bodenheimer}, \textit{ supra} note 385, at 1221-31.
\end{itemize}
tion, jurisdiction obtains on the basis of priority of filing. Sometimes this is consistent with due process; sometimes it is not. Simply looking at the results of many cases makes it clear that often the jurisdictional decision works harm to the child and violates both the parent’s and the child’s interests. This is done in the name of jurisdictional clarity or expediency. Thus, although the overall idea of the UCCJA is important and can be most valuable, it is necessary to analyze it more carefully and to see if it can be modified more fully to accommodate substantive due process.

In addition, although “home state” predominance does promote the values of preventing jurisdictional conflicts, continuous litigation, and child snatching, in some circumstances, it is neither fair nor beneficial to the child or to the child’s other parent. In this sense the jurisdictional rules sometimes make a given child expendable to benefit children in general or to deter child snatching and ongoing litigation. Do we promote a policy that is better for children generally, but detrimental to a given child? This seems ultimately unhealthy and destructive of the purported goals of protecting children.

Similarly inconsistent with the optimist’s claims, and often extremely unfair and harmful, is the reality that under the UCCJA and PKPA schemes, the place where an original custody order is rendered retains jurisdiction, as long as a party remains in that state and that state’s law provides jurisdiction. Thus, often the jurisdictional state will not be the one with the more significant connection to the child and the custodial parent or the one in which the more substantial evidence regarding the child’s well-being exists. It may not even be the home state. Moreover, the jurisdictional forum is sometimes miles away from the other parent, the evidence and information relating to the child’s well-being. We have seen that significant connection is secondary to home state jurisdiction.

2. Declining Jurisdiction on the Basis of a Party’s Misconduct or Forum Non Conveniens

Another misconception or erroneous claim relates to the inconvenient forum and unclean hands aspects of the UCCJA. Although the UCCJA suggests that courts relinquish jurisdiction to the more convenient and proper forum, this is not required. It is not a bar to jurisdiction, as sometimes claimed. Also, although their purposes are the same, the UCCJA and the PKPA are not identical. For example, the UCCJA contains a forum non conveniens clause, but

443. E.g., Fuge v. Uiterwyk, 653 So. 2d 707 (La. App. 4th Cir. 1995) (Had Florida courts not relinquished jurisdiction, Florida would have retained jurisdiction.).
446. See Bruch, supra note 6, at 1051-52.
the PKPA does not.\textsuperscript{447} The PKPA does not mention a registry of custody decrees and proceedings, nor does it provide procedures for inter-state—inter-court communications.\textsuperscript{448} The UCCJA is intended to prompt a court to \textit{decline jurisdiction} where a court is either an \textit{inconvenient forum},\textsuperscript{449} or where the child has been brought to a state after abduction or other similar wrongful conduct.\textsuperscript{450} But again, this is not mandatory; hence the high risk of unfairness in some circumstances.

The UCCJA provides specific criteria to guide the court in its discretion to decline jurisdiction on the basis of \textit{forum non conveniens} and misconduct, such as abduction.\textsuperscript{451} These are not grounds for a forum to disregard another forum's jurisdiction, decree, or a pending proceeding. Louisiana's UCCJA, for example, provides that jurisdiction \textit{may} be declined due to inconvenient forum or the asserting party's wrongful conduct.\textsuperscript{452}

\textbf{a. Inconvenient Forum}

The inconvenient forum section is discretionary, although it is error not to consider factors relevant to inconvenient forum.\textsuperscript{453} The UCCJA provides that "[a] court which has jurisdiction under this Part to make an initial or modification decree \textit{may decline} to exercise its jurisdiction any time before making a decree if it finds that it is an inconvenient forum . . . and that a court of another


\textsuperscript{448} E.g., La. R.S. 13:1705, 1706 (1983). For more on differences and similarities, see Blakesley, supra note 112.


\textsuperscript{451} The UCCJA provides that a state having jurisdiction may decline to exercise it, when a party has wrongfully taken the child from another state or has engaged in similar reprehensible conduct. UCCJA §§ 7 (inconvenient forum), 8 (wrongful conduct), 9 U.L.A. 233, 251 (1988); La. R.S. 13:1706, 1707 (1983). See Janik v. Janik, 542 So. 2d 615, 618-19 (La. App. 5th Cir. 1989); Ehsani v. Ehsani, 519 So. 2d 288, 291 (La. App. 5th Cir. 1988). See also Fuge v. Uiterwyk, 613 So. 2d 717 (La. App. 4th Cir. 1993).


\textsuperscript{453} Lustig v. Lustig, 560 N.W.2d 239 (S.D. 1997).
state is a more appropriate forum. ... The factors to be considered for inconvenient forum include:  
(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.  

