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Joan Zorza

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# The UCCJEA: What Is It And How Does It Affect Battered Women In Child-Custody Disputes

## **Cover Page Footnote**

J.D., Boston College Law School, 1981. Editor, Domestic Violence Report and Sexual Assault Report, Liaison to the American Bar Association's Commission on Domestic Violence, Member of the boards of the National Coalition Against Domestic Violence, the New York State Coalition Against Domestic Violence and the New York City Coalition of Battered Women's Advocates. Before moving to New York in 1990 to start the National Battered Women's Law Project, Ms. Zorza represented more than 2000 battered women at Greater Boston Legal Services and as a clinical supervisor at one of Harvard Law School's clinical programs. She has been a consultant with the American Medical Association and the National Council of Juvenile and Family Court Judges.

# THE UCCJEA: WHAT IS IT AND HOW DOES IT AFFECT BATTERED WOMEN IN CHILD-CUSTODY DISPUTES

Joan Zorza\*

## INTRODUCTION

The Uniform Child-Custody Jurisdiction and Enforcement Act ("UCCJEA" or "Act") is the revised version of The Uniform Child Custody Jurisdiction Act ("UCCJA"), which states are now being asked to adopt immediately in its stead. The UCCJA was the original model act for states to determine when they have jurisdiction to decide a custody case and when they must give full faith and credit to the custody decrees of other states. When the National Conference of Commissioners on Uniform State Laws ("NCCUSL" or "Conference") wrote the UCCJA in 1968, it sought to correct two major problems of its day: child abductions by family members and jurisdictional disputes arising in interstate custody or visitation matters. While these issues can arise independently, the NCCUSL correctly saw the two problems as often interrelated. Indeed, more than half of the nation's 350,000 annual child abductions occur in the context of domestic violence, most of them perpetrated by abusive fathers.<sup>1</sup> These abductions have been found to be as traumatic to children as when they are abducted by strangers, with many developing post-traumatic stress disorder.<sup>2</sup>

This article explains exactly what the new UCCJEA does, focusing on its benefits and some problem areas for battered women. Part I discusses the history of the Act, including the difficulties with, and the inconsistencies between, the Act's predecessors, the

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1. GEOFFREY L. GREIF & REBECCA L. HEGAR, WHEN PARENTS KIDNAP: THE FAMILIES BEHIND THE HEADLINES 4 (1993).

2. *See id.* at 205-06.

UCCJA and the Parental Kidnapping Prevention Act (“PKPA”). Part II examines the UCCJEA, detailing the expanded options available to battered women for temporary emergency jurisdiction, denial of jurisdiction by courts that ordinarily hold such jurisdiction and protections for victims and their children. Part III explains some of the enforcement provisions of the UCCJEA. The article suggests some changes to improve the UCCJEA and PKPA, but concludes that despite some of the problems with the UCCJEA, even as currently written, it is a step in improving child custody jurisdiction and will better protect battered women and their children.

## I. HISTORY OF JURISDICTIONAL DEBATE

### A. The Supreme Court’s Refusal to Resolve Important Jurisdictional Disputes

The jurisdictional problems that arise in interstate custody disputes and the inability to have custody decrees enforced by other states became increasingly prevalent throughout the last century. Attempts by lawyers to get the U.S. Supreme Court to resolve the matter failed, beginning with its 1947 decision in *Halvey v. Halvey*,<sup>3</sup> which refused to require states to give full faith and credit to another state’s custody decree. This refusal was based on the notion that every custody determination, whether issued as a “temporary” or “permanent” order, was actually only a temporary order, always modifiable, and that moving to another state constituted a change in circumstances warranting modification.<sup>4</sup>

Effectively, the *Halvey* decree rewarded losing contestants who abducted their children and relocated across state lines. At a minimum, an abducting family member was guaranteed a *de novo* trial in the new state to try to gain lawful custody.<sup>5</sup> Further, because any prior custody decree could not be enforced beyond the issuing state’s borders, abductors were also safe from contempt or abduction charges so long as the abductors never returned to the state from which they had fled.<sup>6</sup>

Additionally, if the abductors were able to successfully win custody in the new state, they were also not at risk from having the children lawfully removed and returned to the state from which

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3. 330 U.S. 610, 612 (1947) (holding that because a custody decree could be modified at any time, it is not a final judgment entitled to full faith and credit).

4. See *id.* at 620 (Rutledge, J., concurring).

5. See *id.* at 613.

6. See *id.* at 620 (Rutledge, J., concurring).

they fled.<sup>7</sup> However, as Justice Rutledge noted in his concurrence in *Halvey*, should the child be taken back to the original state of jurisdiction, it would set off “a continuing round of litigation over custody, perhaps also of abduction between alienated parents. That consequence hardly can be thought conducive to the child’s welfare.”<sup>8</sup>

This decision was followed by *May v. Anderson*,<sup>9</sup> in a second attempt to require states to honor and enforce the custody decrees of other states. Despite the *May*’s dissenter’s serious reservations, this later attempt proved just as unsuccessful as the first.<sup>10</sup>

At the time of the U.S. Supreme Court’s decision in *Halvey*, most abductors were fathers or grandparents, who were far better situated than mothers to win custody in a new state for a number of reasons. Women of the time faced even greater gender bias discrimination, which impacted them financially and socially, thereby rendering them less able to litigate their interests or be seen as financially or socially fit. In addition, the United States had no awareness of domestic violence,<sup>11</sup> further impeding women’s efforts to force courts to recognize abusive situations, and the need to protect them and not to be blamed for the abuse or receive help in becoming independent both financially and emotionally from the abuse. In light of these circumstances, the Conference probably never guessed how the UCCJA would be used to hurt so many mothers who later fled to protect themselves or their children from abuse.

### **B. Enactment of the Parental Kidnapping Prevention Act<sup>12</sup>**

Although the UCCJA was introduced in 1968, states were slow to adopt it throughout the next twelve years. Those states that did adopt the UCCJA often made alterations — some quite substantial

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7. With no legal remedy available to enforce the original custody decree in a new state, another effect of these laws was to encourage “self-help” remedies by the left-behind parent whose children were abducted as the only way to enforce their rights.

8. *Halvey*, 330 U.S. at 619 (Rutledge, J., concurring).

9. 345 U.S. 528 (1953). There were three dissenters in the case: Justices Jackson, Reed and Minton. *See id.* at 536, 542.

10. *See Kovacs v. Brewer*, 356 U.S. 604 (1958); *see also Ford v. Ford*, 371 U.S. 187 (1962).

11. *See R. EMERSON DOBASH & RUSSELL P. DOBASH, WOMEN VIOLENCE & SOCIAL CHANGE* 12 (1992). The country’s awareness and knowledge of child abuse was still in its infancy, as Dr. C. Henry Kempe only introduced the phrase “battered child syndrome” in 1962. *See C.H. Kempe et al., The Battered Child Syndrome*, 181 JAMA 107-12 (1962). In fact, not one battered women’s shelter existed at the time.

12. 28 U.S.C. § 1738A (1994).

— in their own versions. These practices produced conflicting judicial decisions about whether a state had to recognize another state's decree, even when both states' UCCJA versions differed only slightly. As a result, far too few custody decisions were being honored and enforced by courts of other states.

To correct this problem, Congress enacted the PKPA.<sup>13</sup> The PKPA forced every state to give full faith and credit to any custody decree, no matter in which state the decision was rendered, provided it met due process<sup>14</sup> and the PKPA jurisdictional requirements.<sup>15</sup> The PKPA also prevented other states from modifying a custody order issued by any other state, with only a few exceptions.<sup>16</sup> It also added various enforcement mechanisms for use against abductors, including: (1) the use of the Federal Parent Locator Service to locate abductors;<sup>17</sup> and (2) provision for issuing federal Unlawful Flight to Avoid Prosecution<sup>18</sup> ("UFAP") arrest warrants under the Fugitive Felon Act,<sup>19</sup> for child abductors fleeing across state or international lines to avoid prosecution on state felony abduction charges.

