Remedies for Parental Kidnapping in Federal Court: A Comment Applying the Parental Kidnapping Prevention Act in Support of Judge Edwards

JOAN M. KRAUSKOPF*

INTRODUCTION

Bennett v. Bennett[1] was a diversity action brought in the federal court for the District of Columbia to enforce a custody determination of a District of Columbia court. It involved two different causes of action based on the plaintiff father's asserted right to custody of abducted children who had been taken to Ohio by their mother. The first was a tort action for money damages for harboring a child contrary to the right of the lawful custodian and the second was for an injunction directing and enjoining the defendant from interfering with the custody rights of the plaintiff. The Court of Appeals considered the domestic relations exception to federal diversity jurisdiction and concluded that it would not preclude the tort cause of action, but would preclude federal jurisdiction to entertain the injunction request.[2] Judge Edwards dissented[3] from the decision of his two colleagues on the Fourth Circuit, arguing that enforcement of a child custody decree by injunction was different from and did not allow for modification of the decree. Therefore, he asserted, the federal court should entertain a diversity action for enforcing by injunction a state custody decree. This Article offers an analysis in support of Judge Edwards' conclusion.

Interstate abduction of a child from the rightful custody of one parent, either by or on behalf of the other parent, has been widely recognized as a major social and legal problem.[4] More significant than the deliberate flaunting of the law is the now

---

* Manley O. Hudson Professor of Law, University of Missouri-Columbia.

1. 682 F.2d 1039 (D.C. Cir. 1982).

2. *Id.* at 1043.

3. *Id.* at 1044.

4. Uniform Child Custody Jurisdiction Act, Prefatory Note (1968) [hereinafter cited as UCCJA]. The UCCJA text and notes can be found at 9 U.L.A. 111–70 (1979); *Parental Kidnapping Prevention Act of 1979, S.105: Joint Hearing Before the Subcomm. on Criminal Justice of the Senate Comm. on the Judiciary and the Subcomm. on Child and Human Development of the Comm. on Labor and Human Resources*, 96th Cong., 2d Sess. (1980) [hereinafter cited as *Joint Hearing*]; S. KATZ, CHILD SNATCHING: THE LEGAL RESPONSE TO THE ABDUCTION OF CHILDREN (1981); Bodenheimer, *Progress Under the Uniform Child Custody Jurisdiction Act and Remaining Problems: Punitive Decrees, Joint Custody, and Excessive Modifications*, 65 CALIF. L. REV. 978 (1977); Bodenheimer, *The Rights of Children and the Crisis in Custody Litigation: Modification of Custody In and Out of State*, 46 U. COLO. L. REV. 495 (1975) [hereinafter cited as Bodenheimer, *Rights of Children*]; Bodenheimer, *Judicial and Legislative Cures for Child Custody Ills*, 12 JUDGES' J. 82 (1973); Bodenheimer, *The Uniform Child Custody Jurisdiction Act*, 3 FAM. L.Q. 304 (1969); Bodenheimer, *The Uniform Child Custody Jurisdiction Act: A Legislative Remedy for Children Caught in the Conflict of Laws*, 22 VAND. L. REV. 1207 (1969) [hereinafter cited as Bodenheimer, *Legislative Remedy*]; Ehrenzweig, *The Interstate Child and Uniform Legislation: A Plea for Extralitigious Proceedings*, 64 MICH. L. REV. 1, 1 (1965); Fain, *Custody of the Children*, 1 CALIF. FAM. LAW. 545, 545–47 (C.E.B. 1961); Katz, *Legal Remedies for Child Snatching*, 15 FAM. L.Q. 103 (1981); Ratner, *Legislative Resolution of the Interstate Child Custody Problem: A Reply to Professor Currie and a Proposed Uniform Act*, 38 S. CAL. L. REV. 183 (1965); Ratner, *Child Custody in a Federal System*, 62 MICH. L. REV. 795, 798 (1964); Comment, *Conflicting Custody Decrees: In Whose Best Interest?*, 7 DUQ. L. REV. 262, 266 (1969); Comment, *Children in Transit: Child Custody and the Conflict of Laws*, 6 U.C.D. L. REV. 160, 161–62 (1973); Comment, *The Puzzle of Jurisdiction in Child Custody Actions*, 38 U. COLO. L. REV. 541, 542–43 (1966); Note, Ford v. Ford: *Full Faith and Credit to Child Custody Decrees?*, 73 YALE L.J. 134, 139 (1963); Note, *The Search for a Solution to Child Snatching*, 11 HOFSTRA L. REV. 1073 (1983).

accepted fact that the abducted child is likely to suffer from the trauma of the abduction and separation from the custodian.[5] In the past the opposite belief, that children were so resilient as not to be affected by the instability of caretakers, paralleled the United States Supreme Court's holding under the full faith and credit clause of the Constitution that any state with jurisdiction could modify a previous child custody order to the same extent as the court granting it.[6] Without a federal requirement to defer to the granting state's authority, interstate abduction of children has been encouraged. The parent who had been unsuccessful in the granting state simply took the child elsewhere in search of a more favorable decree.

To appreciate this phenomenon, a review of the effect of a child custody order within the granting jurisdiction itself may be helpful. Within the state of the granting court, enforcement of a custody decree against the noncustodial parent who is retaining possession of the child in violation of the decree can be accomplished by: a contempt order for violation of the custody decree, in which case the offender could be fined or imprisoned until the child is produced; habeas corpus to produce the child; or, an injunction to produce the child or to cease interfering with the rights of the custodian.[7] A child custody order is always modifiable, however, if circumstances have changed sufficiently.[8] Thus, a parent in violation of a custody order may move for modification in the enforcement proceeding. Because efficiency usually calls for entertaining any modification request rather than proceeding on the enforcement action, state courts traditionally have allowed a motion to modify; as a consequence, a practice developed of converting enforcement attempts into proceedings on the merits when modification was requested.[9] A parent would have little chance to succeed in this proceeding, however, if he or she was in violation of an order of a court before which he or she already had appeared and had only the abduction of the child to present as changed circumstances. In these situations, a parent often would take the child to another state.

Courts of the child's location are notoriously reputed to favor the local parent both in interpreting the law and in fact-finding.[10] Because full faith and credit did not require enforcement of a modifiable foreign custody order, the courts of a state to which a child had been taken had even less reason to ignore a request for a hearing on the merits than did the courts in the state of original jurisdiction. Courts of a second state routinely would entertain either the abductor's new proceeding or a motion in a

5. Lehman v. Lycoming County Children's Servs. Agency, 458 U.S. 502 (1982); State *ex rel.* Valles v. Brown, 97 N.M. 327, 330, 639 P.2d 1181, 1184 (1981).

6. Halvey v. Halvey, 330 U.S. 610 (1947); Bodenheimer, *Legislative Remedy*, *supra* note 4, at 1210.

7. P. HOFF & J. SCHULMAN, INTERSTATE CHILD-CUSTODY DISPUTES AND PARENTAL KIDNAPPING: POLICY, PRACTICE AND LAW 8–10 to –18 (1982); Budlong v. Budlong, 51 R.I. 113, 115, 152 A. 256, 257 (1930) (injunction). *Cf.* Butler v. Morgan, 34 Or. App. 393, 578 P.2d 814 (1978) (contempt or habeas corpus).

8. *See e.g.*, Bodenheimer, *Rights of Children*, *supra* note 4, at 498.

9. Doan Thi Hoang Anh v. Nelson, 245 N.W.2d 511, 513 (Iowa 1976). However, nothing has prevented states from enforcing custody orders by contempt, habeas corpus or injunction until such time as the modification issues have been presented and heard separately on a motion to modify. Barcus v. Barcus, 278 N.W.2d 646, 651 (Iowa 1979). *See also* Butler v. Morgan, 34 Or. App. 393, 578 P.2d 814 (1978).

10. Leslie L. F. v. Constance F., 110 Misc. 2d 86, 93 n.4, 441 N.Y.S. 2d 911, 916 n.4 (Fam. Ct. 1981); UCCJA, *supra* note 4, Prefatory Note.

proceeding for enforcement of a child custody order.[11] Although this would be a new decree in the second jurisdiction, in common parlance it is referred to as a modification.