When it works as intended it is quite beneficial. For example, when an Illinois Court of Appeal affirmed the dismissal of a custody action on the basis of forum non conveniens. The parents were living with their children when the action for divorce was filed, but by the time the court vacated its divorce judgment and ordered a new trial (because it decided that the wife was incompetent), both parties and their children had been living in Massachusetts for several months. To require them to return to Illinois for litigation would require that they find alternate care for their children (who are living with the father) and would separate the wife from her co-guardian sister and familiar medical facilities in Massachusetts. Thus, Massachusetts was found to be the better forum to "serve the convenience of the parties and the ends of justice." Massachusetts had acquired a substantial interest in the outcome. It was eminently proper for the Illinois court to defer to Massachusetts.

b. A Party's Misconduct

i. General

Even the so-called "unclean hands" element of the UCCJA is no more than a suggestion that a court "may decline" jurisdiction "[i]f the petitioner . . . has wrongfully taken the child from another state or has engaged in similar reprehensible conduct . . . the court may decline to exercise jurisdiction if this is just and proper under the circumstances." Shocking cases arise, such as

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458. Id. at 243.

In re Marriage of Hudson, where a father was held bound by a custody award to the mother who had abducted their child. The UCCJA bases were met and the forum state did not decline jurisdiction. The award was made at a hearing that the father was unable to attend. It was held in a state to which the mother had run after abducting the children and with which the father had no relationship or contacts at all. Yet, the father was required to litigate custody in that state and, ultimately, to lose custody of his children.

Such cases cause us to question the optimistic assessment that "... the UCCJA is a fine example of the ways that constitutional doctrine can be shaped through legislation in the service of sound policy." Even the policy of deterring child abduction was not met. In reality, so much of such importance to the happiness and well-being of parents and children is at stake, that some consideration of due process must be required. Euphoria over the good that the acts do is not sufficient. The UCCJA provides insufficient protection for parents and children. Their constitutional liberty interests are given short shrift.

Some courts avoid this pitfall and protect protagonists somewhat by interpreting the terms "wrongful" or "reprehensible behavior" to include a "taking" or a "retention" of a child in violation of a parental or concomitant "right." They further hold that to be wrongful or reprehensible, the taking or retention does not have to be in violation of an outstanding "order" or "decree," nor is it a defense that no order or decree has been entered. Jurisdiction will be declined when the conduct is "so objectionable that a court... cannot in good conscience permit the party access..." Unfortunately not all jurisdictions do the same.

Stat. Ann. § 61.1318 (West 1997). E.g., Young v. Young, 670 So. 2d 689, 691-92 (La. App. 3d Cir. 1996) (cannot take the child from partner and come to Louisiana to "get the home field advantage when custody was decided").


461. So here it does not even promote the policy to deter abductions.


463. Bruch, supra note 6, at 1053.


465. See Wasserman, supra note 82, at 819-23 (arguing that the status exception should neither apply to divorce nor to custody jurisdiction); Blakesley, Louisiana Family Law, supra note 1, Chs. 1, 13.


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Other states, like California, Nevada, Utah and Washington, have added a requirement that, in circumstances in which the court declines to exercise jurisdiction based upon petitioner's wrongful conduct (UCCJA section 8), the person in the other state, having legal custody, must 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. A party who has wrongfully taken or retained a child has the opportunity and burden to show that conditions in the other state are harmful to the child.

Thus, inconsistency and strife prevail among states in this arena. Some states emphasize the anti-child abduction aspect, while others emphasize the child-protection aspect of the law. Often, unfortunately, forum chauvinism and prejudice still seem to thrive in the atmosphere of concurrent jurisdiction. Courts having jurisdiction under the UCCJA and PKPA often assert it and render a decision favoring their domiciliary, simply because the person is their domiciliary. One state may be the home state and another the state with the more significant connections with the child and the more substantial evidence.

ii. "Punitive Decrees"

A punitive decree is one that transfers custody from the parent who violated the UCCJA by removing a child from the jurisdiction, or wrongfully retaining the child, or committing some other violation of a court's order, to the other parent who did not violate the law. Although such "punitive decrees" deter child snatching, a debate rages over whether they ought to be allowed. Many suggest adoption of a special rule not requiring recognition of punitive decrees. Some courts have followed this special rule, refusing to enforce decrees that were

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469. Id.
470. For discussion of the schizophrenic nature of the UCCJA, see Blakesley, supra note 112, at 302-04; Blakesley, Louisiana Family Law, supra note 1, Ch. 13.
471. The depth of prejudice and chauvinism favoring residents is shown in Salisbury v. Salisbury, 657 S.W.2d 761, 768 (Tenn. Ct. App. 1983) ("We conclude that the Tennessee decree, as modified . . ., is entitled to enforcement by the state of Texas, which we would point out would still be a province had Tennesseans not fought at the Alamo."). cited and quoted in Waller, supra note 12, at 275 n.20.
472. See Salisbury, 657 S.W.2d at 768.
473. Brigitte Bodenheimer, Progress Under the Uniform Child Custody Jurisdiction Act and Remaining Problems: Punitive Decrees, Joint Custody, and Excessive Modifications, 65 Cal. 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 Helen Donigan, Child Custody Jurisdiction: New Legislation Reflects Public Policy Against Parental Abduction, 19 Gonz. L. Rev. 1, 13 (1983) (criticizing the rule of non-recognition of punitive decrees).
issued in response to a party’s failure to comply with court orders, even though this policy has a potential for abuse and promotes child snatching. Many courts which retain the punitive decree rule apply it with circumspection. For example, it was held that “[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.’” Generally, ... temporary [emergency] custody orders, because of their temporary nature, should not be deemed punitive. They hold the punitive decree principle to be narrow; sister state decrees are considered punitive only if the state changes or awards custody, without regard to the interests of the child solely to punish one parent for disregarding its authority.

