

Note,  
**PRE-EMPTION OR ABDICATION? COURTS  
RULE FEDERAL LAW TRUMPS STATE LAW  
IN CHILD SUPPORT JURISDICTION**

by  
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**I. Introduction**

*A. Uniform Interstate Family Support Act (UIFSA)*

The 1996 version of the Uniform Interstate Family Support Act was adopted in every state, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands. The 2001 version has been adopted in twenty-one states (Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Idaho, Illinois, Maine, Mississippi, Nebraska, Nevada, New Mexico, Oklahoma, Rhode Island, South Carolina, Texas, Utah, Virginia, Washington, West Virginia, Wyoming) and the District of Columbia. The Uniform Law Commission passed amendments in 2008 dealing with the enforcement and modification of foreign support orders under the Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, concluded at The Hague on November 23, 2007. This version has been approved in seven states (Maine, Nevada, New Mexico, North Dakota, Tennessee, Utah, Wisconsin), and introduced in six more states in 2011.<sup>1</sup>

Prior to UIFSA, interstate enforcement and modification of support was governed by the Uniform Reciprocal Enforcement of Support Act (URESA). URESA was first drafted and approved by the National Conference of Commissioners on Uniform State Laws in 1950. At the time, URESA was an important development in the law of support enforcement: URESA provided the first mechanism by which support orders could be established and enforced across state lines. Pursuant to URESA,

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<sup>1</sup> Legislative Fact Sheet, <http://nccusl.org/LegislativeFactSheet.aspx?title=interstate%20Family%20Support%20Act%20Amendments%20%282008%29> (last visited April 27, 2011).

an obligee could establish paternity, establish a support duty, enforce an existing support order for both arrears and prospective support, seek a new order in a higher amount, and register a foreign support order in a second state.<sup>2</sup> In the years since its adoption, URESA proved incredibly troublesome, for a number of reasons. Indeed, the United States Supreme Court even noted criticisms of URESA: “Although appellant’s argument that URESA is inadequate to enforce support obligations is persuasive, for purposes of deciding this case we need neither accept nor reject it.”<sup>3</sup>

The shortcomings of URESA were many. First, URESA did not have a long-arm provision. All proceedings under URESA required initiation of a proceeding in the initiating state through the filing of a petition or a request for registration that was forwarded to the appropriate entity in the responding state. URESA thus always involved two states. Further, once the responding state took the URESA case, the responding state was limited to the URESA petition only, and jurisdiction was not conferred on the court on any counterclaim the obligor might have. Jurisdiction for modification had to exist independent of the URESA petition.

Second, URESA began its life as the Runaway Pappy Act: It was designed to allow obligees to track down obligors.<sup>4</sup> Thus, through all its revisions and amendments, it only allowed obligees to initiate an action. Parties, however, may relocate for legitimate reasons, and both the obligor and the obligee should have access to the system of revision and enforcement.

Third, the biggest problem under URESA was that a URESA order did not nullify any other support order, and was not nullified by any other support order, regardless of the priority of issuance, unless as specifically provided by the court. Therefore, a URESA order existed independent of any other

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<sup>2</sup> See generally Margaret C. Haynes, *The Uniform Reciprocal Enforcement of Support Act*, in *INTERSTATE CHILD SUPPORT REMEDIES* (Margaret C. Haynes & G. Diane Dodson, eds. 1989).

<sup>3</sup> *Jones v. Helms*, 452 U.S. 412, 425 n.26 (1981) (citing commentators critical of URESA).

<sup>4</sup> Shannon Braden, *Battling Deadbeat Parents: The Constitutionality of the Child Support Recovery Act in Light of United States v. Lopez*, 7 *KAN. J.L. & PUB. POL’Y* 161, 164 (1998).

support order between the parties. If the URESA order required payment of support in a different amount than that required by another support order, both were valid orders with which the obligor had to comply. This result of multiple, conflicting orders caused the National Conference of Commissioners on Uniform State Laws to reexamine URESA and ultimately to abandon URESA altogether.

URESAs were amended in 1952 and in 1956, and it was substantially redrafted in 1968, resulting in RURESAs, the Revised Uniform Reciprocal Enforcement of Support Act.<sup>5</sup> In 1988, the National Conference of Commissioners on Uniform State Laws formed a drafting committee to again revise URESAs to reflect the changes in child support enforcement since 1968. The drafting committee concluded that the best course of action would be not to revise URESAs, but to draft an entirely new act to supersede URESAs, embodying the radically different, but better, policy of one order, one time, one place. The fruit of the efforts of the drafting committee is the Uniform Interstate Family Support Act (UIFSA).<sup>6</sup>

The Welfare Reform Bill, signed into law on August 22, 1996, makes UIFSA mandatory in all states by providing that, as a condition of receiving federal funds, all states must have UIFSA in effect by January 8, 1998, as approved by the American Bar Association on February 9, 1993, together with any amendments officially adopted before January 1, 1998 by the National Conference of Commissioners on Uniform State Laws.<sup>7</sup> URESAs are dead; long live UIFSA.

