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ENFORCING THE FULL FAITH AND CREDIT CLAUSE: CONGRESS LEGISLATES FINALITY FOR CHILD CUSTODY DECREES*

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Unfortunately there will continue to be, as there long have been, repetitious lawsuits and abductions undeniably harmful to the stability and welfare of the child. But the principle of full faith and credit has not been helpful in preventing such disorders; it has only embarrassed the courts in their efforts to deal with the problem. There will be hard cases, as where the losing parent, merely because he is dissatisfied with the outcome, abducts the child and, in violation of an injunction, spirits it to another state.¹

Stability in child custody decrees has proven to be an elusive goal. Child custody awards once entered could be easily modified

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1. Currie, *Full Faith and Credit, Chiefly to Judgments: A Role for Congress*, 1964 SUP. CT. REV. 89, 116 (Footnote omitted).

in the court of another state because there existed no impediment to the serial litigation of custody. This full faith and credit problem with child custody is a product of two separate doctrinal strains — one related to the fact that, as an issue, custody could not be given *res judicata* status and precluded from relitigation; the other derived from the fact that both parties could not resolve custody in a federal forum as a consequence of the “domestic relations” exception to federal diversity jurisdiction. The language of the applicable clause (“Full faith and credit shall be given in each State to the . . . judicial proceedings of every other State.”) is not self-enforcing. When Congress exercised its power to ‘prescribe the manner’ of proving such laws and their ‘effect,’ it did so in language which largely echoed the clause itself,² allowing little specific direction to state court judges to respond to the apparent force of the clause. Furthermore, since, given sufficient resources, litigants would eventually face conflicting custody awards in the highest courts of different states, responsibility for enforcing the Full Faith and Credit Clause has largely devolved upon the Supreme Court.³ That route has not proven effective, however. The Supreme Court has avoided addressing the applicability of the clause to custody decrees in two recent cases, including one from Georgia.⁴

2. See Reese & Johnson, *The Scope of Full Faith and Credit to Judgments*, 49 COLUM. L. REV. 153-55 (1949).

3. U.S. CONST. art. IV, § 1. On the history and background of the clause, see generally Childs, *Full Faith and Credit: The Lawyer's Clause*, 36 KY. L.J. 30 (1947); Jackson, *Full Faith and Credit — The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1 (1945); Radin, *The Authenticated Full Faith and Credit Clause: Its History*, 39 ILL. L. REV. 1 (1944); Moore and Oglebay, *The Supreme Court and Full Faith and Credit*, 29 VA. L. REV. 557 (1943); Abel, *Administrative Determinations and Full Faith and Credit*, 22 IOWA L. REV. 461 (1937); Ross, “Full Faith and Credit” in a Federal System, 20 MINN. L. REV. 140 (1936); Corwin, *The “Full Faith and Credit” Clause*, 81 U. PA. L. REV. 371 (1933); Cook, *The Powers of Congress Under the Full Faith and Credit Clause*, 28 YALE L.J. 421 (1919); Costigan, *The History of the Adoption of Section I of Article IV of the United States Constitution and a Consideration of the Effect on Judgments of that Section and of Federal Legislation*, 4 COLUM. L. REV. 470 (1904).

4. *Flood v. Braaten*, 727 F.2d 303, 309 n.19 (3d Cir. 1984).

Webb v. Webb, cert. dismissed, 451 U.S. 493, 101 S.Ct. 1889, 68 L.Ed.2d 392 (1981), the Court reasoned that the [Georgia Supreme Court], 245 Ga. 650, 266 S.E.2d 463 (1980), had not clearly based its decision on the Full Faith and Credit Clause, and therefore dismissed for lack of a federal question. In *Eicke v. Eicke*, 399 So.2d 1231 (La. App. 1981), cert. granted, 456 U.S. 970, 102 S.Ct. 2232, 72 L.Ed.2d 843 (1982), the Supreme Court originally agreed to hear an appeal from a Louisiana decision refusing to enforce a Texas custody decree. The dissent in the state court had argued

Because child custody decrees are not entitled to full faith and credit,⁵ state court judges have been free to ignore prior custodial awards (by refusing to enforce them or by modifying them). Such actions have in some instances culminated in unsightly impasses in which even state supreme courts upheld inconsistent awards binding on the parents.⁶

Since the antebellum decision in *Barber v. Barber*,⁷ "disclaim[ing] altogether any jurisdiction in the courts of the United States upon the subject of divorce, or for the allowance of alimony . . ."⁸ federal courts have refused to hear actions for divorce, alimony, child custody, and similar "domestic relations [matters]."⁹

Recent court decisions and scholarly commentary suggest continuing dissatisfaction with the apparently intractable problem of lack of finality for custody awards. This problem is reflected in the gloomy prognosis of Professor Currie quoted above. This has in turn provoked a renewed interest in addressing the problem with new tools.

The purpose of this article is to investigate and assess recent innovations in child custody litigation. Modification of state statutes will be considered first, and adjustments of federal court jurisdic-

that Louisiana was violating the Full Faith and Credit Clause by failing to recognize the Texas decree. Six months after granting certiorari, the Court requested supplemental briefs on the import of 28 U.S.C. § 1738A. 459 U.S. 1032, 103 S.Ct. 439, 74 L.Ed.2d 597 (1982). Before hearing argument, however, the Court dismissed the writ of certiorari as improvidently granted. [459 U.S. 1139], 103 S.Ct. 776, 74 L.Ed.2d 987 (1983).

Id.; see also Coombs, *infra* note 117, at 784 n.411.

5. See, e.g., *Halvey v. Halvey*, 330 U.S. 610 (1947) ("[I]t is clear that the State of the forum has at least as much leeway to disregard the judgment [awarding custody], to qualify it, or to depart from it as does the State where it was rendered." *Id.* at 615); see also *Ford v. Ford*, 371 U.S. 187 (1962); *Kovacs v. Brewer*, 356 U.S. 604 (1958); and *May v. Anderson*, 345 U.S. 528 (1953) (plurality opinion). On *Ford*, see Note, *Ford v. Ford: Full Faith and Credit to Child Custody Decrees*, 73 YALE L.J. 134 (1963).

6. See, e.g., *Flood v. Braaten*, 727 F.2d 303 (3d Cir. 1984); *Dees v. McKenna*, 261 N.C. 373, 134 S.E.2d 644 (1964).

7. 62 U.S. (21 How.) 582 (1859).

8. *Id.* at 584.

9. See, e.g., *Phillips, Nizer, Benjamin, Krim & Ballon v. Rosenstiel*, 490 F.2d 509, 513-14 (2d Cir. 1973); *Spindel v. Spindel*, 283 F. Supp. 797, 799-812 (E.D.N.Y. 1968); C. WRIGHT, A. MILLER, & E. COOPER, *FEDERAL PRACTICE AND PROCEDURE: JURISDICTION* 2d § 3609 (1984). For a useful and thorough discussion of the "domestic relations" exception, see Krauskopf, *Remedies for Parental Kidnapping in Federal Court: A Comment Applying the Parental Kidnapping Prevention Act in Support of Judge Edwards*, 45 OHIO ST. L.J. 429, 443-44 (1984); see also Wand, *A Call for the Repudiation of the Domestic Relations Exception to Federal Jurisdiction*, 30 VILL. L. REV. 307 (1985); Note, *The Domestic Relations Exception to Diversity Jurisdiction: A Re-Evaluation*, 24 B.C.L. REV. 661 (1983).

tion will be taken up separately.