Sometimes, declining jurisdiction is quasi-mandatory, unless required in the interest of the child. Section 8(b) provides that “the court shall not exercise its jurisdiction to modify [an extant] custody decree of another state if the petitioner, without the consent of the person entitled to custody, has improperly removed the child from the physical custody of the person entitled to custody or has improperly retained the child after a visit or other temporary relinquishment of physical custody, if just and proper under the circumstances.” Even here, therefore, the decision to decline jurisdiction is discretionary.

X. INTERNATIONAL CHILD CUSTODY JURISDICTION AND THE HAGUE CONVENTION ON CHILD ABDUCTION

A. Issues and General Thoughts


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475. See In re Lemond, 395 N.E.2d 1287, 1291 (Ind. Ct. App. 1979) (decree awarding custody to mother in Hawaii not “punitive”); 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.”); Brooks v. Brooks, 530 P.2d 547, 551 (Or. Ct. App. 1975) (order held punitive as effort to discipline mother for interference with father’s visitation right, and thus subject to judicial inquiry).
477. Slidell, 298 N.W.2d at 605.
479. Rock, 475 S.E.2d at 546; Spaulding, 460 A.2d at 1367; Bodenheimer, supra note 473, at 1003-09.
Department received reports of 4,563 children having been abducted by parents from the United States and taken to a foreign country.\(^{482}\) Foreign countries report similar statistics. Although the UCCJA and the PKPA may apply to circumstances arising in and in relation to foreign countries, historically, these problems have been addressed at the national level. There is a split of opinion among the various states, however, over the extent to which the UCCJA applies to international circumstances. There is no doubt that it applies to foreign custody or related judgments.\(^{483}\) Whether it applies beyond that is debated, but the better view is that the UCCJA applies to international disputes.\(^{484}\) Although there is divergent opinion on this point,\(^{485}\) the trend is to apply the acts.\(^{486}\)

### B. UCCJA Section 23—Requirement to Promote the Policies of the UCCJA in the International Arena

UCCJA section 23 provides: “The general policies of this Part extend to the international arena. The provisions of this Part relating to the recognition and enforcement of custody decrees of other states apply to custody decrees and decrees involving legal institutions similar in nature to custody institutions rendered by appropriate authorities of other nations if reasonable notice and opportunity to be heard were given to all affected persons.”\(^{487}\) The same goes for the general policies and purposes of the UCCJA and the PKPA noted in


\(^{485}\) Compare Ivaldi v. Ivaldi, 672 A.2d 1226 (N.J. Super. Ct. App. Div. 1996) (holding that the UCCJA does not apply between New Jersey and Morocco) with its reversal by the New Jersey Supreme Court in Ivaldi v. Ivaldi, 685 A.2d 1319 (N.J. 1996), and with Abu-Dalbouh, 547 N.W.2d at 704 (rejecting foreign resident’s argument that UCCJA does not apply to international custody disputes); Black v. Black, 657 A.2d 964, 970 (Pa. Super. Ct.), app. denied, 668 A.2d 1119 (1995) (applying UCCJA internationally); In re Stephanie M., 867 P.2d at 713. See general discussion of the application of UCCJA principles to international cases, infra at Section X.

\(^{486}\) See, e.g., In re Stephanie M., 867 P.2d at 713; Tatargasi v. Tatargasi, 477 S.E.2d 239, 246 (N.C. Ct. App. 1996) (emergency jurisdiction applied despite father’s pending action in Turkey); Black, 657 A.2d at 966.

Section 1 of the UCCJA. Although it is obvious that the Full Faith and Credit Clause does not apply to foreign countries, comity and specific legislation in the United States do. Parental kidnapping is a federal felony, calling for up to three years imprisonment. It is also a felony in most (if not all) states. The federal felony (and likely the state crimes as well) provide at least three affirmative defenses: (1) custody or visitation award to defendant pursuant to the UCCJA; (2) flight from a pattern of domestic violence; and (3) defendant had physical custody (e.g., proper visitation) and failed to return the child for reasons beyond his control. Does the UCCJA or any other state or federal law call for relinquishment of jurisdiction in cases wherein the only connection with the state is the fact that one of the parents abducted the children and now resides there. This section will show that the cases which hold that the UCCJA and the PKPA apply internationally are correct. The UCCJA itself provides that its policies and principles of the UCCJA require state courts to accept or to relinquish jurisdiction in international situations, based upon principles of the UCCJA. This is discussed in detail below in the section on UCCJA section 23, which requires the courts to decide cases to promote the policies and principles of the UCCJA, even in the international arena.

