

Child Custody and Visitation by Non-Parents Under the New Uniform Child Custody Jurisdiction and Enforcement Act: A Rerun of Seize-and-Run

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I. Introduction

There is cause for grave concern among grandparents and the numerous other non-parents who visit minor children or sometimes have their custody. Many of these adults maintain important and mutually beneficial relationships with these children. Non-parent visitors and erstwhile custodians often include grandparents, and sometimes include also step-grandparents, great-grandparents, adult siblings, aunts, uncles, cousins, former step-parents, former foster parents, former heterosexual and homosexual partners, and others.¹ A recently promulgated uniform law, the Uniform Child Custody Jurisdiction and Enforcement

¹ See, e.g., Bruner v. Tadlock, 991 S.W.2d 600 (Ark. 1999) (grandparents' visitation); Young v. Smith, 964 S.W.2d 784 (Ark. 1998) (stepparent's visitation); E.N.O. v. L.M.M., 711 N.E.2d 886 (Mass. 1999) (visitation by mother's former lesbian partner); Youmans v. Ramos, 711 N.E.2d 165 (Mass. 1999) (aunt's visitation); Olson v. Olson, 534 N.W.2d 547 (Minn. 1995) (grandmother's visitation); Settle v. Galloway, 682 So.2d 1032 (Miss. 1998) (grandparents' visitation); Farrell v. Denson, 821 S.W.2d 547 (Mo. Ct. App. 1991) (grandmother's visitation); Watkins v. Nelson, 729 A.2d 484 (N.J. App. Div. 1999) (grandparents' custody); In re E.A.R., 1999 WL 30206 (Wash. Ct. App.) (unpublished opinion), petition for cert. filed, 67 U.S.L.W.3008 (U.S. June 21, 1999) (No. 98-2047) (custody by father of child's half-sibling). Visitation of minor children by persons other than parents, which this article refers to as visitation by "non-parents," is sometimes referred to as "third-party" visitation.

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Act (UCCJEA),² contains provisions that on their face would allow custodial parents in many cases to prevent or end such contacts with their children unilaterally, by relocating from one state to another. These provisions would also invite virtually endless litigation and conflicting decrees in different states.

This aspect of the newly proposed statute is an abrupt departure from existing state³ and federal⁴ laws governing jurisdiction and procedure in child custody cases. These existing laws were enacted over the last thirty years to replace what a committee of experts had described in 1968 as a “confused legal situation” that had allowed “self-help and the rule of ‘seize-and-run’” to prevail.⁵

Until the new UCCJEA was promulgated, the state and federal laws adopted in the last few decades placed jurisdiction to resolve custody and visitation disputes usually in the state with the strongest interest in the matter, and with the best opportunity to hear all the interested parties and to evaluate all the relevant evidence.⁶ Those laws did not reward self-help, because an adult could not create immediate jurisdiction in a new state just by moving there with the child.⁷ The laws limited relitigation of such disputes, because they permitted joinder of all interested parties in a single proceeding, so the resulting decisions bound all those parties.⁸

² Unif. Child Custody Jurisdiction And Enforcement Act (1997), 9 U.L.A. Part I pp. 257-94 (1999 Supp. Pamphlet) [hereinafter UCCJEA]. Successive drafts written by the Drafting Committee that produced the UCCJEA can be found at this website: <http://www.law.upenn.edu/bll/ulc/>. Among them are the following drafts, which bear the following dates. In each case, the following symbols come immediately after “ulc/” in the website given just above: icv/childvis.htm (draft of 1/18/95); uccja/uccja.htm (draft of 11/17/95); icv/chldv-sit.htm (draft for discussion at meeting of 7/12-19/96); uccjea/uccjea.htm (draft of 7/18/96); uccjea/uccjea2.htm (draft of 10/25/96); uccjea/chldcust.htm (draft for approval at meeting of 7/25-8/1/97).

³ Unif. Child Custody Jurisdiction Act (1968), 9 U.L.A. Part I pp. 115-331 (1988) [hereinafter UCCJA].

⁴ 28 U.S.C.A. § 1738A (1994 & 1999 Cum. Ann. Pocket Part). The Pocket Part covers 1998 amendments that changed certain phrasing in legally insignificant ways.

⁵ UCCJA, *supra* note 3, Prefatory Note, at 117.

⁶ *See infra* text accompanying notes 120-44, 172-94.

⁷ *See infra* text accompanying note 145.

⁸ *See infra* text accompanying notes 126-36, 159-65, 355.

In contrast with these statutes, the new UCCJEA provides that the state where children had their home ceases to have jurisdiction as soon as a parent moves them to another state, unless a parent remains there, or unless a non-parent who recently lived with the children for a specified length of time continues to live there.⁹ Furthermore, under the new uniform act, jurisdiction sometimes arises in the children's new state the very day they arrive there,¹⁰ and it becomes exclusive of jurisdiction elsewhere either immediately or, in some cases, after a year or so.¹¹

In addition, under the new UCCJEA, non-parental visitors or recent custodians often need not even be joined as parties in the proceeding in the new state, nor notified of it and given an opportunity to be heard.¹² They sometimes are denied these rights even if they have visitation or, still more remarkable, custody rights under a valid decree of the state from which the parent just fled.¹³ Since they cannot participate in the proceeding, they are not bound by its outcome, so they can bring further lawsuits and obtain conflicting decrees in other states.¹⁴ Obviously, promulgation of the new uniform act should disturb grandparents and other non-parents who live with or visit minor children. In addition, the UCCJEA should worry everyone who is aware of the merits of current custody jurisdiction law, which has deterred adults from seeking jurisdictional advantages in litigation through self-help and forum-shopping, and from disrupting their children's lives with prolonged litigation and inconsistent judgments.¹⁵

⁹ See *infra* text accompanying notes 66-69.

¹⁰ See *infra* text accompanying notes 66-69.

¹¹ See *infra* text accompanying notes 66-75, 96-98.

¹² See *infra* text accompanying notes 69-70, 99-101.

¹³ See *infra* text accompanying notes 69-75, 100-01.

¹⁴ See *infra* text accompanying notes 76-83, 102-19.

¹⁵ There are numerous and varied respects in which the UCCJEA is poorly conceived and drafted, and a number of different ways in which its enactment and application would harm children and cause other mischief. I plan to write another article offering a relatively thorough critique of important flaws in the new uniform act. This article, however, focuses on only one of these problems, the UCCJEA's treatment of grandparents and other non-parents who seek orders for visitation or custody, or who have already obtained such orders. For some other criticisms of the UCCJEA, see, e.g., Barbara Ann Atwood, *Identity and Assimilation: Changing Definitions of Tribal Power Over Children*, 83 MINN. L. REV. 927, 993 (1999) (suggesting modifications that states

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Fortunately, the harm to be caused by the new UCCJEA will be limited by operation of a federal statute, commonly called the PKPA,¹⁶ that was enacted in 1980 as part of the Parental Kidnapping Prevention Act.¹⁷ In some important respects, a few of which are discussed in this article,¹⁸ the UCCJEA on its face directs or permits courts to violate the PKPA. As I explain below,¹⁹ the federal statute preempts the new uniform act in such cases and renders the UCCJEA invalid as applied, so the PKPA prevents some of the problems that the new act otherwise would cause.

Part II of this article illustrates mischief that, but for the federal statute, the new uniform act would work in a hypothetical grandparent visitation case based in some respects on the facts of a reported decision. Part III does likewise for a hypothetical dispute over a child's primary custody. Part IV describes the contrast between the new UCCJEA and the prior state law on this subject. Part V similarly explains the contrast between the UCCJEA and the PKPA. Part VI illustrates the interrelationships among these various sources of law, by applying all of them to the same hypothetical cases to which the new uniform act was applied in Parts II and III. Part VII addresses additional problems the UCCJEA may create in light of federal and state constitutional provisions and another federal statute. Part VIII critiques the UCCJEA drafters' purported justifications for some of the features of the new act that are addressed in this article. The article ends with Part IX, a brief conclusion to the effect that state legislatures should reject the UCCJEA, or at least should consider it very carefully before taking action to substitute it for their existing statutes.

enacting the UCCJEA could make in its provisions, to exclude Indian tribes from its coverage or to give special treatment to tribal custody decrees); David H. Levy & Nanette A. McCarthy, *A Critique of the Proposed Uniform Child Custody Jurisdiction and Enforcement Act*, 10 J. AM. ACAD. MATRIM. LAW. 149 (1998) (criticizing many provisions of the new uniform act).

¹⁶ 28 U.S.C.A. § 1738A (1994 and 1999 Cum. Ann. Pocket Part).

¹⁷ Pub. L. No. 96-611, § 8(a), 94 Stat. 3569 (1980) (codified at 28 U.S.C. sec. 1738A (1994)).

¹⁸ See *infra* text accompanying notes 210-34.

¹⁹ See *infra* text accompanying note 221-22.

II. The UCCJEA and Non-Parent Visitation

When a child's parents are unmarried, separated, or divorced, the custodial parent often becomes displeased with a non-parent's visitation of the child, which until then had occurred either by that parent's permission or by court order. The volume of litigation over such disputes is large.²⁰

Consulting a lawyer, the custodial parent in such a case often learns that, if she cuts off visitation, the law of the state will permit the non-parent to seek enforcement of any existing visitation order, give the non-parent standing to seek visitation even if no such order was previously made, and then permit enforcement of the new order.²¹ She may further learn that the legal standards for the court's awarding such relief, when applied to the facts of her case, make it quite likely that a new order for visitation will be granted and enforced, or that any existing visitation decree will likewise be enforced.

A similar situation can arise when a child's parents live together and wish to terminate visitation a non-parent has been enjoying by their permission or by judicial decree. Such cases are much less common than cases involving parents who live apart, however, because the laws of most states are much more favorable to non-parents' visitation of children living with just one parent than of children who live with both.²² For that rea-

²⁰ Robert J. Levy has written that "especially if postdecretal activity is considered, more judicial energy is spent resolving visitation issues than is spent on custody dispositions." *Rights and Responsibilities for Extended Family Members?*, 27 FAM. L.Q. 191, 201 (1993). An impression of the large volume of disputes over visitation by non-parents can be gained by reading *Family Law in the Fifty States 1996-97: Case Digests*, 31 FAM. L.Q. 667, 726-34 (1998), where many reported custody and visitation decisions involving non-parents are briefly summarized. Similar summaries are published in this journal annually. Of course, the number of litigated cases far exceeds the number of reported cases, and many such disputes never reach the courts for reasons unrelated to their merits.

²¹ For readers' convenience, this article refers to custodial parents with feminine pronouns. The huge majority of custodial parents of minor children are women. *Parents with Custody of Children*, 21 CHILD SUPPORT REPORT 4 (May 1999) (summarizing a Census Bureau Report of April 1996 to the effect that 85 percent of custodial parents were women).

²² See, e.g., Arnold H. Rutkin, *Family Law and Practice*, vol. 3 § 32.09[7] at 32-282 (1999) (stating that "even in jurisdictions providing grandparents with

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son, the following analysis is focused on cases of children living with only one parent. Such residential arrangements are very common; only about 55 percent of American children live with both biological parents.²³

When the custodial parent in such a case decides to cut off the non-parent's visitation, and learns that her chance of success is doubtful in her own state, the new UCCJEA on its face gives her a way of achieving her goal, provided only that the child's other parent does not live in the same state where she and the child have been living. These days, that is very frequently true, especially in the kinds of situations in which a custodial parent and a non-parent contest visitation. Sometimes the father is unknown, and sometimes deceased. In many other cases, the father is identified and alive, but has already begun living apart from the mother and in a different state from her by the time the visitation dispute arises. Relocations of one or both of a child's parents very commonly result from employers transferring employees, from persons switching from one employer or locus of self-employment to another, and from a parent's beginning a new romantic or marital relationship.

The terms of the UCCJEA give the custodial parent the following method of ending visitation in such a case. She simply moves to a state where the legislature has enacted the UCCJEA and has chosen not to approve standing to seek visitation rights in her type of case. Then she files and pursues a lawsuit seeking an order for her custody exclusive of the non-parent's visitation.²⁴ The new uniform act purports to authorize the court to grant that order without giving the non-parent a hearing or even notice of the proceeding.²⁵ In this manner, according to the terms of the UCCJEA, the parent can not only prevent the entry of an original visitation order where none yet exists, she can even cancel visitation previously ordered by a court of the state she

broad rights to request court-ordered visitation, . . . the general rule is that visitation will not be granted in an ongoing, intact marriage").

²³ See Lee E. Teitelbaum, *Rays of Light: Other Disciplines and Family Law*, 1 J.L. & FAM. STUD. 1, 5 (1999) (summarizing findings of study of 1994 data).

²⁴ See *infra* text accompanying notes 62-65.

²⁵ See *infra* text accompanying notes 66-70.

just left.²⁶ Even when such a prior decree exists, the person whose court-ordered rights are being canceled is not entitled under the proposed act to notice of the proceeding or any opportunity to be heard in it.²⁷ As will be explained below,²⁸ only the federal PKPA prevents this application of the UCCJEA.

At least nineteen states have already enacted the new uniform act.²⁹ Legislatures in a number of other states are apparently considering it.³⁰ But for the PKPA, widespread enactment of the UCCJEA would result in unfairness to grandparents and other non-parents and, more important, harm to children whose lives are enriched by established and beneficial relationships with caring adults. In addition, the terms of the new act would provide an apparent incentive for a parent to disrupt her child's stable lifestyle by relocating from a state where the child has been flourishing to another state where the law disfavors the kind of visitation or custody in question, simply to destroy the child's relationship with the non-parent. The UCCJEA would invite retaliatory self-help by the non-parent, re-litigation of the dispute, and entry and enforcement of conflicting decrees of the parent's and non-parent's states. These statutory incentives for self-help, forum-shopping, re-litigation, and conflict stand in marked con-

²⁶ See *infra* text accompanying notes 71-74.

²⁷ See *infra* text accompanying note 75.

²⁸ See *infra* text accompanying notes 210-31.

²⁹ *E.g.*, Ala. Code §§ 30-3B-101 *et seq.*; Alaska Stat. §§ 25.30.010 *et seq.* (Michie 1999); 2000 Ariz. House Bill No. 2305, enacted Apr. 10, 2000; Ark. Code Ann. §§ 9-19-101 *et seq.*; Cal. Fam. Code §§ 3400 *et seq.* (West 2000); 1999 Conn. Legis. Serv. P.A. 99-185 (West); 2000 Idaho Sen. Bill No. 1298, enacted Apr. 12, 2000; Iowa Code Ann. §§ 598B.101 *et seq.*; 19-A Me. Rev. Stat. Ann. §§ 1731 *et seq.*; Minn. Stat. Ann. §§ 518D.101 *et seq.*; Mont. Code Ann. §§ 40-7-101 *et seq.*; 1999 N.C. Sess. Laws 1999-223; N.D. Cent. Code §§ 14-14.1-01 *et seq.*; Okla. Stat. Ann. tit. 43, §§ 551-101 *et seq.* (West 1999); 1999 Or. Laws ch. 649; Tenn. Code Ann. §§ 36-6-201 *et seq.*; Vernon's Tex. Stat. & Code Ann., Fam. Code, tit. 5, subtit. B, §§ 152.001 *et seq.*; 2000 Utah Sess. Laws S.B. No. 104, West's No. 54; W. Va. 2000 Sess. Laws S.B. No. 129, West's No. 17.

³⁰ See, *e.g.*, 2000 Colo. House Bill No. 1262; 1999 Del. House Bill No. 398; 2000 Fla. House Bill No. 377; 2000 Fla. Sen. Bill No. 1942; 1999 Ga. House Bill No. 1595; 1999 Ill. Sen. Bill No. 1229; 1999 Kan. House Bill No. 2488; 1999 Kan. Sen. Bill No. 382; 2000 Md. House Bill No. 512; 2000 Mo. Sen. Bill No. 603; 1999 R.I. House Bills Nos. 5822 & 7911; 1999 R.I. Sen. Bill No. 2548; 2000 Va. Sen. Bill No. 462; 1999 Wash. House Bill No. 1962; 1999 Wash. Sen. Bill No. 5464.

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trast to the sound provisions of the prior law of child custody jurisdiction, which promoted children's stability, deterred unilateral attempts by parents to gain jurisdictional advantages, and limited re-litigation and conflicting judgments.³¹

A. *Varieties Of Non-Parent Visitation*

The circumstances of visitation and custody by non-parents vary widely. Some examples of the many possibilities can provide contexts for discussion of issues concerning jurisdiction to award or cancel such rights to visitation or custody.

One example is the recent decision of the New York Appellate Division in *Kenyon v. Kenyon*.³² In 1982, Katrina Kenyon gave birth to a son, apparently out of wedlock.³³ During the child's infancy, Katrina was ill for about a year, during which time Katrina's mother cared for the child "virtually day and night."³⁴ After Katrina recovered from her illness, Katrina's parents had "substantial ongoing contact"³⁵ with the child until he was twelve years old. The grandparents "took the child on frequent family camping trips and regularly exchanged birthday and greeting cards with the child over the years."³⁶

Then Katrina "refused to permit further contact"³⁷ between her son and his grandparents, so the latter petitioned the New York Family Court for visitation rights. The court held an evidentiary hearing in which Katrina and her parents presented evidence. At the conclusion of the hearing, the court found that Katrina's stated reason for denying the grandparents access to her son was "pretextual,"³⁸ and determined that it was in the child's best interest to have visitation with his grandparents. When Katrina appealed, the Appellate Division found "ample record evidence" to justify the grandparents' standing to seek visitation,³⁹ and found no basis on which to disturb the Family

³¹ See *infra* text accompanying notes 120-71.

³² 674 N.Y.S.2d 455 (N.Y. App. Div. 1998).

³³ I infer that the child was born out of wedlock from the lack of any reference to the child's father in the reported opinion.

³⁴ *Kenyon v. Kenyon*, 674 N.Y.S. 2d at 456.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Kenyon v. Kenyon*, 674 N.Y.S. 2d at 456.

Court's determination that visitation was in the child's best interest. The mother was prevented from unilaterally destroying the grandparental relationship from which the child had greatly benefited for the last twelve years.

In some states, the law is contrary to that of New York, in that it does not give grandparents standing to seek court-ordered visitation in cases like *Kenyon*.⁴⁰ Also, the law differs from state to state concerning grandparents' standing to seek court-ordered visitation in various kinds of cases quite unlike the *Kenyon* case.⁴¹ For example, some states give grandparents standing to seek visitation of children living at home with both parents, and some do not.⁴² Some states give grandparents standing to seek visitation even after adoption or other judicial proceedings have terminated the parental rights of one or both of the minor children's parents, and some do not.⁴³ These interstate variations in the law are of great practical importance, because at any given

⁴⁰ See, e.g., *Fisher v. Gaydon*, 477 S.E.2d 251 (N.C. Ct. App. 1996), *review denied*, 483 S.E.2d 706 (N.C. 1997). See generally Nicole E. Miller, Note, *The Best Interests of All Children: An Examination of Grandparent Visitation Rights Regarding Children Born Out of Wedlock*, 42 N.Y.L. SCH. L. REV. 179 (1998).

⁴¹ See generally Christopher M. Bikus, Note, *One Step Forward, Two Steps Back*, 75 NEB. L. REV. 288, 293 (1996) (referring to "several glaring differences among the laws" of various states on grandparent visitation); John Dewitt Gregory, *Blood Ties: a Rationale for Child Visitation by Legal Strangers*, 55 WASH. & LEE L. REV. 351, 369-71 (1998) (stating that the grandparent visitation statutes of different states "vary with respect to the circumstances under which a grandparent may petition for, or be entitled to, the right of visitation," and that "the enactments and the scope of the rights granted are of an enormous variety and virtually defy rational classification"); Michael Quintal, Note, *Court-ordered Families: an Overview of Grandparent-visitiation Statutes*, 29 SUFFOLK U.L. REV. 835 (1995) (commenting that the grandparent visitation statutes are "as diverse as the case law interpreting them").

⁴² Stephen Elmo Averett, *Grandparent Visitation Right Statutes*, 13 BYU J. PUB. L. 355, 357-67 (1999).

⁴³ *Id.* at 367-71; Joan M. Krauskopf *et al.*, *Elderlaw: Advocacy For the Aging* § 25.20 (1998 Supp.) (stating that courts are split on the issue of grandparents' rights to visitation after the parental rights of their own children, the parents of the minor children whose visitation is in question, have been lost through adoption or through proceedings to terminate the parental rights of the parents of the minors).

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point in time millions of American children reside solely with their grandparents or in homes headed by grandparents.⁴⁴

Grandparents are not the only non-parents whose standing to seek visitation in court varies from state to state. The laws of the states vary concerning the standing of a minor child's great-grandparent,⁴⁵ former stepparent,⁴⁶ step-grandparent,⁴⁷ former foster parent,⁴⁸ sibling,⁴⁹ aunt, uncle, or cousin,⁵⁰ and concerning

⁴⁴ See Theresa H. Sykora, *Grandparent Visitation Statutes: Are the Best Interests of the Grandparent Being Met Before Those of the Child?*, 30 FAM. L.Q. 753, 754 (1996) (stating that "more than 1 million children were living solely with their grandparents in 1993; the number living in households headed by grandparents rose by at least a third to 3.4 million in the past decade").

⁴⁵ *E.g., compare* Chavers v. Hammac, 568 So.2d 1252 (Ala. Ct. Civ. App. 1990) (holding that great-grandparent lacked standing to seek visitation), *and* People ex rel. Antonini v. Tracey L., 646 N.Y.S.2d 703 (N.Y. App. Div. 1996) (accord), *with* Alaska Stat. 25.24.150(a) (Michie 1996) (providing that "in an action for divorce or for legal separation or for placement of a child when one or both parents have died, the court may . . . make . . . an order for . . . visitation with the minor child that may seem necessary or proper, including . . . visitation by a grandparent or other person if that is in the best interests of the child") *and* Hoff v. Berg, 595 N.W.2d 285 (N.D. 1999) (holding unconstitutional 1993 amendment to statute requiring grandparents to be given visitation rights unless "visitation is not in the best interests of the minor," but upholding 1983 statute that gave great-grandparents standing to seek visitation).

⁴⁶ *E.g., compare* Finck v. O'Toole, 880 P.2d 624 (Ariz. 1994) (en banc) (stating that stepparents lack standing to seek visitation) *with* Hickenbottom v. Hickenbottom, 477 N.W.2d 8 (Neb. 1991) (holding that court could award visitation to ex-stepparent), *and* Rhinehart v. Nowlin, 805 P.2d 88 (N.M. Ct. App. 1990) (holding that court could award visitation to stepparent). See Gregory, *supra* note 41, at 361 (stating that "even a cursory review of statutes that explicitly provide for stepparent visitation reveals little uniformity and a surprising lack of clarity"); Laura W. Morgan, *The Rights, Duties and Responsibilities of Stepparents to Their Stepchildren: Custody and Visitation*, 8 DIVORCE LITIG. 186 (1996). See generally Diane L. Abraham, *California's Stepparent Visitation Statute*, 7 S. CAL. REV. L. & WOMEN'S STUD. 125 (1997).

⁴⁷ *E.g., compare* Finck v. O'Toole, 880 P.2d 624 (Ariz. 1994) (en banc) (holding that step-grandparents lack standing to seek visitation), *with* Reinhardt v. Reinhardt, 720 So.2d 78 (La. Ct. App. 1998), *cert. denied*, 119 S. Ct. 1761 (1999) (holding that step-grandparents have standing to seek visitation). See Fred A. Bernstein, *This Child Does Have Two Mothers . . . and a Sperm Donor with Visitation*, 22 N.Y.U. REV. L. & SOC. CHANGE 1, 53 n. 292 (1996) (citing two step-grandparent visitation cases).

⁴⁸ See *In re G.C.*, 735 A.2d 1226 (Pa. 1999) (holding that foster parents lack standing to seek or contest custody); Gregory, *supra* note 41, at 367-69

the standing of a former heterosexual⁵¹ or homosexual⁵² cohabitant who lived with a child and the child's parent.⁵³

(summarizing conflicting laws of different states on visitation by former foster parents).

⁴⁹ *E.g., compare* L. v. G., 497 A.2d 215 (N.J. Ch. 1985) (holding that siblings had standing to seek visitation), *and* State *ex rel.* Noonan v. Noonan, 547 N.Y.S.2d 525 (N.Y. Sup. Ct. 1989) (holding that half-siblings have standing to seek visitation), *with* Ken R. v. Arthur Z., 682 A.2d 1267 (Pa. 1996) (holding that half-sibling lacked standing to seek visitation). *See* Susan Solle, Note, *Sibling Relationships Should Not Be Denied By Formalistic Judges*, 23 U. DAYTON L. REV. 659 (1998); Joel V. Williams, Comment, *Sibling Rights to Visitation: A Relationship Too Valuable to be Denied*, 27 U. TOL. L. REV. 259 (1995).

⁵⁰ *See, e.g.,* Youmans v. Ramos, 711 N.E.2d 165 (Mass. 1999) (holding that aunt had standing to obtain visitation); Terry v. Affum, 592 N.W.2d 791 (Mich. Ct. App.), *aff'd in part and vacated in part* (Mich.) (text not available on Westlaw), *remanded to trial court*, 1999 WL 731849 (Mich. Ct. App. Sep. 17, 1999) (holding that aunts and uncle lacked standing to seek visitation); *In re* Katrina E., 636 N.Y.S.2d 53 (N.Y. App. Div. 1996) (accord); MacDonald v. Quaglia, 658 A.2d 1343 (Pa. Super Ct. 1995) (holding that cousin had standing to seek visitation).

⁵¹ *See, e.g.,* Kalusin v. Schwadron, 695 So.2d 817 (Fla. Dist. Ct. App. 1997) (giving effect to another state's visitation order in favor of a parent's former heterosexual cohabitant, while stating that local law and policy would not support such an order); Ellison v. Ramos, 502 S.E.2d 891 (N.C. Ct. App. 1998) (holding that a father's former heterosexual cohabitant had standing to seek custody).

⁵² *See, e.g.,* Barnae v. Barnae, 943 P.2d 1036 (N.M. Ct. App. 1997) (observing that a mother's former lesbian partner may have had standing to seek custody in New Mexico but apparently lacked it in California). *Compare* West v. Superior Court, 69 Cal. Rptr. 2d 160 (Cal. Ct. App. 1997) (holding that nonparent in lesbian couple lacks standing to seek visitation), *with* E.N.O. v. L.M.M., 711 N.E.2d 886 (Mass. 1999) (holding that mother's former lesbian partner had standing to obtain visitation), *and* V.C. v. M.J.B., 725 A.2d 13 (N.J. App. Div. 1999) (holding that former lesbian partner was entitled to visitation). *See generally* Elizabeth A. Delaney, Note, *Statutory Protection of the Other Mother*, 43 HASTINGS L.J. 177 (1991); Nancy D. Polikoff, *This Child Does Have Two Mothers*, 78 GEO. L.J. 459 (1990).

⁵³ *See also* *In re* Hood, 847 P.2d 1300 (Kan. 1993) (holding that grandparent of child's half-brother, who claimed to be "grandparent like" in relation to child, lacked standing to seek visitation); Adoption of Vito, 712 N.E.2d 1188 (Mass. Ct. App.) (holding that mother whose parental rights were terminated for unfitness had standing to seek visitation); Thomas S. v. Robin Y., 618 N.Y.S.2d 356 (N.Y. App. Div. 1994) (holding that sperm donor was entitled to order of filiation, which would give him standing to seek visitation); Jeanette H. v. Angelo V., 562 N.Y.S.2d 368 (N.Y. Fam. Ct. 1990) (holding that woman whose child had been adopted by the woman's parents had standing to seek

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State laws vary widely not only concerning the circumstances under which grandparents and each other class of non-parents have standing to seek visitation or custody, but also concerning the substantive standards governing the merits of such claims.⁵⁴ Consequently, it is common for a non-parent to receive court-ordered custody or visitation in one state on the basis of a finding that this will benefit the child, even though the non-parent would not even have standing to seek such an order in one or more other states, or could sue but would be almost certain to lose on the merits.⁵⁵ And some states have frequently changed their laws concerning the standing of non-parents to seek custody or visitation and concerning the substantive standards that apply when standing is present.⁵⁶

It is not surprising that laws on standing of non-parents to seek visitation, and on the substantive criteria governing such

sibling visitation with her former daughter); *In re E.A.R.*, No. 40658-2-I, 1999 WL 30206 (Wash. Ct. App. Jan. 25, 1999) (unpublished opinion) (affirming award of custody to father of child's half-sibling), *petition for cert. filed*, 67 U.S.L.W.3008 (U.S. June 21, 1999) (No. 98-2047). *See generally* Gregory, *supra* note 41, at 352 (stating that "legislative enactments that deal explicitly with visitation by third parties do not provide uniform or clear standards reflecting the circumstances under which visitation claims will be honored").

⁵⁴ *See, e.g.*, *In re V.L.K.*, 993 S.W.2d 887 (Tex. Ct. App. 1999) (applying presumption that, in a custodial dispute between a parent and a non-parent, the child's best interests are served by awarding custody to the parent, and reversing custody award because failure to apply this presumption was not harmless error); Kathryn L. Mercer, *A Content Analysis of Judicial Decision-Making — How Judges Use the Primary Caretaker Standard to Make a Custody Determination*, 5 WM. & MARY J. WOMEN & L. 1 (1998); Laura W. Morgan, *The Relevance of Adultery and Extra-Marital Sexual Conduct in Custody and Visitation Cases*, 9 DIVORCE LITIG. 165 (Sept. 1997).

⁵⁵ *See, e.g.*, *Kalusin v. Schwadron*, 695 So.2d 817 (Fla. Dist. Ct. App. 1997) (giving full faith and credit to Maryland visitation order "at odds with" Florida law and public policy).