In a recent *Yale Law Journal* article,¹⁰ Professor Joan G. Wexler of New York University suggests "a new, more restrictive standard for custody modification"¹¹ to be applied by states as a solution to the relitigation of custody orders. Her proposal, which relies on adjusting the standards used by state courts to support modification, promises to be no more effective than past state-law-based approaches to the problem of the nonfinality of custody awards canvassed elsewhere in this article.¹² It is useful, however, to compare Professor Wexler's proposal with two recent decisions by the Third Circuit Court of Appeals¹³ as well as with an article by Professor Joan M. Krauskopf,¹⁴ which present quite different approaches to the problem. These revolutionary cases, in particular, afford a custodial parent with a valid custody order a potent new tool grounded in federal law for the enforcement of that order under the Full Faith and Credit Clause.¹⁵ This new cause of action in federal court for the enforcement of child custody orders represents a major legal breakthrough in the problem of the serial relitigation of custody claims in the courts of different states. The Krauskopf article counsels the use of an injunction to enforce state custody decrees brought under the diversity jurisdiction of federal courts. This approach, while similar to that of the Third Circuit, has enjoyed limited judicial acceptance.¹⁶

Like modification of custody awards which deprives children of a stable, secure home environment,¹⁷ the problem of child snatching is both well recognized and well documented.¹⁸ Child snatching re-

10. Wexler, *Rethinking the Modification of Child Custody Decrees*, 94 *YALE L.J.* 757 (1985).

11. *Id.* at 782.

12. *See infra* note 18.

13. *Flood v. Braaten*, 727 F.2d 303 (3d Cir. 1984) and *DiRuggiero v. Rodgers*, 743 F.2d 1009 (3d Cir. 1984).

14. Krauskopf, *Remedies for Parental Kidnapping in Federal Court: A Comment Applying the Parental Kidnapping Prevention Act in Support of Judge Edwards*, 45 *OHIO ST. L.J.* 429 (1984).

15. "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." U.S. CONST. art. IV, § 1.

16. *See Bennett v. Bennett*, 682 F.2d 1039 (D.C. Cir. 1982). Krauskopf's article is an *apologia* for the dissenting opinion by Judge Edwards in the *Bennett* case.

17. Wexler, *supra* note 10, at 784-803 (social science data support the conclusion that finality or repose is what is needed by children and divorced parents).

18. Abram, *How to Prevent or Undo a Child Snatching*, A.B.A.J., May 1984, at 52; Wallop, *Children of Divorce and Separation: Pawns in the Child-Snatching Game*, TRIAL, May 1979, at 34; *see also* Comment, *The UCCJA: Coming of Age*, 34 *MERCER L. REV.* 861 (1983); Bodenheimer, *Progress Under the Uniform Child Custody Jurisdic-*

sulted from the old rule of jurisdiction, grounding jurisdiction in the court where the child was present. This rule, in turn, prompted parents who were unsuccessful in gaining custody in one state and who wished to relitigate custody to take the child to another jurisdiction and try again. Such serial relitigation was permissible under the Constitution because child custody decrees were not final judgments and hence not entitled to Full Faith and Credit.¹⁹

All states permit the modification of custody orders made at divorce on one of three bases: (1) that there has been "a substantial change in circumstances that makes a modification of custody in the child's best interests;" (2) that "it is in the child's best interests regardless of . . . any change in circumstances since the initial award;" or (3) that modification is consented to or is appropriate because of a risk of "serious harm to the child."²⁰ In practice, modification can become a vehicle for the relitigation of previously determined facts as well:

Though modification is ordinarily based on a subsequent change in circumstances, implicit reconsideration of previously litigated events is not uncommon; the loser is thus given a second chance in a forum of his own choosing perhaps inconvenient to the prevailing parent and far from most of the evidence.²¹

While accepting Professor Wexler's thesis that the easy modification of child custody decrees is an evil that should be addressed, this article assumes that modification will likely not be inhibited by a new standard for modification which the states must adopt. The dim prospects for the success of Wexler's idea are admitted by their author since she proposes a more stringent rule engrafted on

tion Act and Remaining Problems: Punitive Decrees, Joint Custody, and Excessive Modifications, 65 CALIF. L. REV. 978 (1977); Bodenheimer, *The Rights of Children and the Crisis in Custody Litigation: Modification of Custody In and Out of State*, 46 U. COLO. L. REV. 495 (1975); Bodenheimer, *Judicial and Legislative Cures for Child Custody Ills*, 12 JUDGES J. 82 (1973); Bodenheimer, *The Uniform Child Custody Jurisdiction Act*, 3 FAM. L.Q. 304 (1969); Bodenheimer, *The Uniform Child Custody Jurisdiction Act: A Legislative Remedy for Children Caught in the Conflict of Laws*, 22 VAND. L. REV. 1207 (1969); Ehrenzweig, *The Interstate Child and Uniform Legislation: A Plea for Extralittigious Proceedings*, 64 MICH. L. REV. 1 (1965).

19. See Ratner, *Child Custody in a Federal System*, 62 MICH. L. REV. 795, 828-37 (1964).

20. Wexler, *supra* note 10, at 760-61 (1985).

21. Ratner, *Legislative Resolution of the Interstate Child Custody Problem: A Reply to Professor Currie and a Proposed Uniform Act*, 38 S. CAL. L. REV. 183, 184-85 (1965).

the Uniform Marriage and Divorce Act (UMDA),²² an act which she admits "is the law in very few jurisdictions."²³ Instead of further tinkering with state law by modifying or refining model acts, which in the past have failed to deal successfully with the problems of nonfinality in child custody decrees,²⁴ the appropriate time has come to exploit the statutory provision Congress provided to deal with the problem and which has been marked out so well by the Third Circuit. Professor Wexler has thoroughly canvassed the shortcomings of UMDA, which will not be recapitulated here. Of greater pertinence is that UMDA's failings are reflected in other uniform laws such as the Uniform Child Custody Jurisdiction Act (UCCJA).

A. THE UNIFORM CHILD CUSTODY JURISDICTION ACT

In response to the social problem of child snatching, the National Conference of Commissioners on Uniform State Laws proposed the Uniform Child Custody Jurisdiction Act for adoption by states.²⁵ Although it has been adopted in all fifty states and the District of Columbia,²⁶ this statutory solution for the underlying and interrelated problems of conflict of laws, jurisdiction, finality and Full Faith and Credit which inhere in the complex area of child custody has proven less than adequate.²⁷ Experience with the UCCJA in Georgia is informative and illustrative with respect to the Act's accomplishments and limitations.

22. UNIFORM MARRIAGE AND DIVORCE ACT §§ 101-506, 9A U.L.A. 91-221 (1979) (the Uniform Marriage and Divorce Act was approved in 1970 and was amended in 1971 and 1973).

23. Wexler, *supra* note 10, at 774.

24. Much the same can be said for urging a more stringent standard for state custody decisions based on the tenuous argument that the "post-divorce familial unit" is entitled to heightened constitutional solicitude which would act to protect original custody awards. *See* Wexler, *supra* note 10, at 803-18.

25. UNIFORM CHILD CUSTODY JURISDICTION ACT, 9 U.L.A. 111 (1979) [hereinafter cited as UCCJA].

26. 9 U.L.A. 22-23 (Supp. 1985).

27. "[J]udicial interpretations of the [UCCJA] have undermined its utility by expanding the opportunities for jurisdiction to rest in more than one state. Furthermore, the act fails to provide effective enforcement procedures and offers no means to locate and punish an abducting parent." Abram, *How to Prevent or Undo a Child Snatching*, A.B.A.J., May 1984 at 52, 53.