#### B. *Full Faith and Credit for Child Support Orders Act (FFCCSOA)*

The problem of enforcement of child support orders was particularly troublesome to Congress. Congress has an interest in enforcement of child support orders because when child support is not paid by a noncustodial parent the federal government pays child support in the form of welfare. As commentators noted:

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<sup>5</sup> John J. Sampson, *Uniform Interstate Family Support Act*, 43 FAM. L.Q. 75 (2009).

<sup>6</sup> See also Traer Cundiff, *Making Sense of the Changes: The 2001 Amendments to UIFSA*, 20 J. AM. ACAD. MATRIM. LAW. 323 (2007).

<sup>7</sup> See 22 Fam. L. Rep. (BNA) 1484 (1996).

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To a large extent, the problem of welfare in the United States is due to the nonsupport of children by their absent parents. AFDC benefits are in a direct sense child support paid by the taxpayer: eligibility for AFDC requires a dependent child and a parent who is absent from the home.<sup>8</sup>

Compounding the financial burden on Congress was the fact that interstate modifications of child support orders were governed by the Uniform Reciprocal Enforcement of Support Act (URESA) or its revised version (RURESA). Under URESA, the forum state frequently asserted the right to modify any outstanding support orders. Under the antisupecession clause of URESA, however, this led to the anomalous result of more than one valid support order being in effect in more than one state.

In 1994, Congress addressed the problems of interstate enforcement of child support by enacting the Full Faith and Credit for Child Support Orders Act (FFCCSOA).<sup>9</sup> The FFCCSOA was drafted by the United States Commission on Interstate Child Support, and was always intended to be consistent with the principles of the Uniform Interstate Family Support Act (UIFSA). To this end, the FFCCSOA defines its key term, continuing, exclusive jurisdiction, in a manner consistent with UIFSA, and the legislative history states that this key term is to be interpreted consistently with UIFSA.<sup>10</sup>

The FFCCSOA and UIFSA thus interact together, much like the Parental Kidnapping Prevention Act (PKPA) and the Uniform Child Custody Jurisdiction Act (UCCJA) interact together. The federal statute lays out jurisdictional requirements for state courts to recognize, enforce, and modify orders of sister states, while the state statute lays out the requirements for the state to make original orders, recognize foreign orders, and modify any outstanding order.<sup>11</sup> Thus, FFCCSOA is a federal statute

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<sup>8</sup> MARIAN F. DOBBS, MARGARET C. HAYNES & MARILYN R. SMITH, *ENFORCING CHILD AND SPOUSAL SUPPORT* § 4.04 at 4-10 (1995).

<sup>9</sup> Full Faith and Credit for Child Support Orders Act, 28 U.S.C. § 1738B (2011).

<sup>10</sup> 28 U.S.C. § 1738B(d).

<sup>11</sup> See *Child Support Enforcement Division of Alaska ex rel. Brenckle v. Brenckle*, 675 N.E.2d 390 (Mass. 1997) (requiring an independent finding of a duty of support by the Massachusetts court after Alaska has already made that determination would impede and frustrate the purposes of UIFSA, would deny the court issuing the support order the full faith and credit of its judgment in

that establishes the standards by which the states can determine their jurisdiction to issue their own support orders and the effect to be given to support orders from other states. As a jurisdictional statute, it is authorized by the Full Faith and Credit Clause of the United States Constitution, which empowers Congress to enact general laws, to prescribe the manner in which state Acts, records, and proceedings shall be proved, and the effect thereof.<sup>12</sup>

### C. *Original Inconsistencies Between UIFSA and the FFCCSOA*

It was the goal of the United States Commission on Interstate Child Support that the FFCCSOA be consistent with the principles of UIFSA. The 1994 version of the FFCCSOA contained a number of inconsistencies, however.