The PKPA, as a federal law, preempts any state's enacted UCCJA whenever the two are inconsistent.<sup>20</sup> Both the PKPA and UCCJA are jurisdictional in that they determine whether a court in

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13. *See id.* When Congress enacted the PKPA in December of 1980, 43 states had adopted the UCCJA. By 1980 there was enough awareness of domestic violence that Congress could and should have taken it into account. However, domestic violence issues were never raised or considered in it. *See* Patricia M. Hoff, *The ABC's of the UCCJEA: Interstate Child-Custody Practice Under the New Act*, 32 *FAM. L.Q.* 267, 268 (1998).

14. The PKPA requires that, before a court can decide any custody matter, reasonable notice and opportunity to be heard has been given to all contestants, parents whose parental rights have not been terminated and to anyone actually having physical custody of the child. *See* 28 U.S.C. § 1738A(e).

15. Specifically, for initial custody determinations, the PKPA prioritizes home state jurisdiction over significant continuing jurisdiction and otherwise repeats the temporary and no other state jurisdictional requirements of the UCCJA. *See id.* § 1738A(c).

16. *See id.* The exceptions are if all of the contestants and the child have moved from the initial state or the initial state has declined jurisdiction. *See id.*

17. *See* 42 U.S.C. §§ 654(17), 663 (1994).

18. 18 U.S.C. § 1073 (1994). Once a UFAP warrant has been issued, the F.B.I. can become involved in searching for the abductor.

19. *Id.*

20. *See* U.S. CONST. art VI, § 2 (identifying the supremacy of federal law). *See, e.g., In re Clausen*, 502 N.W.2d 649 (Mich. 1993); *Hangsleben v. Oliver*, 502 N.W.2d 838 (N.D. 1993); *Michalik v. Michalik*, 494 N.W.2d 391 (Wis. 1993); *Shute v. Shute*, 607 A.2d 890 (Vt. 1992); *Griffin v. District Court*, 831 P.2d 233 (Wyo. 1992); *Archambault v. Archambault*, 555 N.E.2d 201 (Mass. 1990); *Marks v. Marks*, 315 S.E.2d 158 (S.C. Ct. App. 1984); *Serna v. Salazar*, 651 P.2d 1292 (N.M. 1982).

a particular state has the power to decide a case, not how the court should decide the actual custody issues being contested. The court may have jurisdiction under state law, for example, to decide the divorce between the parties, but may not have jurisdiction under the PKPA/UCCJA to decide the custody issues regarding the parties' children. Similarly, the court may have PKPA/UCCJA jurisdiction to decide custody of one child, but not that of another child, since the jurisdictional requirements are specific to each child.<sup>21</sup> Courts have a real incentive to follow jurisdictional rules because their orders will not be entitled to full faith and credit when they do not have jurisdiction.

Specifically, the PKPA preempts the UCCJA by not allowing courts making initial custody decisions to consider significant connection jurisdiction in cases when there is a home state jurisdiction.<sup>22</sup> It prevents any state from exercising modification jurisdiction when there is already a pending proceeding in a state in accordance with the PKPA/UCCJA,<sup>23</sup> and further gives the original state the right to exclusive jurisdiction to modify any of its orders provided the child or one of the contestants continued to reside in that state.<sup>24</sup>

## II. THE UCCJEA

### A. Re-Examination of the UCCJA

While the Conference knew that the UCCJA would have to be amended to conform with the PKPA, it was ironically the Uniform Interstate Family Support Act,<sup>25</sup> which governs paternity establishment and child support determinations, collection and enforcement, that was the impetus for the reexamination of the UCCJA. The Conference began reexamination of the UCCJA in 1994, and soon realized it must harmonize the UCCJA with the full faith and

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21. See 28 U.S.C. § 1738A(c).

22. See *id.* § 1738A(d). See also *infra* Part II.C. (describing the difference between home state and significant connection jurisdiction).

23. 28 U.S.C. § 1738A(d). The U.S. Supreme Court held that the PKPA does not create a cause of action in federal court to resolve which of two competing custody decrees is valid, thereby ending the litigation that was creeping into federal court to resolve these disputes. See *Thompson v. Thompson*, 484 U.S. 174 (1988).

24. See 28 U.S.C. § 1738A(d).

25. See John J. Sampson, *Uniform Interstate Family Support Act (1996) (with More Unofficial Annotations)*, 32 FAM. L.Q. 390 (1998). See also The Nat'l Conf. of Comm'rs on Unif. St. Laws, *Uniform State Law Helps Enforce Child Custody Orders* (visited Nov. 4, 1999) <<http://www.nccusl.org/pressrel/uccjea99.htm>>.

credit mandate of the Violence Against Women Act (“VAWA”),<sup>26</sup> which was enacted on September 13, 1994, and requires states to honor and enforce orders of protection, including ex parte orders. The Conference would also need to decide whether to cover tribal court orders, resolve the ambiguities about which custody proceedings are covered, clarify that the “best interests” language in the UCCJA<sup>27</sup> was not meant to open up the merits of the case, resolve whether orders of protection trigger emergency jurisdiction, determine when courts have declined jurisdiction, resolve confusion about how long temporary jurisdiction lasts and finally, determine how to effectively enforce orders quickly and uniformly throughout the country. While the NCCUSL continued to ignore the problems of domestic violence for anyone except those involving the particular child, domestic violence advocates<sup>28</sup> forced the Commissioners to make a number of concessions in its final version to include some protections for victims of domestic violence. While these changes are rather minimal, in part because of PKPA limitations, they will help battered women and their children. These changes are discussed in the remainder of the article.

The Conference’s final version has been met with remarkable success. To date, at least fifteen states have adopted the new legislation,<sup>29</sup> and many more states are actively considering enactment during their current or next legislative session.<sup>30</sup>

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26. 18 U.S.C. §§ 2265-2266 (1994) (requiring states to honor and enforce orders of protection, including ex parte orders). Although the full faith and credit mandate of VAWA specifically exempts custody orders, certain practice orders, including stay-away from a child orders, might be inconsistent with the UCCJA.

27. See UCCJA § 3(a)(2) (stating that “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, protection training, and personal relationships”).

28. These advocates included Lesley Orloff, then of AYUDA (an immigration program for battered women in Washington D.C) and a small group of domestic violence advocates (including the author) acting through Roberta Valente, then staff director of the American Bar Association’s Domestic Violence Commission.

29. See, e.g., 1999 Ala. Acts 438; 1999 Ark. Acts 668; 1999 N.D. Laws 147 (S.B. 2152). During the authoring of this article, New York State vetoed the UCCJEA. See N.Y.S. Bills & Statutes, *Veto Message No. 64* (visited Jan. 13, 2000) <gopher://38.246.113.4:70100/vetos/veto%20%20%2064>.

30. See The Nat’l Conf. of Comm’rs on Unif. St. Laws, *A Few Facts About the UCCJEA* (visited Nov. 1, 1999) <<http://www.nccusl.org/factsheet/uccjea-fs.html>>.