489. Pub. L. No. 103-173, 107 Stat. 1998, codified as 18 U.S.C. § 1204 (1994). The problem with this felony is that it (probably unconstitutionally) makes it a felony to abduct a child from the United States or to retain (abroad) a child who has habitually been in the United States. It shows the importance of international abductions, but inanely does not include even United States citizens (let's say parents in the State Department assigned abroad) whose children are abducted by the other parent and brought to the United States from abroad. There are many other circumstances where the equal protection clause is breached here, but that is another paper. The bottom line may be that the statute itself, given its chauvinistic (thus vote getting) nature will not be helpful, unless it has been held unconstitutional and expanded to cover abductions from abroad where children are brought to the United States.
490. 18 U.S.C. § 1204 (1994) provided that the defendant make reasonable efforts to notify the other legal custodian of the problem within 24 hours of the end of his visitation period.
491. In re Fischer, 666 So. 2d 724, 725 (La. App. 4th Cir. 1995) (applying La. R.S. 13:1702(3)(i) to situation relating to Canada); see also In re Stephanie M., 867 P.2d 706, 713 (Cal. 1994).
492. UCCJA § 23, 9 U.L.A. 326 (1988). See, e.g., Abu-Dalbouh v. Abu-Dalbouh, 547 N.W.2d 700, 704-05 (Minn. Ct. App. 1996) (rejecting foreign resident’s argument that UCCJA does not apply to international custody disputes and expressly holding that Minnesota’s UCCJA does so apply). The Minnesota Court of Appeals applied the UCCJA first to file rule and the rule that jurisdiction obtains if the foreign law does not conform to the UCCJA (citing Nazar v. Nazar, 474 N.W.2d 206, 208 (Minn. Ct. App. 1991)). See also, e.g., In re Fischer, 666 So. 2d at 725 (applying La.R.S. 13:1702(3)(i) to situation relating to Canada); see also In re Stephanie M., 867 P.2d at 713.
493. E.g., Ivaldi v. Ivaldi, 685 A.2d 1319, 1323 (N.J. 1996) (holding that the UCCJA applies to international circumstances).
1. The Policies of the UCCJA—Applicable to Cases Involving Foreign Nations

As important as any judicial decision applying the UCCJA to international circumstances is the UCCJA itself; its language, policy and underlying principles are applicable internationally. The policies of the UCCJA and the PKPA do not depend upon any national factor. Deterrence of child abduction, continued and harmful litigation over child custody, and forum shopping are not mere domestic issues. These policies formed the very foundation of the laws' promulgation. Child snatching and the other abuses that the UCCJA and the PKPA are aimed at deterring are encouraged when state courts ignore the international application of the UCCJA. Just because it requires a treaty to bind another country to act does not mean that domestic law does not obtain. This is why the UCCJA extends internationally. This would occur with or without Section 23. Any limitation of the law to domestic litigation encourages child snatching, abuse of children for purposes of forum shopping, and continuing litigation under circumstances that make it much harder for parents to protect themselves. It should not be the policy of the Louisiana law to encourage parents to snatch their children, whether this is prior to or after a custody decree, and run to Louisiana. Yet this is what a state does when it refuses to apply the UCCJA to international circumstances. Decisions recognizing state jurisdiction, where another nation is clearly the “home state,” has “significant connection” with the child and the parents, and “substantial evidence” regarding the issue of custody and the best interest of the child unwittingly promote the risk of harm to children.

Many courts that have considered the issue have held that the term “state” in the UCCJA may include a foreign state. Very few appellate level courts have held that the UCCJA does not apply to foreign states. Virtually all of those states did not include the equivalent of Section 23 (the international application

494. It is true that the PKPA has been read to be a Full Faith and Credit law, but that does not mean that its purposes are limited to notions of Full Faith and Credit.

of UCCJA policy) in their law. The analysis of these courts count the absence of Section 23 as crucial.

2. **Louisiana: McFaull v. McFaull**

Not many Louisiana decisions, nor those in other states, have considered the international application of the UCCJA. In a recent Louisiana case, however, the Fourth Circuit Court of Appeal held that the UCCJA is applicable to international circumstances. The mother and father were married in Leningrad in 1985. The father had resided in New Orleans and the mother in Leningrad since then. The father visited Leningrad several times and the couple lived together in New Orleans for almost two months in 1987. The mother gave birth to the child in Leningrad on February 6, 1988. The father visited mother and child in Leningrad, where he stayed for about nine months. After that, the family lived together in New Orleans from February to May 1989. Then the mother and child returned to Leningrad. They returned to New Orleans and again lived together there from December 21, 1989 for about four months. Thus, Louisiana did not become the "home state" under the terms of the UCCJA. The last time the mother attempted to leave Louisiana with the child, father had them removed from the plane (which had stopped in New York on the way to Leningrad). The father had the child brought back to New Orleans. The mother followed. In any action for custody or visitation, the initial question is whether the court has jurisdiction (subject matter legal authority) to make the custody determination.

The majority held that Louisiana Revised Statutes 13:1702(A)(4) [UCCJA section 3(A)(4)] confers jurisdiction, notwithstanding the failure of Louisiana Revised Statutes 13:1701(10) to include foreign countries in its definition of "states." Although no state had become "home state" because of the parent's frequent moves, the Fourth Circuit Court of Appeal clearly and correctly held that the UCCJA applies; UCCJA section 23 [Louisiana Revised Statutes 1722] along with Louisiana Revised Statutes 1702(A)(4) provide jurisdiction, even under international circumstances, when no other state would have jurisdiction pursuant to law similar to the UCCJA.