⁵⁶ *See, e.g.*, *Weathers v. Compton*, 723 So.2d 1284 (Ala. Ct. Civ. App. 1998) (summarizing frequent amendments of grandparent visitation law); Patricia S. Fernandez, *The Status of Grandparents' Visitation Rights in Massachusetts*, 40 BOSTON B.J. 6 (Oct. 1996) (stating that the Massachusetts grandparent visitation statute was amended several times between 1972 and 1996); Morgan, *supra* note 54, at 165 (stating that "the issue of a parent's nonmarital [heterosexual] relationships is one of the most inconsistently applied factors used to decide custody cases"); Laura M. Morgan, *Sibling Visitation Rights*, 9 DIVORCE LITIG. 85 (May 1997).

awards of visitation, vary so widely. Appealing reasons of policy point both ways on almost every specific issue in this area, from the proper scope of grandparent visitation to whether lesbian “co-parents” or some other classes of non-parents should have standing at all.

Basically, the underlying policies are the policy favoring wide latitude for the person having primary custody of a child to control its upbringing, and the competing policy of giving a child the benefit of continued association with members of his or her extended family and with other adults already having valuable relationships with the child.⁵⁷ Since balancing these two legitimate and strong policies in various contexts permits reasonable differences of forceful opinions, it is understandable that the legislatures and courts of different states often reach different, sometimes even sharply contrasting, conclusions on particular categories of potential visitors or custodians.⁵⁸

B. *The Impact Of Jurisdiction On The Merits*

I happen to believe that laws favoring visitation or custody rights for non-parents usually do more good than harm, but I shall not attempt to support that belief in this article. It is not the

⁵⁷ See, e.g., *Smith v. Stillwell-Smith*, 969 P.2d 21, 31 (Wash. 1998) (en banc) (relying on parental autonomy); *id.* at 32 (concurring and dissenting opinion) (relying on “cruel and far-reaching effects on loving relatives” when visitation is denied).

⁵⁸ Research and analysis by social scientists have not resolved these questions to the satisfaction of all, in part for reasons inherent in the limitations of social science and in part because studies have been excessively ideological. See Christopher L. Blakesley, *Comparativist Ruminations from the Bayou on Child Custody Jurisdiction*, 58 LA. L. REV. 449, 461 (1998) (stating that “much of the literature on child custody is not useful. . . . Many studies are dogmatically ideological,” and citing as support for that conclusion the contrast between such works as, on the one hand, Joseph Goldstein *et al.*, *Beyond the Best Interests of the Child* (2d ed. 1979), and, on the other hand, Judith Wallerstein & Joan B. Kelly, *Surviving the Breakup: How Children and Parents Cope with Divorce* 310, 311 (1980)); Sarah H. Ramsey & Robert F. Kelly, *Using Social Science Research in Family Law Analysis and Formation*, 3 S. CAL. INTERDISCIPLINARY L.J. 631, 657-58 and n.70 (1994) (stating that “unfortunately some family researchers, when writing books for a lay audience, have made stronger claims for the general validity of their findings than their research designs would warrant,” and that Goldstein *et al.*, *Beyond the Best Interests of the Child* (1973), is “a particularly glaring example of unsupported claims”).

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purpose of this article to defend a position on the merits of non-parent visitation or custody in general, or on the merits of any particular category of such visitation or custody. Instead, this article addresses the question of how the law of child custody jurisdiction should be written, in view of this wide variation among states' substantive laws on non-parents' visitation and custody.

This jurisdictional topic is important, because the decision on the merits of a visitation or custody dispute is often influenced or even determined by the choice of forum, for at least three reasons. First, experienced litigators, courts, and commentators long have said that courts in custody and visitation disputes tend to favor local litigants,⁵⁹ and that the substantive law is so full of vague legal standards and discretion that favoritism has an ample field of play.⁶⁰

Second, even in the absence of local favoritism, the local litigant has a huge practical advantage in litigating the merits of any issue. She needs only one, local lawyer, not one in one place and another at a possibly distant location. She need not travel and take much time off from work, nor pay for experts and other witnesses to do so, when hearings are held.

The third reason why a decision on jurisdiction can have vital consequences for the merits of a case, and the reason most directly pertinent to the points made above about interstate variation in substantive law, is the following. In contests over child custody or visitation, the choice of the jurisdiction in which a case will be heard determines the choice of which state's law the court will apply. In these kinds of cases, courts virtually never apply

⁵⁹ See, e.g., Linda Lea M. Viken, *Calling in the Feds: The Need for an Impartial Referee in Interstate Child Custody Disputes*, 39 S.D.L. REV. 469, 476 (1994) (quoting a court's reference to "a 'spectre of local bias which surfaces with unfortunate frequency' in interstate custody cases"). See also Homer H. Clark, *The Law of Domestic Relations in the United States* § 12.5, at 494 (2d ed., student ed., 1988) (referring to "local chauvinism" as "a troublesome aspect of custody litigation"); Jerry A. Behnke, Note and Comment, *Pawns or People? Protecting the Best Interests of Children in Interstate Custody Disputes*, 28 LOY. L.A. L. REV. 699, 721 (1995) (stating that "local bias can have a significant impact in child custody cases").

⁶⁰ See Sykora, *supra* note 44, at 761 (observing that "grandparent visitation statutes typically do not indicate how to determine what is in the best interests of the child, therefore, this difficult determination is left to the discretion of the presiding judge").

other states' substantive law.⁶¹ When the law of the forum state denies standing to one who desires visitation or custody, that person of course has no chance to prevail on the merits. Even a litigant with standing may be virtually bound to lose a case, where the substantive law of the forum is unfavorable to his or her position. These are principal reasons why jurisdictional law can motivate a custodial parent, if she wishes to avoid visitation, to shop among forums with sharply contrasting law on standing or on the substantive criteria for visitation, so that she can force any litigation into the forum where she is certain or very likely to win.

C. Application Of UCCJEA To Initial Visitation Case

How, though, would the proposed UCCJEA create such motivation if the PKPA did not undercut it? There are not yet any reported decisions applying the UCCJEA, but the answer becomes clear when we apply it to the facts of hypothetical cases. For example, let us briefly put the PKPA aside, and apply the language of the new uniform act to the facts of a case like *Kenyon*, the grandparent visitation case described above.⁶²

When a child's mother decides to block contact between her son and his grandparents, which she hitherto has permitted without the need for a court order, she consults an attorney. Suppose that he learns that the child's father is dead or unknown or lives in another state.⁶³ If the attorney is well-informed and loyal to his client, he advises her that one of her choices is to move to a state where the child's grandparents lack standing to seek court-ordered visitation under the circumstances of this case, and where the legislature has enacted the UCCJEA. He tells her which states those are, she weighs the other advantages and disadvantages of the relocation, and she decides to make the move.

⁶¹ See, e.g., UCCJEA, *supra* note 2, § 102 cmt., at 263 (referring to "the traditional view that a court in a child custody case applies its own substantive law").

⁶² See *supra* text accompanying notes 32-39.

⁶³ For convenience of distinguishing the mother from her attorney through simple uses of personal pronouns, this article assumes that her lawyer happens to be male.

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Reported cases exist of parents so “blatantly forum shopping,”⁶⁴ and of parents resisting non-parents’ visitation for selfish and arbitrary reasons, to the detriment of their children.⁶⁵ So she moves with her son. The very day they arrive in the new state, the UCCJEA gives its courts jurisdiction to decide matters concerning the child’s custody and visitation.

The provision creating jurisdiction on these facts is section 201, which provides in relevant part:

- (a) . . . [A] court of the State has jurisdiction to make an initial child-custody determination only if:
- (1) this State is the home State of the child on the date of the commencement of the proceeding, or was the home State of the child within six months before the commencement of the proceeding and the child was absent from this State but a parent or a person acting as a parent continues to live in this State;
 - (2) a court of another State does not have jurisdiction under paragraph (1), or a court of the home State of the child has declined to exercise jurisdiction on the ground that this State is the more appropriate forum . . . , and:
- (A) the child and the child’s parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this State other than mere physical presence; and
 - (B) substantial evidence is available in this State concerning the child’s care, protection, training, and personal relationships;
- (3) all courts having jurisdiction under paragraph (1) or (2) have declined to exercise jurisdiction . . . ; or
 - (4) no court of any other State would have jurisdiction under the criteria specified in paragraph (1), (2), or (3).⁶⁶

That section’s reference to a “child-custody determination” covers decisions about custody, visitation, or both.⁶⁷ The mother’s new state has jurisdiction under section 201(a)(4), because no other state would have jurisdiction under subsection (a)(1), (2), or (3). To see why the state she just left would lack

⁶⁴ See, e.g., *Davidian v. Kessler*, 685 So.2d 13, 14 (Fla. Dist. Ct. App. 1996).

⁶⁵ See, e.g., *Hickenbottom v. Hickenbottom*, 477 N.W.2d 8, 17 (Neb. 1991) (affirming award of visitation to former stepfather, and commenting on selfish and harmful conduct of child’s mother).

⁶⁶ UCCJEA, *supra* note 2, § 201.

⁶⁷ *Id.* § 102(3).

jurisdiction, one must apply each of those three subsections in turn to the facts of the case.

The state the mother just left lacks jurisdiction under subsection (a)(1), because it is not true that “a parent or person acting as a parent continues to live in” that state. “Person acting as a parent” is defined in UCCJEA section 102(13) to mean, in relevant part,

a person, other than a parent, who:

- (A) has physical custody of the child or has had physical custody for a period of six consecutive months, including any temporary absence, within one year immediately before the commencement of a child-custody proceeding; and
- (B) has been awarded legal custody by a court or claims a right to legal custody under the law of this State.⁶⁸

The mother’s parents do not fit this definition for more than one reason, either of which is sufficient to exclude them from the category of “persons acting as parents.” Under section 102(13)(A), they lack physical custody of the child and have not had it recently enough. Under section 102(13)(B), they have not been awarded legal custody by a court, and they do not claim a right to legal custody under the law of the mother’s new state. All they want to claim is visitation, and the mother has moved to a state where the law denies them standing to seek even that. Thus, the grandparents are not persons acting as parents under the UCCJEA, and the grandparents’ state would therefore lack jurisdiction under subsection 201(a)(1).

That state would also lack jurisdiction under UCCJEA subsection 201(a)(2), because it is not true that “the child and at least one parent or a person acting as a parent . . . have a significant connection” with that state. The mother just severed her connections with that state, and the grandparents are not “persons acting as parents” as the UCCJEA defines that term. Finally, the grandparents’ state would lack jurisdiction under subsection 201(a)(3), because no state has “jurisdiction under paragraph (1) or (2)” and no state has “declined to exercise jurisdiction.”

Since, in the language of section 201(a)(4), “no court of any other State would have jurisdiction under the criteria specified in

⁶⁸ *Id.* § 102(13).

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paragraph (1), (2), or (3),” the mother’s brand-new state has jurisdiction under section 201(a)(4). Thus, the UCCJEA lets her petition there for custody exclusive of any visitation, and do so the very day she arrives. Since the law of her new state is that grandparents lack standing in a case like hers, she is certain to obtain an order giving her custody unfettered by any duty to give her son contact with his grandparents.

More than that, the UCCJEA even lets her deny the child’s grandparents any notice that she is going to court, and deprive them of any opportunity to be heard in the case. Section 205(a) of the new act provides that

[b]efore a child-custody determination is made under this [Act], notice and an opportunity to be heard in accordance with the standards of Section 108 must be given to all persons entitled to notice under the law of this State as in child-custody proceedings between residents of this State, any parent. . . , and any person having physical custody of the child.⁶⁹

A related provision in section 205(c) is that “the obligation to join a party and the right to intervene as a party . . . are governed by the law of this State as in child-custody proceedings between residents of this State.”⁷⁰ Since the law of the mother’s brand-new state denies standing to the grandparents in a case like this, under the UCCJEA they are not joined as parties and get no notice or opportunity to be heard before the court decrees that they must stop visiting their grandchild.

D. Application Of UCCJEA To Visitation Modification

If this outcome seems abrupt and extreme, the UCCJEA creates such results under even more remarkable circumstances. The new uniform act treats the child and his grandparents this way even if the grandparents have already been duly awarded court-ordered visitation.

Suppose that the grandparents saw this problem on the horizon, and therefore went to court successfully in their own state when the mother and child still lived there. Suppose that, before the mother relocated, the grandparents litigated the child’s best interests with the mother in a full and fair hearing, and obtained a court order for visitation, as happened in *Kenyon*. Even under

⁶⁹ *Id.* § 205(a).

⁷⁰ *Id.* § 205(c).

those circumstances, as soon as the mother takes her child to a UCCJEA state whose law denies standing to the grandparents, the UCCJEA on its face lets the court of her new state extinguish visitation rights under the existing court order without even giving the grandparents notice and an opportunity to be heard.

This is true because, under the section 102(13) definition quoted above,⁷¹ even grandparents with a visitation order are not “persons acting as parents.” Jurisdiction shifts to the mother’s new state as soon as she moves there, and under the UCCJEA the grandparents lack standing to participate in the new lawsuit in which the existing court order will be canceled. The new uniform act does not even provide for them to be notified that they are about to lose their court-ordered rights.

The UCCJEA provisions dictating this result are found in sections 202 and 203. Section 202 provides in relevant part that

a court of this State which has made a child-custody determination consistent with Section 201 or 203 has exclusive, continuing jurisdiction over the determination until:

- (1) a court of this State determines that neither the child, the child’s parents, and any person acting as a parent do not have a significant connection with this State and that substantial evidence is no longer available in this State concerning the child’s care, protection, training, and personal relationships; or
- (2) a court of this State or a court of another State determines that the child, the child’s parents, and any person acting as a parent do not presently reside in this State.⁷²

Section 203 is in most ways similar to 202 but, whereas section 202 was written for application by a court of the state that already made a decree, section 203 was written for application by a court that is asked to modify another state’s judgment. Section 203 provides in relevant part that

a court of this State may not modify a child-custody determination made by a court of another State unless a court of this State has jurisdiction to make an initial determination under Section 201(a)(1) or (2) and:

- (1) the court of the other State determines it no longer has exclusive, continuing jurisdiction under Section 202 . . . ; or

⁷¹ *Supra* text accompanying note 68.

⁷² UCCJEA, *supra* note 2, § 202.

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(2) a court of this State or a court of the other State determines that the child, the child's parents, and any person acting as a parent do not presently reside in the other State.⁷³

The quoted language in section 203 does not forbid a court of the mother's new state to modify the grandparents' existing visitation order, because the grandparents are not deemed to be persons acting as parents. The Official Comment to section 203 makes explicit what the text of that section conveys by negative implication: a state with jurisdiction under the section 201 criteria quoted above can modify another state's prior order once the child, the parents, and any persons acting as parents have ceased to live in the state that made the prior order.⁷⁴ In such a case, jurisdiction to modify a foreign decree is governed by section 201's provisions on jurisdiction to make an initial decree, as if the prior decree had never existed. And sections 205(a) and (c), quoted above,⁷⁵ provide that the grandparents are not joined as parties and receive neither notice nor an opportunity to be heard before the existing court order in their favor is canceled.

E. *Persistent Interstate Conflict Over Visitation*

That is bad enough, but it gets worse when one considers likely further developments. If the grandparents learn that this new decree has been entered in the mother's state, they may thereupon return to the court in their own state and seek enforcement of the visitation decree previously entered there in their favor. If the legislature of their state, like that in the new state of the children's mother, has enacted the UCCJEA, the grandparents will appear entitled to prevail in their local court. That is, the court in the grandparents' state may well view its prior decree as the only one entitled to respect under its uniform act, for the following reasons.

UCCJEA section 205(a), quoted above,⁷⁶ provides in relevant part that "[b]efore a child-custody determination is made under this [Act], notice and an opportunity to be heard . . . must be given to all persons entitled to notice under the law of this

⁷³ *Id.* § 203. UCCJEA section 201(11) defines "modification" to include issuance of one order superseding another.

⁷⁴ *Id.* § 203 cmt., at 274.

⁷⁵ *Supra* text accompanying notes 69-70.

⁷⁶ *Supra* text accompanying note 69.

State as in child-custody proceedings between residents of this State.” The two references to “this State,” when they appear in the UCCJEA as enacted by the legislature of a state, mean that very state. Thus the UCCJEA in the grandparents’ state requires that notice be afforded to all persons who would be entitled to notice under the law of the grandparents’ state in an intrastate dispute.

In our hypothetical case of grandparent visitation based loosely on *Kenyon*, the grandparents were entitled to notice under the law of their own state, even though they were not so entitled under the law of the state where the child’s mother now lives. Section 205(a) of the UCCJEA, as enacted in the grandparents’ state, required that they be given notice before their visitation order was canceled, and the court in the mother’s state did not provide it. Consequently, the decree entered in her state is deemed unworthy of enforcement by a court of their state. Section 205(b) underscores the point, providing that “this [Act] does not govern the enforceability of a child-custody determination made without notice or an opportunity to be heard.”

Other provisions of the UCCJEA create a duty to enforce other states’ custody decisions, and to refrain from modifying them, but only if the foreign decisions were made “in substantial conformity with this [Act],”⁷⁷ and as always “this act” means the UCCJEA as enacted in the enforcing state. Still other UCCJEA provisions set forth detailed procedures and remedies for such enforcement.⁷⁸ However, the general duty to enforce and not modify, and these specific provisions for enforcement, are all inapplicable if notice and an opportunity to be heard were not given to a person who was entitled to these procedural rights under the law of the state where enforcement is sought.⁷⁹

⁷⁷ UCCJEA, *supra* note 2, § 203 cmt., at 274 (stating that section 203 “prohibits a court from modifying a custody determination made consistently with this Act by a court in another state” unless specified requirements are met); *id.* § 303(a) (requiring enforcement of “a child-custody determination of a court of another State if the latter court exercised jurisdiction in substantial conformity with the [Act] or the determination was made under factual circumstances meeting the jurisdictional standards of this [Act] and the determination has not been modified in accordance with this [Act]”).

⁷⁸ See *infra* text accompanying notes 260-69.

⁷⁹ *E.g.*, UCCJEA, *supra* note 2, § 106 (providing that “[a] child-custody determination made by a court of this State that had jurisdiction under this

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Since notice and hearing were not given to the grandparents, the decree ending their visitation was not made “in substantial conformity” with the version of the UCCJEA enacted in their state. Thus, the UCCJEA there does not obligate the court of the grandparents’ state to enforce the mother’s new decree canceling visitation against the grandparents.⁸⁰ In the eyes of that

[Act] binds all persons who have been served in accordance with the laws of this State or notified in accordance with Section 108 or who have submitted to the jurisdiction of the court, and who have been given an opportunity to be heard”); *id.* § 305 (authorizing registration of another state’s custody determination, and providing in subsection (d) that the court shall confirm the registered order unless “the person contesting registration was entitled to notice, but notice was not given in accordance with the standards of Section 108, in the proceedings before the court that issued the order for which registration is sought”); *id.* § 308 (providing for expedited enforcement of a child custody determination, and for a defense that “the respondent was entitled to notice, but notice was not given in accordance with the standards of Section 108, in the proceedings before the court that issued the order for which enforcement is sought”); *id.* § 310 (providing that the court shall order that the petitioner for enforcement may take immediate physical custody of the child unless, *inter alia*, “the respondent was entitled to notice, but notice was not given in accordance with the standards of Section 108, in the proceedings before the court that issued the order for which enforcement is sought”). The references to section 108 in all these provisions do not expand the categories of persons entitled to notice. Section 108 addresses only the *manner* of giving notice. *See id.* § 108 & cmt.

⁸⁰ Courts have made decisions along these lines under the PKPA and the uniform act that preceded the UCCJEA, the UCCJA, which is cited *supra* note 3. *See, e.g., Allison v. Superior Court*, 160 Cal. Rptr. 309, 313 (Cal. Ct. App. 1979) (holding that California court was free to exercise its jurisdiction because Texas court did not exercise jurisdiction “substantially in conformity” with the UCCJA, in part because the Texas court provided shorter notice than California law required); *In re C.L.W.*, 467 So.2d 1106, 1110-11 (Fla. Dist. Ct. App. 1985) (holding that Pennsylvania custody decree was not enforceable, in part because prospective adoptive parent was not served with process in the Pennsylvania case); *Barnae v. Barnae*, 943 P.2d 1036 (N.M. Ct. App. 1997) (holding that New Mexico was not an inconvenient forum to decide custody and visitation dispute because non-parent petitioner lacked standing in the other possible forum under the law of that state, and relying on the *Priscilla S.* case cited in this footnote below); *Wells v. Van Coutren*, 606 N.Y.S.2d 295, 296 (N.Y. App. Div. 1994) (declining to recognize and enforce a Pennsylvania decree because the Pennsylvania court had not given an opportunity to be heard to one who lacked standing under Pennsylvania law, and relying on the *Priscilla S.* case cited immediately below); *Priscilla S. v. Albert B.*, 424 N.Y.S.2d 613, 618-21 (N.Y. Fam. Ct. 1980) (holding, *inter alia*, that the UCCJA did not require enforcement of a

court, the visitation order was duly entered and has not been duly superseded, so enforcement of visitation remains proper.

One might suppose that this conflict is obviated by the provision found in the UCCJEA, as in all uniform laws, that “in applying and construing this Uniform Act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among States that enact it.”⁸¹ However, such provisions in general have not prevented courts from applying their own states’ enactments and interpretations of uniform laws in preference to those of other states.⁸² In any event, that general provision has no impact on the kinds of cases now under discussion. It is subject to the exception created in the UCCJEA’s specific and repeated provisions and Official Comments making it clear that, however uniform the new act’s own provisions may be in other respects, they incorporate by reference each enacting state’s contrasting laws on joinder, notice, and hearing in custody and visitation cases.⁸³

Because of these features of the UCCJEA, a court of the mother’s state may try to enforce its new custody award in her favor, while a court of the grandparents’ state may try to enforce its previous visitation order in their favor. The court in the mother’s state may consider the grandparents’ visitation decree no longer worthy of enforcement, since under the law of the mother’s state the visitation order was duly superseded by a subsequent judgment entered in a proceeding in which notice was given to every person entitled to receive it under the law of the mother’s state. Conversely, the court in the grandparents’ state may consider the mother’s decree canceling visitation unworthy of enforcement, since it was made without notice to parties who were entitled to notice under the law of the grandparents’ state. The new uniform act invites this deadlock, which could persist indefinitely unless federal law broke it.

Vermont decree in favor of a child’s adoptive father and against a second cousin by adoption who lacked standing under Vermont law and who therefore was not afforded notice and an opportunity to be heard in the Vermont litigation).

⁸¹ UCCJEA, *supra* note 2, § 401.

⁸² *Cf. Young v. Smith*, 939 S.W.2d 576, 578 (Tenn. Ct. App. 1996) (applying Arkansas version of old uniform act rather than contrary Tennessee version only because PKPA required this). *See also supra* note 80.

⁸³ *See supra* text accompanying notes 69-70, 76.

Thus, where two UCCJEA states have contrasting entitlements to joinder, notice, and hearing in intrastate visitation cases, the new uniform act poses dangers beyond the risk that a too-rapid shift of exclusive jurisdiction will invite self-help, forum-shopping, and instability in children's lives. In addition, there is the specter of prolonged litigation and persistently conflicting judgments of courts of different states. Still worse, since each party has a forum favorable to that party's claims, there may be temptations for child-snatching and similar conduct by which adults could try to obtain practical enjoyment of rights created on paper by the courts of their respective states.

The foregoing analysis of the impact of the UCCJEA intentionally disregarded the PKPA. For reasons explained below,⁸⁴ that federal statute forbids application of the new uniform act in this manner and, to that extent, preempts it. One must hope that attorneys will be aware of this conflict between the federal and state statutes, and so will advise their clients that such an attempt at self-help would be ultimately unsuccessful. Also, when attorneys do err in this regard, one hopes that trial judges in shopped-for forums will perceive federal preemption of the UCCJEA and thus will not reward parties' self-help. However, a long and regrettable train of reported decisions exists in which courts have pointed out lawyers' and trial judges' omissions to consider the PKPA, and this history has continued into recent years.⁸⁵ Thus the best and surest hope must be that state legislators will see the unwisdom and even futility of enacting a new uniform act that, under a federal statute and the Constitution's Supremacy Clause,⁸⁶ is invalid as applied in many cases of non-parent visitation.

III. The UCCJEA and Non-Parent Custody

Visitation disputes are not the only context in which the UCCJEA on its face creates such incentives for self-help, forum-

⁸⁴ See *infra* text accompanying notes 215-31.

⁸⁵ See *infra* note 405 and accompanying text. See, e.g., *Hudson v. Purifoy*, 986 S.W.2d 870, 873 (Ark. 1999) (Glaze, J., concurring) (noting that "the Parental Kidnaping Prevention Act (PKPA) controls the outcome of this custody case, but the PKPA was not argued or considered at the hearing before the chancellor").

⁸⁶ U.S. CONST. art. VI, cl. 2.

shopping, re-litigation, and conflicting decrees. The language of the new act invites these problems in some disputes between parents and non-parents over primary custody as well. A case whose facts illustrate this danger is *In re Sleeper*,⁸⁷ a recent decision of the Oregon Supreme Court.

Royal Sleeper had a vasectomy in 1977, and then he married Rose in 1980. Royal had a heart attack in 1987, and stopped working. Rose had a "brief extra-marital relationship that produced a child in April 1989."⁸⁸ Since Rose was employed and Royal was not, he was the baby's primary caretaker.

When the child was about a year old, Rose left the child with Royal and went to California. There, she had another illicit relationship, which produced her second child in August 1991. Rose then returned to Oregon with her new infant, Royal took them in, and the two adults and two infants lived together for the next two years. As the state supreme court described the subsequent events, "husband was the primary caretaker of both children throughout the marriage. He provided for the physical and emotional needs of both children on a daily basis. Wife had only sporadic contact with the children."⁸⁹

In August 1993, when the children were four and two years old, Rose left the family home. Royal petitioned for dissolution and custody, and the trial court gave him temporary and then permanent custody. When Rose appealed, the Oregon Court of Appeals affirmed, on the ground that Rose was estopped from denying Royal's paternity of the children.⁹⁰

The Oregon Supreme Court also affirmed, but on other grounds. The court, treating Royal as a non-parent, held that he had standing to seek custody as a "stepparent with a child-parent relationship with the subject minor child,"⁹¹ that the merits of custody in such a case are governed by the best interests of the child,⁹² and that the record supported the conclusion that awarding custody to Royal was in the children's best interests.⁹³

⁸⁷ 982 P.2d 1126 (Ore. 1999).

⁸⁸ *Id.* at 1128.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at 1129-30.

⁹² *In re Sleeper*, 982 P.2d 1126, 1130-31 (Ore. 1999).

⁹³ *Id.* at 1131.

A. UCCJEA Application To Initial Custody Case

How might a mother in such a case exploit the UCCJEA to shop for a forum favorable to her, and thereby get custody of the children? Putting the PKPA aside for a moment here, as was done above, one can see that the new uniform act, on its face, rewards the following method of self-help.

When the mother, her husband, and the two children have been living together for a time, the mother could contact an attorney and ask the surest way to win the custody contest she foresees. After learning that the children's respective fathers are unknown or dead or live in other states, the attorney could identify a state where the UCCJEA is in effect, and where a man in her husband's position would lose standing to seek custody after a period of time in which he lived apart from the children.⁹⁴ The mother's attorney could advise her that she should try to persuade her husband to accept a trial separation, during which she and the children would live in that new state and the husband would be welcome to visit a great deal.

The mother would propose this to her husband without disclosing her legal consultation. She would give him whatever reasons seemed plausible and persuasive under her particular circumstances. Perhaps the new state has the mother's family members or an ostensibly good opportunity for her education, training, or employment. Perhaps she convinces her husband that her relationship with him, or her relationships with the children, require this trial separation. She may convey an implicit threat that his failure to agree to the plan would result in litigation that he knows would be upsetting to the children, that he cannot be sure he would win, and that he thinks would cause a final fragmentation of the family, win or lose. Perhaps the husband fears a second heart attack, or has other health problems that provide another incentive to compromise. It is not unusual for persons dealing with the emotional, economic, and other

⁹⁴ See, e.g., TEX. FAM. CODE ANN. tit. 5, § 102.003(9) (1999 Cum. Ann. Pocket Part) (allowing a suit for custody by, *inter alia*, "a person who has had actual care, control, and possession of the child for not less than six months preceding the filing of the petition"); *In re Garcia*, 944 S.W.2d 725 (Tex. Ct. App. 1997) (interpreting § 102.003(9) as applying only where those six months were consecutive and immediately preceded the filing). The Texas legislature recently enacted the UCCJEA. See *supra* note 29.

stresses of grave marital problems to make concessions about custody, visitation, relocation, support, property, or other important matters, only later to realize that the concessions appear in hindsight to have been most unwise.⁹⁵

Suppose that the husband accedes to her plan. The couple agrees also that they will live together in the new state if the trial separation results in the family's reunification, since the mother by then should be employed or otherwise occupied in the new state, and since her husband's medical condition prevents his working and leaves him free to relocate.

Then the mother would move with the children to the new state, and her husband would visit there frequently. When just over twelve months have passed,⁹⁶ the mother would sue for custody in the new state. The court there would have jurisdiction under UCCJEA section 201(a)(1), quoted above,⁹⁷ because the mother's new state would have become the children's "home state."⁹⁸ Since the law of the new state is that a husband lacks standing in a case like this, the mother is certain to obtain a decree giving her sole custody. Not only that, the UCCJEA even lets her deny her husband notice of the lawsuit and any opportu-

⁹⁵ In *Bless v. Bless*, 723 A.2d 67, 69 (N.J. App. Div. 1998), the parents made a somewhat similar agreement that the child's father would relocate with the child "for an indefinite period of time" and that the mother would have generous visitation.

⁹⁶ Under UCCJEA § 102(13)(A), quoted above, *supra* text accompanying note 68, the term "person acting as parent" does not cover a non-parent unless he or she "has physical custody . . . or has had [it] for a period of six consecutive months . . . within one year immediately before the commencement of a child-custody proceeding." The UCCJEA text and Official Comments do not specify whether all or only part of the period of six consecutive months must fall within the one-year period just before commencement of the proceeding.