## B. The UCCJEA Notice Requirements

The UCCJEA provides that any first child-custody determination made concerning a particular child under age 18 — as long as the jurisdictional requirements are met — binds all parties with notice. This specifically includes child custody provisions in orders of protection.<sup>31</sup> This notice should be given to any parent whose rights have not been terminated and to any other person<sup>32</sup> having physical custody of the child or who had physical custody of the child barring temporary absences for six consecutive months within the year prior to beginning the custody proceeding and has either been awarded legal custody by a court or claims a right under the law of the state to legal custody.<sup>33</sup> Notice, in a way that is reasonably likely to give *actual* notice, can be given to any person outside of the state under either state's notice laws, "but may be by publication if other means are not effective."<sup>34</sup> This change will enable a fleeing battered woman to protect herself against her abuser by being able to serve him and causing him to be bound by any decision later made in the case.<sup>35</sup> It should also prevent her from being subject to federal kidnapping charges<sup>36</sup> in cases where he has filed an action in the home state without ever giving her notice, but the court nevertheless defaults her and awards him custody.<sup>37</sup>

## C. UCCJEA Initial Jurisdictional Criteria

Except in emergencies, an initial custody determination must be made by a court having one of the UCCJEA's four jurisdictional criteria, some of which are new and all of which are statutorily prioritized.<sup>38</sup> Parties cannot confer jurisdiction on a court that does not otherwise meet one of these criteria; however, emergency juris-

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31. See UCCJEA §§ 102(4), 205 cmt.

32. See *id.* § 102(12) (clarifying that "person" includes agencies of states involved with custody of a child).

33. Cf. *id.* § 102(13) (noting that "'person acting as a parent' means a person, other than a parent, who . . . has physical custody . . . [or] has been awarded legal custody").

34. *Id.* § 108(a).

35. See *id.* § 108. He would also be bound if he appeared, unless it was a special appearance. See *id.* § 109(a).

36. While 18 U.S.C. § 1204 provides a defense to someone fleeing a pattern or incident of domestic violence, it does not mean that the charges will not be filed. See 18 U.S.C. § 1204(c)(2).

37. Although the UCCJEA explains that the "[p]hysical presence of, or personal jurisdiction over, a party or the child is not necessary or sufficient to make a child-custody determination." UCCJEA § 201(c).

38. See *id.* § 201(a).

diction, while largely eliminated for initial permanent determinations,<sup>39</sup> can often be used to obtain temporary orders and modifications.<sup>40</sup> The four types of jurisdiction are “home state,” “significant connection,” “appropriate forum,” and “no other state.”

*Home State Jurisdiction:* As required by the PKPA, the UCCJEA states that if the child involved in the custody dispute has a home state, only that state may make the initial custody determination, unless the home state declines jurisdiction. A child’s temporary absences from the state are not relevant to this determination. A child’s home state keeps its status for six months after a child leaves, regardless of why the child has left,<sup>41</sup> provided a parent or person acting as a parent remains in the home state.<sup>42</sup> Unless acting as a parent, grandparents possessing visitation are not considered “contestants” for purposes home state retention.<sup>43</sup>

*Significant Connection Jurisdiction:* As under the PKPA, when there is no home state or the home state court has declined jurisdiction, a state with significant connection jurisdiction is permitted to preside over a custody determination. In contrast to the old UCCJA, the child’s presence is not required for there to be significant connection jurisdiction, and the “best interests” and “present or future care” language has been eliminated.<sup>44</sup>

*More Appropriate Forum Jurisdiction:* A court in a state that is the appropriate forum may do so only if courts having home state or significant connection jurisdiction have decided to exercise it.<sup>45</sup>

*No Other State Jurisdiction:* Only if no court of any other state has jurisdiction on any of the three previous jurisdictional criteria may a court exercise no other state jurisdiction to deal with these “vacuum” situations.<sup>46</sup> This type of jurisdiction would enable a court to take jurisdiction in a custody action between the parents

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39. *But see infra* Part II.D.

40. *See id.*

41. Under the UCCJA, a state could only remain a child’s home state for six months after the child left because of wrongful removal or retention. *See* UCCJA § 3(a)(1).

42. *See id.* §§ 201, 208 (discussing declining jurisdiction for wrongful removal).

43. However, a recent change to the PKPA appears to preempt this. *See* 28 U.S.C. § 1738A(b)(2) (1999).

44. *See* UCCJEA § 201(a)(2) & cmt.

45. *See id.* § 201(a)(3).

46. *See id.* § 201(a)(4).

who work for a traveling circus, whose child has never spent, for example, more than two weeks per year in the same state.<sup>47</sup>

Once a state court has made an initial child-custody determination consistent with one of these four jurisdictional requirements, the issuing court retains exclusive continuing jurisdiction with the following exceptions: (1) under certain exceptions when a court of another state has temporary emergency jurisdiction;<sup>48</sup> (2) when the issuing court “or the court of another State determines that the child, the child’s parents, and any person acting as a parent do not presently reside in”<sup>49</sup> the issuing state; or (3) when a court of this state finds “that neither the child, the child and one parent nor the child and a person acting as a guardian 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.”<sup>50</sup> This section is necessary to bring this act in compliance with section 1738(d) of the PKPA, which prevents any other state from modifying an issuing state’s custody decree except when all of the parties and child have left the state, unless the issuing state has declined jurisdiction.

#### D. Temporary Emergency Jurisdiction

Temporary emergency jurisdiction only arises in the extraordinary circumstances where a child is present in a state and it permits that state’s court to issue only short-term orders.<sup>51</sup> However, the UCCJEA does permit a court to exercise this type of jurisdiction in an emergency to protect the child, its siblings or its parents who are subjected to or threatened with mistreatment or abuse. This is a major improvement over the comparable sections in both the UCCJA<sup>52</sup> and the PKPA,<sup>53</sup> which only permit jurisdiction to be assumed to protect the particular child in question, and not a parent or sibling.

If no previous custody determination has been made, and no child-custody proceeding is commenced in a court having jurisdiction to make an initial child-custody determination, the temporary

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47. Many law school exam-like scenarios are possible, for example, a custody fight over a baby born to two American parents on a Soviet spacecraft or U.S. Navy submarine in international waters.

48. See discussion *infra* Part II.D.

49. UCCJEA § 202(a)(2).

50. *Id.* § 202(a)(1).

51. See *id.* § 204 & cmt.

52. UCCJA § 3(a)(3).

53. 28 U.S.C. § 1738A(c)(2)(C) (1994).

order made under the temporary emergency jurisdiction can become a final order, but only if it so provides, once the deciding state becomes the child's home state.<sup>54</sup> However, if there is a prior custody decree that is entitled to be enforced or an action is filed in a court having jurisdiction to make an initial child-custody determination, the court with emergency jurisdiction must do two things. First, it must specify in the temporary emergency order a period of time that the court considers adequate to allow the person seeking the emergency order to obtain an order from the state having initial custody jurisdiction.<sup>55</sup> Second, the court "shall immediately communicate with the court of that State to resolve the emergency, protect the safety of the parties and the child, and determine a period for the duration of the temporary order."<sup>56</sup>

Once factual findings or rulings of law have been made after notice and opportunity to be heard in a custody or other proceeding entitled to full faith and credit, for example, in an order of protection case, no court may re-litigate the issues decided.<sup>57</sup> Thus, a temporary emergency jurisdiction can make a final ruling as to the underlying abuse. It also will halt the practice of re-litigating the abuse finding on the theory that the allegation was only made for tactical advantage or to alienate the child from the other parent.

This new language in the UCCJEA is a significant improvement for battered women over treatment allotted under the original UCCJA. For example, it permits a court of another state to assume temporary jurisdiction when a parent removes herself to another state when she is being battered or threatened with abuse, and enables her to protect all of the children when only one is being abused. In addition, it tells both courts that safety of the parties and child is the first consideration.

However, there are serious deficiencies as well. Forcing women to rely on a judge to decide whether the temporary order may become permanent leaves the battered woman or protective parent at the mercy of a judge, who may fail to find that an emergency exists, or may fail to finalize the order because he or she believes there is a minimal likelihood of future danger, a common judicial failing.<sup>58</sup>

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54. See UCCJEA § 204(b).

55. See *id.* § 204(c).

56. *Id.* § 204(d).