496. See, e.g., State ex rel. Rashid v. Drumm, 824 S.W.2d 497, 503 (Mo. Ct. App. 1992) ("Since Missouri has not adopted § 23 . . . , it is clear that the legislature did not intend the word 'state' as used in [the jurisdictional section] to include a foreign country."); Schroeder v. Vigil-Escalera Perez, 664 N.E.2d 627, 636-37 (Ohio Com. Pl. 1995) ("While some states have extended the general policies of the UCCJA to the international arena, Ohio has not promulgated similar provisions in its adoption of the UCCJA.").


498. Id. at 1014-15.

499. Id. at 1014.
the significant connection basis also provided jurisdiction. On the other hand, it could have been argued, perhaps, that the father unlawfully brought the minor back to Louisiana, thus allowing the court to refuse to assert jurisdiction. That, also, would have been a proper application of the UCCJA. At any rate, the policies of the UCCJA apply to international circumstances as does the law itself. The UCCJA was correctly applied to this international case.

The court noted that "... the general policies of the UCCJA ... extend to the international area." The drafters of the UCCJA clearly intended that it apply internationally. The policies of combating child abduction, forum shopping, multiple and continuous litigation, and chauvinistic decisions which feed the evils for which the UCCJA was promulgated, all are promoted, indeed incited, when state courts do not apply the principles of the UCCJA to the international arena. This is why Louisiana Revised Statutes 13:1722 [UCCJA section 23] provides for such international application. To do otherwise would allow crossing international borders to defeat the purposes of the law: "[T]he general policies of the UCCJA ... extend to the international area." Failure to apply the UCCJA may cause children to suffer the "strain of life on the run, ... life in an atmosphere of instability and insecurity, without any access to the other parent," and will damage children, causing them to lose any chance "to develop a sense of belonging and whose personal attachments ... are cruelly disrupted, [so that the child] may well be crippled for life." These harmful effects are incited when state courts do not apply the principles of the UCCJA to the international arena. This is why the UCCJA provides for such international application. To do otherwise would allow crossing international borders to defeat the purposes of the law.

The amount of respect given a decree from a foreign nation is enhanced by the new Hague Convention which we will discuss immediately below. European Countries, under the auspices of the Council of Europe, have entered into another convention that provides rules for the recognition and enforcement of child custody decrees by nations party to the convention. Article 23 of the Strasbourg Convention provides that non-European nations may accede to the Convention by invitation.

500. Id. at 1014-15.
503. La.R.S. 13:1722 (1983); McFaull, 560 So. 2d at 1014.
504. McFaull, 560 So. 2d 1013.
Although no full faith and credit is owed foreign laws, Louisiana's and many other states' choice-of-law rules require that the jurisdiction having the more important policy stake in the case should have its laws apply.\footnote{506} This applies to the international as well as the domestic arena and, of course, it includes the law relating to jurisdiction. Furthermore, comity, although not mandatory, calls for nations, and therefore United States states, to give similar respect to other nations' laws. As long as the law of the foreign nation is not anathema to custody law in the United States state, it ought to be given comity or the equivalent to full faith and credit. This is especially true in the custody arena, where to do otherwise will injure children and allow them to be pawns of parents who happen to have some international connection. This is precisely why the UCCJA was drafted as it was.

Thus, when a state court takes jurisdiction in a situation in which a foreign nation is the home state, or which has the more significant connection and where the more substantial evidence is found, that court violates the UCCJA! The fact that the home state or the significant connection or the substantial evidence happen to be in a foreign nation is irrelevant to the issue of the UCCJA's application. Moreover, to take jurisdiction when a child has been removed from his home state or the state in which he has resided for a significant period of time (enough to be the home state) or from the place where all the evidence relating to the well-being of the child, fosters child abduction and the abuse of the child that goes along with using international borders as the means of avoiding the responsibility that custody law places on the courts and the parents or other parties in interest. The court is not only violating the very essence of the Louisiana UCCJA, it is facilitating, indeed participating in, the abuse. The purposes and policies of Louisiana law require that deference be given to the law of a foreign state under circumstances such as that in McFaull v. McFaull,\footnote{507} discussed below.

International application is consistent with the comments of the original rapporteurs of the UCCJA. For example, in their comment to Section 23, they note that the Act's general policies, as delineated in UCCJA section 1, "are to be followed when some of the persons involved are in a foreign country or a foreign custody proceeding is pending. . . ." Thus, the narrow reading of Section 23, to make it limitative, is wrong. Such a reading does a disservice to the purposes of the UCCJA and the families involved. The general purposes of the Act are further accomplished by international application.\footnote{508} Reading the terms of the UCCJA in pari materia makes it clear that its policies and rules apply to

\footnotesize{506. La. Civ. Code arts. 3519-3522.}
\footnotesize{507. McFaul, 560 So. 2d 1013.}
\footnotesize{508. Ivaldi v. Ivaldi, 685 A.2d 1319, 1325 (N.J. 1996); see also Linda Silberman, Hague International Child Abduction Convention: A Progress Report, 57 Law & Contemp. Probs. 209, 249 n.199 (1994) ("The principles of the UCCJA may be used to locate the litigation in the child's home state to recognize and/or enforce a foreign decree.").}
any state, domestic or foreign. This conclusion comports with the central policy of the UCCJA: to assure that custody litigation occurs in the place where the child and his or her family have the closest connection. There can be no doubt that a foreign state is both a "state" and a "place" and that the central policy applies whether the child is removed to a foreign state or to a domestic one.