The tendency to favor a local party increased the probability of a parent's obtaining custody if he or she went to a new jurisdiction rather than trying again for custody in the court that already had ruled in the opposite direction. This psychological advantage, plus the combination of the court's freedom under full faith and credit to modify and the common practice of modifying in enforcement actions, rendered abduction an attractive possibility. Recent changes in state and federal legislation have decreased the advantages of interstate abduction and have increased the opportunities for effective remedies against the abductor. However, *Bennett v. Bennett*[12] and its offspring, *Lloyd v. Loeffler*,[13] threaten the most promising federal effort to reduce parental kidnapping between states.

I. STATE LEGISLATION: UCCJA

Legislative attacks upon the interstate child abduction problem have centered both on reducing the number of states that could have jurisdiction initially to grant a decree of child custody and on strengthening the interstate authority of the initial decree.

A. *Initial Jurisdiction*

The Uniform Child Custody Jurisdiction Act (UCCJA) attempts to limit the number of states that have the power to make initial child custody orders. A state that enacts the UCCJA limits the power of its courts by specifying only four bases for subject matter jurisdiction,[14] none of which are the presence of the child alone. The basis most often used is the "home state" of the child, the state where the child has resided for six months.[15] That state also will have initial jurisdiction for six months after the child has left the state. The other three alternative bases for jurisdiction allow for concurrent jurisdiction to enter an initial custody order in more than one state. One basis is "significant connection," which requires that the state have a significant connection with the child and one contestant, and that there be substantial evidence concerning the child's care in that state.[16] For example, a child may be taken to a new state that will have "home state" jurisdiction after six months, but the original state may continue to have jurisdiction as well because the child had lived there for many years, developing significant social and educational contacts and building an array of evidence pertinent to his or her care. The third basis for initial jurisdiction under the UCCJA is abandonment or "emergency," which is worded broadly to include the

11. UCCJA, *supra* note 4, Prefatory Note. A major exception developed in some states when the party seeking modification had "unclean hands." *See, e.g.*, Kennedy v. Carman, 471 S.W.2d 275 (Mo. App. 1971).

12. 682 F.2d 1039 (D.C. Cir. 1982).

13. 694 F.2d 489 (7th Cir. 1982).

14. UCCJA, *supra* note 4, § 3.

15. *Id.* § 3(a)(1).

16. The actual wording of this section uses a "best interest of the child" basis. However, the "best interest" can be found only because of "significant connection" and "substantial evidence."

subjection of a child to mistreatment, abuse or neglect within the state.[17] The last basis for initial jurisdiction is the absence of jurisdiction elsewhere.[18]

The requirement that something more than mere presence of the child be found for initial jurisdiction should discourage pre-decree interstate abduction of children. The UCCJA, however, permits concurrent jurisdiction in more than one state to enter an initial decree and allows for wide variation in interpretation to determine which states have jurisdiction. Although residence in a state for six months is an obvious basis for jurisdiction, the vaguely worded alternative bases of "significant connection" and "emergency" allow for jurisdiction in two or more states under circumstances that can vary widely because of differing interpretations of these bases. Thus, a significant incentive for initially taking a child to another jurisdiction remains.

B. *Modification and Enforcement Power*

A major goal of the UCCJA is to decrease the opportunity for modification of a child custody decree in a new jurisdiction, and thereby discourage interstate child abduction.

1. *UCCJA Provisions*

The Uniform Child Custody Jurisdiction Act prohibits a court from modifying the custody orders of other states except in certain specified instances, and it requires summary enforcement of these child custody orders when they meet the standards of the Act. Volumes of early writing concerning interstate custody and the proposed UCCJA, especially by Professor Brigitte Bodenheimer,[19] draw the distinction between modification and enforcement. A modification hearing involves the entire range of evidence pertinent to the substantive issue of the child's best welfare and concludes with a judgment on the merits of that issue based on the forum state's internal standards for determining a child's welfare. An enforcement proceeding determines only whether the court granting the initial order had jurisdiction to do so and whether it retains that jurisdiction and, if so, it concludes with an appropriate order to enforce the initial decree. The UCCJA is designed to require enforcement rather than modification by the court in the second forum. The Act's drafters stated that the power to enforce does not include the power to modify.[20] Some courts have stated succinctly that in a recognition and enforcement action under the UCCJA the circumstances of the child are not in issue.[21]

Section 14 of the UCCJA provides that once "a court of another state has made a custody decree, a court of this State shall not modify that decree."[22] The goal is to force resolution of modification issues in the court that granted the initial order. This section prevents the second jurisdiction from modifying the initial order, so long as

17. UCCJA, *supra* note 4, § 3(a)(3).
18. *Id.* § 3(a)(4).
19. *See supra* note 4.
20. UCCJA, *supra* note 4, § 15 commissioners' note.
21. Wyatt v. Falhsing, 396 So. 2d 1069, 1073 (Ala. App. 1981).
22. UCCJA, *supra* note 4, § 14.

any other basis for initial jurisdiction that is substantially in accord with the second state's jurisdictional law (usually the UCCJA's four alternative bases) continues to exist in the court of the initial order. This limit applies even though the subsequent state had become the "home state" by virtue of the child moving there and remaining there for six months.

After a second state has become the "home state," the most likely basis for jurisdiction to continue in the initial state would be "significant connection." Professor Bodenheimer believed that the initial child custody decree constituted both the significant connection and the substantial evidence necessary under the "significant connection" basis for jurisdiction.[23] She evidently believed that this would be true indefinitely, so that the only manner in which the initial court would lose the exclusive power to modify would be through relinquishment of the power or the absence of all the parties from that state. This has been described as the most strict view of exclusive continuing jurisdiction to modify.[24] A less strict approach would consider whether the lapse of time was so great that neither the preexisting decree nor any other prior relationship with the child was sufficient to find a significant connection with the initial state. The purpose of Section 14 of the UCCJA, whether interpreted strictly or not, is to insure that once a custody decree had been granted, no concurrent jurisdiction to modify would exist; thus, there would be no incentive to move to another state hoping to obtain a new order—either immediately or after six months. The connections between the state of the first decree and the child would have to atrophy over a much longer period of time before any other jurisdiction could modify the decree.

Section 15 of the UCCJA[25] requires that the second state enforce the decree of the initial state so long as the initial state continues to have jurisdiction. This section permits filing a certified copy of a state's custody decree for use in any summary enforcement procedure available in another state. The drafters' note states that the authority to enforce the out-of-state decree does not include the power to modify, and that "if modification is desired, the petition must be directed to the court which has jurisdiction to modify under Section 14."[26] The registered decree would take on a local or domestic character solely for enforcement purposes and not for modification purposes. How enforcement was carried out would depend on the particular enforcement procedures of the second jurisdiction.[27] Contempt, or a restricted form of habeas corpus in which the merits may not be considered, may be available.[28] A petition to enforce a foreign judgment,[29] a petition for a warrant to deliver the child,[30]

23. Bodenheimer, *Interstate Custody: Initial Jurisdiction and Continuing Jurisdiction under the UCCJA*, 14 FAM. L.Q. 203, 215 (1981). [hereinafter cited as Bodenheimer, *Interstate Custody*.]

24. P. HOFF & J. SCHULMAN, *supra* note 7, at 3–30.

25. UCCJA, *supra* note 4, § 15.

26. UCCJA, *supra* note 4, § 15 commissioners' note.

27. Bodenheimer, *Interstate Custody*, *supra* note 23, at 221.

28. Barcus v. Barcus, 278 N.W.2d 646, 651 (Iowa 1979); Butler v. Morgan, 34 Or. App. 393, 578 P.2d 814 (1978).

29. Frumkes & Elser, *The Uniform Child Custody Jurisdiction Act: The Florida Experience*, 53 FLA. B.J. 684, 687 (1979).

30. *In re* Marriage of Schwander, 79 Cal. App. 3d 1013, 145 Cal. Rptr. 325 (1978).

or a form of injunction requested as a motion to enforce or to show cause why the child should not be delivered may be suitable.[31]

2. *UCCJA Shortcomings*

Although nearly all state legislatures have enacted a version of the UCCJA, Professor Bodenheimer's last publication sadly bemoaned the fact that the Act was not achieving the full expectations of its drafters.[32] Other experts agreed.[33] The reasons are twofold:[34] first, differing versions of the Act have been enacted, and second, there is state-by-state variation in interpretation of the Act's requirements. Both of these phenomena operate to allow for more findings of jurisdiction and less deference to initial states' orders than the drafters envisaged.