B. THE UNIFORM CHILD CUSTODY JURISDICTION ACT IN GEORGIA

Admittedly, the UCCJA²⁸ has provided some relief by limiting the number of instances in which relitigation of custody was possible. For example, the Georgia Supreme Court has upheld the enforcement of a custody award issued by a foreign court pursuant to the UCCJA against a Georgia resident over whom the foreign court lacked personal jurisdiction.²⁹ At common law, jurisdiction in custody cases was based on the situs of the child because the action was *in rem* rather than *in personam*.³⁰ The jurisdictional competition among states which evolved under this *in rem* approach is avoided under the UCCJA by denying jurisdiction in custody cases already pending in another state. As a predicate for the exercise of jurisdiction under the UCCJA, there must be no other custody action pending.³¹ For example, in *Steele v. Steele*,³² the Georgia Supreme Court held that it was improper for the DeKalb Superior Court to take jurisdiction in a child custody case since, at the time of the filing of the Georgia custody petition, an action was already pending in Wisconsin. Appropriate jurisdiction under the UCCJA is determined by priority in filing.

There are, however, exceptions under Georgia practice to this *action pending* approach for determining jurisdiction. For example, in *Daily v. Dombrowski*,³³ the UCCJA was held not to bar the acceptance of jurisdiction over a visitation modification by an Ohio court in a contempt proceeding filed in a Georgia superior court against a custodial father for breach of the visitation provisions of a Georgia custody decree. Noting that the Ohio court had not yet "entered an order modifying the visitation provisions of the Georgia court's decree," the court viewed the contempt proceeding as

28. O.C.G.A. §§ 19-9-40 — 19-9-64 (1982).

29. *Burton v. Bishop*, 246 Ga. 153, 269 S.E.2d 417 (1980).

30. The traditional basis for asserting jurisdiction over a child in a custody dispute was the domicile of the child which was technically that of the father. See RESTATEMENT OF CONFLICT OF LAWS, §§ 9, 30, 117, 144, 145 (1934). For a comment on the anomalous character of the First Restatement in this regard allowing a departure from the father's domicile in favor of the child's domicile, see Note, *Ford v. Ford: Full Faith and Credit to Child Custody Decrees?*, 73 YALE L.J. 134 n.5 (1963). The modern view has centered jurisdiction at the residence of the child. See Stansbury, *Custody and Maintenance Law Across State Lines*, 10 LAW & CONTEMP. PROBS. 819, 823 (1944); Stumberg, *The Status of Children in the Conflict of Laws*, 8 U. CHI. L. REV. 42, 55 (1940).

31. O.C.G.A. § 19-9-46(a) (1982).

32. 250 Ga. 101, 296 S.E.2d 570 (1982).

33. 250 Ga. 236, 297 S.E.2d 246 (1982).

merely the "enforcement by a court of its own, unmodified custody order."³⁴

C. JURISDICTION UNDER THE UNIFORM CHILD CUSTODY JURISDICTION ACT

Four grounds for jurisdiction are available under the UCCJA:³⁵ (1) when the court in which custody is sought is in the child's "home state"; (2) when it is in the best interest of the child; (3) when an emergency exists; or (4) when no other state would assume jurisdiction. The "home state" is defined in the UCCJA as the state in which the child has lived with his or her parent or with the person having legal custody for at least six months (or fewer if the child is under six months old).³⁶ Jurisdiction "in the best interest" of the child is available when the child and his parents or "the child and at least one" contesting parent have a significant connection with the state.

Although emergency jurisdiction is available to protect dependent or neglected children, the emergency must exist in the forum state to sustain jurisdiction under this section. The Supreme Court of Georgia reached this conclusion by an uncertain path. In *Webb v. Webb*,³⁷ the court upheld jurisdiction under the emergency provision of the UCCJA,³⁸ when the emergency (leaving a six-year old child without adult supervision) took place in Florida. The noncustodial parent brought the putatively neglected child back to Georgia and initiated action under the UCCJA. *Webb*, which obviously contravened the purpose of the UCCJA, has been abandoned by the Georgia Supreme Court, which earlier limited it to its facts,³⁹ and is no longer good law. Overruling *Webb* was clearly correct because the UCCJA was enacted to inhibit child snatching, not to foster it. Finally, the UCCJA incorporates a catch-all jurisdictional provision designed to prevent jurisdictional cracks through which children might fall because no court could take jurisdiction.⁴⁰

34. *Id.* at 236, 297 S.E.2d at 246-47.

35. O.C.G.A. § 19-9-43 (1982).

36. O.C.G.A. § 19-9-42(5) (1982).

37. 245 Ga. 650, 266 S.E.2d 463 (1980), *cert. dismissed*, 451 U.S. 493 (1981).

38. O.C.G.A. § 19-9-43(a)(3) (1982).

39. See *Yearta v. Scroggins*, 245 Ga. 831, 833 n.3, 268 S.E.2d 151, 153 n.3 (1980); and *Etzion v. Evans*, 247 Ga. 390, 391-92, 276 S.E.2d 577, 579 (1981).

40. O.C.G.A. § 19-9-43(a)(4)(A) (1982).

D. CONGRESS ADDRESSES THE PROBLEMS OF JURISDICTION AND FINALITY: THE PARENTAL KIDNAPPING PREVENTION ACT OF 1980 AND THE THIRD CIRCUIT

The Parental Kidnapping Prevention Act of 1980 (PKPA)⁴¹ was enacted by Congress to establish one set of rules binding on all states for the enforcement and modification of child custody decrees. Its adoption was, in part, a response to the fact that, formerly, not all states had enacted the UCCJA.⁴² The PKPA tracks the jurisdictional provisions of the UCCJA, i.e., home state jurisdiction, jurisdiction in the best interest of the child, emergency jurisdiction and catch-all jurisdiction. Under the PKPA,⁴³ two states' courts cannot validly exercise concurrent custody jurisdiction. *Flood v. Braaten* explains the impact of the PKPA thusly: "[I]f two states concurrently render custody decrees, one state has asserted jurisdiction in violation of federal law."⁴⁴ The *Flood* decision promises to become a bellwether in federal application of the PKPA.

Betty Braaten Flood and Gerald Braaten were divorced in 1977. The original divorce decree awarded custody of their four children to Betty. In 1979, however, both parties agreed to amend the custody agreement.⁴⁵ The amended agreement allowed Betty to leave North Dakota with the children; Gerald was to have custody rights each summer. Gerald remained in North Dakota, while Betty and the children moved to New York.

The custody battle began during the children's 1979 Thanksgiving trip to North Dakota. At that time Gerald obtained an ex parte order awarding custody of the children to him, but shortly thereafter Betty successfully had the ex parte order rescinded and regained custody of the children. Soon after her return to New York with the children, Betty moved to New Jersey.

Several weeks later, Betty was ordered by a North Dakota district court to show cause why Gerald should not be awarded custody of the children. In August 1980, the North Dakota court

41. 28 U.S.C. §§ 1738A(a) — 1738A(g). See Note, *The Uniform Child Custody Jurisdiction Act and the Parental Kidnapping Prevention Act: Dual Response to Interstate Child Custody Problems*, 39 WASH. & LEE L. REV. 149, 159 (1982); Note, *The Parental Kidnapping Prevention Act of 1980 — An End to Child Snatching*, 8 J. LEGIS. 357, 366 (1981).

42. See *supra* note 26.

43. 28 U.S.C. § 1738A(g).

44. *Flood v. Braaten*, 727 F.2d 303, 310 (3d Cir. 1984).

45. *Id.* at 305.

awarded custody of the children to Gerald.⁴⁶ Without referring to any North Dakota authority authorizing modification of a custody decree,⁴⁷ and over the objection of Betty's attorney, the court decided it had jurisdiction to modify the custody decree.

Following the North Dakota decision, Gerald went to New Jersey, seized two of the children and took them back to North Dakota. Betty countered by requesting that a New Jersey superior court award custody of the children to her. Betty also returned to North Dakota and filed a motion requesting that the North Dakota order be modified to return custody of the children to her. The same day Betty attempted to abduct two of the children, but succeeded in removing only one child.⁴⁸

In 1981, the New Jersey Superior Court ruled it had jurisdiction to modify the custody decree.⁴⁹ The court found New Jersey to be the proper forum under the UCCJA, and as a result, denied Gerald's attempt to have the North Dakota order enforced.⁵⁰ No New Jersey court would grant Gerald leave to appeal, which allowed the New Jersey Superior Court to award custody of the children to Betty.⁵¹ Betty then tried to abduct the only child remaining in North Dakota.