3. The Counter Argument

Many courts hold that the UCCJA only applies when there is an extant custody decree. For example, the New Jersey Supreme Court, in December, 1996, held that the UCCJA applies to international circumstances. It noted that, at first blush, the statutory language suggests that the Act applies to custody disputes between residents of different states and not to such disputes when one party resides in a foreign country. The Act describes the jurisdiction in relation to jurisdiction of other "states." In addition, legislative findings assert that the UCCJA's purpose is to avoid jurisdictional competition and conflict with courts of other "states." The Act's definition of "states" does not explicitly cover foreign "states", noting that it covers "any state, territory, or possession of [the United States], the Commonwealth of Puerto Rico, and the District of Columbia." But there is no indication that the list is exclusive. Moreover, the purpose and policy section relating to "international application" could well be read to extend the definition of "state" to any state, including foreign states. This section extends the "general policies of [the UCCJA] to the international arena."

4. Proposed Replacement for the UCCJA Makes International Application Even More Explicit

The proposed revision of the UCCJA, the Child Custody Jurisdiction and Enforcement Act (UCCJEA), which is currently being considered by the National Conference of Commissioners on Uniform State Laws, explicitly provides that all of its provisions apply to the international arena. California courts, for example in In re Stephanie M., held that they had jurisdiction to determine the custody of a minor (Mexican national) under the UCCJA. The minor, although a Mexican national, had resided in California with her parents (also Mexican nationals). The court stated that "[one of the primary purposes of the UCCJA is to] avoid the disruption to the life of a child involved in relitigation

509. Ivaldi, 685 A.2d at 1323.
511. Ivaldi, 685 A.2d at 1323.
512. Ivaldi, 685 A.2d at 1322-25.
of custody matters ... once a custody order is entered by a court with jurisdiction under [the UCCJA]. The California Court also held that no treaty or other source of international law precludes California courts from asserting jurisdiction in a case properly brought, but that the prerequisites of the UCCJA were applicable. California was the "home state" and the state "with the more significant connection" to the parents and the child, and with substantial evidence relating to the child’s well-being. The UCCJA leaves no doubt that its policies and principles apply in international cases. Is jurisdiction limited to cases in which a custody order is issued in another country? Section 23 so states, but the policies transcend the language. It could certainly be read to mean that at least where a custody order has been issued. This would seem to be required to promote the policies of the UCCJA.

C. The Hague Convention

1. General

The UCCJA and the PKPA are not the only laws on international jurisdiction over child custody. In 1980, the Hague Convention on the Civil Aspects of International Child Abduction was formed to complement our UCCJA and PKPA in the international arena. The Hague Convention is different from the UCCJA and PKPA in that it does not formulate recognition and enforcement standards, but requires the prompt restoration of the custody that existed before the alleged abduction. Accession to the Convention is not possible, unless and only to the extent that, it is accepted by the other party-states on an individual basis. When a nation is not formally a member of the Hague Conference on Private International Law of 1980, a prerequisite to automatic acceptance into the Convention fold, accession to the Convention is effective between the acceding state and other party-states which officially accept its accession.

516. Id. at 716 (In this case, the foreign court had continuing exclusive jurisdiction over any "connection jurisdiction" under the act.).

517. Id.


2. United States Enabling Legislation Giving Force to the Hague Convention

With regard to nations not party to the Convention, the respect afforded custody decisions varies from state to state and from fact situation to fact situation, although the available cases show a willingness to recognize foreign decrees based on laws which comport with or approximate UCCJA standards. The United States ratified the Hague Convention in 1986. It went into effect in 1988, upon the enactment of its enabling legislation, the International Child Abduction Remedies Act (ICARA). This Act provides that it "shall apply to any child who was habitually resident in a contracting state immediately before any breach of custody or access rights." The Convention also ceases to apply when an abducted child reaches the age of sixteen years. The Federal District Court for the District of Wyoming found that the Child Abduction Remedies Act does not stand alone. The Act in itself provides no substantive rights, stating that it "empower[s] courts in the United States to determine only rights under the Convention. . . ."

Thus, the Act is a procedural mechanism provided to allow a petitioner access within the United States to those remedies provided under the Hague Convention. Though the Act does allow a petitioner to seek remedies under other international agreements, the court found that this was not the same as allowing a petitioner from a state which is not party to the Hague Convention to apply the Remedies Act to obtain the return of a child who was also habitually resident in the same state not a party to the Convention prior to the abduction. The Remedies Act also provides the courts with authority to fashion provisional remedies [42 U.S.C. § 11604(a)]. But providing authority for provisional remedies does not provide authority to fashion permanent remedies under the color of the Remedies Act or the Convention. Passing enabling legislation and incorporating the Hague Convention into United States domestic law did not create rights and remedies broader than those available under the Convention. Of course, absent treaties and enabling legislation, foreign country custody orders are recognized and enforced by way of comity. The amount of respect given a decree or order from a foreign nation varies from state to state in the United States and from fact situation to fact situation, although the available cases suggest that there may be an emerging willingness to recognize foreign decrees based on laws which comport with or approximate UCCJA standards.