Unfortunately, as described cogently by Bodenheimer, early interpretations evidenced a parochial concern with finding added jurisdiction in the second forum.[35] Courts of the second state quickly developed what she termed "myths." First, the courts misused the requisites for determining initial jurisdiction by using them as a basis for modification jurisdiction in a second state. For example, when a second state became the "home state," it was assumed erroneously that modification power existed. This permitted the exercise of concurrent jurisdiction to modify. Second, the courts misused the six-month "home state" provision for initial jurisdiction by holding that as soon as it existed in a second state, the continuing jurisdiction of the initial court had ended. This error was committed by the courts' failure to follow the UCCJA direction to consider whether jurisdiction continued on any of the alternative bases for jurisdiction under the second state's law. The effect was to allow modification in a new state after only six months, no matter how significant the connection and evidence in the initial state remained. Both myths exemplify the extreme tendency of a local court to find that it has power to deal with a child before it. Both ignored the command of Section 14 and, thus, continued encouragement of child abduction with the lure of obtaining a new order in a new state.

A third myth in the making, which Bodenheimer feared based on conversations with attorneys, was that a proceeding begun in the second state to enforce the initial decree could be turned automatically into a modification proceeding.[36] The *Bennett* court followed this myth. Converting an enforcement proceeding to one entertaining issues on the merits, without the requisite modification jurisdiction under the UCCJA, would subvert the Act's primary method of deterring interstate abduction of children after a custody order had been granted. The effectiveness of the UCCJA requires an understanding and acceptance of the fact that enforcement can be granted by a second state, which can refer any request for modification back to the state that initially granted the order.

---

31. P. HOFF & J. SCHULMAN, *supra* note 7, at 8–16.

32. Bodenheimer, *Interstate Custody*, *supra* note 23.

33. *Joint Hearing*, *supra* note 4.

34. P. HOFF & J. SCHULMAN, *supra* note 7, at 1–6; Coombs, *Interstate Child Custody: Jurisdiction, Recognition, and Enforcement*, 66 MINN. L. REV. 711, 808 [hereinafter cited as Coombs, *Enforcement*].

35. Bodenheimer, *Interstate Custody*, *supra* note 23, at 213.

36. Id. at 220.

C. *Remaining Difficulties*

Three major difficulties in interstate enforcement of custody decrees remained even after most states had enacted the UCCJA. One difficulty was that no law was aiding the custodian in finding the abducting parent, who could have gone anywhere with the child. Of course, without locating the abductor, no enforcement is possible. The second difficulty was the application of the UCCJA itself: the fact that the UCCJA had not been uniformly adopted in all jurisdictions, its allowance of concurrent initial jurisdiction, and the unfortunate propensity of courts to misconstrue its modification and enforcement provisions, so as to allow the exercise of "second-state" jurisdiction to modify initial custody orders. Another difficulty was the necessity for the custodian under the initial decree to go to the courts of the abductor's state to attempt to regain the child by enforcement of the decree. Burdens of time, expense, representation by a new attorney, and the expected favoritism toward the local party often were insurmountable. All of these difficulties together led to pressure for federal intervention.[37] After a variety of different proposals, the Wallop Amendment, titled the Parental Kidnapping Prevention Act[38] (PKPA), was passed by Congress in December, 1980.

II. FEDERAL LEGISLATION: PKPA

Congress dealt with all three of the above difficulties in passing the PKPA. The difficulty of locating the abductor was addressed by making the Parent Locator Service available to custodians trying to locate their children.[39] Most of the Act was directed to alleviating the shortcomings of the UCCJA.[40] It is the thesis of this Article that, indirectly, Congress also dealt with the difficulty of enforcement in a foreign jurisdiction. The reason is that the PKPA necessarily affects the determination of federal diversity jurisdiction.

This federal law affecting child custody is narrow and is limited to allocation of authority to determine child custody among the states. The PKPA places a federal duty upon state courts to enforce and not modify a previous state court's custody determination.[41] At the same time the PKPA commands that the initial court's ju-

---

37. P. HOFF & J. SCHULMAN, *supra* note 7, at 1–6.

38. Pub. L. No. 96-611, §§ 6–10, 94 Stat. 3567 (1980) (codified at 28 U.S.C. § 1738A (1982), 42 U.S.C. § 663 (Supp. V 1981), 18 U.S.C. § 1073 (1982)).

39. 42 U.S.C. § 663 (Supp. V 1981).

40. 28 U.S.C. § 1738A (1982), hereinafter referred to as the PKPA. In addition, § 10 of the PKPA made the provisions of the Federal Fugitive Felon Act applicable to parental kidnapping and flight to avoid state felony prosecution. 18 U.S.C. § 1073 (1982).

41. The specific words "shall enforce" and "shall not modify . . . any child custody determination," 28 U.S.C. § 1738A(a) (1982), have led to controversy, not relevant to this argument, concerning whether the act requires "full faith and credit," or something less. *See* Coombs, *Enforcement, supra* note 34, at 729, 818–22, 834–48.

Controversy also exists concerning the extent to which the PKPA preempts state jurisdictional law concerning child custody, but there is general agreement that preemption exists at least to the extent of any conflict between state law and the PKPA. *See id.*

Coombs' *Enforcement* article is the definitive analysis of the PKPA to date. Coombs was Deputy Chief Counsel, Subcommittee on Criminal Laws and Procedures, Committees on the Judiciary, United States Senate, during the developmental stages of the PKPA in Congress. *See* Coombs, *The "Snatched" Child is Halfway Home in Congress*, 11 FAM. L.Q. 407 (1978).

risdiction to modify continues. It allocates continuing power to modify to the court that initially made a child custody order, and it requires another state's court that subsequently obtains jurisdiction to defer to that initial court for modification.[42] The PKPA is effectively an amendment to the full faith and credit statute, 28 U.S.C. § 1738 (1982), because it uses federal power to allocate authority by limiting the freedom of a state to ignore the previous child custody determinations of another state.[43]

The purpose of the PKPA is to achieve the same goals as the UCCJA by a federal allocation among the states of the authority to determine custody issues.[44] In other words, the PKPA functions primarily to end the myths developing in the application of the UCCJA. Its proper implementation requires an appreciation of the difference between enforcement and modification of a child custody decree.

A. *Enforcement Requirement*

The PKPA's main provision states that the "authorities of every State shall enforce according to its terms, and shall not modify . . . any child custody determination made consistently with the provisions of this section by a court of another State."[45] The mandate to enforce and not modify continues so long as the court of the initial state continues to have jurisdiction.

Two features, unfortunately, complicate understanding of this basically simple and narrow statute. First, the "provisions" appear to be jurisdictional requisites, but they are not federally imposed requirements for obtaining initial jurisdiction; the "provisions" are conditions or standards that must have existed at the time of the initial decree in order for it to be entitled to the PKPA's right of later enforcement without modification in another state.[46] In other words, they are simply tests for determining whether the jurisdictional basis for the initial decree entitles it to be enforced and not modified.[47] Jurisdiction to make an initial order continues to be determined by the law of the state, usually the UCCJA.

The second complicating feature is that these provisions are somewhat similar, but different in important respects, from the UCCJA's initial jurisdiction requirements.[48] In contrast to the UCCJA's actual jurisdictional bases, the PKPA's "provisions" do not recognize alternative conditions under which orders would be equally entitled to enforcement; they make the "home state for six months" condition

---

42. 28 U.S.C. § 1738A (1982).

43. In only two respects does it directly affect the power of a state to initially determine a child's custody. It requires that notice be given and it forbids the exercise of jurisdiction during the pendency of another proceeding. 28 U.S.C. § 1738A(e), (g) (1982); Coombs, *Enforcement*, *supra* note 34, at 765.

44. The PKPA lists among its purposes: to facilitate enforcement of custody decrees of sister states, to discourage continuing interstate controversies over child custody, and to deter interstate abductions. Pub. L. No. 96-611, § 7, 94 Stat. 3569 (1980).

45. 28 U.S.C § 1738A(a) (1982).

46. *Id.* § 1738A(c). This section states, "A child custody determination made by a court of a State is consistent with the provisions of this section only if — (1) such court has jurisdiction under the law of such State; and (2) one of the following conditions is met: . . . ." "Conditions" or "provisions" follow describing five fact situations similar to those that constitute jurisdictional bases under the UCCJA.