⁹⁷ See *supra* text accompanying note 66.

⁹⁸ The UCCJEA, like the UCCJA and PKPA, excludes "temporary absences" from calculations of the six-months periods on which "home state" and "extended home state" jurisdiction depends, compare UCCJEA, *supra* note 2, § 102(7), with UCCJA, *supra* note 3, § 2(5), and 28 U.S.C.A. § 1738A(b)(4) (1994). However, these hypothetical facts do not involve a temporary absence, since the husband and wife agreed that her move with the children would be of indefinite duration and that the entire family would probably live in her new state if they resumed cohabitation.

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nity to be heard in it, under sections 205(a) and (c), quoted above.⁹⁹

B. *UCCJEA Application To Custody Modification*

The UCCJEA treats the children and the husband this way even if the husband obtained a custody decree in his favor in the old state, before the mother commenced her lawsuit in the new state. Indeed, the mother's lawyer may have coached her to agree to entry of such a decree, if that agreement appeared necessary to overcome the husband's resistance to her relocating with the children.

Under section 203, quoted above,¹⁰⁰ the UCCJEA lets the court in the mother's state enter an order giving her custody and superseding the prior decree. Section 203 requires respect for the old state's order only as long as the children, a parent, or a "person acting as a parent" continues to live there. The act defines the latter term to exclude a person who, like this husband, has not had physical custody of the children for six consecutive months within one year immediately before commencement of the mother's suit.¹⁰¹ The UCCJEA thus lets the court in the new state cancel the husband's custody decree without his even receiving notice of the proceeding or any opportunity to be heard in it.

C. *Persistent Interstate Conflict Over Custody*

In this custody case as in the visitation case discussed above,¹⁰² the UCCJEA tells the court in each state that its decree is the only one entitled to enforcement and protected against modification, so the problem of conflicting decrees may persist. The court in the husband's state deems its decree to be still in effect, since the judgment purporting to supersede it was entered without giving the husband the procedural rights of joinder, notice, and hearing to which he was entitled under the UCCJEA in his state as a person with standing to litigate the merits of his claim. Conversely, the court in the mother's state deems its de-

⁹⁹ See *supra* text accompanying notes 69-70.

¹⁰⁰ See *supra* text accompanying note 73.

¹⁰¹ See UCCJEA, *supra* note 2, §§ 103(13)(A), 202(a)(2), 203.

¹⁰² See *supra* text accompanying notes 62-86.

creed to have duly superseded the prior decree, since under its law the husband was not entitled to the benefit of those procedures.

Indeed, the practical results of conflicting decrees may be even worse for this custody contest than for a dispute over visitation. At any moment when the children are in the mother's possession or the husband fears they are about to be, the UCCJEA may present an especially strong temptation for the husband to snatch them or otherwise obtain or retain their presence in his state, where the local decree gives him the right to their physical custody, for two reasons. To compound the trouble, the new act offers a similar incentive for the mother to get or keep possession of the children.

The first reason why both parties have these incentives for self-help is that, under the new uniform act's definition of the crucial term "person acting as a parent," quoted above,¹⁰³ even a non-parent who has been awarded legal custody ceases to be a "person acting as a parent" when a specified period of time passes in which he lacks physical custody of the children. Once the husband loses that status, neither "home state" nor "significant connection" jurisdiction can exist in his state even under its own UCCJEA. By hypothesis he would have standing to obtain a renewed award of custody if the litigation were conducted in his state, but it cannot be conducted there unless his possession of the children in his state maintains his status as a person acting as a parent. On the face of it, the UCCJEA's criteria for the existence of jurisdiction make physical possession of the child crucial, and thus give the husband a strong incentive to get or keep the children with him. Conversely, these jurisdictional provisions give the mother an equally strong incentive to keep the children out of the husband's possession, so he will not be a person acting as a parent and her state will be the only one with jurisdiction.

The second reason these incentives for self-help exist is that the new act's provisions on joinder, notice, and hearing also turn on physical custody of the child. Under section 205(a), quoted above,¹⁰⁴ the husband's lack of standing under the law of the mother's state ordinarily means, under the UCCJEA, that he is

¹⁰³ *Supra* text accompanying note 68.

¹⁰⁴ *Supra* text accompanying note 69.

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not joined as a party and gets no notice of any custody proceeding there. However, under the same section he *is* entitled to joinder, notice, and an opportunity to be heard whenever he has the children's physical custody. Thus, by obtaining or retaining possession of the children, each contestant not only affects the basis for jurisdiction over the dispute in the two states, he or she also determines whether the husband is or is not entitled to joinder, notice, and hearing rights in the mother's state in the event of further litigation there.

These incentives on the face of the UCCJEA may appear strong to some litigants. By making physical custody of children for a given moment or period of time a key to such fundamental questions as the existence of jurisdiction to decide a dispute, and joinder, notice, and hearing rights in the litigation, the UCCJEA apparently creates strong temptations for both litigants to use fair means or foul to obtain and retain possession of their children.

D. Preclusion Of Re-Litigation

An argument might be raised to question this picture of persistent conflict between different states' judgments, and of incentives for self-help. The argument would be that application of the UCCJEA's requirement that the husband be joined, notified, and given a hearing, once he has physical custody, will break the judicial deadlock and end the parties' self-help. As long as the children remain in the mother's physical custody, the interstate conflict exists only on paper, so is tolerable, the argument would go. And once the husband somehow obtains physical custody of the children, he then can be joined, notified, and heard in the mother's state.¹⁰⁵ The argument would conclude with an assertion that the husband would be bound by the resulting decision, conflicting decrees would be replaced by a single, superseding

¹⁰⁵ A similar argument might be raised with regard to a dispute limited to visitation, like the hypothetical case discussed above, *supra* text accompanying notes 62-86. Whether that argument is even as superficially plausible as the one now being discussed in the text depends on whether possession of a child for the sole purpose of visitation comes within the meaning of the UCCJEA phrase "physical custody." The definition of that term in § 102(14) seems to leave that question debatable.

judgment, and the apparent incentives for self-help would no longer exist.

The weaknesses of that argument can be seen when one remembers the tortuous path of litigation that led up to the eventual trial in the mother's state with both litigants appearing, and one attempts to predict ensuing events. First, the husband obtained a custody award in his state, in a proceeding that was begun before the mother relocated or so soon afterward that the husband remained a "person acting as a parent" and his state retained jurisdiction. The mother participated in that litigation, and in every way it was conducted and decided in accordance with the UCCJEA as enacted in the husband's state.

Then the mother waited until she had possessed the children long enough in her new state so that the husband had ceased to be a "person acting as a parent." She thereupon commenced a suit in her state in which the husband was not entitled to the benefits of joinder, notice, and hearing, since he neither had "person acting as a parent" status nor had physical custody of the children. Her state's court, hearing only her side of the story and lacking another litigant with standing, entered a decree giving her exclusive custody.

At that point, the court in each state considered its decree valid and the conflicting decree unworthy of enforcement under the UCCJEA. The mother had possession of the children. The husband wanted it and was entitled to it according to his state's decree, so he employed self-help to obtain physical custody. She thereupon commenced a proceeding intended to terminate the litigation. The husband received the procedural rights to which his possession of the children entitled him. The mother won custody again, since the husband lacked standing to seek custody in the mother's state. Is it correct to argue that, at that point, the courts of both states would see that a single decree binding the husband has replaced the conflicting judgments, and has destroyed incentives for self-help otherwise apparent on the face of the UCCJEA?

E. Effects Of Drafting Flaws On Preclusion

That argument does not appear to be sound, though flaws in the conception and drafting of the UCCJEA make the conclusion less than perfectly clear. The court in the husband's state

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will apply the relevant provisions of section 202, quoted above,¹⁰⁶ to determine its own jurisdiction. That court may conclude that it had exclusive, continuing jurisdiction to modify its prior decree when the court in the mother's state purported to do so, and that the mother's recent decree was therefore entered in violation of section 203 and thus is not worthy of enforcement. Clearly, the husband's court's original decree was made consistently with section 201, so it did indeed create exclusive, continuing jurisdiction until either of two things happened.

First, such jurisdiction in the husband's state would end according to section 202 if "a court of this State determines that neither the child, the child and one parent, nor the child and a person acting as a parent have" a significant connection there and that substantial evidence is no longer available there.¹⁰⁷ The court in the husband's state may not make such a finding, since it may view the children's connection with that state as still quite significant and the evidence there ample.

Second, continuing jurisdiction there would end under section 202 if a court of either state determines "that the child, the child's parents, and any person acting as a parent do not *presently* reside in this State."¹⁰⁸ The word "presently" may mean at the time when the proceeding for modification was commenced, or at the later time when a decision on jurisdiction is made. In any event, at each of those times the children were indeed residing in the husband's state, and doing so pursuant to a decree duly entered in that state and not yet duly superseded, the court of the husband's state would surely find. The court may therefore conclude that under section 202 it indeed had exclusive, continuing jurisdiction when the last proceeding was begun and completed in the court in the mother's state, and that the resulting judgment is therefore invalid.

This conclusion would appear reinforced by application of section 203 to the mother's state. When the court in the husband's state applies the relevant language of that section to the court in the mother's state, it sees that her state's court was forbidden to modify the decree unless one of the two conditions quoted just above was satisfied. The first clearly was not; the

¹⁰⁶ *Supra* text accompanying note 72.

¹⁰⁷ *Supra* text accompanying note 72.

¹⁰⁸ *See id.*

court in the husband's state had not determined that it no longer had exclusive, continuing jurisdiction. Since the court in the mother's state did modify the prior judgment, unless it simply ignored the UCCJEA it must have found that the children did not "presently reside" in the husband's state. The court in his state may well disagree with that finding, as was explained just above. Do the laws of issue preclusion and full faith and credit bar the court in the husband's state from hearing the issue of where the children resided at the critical time and deciding that issue differently from the court in the mother's state?

Other aspects of the law of judgments and full faith and credit are discussed briefly below.¹⁰⁹ The aspect that is pertinent to the question now under discussion is this: A widely accepted rule of collateral estoppel is that re-litigation is precluded only when the issues raised in the two courts are the same, and sameness is often debatable.¹¹⁰ According to a comment to a provision of the Second Restatement of Judgments, among "several factors that should be considered in deciding whether . . . the 'issue' in the two proceedings is the same" is "[d]oes the new evidence or argument involve application of the same rule of law as that involved in the prior proceeding?"¹¹¹ In our hypothetical case, the court in the husband's state may conclude that the laws were different and thus that the issues were different, for the following reasons.

There was probably no factual dispute over where the children were sleeping every night. Instead, to find that the children did not presently reside in the husband's state, the court in the mother's state must have interpreted the word "reside" as not covering children's living in the home of an adult who had custody under a decree of another state that the court in the mother's state deems invalid. According to that view, the children did not "reside" there since their presence was unlawful and therefore transient.

Conversely, to find that the children did reside in the husband's state, the court there must have interpreted the word "reside" differently. In that court's view, the children's presence was lawful and therefore presumably of indefinite duration, and

¹⁰⁹ See *infra* text accompanying notes 319-26.

¹¹⁰ Restatement (Second) of Judgments § 27, cmt. c. (1982).

¹¹¹ *Id.*

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it thus constituted “residence.” When each court addresses this issue of mixed law and fact — where do the children reside at a given time? — a significant difference in the legal definition of residence may make the two mixed issues different, in the eyes of the court in the husband’s state. The court may thus conclude that the second decision about the children’s “present residence” is not precluded.

A UCCJEA proponent might take issue with this entire analysis, by citing two uses of the word “continuing” in the text of section 202 and one in its caption, and by relying on several statements about continuity in the Official Comment to that section. The thrust of the argument would be that, once a period of time passed during which the parent and children were absent from the husband’s state and he was no longer a “person acting as a parent,” the children’s resumption of residence in that state did not create jurisdiction there under section 202 because continuity of jurisdiction had been lost. The Official Comment language most specifically addressing this point is the following sentence: “Exclusive, continuing jurisdiction is not reestablished if, after the child, the parents, and all persons acting as parents leave the state, the non-custodial parent returns.”¹¹²

Obviously, that sentence addresses facts that are distinguishable from the hypothetical case now under discussion. In our case, the husband who, though not a parent of the child, had been acting as a parent did not “leave the state.” Instead, he remained there and was tricked into relying on his valid custody judgment during an absence of the children from his state sufficiently prolonged that he ceased to be a “person acting as a parent” under the UCCJEA’s technical definition of that phrase.

More importantly, the statutory language is inconsistent with the Official Comment. Since captions must be concise, they often misstate the content of the statutes they introduce, and thus are a very weak basis for statutory interpretation. Consequently, the word “continuing” in the section 202 caption has little significance. And both times the word “continuing” is used in the operative language of section 202, it is used only to identify the *conclusion* about jurisdiction, not to prescribe the criteria for its existence. When this section specifies the *criteria* for existence of

¹¹² UCCJEA, *supra* note 2, § 202 cmt., at 273.

section 202 jurisdiction, it uses the phrase “presently reside,” and so does section 203. “Presently reside” means exactly that; it does not mean “resided continuously from the time of the prior custody determination to the present.”

The drafters’ choice of the word “presently” is particularly significant in view of the manner of drafting of both the PKPA and the previous uniform law, which is cited above.¹¹³ Those acts consistently use words and phrases of continuity like “continues,”¹¹⁴ “lived from birth,”¹¹⁵ and “six consecutive months”¹¹⁶ when the intention is to require continuity. Conversely, both acts consistently use words and phrases like “now”¹¹⁷ and “on the date of the commencement of the proceeding”¹¹⁸ when the intention is not to require continuity. Since the UCCJEA drafters studied the prior acts in great detail before drafting their new one, the inference is that they chose the word “presently” advisedly and thus did not require continuity for a court that had rendered a prior decree to have jurisdiction under section 202 at a particular, subsequent time.

This interpretation of the UCCJEA would make it consistent on this point with the prior uniform act. The comment to the relevant section of the old act included this precise statement about the meaning of the criteria for a state’s jurisdiction to modify its own decree — “The prior court has jurisdiction to modify . . . even though its original assumption of jurisdiction did not meet the standards of this Act, as long as it would have jurisdiction *now*, that is, at the time of the petition for modification” — emphasizing the word “now.”¹¹⁹ These are powerful reasons to

¹¹³ UCCJA, *supra* note 3.

¹¹⁴ 28 U.S.C.A. §§ 1738A(c)(2)(A)(ii), (c)(2)(E), (d) (1994 & 1999 Cum. Ann. Pocket Part); UCCJA, *supra* note 3, § 3(a)(1).

¹¹⁵ 28 U.S.C.A. § 1738A(b)(4) (1994); UCCJA, *supra* note 3, § 2(5).

¹¹⁶ 28 U.S.C.A. § 1738A(b)(4) (1994); UCCJA, *supra* note 3, § 2(5).

¹¹⁷ *Id.* § 14(a).

¹¹⁸ 28 U.S.C.A. § 1738A(c)(2)(A)(i) (1994); UCCJA, *supra* note 3, § 3(a)(1)(i).

¹¹⁹ *Id.* § 14 cmt., at 293. The UCCJEA drafters make unpersuasive claims that the UCCJA’s treatment of a court’s jurisdiction to modify its own decree is confusing, *see, e.g.*, UCCJEA, *supra* note 2, § 202 cmt., at 274, but they do not offer criticisms of the merits of the UCCJA’s drafters’ decision to forbid one state to modify another state’s decree whenever the decree state currently has jurisdiction consistent with the act’s criteria, even if it lacked such jurisdiction

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interpret this language in the UCCJEA as meaning what it says, and requiring only present residence, not uninterrupted residence to the present.

On the other hand, a court might consider the wording of sections 202 and 203 simply bad drafting, might find a resulting ambiguity despite the facial clarity of the statutory language, might therefore deem the Official Comments more instructive than the act itself, and might then construe the Comments as authoritatively establishing a requirement that the state claiming jurisdiction under section 202 be continuously the residence of a child, a parent, or a person who, at every moment when no child or parent lived there, was a "person acting as a parent." Having taken all these steps, the court might conclude in our hypothetical case that the husband's state did not have jurisdiction under 202 when the court in the mother's state entertained the suit in which the superseding decree was made.

Before long, reported judicial decisions will begin answering these questions of interpretation. Experience teaches that sometimes courts reach various conclusions on such issues. What we know already, therefore, is that this question of interpreting the word "presently" may be yet another occasion for a litigant, like the husband in our case, to avoid issue preclusion on the ground that two mixed issues of fact and law are different when they include substantially different legal criteria.

The court in the mother's state might have felt free under section 203 to supersede the decree of the husband's state because it read "presently" to mean "continuously to the present." In contrast, the court in the husband's state might have read the statute literally, and thus concluded that the superseding judgment violated section 203 and therefore was unworthy of respect. Since the UCCJEA is authoritatively interpreted by the courts of each enacting state, there is nothing illegal about such inconsistent interpretations.

The result of varying interpretations may be that two different issues of mixed law and fact are raised in the two states' courts, and the second court may consider itself free to hear and decide its issue unrestrained by the law of collateral estoppel.

when it made the prior decree. The Comment to UCCJA section 14 explained that "stability of custody arrangements" and avoidance of "forum shopping" justified this feature of the old act. UCCJA, *supra* note 3, § 14 cmt., at 292.

For this reason and the others explained above, the UCCJEA proponent's argument that the husband's physical custody of the children results in litigation that binds him, and that ends the interstate conflict and incentives for self-help, is at best questionable.

In the immediately foregoing discussion of primary custody, as was further explained above in discussing visitation, one concludes that the new uniform act produces these results only if one ignores the PKPA. Fortunately, as will be described below, the federal statute preempts application of the UCCJEA in this manner, and will prevent these potential harms provided that attorneys and courts attend to the PKPA or, better yet, legislatures choose not to enact a new uniform act that is legally invalid in many applications.

IV. The UCCJA and Non-Parent Visitation and Custody

The state statutes the UCCJEA is designed to replace are sharply contrary to these features of the new act, whether the matter to be litigated is visitation or custody. Between 1969 and 1983, all fifty states and the District of Columbia adopted in sometimes varying terms a uniform act promulgated in 1968, the Uniform Child Custody Jurisdiction Act (UCCJA).¹²⁰ Under this old uniform act, a parent's relocation with the child does not cause an automatic and immediate shift of exclusive jurisdiction from one state to another in cases like those discussed above. The new state does acquire jurisdiction relatively soon, the old state loses jurisdiction sooner or later, and during periods when concurrent jurisdiction exists, important provisions apply that are designed to prevent concurrent *exercise* of jurisdiction. The UCCJA apparently permits joinder of all the interested adults in judicial proceedings, so they get a hearing and then are bound by the decision. Opportunities for re-litigation and for conflicting decree are limited. All these provisions combine to deter self-help and forum-shopping, and can give children the benefits of final decisions and stable living arrangements.

¹²⁰ UCCJA, *supra* note 3.

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A. *Vital UCCJA Provisions*

The provisions that produce those results are as follows. For the sake of brevity, I am editing and summarizing the provisions whenever possible, in ways that I make obvious by my use of quotation marks and ellipses. On a superficial reading, the following UCCJA provisions may appear very similar to various provisions of the new UCCJEA, but differences of great importance will be identified and evaluated below.

UCCJA section 3(a) governs the existence of jurisdiction, and provides that

[a] court . . . has jurisdiction to make a child custody determination by initial or modification decree if:

(1) this State (i) is the home state of the child at the time of commencement of the proceeding, or (ii) had been the child's home state within 6 months before commencement of the proceeding and the child is absent from this State . . . , and a parent or person acting as parent continues to live in this State; or

(2) it is in the best interest of the child that a court of this State assume jurisdiction because (i) the child and his parents, or the child and at least one contestant, have a significant connection with this State, and (ii) there is available in this State substantial evidence concerning the child's present or future care . . . ; or

(3) . . . it is necessary in an emergency to protect the child . . . ; or

(4) . . . no other state would have jurisdiction . . . substantially in accordance with paragraphs (1), (2), or (3), or another state has declined to exercise jurisdiction on the ground that this State is the more appropriate forum to determine the custody of the child, and (ii) it is in the best interest of the child that this court assume jurisdiction.¹²¹

Definitions of some of the terms used in section 3 are important. Their features that are crucial in the following discussion can be described as follows, in the order in which these terms appear in section 3. Under section 2(2), a "custody determination" includes an order for visitation.¹²² Under section 2(5), the "home state" is the state where the child lived with a parent or a person acting as parent for at least six consecutive months, right up to the time when the custody proceeding was commenced.¹²³ Under section 2(9), a "person acting as parent" is a non-parent

¹²¹ *Id.* § 3(a).

¹²² *Id.* § 2(2).

¹²³ *Id.* § 2(5).

“who has either been awarded custody by a court or claims a right to custody.”¹²⁴ Finally, under section 2(1), a “contestant” is a person “who claims a right to custody or visitation rights.”¹²⁵ The Official Comment to section 2(1) contains no explicit requirement that the “contestant” be making a claim cognizable under the substantive law of the forum state.

1. Joinder of parties

UCCJA section 10 governs joinder of parties. It requires joinder of anyone who “has physical custody of the child or claims to have custody or visitation rights.”¹²⁶ Section 10 does not expressly limit this requirement of joinder to persons having standing to litigate the merits of custody or visitation under the law of the state in which the case is pending. The Official Comment to UCCJA section 10 explains that “the purpose of this section is to prevent re-litigations of the custody issue when these would be for the benefit of third claimants rather than the child.”¹²⁷ This purpose certainly is best served if “third claimants” are joined as parties regardless of whether their standing arises under the law of the forum or of the state where they live, since those claimants may later seek to relitigate custody or visitation at their own homes. Thus it is at least arguable that section 10 requires joinder even of “contestants” who lack standing under local law, but who have it under the law of their own states.¹²⁸

2. Disclosure requirements

Section 9 facilitates application of section 10. It requires that every party in a custody or visitation case disclose under oath, along with other information, the names of all persons with whom the child has lived within the last five years, information

¹²⁴ *Id.* § 2(9).

¹²⁵ UCCJA, *supra* note 3, § 2(1).

¹²⁶ *Id.* § 10.

¹²⁷ *Id.* § 10 cmt., at 270.

¹²⁸ The UCCJA Prefatory Note explains that “[u]nderlying the entire Act is the idea that to avoid the jurisdictional conflicts and confusions which have done serious harm to innumerable children, a court in one state must . . . arrive at a fully informed judgment which transcends state lines and considers all claimants, residents and nonresidents.” *Id.* at 118.

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about any pending case in any state concerning custody or visitation of the same child or about any previous case in which he or she was a party or witness, and information about any person who claims to have custody or visitation rights.¹²⁹

The section 9 Comment explains that such disclosures help the court determine its jurisdiction, make decisions about joinder of additional parties, and identify courts in other states to be contacted by the court in which the current case is pending.¹³⁰ Again, neither the text of section 9 nor its Official Comment contains any language expressly limiting its application to claims that are cognizable under local law, rather than the law of the claimant's state, and again the stated purposes of section 9 are best served by broad joinder.

3. *Notice and hearing requirements*

Under section 4, before a court makes a custody determination "reasonable notice and opportunity to be heard shall be given to the contestants, any parent . . . , and any person who has physical custody of the child."¹³¹ The Official Comment to section 4 contains no explicit limitation of its requirement to "contestants" with claims cognizable in the forum state. The Comment acknowledges that notice and an opportunity to be heard are requirements of due process, and therefore that "strict compliance . . . is essential for the validity of a custody decree within the state and its recognition and enforcement in other states."¹³² Sections 5 and 10 provide expressly that the UCCJA's provisions on joinder, notice, and hearing apply to persons outside the state as well as local residents.¹³³

4. *Intrastate and interstate validity*

A UCCJA provision with a functional relation to the joinder, notice, and hearing provisions is section 12, to which the Comment to section 4 refers.¹³⁴ Section 12 provides in relevant part that

¹²⁹ *Id.* § 9.

¹³⁰ *Id.* § 9 cmt., at 266.

¹³¹ UCCJA, *supra* note 3, § 4.

¹³² *Id.* § 4 cmt., at 208.

¹³³ *Id.* §§ 5 & 10.

¹³⁴ *Id.* § 4 cmt., at 208.

[a] custody decree rendered by a court of this State which had jurisdiction under section 3 binds all parties who have been [duly] served . . . or notified . . . and who have been given an opportunity to be heard. As to these parties the custody decree is conclusive as to all issues of law and fact decided.¹³⁵

The section 12 Comment explains that “[t]his section deals with the intra-state validity of custody decrees which provides the basis for their interstate recognition and enforcement.”¹³⁶ Thus, section 12 affords intrastate and interstate validity to decrees only as against persons who were given notice and an opportunity to be heard.

5. *Restrictions on exercise of jurisdiction*

Also, sections 6 and 14 contain very important, mandatory restrictions on the exercise of jurisdiction by a court of one state, when a court of another state already is duly entertaining a dispute or already has duly made an order concerning the same child. A description of those two sections can be best provided below.¹³⁷ Finally, two UCCJA sections give a court discretion to decline to exercise its jurisdiction. One of these, section 8, lets a court decline to decide a case where the petitioner has engaged in certain kinds of wrongful conduct that otherwise might affect jurisdiction in the case.¹³⁸

The other is section 7. Section 7(a) permits a court to decline to exercise its jurisdiction on the grounds that that court is an inconvenient forum and a court of another state is a more convenient forum.¹³⁹ Section 7(c) requires the court to “consider if it is in the interest of the child that another state assume jurisdiction,” and allows the court to consider

the following factors, among others:

- (1) if another state is or recently was the child’s home state;
- (2) if another state has a closer connection with the child and his family or with the child and one or more of the contestants;

¹³⁵ *Id.* § 12.

¹³⁶ UCCJA, *supra* note 3, § 12 cmt., at 274.

¹³⁷ *See infra* text accompanying notes 148-52.

¹³⁸ UCCJA, *supra* note 3, § 8.

¹³⁹ *Id.* § 7(a).

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- (3) if substantial evidence concerning the child's present or future care, protection, training, and personal relationships is more readily available in another state;
- (4) if the parties have agreed on another forum which is no less appropriate; and
- (5) if the exercise of jurisdiction by a court of this state would contravene any of the purposes stated in section 1.¹⁴⁰

B. *UCCJA Policies*

Reading the above provisions makes it obvious that some crucial UCCJA provisions of section 3, governing when jurisdiction begins and ceases to exist, are phrased in vague language.¹⁴¹ Section 3(a)(2) is particularly important for the analysis in this article, and it employs three vague phrases, requiring courts to decide what jurisdictional decision is in the "best interest of the child," whether there is a "significant connection" between the child and a parent or contestant with this state, and whether there is "substantial evidence" in this state. All three terms could bear a variety of meanings and applications. The vagueness of these terms gives each state's courts, when applying section 3(a)(2), flexibility to interpret and apply them in the manner that, in the view of those courts, best accommodates the competing policies on which the UCCJA is based.

These competing policies were rather fully articulated by the drafters of the old uniform act, and are important policies. If the new state acquires jurisdiction too quickly, this creates an incentive for parental self-help and forum-shopping, may allow re-litigation of disputes and conflict among courts of different states, and contributes to, as UCCJA section 1 described it, "the shifting of children from state to state with harmful effects on their well-being."¹⁴² The undesirable incentive would be magnified if the too-rapid shift of jurisdiction to the child's new state were exclusive of jurisdiction in the former state.

If, instead, the new state acquires jurisdiction too slowly, then another UCCJA policy set forth in section 1 is frustrated, the policy that custody litigation should "take place ordinarily in the state with which the child and his family have the closest con-

¹⁴⁰ *Id.* § 7(c).

¹⁴¹ See *supra* text accompanying note 121.

¹⁴² UCCJA, *supra* note 3, § 1(a).

nection and where significant evidence concerning his care, protection, training, and personal relationships is most readily available”¹⁴³ Frustration of this policy can result in courts making custody and visitation decisions without the fullest possible information or without an optimal state interest in the outcome of the litigation.

The drafters of the UCCJA realized that room existed for reasonable differences of opinion over how best to balance those important, competing policies. That is why they deliberately employed vague phrases in section 3(a)(2). Using these phrases, courts of different states can and do reach varying accommodations of the competing policies described above, emphasizing one policy or another in particular kinds of cases.¹⁴⁴

C. UCCJA Application To Initial Visitation Case

Virtually no state, however, has adopted a rule as extreme, sweeping, and mechanical as the UCCJEA rules described above. Instead, typical applications of the UCCJA to cases similar to the *Kenyon* and *Sleeper* cases discussed above would be as follows.

In a case like *Kenyon*, if the mother moves from one UCCJA state to another UCCJA state where grandparents in such a case lack standing to seek visitation, because she hopes that this forum-shopping will block contact between her son and his grandparents, the UCCJA should defeat her ploy. Jurisdiction to resolve the dispute over visitation will not exist in the new state until the mother and child have lived there long enough so that, under UCCJA section 3(a)(2), jurisdiction there is in the child’s best interest because significant connections and substantial evidence have arisen in the new state. A court of the new state would not find those requirements established until the

¹⁴³ *Id.* § 1(a)(3).

¹⁴⁴ *E.g., compare* Yurgel v. Yurgel, 572 So.2d 1327, 1331-32 (Fla. 1990) (holding that section 3(a)(2) jurisdiction continues until virtually all contacts with the state have ceased), *with* In re Harris, 883 P.2d 785 (Kan. Ct. App. 1994) (holding that the presence of one parent in the state and occasional visits to the state by a child are not sufficient under § 3(a)(2)).