522. Id.
526. Id. at 1065 n.3.
3. The Underlying Policies of the Convention and the Enabling Act

The Convention's stated objective is "to secure the prompt return of children wrongfully removed to or retained in any Contracting State," and "to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States." Article 19 of the Convention and Section 2(b)(4) of the International Child Abduction Remedies Act empower a court of a Contracting State to determine the merits of an alleged abduction, but not the merits of the underlying custody claims or issues. The Hague Convention's underlying policy is essentially to secure a swift return of an abducted child to the state in which he or she was an habitual resident, without undertaking a full investigation of the case's merits. Thus, it and its enabling legislation are aimed at curbing international child abduction by providing judicial remedies to restore the status quo ante. State courts have held that the UCCJA applies to provide deference to custody awards from foreign countries.

4. How It Works

The remedies of the Hague Convention may be invoked when two threshold issues have been satisfied by a preponderance of the evidence. First, the moving party must establish that she or he had lawful custody rights in the child when the child was wrongfully removed or retained. Second, the removal or retention must be from the child's "habitual residence." Articles 3 and 5(a) of the Convention provide that the removal or retention is wrongful when "(a) it is in breach of rights of custody attributed to a person . . . under the law of the state in which the child was a habitual resident immediately before the removal or retention; and (b) at the time of the removal or retention, those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention."

Thus, the moving party must prove by a preponderance of the evidence that the removal was wrongful. Once this burden is met, the burden shifts to the other party, who must prove: (1) by clear and convincing evidence, that there is a grave risk that return of the child will expose the child to physical or

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529. Id.; Merideth, 759 F. Supp. at 1434.
531. E.g., Ruppen v. Ruppen, 614 N.E.2d 577 (Ind. Ct. App. 1993) (deferred to Italy's jurisdiction); Zenide v. Superior Ct., 27 Cal. Rptr. 2d 703 (Cal. Ct. App. 1994) (Texas custody order was not enforceable because Texas should have deferred to French award.).
532. In re Prevot, 59 F.3d 556, 560 (6th Cir. 1995).
psychological harm; 533 (2) that return of the child "would not be permitted by the fundamental principles of the requested State, relating to the protection of human rights and fundamental freedoms;" 534 (3) by a preponderance of the evidence that the proceeding was commenced more than one year after the abduction and the child has become settled in its new environment; 535 or (4) by a preponderance of the evidence that the other parent was not actually exercising custody rights at the time of removal or retention, or that he had consented to or acquiesced in the removal or retention. 536

5. Choice of Law

Custody rights are determined by the law of the child's "habitual residence." Note, as a threshold constitutional matter, due process requires that proper notice of Hague Convention proceedings be given so that the other parent can appear or otherwise inform the court of his or her position on the issues involved. 537

6. Definitions and Interpretations

a. Habitual Residence

"Habitual residence" is a term left undefined in the Convention and in the United States' implementing legislation, apparently leaving the issue to be decided upon the facts and circumstances of the case. 538 United States courts have held that the terms of the Convention are to be construed narrowly. 539 A leading British decision defined "habitual residence" as follows: 540

[T]here may be a degree of settled purpose [to reside in the place]. The purpose may be one or there may be several. It may be specific or general. All that the law requires is that there is a settled purpose. That is not to say that the propositus intends to stay where he is indefinitely. Indeed his purpose while settled may be for a limited period. Education, business or profession, employment, health, family

539. E.g., Rydder v. Rydder, 49 F.3d 369 (8th Cir. 1995).
or merely love of the place spring to mind as common reasons for a choice of regular abode, and there may well be others. All that is necessary is that the purpose of living where one does has a sufficient degree of continuity to be properly described as settled.\textsuperscript{541}

In addition, the term "habitual residence" has been found to mean about the same thing as "ordinary residence."\textsuperscript{542} "Habitual residence" under the Convention and the United States Act does not include "coerced residence."\textsuperscript{543} Does the UCCJA also apply to cases in which a child is in a United States state, after having been removed from a foreign nation in which the child had lived for more than six months? What if the child had been wrongfully taken from one state to another, where the child has lived long enough to make it "the habitual residence"? The UCCJA and the PKPA provide that a state in these circumstances has discretion not to assert jurisdiction, barring exceptional circumstances, even if it had become the "home state."\textsuperscript{544} The same principles and logic behind them ought to apply to the international arena. Some decisions, deciding issues relating to visitation violations and the Hague Convention, have held that the child did not have to be returned to a foreign country when a parent had violated the other parent's visitation rights.\textsuperscript{545} The Massachusetts Supreme Court based its decision, not on wrongful removal or retention per se, but on the fact that it interpreted the Convention not to cover visitation rights.\textsuperscript{546}

b. Coercion

"Coercion" means that the parent was forced to remain in the country and was forced "by means of verbal, emotional and physical abuse, [such as to remove] any element of choice and settled purpose."\textsuperscript{547}