47. Coombs, *Enforcement*, *supra* note 34, at 821, 838, 849; P. HOFF & J. SCHULMAN, *supra* note 7, at 3–34.

48. Coombs, *Enforcement*, *supra* note 34, at 820; P. HOFF & J. SCHULMAN *supra* note 7, at 3–34 to –36.

primary. Thus, it is ordinarily only the home state court's decree that will be entitled to recognition and enforcement under the PKPA. "Significant connection" as a basis for initial jurisdiction would not entitle the decree to PKPA protection unless there had not been another home state.[49] A decree depending on "emergency" jurisdiction would be entitled to PKPA protection in the absence of abandonment, only if the emergency were mistreatment or abuse of the child.[50] Therefore, a few child custody decrees that would be valid within a state because they meet the jurisdictional requisites of that state's UCCJA, would not be entitled to interstate enforcement under the PKPA.

These complications should not obscure the clear federal duty. A state custody decree made with jurisdiction that is consistent with the PKPA "provisions" must be enforced and not modified by courts of another state (unless the PKPA exception discussed below applies). The second court is expected to use whatever summary enforcement proceedings are available under its normal procedures.[51] The PKPA does not create or specify enforcement remedies.

B. *Continuing Jurisdiction*

When a child is abducted and taken to another state, the law of that second state may confer jurisdiction to make initial custody determinations. For example, under the UCCJA the second state may become the home state after six months or there may be "significant connection" to the child in the second state. In these situations locally influenced interpretations of the UCCJA alone have allowed the second state to entertain a proceeding on the merits and enter a modification decree. The PKPA preempts state law that permits modification in the second state solely because jurisdiction to make an initial decree exists.[52] The PKPA requires enforcement of the prior decree. Thus, the first myth under the UCCJA is destroyed.

The PKPA, in subsection (d), provides that the jurisdiction of the first court (the jurisdictional requisites of which were consistent with the "provisions" of the PKPA initially) continues if that state remains the residence of the child or of any of the contestants, so long as the first court continues to have jurisdiction under its own law. In nearly every state its own law of jurisdiction will be its version of the UCCJA with its four alternative bases for jurisdiction. Home state or "significant connection" is most likely to continue at the time that someone is attempting to obtain a decree in another state. So long as the state in which the initial order was entered continues to be the home state or to have a significant connection with the child under its own law,

---

49. 28 U.S.C. § 1738A(c)(2)(B)(i) (1982).

50. *Id.* § 1738(c)(2)(C)(ii).

51. Hoff and Schulman urge attorneys to attempt a wide range of remedies including simply a motion to enforce. The order would be the preventional equivalent of an injunction, *e.g.*, Deliver the Child or Refrain from not Delivering. P. HOFF & J. SCHULMAN, *supra* note 7, at 8–10 to –18. They also suggest requesting an order to show cause why the custody order should not be enforced because this would shift the burden of proof to the abducting party. *Id.* at 8–16.

52. Mitchell v. Mitchell, 437 So. 2d 122, 126 (Ala. App. 1982); Tufares v. Wright, 98 N.M. 8, 10, 644 P.2d 522, 524 (1982); Belosky v. Belosky, 97 N.M. 365, 366, 640 P.2d 471, 472 (1982); State *ex rel* Valles v. Brown, 97 N.M. 327, 332, 639 P.2d 1181, 1186 (1981); Diane W. v. Norman W., 112 Misc. 2d 114, 116, 446 N.Y.S.2d 174, 176 (1982).

it will continue to have jurisdiction under its own law. Therefore, it will continue to have jurisdiction under subsection (d) of the PKPA.[53]

The language of the PKPA is unambiguous. Creation of the initial jurisdictional requisites in a second state does not end the continuing jurisdiction in the initial state. Thus, the second myth under the UCCJA is also shattered. Application of this section, however, may be the Achilles' heel of the PKPA.[54]

C. *Limited Power to Modify*

The only exception to the duty to enforce and not modify is in subsection (f), which dovetails with the continuing jurisdiction section. Subsection (f) states affirmatively that a court of a second state may modify a custody determination of the court of another (initial or first) state if it has jurisdiction to make a child custody determination and if the court of the first state "no longer has jurisdiction, or it has declined to exercise such jurisdiction to modify such determination."[55]

The subsection contains an ambiguity in that it does not specify whether the question of continuing jurisdiction is to be resolved on the basis of the PKPA's "provisions" or on the jurisdictional law of the first or initial state. To be consistent with the wording and intent of the preceding continuing jurisdiction section (subsection (d)), it must mean the jurisdictional law of the initial state. Those who developed the language of the PKPA state that the PKPA was to reinforce the restriction on modification first articulated in the UCCJA's section 14 that there be no power to modify so long as the initial state retains jurisdiction according to its own law.[56] Decisions applying the PKPA either recognize that the lack of continuing jurisdiction in subsection (f) is determined by the test of subsection (d)[57] or they simply discontinue their analysis of continuing jurisdiction after applying subsection (d).[58] If the initial state continues to have jurisdiction according to its own law, the *only* federal basis for allowing a second state to modify is that the initial state has declined to exercise jurisdiction.[59]

D. *Application*

The PKPA is applied without any consideration of the merits of the underlying child custody controversy. No substantive considerations can be entertained until its standards for determining jurisdiction have been applied. Thus, it supplies a con-

---

53. Mitchell v. Mitchell, 437 So. 2d 122, 126 (Ala. App. 1982); Flannery v. Stephenson, 416 So. 2d 1034, 1038 (Ala. App. 1982); Bullard v. Bullard, 3 Hawaii App. 194, 647 P.2d 294 (1982); Pierce v. Pierce, 640 P.2d 899, 903 (Mont. 1982). An early New Mexico opinion stated that the first state must also continue to satisfy the "jurisdictional" requisites of the PKPA, State *ex rel* Valles v. Brown, 97 N.M. 327, 330, 639 P.2d 1181, 1184 (1981), but later decisions apply the law of the initial state only to determine continuing jurisdiction. Serna v. Salazar, 98 N.M. 648, 650, 651 P.2d 1292, 1294 (1982); Olsen v. Olsen, 98 N.M. 644, 646, 651 P.2d 1288, 1290 (1982).

54. See infra text accompanying notes 63–67, for an explanation of a troublesome weakness.

55. 28 U.S.C. § 1738A(d) (1982).

56. P. HOFF & J. SCHULMAN, *supra* note 7, at 3–40.

57. Leslie L.F. v. Constance F., 110 Misc. 2d 86, 89, 441 N.Y.S.2d 911, 914 (Fam. Ct. 1981).

58. *See* cases cited *supra* note 53.

59. E. E. B. v. D. A., 89 N.J. 595, 446 A.2d 871 (1982), *cert. denied sub nom.* Angle v. Bowen, 103 S. Ct. 1203 (1983), *reh'g denied*, 103 S. Ct. 1806 (1983). *See also* Moore v. Perez, 428 So. 2d 113 (Ala. App. 1983). *Cf.* Leslie L.F. v. Constance F., 110 Misc. 2d 86, 90, 441 N.Y.S.2d 911, 915 (Fam. Ct. 1981).

gressionally recognized need: "national standards under which the courts . . . will determine their jurisdiction to decide such disputes."[60] When it has no jurisdiction to modify, a court in a second state must act to enforce the decree. Thus, through mandated enforcement, the PKPA achieves its stated purpose to "facilitate the enforcement of custody and visitation decrees of sister States."[61]

After a child custody order of a state has been entered and a court of another state is asked to enforce or modify that order, whether the second court must enforce or has the authority to modify under the PKPA can be determined through a four step inquiry process.

Step 1: Determine whether the court of the second state has subject matter jurisdiction according to its own jurisdictional law, its version of the UCCJA. If not, the inquiry is complete and the request to modify should be dismissed because the PKPA mandates enforcement of the initial decree according to its terms. The court of the second state should grant summary enforcement. If there is jurisdiction, the inquiry continues.

Step 2: Determine whether the initial order was granted consistently with the "provisions" of the PKPA, which are jurisdictional conditions necessary to entitle a party to a decree of enforcement and to preclude its modification. If the initial court was a court of the home state, there was no home state and the court had "significant connection" to the child, there was "emergency" jurisdiction, or no other state would take jurisdiction, then the order of the initial court would be consistent with the provisions of the PKPA and the inquiry should continue. If the initial court did not have jurisdiction at the time it rendered the decree consistent with any of the "provisions" as defined in the PKPA, then its order may be ignored and the merits of the custody controversy heard.[62]

Step 3: Determine whether the court granting the initial decree has continuing jurisdiction under subsection (d) of the PKPA. Such jurisdiction requires that one of the parties or the child must still reside in the initial state and that state must have jurisdiction according to its own law.