57. See *id.* § 204 cmt.

58. See, e.g., RUTH I. ABRAMS & JOHN M. GREANEY, REPORT OF THE GENDER BIAS STUDY OF THE SUPREME JUDICIAL COURT 90-91 (1989) (stating that the Massachusetts Gender Bias study found that judges expect more collaboration in domestic violence cases than they do in other serious crimes, and that they often asked inappro-

Nor will she be protected if her abuser initiates (or re-initiates) litigation before she has been gone for six months, and it may not protect her if she is forced to flee to yet another state. Similarly, the new language will not help in all emergency situations where she acts to protect someone who is not her and the abuser's child. For example, siblings are not defined in the statute, and only in a state that otherwise adopts a broad construction of that term would half- and step-siblings be included. Without a broad construction, emergency jurisdiction will not be able to protect a mother from being treated as a wrongful abductor in a case filed by her current husband when she has fled with all of her children because her prior husband was sexually abusing his child. It is even less likely to protect her if she fled with all children in an attempt to protect an abused niece, nephew, grandchild or foster child in her care, or her own parent or sibling who is being severely abused by her husband.<sup>59</sup> Regardless of whether the emergency is covered under section 204, including the state's definition of "sibling," it may still be possible for her to convince the court that issued the initial decree to decline jurisdiction in a case where the abuse is particularly severe.<sup>60</sup>

Unfortunately, although the comments make it clear that section 208 of the UCCJEA should not be used to harm protective parents,<sup>61</sup> section 208(c) makes it extremely risky for a battered wo-

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appropriate questions indicating that the victim deserved to be hit or had provoked the abuse, or that they felt domestic violence wastes the court's time). The authors assert that judges scrutinized mothers more closely than fathers and held the women to a much higher standard. *See id.* at 63, 73. Judges also often ignored any domestic violence in making custody awards. *See id.* at 73. Similarly, the New York study found that battered women trying to protect themselves and their children from the abuse are frequently not helped by courts and are treated as unstable or hostile for moving or preventing a child from seeing an abusive father. *See* Lynn H. Shafran, *Documenting Gender Bias in the Courts: The Task Force Approach*, 70 JUDICATURE 280, 286 (1987). Custody courts are even more reluctant to make findings that a father has sexually abused a child, and are more likely to award a father who sexually abuses his child full custody than one who does not, and in any case grant him unsupervised access to the children. *See* Marsha B. Liss & Geraldine Butts Stahly, *Domestic Violence and Child Custody*, in BATTERING AND FAMILY THERAPY: A FEMINIST PERSPECTIVE 175, 183 (Marsali Hansen & Michele Harway eds., 1993).

59. Notwithstanding the UCCJEA's inability to protect her in such a situation, a necessity or justification defense should protect her from any criminal charges.

60. *See infra* Part II.G.

61. Specifically, the section states:

The focus of this section is on the unjustified conduct of the person who invokes the jurisdiction of the court. A technical illegality or wrong is insufficient to trigger the applicability of this section. This is important in cases involving domestic violence and child abuse. Domestic violence victims should not be charged with unjustifiable conduct for conduct that occurred

man who has fled abuse to seek protection under the court's temporary emergency jurisdiction. This is because the court may assess her with all of the opponent's "necessary and reasonable expenses" if the court declines jurisdiction or stays her proceeding.<sup>62</sup> Her risk may be exacerbated because many batterers deliberately threaten to, and in some instances, drive their victims into poverty or even homelessness,<sup>63</sup> even if it also may make them destitute themselves. Such an abuser, though taking a calculated risk, may deliberately escalate the violence to force his victim to flee, and then purposely drive up his expenses to further punish and control her. Even if she ultimately prevails, she will have been further emotionally drained by the flight and litigation, possibly impairing her parenting abilities.<sup>64</sup>

### E. Jurisdiction for Modifying Custody Decrees

Except under the limited circumstances, when temporary emergency jurisdiction exists, no other state's court may modify an issuing court's child-custody determination unless it has jurisdiction to make an initial child-custody determination and one of two determinations are made.<sup>65</sup> Specifically, the issuing court must decide either that it no longer has exclusive continuing jurisdiction<sup>66</sup> or that the would-be modifying state would be a more convenient fo-

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in the process of fleeing domestic violence, even if their conduct is technically illegal. Thus, if a parent flees with a child to escape domestic violence and in the process violates a joint custody decree, the case should not be automatically dismissed under this section. An inquiry must be made into whether the flight was justified under the circumstances. . . .

UCCJEA § 208 cmt.

62. Section 208(c) makes her vulnerable to being considered the party who wrongfully removed or retained a child if the court does not believe how serious the victim's fears were or naively assumes that the police could have afforded adequate protection. Specifically, section 208(a) of the UCCJEA says that someone seeking unsuccessfully to invoke jurisdiction can be assessed "necessary and reasonable expenses including costs, communication expenses, attorney's fees, investigative fees, expenses for witnesses, travel expenses, and child care during the course of the proceedings, unless the party from whom fees are sought establishes that the assessment would be clearly inappropriate." UCCJEA § 208(a).

63. Joan Zorza, *Woman Battering: A Major Cause of Homelessness*, 25 CLEARINGHOUSE REV. 421, 421-22 (1991); Joan Zorza, *Batterer Manipulation and Retaliation in the Courts: A Largely Unrecognized Phenomenon Sometimes Encouraged by Court Practices*, 3 DOMESTIC VIOLENCE REP. 67, 75 (1998).

64. GEORGE W. HOLDEN ET AL., PARENTING BEHAVIORS AND BELIEFS OF BATTERED WOMEN IN CHILDREN EXPOSED TO MARITAL VIOLENCE: THEORY, RESEARCH, AND APPLIED ISSUES 289, 293 (George W. Holden et al., eds., 1998).

65. See UCCJEA § 202(b).

66. See *id.* § 202(a).

rum.<sup>67</sup> Alternately, in situations where all parties and the child have moved from the state, either the issuing or would-be-modifying court can determine that the child, the child's parents or any other person acting as a parent do not presently reside in the other state. In the absence of an emergency, the would-be modifying court is prohibited from making any custody determinations except as to whether all of the contestants have moved from an exclusive continuing jurisdiction state, a determination that either court is permitted to make.<sup>68</sup>

### F. Judicial Communication and Cooperation

A primary goal of both the UCCJEA and PKPA is to avoid simultaneous proceedings in different states or the wrongful modification of a court order of a previous state by a court of a new state. One of the key mechanisms that the UCCJEA has implemented to prevent this from occurring is mandating that the courts involved communicate with each other.<sup>69</sup> The changes in the UCCJEA, however, give the courts fewer situations when they will be required to do so, having resolved many of the ambiguities created by the UCCJA.<sup>70</sup> The times when communication will be required will likely occur when there is no home state, no state with exclusive continuing jurisdiction, more than one significant connection state or, in cases involving temporary emergency jurisdiction.

In instances where a court does not have jurisdiction, but feels it should assume it to, for example, protect someone, it should stay its proceeding, but ask the court that does have jurisdiction to de-

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67. *See infra* Part II.G.1.

68. *See* UCCJEA § 110 cmt. The UCCJEA provides no guidance except for judicial communication on how to resolve disputes when two courts make contrary determinations as to whether all parties have moved from the state, particularly when the determinations are made simultaneously. However, this is only a problem if the home state determines that all parties have not all left, whereas the other state determines that the parties have all left. When the courts have made contradictory findings, the other state can assume jurisdiction because the home state will have effectively declined jurisdiction.

69. Other mechanisms include prioritizing home state jurisdiction, creating the exclusive continuing jurisdiction provisions, restricting when states may modify, requiring all parties to disclose any information about other cases having courts examine those documents to see whether another state already has jurisdiction, and mandating that the courts involved communicate with each other. *See generally* Part II.