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child and his mother had lived there for some time, probably a few months.¹⁴⁵

Meanwhile, jurisdiction under these same UCCJA provisions will exist for a time in the old state from which the mother fled. Applying the language of section 3(a)(2), the child and at least one “contestant,” that is, the two grandparents, have a “significant connection” with the old state. As we saw above, the word “contestant” in section 3(a)(2) is defined by UCCJA section 2(1) to mean “a person, including a parent, who claims a right to custody or visitation rights with respect to a child.” That definition covers the grandparents as well as the mother, since the grandparents claim visitation rights. As a result of the child’s long and recent residence in the old state, and the grandparents’ long and current residence there, it remains true after relocation of the mother and child that the child and these two grandparent contestants have significant connections in the old state and substantial evidence is available there, so the old state has jurisdiction.¹⁴⁶

This conclusion is the opposite of that described above¹⁴⁷ under the UCCJEA’s superficially similar provision for “significant connection” jurisdiction. The contrasting jurisdictional outcomes result from the old act’s coverage of “contestants” for this purpose, and the new act’s narrower coverage only of “persons acting as parents,” a term defined so as to exclude most non-parents.

Thus, under the UCCJA, for the first few months after the mother’s relocation, she cannot file suit in her new state to block visitation, and the grandparents can sue in the old state to obtain a court order for visits. These UCCJA provisions, delaying the old state’s loss of jurisdiction and the new state’s acquisition of it, are drastically inconsistent with the new UCCJEA’s provisions,

¹⁴⁵ See, e.g., *In re Mayes*, 523 N.E.2d 249 (Ind. Ct. App. 1988); *Swan v. Swan*, 796 P.2d 221 (Nev. 1990).

¹⁴⁶ Cf., e.g., *Lane v. Lane*, 659 A.2d 809 (Del. Fam. Ct. 1994) (holding that Texas had significant connection jurisdiction after mother and children left Texas); *Davis v. Davis*, 799 S.W.2d 127 (Mo. Ct. App. 1990) (holding that Alabama had significant connection jurisdiction after mother and daughter had left Alabama); *In re Payne*, 899 P.2d 1318 (Wash. Ct. App. 1995) (holding that Virginia had significant connection jurisdiction after mother and child had left Virginia).

¹⁴⁷ See *supra* text accompanying notes 66-68.

which both destroy jurisdiction in the old state and create it in the new one on the very day of the mother's relocation. In this respect the new UCCJEA on its face creates a very strong incentive for forum-shopping, while the old UCCJA avoids creating such an incentive.

The old UCCJA goes even further to deter forum-shopping. In addition to prolonging the *existence* of jurisdiction in the grandparents' state and delaying it in the mother's new state, the UCCJA contains additional, mandatory provisions restricting *exercise* of jurisdiction by courts of the new state, even after the mother and child have lived there for months and jurisdiction therefore has begun to *exist* there.

These two provisions, found in sections 6 and 14, were referred to above, but their description was postponed there,¹⁴⁸ and is now due. First, UCCJA section 6(a) provides that a court of the new state cannot exercise its jurisdiction if, when the mother files her petition there, a proceeding "substantially in conformity with" the UCCJA is already pending in the old state.¹⁴⁹

This provision is designed to prevent conflict between courts of the two states from arising as soon as the mother and child have lived in the new state long enough to create jurisdiction there. At that point in time, jurisdiction may well exist in both states under UCCJA section 3(a)(2), since significant connections and substantial evidence exist in both the old state and the new one. But if the grandparents commence a visitation suit in their state before the mother and child have lived in the new state long enough to create section 3(a)(2) jurisdiction, then under section 6(a), even after a court of the new state does come to *have* section 3(a)(2) jurisdiction, it cannot *exercise* that jurisdiction as long as the case remains pending in the old state.

¹⁴⁸ *Supra* text accompanying note 137.

¹⁴⁹ UCCJA, *supra* note 3, § 6(a). This provision refers to "a proceeding concerning the custody of the child . . . pending in a court of another state," but section 2(2) defines "custody determination" to mean, *inter alia*, a court order "providing for the custody of a child, including visitation rights," and section 2(3) defines "custody proceeding" to include "proceedings in which a custody determination is one of several issues." Therefore, § 6(a)'s proscription of concurrent proceedings applies where the prior, pending proceeding involves only visitation issues. *See, e.g.*, P.A.T. v. D.B., 638 So.2d 905, 910 (Ala. Ct. Civ. App. 1994); Sterzinger v. Efron, 534 So.2d 798 (Fla. Dist. Ct. App. 1988).

D. *UCCJA Application To Visitation Modification*

The UCCJA's deterrence of forum-shopping does not stop there. As soon as the court in the old state enters a visitation order in the grandparents' suit, the second of these two mandatory restrictions, found in section 14(a), imposes an additional bar to *exercise* of jurisdiction by a court of the new state. Section 14(a) provides in relevant part that

[i]f a court of another state has made a custody decree, a court of this State shall not modify that decree unless (1) . . . the court which rendered the decree does not now have jurisdiction under jurisdictional prerequisites substantially in accordance with this Act or has declined to assume jurisdiction to modify the decree and (2) the court of this State has jurisdiction.¹⁵⁰

Under the definitions in UCCJA section 2, the term "custody decree" covers visitation orders,¹⁵¹ and the term "modify" covers any custody decree "which modifies or replaces a prior decree, whether made by the court which rendered the prior decree or by another court."¹⁵² In short, section 14(a) forbids a court of the mother's new state later to supersede or otherwise to modify the old state's visitation order, as long as the court in the old state then has jurisdiction "substantially in accordance with" the UCCJA and does not decline to exercise it.

The UCCJA thus forbids the new state in our hypothetical case to exercise jurisdiction while the case in the old state is pending, and also forbids the new state to modify the old state's decree. In addition, the old uniform act also contains section 13, which requires the new state to enforce the old state's decree if it was made "under statutory provisions substantially in accordance with [the UCCJA] or . . . under factual circumstances meeting the jurisdictional standards of" this act.¹⁵³

Thus, when both states have the old UCCJA the big picture is as follows. Jurisdiction does not exist in the mother's new state until she and the child have lived there for a few months or so. Even after that, a court of her new state cannot exercise its jurisdiction if the grandparents already began a suit for visitation in the old state soon after the mother's departure. The new state's

¹⁵⁰ UCCJA, *supra* note 3, § 14(a).

¹⁵¹ *Id.* § 2(2), (4).

¹⁵² *Id.* § 2(7).

¹⁵³ *Id.* § 13.

court is barred from exercising its jurisdiction not only during the pendency of the case in the old state, but also after the court there makes a visitation order. And the new state must enforce the old state's decree.

The combined effect of the UCCJA's broad requirements of joinder, notice, and hearing, coupled with its restrictions on the exercise of jurisdiction where another state is already considering a dispute or has already decided it, is to reduce the incidence of self-help, forum shopping, concurrent proceedings, successive proceedings, re-litigation of decisions, and conflicting decrees. In this manner the UCCJA serves its purposes to protect children from "harmful effects on their well-being" caused by people "shifting [them] from state to state," by "abductions and other unilateral removals," and by "continuing controversies."¹⁵⁴ These provisions also serve the UCCJA purposes to "avoid jurisdictional competition and conflict with courts of other states" and "avoid re-litigation of custody decisions."¹⁵⁵ Finally, these UCCJA provisions also provide procedural fairness to the adults who are interested in the children's welfare.

Even under the UCCJA, eventually the new state may become free to modify the old state's visitation order, because jurisdiction may cease to exist in the old state. When the mother and child have lived in the new state long enough, the old state's "connections" may cease to be "significant," and the evidence available there may cease to be "substantial," within the meaning of those terms in UCCJA section 3(a)(2). And even before the old state's jurisdiction ceases to *exist*, the court there may decline to *exercise* it under section 7(a), described above,¹⁵⁶ which permits such a ruling on the grounds that the old state has become an inconvenient forum and the mother's new state has become a more convenient forum.

However, even when the connections and evidence in the state appear to have dwindled somewhat, and a court of the new state may therefore seem to be free to modify the existing decree, the UCCJA may at least guarantee the grandparents notice of the proceeding and an opportunity to be heard in it. As was

¹⁵⁴ *Id.* § 1.

¹⁵⁵ UCCJA *supra* note 3, § 1.

¹⁵⁶ *See supra* text accompanying note 139.

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said above,¹⁵⁷ section 4 provides that “reasonable notice and opportunity to be heard shall be given to the contestants.” Section 2(1) defines a “contestant” as “a person . . . who claims a right to custody or visitation rights.” And under the provisions of section 10 summarized above,¹⁵⁸ the court is required to order joinder of any person who “claims to have custody or visitation rights.” Even one who lacks standing to claim visitation under local law in an initial proceeding may arguably have standing to claim visitation rights under a prior order of another state. In most UCCJA states, those provisions of the old uniform act probably mean that persons already entitled to visitation under an order of a court of another state are entitled to notice and a hearing before a new state cancels the order, even if they would have lacked standing to seek an initial visitation order in the new state.¹⁵⁹

This opportunity to participate in the new litigation may be valuable even to non-parents who lack standing to obtain visitation under the law of the forum. It gives them an opportunity to litigate the issues of whether the court of the new state has jurisdiction under section 3 and, even if so, whether that court must decline to exercise its jurisdiction under section 14(a) or should do so as an inconvenient forum under section 7.

All these issues depend on evidence about the particular case. When one re-reads sections 3,¹⁶⁰ 7,¹⁶¹ and 14,¹⁶² one sees that answers to the following questions and others may determine whether the court of the new state is forbidden to modify

¹⁵⁷ See *supra* text accompanying note 131.

¹⁵⁸ See *supra* text accompanying note 126.

¹⁵⁹ Cf. *Hoeck v. Hoeck*, 545 So.2d 786 (Ala. Ct. Civ. App. 1989) (holding that it was error not to join, as parties to custody litigation between child's father and mother, grandparents who had temporary custody of the child pursuant to a valid court order). In a previous article, I mentioned but took no position on the question whether standing to seek custody or visitation under the law of one state makes one a “contestant” entitled under the UCCJA to notice and hearing in another state where standing would be absent. Russell M. Coombs, *Interstate Child Custody: Jurisdiction, Recognition, and Enforcement*, 66 MINN. L. REV. 711, at 769-70 and nn.327-34, and at 859 and nn.872-73 (1982). I did not there even mention the different question addressed here in the text.

¹⁶⁰ See *supra* text accompanying note 121.

¹⁶¹ See *supra* text accompanying notes 139-40.

¹⁶² See *supra* text accompanying note 150.

the prior decree and, if not, whether that court should nonetheless decline to do so. How strong now are each state's connections with the child and with each adult? How much evidence about the child's care and relationships exists in each state?¹⁶³ Did the litigants make a valid agreement on the choice of a forum?¹⁶⁴

Joined as parties and allowed to present evidence relevant to these questions, evidence that the parent might prefer to withhold from the court, non-parents may be able to show the court in the mother's state, for instance, that section 14(a) forbids it to modify the prior decree, or that it should consider itself an inconvenient forum. Winning such a victory would give these litigants a chance to prevail on the merits of the case in a court of their own state and under its law. Rights of joinder, notice, and hearing are indeed valuable to a litigant who lacks standing in the state where a proceeding is pending but has it elsewhere.¹⁶⁵

In view of all these provisions, under the UCCJA the prospect that the old state will lose jurisdiction or decline to exercise it is usually too uncertain and too remote in time, when a dispute first arises, to give the mother much incentive to relocate for the purpose of forum-shopping. In any event, even if litigation does occur in the forum she shopped for, the grandparents will at least be joined as parties and given notice and a hearing, and the court will at least hear all the evidence bearing on the existence and exercise of its jurisdiction, if not on the merits of visitation.

The contrast between the old UCCJA and the new UCCJEA in this respect could hardly be sharper. If federal law permitted literal application of the UCCJEA, then the very day the mother spirited her child away from his established home to an unfamiliar state, the courts of the new state would acquire exclusive jurisdiction, and she could destroy the grandparents' visitation there without even notifying them of the lawsuit,

¹⁶³ See *supra* text accompanying notes 121 & 140.

¹⁶⁴ See *supra* text accompanying note 140. See, e.g., *In re Koller*, 882 P.2d 132 (Ore. Ct. App. 1994) (affirming dismissal of petition to modify other state's judgment, on ground that section 14 forbade modification because other state had significant connection and substantial evidence under section 3).

¹⁶⁵ See *infra* text accompanying notes 306-18, where a discussion of the PKPA addresses additional reasons for joining the grandparents and giving them an opportunity to litigate jurisdictional issues in the new forum.

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whether or not a court had already ordered visitation. Thus, but for the contrary and preemptive effect of the PKPA, the UCCJEA would create a mighty incentive for forum-shopping, in an abrupt departure from the UCCJA's thoroughgoing deterrence of such self-help.

E. *UCCJA Application To Custody Case*

The contrast between the old and new uniform acts is equally sharp when they are applied to a case similar to *Sleeper*, where the contest is over primary custody rather than visitation. Suppose that the mother in such a case attempts to forum-shop in the manner described above.¹⁶⁶ She negotiates a trial separation, and then sues for sole custody in her new state when enough time has passed so that the new state, where her husband lacks standing to seek custody, has acquired jurisdiction. When the governing state law is the UCCJA instead of the UCCJEA, the husband can frustrate the mother's stratagem.

All he must do is commence a custody suit in the old state before she relocates with the children. The old state is the children's "home state" as that term is defined in UCCJA section 2(5), since immediately preceding the filing of the husband's suit the children have lived there with a parent for more than six months.¹⁶⁷ Consequently, the old state has "home state" jurisdiction under section 3(a)(1)(i).¹⁶⁸

Once the husband's suit has been commenced in the old state, the UCCJA section 6(a) provision discussed above bars a court of the new state from exercising jurisdiction during the pendency of the husband's case.¹⁶⁹ And once the court of the old state makes a custody order, UCCJA section 14(a) forbids the court of the new state to modify it.¹⁷⁰ In addition, the new state must enforce the old state's decree. Section 13 provides that a court must

enforce an initial or modification decree of a court of another state which had assumed jurisdiction under statutory provisions substantially in accordance with this Act or which was made under factual

¹⁶⁶ See *supra* text accompanying notes 94-96.

¹⁶⁷ See *supra* text accompanying note 123.

¹⁶⁸ See *supra* text accompanying note 121.

¹⁶⁹ See *supra* text accompanying note 149.

¹⁷⁰ See *supra* text accompanying notes 150-52.

circumstances meeting the jurisdictional standards of the Act, so long as this decree has not been modified in accordance with jurisdictional standards substantially similar to those of this Act.¹⁷¹

Consequently, the children are returned to live with the husband in the old state.

Thus, the big picture under the old UCCJA for a custody case like *Sleeper* is similar to what it is for a visitation case like *Kenyon*. Under the UCCJA, jurisdiction does not arise immediately in the mother's new state. Even after jurisdiction does begin to exist there, a court of her new state cannot exercise its jurisdiction if the husband began a custody suit in the old state before the mother's departure. The new state's court is barred from exercising its jurisdiction not only during the pendency of the case in the old state, but also after the court there makes a custody order, and the new state must enforce the husband's existing judgment.

In short, for some custody contests as for some visitation disputes, the contrast between the old UCCJA and the new UCCJEA is dramatic. According to the terms of the UCCJEA, the very day the mother spirits her child away from their established home to an unfamiliar state, the courts of the new state acquire exclusive jurisdiction, and she can win custody there without even notifying her adversary of the lawsuit, even if he or she already has a custody decree. Interstate conflict between judgments can persist, and the UCCJEA appears to invite additional rounds of self-help. Thus for some custody cases, as for some visitation litigation, the UCCJEA on its face replaces the UCCJA's deterrence of forum-shopping, self-help, repetitive litigation, and interstate conflict with a virtual invitation of those vices.

V. The PKPA and Non-Parent Visitation and Custody

Fortunately, some federal statutes and provisions of the United States Constitution should limit the harm caused by these features of the UCCJEA. Analysis of these federal laws should begin with the one addressed specifically to issues of jurisdiction in child custody cases, the PKPA. In 1980, when six states and

¹⁷¹ UCCJA, *supra* note 3, § 13.

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the District of Columbia had not yet enacted the UCCJA,¹⁷² Congress enacted the Parental Kidnapping Prevention Act (PKPA),¹⁷³ the most important part of which is codified as section 1738A of title 28 of the United States Code.¹⁷⁴

A. *Vital PKPA Provisions*

Section 1738A is modeled in most respects on key provisions of the UCCJA. This federal statute contains provisions similar to UCCJA sections 2, 4, 6(a), 13, and 14(a), discussed above.¹⁷⁵

That is, the federal statute covers visitation as well as custody litigation,¹⁷⁶ it requires that “contestants” receive reasonable notice and opportunity to be heard,¹⁷⁷ it places mandatory restrictions on the authority of state courts to entertain such a case when another case about the same child is already duly pending in another state,¹⁷⁸ it requires states to enforce duly entered orders of other states until they are duly modified,¹⁷⁹ and it limits the authority of state courts to modify duly made orders of other states.¹⁸⁰ These last three provisions — the bars against concurrent proceedings and against modification of foreign decrees, and the duty of enforcement — apply only if the previously commenced proceeding is being conducted, or the previously made decree was entered, “consistently with” the law of that other state and with this federal statute.¹⁸¹

What does it take for a first state’s pending proceeding or prior order that is consistent with that state’s own law to be also consistent with section 1738A? Three things. First, “before a child custody or visitation determination is made, reasonable notice and opportunity to be heard shall be given to the contestants, any parent . . . and any person who has physical custody of a

¹⁷² The effective dates of the UCCJA in the 50 states and in the District of Columbia are listed in 9 U.L.A. Part I pp. 115-16 (1988).

¹⁷³ See *supra* note 17.

¹⁷⁴ 28 U.S.C.A. § 1738A (1994 and 1999 Cum. Ann. Pocket Part).

¹⁷⁵ See *supra* notes 121-31, 149-53, 171.

¹⁷⁶ 28 U.S.C.A. § 1738A(b) (1994 and 1999 Cum. Ann. Pocket Part).

¹⁷⁷ *Id.* § 1738A(e). See *infra* text accompanying notes 182-83.

¹⁷⁸ *Id.* § 1738A(g). See *infra* text accompanying note 217.

¹⁷⁹ *Id.* § 1738A(a). See *infra* text accompanying note 229.

¹⁸⁰ *Id.* § 1738A(a), (c), (d), (f). See *infra* notes 218 & 229 and accompanying text.

¹⁸¹ See *infra* notes 217-18 & 229 and accompanying text.

child.”¹⁸² The statute defines a “contestant” as “a person . . . who claims a right to custody or visitation.”¹⁸³

Second, conducting the proceeding or entering the order must not itself have violated another provision of section 1738A. In other words, a proceeding that violated the statute’s prohibition of concurrent proceedings or of modifying another state’s decree was of course not consistent with section 1738A.

Third and finally, this statute sets forth additional criteria for the consistency of state proceedings or orders with its provisions. That is, section 1738A contains language¹⁸⁴ similar in almost all respects to UCCJA section 3(a),¹⁸⁵ but with a few differences. The most fundamental difference is this: UCCJA section 3 governs the *existence* of jurisdiction, while the similar language in section 1738A serves only as criteria for determining the applicability of the federal act’s duty of enforcement and its restrictions on the *exercise* of jurisdiction, that is, its bars to concurrent proceedings and modifications.

One additional feature of the federal statute is important for the following analysis. The PKPA’s description of “significant connection” jurisdiction, like that of the UCCJA and unlike the new UCCJEA, covers a state’s connection with a “contestant,” defined to include one who is not a “person acting as a parent.” We saw above that the new uniform act’s dropping of the term “contestant” produced jurisdictional results sharply at odds with those of the UCCJA. We shall find below that this aspect of the UCCJEA likewise creates direct conflicts between it and the PKPA.¹⁸⁶

B. PKPA Purposes

The federal statute was originally designed to serve four purposes. First, it encouraged the states that had not yet enacted the UCCJA to do so, since only orders made under jurisdictional standards similar to the UCCJA would win the new federal statute’s protection from interference by other states. Section 1738A seemed to succeed in achieving this purpose. The last several

¹⁸² 28 U.S.C.A. § 1738A(e) (1999 Cum. Ann. Pocket Part).

¹⁸³ *Id.* § 1738A(b)(2).

¹⁸⁴ *Id.* § 1738A(c)(2) (1994 & 1999 Cum. Ann. Pocket Part).

¹⁸⁵ *See supra* text accompanying note 121.

¹⁸⁶ *See infra* text accompanying notes 210-34.

states and the District of Columbia enacted versions of the UCCJA by 1983, less than three years after the PKPA was signed into law.¹⁸⁷

The second purpose of the federal statute was to provide mechanisms for resolving conflicts between the courts of different states that could arise even if all American jurisdictions did adopt the UCCJA. Such conflicts could result from differences in versions of the UCCJA enacted by various state legislatures, and from differences in their courts' interpretations of even identical UCCJA language.

For example, as was mentioned above, section 3(a)(2) is often crucial when a court must decide whether jurisdiction exists at all, and when it must decide whether one of the bars to the exercise of jurisdiction applies to a case, especially section 14(a)'s bar to modification of another state's decree. The state that rendered the existing decree may conclude that it retains exclusive jurisdiction under its interpretation of section 3(a)(2)'s flexible phrases, "significant connection," "substantial evidence," and "best interest." At the same time, a court in a sister state may interpret those phrases more narrowly. The latter court thus may conclude that the prior state has lost jurisdiction, and that the section 14(a) bar to modifying the prior decree is therefore inapplicable.

Such differences in UCCJA enactments or interpretations could result in the two states entering conflicting decrees. The federal statute was designed to prevent or resolve such conflicts, by specifying that the federal bar to modification of another state's decree lasts as long as that state retains jurisdiction under *its own* law and the child or contestant still lives there. This purpose of the act, too, has been very successfully achieved.¹⁸⁸

¹⁸⁷ See *supra* note 172.

¹⁸⁸ See, e.g., Barbara Ann Atwood, *Child Custody Jurisdiction and Territoriality*, 52 OHIO ST. L.J. 369 (1991) (stating that "with the adoption of the [UCCJA] in every state . . . and the enactment of the [PKPA], the widespread hope was that jurisdictional confusion in child custody litigation would disappear. To a great extent, that hope has been realized") (footnotes omitted); Roger M. Baron, *Federal Preemption in the Resolution of Child Custody Jurisdiction Disputes*, 45 ARK. L. REV. 885, 901, 912 (1993) (stating that "acceptance of the PKPA's federal standard for continuing exclusive jurisdiction has been quite positive by many jurisdictions" and that, as to both initial and continuing jurisdiction, "the PKPA is working wonderfully well"); Roger M. Baron, *Refin-*

The third purpose of the federal act was to reduce the temptation the UCCJA created for litigants to race to the courthouses of different states when filing petitions for initial custody or visitation awards. Section 6(a) of the old uniform act barred the exercise of jurisdiction in the second of two cases that were both commenced consistently with UCCJA standards, even if the first case was based only on section 3(a)(2) “significant connections” and “substantial evidence” jurisdiction, while the second case was based on “home state” jurisdiction. This provision created an incentive for both parties to begin litigation in their respective states as early as possible.

Section 1738A reduced the number of cases with such an incentive, by providing that the federal bar on exercising jurisdiction protected a prior, pending case based on section 3(a)(2) jurisdiction only if the child had no “home state” when that case was commenced. Thanks to this federal provision, a race to courthouses for an initial proceeding was invited only when no home state existed. Like the first two purposes discussed above, this third purpose has been achieved in practice.¹⁸⁹

ing Relocation Laws — The Next Step in Attacking the Problem of Parental Kidnapping, 25 TEX. TECH. L. REV. 119, 120 (1993) (referring to the PKPA as “a most appropriate and effective tool” and “wonderfully simple in its operation,” and stating that “criticisms that the PKPA is poorly drafted or too complex are not well-founded”); Christopher L. Blakesley, *Comparativist Ruminations from the Bayou on Child Custody Jurisdiction*, 58 LA. L. REV. 449, 449-51 (1998) (stating that, although the UCCJA and PKPA “are far from perfect, and even cause problems in some circumstances,” the problems of interstate and international custody jurisdiction were “much worse” before their enactment); see also Linda M. Demelis, Note, *Interstate Child Custody and the Parental Kidnapping Prevention Act*, 45 HASTINGS L.J. 1329, 1330, 1338-40 (1994). But see, e.g., Andrea S. Charlow, *Jurisdictional Gerrymandering and the Parental Kidnapping Prevention Act*, 25 FAM. L.Q. 299, 300 (1991) (stating that the PKPA “does not meet Congress’s expectations” in that “parents still snatch their children for forum shopping purposes and conflicting custody orders from different states have not been eliminated”) (footnotes omitted); Nancy S. Erickson, *The Parental Kidnapping Prevention Act*, 18 GOLDEN GATE U. L. REV. 529, 531 (1988) (stating that “the UCCJA and the PKPA have been quite effective . . . with regard to children of divorced couples, but they are much less protective of children of parents who have never been married”). See generally Christopher L. Blakesley, *Child Custody — Jurisdiction and Procedure*, 35 EMORY L.J. 291, 361-62 (1986).

¹⁸⁹ See, e.g., Baron, *Federal Preemption*, *supra* note 188, at 893-97, 912 (stating that “the PKPA goes much further [than the UCCJA] in limiting initial

Those three purposes of section 1738A were all based quite directly on the prospect of states' enacting the UCCJA: the federal act would encourage them to do so, and would improve the UCCJA's functioning among states that enacted it, whether the issue was initial or continuing jurisdiction. The fourth and final purpose of the federal statute was different. Just in case some states never did enact the UCCJA, the fourth purpose of section 1738A was to establish national rules of federal law that would (1) determine which custody and visitation proceedings and orders of non-UCCJA states must be respected by other states, and (2) almost always require non-UCCJA states to respect proceedings and decrees of UCCJA states.

This fourth purpose of the federal act would have been very important if all the states had not promptly enacted the UCCJA. As the drafters of the UCCJA explained in 1968 when promulgating that uniform act, the judicial trend then was "toward permitting custody claimants to sue in the courts of almost any state, no matter how fleeting the contact of the child and family was with the particular state."¹⁹⁰ In addition, many states "felt free to modify custody decrees of sister states."¹⁹¹ The UCCJA drafters further explained:

In this confused legal situation the person who has possession of the child has an enormous tactical advantage. Physical presence of the child opens the doors of many courts to the [petitioner] and often assures him of a decision in his favor. It is not surprising then that custody claimants tend to take the law into their own hands, that they resort to self-help in the form of child-stealing, kidnapping, or various other schemes to gain possession of the child.¹⁹²

The results, the drafters went on, are that "children are shifted from state to state . . . while their parents or other persons battle over their custody in the courts of several states."¹⁹³ Even after one court has rendered a judgment, the drafters wrote, the loser often will seek and find a more sympathetic court in a distant state. The drafters concluded that children need "security and stability of environment and a continuity of affection" and suffer

jurisdiction," and describing states' applications of sec. 1738A(g)). *See generally supra* note 188.

¹⁹⁰ UCCJA, *supra* note 3, Prefatory Note, at 117.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.* at 116.

great harm when they undergo such experiences.¹⁹⁴ If some states declined to enact the UCCJA, these problems would have persisted unless prevented by the PKPA.

For the last sixteen years, this fourth purpose of the federal statute, to determine when custody proceedings and orders of non-UCCJA states must be respected by other states and to require non-UCCJA states to respect UCCJA cases and decisions, has been virtually moot. This was true because by 1983 all the states and the District of Columbia had enacted one version or another of the UCCJA.

C. UCCJEA Revival Of One PKPA Purpose

Now, though, the UCCJEA has given new importance to the PKPA's fourth purpose, since the new uniform act invites litigants in some kinds of cases to engage in the harmful activities the UCCJA successfully controlled. It seems ironic that the National Conference of Commissioners on Uniform State Laws (NCCUSL), the very body that promulgated the old UCCJA "to remedy this intolerable state of affairs where self-help and the rule of 'seize-and-run' prevail,"¹⁹⁵ has now created incentives for self-help and re-litigation and has thereby revived section 1738A's fourth purpose. By advising states to adopt the new UCCJEA and to repeal their enactments of the UCCJA, NCCUSL has given the PKPA a function that was virtually unnecessary for sixteen years.

As was illustrated above in the hypothetical applications of the new UCCJEA to cases like *Kenyon* and *Sleeper*,¹⁹⁶ the new uniform act creates many of the very problems the UCCJA eliminated. Indeed, the language the UCCJA drafters used in 1968 to describe in some detail an "intolerable state of affairs" is very apt to describe results of the UCCJEA that would be predictable but for their thwarting by the PKPA.

If it were not for the PKPA, in cases similar to *Kenyon* and *Sleeper* the UCCJEA would permit "custody claimants to sue in the courts [despite] fleeting . . . contact of the child and family . . . with the particular state,"¹⁹⁷ since the new act creates jurisdiction

¹⁹⁴ *Id.*

¹⁹⁵ UCCJA *supra* note 3, Prefatory Note, at 117.

¹⁹⁶ *See supra* text accompanying notes 62-83, 94-119.

¹⁹⁷ UCCJA, *supra* note 3, Prefatory Note, at 117.

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the very day the mother and child arrive in the new state where she is shopping for favorable law. Tempted by the new law to gain this “enormous tactical advantage,”¹⁹⁸ the mother may resort to self-help by “shift[ing her child] from state to state.”¹⁹⁹ The mother may “remove the child” to find “a more sympathetic ear”²⁰⁰ in another state’s court or, better still, a state where the law denies the other interested parties standing, notice of the case, and an opportunity to be heard in it.

The mother’s temptation may be especially strong when she has already “los[t] a court battle . . . [and is] unwilling to accept the judgment of the court.”²⁰¹ But for preemption by the PKPA, the UCCJEA leaves a court of the mother’s new state “free to modify [the] custody decree . . . of [the] sister state,”²⁰² again even without giving the mother’s adversary notice or a hearing. Then the UCCJEA also leaves the courts of the two states free to consider their own decrees superior to each other’s, and tempts the parties to employ self-help so that paper rights are enjoyed in practice. Among the undesirable results of such events would be that “harm [is] done to [the child, since he or she] needs security and stability of environment and a continuity of affection.”²⁰³

These effects of the UCCJEA would be regrettable in many ways if every state enacted it, for reasons described above when the new act was applied to hypothetical cases.²⁰⁴ The UCCJEA will have the same or worse effects in the present circumstances, where some states have the new uniform act and some have the old one, except to the extent that the PKPA blunts these effects.²⁰⁵ Clearly, courts in UCCJA states and courts in UCCJEA states will frequently refuse to defer to each other’s pending proceedings and final decrees. They will often find in their respective uniform acts ample, apparently sound reasons for such refusal.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 116.