It is essential that every basis for jurisdiction in the initial state be examined at this point. These ordinarily will be the four alternative bases of the UCCJA. The most likely basis would be "home state," which continues for six months after removal of the child, or "significant connection" as defined in the UCCJA. It is doubtful that subsection (d) adopted the strict continuing jurisdiction doctrine that Professor Bodenheimer had hoped would develop under the UCCJA. If her strict interpretation that "significant connection" could be based on the former hearing and decree applied, continuing jurisdiction would nearly always be found.[63] In contrast, under a

60. Pub. L. No. 96-611, § 7(b), 94 Stat. 3569 (1980).

61. *Id.* § 7(d)(3).

62. Dobyns v. Dobyns, 650 S.W.2d 701, 705 (Mo. App. 1983); Virginia E. E. v. Alberto S. P., 110 Misc. 2d 448, 440 N.Y.S.2d 979 (1981); Quenzer v. Quenzer, 653 P.2d 295 (Wyo. 1982), *cert. denied*, 103 S. Ct. 1436 (1983); *cf.* Flannery v. Stephenson, 416 So. 2d 1034 (Ala. App. 1982).

63. Hoff and Schulman stated that the PKPA intended to adopt that interpretation. P. HOFF & J. SCHULMAN, *supra* note 7, at 3-31. In Flannery v. Stephenson, 416 So. 2d 1034, 1038 (Ala. App. 1982), a forum court held that it retained continuing jurisdiction because of its having granted the initial decree and the contestant father remaining in the state two

standard for "significant connection" that requires relatively recent contacts and fresh evidence, a long passage of time would weaken the significance of even a former hearing and decree.[64]

The success of the PKPA in achieving its goal will depend on the application of subsection (d). Although the law of the initial state is to determine its own continuing jurisdiction, the court of the second state in which modification or enforcement is being sought decides what the law of the initial state is. Thus, the propensity of local courts to find power in themselves may lead the second state's court to misinterpret the jurisdictional law of the initial court and to find that it no longer continues to have jurisdiction. This is illustrated in a New York case in which the child had lived his entire life in California, where the initial decree was granted in 1972, and had been in the forum state of New York only one year, from 1978 to 1979. The court held that California would not have jurisdiction "since no jurisdictional predicate exists under the UCCJA as adopted by California."[65] The court described several California cases in which courts had declined jurisdiction after the child had been out of the state from two and one-half years to five years. It distinguished one case in which the California court held that it retained continuing jurisdiction after only an eighteen month absence, on the ground that the second state had not passed the UCCJA. Remarkably, and without contrasting the child's lifelong connection to California against the mere one year in New York, it justified its decision that California no longer had jurisdiction on the basis that the California decisions explicitly articulate that custody determinations should be made "in the forum which possesses greatest access to the relevant evidence."[66] This strongly suggests that the New York court assumed that the state that has the most relevant evidence is the home state. The California decisions do not support that conclusion, but rather indicate that a longer time period away from California is more compelling.[67] Thus, the second myth under the UCCJA may be sprouting under the PKPA. When it is found that the initial state's jurisdiction does not continue, of course, the forum state may modify the order. The strong interest of the forum state could undermine the PKPA's national standards for determining jurisdiction at this stage.

If the jurisdiction of the initial court is found to continue, then the PKPA

---

years. However, the New Mexico Supreme court has rejected Bodenheimer's interpretation. Serna v. Salazar, 98 N.M. 648, 651 P.2d 1292 (1982). In holding that a full evidentiary hearing is necessary to determine "significant connection" continuing jurisdiction, the Montana Supreme Court also rejected it. Pierce v. Pierce, 640 P.2d 899, 905 (Mont. 1982).

In a questionable decision, a New York court has held that the initial court continued to have *exclusive* continuing jurisdiction, because it expressly reserved jurisdiction and the PKPA forbids the exercise of jurisdiction during the "pendency of a proceeding in a court in another State." Diane W. v. Norman W., 112 Misc. 2d 114, 116, 446 N.Y.S.2d 174, 176 (1982) (citing 28 U.S.C. § 1738A(g) (1982)). Surely Congress did not intend that an initial court can so easily and permanently continue its jurisdiction to the exclusion of all other courts without regard to atrophy of ties to the initial jurisdiction.

64. *Cf.* Virginia E. E. v. Alberto S. P., 110 Misc. 2d 448, 456, 440 N.Y.S.2d 979, 984 (1981) (Illinois decree).

65. Leslie L.F. v. Constance F., 110 Misc. 2d 86, 89, 441 N.Y.S.2d 911, 915 (Fam. Ct. 1981).

66. *Id.* at 92, 441 N.Y.S.2d at 916.

67. The *Leslie* holding, *Id.*, was weakened by the fact that the court also indicated that the California court may have declined jurisdiction, *id.* at 89, 441 N.Y.S.2d at 915. Another New York decision, however, evidenced the same propensity when it held that the initial decree state of Illinois no longer had continuing jurisdiction without discussing the state's law at all, but rather by noting that New York had been the home state for four years. Virginia E.E. v. Alberto S.P., 110 Misc. 2d 448, 456, 440 N.Y.S.2d 979, 984 (1981).

mandates that its decree must be enforced according to its terms unless modification is permitted by subsection (f) of the PKPA. Therefore, the last step is to apply subsection (f).

Step 4: Determine whether the second state court has the power to modify under the provisions of subsection (f). First, it must have jurisdiction, which will have been determined at Step 1. Second, the court of the first state must no longer have jurisdiction, or it must have declined jurisdiction to modify. If the first state's continuing jurisdiction already has been determined at Step 3, the only inquiry remaining is whether it has declined to exercise its jurisdiction to modify the decree. If it has not so declined, then the second court does not have authority to modify and must enforce the initial order according to its terms.

III. Federal Court Jurisdiction

Although the PKPA sets standards for determining jurisdiction and also provides a federal parental locator service through which federal records may be used to locate absconding parents, nothing in it[68] or any other federal legislation[69] creates substantive rights to child custody. Since federal court jurisdiction was neither specifically foreclosed nor created by the PKPA, the only feasible basis for federal jurisdiction over a child abduction incident is diversity jurisdiction.[70]

---

68. Bennett v. Bennett, 682 F.2d 1039, 1043 (D.C. Cir. 1982), stating: "We note that conspicuously absent from this comprehensive enactment is any provision creating or recognizing a direct role for the federal courts in determining child custody. Indeed, the legislative history of the Act makes clear that Congress deliberately and emphatically omitted such a role.". The court's words "determining child custody" and the quotations from congressional testimony, which the court sets out in footnote 6 of its opinion, all concern substantive decisions on the merits. *Id.* at 1043 n.6.

69. In Lehman v. Lycoming County Children's Servs. Agency, 458 U.S. 502 (1982), the Supreme Court settled speculation concerning the availability of federal habeas corpus to resolve child custody disputes by holding that, even when state action which terminated parental rights was challenged as unconstitutional, the habeas corpus statute did not affect federal jurisdiction. The Court held that the petitioner actually sought to relitigate "not any liberty interest of her sons, but the interest in her own parental rights" and that federal habeas corpus had never been available to challenge parental rights or child custody. *Id.* at 511. The Court buttressed its holding with policy considerations of federalism and the "exceptional need for finality in child-custody disputes." *Id.* at 512. The Court recognized that stability and certainty of care was essential for children and that extended uncertainty would be inevitable if federal courts had jurisdiction to "relitigate state custody decisions." *Id.* at 514. Thus, the Court ruled on the same policy of protecting children from disruption that has prompted passage of both the UCCJA and the PKPA.

70. Hoff and Schulman reviewed the legislative history and language of the PKPA, noting that federal court jurisdiction was not foreclosed by the statute, and concluded that Congress did not intend to change the status quo with respect to federal court jurisdiction in custody cases. P. Hoff & J. Schulman, *supra* note 7, at 8–35 to –36.

Coombs explains that review of the federal duty created by the PKPA would be available through petition for certiorari in the Supreme Court to review state court decisions. He notes that whether other avenues into federal court were available was beyond the scope of his article. *Coombs, Enforcement, supra* note 34, at 784 n.411.