70. For example, by prioritizing home state over significant connection jurisdiction, courts will know which state is entitled to make an initial custody determination since only one state can be the child's home state at any point in time.

cline because it is an inconvenient forum.<sup>71</sup> The parties to the suit may be allowed to participate in this communication.<sup>72</sup> However, if they “are not able to participate . . . they must be given an opportunity to present facts and legal arguments before a decision on jurisdiction is made.”<sup>73</sup> Furthermore, a retrievable record must be made and the parties must be promptly informed of the communication and given access to the record.<sup>74</sup> Modern technology can be employed for the purpose of communication;<sup>75</sup> not only may witnesses testify by telephone, audiovisual or other electronic means, but documentary evidence transmitted by technological means from another state to the court is admissible.<sup>76</sup>

Specific provisions permit the court to communicate with foreign courts, or, when states opt to recognize tribal orders, tribal courts.<sup>77</sup>

### G. Declining Jurisdiction

As under the UCCJA, the UCCJEA provides that a court with jurisdiction may decline to exercise it for two reasons: inconvenient forum,<sup>78</sup> which can be done at any time,<sup>79</sup> and unjustifiable conduct.<sup>80</sup> However, both grounds have been altered, in part to take domestic violence into account.

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71. See UCCJEA § 207(a); see also *supra* Parts II.C-D. Section 112 of the UCCJEA permits a court to ask another court to order an evidentiary hearing, conduct discovery, order any party or person having physical custody of the child to appear with or without the child or forward certified copies of transcripts, evidence or custody evaluations. The court must preserve copies of the records until the child is 18 years old, and when requested by a court or law enforcement official of another state, forward a certified copy of those records. For domestic violence victims in hiding, the requirement in section 112(d) that law officers of this state can request records may greatly endanger them. Also potentially troublesome is the fact that the court can assess “[t]ravel and other necessary and reasonable expenses incurred” for out-of-state discovery or evidentiary hearings. UCCJEA § 112(c).

72. See UCCJEA § 110(b) (while not completely upholding *Yost v. Johnson*, 591 A.2d 178 (Del. 1991), the court held that it was error not to allow both parties to participate in the judicial communication).

73. *Id.*

74. See *id.* § 110(d). Courts may communicate in other circumstances, e.g., one court could ask another one to schedule an evidentiary hearing to obtain the testimony of a witness who lives in the second state. See *id.* § 111.

75. See *id.* § 111(b).

76. See *id.* § 111(c).

77. See *id.* § 110 cmt.

78. See *id.* § 207.

79. See *id.* § 207(a).

80. See *id.* § 208(a).



### 1. *Declining Jurisdiction for Inconvenient Forum*

A court can decline jurisdiction because it is an inconvenient forum upon a motion of a party, the court's own motion, or at the request of another court (but no longer at the request of a guardian ad litem).<sup>81</sup> Declining jurisdiction in the custody matter does not mean that the court would have to decline jurisdiction in the divorce or another proceeding, or all aspects of the proceeding;<sup>82</sup> however, once a court has declined custody jurisdiction, it should stay the custody matter upon condition that it is commenced in the appropriate designated state, imposing any other conditions that the court considers reasonable.<sup>83</sup> In deciding whether to decline jurisdiction, a court is required to permit the parties to submit information and consider all relevant factors, including: (1) whether domestic violence has occurred and is likely to continue, and which state could best protect the parties and child;<sup>84</sup> (2) how long the child has lived outside this state; (3) how far it is between the courts; (4) the relative finances of the parties; (5) any agreement of the parties as to which state should hear the case; (6) the nature and location of the evidence needed to resolve the case (including the child's testimony); (7) the ability of the court to decide the issues expeditiously and the procedures necessary to present the evidence; and (8) how familiar each court is with the facts and issues in the pending litigation.<sup>85</sup>

Not only are domestic violence and safety listed as factors, but the relative financial circumstances of the parties must be considered, which often is a critical issue for battered women, who traditionally have far less access to finances, particularly when they must flee their abusers. Health of the parties is another specifically mentioned factor in the commentary after this section, another issue often relevant to victims of abuse because physical, emotional or sexual abuse can cause long-term or permanent physical or psychological injuries. Courts are urged not to divide custody of all the children amongst different courts, but also to remember that it

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81. See *id.* § 207(a); cf. UCCJA § 7(b) (specifically including a guardian *ad litem*).

82. See *id.* § 207(d) (noting that a court might retain jurisdiction to determine paternity, divide property or order child support, but relinquish the custody aspect of a case).

83. See *id.* § 207(c).

84. Indeed, this is the first listed factor in section 207(b), thereby finally recognizing its importance.

85. See *id.* § 207(b)

may be desirable not to lose child support collection possibilities, two issues that may affect battered women and their children.<sup>86</sup>

## 2. *Declining Jurisdiction for Reason of Conduct*

In contrast to the UCCJA, the UCCJEA mandates that if a state court has jurisdiction, except in temporary emergency jurisdiction situations, the court must decline jurisdiction when a person seeking to invoke its jurisdiction has engaged in unjustifiable conduct, with three exceptions.<sup>87</sup> The court need not decline jurisdiction by reason of conduct if the parents and all persons acting as parents agree to the acceptance of jurisdiction,<sup>88</sup> no court of any other state would have initial, exclusive continuing or modification jurisdiction,<sup>89</sup> or the court of the state otherwise having jurisdiction determines that this state is the more appropriate forum.<sup>90</sup> Even if jurisdiction is declined, the court may retain it until jurisdiction is assumed in the other court, or so that it can issue temporary orders to prevent a repetition of the unjustifiable conduct or to ensure the safety of the child.<sup>91</sup>

Unjustifiable conduct includes "removing, secreting, retaining or restraining" a child.<sup>92</sup> However, in language specifically favorable to battered women, the comment to the statute reads:

A technical illegality or wrong is insufficient to trigger the applicability of this section. This is particularly important in cases involving domestic violence and child abuse. Domestic violence victims should not be charged with unjustifiable conduct for conduct that occurred in the process of fleeing domestic violence, even if their conduct is technically illegal. Thus, if a parent

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86. *See id.* § 207 cmt. Child support may be too dangerous for a battered women to pursue, particularly if the system cannot adequately protect her. *See* Paula Roberts, *Pursuing Child Support for Victims of Domestic Violence*, in *BATTERED WOMEN, CHILDREN, AND WELFARE REFORM: TIES THAT BIND* 59, 72-73 (Ruth A. Brandwein, ed., 1999); Evan Stark & Anne H. Flitcraft, *Spouse Abuse*, in *VIOLENCE IN AMERICA: A PUBLIC HEALTH APPROACH* 123, 124, 140-41, 143 (Mark L. Rosenberg & Mary Ann Fenley, eds., 1991); Jody Raphael, *Keeping Women Poor: How Domestic Violence Prevents Women From Leaving Welfare and Entering the World of Work*, in *BATTERED WOMEN, CHILDREN, AND WELFARE REFORM: TIES THAT BIND* 31, 37-39 (Ruth A. Brandwein, ed., 1999).

87. *See* UCCJEA § 208(a).

88. *See id.* § 208(a)(1). But note that this does not include the state or agency or the guardian *ad litem*. This provision is likely to disadvantage battered women, who are far less likely to have equal bargaining power in negotiating or refusing to negotiate on acquiescence of jurisdiction.

89. *See id.* § 208(a)(3).

90. *See id.* § 208(a)(2).

91. *See id.* § 208(b).