In the 1994 and 1996 versions, the definition of contestant in subsection (b) includes a state or political subdivision of a state to which the right to obtain child support has been assigned. In the 1994 version, continuing, exclusive jurisdiction remained in the issuing state so long as a contestant resided there. Thus, a state agency may hold the case in one state forever, even if all parties have left the state. UIFSA avoided that problem by referring only to individual parties. The 1996 version of the FFCCSOA provides that continuing, exclusive jurisdiction is based on the residence of the child or the individual contestants, as in UIFSA.<sup>13</sup>

The 1996 (passed in 1997) amendments added a definition of a child's home state that is identical to the definition contained in UIFSA. The amendment also undertook technical refinements, by providing rules for determining the controlling order for purposes of enforcement and determination of continuing, exclusive jurisdiction to modify that are consistent with UIFSA. Further, the law amended the choice-of-law subsection to be consistent with UIFSA, clarified that the law of the issuing state governs duration of support, and added a provision that if there is no state with continuing, exclusive jurisdiction the party or agency

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violation of article IV, section 1 of the U.S. Constitution, and would violate the FFCCSOA).

<sup>12</sup> U.S. CONST. art. IV, § 1. (The PKPA is codified at 28 U.S.C. § 1738A (2011); the Defense of Marriage Act is codified at 28 U.S.C. § 1738C (2011).)

<sup>13</sup> 28 U.S.C. § 1738B(d).

seeking modification must register the order in a state with jurisdiction over the nonmovant for the purpose of modification, consistent with UIFSA. The result of this retooling is that the FFCCSOA is compatible with UIFSA.<sup>14</sup>

As stated by Professor John L. Saxon:

Today, UIFSA and FFCCSOA together prohibit a court from entering (and, except under certain limited circumstances, prohibit a court's modification of) a child support order if a sister state's court has already entered a support order involving the same parent and child and the other court's order is, or may be determined to be, the one controlling support order with respect to the parent's duty to support that child or family.<sup>15</sup>

## II. *Draper v. Burke* and *Bowman v. Bowman*

In *Draper v. Burke*, the parties were divorced in Oregon, which entered a child support order.<sup>16</sup> The wife moved to Massa-

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<sup>14</sup> Patricia Wick Hatamyar, *Critical Applications and Proposals for Improvement of the Uniform Interstate Family Support Act and the Full Faith and Credit for Child Support Orders Act*, 71 ST. JOHN'S L. REV. 1 (1997). See also, e.g., *Gentzel v. Williams*, 965 P.2d 855, 860 (Kan. Ct. App. 1998) ("FFCCSOA is similar to UIFSA both in terms of structure and intent. FFCCSOA similarly obligates states to enforce, according to its terms, a child support order issued by another state which is made consistent with the Act's jurisdiction and due process standards."); *Superior Court v. Ricketts*, 836 A.2d 707, 729-30 (Md. Ct. Spec. App. 2003) ("FFCCSOA. . . is intended to work in tandem with the UIFSA and essentially mirrors its jurisdictional concepts."); *Harbison v. Johnston*, 28 P.3d 1136 (N.M. Ct. App. 2001) (same); *New Hanover County v. Kilbourne*, 578 S.E.2d 610, 614 (N.C. Ct. App. 2003) ("Congress, therefore, amended FFCCSOA in 1996 so that it mirrored UIFSA. After the 1996 amendment, FFCCSOA was identical to UIFSA with both acts strictly prohibiting modification of a sister state's prior, valid order."). The Tennessee Supreme Court stated this principle strongly in *LeTellier v. LeTellier*, 40 S.W.3d 490, 498 (Tenn. 2001):

[T]he legislative history of FFCCSOA consistently addresses UIFSA and FFCCSOA in tandem and expresses that the statutes were intended to work together without conflict. In light of this legislative history, we find it appropriate to construe the ambiguous jurisdictional provisions of FFCCSOA to be in harmony with UIFSA to the greatest extent possible.

<sup>15</sup> John L. Saxon, *Reconciling Multiple Child Support Orders Under UIFSA and FFCCSOA: The Twaddell, Roberts, and Dunn Cases*, FAM. LAW. BULL., June 2000, at 3.

<sup>16</sup> 881 N.E.2d 122, 128 (Mass. 2008).

chusetts with the children, and the husband moved to Idaho. The wife requested a modification of child support in Massachusetts.

The court admitted that under UIFSA section 611, the trial court could not take jurisdiction, because the wife, the petitioner, was a resident of Massachusetts. Nonetheless, the court concluded that Massachusetts had subject matter jurisdiction under the FFCCSOA:

[T]he Federal act obligates States to enforce child support orders issued by another State, and imposes limitations on a State's authority to modify child support orders issued by another State. See 28 U.S.C. § 1738B(a). Regarding modification, insofar as relevant here, the Federal act provides:

“A court of a State may modify a child support order issued by a court of another State if-

“(1) the court has jurisdiction to make such a child support order pursuant to subsection (i); and

“(2)(A) the court of the other State no longer has continuing, exclusive jurisdiction of the child support order because that State no longer is the child's State or the residence of any individual contestant. . . .”