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² UCCJA *supra* note 3, Prefatory Note, at 117.

²⁰³ *Id.* at 116.

²⁰⁴ *See supra* text accompanying notes 62-83, 94-119.

²⁰⁵ *See infra* text accompanying notes 206-34.

For example, courts in UCCJEA states will frequently conclude that decrees previously made in UCCJA states were not made “in substantial conformity with this [Act]” or “under factual circumstances meeting the jurisdictional standards of this [Act],” a precondition of a UCCJEA state’s duty under its uniform act to enforce the decrees.²⁰⁶ Likewise, a UCCJEA court will often conclude that a decree made in a UCCJA state was not “consistent with Section 201 or 203” when made, and that it is not true that the child, a parent, or a person acting as a parent presently resides in the UCCJA state. Either finding means that the UCCJA state lacks exclusive, continuing jurisdiction in the eyes of the UCCJEA court, so its uniform act permits the latter to enter a conflicting order.²⁰⁷

Conversely, courts in UCCJA states will often conclude that UCCJEA decrees were not made “under statutory provisions substantially in accordance with this Act” nor “under factual circumstances meeting the jurisdictional standards of this Act,” a precondition of a UCCJA state’s duty under its uniform act to enforce the decrees.²⁰⁸ And a UCCJA court will frequently decide that a UCCJEA court “does not now have jurisdiction under jurisdictional prerequisites substantially in accordance with this Act,” so the UCCJA will not bar modification of the UCCJEA judgment.²⁰⁹

The bases of such decisions, in cases involving non-parents, will include the UCCJEA’s and UCCJA’s contrasting treatments of “contestants,” their inconsistent provisions concerning “persons acting as parents,” interstate variations in the rules of standing incorporated by reference in the new uniform act, the resulting contrasts between the old and new acts’ jurisdictional standards, their conflicting rules on joinder, notice, and hearing, and other inconsistencies between the two uniform acts. Thus the new UCCJEA on its face revives pre-UCCJA social and legal problems, regardless of whether the new act finds universal acceptance among the states or some states continue to retain their enactments of the old UCCJA. The fourth purpose of the PKPA, to establish federal criteria that would (1) determine which pro-

²⁰⁶ UCCJEA, *supra* note 2, § 303.

²⁰⁷ *Id.* § 202(a).

²⁰⁸ UCCJA, *supra* note 3, § 13.

²⁰⁹ *Id.* § 14(a).

ceedings and orders of non-UCCJA states must be respected by other states, and (2) normally require non-UCCJA states to respect proceedings and orders of UCCJA states, has regained the importance it had before 1983.

VI. Application of PKPA to Cases Involving Non-Parents

A. PKPA Application To Visitation Case

The manner in which the PKPA will serve that purpose can be seen when one applies section 1738A to the facts of hypothetical cases involving states one or both of which have enacted the new UCCJEA.²¹⁰ In a case with facts similar to those of *Kenyon*,²¹¹ for example, it was explained above²¹² that the language of the UCCJEA might tempt the mother to relocate with the child to a UCCJEA state where the grandparents lack standing to seek visitation. According to the terms of the new uniform act, doing so lets her immediately obtain court-ordered custody exclusive of any grandparental visitation without even giving the grandparents notice or a hearing, even if they have a visitation order from a court of their own state.

A persistent conflict between the two states' decrees may result even if the grandparents' state, like the mother's state, has enacted the UCCJEA, for reasons explained above.²¹³ And if the grandparents' state still has the old UCCJA, the courts of the new and old states each will appear even more free, according to their respective state laws, to give effect only to the local decree, for reasons explained just above.²¹⁴ The results would be conflicts between the judgments of different states, and incentives for further self-help and disruption of the child's life.

However, the federal statute can prevent this outcome, by giving one state's proceeding or order preference over the other

²¹⁰ Again, no reported cases apply the PKPA where one or both of the states involved has enacted the UCCJEA, so hypothetical cases are the best way to analyze the federal statute's impact on application of the new uniform act.

²¹¹ *See supra* text accompanying notes 32-39.

²¹² *See supra* text accompanying notes 62-84.

²¹³ *See supra* text accompanying notes 70-83.

²¹⁴ *See supra* text accompanying notes 205-09.

state's proceeding or order. Suppose, for example, that the mother moves to a UCCJEA state, but the UCCJA is still the law of the grandparents' state. If the grandparents learn that the mother began a custody suit as soon as she arrived in her new state, or if they fear that she may file soon, they can promptly begin a visitation suit in their state. If they commence their lawsuit before she relocates, their state has "home state" jurisdiction under UCCJA section 3(a)(1), quoted above.²¹⁵ If instead they commence it after she relocates but within six months after her relocation, then their state almost surely has jurisdiction under UCCJA section 3(a)(2), since the child's long and recent residence there, coupled with the grandparents' long and current residence there, have created "significant connections" with these "contestants" and "substantial evidence" there that endure for some time after the departure of the mother and child.²¹⁶

In either case, provided the grandparents begin their suit before the mother begins hers, then section 1738A(g) forbids a court of the mother's state to exercise jurisdiction. According to that federal provision,

a court of a State shall not exercise jurisdiction in any proceeding for a custody or visitation 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 or visitation determination.²¹⁷

The mother's state is barred by this provision, because the court of the grandparents' state is indeed exercising jurisdiction consistently with section 1738A, under the following provisions of the federal statute.

Section 1738A(c) and (d) provide in relevant part:

- (c) A child custody or visitation determination made by a court of a State is consistent with the provisions of this section only if —
 - (1) such court has jurisdiction under the law of such State; and
 - (2) one of the following conditions is met:

²¹⁵ See *supra* text accompanying note 121.

²¹⁶ See *supra* text accompanying note 146.

²¹⁷ 28 U.S.C.A. § 1738A(g) (1999 Cum. Ann. Pocket Part).

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- (A) such State (i) is the home State of the child on the date of the commencement of the proceeding, or (ii) had been the child's home State within six months before the date of the commencement of the proceeding and the child is absent from such State . . . , and a contestant continues to live in such State . . . ;
- (B)(i) it appears that no other State would have jurisdiction under subparagraph (A), and (ii) it is in the best interest of the child that a court of such State assume jurisdiction because (I) the child and his parents, or the child and at least one contestant, have a significant connection with such State . . . , and (II) there is available in such State substantial evidence
- ...
- (E) the court has continuing jurisdiction pursuant to subsection (d) of this section.
- (d) The jurisdiction of a court of a State which has made a child custody determination consistently with the provisions of this section continues as long as the requirement of subsection (c)(1) of this section continues to be met and such State remains the residence of the child or of any contestant.²¹⁸

Under those provisions, the grandparents' state is the child's "home state" under section 1738A(c)(2)(A)(i) if they commence their lawsuit before the mother relocates. If, instead, they commence it after she leaves but within six months, their state may be the "extended home state" under section 1738A(c)(2)(A)(ii). They probably are contestants who continue to live in the state, because section 1738A(b)(2) defines a "contestant" to include "a person . . . who claims a right to custody or visitation of a child." They are making such a claim under the law of their state and in one of its courts, even though the law of the mother's new state denies them standing to make such a claim in its courts.²¹⁹ If

²¹⁸ *Id.* § 1738A(c) & (d).

²¹⁹ I have argued elsewhere that § 1738A(e) should be interpreted as not requiring a court of one state to give notice and an opportunity to be heard to a person who lacks standing under the law of that state but who has standing under another state's law. Coombs, *supra* note 159, at 859-62. Briefly restated, my essential reason for that interpretation was that the PKPA's purposes include requiring each state to respect another state's custody or visitation proceedings conducted consistently with the latter state's law and with the PKPA's criteria, but that the purposes of this federal act do not include forcing the latter state into a broader assertion of power to bind potential litigants by involving them in litigation than its own local policy leads it to do. *Id.* at 861-62. My discussion covered only the question of giving such a person notice and an opportunity to be heard in an initial proceeding.

they are “contestants,” then their state’s court also satisfies section 1738A(c)(2)(B), since the old state still has the necessary connections and evidence, and since the new state has not yet become the child’s home state.

The grandparents’ state also satisfies the section 1738A(c)(1) requirement that that state have jurisdiction under its own law, since their state has “significant connection” jurisdiction for the reasons given above.²²⁰ Also, the court of the grandparents’ state can readily comply with every other requirement of the PKPA, including the provision of section 1738A(e) that “before a child custody determination is made, reasonable notice and opportunity to be heard shall be given to the contestants.”

In every respect, the court in the grandparents’ state is thus exercising jurisdiction consistently with the federal statute, so section 1738A(g) forbids the mother’s state to exercise the jurisdiction the new UCCJEA gives it. This is a direct conflict between federal and state law. The UCCJEA tells a court of the new state it may exercise jurisdiction, and section 1738A(g) says it may not. Under the Supremacy Clause of the United States Constitution,²²¹ when federal law conflicts with state law this di-

That argument and conclusion are distinguishable from the statement made at this point in the text of this article, in terms of the purposes of the PKPA. In the hypothetical case under discussion here, the issue is whether the grandparents’ state, where local policy gives them standing to become contestants and claim visitation, and where a local court in fact is currently entertaining their claim, receives the PKPA’s protection from conflict or competition with those proceedings by another state in which the grandparents lack standing. The purposes of the federal act as I summarized them in that prior article, including purposes to “discourage continuing interstate controversies” and to “avoid jurisdictional competition and conflict,” *id.* at 859, are well served when section 1738A(g) forbids the mother’s state to exercise jurisdiction during the pendency of the case in the grandparents’ state.

There seem to be very few judicial opinions exploring issues such as these. *See, e.g.,* DeBoer v. Schmidt (In re Clausen), 502 N.W.2d 649, 664 (Mich.), *stay denied sub nom.* DeBoer v. DeBoer v. Schmidt, 509 U.S. 1301 (1993) (stating that an Iowa temporary custody order might confer standing in a Michigan court on persons otherwise lacking it under Michigan law); *id.* at 684 (Levin, J., dissenting) (arguing that the PKPA confers standing in a Michigan court under those circumstances).

²²⁰ *See supra* text accompanying notes 146, 216.

²²¹ U.S. CONST. art. VI, cl. 2.

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rectly, the federal statute prevails, and the UCCJEA is preempted as applied to this case.²²²

B. Bruner v. Tadlock

Operation of the PKPA on somewhat similar facts is illustrated by a recent decision of the Arkansas Supreme Court, *Bruner v. Tadlock*.²²³ There a five-year-old child's father died while estranged from his wife, the child's mother. Less than three weeks after the father's death, the mother moved with the child from their home in Arkansas to Oklahoma, promptly married a second husband, and cut off visitation by the child's paternal grandparents, residents of Arkansas.²²⁴

The grandparents filed suit in Arkansas, where they continued to live, three months after the mother had relocated to Oklahoma. This was an initial custody proceeding, in which the grandparents sought visitation. The child's mother filed a motion to dismiss the Arkansas lawsuit. The trial court held a preliminary hearing and ruled that it had jurisdiction. After a hearing on the merits, the chancellor decided it was in the child's best

²²² Inexplicably, Professor Robert G. Spector, the Reporter to the UCCJEA Drafting Committee, has written that I maintain that the UCCJA and the PKPA "can be read together and that therefore it is not necessary to consider whether the PKPA preempts the UCCJA." *Uniform Child-Custody Jurisdiction and Enforcement Act* (with Prefatory Note and Comments by Robert G. Spector), 32 FAM. L.Q. 301, 306 n.6 (1998) (footnotes in title omitted) [hereinafter *Reporter's Footnotes to UCCJEA Comments*]. As support for this inaccurate description of my position, he cited pages 822-47 of an article I wrote, Coombs, *supra* note 159. What I actually said in those pages was that other commentators were wrong in stating that the PKPA "broadly 'preempts the field'" of custody jurisdiction law, *id.* at 823, that "a complete analysis must determine the extent to which the [PKPA] preempts state law," *id.*, that such analysis leads to the conclusion "that enactment of section 1738A has preempted state law only to the extent that compliance with both federal and state requirements is impossible," *id.* at 833, and that examples are that "when the federal statute forbids a court to modify a custody determination or to exercise concurrent jurisdiction, and state law permits or requires the court to do so, the state law is preempted," *id.* at 834. These examples of preemption are the same ones discussed in the text of this article, *see supra* text accompanying notes 210-22 & *infra* text accompanying notes 223-34. At least one court has accurately summarized what I said in those pages of the Minnesota Law Review article. *Columb v. Columb*, 633 A.2d 689 (Vt. 1993).

²²³ 991 S.W.2d 600 (Ark. 1999).

²²⁴ *Id.* at 601.

interests to have visitation with her paternal grandparents. The mother appealed, not denying that visitation was in the child's interest, but only attacking the court's jurisdiction.²²⁵ On appeal, the Arkansas Supreme Court held that the child's long residence in the state gave the court jurisdiction under the UCCJA, and that such jurisdiction was consistent with the PKPA.²²⁶

On these facts, if the mother then promptly tried to modify the Arkansas decree in a court of Oklahoma,²²⁷ Oklahoma's UCCJEA would instruct its court to accept the case. The PKPA would require the Oklahoma court to dismiss it. Section 1738A(a) forbids a court to modify another state's decree entered consistently with the federal act unless the court of that other state has lost jurisdiction or has declined to exercise it, neither of which applies. The PKPA would preempt the UCCJEA in this case.

In terms of the purposes of the federal act, and even the ostensible purposes of the new uniform act, the results of applying the PKPA would be that the jurisdictional conflict between courts of different states would be avoided, the case would not be re-litigated, there would be no continuing controversy in the courts and no conflicting decrees, and the mother would not be rewarded for shifting her child from state to state. In addition, the child and grandparents would enjoy continuation of their long-standing relationship.

C. Hypothetical Visitation Case

Even if a mother in a different case wins the race to the courthouses, and begins her suit in the new state before the grandparents begin theirs in the old state, the PKPA may still resolve the jurisdictional conflict in favor of the grandparents and against the forum-shopper, provided that the grandparents commence their suit within six months after the mother's relocation. Section 1738A(g) does not forbid the court of her state to exercise jurisdiction, because her proceeding was not "commenced during the pendency of" the grandparents' case.²²⁸ However, once the grandparents obtain a visitation order in their

²²⁵ *Id.* at 601-02.

²²⁶ *Id.* at 602-04.

²²⁷ Incidentally, Oklahoma has enacted the UCCJEA. *See supra* note 29.

²²⁸ *See supra* text accompanying note 217.

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state, then the following language in section 1738A(a) may forbid the court of the mother's state to modify the order, and may require the mother's state to enforce it:

The appropriate authorities of every State shall enforce according to its terms, and shall not modify except as provided in subsections (f), (g), and (h) of this section, any custody or visitation determination made consistently with the provisions of this section by a court of another State.²²⁹

The order made by the court of the grandparents' state may indeed have been made consistently with the PKPA. That court's jurisdiction may have been consistent with section 1738A(c)(2)(A)(ii)'s provision on "extended home state" jurisdiction, depending on how the federal term "contestant" is applied to a case where the grandparents have standing to claim visitation in their own state but lack it in the other state.²³⁰ In addition, the grandparents' state had jurisdiction under its own law, and presumably will have given the mother notice and an opportunity to be heard.

If jurisdiction in the grandparents' state was consistent with section 1738A's "extended home state" provision, then the fact that the court of the grandparents' state exercised jurisdiction

²²⁹ 28 U.S.C.A. § 1738A(a) (1999 Cum. Ann. Pocket Part). The subsections cross-referenced in § 1738A(a) are as follows:

(f) A court of a State may modify a determination of the custody of the same child made by a court of another State, if —

(1) it has jurisdiction to make such a child custody determination; and

(2) the court of the other State no longer has jurisdiction, or it has declined to exercise such jurisdiction to modify such determination.

(g) A court of a State shall not exercise jurisdiction in any proceeding for a custody or visitation 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 or visitation determination.

(h) A court of a State may not modify a visitation determination made by a court of another State unless the court of the other State no longer has jurisdiction to modify such determination or has declined to exercise jurisdiction to modify such determination.

²³⁰ See *supra* note 219.

during the pendency of the mother's case did not itself violate section 1738A(g), so it did not render the grandparents' order inconsistent with the federal statute. The reason is that section 1738A(g) bars an exercise of concurrent jurisdiction only when the case begun first is being conducted consistently with the federal statute.²³¹

On the above supposition, the mother's case, though begun first, was not consistent with section 1738A(c)(2)(A) and (B), since the only basis for jurisdiction in the mother's new state was "significant connection" jurisdiction. Section 1738A(c)(2)(B)(i) makes that kind of jurisdiction consistent with the federal act only if "no other State would have jurisdiction under subparagraph (A)," which covers the "home state" or a state that ceased to be the home state within six months and remains the residence of a contestant. I shall refer to a state in the latter situation as the "extended home state." If the grandparents' state had jurisdiction consistent with the "extended home state" provision of the federal act, then exercise of "significant connection" jurisdiction by the court of the mother's state was not consistent with section 1738A. Since, on that supposition, the mother's proceeding was not conducted consistently with the federal statute, the court of the grandparents' state could exercise its jurisdiction without violating section 1738A(g). Once it has done so, section 1738A(a) will oblige the mother's state to enforce the grandparents' decree, and will forbid her state to modify it.

Under these provisions of the federal statute, section 1738A may thus thwart the mother's attempt at forum-shopping. If her lawyer advises her well, she may realize in advance that the PKPA cancels the new UCCJEA's incentive for self-help, and her child may be protected from the disruption such conduct and its legal and personal consequences can inflict on his or her life.

D. PKPA Application To Custody Case

As a second example of how the PKPA requires one state to respect the proceeding or order of another, and thereby frustrates undesirable incentives that would be created by the terms of the new UCCJEA, one can make a similar application of the federal statute to facts like those of the *Sleeper* case, discussed

²³¹ Section 1738A(g) is quoted *supra* text accompanying note 217.

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above.²³² Suppose that the mother convinces her husband to accept a trial separation, and to acquiesce in her relocation with the children who are not his biologically but whom he has mainly raised. She and the children move to the state where her lawyer has correctly told her that her husband will lack standing to seek custody, and that the UCCJEA on its face will soon permit her to obtain exclusive custody without notifying her husband of the proceeding or giving him any opportunity to be heard by the court.

After they have lived there just over a year, the mother attempts to commence a custody proceeding in her new state. For reasons similar to those described just above concerning a case like *Kenyon*, the PKPA can cancel the harmful incentives ostensibly created by the new UCCJEA in a case like *Sleeper*. What the husband must do is commence a custody case in the old state under the old UCCJA, before the mother leaves. It may even be sufficient to do so within six months after her departure, before her new state becomes the “home state,” for reasons discussed above.²³³

As was explained above, in such a case the UCCJEA confers no protection on a husband who commences a custody proceeding or even obtains a custody award before or soon after the child’s mother relocates according to their agreement. That is true because under the UCCJEA the husband ceases to be a “person acting as a parent” once it becomes no longer true that he has had physical custody for six consecutive months within one year immediately before the mother commences suit in her new state.

In contrast with that result, the PKPA can protect the husband under these circumstances. His state almost surely will have jurisdiction under the UCCJA. Such jurisdiction will be consistent with the PKPA’s “home state” provision if he sues before she leaves, and it may even be consistent with 1738A’s “extended home state” criteria if he sues soon thereafter. If the husband wins the race to the courthouses, then on the above suppositions the federal statute will forbid a court of the mother’s new state to exercise its jurisdiction. Even if she commences her

²³² See *supra* text accompanying notes 87-93.

²³³ See *supra* text accompanying note 219.

case first, orders made by the court of his state may prevail in the long run, since the PKPA may leave courts of his state free to modify orders made by the courts of her state, and forbid courts of her state from doing likewise.²³⁴ Once again, section 1738A undercuts the UCCJEA's incentives for forum-shopping and persistent conflict among different states' courts. In that fashion the federal statute protects children from being shuttled repeatedly among states, and being exposed to long periods of inconclusive litigation and resulting instability.

VII. Federal Law Other Than the PKPA

The PKPA may not be the only federal law to render some applications of the new UCCJEA invalid. For one thing, section 1738A(e) is not the only federal law requiring "reasonable notice and opportunity to be heard" in litigation. The Fourteenth Amendment's guarantee of procedural due process also requires this.²³⁵ As the Supreme Court recently wrote, "the opportunity to be heard is an essential requisite of due process of law in judicial proceedings."²³⁶ For reasons explained below,²³⁷ many applications of the UCCJEA are very probably unconstitutional as violative of the Due Process Clause.

In addition, the PKPA is not the only federal law mandating some kinds of full faith and credit. The Full Faith and Credit Clause of the Constitution's Article IV²³⁸ and a general statute enacted over 200 years ago require that courts respect judgments of other states. That general statute is currently codified as section 1738 of title 28 of the United States Code.²³⁹ For reasons

²³⁴ Application of the PKPA to this custody dispute is the same as to the visitation dispute discussed *supra* in the text accompanying notes 228-31.

²³⁵ U.S. CONST. amend. XIV, § 1.

²³⁶ *Richards v. Jefferson County*, 517 U.S. 793, 797 n.4 (1996). *See also* *LaChance v. Erickson*, 522 U.S. 262, 266 (1998) (stating that "the core of due process is the right to notice and a meaningful opportunity to be heard").

²³⁷ *See infra* text accompanying notes 290-326.

²³⁸ In relevant part, this constitutional provision is that "Full Faith and Credit shall be given in each State to the . . . judicial Proceedings of every other State." U.S. CONST. art. IV, § 1.

²³⁹ In relevant part, this general full-faith-and-credit statute provides that "the . . . judicial proceedings of any court of any . . . State, Territory or Possession . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in

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discussed below,²⁴⁰ it is quite possible that some applications of the UCCJEA deny judgments full faith and credit in violation of these federal laws.

A. *Prior State Custody And Visitation Enforcement Law*

To address the UCCJEA's validity under these requirements of due process and full faith and credit, one should begin with some knowledge of the law governing enforcement of child custody judgments. The nature of the procedures and remedies that first threaten defendants, and then are applied to them, may be a factor in determining what process is due at each stage of proceedings.²⁴¹

The law of child custody enforcement varies from state to state.²⁴² Some remedies are applicable only to persons who were parties to the proceedings that resulted in the order disobeyed or were privies of parties,²⁴³ and only to persons over whom the court has personal jurisdiction,²⁴⁴ and even then these remedies often have a direct impact on the defendant only after notice of the enforcement proceeding and an opportunity to be heard in it.²⁴⁵ An example of such a remedy is citing a person for contempt of a custody order, holding a hearing, and then holding the defendant in contempt and imposing either civil sanctions to coerce obedience to the order or criminal penalties for its violation.

However, not all remedies are so restricted. One of the most common methods of enforcing custody decrees is the writ

the courts of such State, Territory or Possession from which they are taken." 28 U.S.C. § 1738 (1994).

²⁴⁰ See *infra* text accompanying notes 319-26.

²⁴¹ See *Mathews v. Eldridge*, 424 U.S. 319 (1976) (holding that factors determining the type of due process required include, *inter alia*, "the private interest that will be affected by the official action" and "the risk of erroneous deprivation of such interest through the procedure used").

²⁴² UCCJEA, *supra* note 2, Prefatory Note, at 259 (stating that "the law of enforcement [has evolved] differently in different jurisdictions" and that "all of [the] enforcement procedures differ from jurisdiction to jurisdiction"). See *generally* *Rutkin*, *supra* note 22, vol. 3 § 32.11 and vol. 4 § 47.01.

²⁴³ See, e.g., *Hendershot v. Handlan*, 248 S.E.2d 273 (W. Va. Supreme Ct. of App. 1978).

²⁴⁴ See, e.g., *Chavarria v. Jackson*, 390 S.E.2d 613 (Ga. Ct. App. 1990).

²⁴⁵ See, e.g., N.D. Cent. Code § 27-10-01.3 (1999) (providing that a court after notice and hearing may impose a remedial sanction for contempt of court).

of habeas corpus.²⁴⁶ In some states, granting the writ is “automatic, immediate, and ministerial” once the petitioner establishes that she is entitled to custody.²⁴⁷ Also, the law of some states allows *ex parte* issuance of the writ of habeas corpus along with an order for the immediate arrest of the defendant²⁴⁸ or “pick-up” of the child.²⁴⁹ Whether such laws are applied cor-

²⁴⁶ Rutkin, *supra* note 22, vol. 3, § 32.11, p. 32-356.

²⁴⁷ See, e.g., *Greene v. Schuble*, 654 S.W.2d 436, 438 (Tex. 1983); *Armstrong v. Reiter*, 628 S.W.2d 439, 440 (Tex. 1982).

²⁴⁸ See, e.g., *Salim v. Salim*, 260 S.E.2d 894 (Ga. 1979). In that case a child’s mother filed a divorce proceeding against the child’s father, and the same morning obtained an *ex parte* custody order. Over five months later, she filed a petition for habeas corpus, obtained an *ex parte* order that the father be arrested, and obtained service of process on the father in the divorce case, all on the same day. That same day or within several days later, the court issued the writ *ex parte*. The father was first informed of the habeas petition eleven days later, when he was served with a copy of that petition and arrested under the *ex parte* order the court had issued the day the habeas petition was filed. On the father’s appeal, the Georgia Supreme Court affirmed the habeas judgment, and approved the father’s arrest and detention.

The reported opinion in *Salim* is short and somewhat cryptic. The state supreme court made it clear that the father had taken the child to the home of his relatives in Pakistan the very afternoon of the day that the mother filed the divorce case and obtained the *ex parte* custody order, that the child remained there up to the time of the reported decision, and that the father remained in jail from the time of his arrest until the time of the reported decision. Some of the other facts are unclear, however. For example, the opinion contains the statement that “appellant transferred custody of an infant to avoid a writ of habeas corpus,” but contradicts that conclusion by disclosing that the father caused the transfer of custody over five months before the habeas petition was even filed.

See also Mo. S. Ct. R. 91.01 *et seq.* and Mo Ann. Stat. § 532.170 *et seq.* (West 1999) (providing for speedy habeas proceedings to enforce child custody rights and in some situations for seizure of the child or the habeas defendant); *State ex rel. O’Connell v. Nangle*, 280 S.W.2d 96, 99 (Mo. 1955) (en banc) (holding that a court can reduce the 24-hour period specified by MO. ANN. STAT. § 532.170 for the return of the writ).

²⁴⁹ Rutkin, *supra* note 22, vol. 3, § 32.11, p. 32-356; see *Conroy v. Jones*, 232 S.E.2d 917 (Ga. 1977) (describing proceedings by which a child’s maternal grandparents filed a complaint in one county against the child’s divorced parents, alleging that the grandparents were entitled to custody under a judgment of the juvenile court of that county, obtained an *ex parte* “pick-up order” from a judge of that county, and, when that order was executed two days later, secured possession of the child, despite the fact that the child’s father had been awarded

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rectly or incorrectly to particular cases, the results can be quite serious.²⁵⁰

Also, some states have criminal statutes under which a person who has not been a party to a custody proceeding can nevertheless be arrested, prosecuted, convicted, and sentenced to prison for interference with custody of the child. In Arizona, for example, the felony of custodial interference carries a possible sentence of imprisonment.²⁵¹ The criminal statute has been applied to persons acting as agents of the children's parents and to a stepparent acting on his own, though none of these defendants were parties to prior judicial proceedings awarding the custody with which the defendants interfered.²⁵² The Arizona Supreme Court has held that, under the predecessor of the current statute, it was no defense to the criminal charge that the court that had awarded custody had lacked jurisdiction to do so and had been defrauded into finding that it had jurisdiction, and that the custody decree therefore was void.²⁵³ A comparison of that predecessor statute and the current one suggests that that holding is still the law of the state.²⁵⁴

Similarly, the Washington Supreme Court has affirmed the felony conviction of a child's father for interference with the child's mother's right to custody under an order of a Washington

custody in a divorce judgment entered two weeks earlier by a court in another county).

²⁵⁰ See, e.g., *Cook v. Cook*, 691 S.W.2d 243 (Mo. 1985) (en banc). In that case, a child's mother was awarded custody in a divorce decree. Several years later, the father obtained a change of custody. The new decree was invalid, because it was made at a hearing that the mother had not attended since she was given an inadequate period of time to respond to the father's motion for modification of the divorce decree. Relying on the new decree, the father summarily secured possession of the child by means of a Texas writ of habeas. By the time the mother's original habeas proceeding in the Missouri Supreme Court ended with a transfer of custody to her, the father had had possession of the child for over two years.

²⁵¹ ARIZ. REV. STAT. ANN. § 13-1302 (West 1999).

²⁵² *State v. McLaughlin*, 611 P.2d 92 (Ariz. 1980) (in banc) (agent of parent); *State v. Grooms*, 702 P.2d 260 (Ariz. Ct. App. 1985) (stepparent); *State v. Donahue*, 680 P.2d 191 (Ariz. Ct. App. 1984) (agent of parent).

²⁵³ *State v. McLaughlin*, 611 P.2d 92 (Ariz. 1980) (in banc).

²⁵⁴ Compare ARIZ. REV. STAT. ANN. § 13-1302 (West 1999) with *State v. McLaughlin*, 611 P.2d 92, 94 (Ariz. 1980) (in banc) (quoting statutory predecessor of § 13-1302).

court, even though the father's attorney had "advised him that his [previously entered] California custody order was the only valid one."²⁵⁵ The court so held regardless of what it called "the ultimate correctness" of the ruling of a Washington Commissioner placing the father on notice that the mother was entitled to custody,²⁵⁶ and even though the Washington trial court had found that "both the California and Washington custody decrees were valid but voidable."²⁵⁷ The effects of such criminal statutes reach beyond state lines, since one state may have criminal jurisdiction over a child "abduction" occurring in another state.²⁵⁸

Tort remedies are also important. Many states give a cause of action for damages to a custodial parent whose custody is interfered with by another, regardless of whether the defendant in the tort case was a party to any proceeding at which the right to custody was adjudicated.