92. *See id.* § 208 cmt.

flees with a child to escape domestic violence and in the process violates a joint custody decree, the case should not be automatically dismissed under this section. An inquiry must be made into whether the flight was justified under the circumstances of the case. However, an abusive parent who seizes the child and flees to another state to establish jurisdiction has engaged in unjustifiable conduct and the new state must decline to exercise jurisdiction under this section.<sup>93</sup>

Following the International Child Abduction Remedies Act,<sup>94</sup> a state court must assess all reasonable costs and fees to be paid to the parent who establishes that jurisdiction was based on unjustifiable conduct. In cases where a fleeing victim sought the court's temporary emergency jurisdiction but the court declined jurisdiction or stayed its action, the court should presumptively assess all costs against the wrongful party (i.e., the parent who wrongfully fled, as determined by the court's denial of accepting temporary emergency jurisdiction), unless the party from whom the fees are sought can establish that the assessment would be clearly inappropriate.<sup>95</sup> This puts a battered woman or mother of an abused child at enormous risk when she attempts to claim temporary emergency jurisdiction. It greatly increases the chance that an abusive father, particularly if he has greater resources,<sup>96</sup> will be encouraged to aggressively litigate, in his effort to make her liable for all of his "reasonable expenses including costs, communication expenses, attorney's fees, investigative fees, expenses for witnesses, travel expenses, and child care during the courts of the proceedings."<sup>97</sup> Batterers, who are known to retaliate by abusing the judicial process to further control and demoralize their victims or drive them into economic ruin,<sup>98</sup> may well use this penalty to drive their victims into flight or hiding, and then have the judicial system simultaneously reward themselves and punish their victims. California has attempted to decrease this possibility for abuse of this section by batterers.<sup>99</sup>

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93. *See id.*

94. 42 U.S.C. § 11607(b)(3) (1994).

95. *See* UCCJEA § 208(c).

96. *See, e.g.,* Liss & Stahly, *supra* note 58, at 179, 181 (stating that batterers are far less likely to pay child support than other men as part of their tactic of depriving their partners of access to money).

97. UCCJEA § 208(c).

98. *See* Zorza, *Batterer Manipulation and Retaliation*, *supra* note 63, at 73.

99. California has added language to its act's counterparts of section 208(c) of the UCCJEA to clarify much more strongly that battered women and protective parents should not be punished for fleeing from abuse.

### H. Affidavit and Address Confidentiality

The UCCJEA attempts to get each party in its first pleading to provide under oath essentially the same information that section 9 of the UCCJA required: (1) a child's present address or whereabouts; (2) places where the child lived during the last five years and the names and present addresses of the persons with whom the child lived; (3) whether the party has ever participated in any capacity in any custody proceeding concerning the child and, if so, which court, docket number and date of any child-custody determination; (4) information about any other related proceeding, including those for enforcement, protective orders, termination of parental rights and adoptions; and (5) the names and addresses of anyone not a party who has physical custody of the child or claims rights to legal or physical custody or visitation with the child.<sup>100</sup> Likewise, it places a continuing duty on each party to update the information about "any proceeding in this or any other State that could affect the current proceeding."<sup>101</sup>

However, the UCCJEA notice requirements make two changes, the first in partial response to those advocates asking for protections for battered women. That change is an option, which if taken by a state, can help victims of domestic violence by incorporating "local law providing for the confidentiality of procedures, addresses, and other identifying information,"<sup>102</sup> including procedures to seal the information and not release it until "after a hearing in which the court takes into consideration the health, safety, or liberty of the party or child and determines that the disclosure is in the interest of justice."<sup>103</sup> The commentary to section 209 urges states that do not have procedures to keep sensitive identifying information confidential to adopt such statutory protections. As suggestions, it refers states to section 304(3) of the Model Code on Domestic and Family Violence of the National Council of Juvenile and Family Court Judges<sup>104</sup> and section 312 of the Uni-

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100. See UCCJEA § 209(a).

101. *Id.* § 209(d).

102. *Id.* § 209(a).

103. *Id.* § 209(e).

104. Subsection 3 generally provides: A petitioner may omit her or his name from all documents filed with the court. If a petitioner omits her or his address, the petitioner must provide the court a mailing address. If disclosure of petitioner's address is necessary to determine jurisdiction or consider venue, the court may order the disclosure to be made: (a) After receiving the petitioner's consent; (b) Orally and in chambers, out to the presence of the respondent and a sealed record to be made; or (c) After a hearing, if the court takes into consideration the safety of the petitioner and finds such disclosure in the interests of justice. See NAT'L COUNCIL OF JUVENILE AND

form Interstate Family Support Act (“UIFSA”) as possible models.<sup>105</sup> Obviously, states with identification protections should consider making them stronger, and are not limited by the protections in the two suggestions given.

The second change overturns roughly half of the existing case law<sup>106</sup> that held that failure to comply with the affidavit requirements or knowingly submitting false information was a jurisdictional defect, allowing jurisdiction to be declined and the case dismissed, and that any resulting custody decree be considered void.<sup>107</sup> Instead, section 209(b) of the UCCJEA permits the court on its own motion or that of a party to stay the proceeding until the information is furnished. Abusers are most likely to manipulate courts by falsifying information, and this change in the statute removes the possibility of having a case dismissed from victims faced with blatant fraud or deception.

### I. Option to Recognize Tribal Orders

Unlike the UCCJA and PKPA, which never addressed tribal court custody proceedings, the UCCJEA gives states the option of

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FAM. CT. JUDGES, MODEL CODE ON DOMESTIC AND FAMILY VIOLENCE § 304(3) (1994).

105. This statute states in pertinent part:

Upon a finding, which may be made *ex parte*, that the health, safety, or liberty of a party or child would be unreasonably put at risk by the disclosure of identifying information, or if an existing order so provides, a tribunal shall order that the address of the child or party or other identifying information not be disclosed in a pleading or other document filed in a proceeding under this [Act].

UIFSA § 312 (1996).

106. See JOAN ZORZA, NAT’L CENTER ON WOMEN AND FAM. LAW, GUIDE TO INTERSTATE CUSTODY: A MANUAL FOR DOMESTIC VIOLENCE ADVOCATES 35-36 (2d ed. 1995) (on file with NOW Legal Defense and Educational Fund). See also Evans v. Evans, 623 N.Y.S.2d 685, 688 (App. Div. 1995) (holding that failure of a party to comply deprives the court of the “opportunity to ascertain essential facts pertaining to its assumption and continuance of jurisdiction”).

107. See, e.g., Owens v. Huffman, 481 So. 2d 231, 242-43 (Miss. 1985) (supporting the current position that the case should not be dismissed); Brewington v. Serrato, 336 S.E.2d 444, 447 (N.C. Ct. App. 1985) (same); Peery v. Peery, 453 So. 2d 635, 639-40 (La. Ct. App. 1984) (same); *In re Nelsen*, 681 P.2d 1302, 1304 (Wash. Ct. App. 1984) (same); Pasqualone v. Pasqualone, 406 N.E.2d 1121, 1124 (Ohio 1980) (same); Paltrow v. Paltrow, 376 A.2d 1134, 1137 (Md. Ct. Spec. App. 1977) (same). Cf. Breaux v. Mays, 746 P.2d 708, 709-10 (Okla. Ct. App. 1987); *In re Marriage of Bolson*, 394 N.W.2d 361, 364 (Iowa 1986); Berry v. Berry, 466 So.2d 138, 139-40 (Ala. Civ. App. 1985) (finding that the court may exercise modification jurisdiction, at least where no action is pending in another state); Szmyd v. Szmyd, 641 P.2d 14, 16-18 (Alaska 1982); Gambrell v. Gambrell, 272 S.E.2d 70, 72 (Ga. 1980).