By 1982, there was a total impasse when the courts of North Dakota and New Jersey refused to enforce the decrees of each other, and each state had awarded custody to the parent residing in that state. During this period of two and one-half years, both parents had been held in contempt by the court of the state in which the other party resided,⁵² and both parents had also been charged with a criminal violation for abducting their own children.⁵³

46. *Id.*

47. *See id.* at n.6.

48. *Id.* at 305.

49. *Id.*

50. The New Jersey court presented four reasons why it should exercise jurisdiction over the custody decree:

[F]irst, when Betty's suit was commenced, the children had lived in New Jersey just three days short of the six months required to make it the "home state"; second, North Dakota had not been the children's "home state" within the past six months; third, the North Dakota court had awarded custody to Gerald without considering the pending New Jersey proceeding; and fourth, a New Jersey court could reconsider the custody decree in the "best interest" of the children.

Id. at 306 n.9.

51. *Id.* at 306.

52. *Id.*

53. *Id.*

In an effort to end the impasse, Betty filed a complaint in the United States District Court for the District of New Jersey. She requested a stay of all proceedings, pending the federal court's decision and the federal court's enforcement of the New Jersey decree. The complaint asserted federal jurisdiction under 28 U.S.C. § 1738A. The district court on its own motion dismissed Betty's complaint for want of jurisdiction,⁵⁴ and she appealed to the Third Circuit Court of Appeals.

While acknowledging that federal courts have traditionally avoided involvement in child custody disputes,⁵⁵ the Third Circuit determined that the traditional doctrinal bars to federal involvement in child custody disputes do not apply to a suit under § 1738A. The court reasoned that the primary bar to federal jurisdiction in cases involving child custody has been the "domestic relations exception" to diversity jurisdiction.⁵⁶ Under this exception, federal courts have declined to assert diversity jurisdiction over matters deemed "domestic relations." The court, however, limited this exception to actions in diversity. It found no basis for declining jurisdiction "when a litigant has otherwise made out a well-pleaded and substantial complaint alleging federal subject matter jurisdiction" rather than diversity jurisdiction.⁵⁷

The second, traditional doctrinal impediment the Third Circuit declined to apply was the refusal of federal courts to extend the Full Faith and Credit Clause to child custody decrees. While federal courts had been willing, under the Full Faith and Credit Clause, to enforce some types of state court judgments involving domestic relations, they had specifically declined to extend this constitutional provision to child custody decrees.⁵⁸ Enforcing a child custody decree, however, presents special problems because of the parties' ability to modify the decree if it is in the "best interests" of the child.⁵⁹ Before determining whether full faith and credit principles have been violated, the federal court could be drawn into readjudicating the underlying dispute. Therefore, the Third Circuit Court viewed it as "unlikely that a litigant could properly allege a federal claim for outright enforcement of a cus-

54. *Id.*

55. *Id.*

56. *Id.* at 307.

57. *Id.*

58. *Id.* at 308.

59. See *Ford v. Ford*, 371 U.S. 187, 193-94 (1962); and *Halvey v. Halvey*, 330 U.S. 610, 612-15 (1947).

today decree under the Full Faith and Credit Clause"⁶⁰

The court, however, distinguished a lawsuit based on § 1738A from an action for enforcement or modification of a custody decree. The court found that § 1738A relies upon a wholly different foundation for enforcement of custody decrees. Rather than requiring respect for sister state judgments, as would be the case if a federal district court were to enforce directly a custody decree, § 1738A merely provides specific rules to determine the proper forum state.⁶¹ Hence, unlike the Constitution, § 1738A addresses concurrent proceedings on the same matter. Under the statute, jurisdiction may be asserted by only one state at a time. As a result, a federal court could, in certain cases, enforce a custody decree without being drawn into adjudicating the merits of the custody dispute itself. The federal forum merely determines which court's exercise of jurisdiction meets the standard Congress imposed to resolve which decree is entitled to Full Faith and Credit. Therefore, under § 1738A, a federal court need not become involved in questions of "changed circumstances" and modifiability.⁶² In short, the Third Circuit saw the issue before it in an action under § 1738A as a federal question of adherence to the standards of the PKPA, not as a diversity action litigating the merits of a custody dispute.

Unrestrained by these traditional doctrinal bars to federal involvement in custody disputes, the court was free to focus on the heart of the matter: whether Congress intended federal courts to have jurisdiction to enforce compliance with § 1738A.⁶³ In its analysis, the court concluded that Congress deliberately created a federal law governing state enforcement of custody decrees despite Congress' desire that federal courts steer clear of the merits of custody disputes.⁶⁴ The court also considered and rejected the idea that Congress intended that § 1738A be enforced by direct appeal to the U.S. Supreme Court upon exhaustion of state remedies.⁶⁵

60. 727 F.2d at 309.

61. *Id.*

62. *Id.* at 310-11.

63. *Id.*

64. In reviewing the legislative history of § 1738A, the court noted that Congress had rejected the idea that federal courts be called upon *in the first instance* to enforce a state's child custody decree. This conclusion was based upon the rejection of a proposed amendment to 28 U.S.C. § 1332 that would have permitted parents to enforce child custody decrees in the federal courts without regard to the \$10,000 jurisdictional amount. *See id.* at 310-11.

65. *See id.* at 312. (The court raised, but chose not to address, the issue of "whether a plaintiff, prior to invoking the power of a federal court, must exhaust state judicial remedies for the alleged noncompliance with § 1738A." *Id.* at 312 n.28.)

The overtaxed resources of the Supreme Court and the multitude of potential litigants led the court of appeals to conclude that this could not have been the intent of Congress. On this basis, the court reasoned that “*in limited circumstances of noncompliances with § 1738A, federal district court intervention [was congressionally authorized].*”⁶⁶

The Third Circuit had another opportunity to consider the *Flood* approach to § 1738A in *DiRuggiero v. Rodgers*.⁶⁷ *DiRuggiero* involved a child custody dispute that began in 1978, after a separation and following Rebecca DiRuggiero Rodgers’ romantic involvement with another man while she was still married to Douglas DiRuggiero. Rebecca remained in the marital home with their two children and Douglas moved out. Upon learning of Rebecca’s plans to travel to Japan with Ted Rodgers (whom she subsequently married), while leaving the children in several temporary homes, Douglas moved back into the house and changed the locks. Rebecca thereafter sued for divorce.⁶⁸

In 1979, a North Carolina court awarded custody of the children to Douglas.⁶⁹ The order further established visitation rights and a monthly support obligation for Rebecca. In 1981, Douglas and the children moved to New Jersey. In response, Rebecca filed a motion in the North Carolina General Court of Justice to regain custody. That motion was denied.⁷⁰ Shortly thereafter, she moved in the North Carolina court to hold Douglas in contempt for violating a visitation order.⁷¹ In addition, she again moved to regain custody and also to terminate her child support payments.⁷²

During the same period Douglas instituted proceedings in a New Jersey superior court,⁷³ seeking to enforce the prior North Carolina custody decree and to have a temporary restraining order issued to prevent Rebecca from relitigating the custody issue in North Carolina. The evidence concerned Rebecca’s continued attempts to regain legal custody of the children and the financial burden this serial litigation placed on Douglas. Upon this evidence, the New Jersey court issued a temporary restraining order.⁷⁴ The court

66. *Id.* at 312 (emphasis added).

67. 743 F.2d 1009 (3d Cir. 1984).