In general, for federal question jurisdiction to exist, federal law must be a direct element in plaintiff's cause of action, not a remote or indirect factor in allowing the action to be brought. Gully v. First Nat'l Bank, 299 U.S. 109, 115–16 (1936); C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3562 (1975 & Supp. 1980) [hereinafter cited as Wright & Miller]. Therefore, when a federal right has been created by Congress without express or implied remedy, ordinarily only state court action and remedies are available. *Id.* § 3562, at 411–12 (1975); *cf.* Huber Baking Co. v. Stroehmann Bros. Co., 252 F.2d 945, 951 (2d. Cir.), *cert. denied*, 358 U.S. 829 (1958). The full faith and credit clause (and presumably statutes enacted to implement it) prescribes a rule by which to determine what faith and credit to give judgments and public acts, and it does not create a basis for federal court jurisdiction. Minnesota v. Northern Securities Co., 194 U.S. 48, 72 (1904); Hazen Research, Inc. v. Omega Minerals, Inc., 497 F.2d 151, 153 n.1 (5th Cir. 1974) (action on a state court default judgment in which the court stated, "[W]e have the rather anomalous situation of a federal diversity court deciding a controversy in which Congress has . . . federalized all relevant legal questions—a diversity case in which there are not issues of forum state law."); New York v. Holy Spirit Ass'n, 464 F. Supp. 196, 198 (S.D.N.Y. 1979).

A. *Advantages of Federal Diversity Jurisdiction*

Among the many reasons why the parent entitled to custody may wish to bring an enforcement action in federal court, two reasons stand out. First, if enforcement procedures are to be brought where the child has been taken, the federal forum avoids the notorious local prejudice of the state court where the child is located.[71] Second, a personal order in the nature of an injunction to produce the child, if granted by the federal court for the state of the custodian, can reach the abducting parent anywhere in the country.[72] This is the only method to allow the custodial parent, who is often financially and psychologically disadvantaged in the foreign jurisdiction, to pursue enforcement with local counsel in a proceeding close to home.[73]

From the perspective of enforcing federal policy, federal court interpretation of the PKPA would insure the application of a uniform federal standard for determining jurisdiction and requiring enforcement of sister state decrees, which was desired when Congress enacted the PKPA.[74] Although a federal court in a diversity action sits as another state court[75] in applying that state's law,[76] it is not bound by state interpretations of federal law[77] and, presumably, not prejudiced by strong local concerns.[78] Furtherance of federal policy could be helped most by federal courts determining more fairly than state courts whether the initial state's jurisdiction continues.

The traditional requisites for diversity jurisdiction in an interstate child abduction can exist without regard to the PKPA. Therefore, the PKPA itself appropriately did not provide for federal jurisdiction. The required diversity of citizenship is often present in interstate child abduction incidents because the abducting parent establishes residence in a state different from that of the custodian. A tort damages claim, as discussed below, can supply the required amount in controversy. It will be argued below that the PKPA eliminates the rationale for an exception to diversity jurisdiction.

---

71. Even among those who wish to narrow the range of diversity jurisdiction, there is support for maintaining diversity actions to protect the "out of state" party from local prejudice. Phillips, Nizer, Benjamin, Krim & Ballon v. Rosenstiel, 490 F.2d 509, 515 (2d Cir. 1973); AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS, OFFICIAL DIGEST 2 (1969); WRIGHT & MILLER, *supra* note 70, § 3601.

72. The mandate of a federal court injunction runs throughout the United States so that disobedience anywhere is contempt of the granting court without the necessity of having registered the injunction order at the place of violation. Leman v. Krenlter-Arnold Co., 284 U.S. 448, 454 (1932); Stiller v. Hardman, 324 F.2d 626, 628 (2d Cir. 1963).

73. Although the PKPA provides that the Federal Fugitive Felon Act is applicable to felonious parental kidnappings, that Act does not give the deprived parent a private right to require the Justice Department to issue a warrrant for the fugitive parent or to produce the child. Beach v. Smith, 535 F. Supp. 560 (S.D. Cal. 1982).

74. Pub. Law No. 96-611, § 7(b), 94 Stat. 3568 (1980); Note, *The Uniform Child Custody Jurisdiction Act and the Parental Kidnapping Prevention Act: Dual Response to Interstate Child Custody Problems*, 39 WASH. & LEE L. REV. 149, 159 (1982); Note, *The Parental Kidnapping Preventing Act of 1980—An End to Child Snatching*, 8 J. LEGIS. 357, 366 (1981).

75. Guaranty Trust Co. v. York, 326 U.S. 99, 108 (1945).

76. Erie R.R. v. Tompkins, 304 U.S. 64 (1938) (law); Ruhlin v. New York Life Ins. Co., 304 U.S. 202 (1938) (equity).

77. Commissioner v. Estate of Bosch, 387 U.S. 456 (1967); United States v. Bedford, 519 F.2d 650 (3rd Cir.), *cert. denied*, 424 U.S. 917 (1975); Thrall v. Wolfe, 503 F.2d 313 (7th Cir. 1974), *cert. denied*, 420 U.S. 972 (1975); Metropolitan Life Ins. Co. v. Thompson, 368 F.2d 791 (3d Cir. 1966), *cert. denied*, 388 U.S. 914 (1967); Owen v. Illinois Baking Corporation, 260 F. Supp. 820 (W.D. Mich. 1966).

78. WRIGHT & MILLER, *supra* note 70, § 3601.

B. *The Domestic Relations Exception*

1. *Theory and Application*

The domestic relations exception to diversity jurisdiction developed from dicta in a series of Supreme Court cases. In the seminal case of *Barber v. Barber* in 1859 the Court stated: "We disclaim altogether any jurisdiction in the courts of the United States upon the subject of divorce."[79] It held, however, that the federal courts had the power to decide whether a divorce was valid and ruled that a district court had diversity jurisdiction to enforce a state court decree granting a separation and alimony. The Supreme Court noted that the courts of equity in England will interfere to compel payment of alimony ordered by the ecclesiastical courts and that the reason for the exercise of the equity power there was equally applicable in the United States. The stated reason was that when a court of competent jurisdiction decrees divorce and alimony, a court of equity will interfere to prevent the decree from being defeated by fraud.[80]

In re Burris,[81] decided in 1890, was a habeas corpus action to obtain custody of a child. The Supreme Court held that the federal habeas corpus statute was inapplicable by its terms and, in dicta, repeated even more extensively its earlier disclaimer of federal jurisdiction: "The whole subject of domestic relations . . . belongs to the laws of the States and not to the laws of the United States."[82]

It appears that even today the United States Supreme Court has never applied its dicta to preclude exercise of federal diversity jurisdiction.[83] The dicta in these and other Supreme Court cases[84] have been applied, however, by numerous lower courts to deny jurisdiction over domestic relations matters.[85] Among them are cases that would require determinations on the merits of child custody issues.[86]

Early cases suggested a total lack of power to decide domestic relations issues[87] in the federal courts, which led to academic speculation over the justification for this domestic relations exception.[88] More recently, the decisions hold that policies of federal-state comity warrant deference to the state's strong interest in domestic relations and to the greater competence of the state courts in domestic relations matters.[89]

---

79. 62 U.S. (21 How.) 582, 584 (1859).

80. *Id.* at 590–91.

81. 136 U.S. 586 (1890).

82. *Id.* at 593–94.

83. The one case in the Supreme Court that has found a lack of jurisdiction in a domestic relations matter was not a diversity case. Ohio *ex rel* Popovici v. Agler, 280 U.S. 379 (1930).

84. De La Rama v. De La Rama, 201 U.S. 303 (1906); Simms v. Simms, 175 U.S. 162 (1899).

85. *See* Armstrong v. Armstrong, 508 F.2d 348, 350 (1st Cir. 1974); Phillips, Nizer, Benjamin, Krim & Ballon v. Rosenstiel, 490 F.2d 509, 515 (2d Cir. 1973); Albanese v. Richter, 161 F.2d 688 (3d Cir.), *cert. denied*, 332 U.S. 782 (1947); Bercovitch v. Tanburn, 103 F. Supp. 62 (S.D.N.Y. 1952); Linscott v. Linscott, 98 F. Supp. 802 (S.D. Iowa 1951); Garberson v. Garberson, 82 F. Supp. 706 (N.D. Iowa 1949).