For example, in *Stone v. Walz*²⁵⁹ the Florida Supreme Court answered a question certified by a United States Court of Appeals, and held that a cause of action exists in Florida for interference with a parental relationship where a non-parent with no custody rights intentionally abducts a child from a parent legally entitled to custody. As background for this holding, the state supreme court described the facts and procedural history of the case. Since the federal district court had dismissed the lawsuit for failure to state a cause of action, the Florida Supreme Court assumed the truth of the allegations of the complaint. These were that a decree divorcing the child's father and mother gave the mother custody, that the mother became terminally ill, and that before her death the maternal grandmother, maternal aunt, and their attorney conspired and removed the child from the possession of the dying mother and concealed the child from the father. The state supreme court's holding appears to imply that a cause of action exists against the defendants despite the fact that none of them were parties to any proceeding concerning the custody rights of the child's father.

²⁵⁵ *State v. Carver*, 781 P.2d 1308, 1310 (Wash. 1989) (en banc).

²⁵⁶ *Id.* at 1314.

²⁵⁷ *Id.* at 1311 n.1.

²⁵⁸ *See, e.g., Foster-Zahid v. Commonwealth*, 477 S.E.2d 759 (Va. Ct. App. 1996).

²⁵⁹ 734 So.2d 1038 (Fla. 1999).

B. UCCJEA Enforcement Provisions

The UCCJEA adds new, extremely aggressive and summary provisions for interstate registration and enforcement of UCCJEA custody decrees, without supplanting each enacting state's existing procedures and remedies, which also remain available.²⁶⁰ Under the new uniform act, a decree made by one UCCJEA state can be registered in a court of another UCCJEA state, in a proceeding notice of which is given only to "any parent or person acting as a parent who has been awarded custody or visitation in the child-custody determination sought to be registered."²⁶¹ Thus, no notice of the registration is given to a non-parent "contestant," or apparently even a parent, who already has custody or visitation rights under another decree of a UCCJA or a UCCJEA state. The registered decree is then confirmed in a judicial proceeding in which it is no defense to confirmation that a person received no notice of the proceeding in which the decree was entered, because he or she lacked standing to receive custody or visitation under the law of the state where the decree was entered and therefore was not entitled to notice under that law.²⁶²

Once the UCCJEA decree has been confirmed in this manner, it is then enforced, ending the exercise of rights under the conflicting judgment, through a procedure so summary and so inflexible that, according to the UCCJEA Reporter, "the Drafting Committee came to call this process a 'turbo-habeas' proceeding."²⁶³ UCCJEA section 308(c) provides that "upon the filing of a petition [for enforcement], the court shall issue an order directing the respondent to appear . . . at a hearing." Subject to a section 311 exception described just below, this order and the petition must be served on the person or persons named in the enforcement proceedings as respondents and on "any person who has physical custody of the child," under section 309. Section 308(c) further provides that "the hearing must be held on the next judicial day after service of the order unless that date is impossible. In that event, the court shall hold the hearing on the

²⁶⁰ UCCJEA, *supra* note 2, § 303(b).

²⁶¹ *Id.* § 305(a)(3), (b)(2).

²⁶² *Id.* § 305(d), (e).

²⁶³ *Reporter's Footnotes to UCCJEA Comments, supra* note 222, at 372 n.141.

first judicial day possible. The court may extend the date of hearing at the request of the petitioner[,]” but not at the request of the respondent.

Once the petitioner establishes at this hearing that the UCCJEA decree has been registered and confirmed in the manner described just above, then the court must enforce it unless the respondent establishes that the decree “has been vacated, stayed, or modified by a court of a State having jurisdiction to do so under [Article] 2” of the UCCJEA.²⁶⁴ The statute makes this the only defense to enforcement. The existence of the prior, conflicting decree does not establish this.

Thus, no provision of the new uniform act allows the respondent in the proceeding for enforcement to resist it on the ground that he or she was denied notice and a hearing when the UCCJEA decree was originally made, because of a lack of standing under the law of that state, or on the grounds that he or she was again denied notice and hearings when the decree was registered and when its registration was confirmed. The UCCJEA not only allows but requires a court of the state where the new uniform act has been adopted to enforce the decree under these circumstances, since it provides that the court in this situation “*shall* order that the petitioner [for enforcement] may take immediate physical custody.”²⁶⁵

The summary nature of this mode of enforcement is remarkable, but the section 311 provision mentioned just above²⁶⁶ makes it even more so. Section 311 provides an exception to the requirement that the respondent and any person with physical custody of the child be served with the petition and order and heard, before they lose the child’s possession and are ordered to relinquish rights under the prior judgment in their favor. The exception is that the petitioner can obtain “a warrant to take physical custody of the child,” by showing reason to believe that “the child is imminently likely to . . . be removed from this State.”²⁶⁷ Such an imminent likelihood is common, of course, in interstate disputes over custody or visitation, especially where

²⁶⁴ UCCJEA, *supra* note 2, §§ 308(d)(2), 310(a)(2).

²⁶⁵ *Id.* § 310(a).

²⁶⁶ See *supra* text accompanying note 263.

²⁶⁷ UCCJEA, *supra* note 2, § 311(a), (b).

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each litigant has a decree in his or her favor that is deemed the only valid one by the courts in his or her state.

The warrant “must . . . direct law enforcement officers to take physical custody of the child immediately.”²⁶⁸ Only after the officers do so are the respondent and the person from whose possession the child was taken served with the petition, warrant, and order.²⁶⁹ And even then, at the hearing the next day, the UCCJEA does not permit a defense to enforcement that notice and hearing were denied when the custody award being enforced was first made; that notice and hearing were denied when the award was registered and when its registration was confirmed; or that the court making the award thereby violated the PKPA or even lacked jurisdiction to make it under the UCCJEA. This is the manner in which the new uniform act permits a court to deprive a contestant or even a parent of rights previously awarded by a court of another state that acted consistently with its own and federal law.

C. Supreme Court Due Process Precedents

With this knowledge of procedures and remedies for custody enforcement under the UCCJEA and under other state law, one can begin to evaluate the new uniform act’s provisions on joinder of parties, notice, and opportunity to be heard. As the Supreme Court wrote recently, “state courts are generally free to develop their own rules for protecting against the relitigation of common issues or the piecemeal resolution of disputes.”²⁷⁰ Such rules govern questions of joinder, notice, opportunity to be heard, claim preclusion, and issue preclusion. However, the United States Constitution places some limits on states’ selections of such rules.

The constitutional limitations sometimes leave a state free to apply narrow rules of joinder, notice, and opportunity to be heard, and to render a judicial judgment under those rules, without thereby violating due process. In such cases, the only consequence of the state’s choices is that due process forbids the state from going still further and treating non-parties to the litigation

²⁶⁸ *Id.* § 311(c)(2).

²⁶⁹ *Id.* § 311(d).

²⁷⁰ *Richards v. Jefferson County*, 517 U.S. 793, 797 (1996).

as bound by it. The resulting judgment cannot be enforced against the non-parties, and they remain free, after conclusion of the litigation in which they did not participate, to engage in separate litigation unencumbered by decisions made in the previous case.²⁷¹

However, merely rendering a judgment can violate due process, when the judgment purports to foreclose a person's opportunity to litigate claims and threatens the person with immediate deprivation of his or her property. For example, in *Griffin v. Griffin*,²⁷² a New York court gave an ex-wife an *ex parte* judgment against her ex-husband for arrears of alimony, and an order for issuance of execution for collection of the judgment, as New York law apparently permitted. Thereafter, she sued on the judgment in the District of Columbia, and the ex-husband defended the suit there on various grounds, including the failure of the New York court to give him notice of the proceeding in which the judgment for arrears was entered. The trial court of the District of Columbia entered and affirmed a judgment for the arrearage in favor of the ex-wife. The Court of Appeals affirmed, and the Supreme Court granted *certiorari*.

The Supreme Court reversed, and held that New York violated the ex-husband's right to due process by merely entering the judgment and directing the issuance of execution on it. Since that was true, due process further forbade the courts of the District of Columbia to give effect to the New York judgment. The Court reversed the judgment and explained:

[T]o the extent that petitioner was thus deprived of an opportunity to raise defenses otherwise open to him under the law of New York against the docketing of judgment for accrued alimony, there was a want of judicial due process [A] judgment in personam directing execution to issue against petitioner, and thus purporting to cut off all available defenses, could not be rendered . . . without some form of notice

. . . Moreover, due process requires that no other jurisdiction shall give effect, even as a matter of comity, to a judgment elsewhere acquired without due process.²⁷³

²⁷¹ *Id.*

²⁷² 327 U.S. 220 (1946).

²⁷³ *Id.* at 228-29.

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The Court further explained why the violation of due process is not delayed until the ex-husband's property is actually seized, but occurs sooner.

Due process forbids any exercise of judicial power which, but for the constitutional infirmity, would substantially affect a defendant's rights. . . . [T]he judgment authorizes the immediate issuance of execution. [A] levy upon any property petitioner might have in New York would substantially, and in at least some instances, permanently affect his rights. . . . Even though petitioner could, if he knew of the judgment before execution is actually levied, move to set the judgment aside, that could not save the judgment from its due process infirmity, since it and the New York practice purport to authorize the levy of execution before petitioner is notified of the proceeding or the judgment.²⁷⁴

The Supreme Court has handed down a number of analogous decisions involving various methods of interfering with property rights. For example, in *Fuentes v. Shevin*²⁷⁵ the Court held that state law provisions on replevin of personal property violated due process because they denied the owner an opportunity to be heard before his or her chattels were taken. And in *Connecticut v. Doehr*²⁷⁶ the Court held that even some temporary or partial impairments of property rights give rise to a requirement of due process.²⁷⁷

Children are not property, of course, so one must be cautious in drawing conclusions about due process in child custody litigation from such precedents. The distinction, however, should cut more toward increased rigor of due process in custody cases than where property rights are at stake.

In *Mitchell v. W.T. Grant Co.*,²⁷⁸ the Supreme Court rejected a due process challenge to sequestration of personal property by its seller, who held a vendor's lien, when the buyer's payments became delinquent. The Court relied on the fact that it was a case where "only property rights are involved."²⁷⁹ And in *Snia-*

²⁷⁴ *Id.* at 231-32.

²⁷⁵ 407 U.S. 67 (1972).

²⁷⁶ 501 U.S. 1 (1991).

²⁷⁷ *See also* *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975).

²⁷⁸ 416 U.S. 600 (1974).

²⁷⁹ *Id.* at 611-12, quoting *Ewing v. Mytinger & Casselberry*, 339 U.S. 594, 599 (1950), and *Phillips v. Commissioner*, 283 U.S. 589, 596-97 (1931).

*dach v. Family Finance Corp*²⁸⁰, where the Court struck down a prejudgment garnishment procedure under due process, the Court held that the kind of property right interfered with is a factor in determining what process is due under the Fourteenth Amendment. In *Sniadach* the property at stake was wages. The Court emphasized the possibility of “tremendous hardship on wage earners with families to support” that garnishment could impose,²⁸¹ and referred to the impact on the “family” five more times in the next two pages of the opinion.²⁸² Finally, the Court made the significance of the distinction between property rights and personal rights even more explicit in *May v. Anderson*,²⁸³ where the Court reversed a child custody judgment on constitutional grounds and observed that “rights far more precious to [the children’s mother] than property rights will be cut off if she is to be bound” by the judgment.²⁸⁴

The Court directly addressed due process in custody litigation in *Stanley v. Illinois*.²⁸⁵ There the children of an unwed father, a man who had lived with them and their mother all their lives, were taken from him and declared wards of the state when the children’s mother died. The father obtained Supreme Court review of the state courts’ decisions, and the Court reversed. The Court held that, although Illinois law gave the father no substantive rights that he could assert when the state sought to take his children, substantive due process created such rights in a situation like his.²⁸⁶ Since Stanley had these substantive, federal claims to litigate, the Court went on, procedural due process enti-

²⁸⁰ 395 U.S. 337 (1969).

²⁸¹ *Id.* at 340.

²⁸² *Id.* at 340-42.

²⁸³ 345 U.S. 528 (1953).

²⁸⁴ *Id.* at 533.

²⁸⁵ 405 U.S. 645 (1972).

²⁸⁶ The opinion for the Court was not explicit in locating these rights in the substantive component of the due process clause, but that is how the decision has come to be understood. See, e.g., Barbara Bennett Woodhouse, “*Who Owns the Child?*”: Meyer and Pierce and the Child As Property, 33 WM. & MARY L. REV. 995, 1046 n. 237 (1992); Benjamin C. Zipursky, *The Pedigrees of Rights and Powers in Scalia’s Cruzan Concurrence*, 56 U. PITT. L. REV. 283, 310 n.101 (1994).

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tled him to a hearing “before his children were taken from him.”²⁸⁷

The state had argued that the Court “need not consider the propriety of the dependency proceeding that separated the Stanleys because Stanley might be able to regain custody of his children as a guardian or through adoption proceedings.”²⁸⁸ The Court rejected this notion, writing that it had not “embraced the general proposition that a wrong may be done if it can be undone. . . . Surely, in the case before us, if there is delay between the doing and the undoing petitioner suffers from the deprivation of his children, and the children suffer from uncertainty and dislocation.”²⁸⁹

D. Evaluation Of UCCJEA Applications Under Due Process Precedents

Under this line of Supreme Court decisions, it appears very probable that due process will be violated by some applications of the UCCJEA. The most likely constitutional violations will occur when a court applying the new uniform act renders a custody judgment in a proceeding in which joinder, notice, and an opportunity to be heard are not afforded to a person who already has an award of custody or visitation duly made by a court of another state, but who would lack standing to seek such relief under the law of the UCCJEA state.

The mere *entry* of such a decree may violate due process because, in terms the Supreme Court used in deciding the cases summarized above, the decree “purport[s] to cut off . . . available defenses” and authorizes immediate recourse against the person of the child or the person of the defendant before the latter is notified.²⁹⁰ Still more clearly, *enforcement* of a UCCJEA decree in such a case appears certain to violate due process in many instances.

²⁸⁷ Stanley v. Illinois, 405 U.S. 645, 649 (1972).

²⁸⁸ *Id.* at 647.

²⁸⁹ *Id.*

²⁹⁰ Griffin v. Griffin, 327 U.S. 220, 228-32 (1946). The latter phrases in the text refer to the *Griffin* Court’s discussion of the fact that the New York judgment there “authorize[d] the immediate issuance of execution” and “purport[ed] to authorize the levy of execution before petitioner [was] notified of the proceeding or the judgment.” *Id.* at 231-32.

Even some of the remedies used long before the new uniform act was drafted, summarized above,²⁹¹ seem sure to offend the Fourteenth Amendment when used to enforce a UCCJEA decree the effect of which is to cut off a non-parent's visitation rights, where those rights arise under a duly made judgment of another state but the non-parent was not joined or notified in the UCCJEA case because he or she lacked local standing. For example, suppose a court grants a writ of habeas corpus that is "automatic, immediate, and ministerial" and accompanied by an *ex parte* order for the non-parent's immediate arrest or for pick-up of the child.²⁹² Suppose that the sheriff then finds, say, the grandmother and grandchild spending time together. Since *Fuentes* requires an opportunity to be heard before one's chattels are taken,²⁹³ *Stanley* requires a hearing before a father's children are taken,²⁹⁴ and *Doehr* requires notice and hearing before even some temporary or partial impairments of property rights,²⁹⁵ it seems quite hard to argue that this mode of enforcing such a UCCJEA decree is consistent with due process.

The same is true if the grandparent is arrested in the UCCJEA state, prosecuted there, convicted of custodial interference, and sentenced to prison. As was discussed above,²⁹⁶ some criminal statutes permit that result although the grandparent was not a party to the custody proceeding that purported to cancel the existing visitation decree, though jurisdiction actually was lacking in that proceeding, and though the grandparent had a valid visitation decree of his or her own state. Similar concern must exist regarding her liability for damages, which again may exist despite her non-participation in any custody proceeding.²⁹⁷

The threat to due process presented by these old remedies existed even before the UCCJEA was drafted, since even under the prior law it could sometimes happen that a custody order was entered without an interested person receiving notice and an opportunity to be heard. However, the new uniform act has in-

²⁹¹ See *supra* text accompanying notes 242-59.

²⁹² See *supra* text accompanying notes 246-49.

²⁹³ See *supra* text accompanying note 275.

²⁹⁴ See *supra* text accompanying notes 285-89.

²⁹⁵ See *supra* text accompanying notes 276-77.

²⁹⁶ See *supra* text accompanying notes 251-58.

²⁹⁷ See *supra* text accompanying note 259.

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creased that threat in cases affecting non-parents, by narrowing the rules of joinder, notice, and hearing.

In addition, the UCCJEA has compounded the problem of due process with its provisions, described above, for summary registration of custody judgments of other UCCJEA states, summary confirmation of such judgments, and their enforcement by “turbo-habeas” and warrants to seize the child.²⁹⁸ Under these provisions, after a UCCJEA decree is entered canceling visitation rights duly given a non-parent by another state, then the decree is summarily registered, confirmed, and enforced. The non-parent does not receive notice or a hearing at any stage of the new decree’s making or enforcement, with a sole exception. He or she gets to appear in court the day after the child was taken from him or her, in an enforcement hearing in which it is not a defense that the prior decree was valid, that jurisdiction to enter the new decree was absent, and that notice and hearing were denied at every previous stage of the case.

As the Supreme Court wrote in *Griffin*, “due process requires that no other jurisdiction shall give effect, even as a matter of comity, to a judgment elsewhere acquired without due process.”²⁹⁹ The UCCJEA gives such a judgment extreme effects elsewhere, and does it fast. The effects fall not upon “only property rights,”³⁰⁰ but upon family relationships that are “far more precious . . . than property,”³⁰¹ according to due process and to common experience. The new act clearly appears to violate the Fourteenth Amendment guarantee of due process.

A defender of the new uniform act might make certain arguments to the contrary. First, one might urge that child custody proceedings are *in rem* or are proceedings affecting status,³⁰² and that *Griffin* and certain other precedents are therefore inapposite as involving litigation *in personam*. However, the Court in *Griffin* reminded us that notice of a judicial proceeding “cannot be dispensed with even in the case of judgments *in rem* with respect to property within the jurisdiction of the court rendering the

²⁹⁸ See *supra* text accompanying notes 260-69.

²⁹⁹ *Griffin v. Griffin*, 327 U.S. 220, 228-29 (1946).

³⁰⁰ See *supra* text accompanying note 279.

³⁰¹ See *supra* text accompanying note 284.

³⁰² See UCCJA, *supra* note 3, § 12 cmt., at 274.

judgment.”³⁰³ And of course child custody was the very issue in *Stanley*.

Then a UCCJEA proponent might argue that the due process clause permits a state to deny joinder, notice, and hearing to a non-parent who lacks standing under the law of that state, because that person would have no claims or defenses that are litigable there. The *Griffin* case was decided as it was, the argument would go, only because “petitioner was . . . deprived of an opportunity to raise defenses otherwise open to him under the law of New York against the docketing of judgment for accrued alimony,” as the Court there explained.³⁰⁴ Where a non-parent lacks standing in a UCCJEA state, the UCCJEA proponent might argue, no claims or defenses are open under the local law, so failure to join and notify the non-parent does not deprive him or her of such an opportunity.

This argument overlooks the fact that Illinois law likewise denied *Stanley* standing to present a claim or defense in the dependency proceeding in which the state took custody of his children. Under *Stanley*, the substantive right that procedural due process must protect need not arise from local law.³⁰⁵ Can the law of another state create a substantive right entitled to procedural protection under the due process clause in custody and visitation cases, as it clearly can in cases involving property rights created by the law of another state? The Supreme Court has not answered this question. But *Stanley* does make it clear that *federal* law can create a right that cannot be taken from a person in custody litigation without due process.

In most custody or visitation contests between a parent and a non-parent, federal law confers no *substantive* rights on the non-parents. However, the PKPA has given non-parents important *jurisdictional* rights. As was explained above,³⁰⁶ the federal statute contains not only a provision requiring that every “contestant” receive notice and an opportunity to be heard, but also some additional mandatory provisions. For example, section 1738A(g) forbids a court of any state (including a UCCJEA

³⁰³ *Griffin v. Griffin*, 327 U.S. 220, 228 (1946), citing *Roller v. Holly*, 176 U.S. 398, 409 (1900).

³⁰⁴ 327 U.S. at 228.

³⁰⁵ See *supra* text accompanying notes 285-89.

³⁰⁶ See *supra* text accompanying notes 175-86, 210-34.

state) to exercise jurisdiction in a custody case begun during the pendency of a duly conducted case in another state (such as a UCCJA state). In addition, section 1738A(a) forbids, say, a UCCJEA state to modify a duly made prior order of, say, a UCCJA state, unless the UCCJEA state has jurisdiction and the UCCJA state has lost jurisdiction under its own law to modify the order itself, has ceased to be the residence of the child or any contestant, or has declined to exercise such jurisdiction.

For a court of a UCCJEA state to avoid violating these provisions of section 1738A(a) and (g), it must decide whether they are applicable. To do so, it must receive evidence and consider arguments on the jurisdictional issues that govern application of these federal requirements, issues such as the following. Are the pending or prior proceedings in the UCCJA state sufficiently consistent with that state's own law and with PKPA requirements to earn protection by the federal act?³⁰⁷ If so, does the UCCJEA state have jurisdiction under its own law?³⁰⁸ If so, has the UCCJA state lost or declined to exercise its jurisdiction, or ceased to be the residence at least of a contestant?³⁰⁹

It appears very likely that both the federal constitutional Due Process Clause and the PKPA's own provision for notice and hearing³¹⁰ require the following. Before a court of a UCCJEA state negates custody or visitation rights already being duly sought or already duly obtained in a court of another state, the contestant in the other state must receive notice and an opportunity to litigate these federal jurisdictional issues. Since the UCCJEA does not authorize such notice and hearing for many such cases, it probably is to that extent invalid as applied. In

³⁰⁷ See *supra* notes 181-86, 217-34 and accompanying text.

³⁰⁸ This issue of state law is incorporated by reference in the federal statute. See *supra* notes 181-86, 217-34 and accompanying text.

³⁰⁹ See *supra* notes 181-86, 217-34 and accompanying text.

³¹⁰ I previously expressed the opinion that the PKPA's requirement of notice and hearing does not apply in an initial custody proceeding to a person making a claim that is cognizable under the law of his or her own state but not under the law of the forum where giving notice is in question. See *supra* note 219. However, I did not there address the different question whether section 1738A(e) requires notice to persons who are already seeking custody or visitation in a pending proceeding in another state that is arguably worthy of deference under the PKPA, or are already entitled to custody or visitation under another state's judgment that is arguably worthy of such deference.

addition, some state constitutions may require that a person holding an existing judicial judgment of a court of the same or another state receive notice and opportunity to be heard, in litigation that cancels his or her rights under the judgment and in subsequent proceedings that enforce a resulting judgment, thereby depriving him or her of the benefit of the prior judgment.³¹¹

This conclusion is not only good procedural law, it is good policy as well. As the drafters of the UCCJA recognized more than thirty years ago,³¹² all the adults who claim custody or visitation rights should be joined as parties and given notice and an opportunity to be heard. When federal law requires a court in a UCCJEA state to provide these procedural protections despite the contrary provisions of the new uniform act itself, there are significant benefits to the adults involved and, more importantly, to the children affected.

The adults can litigate the merits of custody or visitation, to the extent that local law allows that. In addition, they can litigate jurisdictional issues governed by each body of relevant law. Since the forum by hypothesis has enacted the UCCJEA, there may be litigable issues, described above,³¹³ relating to that new uniform act's limits on the existence and exercise of jurisdiction as enacted and interpreted under the law of the forum. That is true even if the other potential forum has likewise enacted the UCCJEA.³¹⁴ And even in such a case, where jurisdiction as between two UCCJEA states is at stake, litigable issues may arise under the PKPA, resolution of which determines which state's

³¹¹ *Cf. Olympic Forest Products, Inc., v. Chaussee Corp.*, 511 P.2d 1002 (Wash. 1973) (en banc) (holding that prejudgment garnishment of property without notice and prior hearing violates state constitutional guarantee of procedural due process). See generally Jill E. Family, *Due Process*, 29 RUTGERS L.J. 1168, 1180-81 (1998) (summarizing cases in which child custody awards were held to have violated state constitutional rights to notice and hearing); David Wille, *Personal Jurisdiction and the Internet*, 87 KY. L.J. 95, 156 n.271 (1999) (stating that early judicial opinions "can reasonably be interpreted as making notice and an opportunity to be heard due process requirements under state constitutional due process and law of the land clauses").

³¹² See *supra* text accompanying notes 126-36, 154-65.

³¹³ See *supra* text accompanying notes 76-83, 102-19.

³¹⁴ See *supra* text accompanying notes 76-83, 102-19.

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version and interpretation of the UCCJEA will prevail.³¹⁵ Where the other state involved in the interstate dispute has not enacted the new uniform act but instead has kept the old UCCJA, significantly different issues may be litigable, since crucial PKPA provisions incorporate the law of that other state by reference.³¹⁶

Since all the adults receive notice and an opportunity to litigate these jurisdictional issues (and, if they have standing under local law, the merits of custody or visitation), they are afforded procedural fairness. Consequently, they are not only bound by the decision on the merits, they are also barred from using constitutional arguments to re-litigate the jurisdictional issues. Thus, opportunities for concurrent or successive proceedings, re-litigation of decisions, conflicting decrees, and continuing controversies are minimized. As a result, the law provides no incentive for a disappointed litigant to engage in abductions or other unilateral removals of children.

The Wisconsin Court of Appeals has given similar reasons for requiring notice to persons already awarded visitation rights that a parent wants to cancel, in the context of the UCCJA. In *In re Steven C.*,³¹⁷ the court held that paternal grandparents, who had previously received visitation rights in an Illinois court, were “contestants” under Wisconsin law because of the Illinois order. The court further held that the grandparents were therefore entitled under UCCJA section 4 to notice of a Wisconsin proceeding in which the children’s mother and stepfather sought to terminate visitation. The court explained that

The trial court may not be aware of any dispute until all contestants are given notice and the opportunity to be heard. The UCCJA provides the mechanism to assure that all parties are joined, to assure that the most appropriate jurisdiction to determine custody is established, to discourage continuing controversies and relitigation, and to provide greater stability of family relationships.³¹⁸

³¹⁵ Such issues may involve the PKPA’s duty not to conduct concurrent proceedings, or its duties to enforce and not to modify a decree. Application of each duty depends on the consistency of each state’s proceedings with criteria found in § 1738A itself and with the law of each UCCJEA state. *See supra* text accompanying notes 178-86.

³¹⁶ *See supra* text accompanying notes 307-09.

³¹⁷ 486 N.W.2d 572 (Wis. Ct. App. 1992).

³¹⁸ *Id.* at 574.

That analysis of the relevant policies appears compelling. And from a legal rather than a policy perspective, the preceding analysis of due process and the PKPA's provision on notice and hearing raises at least grave doubts about the consistency with federal law of the UCCJEA's provisions on joinder, notice, and hearing as applied in many cases.

E. *Relationship Between Judgments And Due Process*

Turning to a slightly different legal point, I shall now briefly observe that the full faith and credit obligation created by the United States Constitution and the ancient implementing statute may have a bearing on the issue of procedural due process. Article IV of the Constitution commands that "Full Faith and Credit shall be given in each State to the . . . judicial Proceedings of every other State."³¹⁹ The statute, codified as section 1738 of title 28 of the United States Code, provides in somewhat more specific terms that "the . . . judicial proceedings of any court of any . . . State . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken."³²⁰

These provisions have been given rather limited application in child custody cases, for reasons I have explained elsewhere.³²¹ Briefly, the fact that every state's law permits modification of custody and visitation decrees when a sufficient change of relevant circumstances has been established means that issue preclusion has been the only aspect of judgments and full faith and credit with frequently important application to custody judgments.

Still, some courts in recent years have indeed recognized that other states' judicial rulings on jurisdictional issues under the PKPA have preclusive effects through the federal mandate of full faith and credit.³²² The Supreme Court quite recently de-

³¹⁹ U.S. CONST. art. IV, § 1.

³²⁰ 28 U.S.C. § 1738 (1994).

³²¹ Coombs, *supra* note 159, at 793-98, 815-18.

³²² *See, e.g.*, In re Murphy, 952 P.2d 624, 628-29 (Wash. Ct. App. 1998) (holding Washington court precluded from hearing issue of Ohio court's jurisdiction under Ohio law if issue was fully and fairly litigated in Ohio court, and remanding to Washington trial court for determination of whether such litigation occurred).

cided an issue it had never before directly addressed, and held that the mandate of full faith and credit applies to injunctions,³²³ a form of prospective relief somewhat analogous to a custody or visitation decree. However, in the same case the Court also applied limits on the scope of that constitutional mandate. In view of these recent developments, the entire subject of application of full faith and credit to custody judgments may be ripe for reexamination.

That major task is beyond the scope of this article, but it is worthwhile at least to raise here the following question of full faith and credit. Is a court of a UCCJEA state permitted to do the following? After a grandparent or another non-parent having a mutually valuable relationship with a minor child has obtained a final judgment for custody or visitation rights, entered by a court of another state having jurisdiction under its own law, at the conclusion of proceedings consistent with due process and with the PKPA, can a court of the UCCJEA state enter and enforce an order canceling the rights created by that judgment, without giving notice and a hearing to the party having rights under the judgment? In the context of money judgments, the Supreme Court has held that one state cannot deny full faith and credit to a judicial judgment of another state on the ground that its owner would have been unable to seek the judgment in a court of the former state.³²⁴ Does an analogous rule govern child custody litigation?