68. *Id.* at 1010.

69. *Id.* at 1011.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

based New Jersey's jurisdiction over the custody dispute on the UCCJA.⁷⁵ On the same day, the North Carolina General Court of Justice entered a conflicting order accepting jurisdiction over custody matters in North Carolina.⁷⁶ The two judges involved later conferred by telephone in an effort to resolve the on-going dispute.⁷⁷ The judges agreed that North Carolina would retain jurisdiction over the contempt proceedings while New Jersey would retain jurisdiction over custody matters.⁷⁸

Rebecca then took matters into her own hands by removing the children from New Jersey and taking them back to North Carolina. Upon the advice of her attorney, Rebecca subsequently returned the children to New Jersey; but the situation, as described by the Third Circuit Court of Appeals, thereafter "escalated into small scale internicene [sic] warfare."⁷⁹

Douglas sought an injunction to prevent Rebecca from removing the children from New Jersey. Before the New Jersey court ruled, the North Carolina court held Douglas in contempt of a visitation order.⁸⁰ Despite the earlier agreement reached between the judges by telephone, the North Carolina court reversed itself, held that North Carolina had jurisdiction over all custody matters, and awarded custody of the children to Rebecca.⁸¹ Meanwhile, the New Jersey Superior Court, which had denied a motion for an injunction to prevent removal of the children, was reversed by the New Jersey Appellate Division and ordered to "determine the issue of jurisdiction in New Jersey."⁸²

Rebecca then removed one of the children to North Carolina. Douglas immediately obtained an order from the New Jersey court instructing that the child be returned, but Douglas' sister then became involved and sent the other child to Rebecca.⁸³

The New Jersey Superior Court, in conformance with the order of the Appellate Division, held that New Jersey had jurisdiction over custody and visitation matters under the UCCJA. The court

75. New Jersey had adopted the UCCJA in 1979. N.J. STAT. ANN. §§ 2A:34-28 — 2A:34-52 (West Supp. 1983).

76. 743 F.2d at 1011.

77. *Id.* at 1012.

78. *Id.*

79. *Id.*

80. *Id.* at 1013.

81. *Id.*

82. *Id.*

83. *Id.*

found that New Jersey was the home state of the children.⁸⁴ Rebecca neither attended these hearings nor did she return the children.

Douglas then turned to the federal courts. He asserted a seven count claim in federal district court, two of which are of interest here — those arising under the PKPA and under the Full Faith and Credit Clause.⁸⁵ However, the district court dismissed all seven claims because it reasoned that seeking declaratory and injunctive relief under the PKPA did not arise under federal law within the meaning of 28 U.S.C. § 1331.⁸⁶ Using the same reasoning, the court also dismissed the claim under the Full Faith and Credit Clause, finding that it failed to state a claim under federal law within the meaning of § 1331.⁸⁷

When *DiRuggiero* reached the Third Circuit Court of Appeals, that court referred to its recent holdings in *Flood v. Braaten*.⁸⁸ In *Flood*, the court had decided that claims alleging a violation of § 1738A of the PKPA arise under federal law within the meaning of 28 U.S.C. § 1331. As it had in *Flood*, the court declined to determine the extent to which the PKPA requires the exhaustion of state remedies.⁸⁹

The Third Circuit Court of Appeals held in *DiRuggiero* that the federal district court did have subject matter jurisdiction under § 1331.⁹⁰ The finding was based on the fact that the New Jersey and North Carolina courts had each entered custody decrees. One of the decrees was therefore inconsistent with the PKPA.⁹¹ A colorable claim could be made that it was the North Carolina order which was inconsistent.

The *DiRuggiero* court then found that under the conditions set out by § 1738A(b)(4) New Jersey became the “home state” of the children six months after they began to live with Douglas in New

84. The superior court concluded “that the State of New Jersey is the home state of the infants born of the marriage and has been the home state of said children since June 28, 1982, and accordingly [that] any judgments on the issue of custody from any other state thereby [are] a nullity.” *Id.*

85. *Id.* at 1014.

86. *Id.*

87. *Id.*

88. 727 F.2d 303.

89. 743 F.2d at 1015, *citing* 727 F.2d at 312 n.28.

90. 743 F.2d at 1015.

91. Recall the *Flood* court’s conclusion that “if two states concurrently render custody decrees, one state has asserted jurisdiction in violation of federal law.” 727 F.2d at 310.

Jersey.⁹² Considering the validity of the North Carolina custody decree, the court reasoned that North Carolina could enter the custody decree if it were the home state of the children on "the date of the commencement of the proceedings,"⁹³ the jurisdictional basis alleged under North Carolina law.⁹⁴ That section of the North Carolina UCCJA is identical to § 1738A(c)(2)(A) of the PKPA which requires that North Carolina have been the home state "at the time of the commencement of the proceeding."⁹⁵ The issue thus shifted to a determination of which proceeding constituted the commencement of "the proceedings" in North Carolina.⁹⁶ The Third Circuit concluded that because North Carolina had stipulated that New Jersey had jurisdiction over custody matters, its subsequent custody order was inconsistent with the PKPA. Therefore, the federal district court had jurisdiction to consider it.⁹⁷

As in *Flood*, the Third Circuit was faced again with the traditional domestic relations exception to diversity jurisdiction. The court found that many of the considerations which preclude federal involvement in most domestic relations matters are not present in interstate disputes over the validity of competing custody decrees.⁹⁸ The federal court is not asked to decide the issues underlying the custody decrees, but rather which of the two competing state custody awards is paramount under federal and state law under the rule of priority set out in the federal statutes. Again, quoting *Flood*, the court held that this determination "requires only a preliminary inquiry into jurisdictional facts."⁹⁹

Also present in *DiRuggiero* was an issue of whether the federal district court could adjudicate a claim for the tort of child abduction under New Jersey law. As to that claim, the court held that it could be reached under the federal court's diversity jurisdiction.¹⁰⁰ The Third Circuit repeated its holding in *Flood* that the "domestic relations" exception to diversity jurisdiction is not a bar to the district court's subject matter jurisdiction in this case since the exception does not apply to either the PKPA claim or to the tort claim;

92. 743 F.2d at 1016.

93. *Id.*

94. N.C. GEN. STAT. § 50A-3(a)(1) (Supp. 1981).

95. 743 F.2d at 1016.

96. *Id.* at 1017.

97. *Id.*

98. *Id.* at 1019.

99. *Id.* at 1020, citing 727 F.2d at 310.

100. 743 F.2d at 1020, citing 727 F.2d at 312.

both are resolvable without intrusion into the merits of the underlying state custody issue.¹⁰¹ Other federal courts have followed the lead of the Third Circuit.¹⁰² The decisions in *Templeton v. Witham*¹⁰³ and *Siler v. Storey*¹⁰⁴ are significant examples.

E. SOME LIMITS ON THE THIRD CIRCUIT'S INTERPRETATION OF THE PKPA

In *Templeton v. Witham*,¹⁰⁵ a federal district court in California determined that the failure of one of that state's courts to comply with all applicable state and federal laws divested the court of its jurisdiction in a child custody matter. The district court concluded that the PKPA required that jurisdiction be found in Oregon "because no other state would have jurisdiction under the PKPA and it would be in the best interests of the child for Oregon to assume jurisdiction." ¹⁰⁶

In August, 1979, Darlene Templeton gave birth to a daughter, Debra Templeton. Concerned about the state of her mental health and the fact that she might not be able to care for her daughter, Darlene asked the authorities in Imperial County, California to place the child in the home of her sister-in-law, Vicki Witham. Mrs. Witham resided in Salem, Oregon with her husband. This request led to judicial proceedings in the Imperial County Juvenile Court (the California court) in October, 1977, which resulted in the placement of Debra with the Withams.¹⁰⁷

In March, 1982, as might be expected, Darlene had a change of heart and she asked the California court to reunite her with her daughter. The Withams, however, refused to comply with the order of the California court; and in September, 1982, they filed a petition in the Circuit Court of Oregon, Marion County Juvenile Department (the Oregon court) seeking to adopt Debra. One month later, the Withams asked the Oregon court to assume jurisdiction over Debra and her placement.¹⁰⁸

In March, 1983, Darlene Templeton and the California court

101. 743 F.2d at 1020.