86. *See* Sutter v. Pitts, 639 F.2d 842 (1st Cir. 1981); Bergstrom v. Bergstrom, 623 F.2d 517 (8th Cir. 1980); Huynh Thi Anh v. Levi, 586 F.2d 625 (6th Cir. 1978); Solomon v. Solomon, 516 F.2d 1018, 1021–26 (3d Cir. 1975); Buechold v. Ortiz, 401 F.2d 371, 372 (9th Cir. 1968); Hernstadt v. Hernstadt, 373 F.2d 316 (2d Cir. 1967).

87. Spindel v. Spindel, 283 F. Supp. 797, 802 (E.D.N.Y. 1968).

88. Vestal & Foster, *Implied Limitations on the Diversity Jurisdiction of Courts*, 41 MINN. L. REV. 1, 31 (1956).

89. WRIGHT & MILLER, *supra* note 70, § 3609. *See, e.g.*, Crouch v. Crouch, 566 F.2d 486, 487 (5th Cir. 1978); Phillips, Nizer, Benjamin, Krim & Ballon v. Rosenstiel, 490 F.2d 509 (2nd Cir. 1973); Buechold v. Ortiz, 401 F.2d 371 (9th Cir. 1968); Brandtscheit v. Britton, 239 F. Supp. 652 (N.D. Cal. 1965).

Avoidance of conflicting federal and state court decrees also is stated as a theoretical underpinning for the refusal to entertain domestic relations cases.[90] After *Erie Railroad v. Tompkins*,[91] of course, the federal court would be applying state family law. These reasons suggest a fear that the policies of *Erie* will fail because of the inability or unwillingness of federal judges to master the family law developed in the states.[92] In general, the determination of what a domestic relationship should be, sometimes described as determining status,[93] is still considered beyond the competence of the federal courts. Included are questions whether a divorce should be granted,[94] alimony or support should be ordered,[95] one person or another should have custody of or rights to visit a child,[96] an adoption should be decreed,[97] or a child should remain in the United States.[98]

2. *Domestic Relations Exception Inapplicable*

The narrow character of the exception is readily apparent when one contrasts groups of cases in which the federal courts have exercised diversity jurisdiction in spite of a close connection to domestic relations.[99] Federal courts ordinarily have jurisdiction to declare the validity and effect of instruments and decrees. For example, the United States Supreme Court in 1888 stated that federal courts prima facie had jurisdiction to entertain a suit for cancellation of an allegedly forged instrument, even though it was a purported written declaration of marriage.[100] Actions to declare an alleged divorce invalid[101] and to obtain property or damages because of the effect of the invalid divorce[102] have been held within diversity jurisdiction. In these actions, the petitioner sometimes sought a determination of the effect of an instrument or court decree in order to pursue a separate cause of action in contract or tort to obtain property or money. These actions have sometimes been described as actions to determine the property rights,[103] and not the status, of the parties.

---

90. Sutter v. Pitts, 639 F.2d 842, 844 (1st Cir. 1981); Huynh Thi Anh v. Levi, 586 F.2d 625, 632 (6th Cir. 1978); Crouch v. Crouch, 566 F.2d 486, 487 (5th Cir. 1978). *Crouch* mentioned congestion of federal courts as a possible reason for the exception, but refused to deny jurisdiction on that basis. *Id.* at 486–87.

91. Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

92. The reasons given are consistent with the *Erie* policies of insuring that the outcome in a federal suit does not differ from that in the state court, Guaranty Trust Co. v. York, 326 U.S. 99, 109 (1945), discouraging forum shopping, and avoiding inequitable administration of the laws. Hanna v. Plumer, 380 U.S. 460, 467 (1965).

93. Vestal & Foster, *supra* note 88, at 31.

94. Ostrom v. Ostrom, 231 F.2d 193 (9th Cir. 1955); Bowman v. Bowman, 30 F. 849 (7th Cir. 1887); *In re* Wilson, 314 F. Supp. 271 (E.D. Tenn. 1970).

95. Buechold v. Ortiz, 401 F.2d 371 (9th Cir. 1968).

96. Hernstadt v. Hernstadt, 373 F.2d 316 (2nd Cir. 1967).

97. Huynh Thi Anh v. Levi, 586 F.2d 625 (6th Cir. 1978).

98. Bergstrom v. Bergstrom, 623 F.2d 517 (8th Cir. 1980).

99. There does appear to be an alarming degree of inconsistency in application of the exception. For example, a court that described the exception as narrow upheld jurisdiction to determine legal fees in connection with a domestic matter, but criticized availability of diversity jurisdiction and suggested that had a request been timely made the issue would have been left to state resolution. Phillips, Nizer, Benjamin, Krim & Ballon v. Rosenstiel, 490 F.2d 509, 514–16 (2nd Cir. 1973). Inconsistencies are a major reason for recommendation that the exception be abrogated entirely. Note, *The Domestic Relations Exception to Diversity Jurisdiction: A Re-Evaluation*, 24 B.C.L. REV. 661, 673–74 (1983).

100. Terry v. Sharon, 131 U.S. 40 (1889).

101. Harrison v. Harrison, 214 F.2d 571 (4th Cir.), *cert. denied*, 348 U.S. 896 (1954); Spindel v. Spindel, 283 F. Supp. 797 (E.D.N.Y. 1968); McNeil v. McNeil, 78 F. 834 (N.D. Cal. 1897).

102. Cohen v. Randall, 137 F.2d 441 (2nd Cir.), *cert. denied*, 320 U.S. 796 (1943).

103. Note, *supra* note 99, at 673–74.

A related group of cases decided since 1980 that has been held to fall within diversity jurisdiction involves tort causes of action for money damages arising from marital disputes, including abduction of a child.[104] In *Cole v. Cole*[105] and *Wasserman v. Wasserman*[106] the Fourth Circuit Court of Appeals explained that a tort cause of action was not dependent on family relationships and was within the competence of federal courts. Most important, both decisions recognized that the power to determine the validity and effect of prior orders and to allow money damages for their violation need not include substantive determinations of family relations.[107] In *Wasserman*, a tort action for abduction of a child in violation of an existing custody order, the court emphasized that it was not being asked to make a "determination of entitlement to custody"[108] because "[t]he only genuine custody issue—whether appellant was entitled to custody for all times relevant to the complaint—was definitively determined by [the state court order]."[109]

In *Bennett v. Bennett*,[110] the court cited *Wasserman* favorably and held that the tort cause of action should be heard in the diversity action. In an extremely brief discussion the court pointed out that the domestic relations exception was carved out long ago and that under it a federal court will not take jurisdiction if that would require it to "grant a divorce, determine alimony or support obligations, or resolve parental conflicts over the custody of their children."[111] It then stated that a federal court will hear suits such as tort or contract "which do not exceed . . . its competence."[112] The court stated that a federal court is entirely competent to determine traditional tort issues, and, recognizing that the case would depend upon the validity and effect of the various state custody decrees in existence at the time of the alleged tort, it held that "the task of determining such validity and effect is also not beyond the competence of the federal courts."[113] These recent decisions entertaining the cause of action for tort damages for child abduction are consistent with the previous cases in which a determination of the effect of a decree involving domestic relations was held to be within federal diversity jurisdiction.[114]

In one group of cases, an action to enforce a previously granted state decree affecting a domestic relations matter also has been accepted as within the competence

---

104. Lloyd v. Loeffler, 694 F.2d 489 (7th Cir. 1982); Bennett v. Bennett, 682 F.2d 1039 (D.C. Cir. 1982); Wasserman v. Wasserman, 671 F.2d 832 (4th Cir.), *cert. denied*, 103 S. Ct. 372 (1982); Fenslage v. Dawkins, 629 F.2d 1107 (5th Cir. 1980); Kajtazi v. Kajtazi, 488 F. Supp. 15 (E.D.N.Y. 1978). For analyses of tort causes of action against the noncustodial parent and those who conspire with her or him, *see* Note, *supra* note 4; Note, *The Tort of Custodial Interference—Toward a More Complete Remedy to Parental Kidnappings*, 1983 ILL. L. REV. 229; Note, *Tortious Interference with Custody: An Action to Supplement Iowa Statutory Deterrents to Child Snatching*, 68 IOWA L. REV. 495 (1983). For a list of cases see Wood v. Wood, 338 N.W.2d 123, 125 (Iowa 1983).