*Id.* at § 1738B(e). Title 28 U.S.C. § 1738B(i), in turn, provides:

“If there is no individual contestant or child residing in the issuing State, the party or support enforcement agency seeking to modify, or to modify and enforce, a child support order issued in another State shall register that order in a State with jurisdiction over the nonmovant for the purpose of modification.”

These provisions of the Federal act confer subject matter jurisdiction in Massachusetts because the issuing State, Oregon, no longer has continuing, exclusive jurisdiction (because the wife, husband, and children no longer reside in Oregon); no other State has modified the Oregon judgment; the parties have not executed written consents to jurisdiction elsewhere; and the Probate and Family Court has personal jurisdiction over the husband.

In *Bowman v. Bowman*, the husband and wife were married and divorced in Washington state.<sup>17</sup> The wife and child relocated to New York, while the husband relocated to California. In 2009, the wife filed a petition in Saratoga County, New York, to modify respondent's visitation. The husband answered and cross-petitioned seeking sole custody of the child. Both parties appeared before family court and, in December of 2009, the court entered

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<sup>17</sup> 917 N.Y.S.2d 379 (N.Y. Sup. Ct. 2011).

an order modifying the visitation provisions of the custody order. In the meantime, the wife registered the Washington support order in New York and commenced a proceeding seeking an upward modification of support.

The husband moved to dismiss the petition on the ground that New York did not have personal jurisdiction over him or subject matter jurisdiction to modify the Washington support order. A support magistrate granted the husband's motion to dismiss the petition for lack of subject matter jurisdiction under UIFSA. The family court subsequently dismissed the wife's objections regarding jurisdiction and confirmed the support magistrate's order.

The New York appellate division found a "conflict" between UIFSA and the UCCJEA's provisions concerning when a petitioner may request modification of a child support order once all the parties have left the original issuing state, and set about to decide whether the FFCCSOA preempts "this inconsistent provision of UIFSA."<sup>18</sup> Like the Massachusetts court, the court in *Bowman* found that the FFCCSOA preempts UIFSA, and thus a party can petition in his or her own jurisdiction for a modification of child support once all the parties have left the original state, contrary to the clear language of section 611 of UIFSA.

### **III. Criticism of *Draper v. Burker* and *Bowman v. Bowman***

These decisions are wrong for a number of reasons. First, the legislative history of FFCCSOA demands that it be construed in tandem with UIFSA. This was explained very well in *Gentzel v. Williams*, which addressed the same argument.<sup>19</sup> In that case, husband and wife were divorced in Arizona, which entered a child support order. After the divorce, the wife and children moved to Texas, and the husband moved to Kansas. The husband then moved to modify support in Kansas, his state of residence.

Under section 611 of UIFSA, clearly he could not be the petitioner. The husband argued that under FFCCSOA, he could be the petitioner. The court held as follows:

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<sup>18</sup> *Id.* at 383.

<sup>19</sup> 965 P.2d 855 (Kan. Ct. App. 1998).



The same result is reached through an application of the FFCCSOA, adopted by Congress in 1994. FFCCSOA is similar to UIFSA both in terms of structure and intent. FFCCSOA similarly obligates states to enforce, according to its terms, a child support order issued by another state which is made consistent with the Act's jurisdiction and due process standards. 28 U.S.C. § 1738B(a); *See Kelly v. Otte*, 123 N.C.App. 585, 589-90, 474 S.E.2d 131, rev. denied 345 N.C. 180, 479 S.E.2d 204 (1996).

Under 28 U.S.C. § 1738B(a) and (c), if a child support order is made by a court that had jurisdiction and gave notice and an opportunity for hearing to the parties, a court of another state cannot modify the order except as provided. The major difference with UIFSA is that FFCCSOA does not contain the "nonresident petitioner" restriction on modification jurisdiction. Modification under FFCCSOA of a valid order is only allowed if: (1) neither the child(ren) nor any of the parties remain in the issuing state and the forum state has jurisdiction over the parties; or (2) all parties have consented to the jurisdiction of the forum state to modify the order. 28 U.S.C. § 1738B(e) and (i).

Williams could argue that he has met the requirements of 28 U.S.C. § 1738B(e)(1) and (2)(A) since neither the child(ren) nor any of the parties remain in Arizona, and Kansas has jurisdiction over the parties under the common-law jurisdiction (subject matter jurisdiction) to decide child support matters. *See, e.g., Boyce*, 13 Kan.App.2d at 589, 776 P.2d 1204.