102. See *Heartfield v. Heartfield*, 749 F.2d 1138 (5th Cir. 1985); *McDougald v. Jenson*, 596 F. Supp. 680 (N.D. Fla. 1984).

103. 596 F. Supp. 770 (S.D. Cal. 1984).

104. 587 F. Supp. 986 (N.D. Tex. 1984).

105. 596 F. Supp. 770.

106. *Id.* at 776.

107. *Id.* at 771.

108. *Id.*

sought to have the Withams' adoption petition dismissed; but the Oregon court refused. The California court then issued a bench warrant for the arrest of Debra; but the Oregon court abated the warrant and ordered Oregon authorities to disregard it. Subsequently, in July, 1983, the Oregon court concluded that it had jurisdiction over Debra because the California court had failed to follow applicable state law which caused California's jurisdiction to lapse.¹⁰⁹

At this point "of jurisdictional gridlock" between the California and Oregon courts, Darlene Templeton and the California court filed suit in the United States District Court for the Southern District of California (the district court).¹¹⁰ Applying the PKPA and the analysis of the Third Circuit in *Flood*, the district court found that it had jurisdiction to resolve the issue of whether California or Oregon had the power to enter a binding custody award over Debra.

As to that ultimate issue, the district court held that California had jurisdiction over Debra in 1979 under the PKPA because California was Debra's "home state."¹¹¹ California's jurisdiction lapsed, however, because it failed to satisfy the PKPA predicates for continuing jurisdiction (i.e., remaining the state of residence of at least one contestant for the child's custody and retaining jurisdiction pursuant to state law). Although the first condition was met, Darlene Templeton continued to reside in California, the second, retaining jurisdiction under state law, was not.¹¹²

The holding of the district court with respect to this second issue highlights the interaction between federal and state law under the PKPA. Rather than preempting state law, the PKPA "expressly incorporates state law."¹¹³ As a necessary consequence, a federal court faced with the resolution of a federal question of jurisdiction finds itself drawn into ascertaining the content of the applicable state law under the PKPA. This led the district court in *Templeton* to conclude that the California court had the power to award custody of Debra to the Withams in 1979; but it was the failure of the California court to comply with applicable state law on the out-of-state placement of children which caused its jurisdic-

109. *Id.*

110. *Id.*

111. *Id.* at 772.

112. 28 U.S.C. § 1738A(d).

113. 595 F. Supp. at 772.

tion to lapse.¹¹⁴ Consequently, the district court held that the Oregon court had jurisdiction over Debra under the PKPA as the child's home state¹¹⁵ or as a state of residual jurisdiction¹¹⁶ acting in the child's best interest.

A second useful demonstration of the limitations explicit in the newly formulated Third Circuit remedy under the PKPA is provided in another recent federal district court decision, *Siler v. Storey*.¹¹⁷ Cynthia Jean Siler and Jon David Siler were married and had two children. They established a residence in Pennsylvania, but Jon later moved to California. Jon subsequently took the children from Pennsylvania to California. Through the judicial process, Cynthia was able to recover her daughter, but not her son.¹¹⁸ Cynthia proceeded with a divorce action. A divorce, along with custody of the children, was granted by a Pennsylvania court to Jon.¹¹⁹ The Pennsylvania court also specifically retained jurisdiction over the case.¹²⁰

Cynthia thereafter filed a writ of habeas corpus in a Texas district court and a request for attachment to enforce the Pennsylvania custody decree against Jon, then a resident of Texas.¹²¹ In return, Jon sought and was granted a writ of mandamus and temporary relief in the Texas Court of Appeals. Cynthia then countered by seeking relief from the United States District Court for the Northern District of Texas alleging that she was entitled to a federal determination of whether the court of appeals was exceeding its jurisdiction.¹²² The district court held that the court of appeals was not an inferior court to which the district court could issue a writ of prohibition.¹²³

114. *Id.* at 776-77. In particular, the California court failed to comply with the Interstate Compact on the Placement of Children. CAL. CIV. CODE §§ 264-74 (West 1982). The Compact requires that no child be sent to another state for foster care until the sending state receives the written concurrence of the receiving state that the proposed placement is in the best interests of the child. CAL. CIV. CODE § 265, art. 3(d). In *Templeton*, the district court found that "[t]he California court and the Imperial County Probation Department did not comply with the requirements of the [Interstate Compact on the Placement of Children] . . . until almost *two years* after Debra arrived in Oregon." *Id.* at 773. (Emphasis in original.)

115. 28 U.S.C. § 1738A(c)(2)(B).

116. 28 U.S.C. § 1738A(c)(2)(D).

117. 587 F. Supp. 986.

118. *Id.* at 986-87.

119. *Id.* at 987.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

While it appears that the jurisdiction Cynthia sought to protect is founded on the PKPA, the district court found that the statute "nowhere creates a federal judicial remedy for child custody matters."¹²⁴ The court distinguished Cynthia's claim from the § 1738A right recognized in *Flood v. Braaten*¹²⁵ because in the present case, unlike *Flood*, only one state at a time was adjudicating custody and those adjudications were not in conflict.¹²⁶ Moreover, the court was unwilling to assume that courts of Texas would not protect Cynthia's federal rights.¹²⁷ Taken together, *Flood*, *DiRuggiero* and *Siler* define § 1738A as an important but limited remedy designed to address the special problem of conflicting state custody awards in violation of the jurisdictional standards of the PKPA.

The subject of federal enforcement of child custody orders would not be complete without a brief consideration of a well-argued defense by Professor Krauskopf of the dissenting opinion of Judge Edwards in *Bennett v. Bennett*.¹²⁸ *Bennett* was a diversity action brought by a plaintiff father asserting a right to custody under an award by a District of Columbia court of children who had been abducted by their mother and taken to Ohio. The father's claim was for money damages for the tort of harboring a child in defiance of the right of a lawful custodian and an injunction enjoining the defendant mother from interfering with the father's custody rights. The Court of Appeals for the District of Columbia held the domestic relations exception to federal diversity jurisdiction would not bar the tort-based action but would foreclose consideration of the injunction.¹²⁹

Krauskopf argues that "[a]lthough the PKPA by its terms does not apply to federal courts, it obliterates the rationale [supporting] the domestic relations exception in actions to enforce child custody orders."¹³⁰ Because there is no reference to federal courts or federal jurisdiction, she concludes that any federal jurisdiction must be diversity jurisdiction¹³¹ based on state law as required by the federal

124. *Id.*

125. 727 F.2d 303.

126. 587 F. Supp. at 988.

127. *Id.*

128. 682 F.2d 1039, 1044 (D.C. Cir. 1982) (Edwards, J., dissenting).

129. *Id.* at 1042-43.

130. Krauskopf, *supra* note 14, at 449.

131. "The full faith and credit clause (and presumably statutes enacted to implement it) prescribes a rule by which to determine what faith and credit to give judgments and public acts, and does not create a basis for federal court jurisdiction (citations omitted)." *Id.* at 441 n.70; see also *id.* at 442 and 449.