\textsuperscript{541} Id., quoted in Slagenweit v. Slagenweit, 841 F. Supp. 264, 268-69 (N.D. Iowa 1993), and in Harris et al., supra note 329, at 790.
\textsuperscript{542} Rydder, 49 F.3d 369.
\textsuperscript{543} In re Ponath, 829 F. Supp. 363, 368 (D. Utah 1993).
\textsuperscript{544} See discussion supra and UCCJA § 6, 9 U.L.A. 219 (1988) (emphasis added):
If the petitioner for an initial decree has wrongfully taken the child from another state or has engaged in similar reprehensible conduct the court may decline to exercise jurisdiction if this is just and proper under the circumstances. Unless required in the interest of the child, the court shall not exercise its jurisdiction to modify a custody decree of another state if the petitioner [without consent of the other party] has improperly removed the child from the physical custody of the person entitled to custody or has improperly retained the child. . . .
\textsuperscript{545} Viragh v. Foldes, 612 N.E.2d 241 (Mass. 1993).
\textsuperscript{546} Id.
c. Wrongful Removal

"Wrongful removal" occurs when the child is removed from his habitual residence in a manner or under circumstances that contravene another's valid custody rights. Those custody rights actually must have been exercised at the time the child was removed.

d. Exceptions

There are exceptions (or defenses) to the return of a child who has been wrongfully removed; for example, if there is a grave risk of physical or psychological harm or otherwise that would place the child in an intolerable situation if the child is returned. An appellate court in New Jersey interpreted this not to allow a father to prove that the child would suffer severe psychological trauma from being uprooted and removed from the father's home. The court suggested that Convention article 13(b) was not intended to deal with issues or factual questions which are appropriate for consideration in a plenary custody proceeding. Psychological profiles, detailed evaluations of parental fitness, evidence concerning lifestyle and the nature and quality of relationships all bear upon the ultimate [substantive custody] issue. The Convention reserves these considerations to the appropriate tribunal in the place of habitual residence. Nevertheless, it is clear that Article 13(b) requires more than a cursory evaluation of the home jurisdiction's civil stability and the availability there of a tribunal to hear the custody complaint.

Another interesting "exception" is the so-called "fugitive disentitlement" exception, which a fugitive from United States justice (fled a criminal conviction or its equivalent) is disentitled to access to United States courts. What does this mean? What is the scope of the Hague hearing? The New Jersey court continued:

549. Hague Convention on the Civil Aspects of International Child Abduction, supra note 9, Ch. I, art. 3; In re Prevot, 59 F.3d 556.
552. Id. at 334-35, quoted and discussed in Harris et al., supra note 329, at 791-92.
553. Citing In re Prevot, 59 F.3d at 561-67 (The father had taken flight from the United States because he was in violation of probation terms).
[T]o hold... that the proper scope of inquiry precludes any focus on the people involved is... too narrow and mechanical. Without engaging in an exploration of psychological make-ups, ultimate determinations of parenting qualities, or the impact of life experiences, a court in the petitioned jurisdiction, in order to determine whether a realistic basis exists for apprehensions concerning the child's physical safety or mental well-being, must be empowered to evaluate the surroundings to which the child is to be sent and the basic personal qualities of those located there. 554

Does this mean that a hearing similar to one based on emergency jurisdiction under the UCCJA is called for? Something less? Something more? Was the court concerned with the sophistication of the "requesting" nation's legal system? Its political stability? Its laws relating to women and children? The other nation involved here was Quebec, Canada, so that might indicate that these concerns were not significantly at issue.

XI. CONCLUSION

We have analyzed domestic and international child custody jurisdiction law, considering some of the vexing problems that it causes.555 We have noted the improvement that the PKPA and the UCCJA have wrought as compared to when all that was required was presence or domicile.556 Child custody disputes are so volatile and the parents have such a tendency to move to different and separate jurisdictions that the problems are still complex and difficult. Difficulties, even harm, still face children, parents, and the legal system. In addition to the Hague Convention on Child Abduction, the UCCJA and the PKPA should apply to international circumstances because the situation there is similar to, or worse than, that in the United States prior to the promulgation of the UCCJA and the PKPA. Notwithstanding the value of current child custody jurisdiction law, I have also criticized it, noting situations in which it is extremely unfair, so that principles of substantive due process should apply.

554. Id. (emphasis added).
555. See, e.g., Blakesley, Terrorism, Drugs, International Law & the Protection of Human Liberty, supra note 1, Ch. 3; Blakesley, Jurisdiction Over Extraterritorial Crime, Ch. 1, in International Criminal Law (1998, at press), supra note 1; Blakesley, Louisiana Family Law, supra note 1, Ch. 13.
556. See generally history discussion, infra. 2 Beale, supra note 2, § 144.3; Goodrich, supra note 2, § 132, at 358; Restatement, Conflict of Laws § 117 (1934). But see Ehrenzweig, supra note 2, at 347-48; Murchison, supra note 2, at 1076; Stansbury, supra note 2, at 820-25 (arguing that the traditional approach and rationale did not even explain decisions, which were often whimsical and chauvinistic).