When a state applying the UCCJEA not only makes but also enforces a new custody decree, and thus cancels custody or visitation rights previously awarded by another state that had jurisdiction under its own law and that made the award in compliance with all requirements of federal constitutional and other law, and does these things without giving notice and a hearing to the holder of rights under the prior decree, the UCCJEA state treats the prior decree as if it does not exist at all. In the language of the ancient statute, this seems not to constitute giving that decree “the same full faith and credit . . . as [it has] by law or usage in the courts of [the other state].” Though the novelty of the UCCJEA means that no caselaw exists directly on point, it seems

³²³ *Baker v. General Motors*, 522 U.S. 222 (1998).

³²⁴ *See, e.g., Union National Bank v. Lamb*, 337 U.S. 38 (1949); *Titus v. Wallick*, 306 U.S. 282 (1939).

at least arguable that such total disregard for a valid judicial judgment of a sister state violates federal constitutional and statutory requirements of full faith and credit.

An analogy may be useful as a preliminary test of this argument. Suppose that the law of a UCCJEA state gives a grandmother standing to seek visitation rights under certain circumstances. Suppose visitation is indeed awarded to a grandmother, after a hearing in which the child's mother opposed the petition. Imagine that the legislature subsequently amends the state's grandparent-visitation statute, so that one in this grandmother's position no longer has standing. Assume that the mother then files a petition in the same state to make her custody exclusive of any visitation, seeking to cancel the existing visitation decree.

It seems likely that the state's law would require that the grandmother be made a party and given notice and a hearing in the mother's new case, simply because a prior, valid decree exists. The state's law probably requires this even though, absent such a prior judgment, the grandmother would not now have standing in an original proceeding to determine custody and visitation rights. The law of the state probably gives that much effect to the prior judgment of its own court, imposing procedural requirements where a valid decree is to be canceled that would not apply if no prior decree existed.³²⁵

If that is correct, then the federal requirement of full faith and credit imposed by the Constitution and by the ancient implementing statute may require another state to give the decree the same effect, the effect of triggering fundamental procedural protections. The ancient statute provides that the rendering state's "judicial proceedings" must receive in another state "the same full faith and credit . . . as they have by law or usage in the courts of such State . . . from which they are taken."³²⁶ One must at least worry that this is yet another provision of federal law under which some applications of the UCCJEA will be invalid.

³²⁵ Cf. *Terry v. Affum*, Nos. 210862, 213582, 1999 WL 731849 (Mich. Ct. App. Sep. 17, 1999) (remanding to trial court for decision on merits of maternal grandparents' request for continued visitation, despite their lack of standing to seek it, where child's father and child's paternal grandparents earlier had made maternal grandparents parties and had stipulated to their visitation).

³²⁶ 28 U.S.C. § 1738 (1994).

VIII. Critique of UCCJEA Justifications

When the new UCCJEA is examined in light of the old UCCJA, the PKPA, and the ancient federal constitutional and statutory provisions discussed above, it is clear that the drafters of the new uniform act did a number of very peculiar things. Of course they would not have adopted unwise policies deliberately, and one also assumes on even a brief reading of the credentials of the members of the Drafting Committee and its Reporter that they must have understood this subject rather well. With those assumptions, it is difficult to understand why they drafted the UCCJEA as they did.

For cases involving non-parents, why did they depart so far from the predicate of the old UCCJA that children should be protected from self-help, instability of environment, endless litigation, and conflicting judgments of courts of different states? Why, in place of the old uniform law and a federal act tailored to it, did they create powerful statutory incentives for unilateral forum-shopping in such cases? Why did they deny notice and a hearing to non-parents who not only have mutually precious relationships with children, but who also have existing court orders for visitation or even custody? Why did they promulgate a uniform state law that in many applications clearly would violate one federal statute (the PKPA), and that also may well violate another federal statute and various federal and state constitutional provisions? Why did they urge adoption of a uniform law that would be invalid as applied in many cases?

The Official Comments to the UCCJEA answer some of these questions in a sketchy and unpersuasive manner, and others not at all. The Comment to section 101 states that the purposes of the new uniform act are to:

- (1) Avoid jurisdictional competition and conflict with courts of other States in matters of child custody which have in the past resulted in the shifting of children from State to State with harmful effects on their well-being;
- (2) Promote cooperation with the courts of other States to the end that a custody decree is rendered in the State which can best decide the case in the interest of the child;
- (3) Discourage the use of the interstate system for continuing controversies over child custody;
- (4) Deter abductions of children:

- (5) Avoid relitigation of custody decisions of other States in this State; [and]
- (6) Facilitate the enforcement of custody decrees of other States[.]³²⁷

After giving general lip service to these purposes, however, the UCCJEA Official Comments then offer little or no justification or even explanation of why the new act includes the provisions discussed in this article, which are inconsistent with those purposes when applied to many cases involving non-parents.

A. Purported Clarification Of Law

The Comments do contain numerous claims that the UCCJEA provides clearer jurisdictional rules than the old uniform act.³²⁸ If that were true, and if it were impossible to replace vague standards with bright-line rules without treating non-parents harshly and inviting self-help, re-litigation of disputes, and persistently conflicting decrees, then the greater clarity might be a gain to be balanced against various harms the new act would cause. However, the assertion that the UCCJEA's jurisdictional standards are clearer or more specific than those contained in prior law has little or no substance. The new act makes no significant changes in most of the vague phrases that are vitally important in the UCCJA.

For example, some key provisions of the old uniform act refer to where someone "lives" or "lived" at a given time.³²⁹ So do some important provisions of the PKPA,³³⁰ and another turns on whether a particular state remains the "residence" of a specified person.³³¹ These terms are of course subject to varying interpretations and applications. Indeed, the UCCJEA Official Comments contain an statement that "the phrase 'remains the residence of' in the PKPA has been the subject of conflicting case law."³³²

³²⁷ UCCJEA, *supra* note 2, § 101 cmt., at 261-62.

³²⁸ *See, e.g., id.*, Prefatory Note, at 257 (stating that "this Act provides clearer standards for which states can exercise original jurisdiction" and "clarifies modification jurisdiction").

³²⁹ UCCJA, *supra* note 3, § 2(5), 3(a)(1)(ii).

³³⁰ 28 U.S.C.A. § 1738A(b)(4), (c)(2)(A)(ii) (1994).

³³¹ *Id.* § 1738A(d).

³³² UCCJEA, *supra* note 2, § 202 cmt., at 273.

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Nevertheless, the new act's provisions similar to those UCCJA and PKPA provisions continue to use the words "live"³³³ and "reside."³³⁴ Moreover, the Official Comment to one of those UCCJEA provisions states that the section 202 phrase "presently reside in this State" is "meant to be identical in meaning to the language of the PKPA," which is that the state "remains the residence of" the person in question.³³⁵

Another example of the new act's failure to clarify crucial language is the provision, in the UCCJA's and PKPA's definitions of a "home state," that "periods of temporary absence . . . are counted."³³⁶ Neither statute defines a "temporary absence," and courts have given the phrase conflicting interpretations.³³⁷ Yet the UCCJEA's drafters did not attempt to define this phrase.³³⁸

A third example, the last one to be mentioned here and probably the most important, is the phrases "significant connection" and "substantial evidence" found in both the UCCJA³³⁹ and the PKPA.³⁴⁰ These terms of art are important in some questions of jurisdiction to enter an initial custody or visitation order. They are absolutely central in a great many determinations of whether the exclusive jurisdiction of a state whose court has made a decree continues or instead has expired. Interstate variations in their interpretation and application have been common, as was explained above.³⁴¹ Nevertheless, the UCCJEA does not replace or even define either of these phrases, but carries them forward with undiminished vagueness.³⁴²

³³³ *Id.* §§ 102(7), 201(a)(1).

³³⁴ *Id.* §§ 202(a)(2), 203(2).

³³⁵ *Id.* § 202 cmt., at 273.

³³⁶ 28 U.S.C.A. § 1738A(b)(4) (1994); UCCJA, *supra* note 3, § 2(5).

³³⁷ *See, e.g.*, *In re Frost*, 681 N.E.2d 1030, 1034 (Ill. App. Ct. 1997) (acknowledging a conflict among districts of the court as to what is a temporary absence).

³³⁸ *Reporter's Footnotes to UCCJEA Comments, supra* note 222, at 319 n.32 (stating that "[t]he Drafting Committee decided not to attempt . . . to define the term 'temporary absence'").

³³⁹ *See supra* text accompanying note 121.

³⁴⁰ *See supra* text accompanying note 218.

³⁴¹ *See supra* text accompanying note 144.

³⁴² UCCJEA, *supra* note 2, §§ 201(a)(2), 202(a)(1).

On paper, the PKPA prevented interstate variations in the meanings of these phrases from producing conflicting judgments. The federal act did so by providing that a court asked to modify another state's decree must follow the interpretation given by the courts of that other state. And this federal solution worked well in practice.³⁴³ It preserved the freedom of each state to provide broad or narrow continuing jurisdiction for its courts, yet prevented these interstate legal differences from producing interstate conflicts among judgments.

The UCCJEA attempts, in the context of non-parents' custody and visitation, to replace that federal solution with a new one that is different in two respects. First, the new uniform act provides that, before modifying another state's decree on the theory that the other state no longer has significant connections or substantial evidence, a court may not merely apply the other state's interpretation of those phrases to the facts of the case. Instead, the court where modification is sought must await application of the other state's interpretation of those phrases by the other state's court.³⁴⁴ Second, the UCCJEA provides that no decision about significant connections or substantial evidence is needed at all, if the court where modification is sought determines that no "person acting as a parent" presently resides in the other state.³⁴⁵

The first part of this new solution adds nothing to the clarity of jurisdictional law. It does avoid the possibility that one state's court will misinterpret or misapply another state's law on the meanings of "significant connection" and "substantial evidence," but that seems not to have been a significant problem.³⁴⁶ And if this problem really does exist, the UCCJEA's response to the problem is itself very problematic.

This new provision can result in a peculiar bifurcation of the various jurisdictional issues that may arise in a single case. When one state is asked to modify another state's judgment, the UCCJEA permits the proposed new forum to decide for itself where the child, parents, and persons acting as parents "presently reside." However, if the new forum concludes that one of them

³⁴³ See *supra* notes 188-89 and accompanying text.

³⁴⁴ UCCJEA, *supra* note 2, § 203(1).

³⁴⁵ *Id.* § 203(2).

³⁴⁶ See *supra* notes 188-89 and accompanying text.

does “presently reside” in the old forum, then the UCCJEA lets only the previous forum apply that forum’s interpretations of “significant connections” and “substantial evidence” to the facts of the case.³⁴⁷

The results of thus splitting authority to decide jurisdictional issues can be troublesome. For example, in a custody contest involving two UCCJEA states, a court that is asked to modify the other state’s decree may interpret the phrase “presently reside” according to the law of the state where the court sits. Having interpreted that word, the court may hear evidence, find facts, apply its interpretation to the findings, and conclude that the person who opposes modification does not presently reside in the state where the prior decree was entered. On this basis, the court may conclude that it is free to modify the decree, and then may indeed modify it.

Then, as was explained above,³⁴⁸ the court that rendered the old judgment may apply a different legal definition of “present residence.” The court may decide that that legal difference makes issue preclusion inapplicable, and proceed therefore to hear evidence and rule that the person opposing modification does indeed presently reside in the state of the prior decree.

Having so ruled, the court that rendered the old decree may then turn to the additional requirement of “significant connection” and “substantial evidence,” and find them satisfied. The court thus concludes that the new foreign modification is unworthy of respect under the UCCJEA. Thus, the first part of the new act’s replacement of the federal solution to the problem of vagueness in those phrases does not clarify the legal standards, and seems to leave ample room for conflicting decisions of two states over exclusive, continuing jurisdiction.

The unwisdom of bifurcating jurisdictional issues, by letting the new forum decide the UCCJEA issue of “present residence” but not those of “significant connection” and “substantial evidence,” is even more apparent when one recalls that the new forum must also apply the PKPA. That federal statute may or may not bar the requested modification, depending on several jurisdictional issues. Some are issues of interpretation and applica-

³⁴⁷ UCCJEA, *supra* note 2, §§ 202(a)(2), 203(1).

³⁴⁸ See *supra* text accompanying notes 108-19.

tion of language on the face of the federal act itself. Others are issues of interpretation and application of the law of the previous forum, law that is incorporated by reference in the federal statute.³⁴⁹ The PKPA requires the new forum to decide these issues, and nothing in the UCCJEA forbids the new forum to do so.

Consequently, the new uniform act's bifurcation of jurisdictional issues is even more bizarre than it at first appears. The UCCJEA lets the new forum decide the locations of people's "present residences." The same court also must decide under the PKPA whether the old forum's prior decree was made consistently with the old forum's and the federal act's jurisdictional criteria, and whether the old forum has subsequently lost jurisdiction according to its own law, which often turns mainly on whether it now has "significant connections" and "substantial evidence." Yet these issues are identical or very similar to the issues that the UCCJEA forbids that court to address as a step in deciding whether its own law forbids the modification. It is hard to discern any sense in the new act's allocating decisional authority so as to produce this result, and doing so certainly does not increase clarity in the law.

The second part of the UCCJEA's solution does, on its face, make the law of continuing jurisdiction seem less often debatable in one respect. By providing that "significant connections" and "substantial evidence" in the state that made the prior decree are immaterial once the only person residing there has lacked physical custody of the child long enough, the new act reduces the number of cases in which those vague phrases must be applied.

However, this substitution of a more specific rule for general criteria exacts a price. Where a dispute involving a non-parent concerns only visitation, this feature of the UCCJEA invites a child's custodian to use self-help and forum-shopping, and can result in re-litigation of cases and persistently conflicting judgments, as was explained above.³⁵⁰ To evaluate this legislative proposal, one must at least balance the benefits of more clarity in jurisdictional criteria against those drawbacks.

Where more than visitation is at stake, on the other hand, and a non-parent seeks primary custody, the UCCJEA has the

³⁴⁹ See *supra* notes 178-86, 215-18, 229, 307-09, 315-16 and accompanying text.

³⁵⁰ See *supra* text accompanying notes 76-86.

same disadvantages and another. As was noted above,³⁵¹ the new act gives a non-parent an incentive to obtain and retain physical possession of the child. Doing so can qualify the non-parent immediately for joinder, notice, and hearing rights in the other litigant's state during any period when he or she is not a "person acting as a parent," and can aid in his or her gaining or keeping that status. These drawbacks of the new rule should be balanced against any apparent improvement in the specificity of the jurisdictional rule.

B. *Failure To Balance Competing Values*

How, then, did the drafters of the UCCJEA balance these competing considerations? One must speculate, because the Official Comments make no mention at all of the incentives and opportunities for self-help, forum-shopping, re-litigation, and conflicting judgments that are built into the new act's provisions, nor of the undesirable legal and emotional consequences. Neither do the Comments mention a modification court's duty to decide under federal law jurisdictional issues identical or similar to issues that the UCCJEA forbids it to decide, nor many other anomalies and problems of the new act identified in this article. Since the Official Comments omit any mention of these difficulties, the Comments of course make no attempt to balance all the harms that would result, but for the PKPA, against the purported purposes and benefits of the new uniform act.

Comments that the Reporter of the UCCJEA Drafting Committee, Professor Robert G. Spector, wrote for the Family Law Quarterly in the form of footnotes to the UCCJEA's Official Comments contain more detailed answers to some of the many questions provoked by the new uniform act.³⁵² However, those comments express only the Reporter's own views, not those of NCCUSL or even of a majority of the Drafting Committee.³⁵³ In any event, even the Reporter's footnotes are in many ways incomplete and otherwise unpersuasive.

Limitations of space do not permit a thorough critique of the Reporter's analysis of the UCCJEA in this article, but a discus-

³⁵¹ See *supra* text accompanying notes 102-19.

³⁵² Reporter's Footnotes to UCCJEA Comments, *supra* note 222.

³⁵³ *Id.* at 303 n.** (stating that these footnotes "are strictly the responsibility of the author and are in no way attributable to [NCCUSL]").

sion of his expressed views on some issues should be useful. For one thing, like the Official Comments, the Reporter makes no mention of the fact that some of the UCCJEA's provisions create new incentives and opportunities for forum-shopping, other forms of self-help, re-litigation, and conflicting judgments. Since he ignores these undesirable consequences of the new act's provisions, he of course makes no attempt to balance the resulting harms against countervailing considerations. Two other examples of subjects on which the Comments' and the Reporter's explanations are inadequate merit more extended discussion. These are the UCCJEA's treatment of joinder, notice, and opportunity to be heard, and the new uniform act's other conflicts with the PKPA.

It is distinctly unpleasant to criticize others' work, and almost equally unpleasant to read such criticisms. However, the explanations of the UCCJEA found in its Comments and in the Reporter's footnotes have a superficial plausibility, and unless rebutted could influence still more state legislatures to approve the new uniform act.³⁵⁴ It is important, therefore, to subject those explanations to critical analysis, so that their weaknesses are understood before the UCCJEA bandwagon moves into more states.

C. Joinder, Notice, And Opportunity To Be Heard

1. Relationship between standing and procedures

A very important example of failure to justify the UCCJEA's conflicts with sound policies and with existing federal and state law is the Official Comments' and the Reporter's explanation of the UCCJEA's provisions on joinder, notice, and op-

³⁵⁴ Interpretations and evaluations of various uniform acts are often influenced by their Official Comments, and by statements made in published writings of the Reporters of the acts. The old UCCJA is an example. The Reporter for that act was the late Professor Brigitte Bodenheimer. A search on October 18, 1999, of Westlaw's ALLSTATES database for judicial decisions in which "UCCJA" appeared in the same paragraph as "Bodenheimer" produced 128 cases. See, e.g., *Butler v. Grant*, 714 A.2d 747, 751-53 (Del. 1998) (citing a law journal article by Professor Bodenheimer, stating that "the majority of courts that have considered the issue of continuing jurisdiction have followed Professor Bodenheimer's reading of the [UCCJA]," and accepting her interpretation of the act).

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portunity to be heard. As was explained above,³⁵⁵ the UCCJA contains broad provisions on these topics. By applying procedural rules on those subjects to “contestants,” and by defining “contestants” to include anyone who claims custody or visitation rights, the UCCJA can well be interpreted to authorize a court to involve every interested adult in a case. A court can thereby give the adult procedural fairness.

Even an adult who lacks standing to seek custody or visitation may have a legitimate interest in litigating jurisdictional issues. This interest is an especially strong one in a custody or visitation case, since the jurisdictional rulings will determine not only the forum but also the choice of substantive law. If an adult who lacks standing in one forum to prevail on the substantive merits is nevertheless allowed to challenge the existence or exercise of jurisdiction there, he or she may prevail on one of those preliminary questions. The result may be that the case is litigated instead in another state, where he or she does have standing and may prevail on the merits.

Perhaps even more importantly, the UCCJA can give the child the benefits of conclusive litigation. Under the old uniform act, the adult who unsuccessfully challenges jurisdiction is bound by his loss. In contrast, under the new act the adult receives less procedural fairness, and then remains free to litigate the jurisdictional issues elsewhere and, if he or she prevails on them, to win a contrary decree on the merits too.

The UCCJEA Comments and the Reporter’s footnotes offer only inadequate reasons for abandoning these features of the UCCJA. Their explanation begins with the Official Comment to section 102, which states that the UCCJEA “reaffirms the traditional view that a court in a child custody case applies its own substantive law.”³⁵⁶ Then the UCCJEA Comments go on to explain that the law of each state therefore determines under the new uniform act who has standing to seek custody or visitation,³⁵⁷ who is joined as a party,³⁵⁸ and who receives notice and an opportunity to be heard.³⁵⁹

³⁵⁵ See *supra* text accompanying notes 126-33, 157-65.

³⁵⁶ UCCJEA, *supra* note 2, § 102 cmt., at 263.

³⁵⁷ *Id.*

³⁵⁸ *Id.*, § 205 cmt., at 277.

³⁵⁹ *Id.* at 276-77.

The UCCJEA section 102 Comment quoted just above is correct in stating that “the traditional view” is that “a court in a child custody case applies its own substantive law.” However, that is not the issue on which the UCCJEA departs from the approach of the UCCJA; neither the old nor the new uniform act contains even a general provision addressing choices of substantive law.

Both acts *do* address the question of which adults must be made parties to litigation and given notice and an opportunity to be heard. Why did the UCCJEA drafters abandon the UCCJA’s approach to this subject, and provide that standing to litigate jurisdictional issues mirrors standing to litigate the merits? They fail to offer cogent explanations of why the UCCJEA in these respects departs from wise provisions of the UCCJA.

As was explained above,³⁶⁰ a crucial piece of the UCCJEA’s drafting in this respect is its section 205 provisions that joinder, notice, and opportunity to be heard must be afforded only to persons having standing to seek custody or visitation on the merits, and not also to “contestants” as is provided by the UCCJA. Indeed, the UCCJEA omits the term “contestants” entirely. The Comment to section 102, where UCCJEA terms are defined, explains by saying that “the term ‘contestant’ . . . seems to have served little purpose over the years, and whatever function it once had has been subsumed by state laws on who has standing to seek custody of or visitation with a child.”³⁶¹

Both parts of this explanation are incorrect. As to the first part, in the UCCJA the word “contestant” serves four purposes. First, it is an operative term in one of the most frequently used bases for the existence of jurisdiction, section 3(a)(2), which bases jurisdiction in large part on a “significant connection” between the state and a “contestant.”³⁶² Section 3(a)(2) is an especially important basis for continuing, exclusive jurisdiction under the UCCJA and the PKPA. A second purpose served by the word “contestant” in the UCCJA is that, as was noted above,³⁶³ UCCJA section 4 requires notice and hearing for “contestants,” the definition of which can well be interpreted to cover

³⁶⁰ See *supra* text accompanying notes 68-70.

³⁶¹ UCCJEA, *supra* note 2, § 102 cmt., at 262.

³⁶² See *supra* text accompanying note 121.

³⁶³ See *supra* text accompanying note 131.

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persons who lack standing to seek custody or visitation on the merits but who have legitimate and strong interests in seeking favorable rulings on jurisdictional issues.³⁶⁴ Third, section 7(c)(2) makes a child's connection with a "contestant" a factor in deciding whether the court is an inconvenient forum. Finally, the idea of a "contestant" serves another important purpose. Section 10 does not use the word "contestant," but it may as well; it requires joinder of all persons who fit the section 2(1) definition of a "contestant."³⁶⁵ It is false that the word "contestant" has served little purpose in the UCCJA.

As to the second part of the quoted explanation in the Comment to UCCJEA section 102, it cannot truly be said that "whatever function [the term 'contestant'] once had has been subsumed by state laws on who has standing to seek custody of or visitation with a child." Every state has always had law on such questions of standing; their existence is no new development. The question is whether it is wise or unwise to provide joinder, notice, and hearing to an adult who lacks such standing but who is likely now or later to try to litigate jurisdictional and other questions concerning this child here or elsewhere. The UCCJA can be read to do this, and the UCCJEA clearly cannot. The explanation in the Comment to UCCJEA section 102 does not address this question.

The UCCJEA Reporter's footnote to the Comment to section 106 does raise and attempt to answer the question whether the new uniform act, with its provisions for party status, notice, and hearing that (unlike those of the UCCJA) clearly fail to cover everyone who claims custody or visitation rights,

can provide finality as to a child custody determination, and the jurisdictional facts upon which it rests, against a person who would have not have [sic] standing to contest custody, and therefore would not be entitled to notice, in the forum, but would have standing, and therefore be entitled to notice, under the law of the state where the custody determination is sought to be enforced. The issue has not arisen often. When it has, enforcement of the custody determination has generally been refused. . . . The problem arises out of the differences in state

³⁶⁴ See, e.g., *In re Steven C.*, 486 N.W.2d 572, 574 (Wis. Ct. App. 1992) (holding that, because another state's court had granted visitation rights to the grandparents, they were "contestants" and therefore entitled to notice under the UCCJA).

³⁶⁵ See *supra* text accompanying notes 124-26.

laws with regard to who is entitled to seek custody of or visitation with a child and not out of the elimination of the contestant category in this Act.³⁶⁶

The Reporter's answer misses the point.

First, it may or may not be true that this issue has not arisen often. There do seem to be few if any reported decisions addressing the issue. However, that very probably results in part from trial courts using the UCCJA's apparent authority to join such litigants as parties — a ruling that ordinarily would not be subject to interlocutory appeal, and then not worth appealing after entry of a final judgment. It probably results also in part, when trial judges do fail to join such litigants as parties, from the excluded litigants' choosing to launch only collateral attacks on the resulting judgments, collateral attacks that should be always successful and never worth an appeal by an adversary.

Second, it is no surprise that courts have refused enforcement of custody determinations against persons who did not receive the basic requirements of due process, notice and an opportunity to be heard, when the custody determinations were being made. Would one expect to find many reported cases in which appellate courts violate the Fourteenth Amendment and similar state law requirements of procedural fairness?

Finally, the Reporter incorrectly identifies the source of the problem, which he seems to admit does exist, that the UCCJEA is inferior to the UCCJA in its failure to provide equivalent "finality as to a child custody determination, and the jurisdictional facts upon which it rests." The cause of this problem is not, as the Reporter states, "differences in state laws with regard to who is entitled to seek custody of or visitation with a child." That is nothing new. The source of the new problem is exactly what he says it is not, "elimination of the contestant category in [the UCCJEA]."³⁶⁷ The UCCJA, with its requirement of joinder of "contestants" and the other provisions and Official Comments summarized above,³⁶⁸ provides a basis for giving relatively broad finality to decisions about the merits of custody and visitation cases and about their jurisdictional bases. The UCCJEA ex-

³⁶⁶ Reporter's Footnotes to UCCJEA Comments, *supra* note 222, at 325-26 n.49.

³⁶⁷ *Id.*

³⁶⁸ See *supra* text accompanying notes 363-65.

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pressly rejects this prior law, and neither the new act's Comments nor the Reporter's footnotes offer a cogent reason for thus depriving adults of fair procedures and depriving children of stability in their lives.

The Comment to UCCJEA section 205 also addresses the subject of notice and opportunity to be heard, and again the Reporter contributes some footnotes to that Comment. As was explained above,³⁶⁹ section 205 provides that only persons who have standing to obtain custody or visitation under local law must be joined as parties, and that notice and hearing rights are given only to parents, persons with physical custody of the child, and persons entitled to those procedural rights in intrastate cases.

The Comment to UCCJEA section 205 makes no real attempt to justify its radical departure from the broader UCCJA provisions on joinder, notice, and opportunity to be heard. The Comment's only pertinent language is that

this section . . . does not attempt to dictate who is entitled to notice. . . . Local rules vary with regard to persons entitled to seek custody Therefore, this section simply indicates that persons entitled to seek custody should receive notice but leaves the rest of the determination to local law. . . .

Rules requiring joinder of people with an interest in the custody of and visitation with a child also vary widely throughout the country. The UCCJA has a separate section on joinder of parties which has been eliminated. The issue of who is entitled to intervene and who must be joined in a custody proceeding is to be determined by local state law.³⁷⁰

As a professor used to say in a course I took many years ago, "I get it all but the 'therefore'" — almost all, anyway. The fact that local rules of standing vary is not a reason why this new uniform act, ostensibly designed to avoid continuing controversies and re-litigations over custody and visitation, should retreat from the UCCJA's attempt to enhance the binding effects of decisions about the merits and jurisdictional bases of such cases. On the contrary, the very fact of such interstate variations in substantive law increases the need for broad rules of joinder, notice, and opportunity to be heard that can limit re-litigations.

³⁶⁹ See *supra* text accompanying notes 68-70, 360.

³⁷⁰ UCCJEA, *supra* note 2, § 205 cmt., at 276-77.

Also, it is simply not true that section 205 “does not attempt to dictate who is entitled to notice.” This UCCJEA provision specifies who must be joined and notified, and mentions only parents, those with physical custody, and those with standing under local law. It rejects the UCCJA’s broader requirements of joinder and notice, without any attempt at an explanation in the accompanying Comment.

2. *Practicality of broad joinder and notice*

The UCCJEA Reporter’s footnotes to the section 205 Comment do offer an explanation for its limited notice requirements:

The Drafting Committee heard from a number of court officials, including judges, to the effect that in *pro se* cases, the burden of ascertaining the contestants and serving the notice fell on the court staff and was quite onerous. They suggested limited notice to those persons who were required to receive notice under [local] state law. The Drafting Committee agreed. Ultimately, the contestant classification was eliminated.

The elimination of the contestant classification means that [local] state law will determine who is required to receive notice in a custody proceeding. . . . It would be extremely difficult to require the parties to ascertain whether under the law of all states there exists a person who should receive notice of this proceeding when the law of the forum does not require notice to that person. . . .

The result of not giving notice to a person who is not required to receive it under forum law is that the custody determination cannot be enforced against that person. To do so would violate that person’s due process rights. . . . Therefore, as a practical matter, should counsel find someone in that position, notice should be given in order to avert the problem.³⁷¹

The only support the Reporter cites for this statement that “it would be extremely difficult to require the parties to ascertain whether under the law of all states there exists a person who should receive notice” is an article of mine.³⁷² In the pages he cites, I did not even address the novel and peculiar idea of examining the law of “all states” to see whether there is “a person who should receive notice” in every custody case. A few states have very open-ended provisions for standing to seek custody or visitation, in theory applicable to almost anyone, at least at the stage

³⁷¹ Reporter’s Footnotes to UCCJEA Comments, *supra* note 222, at 351 n.108.

³⁷² He cites Coombs, *supra* note 159, at 822-47.

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of initial pleading.³⁷³ In the article the Reporter cites, I limited my discussion to the question of giving notice to persons having standing under the law of only those states “that under the circumstances could foreseeably become a forum for litigation concerning the child.”³⁷⁴ Even as to that question, I offered no opinion on how difficult doing so might be.