Rules of Decision Act.¹³² Although congressional silence complicates a determination of the role it intended for the federal courts to play under § 1738A,¹³³ the Third Circuit in *Flood* held that in that law “Congress unequivocally and mandatorily imposed federal duties on the states”¹³⁴ Those duties are to “enforce according to its terms” and “not modify except as [otherwise] provided . . . any child custody determination made consistently with the [Act]”¹³⁵ These arise under federal law and are thus subject to federal jurisdiction.¹³⁶ An insistence on diversity jurisdiction seems wide of the mark.

In a recent article, Professor Coombs raised but did not resolve the issue of whether Congress has the power to enact § 1738A,¹³⁷ although he did imply that under *Thomas v. Washington Gas Light Co.*¹³⁸ the PKPA may be infirm.¹³⁹ To the extent that the basis of the *Thomas* problem, identified by Coombs, is one of states determining the extraterritorial effects of their judgments, a congressional assertion of its power under article IV, § 1 would appear to transcend any *Thomas* questions by locating its authority in the enforcement language of the Full Faith and Credit Clause.

The question of whether Krauskopf's view that enforcement of the PKPA is limited to diversity jurisdiction or the *Flood* court's that enforcement can be grounded on § 1331 is the correct one may be “purely academic.”¹⁴⁰ In any event, enough has been said to conclude that Krauskopf's interpretation is not definitive and that the position of the Third Circuit is arguably correct.

F. THE PERSISTENT PROBLEM OF JURISDICTION: *May v. Anderson*

In *May v. Anderson*,¹⁴¹ the United States Supreme Court held that a child custody award obtained by a father in an ex parte divorce was not entitled to Full Faith and Credit. Without *in personam* jurisdiction, the divorce court could not cut off an absent

132. 28 U.S.C. § 1652 (1982). See also Krauskopf, *supra* note 14, at 449.

133. Coombs, *Interstate Child Custody: Jurisdiction, Recognition, and Enforcement*, 66 MINN. L. REV. 711, 838 n.751 (1982).

134. 727 F.2d at 312.

135. 28 U.S.C. § 1738A(a).

136. 28 U.S.C. § 1331.

137. Coombs, *supra* note 133, at 842 n.781; see also Krauskopf, *supra* note 14, at 441.

138. 448 U.S. 261 (1980).

139. Coombs, *supra* note 133, at 842 nn.780, 781.

140. Krauskopf, *supra* note 14, at 450.

141. 345 U.S. 528 (1953).

spouse's rights to the care, custody and companionship of the children of the marriage. The same holds true for subsequent modifications of support awards,¹⁴² although not for changes in custody since such awards may be made on the basis of jurisdiction over the child alone.¹⁴³

May, in turn, poses some difficulties¹⁴⁴ with implications for the UCCJA and for the PKPA itself. Justice Burton's plurality opinion in *May* indicates that the result in the case turns on a lack of personal jurisdiction over the nonresident parent. A concurring opinion by Justice Frankfurter takes a different view, however, suggesting instead that the case merely holds that a sister state is not precluded by the Full Faith and Credit Clause from recognizing a child custody award made without personal jurisdiction over a nonresident parent.

When the National Conference of Commissioners on Uniform State Laws, which drafted the UCCJA, considered the problem of jurisdiction over a nonresident defendant parent in a custody dispute, it adopted the Frankfurter approach and focused its legislative strategy on two principles: jurisdiction over the child and mutual respect for sister state jurisdiction.

Georgia's law copies the Uniform Act and reflects this approach.¹⁴⁵ Asserting jurisdiction under the UCCJA over a nonresident over whom personal jurisdiction cannot be had should violate due process. The reasoning of the plurality position in *May* is well supported by the holding in *Kulko v. Superior Court*.¹⁴⁶

In *Kulko*, the United States Supreme Court held that California could not exercise *in personam* jurisdiction over a nonresident, nondomiciliary father of minor children domiciled in California in an action to modify his support obligation. The defendant father lived in New York. His only contacts with California were his marriage ceremony there (during a "three-day stopover in California en route from a military base in Texas to a tour of duty in Korea") and his acquiescence in his children's relocation to California to be with their mother. California did not seek to rest jurisdiction on its

142. See *Kulko v. Superior Court*, 436 U.S. 84 (1978).

143. See Ratner, *supra* note 19 and accompanying text.

144. See *Webb v. Webb*, cert. dismissed, 451 U.S. 493 (1981); *Eicke v. Eicke*, cert. dismissed as improvidently granted, 459 U.S. 1139 (1983) (refusal to grant Full Faith and Credit to a state custody decree).

145. O.C.G.A. § 19-9-43 (1982).

146. 436 U.S. 84 (1978).

status as the place of marriage.¹⁴⁷

California's long-arm statute permits its courts to assert *in personam* jurisdiction on any basis "not inconsistent with the Constitution."¹⁴⁸ Applying the "minimum contacts" test of *International Shoe Co. v. Washington*,¹⁴⁹ the Court concluded that Kulko had insufficient contacts with the forum state to sustain jurisdiction over him consistent with due process. Furthermore, by acquiescing in the relocation of the children to California to be with their mother, Kulko had not "purposefully avail[ed] [him]self of the privilege of conducting activities within [California] . . ."¹⁵⁰ thus invoking the benefits and protections of its laws by permitting the children to reside in California where they went to school.¹⁵¹

It is interesting to note that in 1983, Georgia amended its long-arm statute to assert jurisdiction "[w]ith respect to proceedings for alimony, child support, or division of property in connection with an action for divorce . . ."¹⁵² over nonresident defendants based on their former residence in the state. Clearly *Kulko* establishes that an assertion of jurisdiction grounded on this contact alone, i.e., former residence, is inadequate to meet the federal constitutional requirement of sufficient minimum contacts between the defendant and the forum.¹⁵³ A similar conclusion can be drawn for assertions of jurisdiction under the UCCJA over nonresidents where personal jurisdiction is predicated solely on the presence of the child and a parent in the forum.

The jurisdictional approach of the UCCJA¹⁵⁴ merely projects the constitutional problems inherent in the UCCJA into the PKPA,¹⁵⁵

147. 436 U.S. at 86-88.

148. 436 U.S. at 89 (Application of this long-arm statute had been upheld earlier in *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957)).

149. 326 U.S. 310 (1945).

150. 436 U.S. at 94; *quoting* *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

151. 436 U.S. at 94.

152. O.C.G.A. § 9-10-91(5) (Supp. 1985).

153. *See also* *Hanson v. Denckla*, 357 U.S. 235 (1958); *Shaffer v. Heitner*, 433 U.S. 186 (1977).

154. *See also* O.C.G.A. § 19-9-43 (1982).

155. Compare the Georgia counterpart of the UCCJA § 6(a), which is O.C.G.A. § 19-9-46(a):

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

with the PKPA, 28 U.S.C. § 1738A(g):

its federal counterpart. The PKPA awards priority to the state first exercising jurisdiction. Because a state can exercise apparent or putative jurisdiction in instances in which it cannot, in fact, have jurisdiction, such as the case with a nonresident, nondomiciliary, noncustodial parent outside of the forum, a subsequent forum, barred under the plain language of the federal act from exercising jurisdiction,¹⁵⁶ could be forced to tolerate the intolerable by not reviewing a case awarding custody in which jurisdiction was clearly absent. This is perhaps the most serious limitation of the PKPA approach to solving the problem of serial litigation of custody. Earlier, unsuccessful attempts to litigate the continuing rule of nonfinality of custody awards¹⁵⁷ indicated that the problem is likely to come to court.