28 U.S.C. § 1738B(i) allows the party seeking to modify the order to register the order "in a State with jurisdiction over the nonmovant for the purpose of modification." (Emphasis added.) Interpreting the word "jurisdiction" in 28 U.S.C. § 1738B(i) to mean both personal jurisdiction and subject matter jurisdiction to modify would avoid the anomaly of reaching different results under FFCCSOA and UIFSA. Subject matter jurisdiction is the power of the court to hear and decide a particular type of action. On the other hand, personal jurisdiction is the power which a court has over the defendant's person and which is required before a court can enter a personal or in personam judgment. *See Carrington*, 22 Kan.App.2d at 817, 923 P.2d 1052.

Therefore, since Kansas would not have subject matter jurisdiction to modify the Arizona child support order under UIFSA, Kansas should not have "jurisdiction over the nonmovant for the purpose of modification" under FFCCSOA either. This construction harmonizes the results attained by FFCCSOA and UIFSA and furthers uniformity in interstate enforcement of child support orders.<sup>20</sup>

Second, the court is wrong, as a matter of federal preemption law, to say the FFCCSOA preempts UIFSA because it conflicts. It does not conflict; it is *silent* as to the requirement that the

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<sup>20</sup> *Id.* at 860-61.

petitioner not be a resident of the forum, and *silence* on the issue cannot be construed to be a “conflict” such that federal preemption applies. It is well settled that, under the Supremacy Clause of the United States Constitution, federal law may supersede state law (1) by explicit preemptive language; (2) where Congress’ intent to preempt may be inferred when the federal regulatory scheme occupies the whole field, thus precluding enforcement of state laws on the same issue; and (3) where the state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”<sup>21</sup> None of these conditions apply. Indeed, Congress specifically intended that UIFSA apply to subject matter jurisdiction by requiring that UIFSA be enacted word for word by the states or else lose federal IV-D funding. In this light, applying federal law as the Massachusetts Supreme Judicial Court did and as the New York Appellate Division did, as opposed to state law, is standing as an obstacle to an explicit purpose and objective of Congress.

Third, FFCCSOA is *not*, as both the *Draper* and *Bowman* court stated, a subject matter jurisdiction statute. Rather, it is a statute that proclaims when one state will give full faith and credit to the child support orders of another state. It does not, and cannot, in and of itself confer subject matter jurisdiction on a state court. There is *no* federal statute that defines the subject matter jurisdiction of a state court.<sup>22</sup>

Finally, *Draper v. Burke* stands as the latest troubling example of Massachusetts taking jurisdiction over cases at any cost, even at the expense of ignoring a state statute and federal legislative policy. *Cherin v. Cherin*, decided July 30 of 2008, also raises an eyebrow.<sup>23</sup> In that case, the court found personal jurisdiction over the husband based on the “impression” he gave to the wife, who moved to Massachusetts, that the marriage was ongoing, despite an almost complete lack of other minimum contacts.

*Bowman v. Bowman* also continues a pattern in New York of the courts flouting UIFSA. For many years, the New York courts ignored the clear language of UIFSA that a child support

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<sup>21</sup> *Hillsborough County v. Automated Med. Labs. Inc.*, 471 U.S. 707, 713 (1985).

<sup>22</sup> For example, PKPA only defines when a state custody order is to be given full faith and credit, to wit, when it complies with UCCJEA.

<sup>23</sup> 891 N.E.2d 684 (Mass. App. Ct. 2008).

ends when the original state provides it ends, and instead allowed parties to enter successive orders. It took the Court of Appeals in *Spencer v. Spencer* to finally put a stop to this erroneous practice.<sup>24</sup>

#### IV. Solutions

The failure of Massachusetts and New York to abide by UIFSA could result in the lack of federal funding for the Department of Revenue's child support enforcement services.<sup>25</sup> Therefore, if the federal government is serious about the collection of child support and the integrity of UIFSA, the U.S. Department of Health and Human Services should threaten this cut.

Congress should also add the language to FFCCSOA that the Massachusetts and New York courts found lacking, to wit, that after a state has lost continuing, exclusive jurisdiction, a new state may take modification jurisdiction only on the petition of a non-resident, unless both parties are residents of the new forum.

Finally, perhaps some courageous member of the bar will force the issue in federal court.<sup>26</sup>

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<sup>24</sup> 882 N.E.2d 886 (N.Y. 2008).

<sup>25</sup> 42 U.S.C. § 666(f) (2011).

<sup>26</sup> The federal court would have jurisdiction over the matter as presenting a question of federal law, the interpretation of FFCCSOA. 28 U.S.C. 1331.