doing so.<sup>108</sup> Furthermore, by taking this option, states help to bring custody law in greater conformity with the VAWA full faith and credit mandate<sup>109</sup> and better protect abused victims. It is likely that reluctance of some states to recognize tribal custody decrees in the past<sup>110</sup> prevented the Conference from including a provision requiring that all states honor and enforce tribal court orders and clarifying that "state" does include tribal lands. The UCCJEA does, however, clarify that it is not trying to diminish the protections of Indian children under the Indian Child Welfare Act ("ICWA"),<sup>111</sup> noting that any proceeding subject to ICWA is not governed by the UCCJEA to the extent it is governed by ICWA.<sup>112</sup> In addition, the commentary observes that the UCCJEA "does not purport to legislate custody jurisdiction for tribal courts," but tells Tribes how they can adopt the UCCJEA.<sup>113</sup>

### III. ENFORCING AND REGISTERING CUSTODY DECREES

The UCCJEA has made many changes so that it can be better enforced to ensure return of the abducted child, including situations governed by the International Child Abduction Remedies Act<sup>114</sup> (ICARA), implementing the Hague Convention. The enforcement section of the UCCJEA specifically covers situations before any party has commenced a custody action in any court, so that a court can order speedy return of the child to the petitioner.<sup>115</sup> In addition, the UCCJEA requires states to enforce and not modify the child-custody determinations of other states or countries, or registered orders that were made in accordance with both the UCCJEA and the PKPA.<sup>116</sup> The determinations entitled to enforcement specifically include temporary emergency jurisdiction orders and the custody provisions after notice of domestic vio-

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108. See UCCJEA § 104(b).

109. See *supra* note 26.

110. See, e.g., *Desjarlait v. Desjarlait*, 379 N.W.2d 139, 142-43 (Minn. Ct. App. 1985); *Malaterre v. Malaterre*, 293 N.W.2d 139, 145 (N.D. 1980). Cf. *Eastern Band of Cherokee Indians v. Larch*, 872 F.2d 66, 68 (4th Cir. 1989) (holding in a custody dispute involving a North Carolina court and a Cherokee tribal court that a reservation is a "state" within the meaning of the PKPA).

111. 25 U.S.C. §§ 1901-1963 (1994) (governing custody proceedings when the state is a party, but not proceedings where the parents are the sole parties).

112. See UCCJEA § 104(a).

113. See *id.* § 104 cmt.

114. 42 U.S.C. §§ 11601-11610 (1994).

115. See UCCJEA § 310 (indicating procedure for filing a warrant to take physical custody of a child if the child is likely to suffer serious physical harm or be removed from the state).

116. See *id.* § 303(a).

lence orders. Enforcement remedies under the UCCJEA are in addition to any other remedies available under state law.<sup>117</sup>

### A. Registration of Decrees

The UCCJEA creates a registration process for custody decrees.<sup>118</sup> However, unlike the registration process required by VAWA's full faith and credit mandate, which does not require giving notice a second time to register a protection order in another jurisdiction, the UCCJEA does require giving notice to any parent or person acting as a parent who has been awarded custody or visitation as part of the registration process before a custody decree can be registered.<sup>119</sup> Furthermore, very naively, the UCCJEA requires that notice must be given in each state where the order must be registered,<sup>120</sup> further endangering those who are already at most risk of retaliation<sup>121</sup> and very likely causing them further delay, uncertainty and expense.

The UCCJEA's registration process unfortunately ignored the urgings of the battered women's advocates submitted through Roberta Valente, former staff director of the American Bar Association's Domestic Violence Commission,<sup>122</sup> who suggested that all custody decrees, particularly those entered in cases involving domestic violence, could be registered statewide, and ultimately national registry for orders of protection.<sup>123</sup> This would immediately afford full protection for battered woman and endangered children throughout the United States no matter where they must flee, and without imposing time delays and endangerment resulting from further slow judicial processes<sup>124</sup> and notification to their abusers.

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117. *See id.* § 303(b).

118. *See id.* § 304.

119. *See id.* § 304(b).

120. *See id.* § 304. Even if a state provides for registration without any filing or service fee, and the state is not mandated to do so, one must file at least one certified copy and an affidavit, which may incur further expense. *See id.* § 304(a)(2).

121. These are the people who are repeatedly stalked, pursued and abused, who must repeatedly flee.

122. *See Hoff, supra* note 13, at 291 n.94.

123. *See Susan B. Carbon et al., Enforcing Domestic Violence Protection Orders throughout the Country: New Frontiers of Protection for Victims of Domestic Violence*, 50(2) *JUV. & FAM. CT. J.* 39, 43 (Spring 1999) (citing the requirements of 18 U.S.C. § 2265). The authors note that as of April 12, 1999, only 23 states are participating to some extent in the National Crime Information Center's Protection Order File registry.

124. *See UCCJEA* § 304(c)(2), (d) (providing the respondent 20 days to contest the registration).

If custody decrees were all nationally registered,<sup>125</sup> so would be any subsequent orders to vacate, stay or modify the prior order, so any enforcing court would have access to information about the validity of the decree.

Although NCCUSL ignored most of the suggestions concerning registration, it did provide for protecting the fleeing family in those few cases where a court has denied all custody or visitation to an abusive parent, by not requiring notice to be given to the abuser.<sup>126</sup> However, since virtually no courts prohibit all contact by the abuser with the children,<sup>127</sup> the fleeing family will be placed in great danger by having to reveal to which state they have fled as part of the notice given to the abusive parent.

In cases where her batterer has already abducted the child, the mother can file a petition to register the child-custody decree with an accompanying request for a warrant to pick up the child,<sup>128</sup> and will not have to notify the abductor until the child has actually been recovered.<sup>129</sup> This provision for protection shows that the NCCUSL takes protection of children far more seriously than it does of that involving battered women, and still does not recognize that in about a quarter of cases where male batterers killing their intimate female partners, they also kill their children.<sup>130</sup>

However, in the typical registration case requiring advance notice (i.e., when no abduction is involved), a victim of domestic violence must notify her abuser when she files to register the order, and he, like any other respondent, has twenty days to contest the validity of the order.<sup>131</sup> The UCCJEA permits a respondent to challenge the order on only three grounds: (1) the issuing court did not have jurisdiction; (2) respondent did not have any notice and opportunity to be heard in the issuing court; or (3) the custody de-

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125. The national registry for orders of protection already exists, although not all states are inputting their data yet.

126. See UCCJEA § 209(e).

127. See Liss & Stahly, *supra* note 58, at 186. Some courts restrict visitation to visitation by photograph or tape recording as a compromise when the court recognizes that any actual contact with the child would be too dangerous.

128. See UCCJEA § 310. See also *infra*, Part III.C.

129. See UCCJEA § 310.

130. See NEIL WEBSDALE, UNDERSTANDING DOMESTIC HOMICIDE 179-80 (1999) (finding that in 52.6% of domestic child homicides where two parents were involved in caring for the children, the woman was known to have been beaten before the child was killed — which is probably an undercount, since agencies did not seek out this data — and that the man often killed the children to spite the child's mother, whom he thought had betrayed him in some way). Websdale notes that overall children made up 26% of all domestic homicides. See *id.* at 201.

131. See UCCJEA § 304(d).



termination was vacated, stayed or modified.<sup>132</sup> It would also be hoped that any finding of fraud, whether notice or the order itself had been faked or fraudulently obtained, will be reduced to a written finding that can later be used to impeach the respondent. Once any custody order is registered, the only permissible grounds for challenge is that it has subsequently been vacated, stayed or modified,<sup>133</sup> although due process considerations and statutory ones should permit a challenge if the matter could not have been asserted previously.<sup>134</sup>

### B. Challenges on Jurisdictional Grounds

For battered women faced with orders that their abusers have obtained, the UCCJEA provisions can be an unfortunate change from under the old UCCJA, which generally permitted jurisdictional challenges to be raised at any time, provided one did not delay in doing so.<sup>135</sup> This ability to raise late challenges is needed for several reasons. First, some abusers use dubious or illegal tactics, such as failing to give notice, faking her signature, sending her to the wrong court or on the wrong date or deflecting her attention, thereby effectively preventing her attendance. Second, abusers may threaten their victims and witnesses so that they dare not show up in court. Third, they may emotionally or financially drain their victims so that the victims are unable to contest custody.<sup>136</sup> If the notice for registration does not warn that one's ability to challenge the order at a later time will be solely limited if one does not show up and contest it now, it is especially unfair to battered women. Under the UCCJA, it was largely left to the registering or enforcing court to verify the pleadings from the issuing court. While the registering or enforcing court is not precluded from contacting the

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132. See *id.* § 307(a)(1)(A)-(C). Presumably the fact that an order had been fabricated could also be raised at any time on due process grounds.