Among the things I did say there was that affording notice and opportunity to be heard to every potential party to a custody proceeding enhances the extent to which the PKPA serves its purposes.³⁷⁵ The same is true of the purposes of the UCCJA and the ostensible purposes of the UCCJEA.³⁷⁶ I also made there a point that I have repeated above: even a litigant who lacks standing to seek custody or visitation under the law of a particular forum has “an important right” to litigate in that forum the question whether the forum “has and should exercise jurisdiction.”³⁷⁷

3. *Best interests of court personnel*

The court officials’ comments that the UCCJEA Reporter summarizes, “to the effect that in *pro se* cases, the burden of as-

³⁷³ See, e.g., *Buness v. Gillen*, 781 P.2d 985, 988 (Alaska 1989) (holding “that a non-parent who has a significant connection with the child has standing to assert a claim for custody”).

³⁷⁴ Coombs, *supra* note 159, at 861. It is especially odd that the Reporter deemed the question to be how difficult it would be “to require the parties to ascertain whether under the law of *all states* there exists a person who should receive notice of this proceeding when the law of the forum does not require notice to that person.” *Reporter’s Footnotes to UCCJEA Comments*, *supra* note 222, at 351 n.108 (emphasis added). It is odd because at another point in the same footnotes, discussing a registration procedure provided in the UCCJEA, he limited his focus to “any state where the respondent might end up,” *id.* at 368 n.138, and “states that had a relationship to the respondent,” *id.* at 369 n.138. That focus is similar to the focus in my prior article mentioned above, on foreseeable forums.

³⁷⁵ Coombs, *supra* note 159, at 859-61.

³⁷⁶ In those pages of that article, I concluded that the PKPA does not require such broad provision of notice, but only because no feature of the federal act requires a state to exert its authority more widely in the interstate arena than its own policymakers choose to do. The question of how to interpret the UCCJA, and of whether replacing its relevant provisions with ones like the UCCJEA would be wise, is an entirely different issue.

³⁷⁷ Coombs, *supra* note 159, at 860; see *supra* text accompanying notes 312-18.

certaining the contestants and serving the notice fell on the court staff and was quite onerous,”³⁷⁸ are scarcely a better reason to conclude that broadly requiring notice is difficult or burdensome than are the ideas he improperly attributes to my article. For one thing, according to the Reporter, those officials discussed only *pro se* cases, which surely limits the burden.

Even as to cases without lawyers the court officials’ complaint is unpersuasive. Both the UCCJA and the UCCJEA purport to serve children’s interests ahead of the interests even of their parents and other adults who care about them, not to mention court officials.³⁷⁹ Both the *Griffin* and *Stanley* decisions of the Supreme Court, discussed above,³⁸⁰ cast doubt on the sufficiency of worries over cost and efficiency as reasons to limit due process protections. The *Griffin* Court expressed doubt that “the cost of providing such notice as will satisfy due process requirements each time a proceeding is begun to docket a judgment for an accrued installment of alimony will be incommensurately high.”³⁸¹ Still more pertinent to the subject of this article, the *Stanley* Court replied to an argument about “administrative inconvenience” by writing that “the Constitution recognizes higher values than speed and efficiency.”³⁸²

It is very strange that the UCCJEA replaces the UCCJA’s joinder and notice provisions, designed to give fairness to litigants and finality for children, with new provisions designed to serve the best interests of court officials. Why did the Drafting Committee make this choice between litigants and children, on the one hand, and civil servants on the other? All the UCCJEA Reporter tells us is that “the Drafting Committee agreed” to limit the requirement of notice.

³⁷⁸ Reporter’s Footnotes to UCCJEA Comments, *supra* note 222, at 351 n.108.

³⁷⁹ See UCCJA, *supra* note 3, § 3 cmt., at 145 (stating that “jurisdiction exists only if it is in the *child’s* interest, not merely the interest or convenience of the feuding parties, to determine custody in a particular state”); UCCJEA, *supra* note 2, § 101 cmt., at 262 (stating that among the new act’s purposes is to “promote cooperation with the courts of other States to the end that a custody decree is rendered in that State which can best decide the case in the interest of the child”).

³⁸⁰ See *supra* text accompanying notes 272-89.

³⁸¹ *Griffin v. Griffin*, 327 U.S. 220, 229 n.3 (1946).

³⁸² *Stanley v. Illinois*, 405 U.S. 645, 656 (1972).

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4. *Notice to one person at the option of another person's lawyer*

The Reporter then attempts to mitigate the harm the UCCJEA will do in this respect, by advising "counsel" that "notice should be given" to some persons not covered by the new act's provisions on joinder and notice.³⁸³ He makes this suggestion despite his writing in a footnote to another section of the act that a person who lacks standing under the substantive law of custody and visitation "therefore would not be entitled to notice."³⁸⁴ But section 205 contains no authority even for a court to do so, much less for "counsel" to send a letter or otherwise give some other kind of "notice" short of an official summons or similar judicial process. The Reporter does not attempt to explain how "notice should be given" under the UCCJEA whenever counsel deems it advisable, notice that would be sufficient to satisfy due process and would go to persons the new act disentitles to receive the kind of notice afforded to the real litigants.

Some states that have enacted the new uniform act may have other statutes concerning notice that courts there might interpret as allowing official notice in UCCJEA cases to persons the new act does not make entitled to it. However, one can hardly expect courts uniformly to apply such legal band-aids to the UCCJEA's flaws. The need for them though is another reason to doubt the desirability of enacting the new statute, and the lack of an explanation for leaving this problem to such an indefinite and uncertain cure is troubling.

5. *Conflicts with federal laws*

The pages just above describe inadequacies of the explanations offered in the UCCJEA's Comments and in the Reporter's footnotes for the new act's misguided treatment of joinder, notice, and opportunity to be heard in cases where a non-parent merely *claims* a right to custody or visitation. What is worse, the Drafting Committee and the Reporter make no mention at all of the most troublesome examples of failure to provide notice and a hearing. These are cases in which a court of another state has

³⁸³ See *supra* text accompanying note 371.

³⁸⁴ Reporter's Footnotes to UCCJEA Comments, *supra* note 222, at 325 n.49.

already duly awarded custody or visitation rights, which new proceedings in the UCCJEA state will purport to extinguish without any notification or hearing.

As was said above, section 1738A(e) of the PKPA provides that “before a child custody or visitation determination is made, reasonable notice and opportunity to be heard shall be given to the contestants, any parent whose parental rights have not been previously terminated and any person who has physical custody of a child.”³⁸⁵ The UCCJEA Drafting Committee seems to have read this provision as merely a limit on the PKPA’s statutory requirements of respect for other states’ courts’ proceedings and orders. Thus the Comment to section 205 describes section 1738A(e) simply as meaning “that a custody determination is entitled to full faith and credit only if there has been notice and an opportunity to be heard.” However, that language in the federal statute is phrased not merely as a condition on the requirement of full faith and credit, but as a positive requirement with which every state court must comply before making a custody or visitation decision.³⁸⁶

It is bad enough that the UCCJEA Comments and the Reporter’s footnotes are silent concerning the UCCJEA-PKPA conflict on rights of notice and hearing. This deficiency is compounded by the fact that the Comments and Reporter’s footnotes do not address apparent conflicts between the UCCJEA and other federal laws relevant to notice and hearing. That is, they do not address at all the possibility that the full faith and credit and due process requirements of general federal law require a state to give effect to another state’s valid custody decree, at least to the extent of providing notice and a hearing to a person whose rights under that decree the new state’s court destroys or impairs

³⁸⁵ 28 U.S.C.A. § 1738A(e) (1994 and 1999 Cum. Ann. Pocket Part); see *supra* text accompanying notes 182-83.

³⁸⁶ The title of section 1738A refers to “full faith and credit,” and article IV of the Constitution certainly was one basis for congressional power to enact the statute. However, Congress also relied on the due process clause of the fourteenth amendment and the commerce clause. It made reliance on due process clear by stating in the findings and purposes set forth in section 7 of the act, Pub. L. 96-611, that prior law on custody jurisdiction and enforcement was resulting in “deprivation of rights of liberty and property without due process of law.” See 28 U.S.C.A. § 1738A, Historical and Statutory Notes, Congressional Findings and Declaration of Purpose, at 364 (1994).

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when it makes and enforces a contrary order. Neither do they offer any discussion of state constitutional requirements of notice and hearing. The Comments' and the Reporter's ignoring of these constitutional topics, coupled with their inadequate explanations of other aspects of their treatment of non-constitutional issues of joinder, notice, and hearing, leads one to conclude that the UCCJEA's treatment of these vital procedural issue is very poorly justified.

D. *Other UCCJEA-PKPA Conflicts*

A final example of the inadequate explanations provided in the Official Comments and in the Reporter's footnotes is their treatment of conflict between the UCCJEA and the PKPA on various issues, other than notice and hearing, that are relevant to non-parent custody and visitation. Surprisingly, the NCCUSL Drafting Committee's notes to 1995 drafts of the new act stated that the purpose of the new act was to bring the UCCJA into compliance with the PKPA and other federal statutes.³⁸⁷ I then sent written comments to the Committee.³⁸⁸ I explained why very little conflict exists between the UCCJA and the PKPA,³⁸⁹ and why the Committee's drafts would create more conflict.³⁹⁰ Subsequently, the Committee watered down its language on this general point, dropping its claim that the UCCJEA provides fuller compliance with the PKPA than does the UCCJA. The Prefatory Note to the UCCJEA as it was finally promulgated

³⁸⁷ See, e.g., Uniform Child Custody Jurisdiction Act (199_), Nov. 17, 1995, Draft for Discussion Only, Introductory Note: Jurisdiction Revision, accessible on internet at <http://www.law.upenn.edu/bl/ulc/uccja/uccja.htm> [sic].

³⁸⁸ Memorandum from Russell M. Coombs to the NCCUSL Drafting Committee for Uniform Interstate Child Visitation Act (UICVA) and Revisions to Uniform Child Custody Jurisdiction Act (RUCCJA) (Nov. 6, 1995) (on file with author).

³⁸⁹ I had already explained this point in published writings. See, e.g., Russell M. Coombs, *Nuts and Bolts of the PKPA*, 22 COLO. LAW. 2397, 2400 (1993); Russell M. Coombs, *Curbing the Child Snatching Epidemic*, 6 FAM. ADVOC. 30, 32 (1984), *editors' error corrected*, 7 FAM. ADVOC. 42 (1984). To repeat the most basic reason in the most concise way, the PKPA provides rules that almost always merely determine which of two states' versions or interpretations of the UCCJA will prevail. The federal act almost never overrides both of two states' versions or interpretations of the UCCJA.

³⁹⁰ Memorandum from Russell M. Coombs, *supra* note 388, at 27-37.

states only that the new act “revises the law on child custody jurisdiction in light of federal enactments and almost thirty years of inconsistent case law.”³⁹¹

When the Official Comments and the Reporter’s footnotes deal more specifically with conflict between the UCCJEA and the PKPA, they are quite misleading, for various reasons. First, they sometimes describe or apply provisions of both acts inaccurately.

For example, explaining why the UCCJEA (unlike the UCCJA) gives home state jurisdiction preference over significant connection jurisdiction for an initial determination of custody or visitation, the Prefatory Note states that “the PKPA prioritizes ‘home state’ jurisdiction by requiring that full faith and credit cannot be given to a child custody determination by a State that exercises initial jurisdiction as a ‘significant connection’ state when there is a ‘home State.’”³⁹² That is clearly false. It is true that section 1738A does not *require* full faith and credit in such a case. However, the federal statute does permit a state to give it if state law so provides, and the UCCJA does so provide.³⁹³ Thus, it is inaccurate to say that “the PKPA [requires] that full faith and credit cannot be given” in such a case.

1. *Conflict over jurisdiction to modify*

As a second misleading step, the Official Comments and the Reporter’s footnotes understate the real extent of UCCJEA-PKPA conflict. For one very important example, the Official Comment to section 202 mentions that a state’s exclusive continuing jurisdiction to modify its prior order is narrower under the UCCJEA than under the PKPA. The Comment explains that continuing jurisdiction can last under the UCCJEA only while a

³⁹¹ UCCJEA, *supra* note 2, Prefatory Note, at 257.

³⁹² *Id.* at 258.

³⁹³ UCCJA §§ 3, 13, and 14 require a court of one state to recognize and enforce, and ordinarily forbid it to modify, a duly-made decree of another state that the other state still has jurisdiction to modify. *See supra* text accompanying notes 121, 150-53, 171. These provisions do not limit “significant connection” jurisdiction to cases in which there is no home state, either when determining whether the initial decree was duly made or when determining whether the state retains jurisdiction.

An example of the Drafters’ applying the UCCJEA inaccurately appears *infra* in the text accompanying note 399.

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parent or “person acting as a parent” continues to live in the state that rendered the decree, while the broader provision of the PKPA “authorizes continuing jurisdiction so long as any ‘contestant’ remains in the original decree State and that State continues to have jurisdiction under its own law.”³⁹⁴ That Comment then states that “this revision does not present a conflict with the PKPA. The PKPA’s reference in section 1738[A](d) to section 1738[A](c)(1) recognizes that States may narrow the class of cases that would be subject to exclusive, continuing jurisdiction.”³⁹⁵ Those two statements are false, as will be explained just below. The Comment then continues by stating:

However, during the transition from the UCCJA to this Act, some States may continue to base continuing jurisdiction on the continued presence of a contestant, such as a grandparent. The PKPA will require that such decisions be enforced. The problem will disappear as States adopt this Act to replace the UCCJA.³⁹⁶

It is important to understand why the first two statements in that explanation, that there is no UCCJEA-PKPA conflict and that it is federal permission to narrow jurisdiction which avoids such conflict, are obviously incorrect. The PKPA leaves each state free to make its *own* exclusive continuing jurisdiction as narrow as it likes. However, it is plainly erroneous to say that section 1738A “authorizes states to narrow the class of cases” in which this federal statute requires each state to honor *another* state’s “exclusive continuing jurisdiction.” On the contrary, the PKPA requires each state to let every other state’s law define the extent of that other state’s exclusive continuing jurisdiction, as long as a contestant continues to live there.

The last three sentences quoted above from the section 202 Comment, beginning with the word “however,” are an afterthought, added *after NCCUSL gave final approval* to the new act. They were added because an American Bar Association body considering the UCCJEA had just been informed of the true nature of its conflict with the PKPA on this point.³⁹⁷ Those three

³⁹⁴ UCCJEA, *supra* note 2, § 202 cmt., at 273.

³⁹⁵ *Id.*

³⁹⁶ *Id.*

³⁹⁷ Jeff Atkinson, the American Bar Association (ABA) liaison to the Drafting Committee, sent me on September 20 and November 11 of 1996 and March 21 of 1997 successive Committee drafts containing that Comment. Uni-

sentences are a belated and ineffectual attempt to explain away the conflict that the already approved UCCJEA had created with the PKPA. Even they understate the nature and extent of the conflict.

The truth is that section 1738A will not only require UCCJEA states “to enforce” decisions made by UCCJA states under their continuing jurisdiction based in part on continued residence of a “contestant,” the federal statute will also forbid UCCJEA states to modify such decrees. These are two direct and vital conflicts between federal law and the UCCJEA. The

form Child Custody Jurisdiction and Enforcement Act, Draft for Discussion Only, for consideration by the NCCUSL Drafting Committee at a meeting of Oct. 25-27, 1996 (on file with author); Uniform Child Custody Jurisdiction and Enforcement Act, Draft for Discussion Only, bearing typewritten date of Sep. 23, 1996, and bearing Jeff Atkinson’s handwritten annotations dated Nov. 11, 1996, reflecting Drafting Committee decisions made during meeting of Oct. 25-27, 1996 (on file with author); Uniform Child Custody Jurisdiction and Enforcement Act, Draft for Discussion Only, Seventh Draft, Incorporating Comments from the February 27 [1997] meeting and from Style, bearing Jeff Atkinson’s handwritten annotations dated March 21, 1997 (on file with author).

None of those three drafts contained the last three sentences set out in the block quotation just above. That is, they all ended with the simply false statement that this difference in exclusive continuing jurisdiction “does not present a conflict with the PKPA,” because section 1738A “authorizes states to narrow the class of cases that would be subject to exclusive continuing jurisdiction.” That was the extent of the Comment’s explanation when the Drafting Committee gave its final approval to the act, and even when NCCUSL formally adopted the UCCJEA. The reader can confirm this by examining the drafts of the new uniform act, on the internet. See *supra* note 2.

After NCCUSL had already given final approval to the UCCJEA, the Council of the ABA’s Family Law Section planned to consider recommending ABA endorsement of the new uniform act, as it almost always does. As an active member of the Family Law Section of the ABA and chair of one of its committees, I sent Council members a written explanation of the actual UCCJEA-PKPA conflict on the subject of exclusive, continuing jurisdiction. Letter from Russell M. Coombs to officers and members of the Council of the ABA Family Law Section (Nov. 11, 1997) (on file with author).

Only then, well after NCCUSL’s final approval of the UCCJEA had been issued, was the Comment augmented with the last three sentences quoted in the text of this article. These last three sentences contradicted the statements in the immediately previous sentences that section 202 does not conflict with the PKPA because the federal act lets states narrow continuing jurisdiction. The new three sentences admitted to some of the federal-state conflict, and claimed that “the problem will disappear as States adopt this Act to replace the UCCJA.”

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new uniform act expressly permits states enacting it not only to deny enforcement to such decrees, but also to modify them as soon as a brand-new resident requests such relief. In direct conflict with the UCCJEA on both of these points, the PKPA mandates enforcement and forbids modification.

Remarkably, when the Drafting Committee added its belated and weak admission of and excuse for this instance of important UCCJEA-PKPA conflict, it failed to augment similarly two almost identical misstatements concerning the existence of such conflict. First, the Drafting Committee left unchanged a statement in the Comment to section 303 that “the changes [from the UCCJA] made in Article 2 of this Act now make a State’s duty to enforce and not modify a child custody determination of another State consistent with the enforcement and nonmodification provisions of the PKPA.”³⁹⁸

2. *Conflict over initial jurisdiction*

Second, the Drafting Committee left a very similar flaw in the Comment to section 201, which governs the quite different topic of UCCJEA jurisdiction to make an *initial* custody or visitation order. That Comment acknowledges that “extended home state jurisdiction” under the PKPA is broader than under the new uniform act, since it preserves jurisdiction for six months after a child’s departure if a “contestant” remains in the state, while the UCCJEA does so only if a “parent or person acting as a parent” does so. The Comment then claims, however, that “there is no conflict with the broader provision of the PKPA. The PKPA in [section 1738A(c)(1)] authorizes states to narrow the scope of their jurisdiction.” These claims are virtually identical to those that the Drafting Committee made and then contradicted in the Comment to section 202.

The claims are false in this context of initial jurisdiction, just as they are in the different context, discussed just above, of modification jurisdiction. The PKPA indeed leaves each state free to narrow *its own* jurisdiction, but it clearly forbids a state to narrow the jurisdictional criteria requiring it to respect proceedings and decrees of *other* states. Federal section 1738A(g) forbids a UCCJEA state to exercise jurisdiction in a case begun during the

³⁹⁸ UCCJEA, *supra* note 2, § 303 cmt., at 284.

pendency of an “extended home state” case in a UCCJA state based on the continued residence of a “contestant,” while the new uniform act provides to the contrary.

Thus, NCCUSL approved the UCCJEA on the basis of false information about conflicts with the PKPA on initial jurisdiction as well as concerning modification jurisdiction. Subsequently, when the Drafting Committee made its belated attempt to admit and minimize the extent of the federal-state conflict on modification, it neglected to make a similar attempt concerning initial jurisdiction.

Moreover, the UCCJEA’s drafters seem to have misunderstood their own provisions on initial jurisdiction. The Comment to 201 discusses a hypothetical case similar to *Kenyon*, in which a parent moves to a UCCJEA state and grandparents, within six months thereafter, sue in the old state for visitation. In doing so, the Comment refers to the parent’s new state as providing a forum once it becomes the child’s new home state. This is incorrect. As was explained above,³⁹⁹ the statutory language of section 201 actually creates jurisdiction in the new state the very day the parent and child arrive there. The parent need not wait six months until the new state becomes the home state. Instead, the UCCJEA lets her invoke instant jurisdiction, which the UCCJEA creates in the new forum for which the new act has let her shop.

3. Impact of the number of UCCJEA enactments

The drafters’ attempt to minimize the UCCJEA’s conflicts with the PKPA is not only belated and incomplete, it is very weak. For one thing, each state’s adoption of the UCCJEA does make not the problem disappear, it *adds* to the problem, at least unless and until a large majority of states follow suit. With each state’s enactment of the new act, new opportunities are created for conflicts between the law and courts of that UCCJEA state, on the one hand, and the law and courts of UCCJA states (supported by section 1738A), on the other hand. The problems caused by some states having the old uniform act and some the new could not “disappear,” even according to the UCCJEA drafters’ understanding of the new act, unless all fifty states and

³⁹⁹ See *supra* text accompanying notes 65-69.

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the District of Columbia replaced their UCCJA's with substantially identical versions of the new uniform act.

Worse than that, when one understands the UCCJEA correctly, it becomes clear that conflict between it and the PKPA would persist regardless of the extent of the new act's acceptance in the states, for reasons explained above.⁴⁰⁰ Even if all fifty states and the District of Columbia did adopt the UCCJEA, the new uniform act on its face would always invite conflict between different states with contrasting rules of non-parents' standing, conflict prevented only by PKPA preemption of the new uniform act.

4. *Prospects for additional UCCJEA enactments*

In any event, there is little reason to think that all the states will enact the UCCJEA. Some uniform acts find little favor among state legislatures. For example, as of August 1998, only one state had enacted the Uniform Adoption Act since it was promulgated in 1994,⁴⁰¹ and only eight states had enacted all or part of the Uniform Marriage and Divorce Act since its 1970 promulgation.⁴⁰² The UCCJEA Reporter has admitted that "the Uniform Adoption Act has not received wide-spread [sic] adoption,"⁴⁰³ which is putting it very mildly since only one state has enacted it. One wonders why the UCCJEA Official Comments predict so confidently that "the problem [of UCCJEA conflict with the PKPA] will disappear," not just diminish, because all the states will adopt the new uniform act.⁴⁰⁴ Even the UCCJA itself took fifteen years to obtain universal enactment, and the last few states to adopt it seem to have been influenced in that direction by the PKPA's enactment. In contrast with that situation, the federal act's existence is a reason *not* to enact the conflicting UCCJEA.

Assessing the specific prospects of the UCCJEA for universal adoption, it seems very likely that the legislatures of some

⁴⁰⁰ See *supra* text accompanying notes 210-34, 385-86.

⁴⁰¹ Unif. Adoption Act, 9 U.L.A. Part I 1 (1999 Supp. Pamphlet).

⁴⁰² Unif. Marriage And Divorce Act, 9A U.L.A. Part I 3 (1999 Supp. Pamphlet).

⁴⁰³ Reporter's Footnotes to UCCJEA Comments, *supra* note 222, at 321 n.39.

⁴⁰⁴ See *supra* text accompanying note 396.

states will decide that they are better off keeping the UCCJA than exchanging it for the new UCCJEA. Lawyers and judges have become familiar with the old uniform act during sixteen years or more of its use in every state. It works very well with the PKPA, since the PKPA was drafted to dovetail with the UCCJA and to enhance its operation. When it sometimes appears that the UCCJA-PKPA tandem fails to accomplish their purposes, the reason usually is not any defect in these statutes, but rather lawyers' and judges' mistakes in their application⁴⁰⁵ — a problem that would be aggravated, not cured, if familiar law were replaced by unfamiliar law. For all these reasons, a number of legislatures may prefer to keep the UCCJA, and to reject the UCCJEA's creation of new conflict with federal law and of new incentives for forum-shopping. In fact, the governor of New York has vetoed a bill that would have replaced the UCCJA with the UCCJEA.⁴⁰⁶

E. Other Conceivable UCCJEA Justifications

In the respects described above and others beyond the scope of this article, the Official Comments' and Reporter's attempts to justify the UCCJEA's treatment of interstate litigation over non-parents' custody or visitation are inadequate. One should consider the possibility, however, that other, sound justifications exist.

It is not the function of this article to identify plausible justifications the UCCJEA drafters omitted to discuss, much less to evaluate them and to weigh them against competing arguments. Instead, this article merely explains why a stampede to enact the new uniform act would be unwise, that is, why the act should receive measured and full evaluation. The very need to describe and evaluate possible justifications for questionable features of

⁴⁰⁵ See *supra* note 85 and accompanying text; Kimberly H. Harris, Note, *Interstate Child Custody Disputes*, 24 MEMPHIS ST. U.L. REV. 533, 540 (1994) (stating that many courts have failed to recognize the PKPA's superseding of state law and that "attorneys often fail to properly cite the PKPA or to rely on it at all in argument"); Raymond T. McNeal, *Jurisdiction in Child Custody Cases, Florida Dissolution of Marriage*, § 4.40 (The Florida Bar 1998) (stating that "the provisions of the PKPA that preempt the UCCJA have been overlooked by lawyers as well as trial and appellate courts").

⁴⁰⁶ 1999 N.Y. Sen. Bill No. 4138, Veto No. 64 of 1999 (Dec. 22, 1999).

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the UCCJEA, probably a large and difficult project and certainly one that its drafters barely began, is an important reason for legislatures to hesitate before replacing the old uniform act with the new.

It may nevertheless be useful to mention here one example of a conceivable basis for the UCCJEA's treatment of non-parents. Doing so may illustrate the point that such arguments can be difficult to evaluate and to weigh against competing arguments. An example of such analysis may underscore the conclusion that it would be unwise to enact the new statute before such difficult points receive fuller consideration than its drafters seem to have given them.

A proponent of the UCCJEA might argue that the old UCCJA went too far in limiting the ability of a child's custodian to cut off a non-parent's visitation by relocating with the child from a state where the law is favorable to such visitation to one where the law disfavors it. In various legal contexts other than that of the law of interstate jurisdiction to resolve custody and visitation disputes, parents are free to shop for law that suits them, by relocating among states. For example, a parent who wishes to provide home schooling for his or her child instead of other education is free to relocate from a state where doing so is legally difficult to another state where the law makes it easier.⁴⁰⁷ Likewise, the law permits a parent desiring wider freedom to rely on faith healing of a sick child to move to a state where the law is more favorable to that practice.⁴⁰⁸

Citing such analogies, a proponent of the UCCJEA might argue that a child's custodian likewise should be free to relocate from a state whose law favors visitation by certain kinds of non-parents to another state with contrasting law, and thereby to shift jurisdiction over the subject to the state with the desired law. The UCCJA unwisely restricted this option, the argument would go, and the new uniform act corrects the error.

⁴⁰⁷ See Ralph D. Mawdsley, *Home Schools and the Law*, 137 West's Educ. L. Rep. 1 (1999) (describing interstate variations in the relevant law).

⁴⁰⁸ See Elizabeth A. Lingle, *Treating Children By Faith: Colliding Constitutional Issues*, 17 J. LEGAL MED. 301, 307-08 (1996) (describing interstate variations among spiritual treatment exemptions in child abuse and neglect statutes).

This argument is quite substantive. Among other things, it requires a legislature to weigh the value of this aspect of a custodian's freedom to control a child's upbringing, perhaps comparing its weight with analogies like those mentioned above. Then the legislature must balance that value against the benefits that visitation produces for children and non-parents. Such substantive arguments are beyond the scope of this article.⁴⁰⁹

However, several important points can be made even without reaching the merits of that conflict of substantive values. First, when one weighs the value of freedom for a custodian to control access to the child, it is not enough to place on the other side of the balance only the benefits of such visitation. One must also consider the risk that relocation as a method of ending visits will undercut the child's feeling of residential stability, balanced against the risk that visitation itself creates instability, at least when opposed by the child's custodian.

Second, one must recall that the UCCJEA permits two states that enact it, but that have contrasting laws on the merits of non-parent visitation, to engage in repetitive litigation, to render conflicting judgments, and to tempt their respective residents to engage in child-snatching and other forms of undesirable self-help in order to seek the practical benefits of persistently inconsistent judgments. Third, one must add the fact that states that reject the UCCJEA and retain the old UCCJA will have additional bases for relitigation and for entry of conflicting decrees. Fourth, the UCCJEA has various points of conflict with the PKPA and with other federal law. All these additional points belong on the side of the balance tilting away from enactment of the new act.

The rebuttal to the UCCJEA's proponent is even stronger when one turns from a dispute over mere visitation to a contest over custody of a child. In that context, the proponent's argument almost begs the question. When a parent and a non-parent litigate the issue of a child's primary custody, it adds little to the analysis to say that the law lets children's custodians shop for states with favorable law. The very question to be litigated, after all, is whether the parent or the non-parent is to have custody and thus to exercise that freedom. However one resolves the

⁴⁰⁹ See *supra* text accompanying notes 58-59.

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substantive choice between broader power for the custodian or broader visitation by others, one must conclude that the UCCJEA's encouragement of forum-shopping, denial of notice and hearing, relitigation of judgments, and conflicting decrees over primary custody is unwise. At the very least, these aspects of the new act require thorough analysis and evaluation before it is enacted.

IX. Conclusion

In view of all the problems of law and policy presented by the UCCJEA, and the sketchy and unsound justifications its drafters have offered in its support, it is certainly desirable that each state legislature give bills to enact it thorough and thoughtful consideration, rather than quick approval. Child custody decisions are important to children, and to adults who care about them. Such decisions are often influenced or even determined by jurisdictional considerations. This country has had a sound and effective system of coordinated state and federal laws on child custody jurisdiction for many years. No state legislature should lightly decide to discard that tested system and replace it with the UCCJEA. Legislatures considering the UCCJEA should be concerned also about its preemption by the PKPA, its conflicts with federal and state due process requirements of notice and hearing, and its questionable validity under federal constitutional and statutory requirements of Full Faith and Credit. This article has not attempted a definitive resolution of all these issues, but it has raised questions that deserve careful study before more states jump on the UCCJEA bandwagon and risk harming children, litigants, and the legal system.