For example, the Georgia Supreme Court has applied Georgia's version of the UCCJA to recognize modifications of custody in other states under principles of comity,¹⁵⁸ but has not yet passed on a robust application of the act under its terms to a nonresident defendant with no ties to the forum, save parenthood. In *Binns v. Smith*, the court declined to permit the assertion of jurisdiction over a Canadian domiciliary under the statute.¹⁵⁹ In doing so, the court interpreted the statute,¹⁶⁰ which requires notice to a person "outside this state" to be given "[i]n the manner prescribed by the law of the place in which the service is made"¹⁶¹ The court thus limited the jurisdictional reach to "states" as defined elsewhere in the Act.¹⁶² It remains to be seen whether in Georgia, as elsewhere under the UCCJA and PKPA, the jurisdictional problems identified in the Burton plurality opinion in *May* and avoided by the Frankfurter concurring opinion in that case remain

A court of a State shall not exercise jurisdiction in any proceeding for a custody determination commenced during the pendency of a proceeding in a court of another State *where such court of that other State is exercising jurisdiction consistently with the provisions of this section to make a custody determination.* (Emphasis added.)

156. 28 U.S.C. §§ 1738A(a) — 1738A(g). Cf. W. RICHMAN & W. REYNOLDS, UNDERSTANDING CONFLICT OF LAWS 342 (1985).

157. See Wexler, *supra* note 24.

158. See *Yearta v. Scroggins*, 245 Ga. 831, 268 S.E.2d 151 (1980) (comity); *Youmans v. Youmans*, 247 Ga. 529, 276 S.E.2d 837 (1981) (comity).

159. 251 Ga. 861, 310 S.E.2d 225 (1984). For a discussion of the law before the decision in *Binns*, see Comment, *The UCCJA: Coming of Age*, 34 MERCER L. REV. 861 (1983).

160. O.C.G.A. § 19-9-45(a)(2) (1982).

161. 251 Ga. at 861, 310 S.E.2d at 226.

162. O.C.G.A. § 19-9-42(10) (1982).

real. *Binns* found a textual way of avoiding them, but they will surely surface again.

Important among the unresolved issues after *Flood* is whether a federal court following the approach of the Third Circuit, commended above, will be able to intervene at a sufficiently early point to provide effective relief for the litigants. The Third Circuit in *Flood* specifically reserved the issue of whether, and to what extent, exhaustion of state judicial remedies will be required.¹⁶³ Under the facts of *Flood*, a case in which litigation had been concluded in the courts of both states implicated,¹⁶⁴ no question of exhaustion was presented, and the court was correct in not reaching it.¹⁶⁵ Future cases, however, may well present the circumstance in which a state seeks to assert jurisdiction under the UCCJA and the PKPA over a nonresident defendant in defiance of the plurality view in *May*. In such a case, effective federal relief under the *Flood* theory would require the federal forum itself to consider some of the significant factual aspects of the case, or at least those going to jurisdiction. This is likely, and rightly so, to trigger abstention concerns. The federal forum should abstain, even in instances in which there is risk of improper resolution of the underlying jurisdictional problem (*May*), assuming, of course, that the Supreme Court wishes to perpetuate the rule of *May*. However, waiting for a state court resolution of the jurisdictional issue is not nearly so burdensome for litigants as the ugly prospect of impasse, their former lot. The deferral of federal relief is not too great a price to pay.

G. CONCLUSION

There is little doubt that Brainerd Currie, were he alive, would oppose the expansive construction placed on 28 U.S.C. § 1738A by the Third Circuit and advocated in this article as a more rationalizing, albeit not innately rational, approach. In his critique of Professor Ratner's proposal¹⁶⁶ for state legislative solutions to the problem of the nonfinality of child custody awards¹⁶⁷ (which ultimately became the UCCJA),¹⁶⁸ Professor Currie anticipated the

163. 727 F.2d at 312.

164. *Id.* n.28.

165. *Id.* at 312-13.

166. Ratner, *supra* note 19, at 798-99 and 827 n.153.

167. *E.g.*, Note, *Prevention of Child Stealing: The Need for a National Policy*, 11 Loy. L.A.L. Rev. 829 (1978).

168. See Bodenheimer, *The Uniform Child Custody Jurisdiction Act: A Legislative*

possibility of a congressional solution on the order of § 1738A;¹⁶⁹ but he expressly disapproved of it.¹⁷⁰

Statutory solutions displeased Currie because they operated on the principle of a mechanical assignment of jurisdiction and a foreclosure of the issues on the basis of an artifact such as the priority of litigation. For him, the child's "best interest" was both a paramount and a fluid condition which could and did change over time and which, because it was fluid, could not be fixed in the law by rules of priority or doctrines like *res judicata*.¹⁷¹ To resolve a child's *best interest* by artificial reference to a rule-based construct would trade clarity and security for litigant parents and courts at the expense of both children and state courts, which lost the ability to assess the child's best interest based upon a current evaluation of extant interests and circumstances. The statutory approach of § 1738A, which so obviously disserves the interest of the state by according full faith and credit to a prior award that meets the federal statute, is, at best, a balancing of less than optimal alternatives. Child-snatching is a problem of significant dimensions; and it, in and of itself as Wexler's canvassing of the psychological and sociological literature amply demonstrates,¹⁷² is hardly to a child's advantage. Further, any system which protects the integrity of the state court's opportunity to fully assess the facts surrounding the *best interest* of a child within its jurisdiction at the expense of fostering a *snatch and run* technique of acquiring jurisdiction over the child runs the risk of being perceived at least publicly as contradictory.¹⁷³ In the face of such hard choices, Congress has passed a statute, which can and has been read by the Third Circuit to resolve by statute some of the intractable aspects of child custody

Remedy for Children Caught in the Conflict of Laws, 22 VAND. L. REV. 1207, 1216-18 (1969); Commissioners' Note to § 1, UCCJA, 9 U.L.A. 117 (1979).

169. "Conceivably Congress might undertake a more elaborate solution [than that proposed by Professor Ratner]." Currie, *supra* note 1, at 116.

170. "[S]urely the proposal is unwise and unacceptable, and the effort serves mainly to demonstrate the probable inadequacy of any academic, judicial, or other sketchily informed effort to regulate this complex matter by detailed rules of jurisdiction and full faith and credit." Professor Currie concludes by characterizing the proposal as "regressive" in comparison with that reached in *Sampsell v. Superior Court*, 32 Cal.2d 763, 197 P.2d 739 (1948). *Id.* at 117; *cf.* Brigitte Bodenheimer, the Reporter for the Special Committee of the Commissioners on Uniform State Laws which prepared the UCCJA, apparently misread Currie, concluding the "congressional legislation under the authorization of the full faith and credit clause" was Currie's "preference." Bodenheimer, *supra* note 151, at 1216 and n.38.

171. See, e.g., Currie, *supra* note 1, at 116-18.

172. Wexler, *supra* note 10, at 784-803.

173. Ratner agrees. See Ratner, *supra* note 21, at 190-91.

by affording litigants a sure federal forum in which to enforce prior custody awards complying with the PKPA. This solution will, in the long run, doubtless prove the lesser of the two evils. Child custody, which obviously fits uneasily into our federal scheme because of its importance to state police power interests as well as its emotional content for the litigant parents and the interest of a third party (the child), invites a rule-based approach which would clearly prove unsatisfactory in other contexts.

Currie's concerns about the nonfinality of child custody decrees can be seen to embrace both a legitimate constitutional concern for the rightful claim of the state to decide what is in the "best interest" of a child physically present before its courts, as well as a concern for the substantive aspect of the "best interest" issue itself, i.e., what is in fact *best* for this particular child.¹⁷⁴ Of these two concerns, the first preoccupied Currie. History, on the other hand, has more highly valued the second, particularly given the problem child-snatching has become. The PKPA is an appropriate response to a problem of national dimensions.

The *May* problem, on the other hand, is one that will not merely go away, as noted above. It represents a limited problem confined to the few cases in which state courts reach out to assert jurisdiction on too fragile a constitutional basis, rather than a significant hurdle which will prevent this new and salutary approach to federal district court relief through § 1738A defined by the Third Circuit.

174. Currie, *supra* note 1, at 117-18.