133. See *id.* §§ 304(f), 308(f)(2).

134. See *id.* § 305(c)(3). While it is not clear if "any matter that could have been asserted" encompasses that the party challenging could not have appeared in court or that the ground for challenging was not as yet known, the better interpretation is that either issue can be raised. *Id.*

135. See *B.J.P. v. R.W.P.*, 20 *FAM. L. RPTR.* 1178 (D.C., No. 91-FM-700m, Feb. 3, 1994) (holding that mother's failure to raise custody jurisdiction issue at outset prevents her from doing so later); *Soderlund v. Alton*, 467 N.W.2d 144 (Wis. Ct. App. 1991) (finding that lawyer's seven-week delay in notifying a Florida court that he had filed wife's divorce seeking custody in Wisconsin resulted in malpractice and the wife's losing custody).

136. See *Zorza, Batterer Manipulation and Retaliation*, *supra* note 63; *Raphael, supra* note 86, at 32-37.

issuing court about the validity of the offered decree, the UCCJEA absolves the registering or enforcing court of responsibility for contacting the issuing court — not a very fair result given how few battered women are likely to be represented in these situations.<sup>137</sup>

### C. Enforcement Mechanisms

For a battered woman with a custody decree in one state who must allow visitation to her out-of-state abuser, it might be wise for her to have the court condition the out-of-state (or country) visitation on the prior registration of the child-custody decree so that it will be immediately enforceable. However, prior registration is not actually needed — though may still be desirable — for orders issued from other Hague Child Abduction Convention<sup>138</sup> signatory countries since that treaty provides for similar swift return of abducted or wrongfully retained children and enforcement of custody orders from those countries.<sup>139</sup>

#### 1. Issuing Warrants

Another remedy under the UCCJEA permits courts to enforce orders by issuing warrants to take immediate physical custody of the child. Section 311 permits the court to issue such a “pick up” warrant upon credible testimony “that the child is imminently likely to suffer serious physical harm or be removed from this State.”<sup>140</sup> Courts are directed to hear such petitions on the next judicial day after the warrant is executed, and may only delay if the next court date is “impossible.”<sup>141</sup> Not only may law enforcement officers be directed to take physical custody of the child immediately, but if “a less intrusive remedy is not effective, it may authorize law enforcement officers to enter private property to take physical custody of the child including, in exigent circumstances, by forcibly entering at any hour.”<sup>142</sup> The court must also provide for the placement of the child pending final relief.<sup>143</sup>

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137. Barbara J. Hart, *Safety and Accountability? The Underpinnings of a Just System* (visited Dec. 2, 1999) <<http://www.mincava.unm.edu/hartindx.asp>>.

138. See 42 U.S.C. § 11601 (1988).

139. See UCCJEA § 302 & cmt.

140. *Id.* § 311 cmt.

141. *Id.* § 311(b).

142. *Id.* § 311(e).

143. See *id.* § 311(c)(3).

## 2. *Enforcing Visitation*

Although the UCCJEA forbids courts to modify the custody order of another state or permanently change custody, Section 305 does allow enforcing courts to enforce visitation rights in two limited situations. The first exception permits a court to provide for make-up visitation time when visitation time has been obstructed.<sup>144</sup> Although the language only talks of visitation (which undoubtedly shows that the language was inserted at the request of fathers' rights groups), custodial parents should be likewise entitled to make-up time if their time with the child has been obstructed. The second exception allows courts to temporarily designate specific visitation times when orders do "not provide for a specific visitation schedule" (e.g., "reasonable visitation.")<sup>145</sup> In a "reasonable visitation" case, the court must set an expiration date<sup>146</sup> unless, as a result of judicial communication, the issuing court has deferred jurisdiction on this issue to the enforcing court on the grounds it is a more convenient forum,<sup>147</sup> or, although not suggested under the UCCJEA, the order is issued simultaneously by both courts. Otherwise, the enforcing court's order expires on whichever date occurs first, the expiration date set by the enforcing court or the date of a new order by the issuing court.<sup>148</sup>

## 3. *Prosecutor's Role in Enforcement*

Probably the most important addition to the enforcement section, unless a state opts out,<sup>149</sup> is the creation in sections 315-317 of an interstate network of prosecutors modeled after California's prosecutors who, for twenty years, have had authority to enforce child-custody orders from other states and countries. These officials will be able to help locate and return missing children, as well as seek enforcement in the state's criminal and civil courts. As a practical matter, they can also help contact their counterparts in other states when the child is in another state. For left-behind battered women, and especially those who have little access to funding, these remedies should greatly help them in retrieving children who are wrongfully taken to other states.

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144. *See id.* § 304 cmt.

145. *Id.* § 304(a)(2).

146. *See id.* § 304(b) & cmt.

147. *See supra* note 51 and accompanying text.

148. *See* UCCJEA § 304(b).

149. For example, in adopting the UCCJEA, Maine specifically chose to opt out of this section. *See* 1999 Me. Laws 486.

The danger is that these public officials, acting on behalf of the court, either fail to act because they do not take the abuse sufficiently seriously or they act against fleeing battered women without raising any domestic violence justifications. Furthermore, they may be subject to manipulation by abusers,<sup>150</sup> especially if they are not very knowledgeable about domestic violence. They may also further endanger battered women and their children by either revealing confidential addresses or workplace locations. Consequently, courts will normally assess expenses pursuant to sections 312 and 317 against the losing party (including all direct expenses and costs incurred by the public officials). It is also likely that this section will be used to hurt fleeing battered women and protective mothers. In contrast, section 208(b), prevents fees, costs or expenses from being assessed against a state under the UCCJEA, although it does not prohibit recovery authorized by other laws.

### CONCLUSION

The UCCJEA has fixed several problems of its predecessor, the UCCJA, with the result that the UCCJEA is more effective than the old UCCJA and better reconciled with other federal laws. For the first time courts that are making child-custody determinations are encouraged to look at domestic and family violence to protect the rest of the family from an abuser when a parent, the child or any sibling of the child is being abused. In addition, the UCCJEA makes clear that protective parents should not be punished for fleeing incidents or patterns of domestic violence, and that any judicial finding or determination that parental or child abuse occurred is *res judicata* as to each party who had notice of that proceeding.

A number of improvements in the UCCJEA are left as options to the states, and it is hoped that battered women's advocates will urge states to adopt these options on behalf of their clients: addressing confidentiality provisions, granting full faith and credit to tribal child-custody determinations and designating prosecutors or other state officials to enforce child-custody determinations. In addition, advocates for battered women should urge their states to adopt the changes made by California<sup>151</sup> for denying jurisdiction by reason of conduct in its version of the UCCJEA.

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150. See Zorza, *Batterer Manipulation and Retaliation*, *supra* note 63.

151. See CAL. FAM. CODE § 3135 (West 1999).

The biggest problem with the UCCJEA for battered women is that it requires notice to be given all over again to register a custody decree in any other jurisdiction. It is likely that this problem can only be rectified by federal legislation amending the PKPA, the VAWA full faith and credit mandate, and requiring the state and federal registries for orders of protection to also register child-custody decrees.

Overall, the UCCJEA is an improvement over the UCCJA, and should be supported by battered women and their advocates, especially with the proposed changes.