105. 633 F.2d 1083 (4th Cir. 1980).

106. 671 F.2d 832 (4th Cir.), *cert. denied*, 103 S. Ct. 372 (1982).

107. Cole v. Cole, 633 F.2d 1083, 1087 (4th Cir. 1980); Wasserman v. Wasserman, 671 F.2d 832, 835 (4th Cir.), *cert. denied*, 103 S. Ct. 372 (1982). *See* Note, *supra* note 99, at 667-80.

108. 671 F.2d 832, 835 (4th Cir.), *cert. denied*, 103 S. Ct. 372 (1982).

109. *Id.*

110. 682 F.2d 1039 (D.C. Cir. 1982).

111. *Id.* at 1042.

112. *Id.*

113. *Id.*

114. Crouch v. Crouch, 566 F.2d 486 (5th Cir. 1978); Richie v. Richie, 186 F. Supp. 592, 594 (E.D.N.Y. 1960) (separation agreement).

and jurisdiction of federal courts in diversity cases. In these cases the plaintiff had not pursued a separate cause of action in which validity of the domestic relations decree was an ancillary issue, but rather, had asserted a cause of action to enforce a contract or the decree itself.[115] The decisive factor in avoiding the domestic relations exception has been the lack of any opportunity to determine substantive domestic relations matters.[116] Enforcement of nonmodifiable monetary obligations has not been unusual.[117] Federal courts occasionally have enforced modifiable alimony obligations as well. The earliest significant case of this kind was *Harrison v. Harrison,*[118] in which the plaintiff sued in the District Court for the Eastern District of Virginia to enforce an Ohio alimony decree. The court not only entered a judgment enforceable by federal procedures for the past due alimony, but also entered an order to pay future alimony. The court quoted favorably the trial court's declaration that it would not entertain an application for modification, thereby leaving such changes to the Ohio court which, if made, would be adopted by the federal court. The Court of Appeals justified enforcement by noting that otherwise the plaintiff would be compelled to sue at law on each installment, which might afford the obligor an opportunity to evade enforcement. For authority that such power existed, the court quoted both the Supreme Court's holding in the 1858 *Barber* decision that equity power existed to enforce alimony orders,[119] and modern statements that the intent of *Erie v. Tompkins* was to insure that the outcome of litigation in a federal court exercising diversity jurisdiction should be substantially the same as if tried in a state court.[120]

In 1976 in *Keating v. Keating*[121] the Fourth Circuit Court of Appeals reversed and remanded a district court's refusal to enforce a state alimony decree for future payments, holding that the plaintiff was entitled to the full breadth of relief afforded by the state decree so long as it was not modified.

IV. Enforcement of Child Custody Decrees

A. *Traditionally Within the Exception*

Although federal courts have enforced monetary decrees for alimony, occasionally even when subject to modification, no federal court had enforced child custody orders[122] prior to *Bennett*. It is submitted that the reason no federal court had enforced child custody orders before *Bennett* lies in the nearly universal practice

115. Barber v. Barber, 62 U.S. (21 How.) 582 (1859) (alimony); Gonzales v. Gonzales, 74 F. Supp. 883 (E.D. Pa. 1947) (alimony).

116. For an analysis classifying the cases as "property/status," "nature of the case," or "determine/enforce," see Note, *supra* note 99, at 673–74. However, whether they are classified as "property" or "tort" cases is hardly significant. The common denominator among all in which jurisdiction was found is the absence of any need to make a substantive determination of a family relations issue.

117. *See, e.g.*, Bennett v. Bennett, 682 F.2d 1039, 1042 n.2 (D.C. Cir. 1982).

118. 214 F.2d 571 (4th Cir.), *cert. denied*, 348 U.S. 896 (1954).

119. *Id.* at 573.

120. *Id.* at 574.

121. 542 F.2d 910 (4th Cir. 1976). *Cf.* Crouch v. Crouch, 566 F.2d 486 (5th Cir. 1978) (judgment for present value of future payments promised in separation agreement).

122. Bennett v. Bennett, 682 F.2d 1039, 1042 n.2 (D.C. Cir. 1982).

within states of entertaining motions to modify in proceedings brought to enforce a previous child custody order.[123]

As described earlier,[124] because the United States Supreme Court had held that modifiable custody orders were not entitled to more credit than would be due in the state where decreed, the second state court, if asked to enforce a prior state court's custody order, routinely entertained the modification request. This was the incentive for interstate child abduction that has been so thoroughly publicized and criticized. What has not been as widely noted is that this same practice accounted for the application of the domestic relations exception to federal diversity jurisdiction when a petitioner sought federal enforcement of a custody decree.

In 1967 in the leading case of *Hernstadt v. Hernstadt,*[125] an action for a declaratory judgment construing a parent's visitation rights, the Second Circuit stated that the domestic relations exception precluded federal court jurisdiction to adjudicate custody and that because custody decrees were not entitled to full faith and credit,[126] the obligations of that clause would not affect the exception. Without discussion, the court assumed that any attempt to construe or enforce the earlier decree would require a re-examination of the merits.[127] That assumption must have been based on knowledge of the common practice. A federal court, which seeks to act as another state court and to afford the same relief obtainable in state court, would follow the state practice of entertaining the modification request in the enforcement proceeding. That, of course, would require a determination on the merits of who should have custody of the child. That was clearly a determination long excluded by the domestic relations exception.

A more recent case dramatically displays the posture taken by the federal courts prior to 1981 when asked to enforce one of two conflicting state custody judgments. In *Sutter v. Pitts*[128] an Alabama court had given the father custody rights, after which a Massachusetts court awarded the mother custody. The father took the child from Massachusetts. The mother instituted an action in the federal district court for Massachusetts seeking an injunction restraining the father from refusing to deliver the child to her. Although the mother alleged violations of her constitutional rights, the First Circuit Court of Appeals agreed with the district court that she was actually seeking enforcement of the state court custody decree. The court held that the domestic relations exception applied because a de novo determination on the merits would be necessary to resolve the mother's request, and a likelihood of conflicting state and federal decrees would result.[129] As in *Hernstadt,* the court assumed that a determination on the merits would be necessary. Since Massachusetts had not enacted the

123. In custody proceedings, both enforcement of an order and its modification are prospective in nature. In contrast, alimony obligations, being monetary, are enforced by execution or garnishment. The practice is to entertain future alimony modification requests by motion only in the original action. This could explain why a federal court would be willing to enforce modifiable alimony orders, but not modifiable custody orders.

124. *See supra* text accompanying notes 6–11.

125. 373 F.2d 316 (2d Cir. 1967).

126. *Id.* at 318.

127. *Id.*

128. 639 F.2d 842 (1st Cir. 1981).

129. *Id.* at 844.

UCCJA and the PKPA had not been passed at the time of argument before the federal court, traditional state law and practice would convert what appeared to be an enforcement action into a modification proceeding.

The similarity of *Sutter* to the holding in *Bennett v. Bennett*[130] is striking. The *Bennett* court held that the request for an injunction to enforce the custody decree would not be entertained because it would depend not merely on past rights and wrongs, but "would also require an inquiry into the present interests of the minor children,"[131] which would "seriously compromise the principles underlying the domestic relations exception."[132] The court apparently meant the principle that federal courts were not competent to decide the merits of custody disputes. The plaintiff had stated in his brief that only a federal court's process would be effective in the matter because the Ohio court would not enforce the District of Columbia decree. Although the court sympathized with his concern, it stated that there were better ways to resolve the dilemma "than by giving the federal courts the power to determine the custody of children."[133] The court then briefly discussed the PKPA, noting, "[C]onspicuously absent from this comprehensive enactment is any provision creating or recognizing a direct role for the federal courts *in determining child custody*."[134]

The holdings and rationales of *Sutter* and *Bennett* are similar, but *Sutter* is right and *Bennett* is wrong. The reason is the effect of the PKPA, enacted on December 28, 1980, after *Sutter* but before *Bennett*.[135]

B. *PKPA: Eliminating the Basis for the Domestic Relations Exception*

The *Bennett* court correctly used legislative history and the stated purposes of the newly enacted PKPA to support its conclusion that the intent of Congress was that determinations on the merits of child custody issues should be left to the states. However, the court analyzed neither the mechanism by which the statute carried out that purpose nor the further purpose to limit those determinations as much as possible to the court initially making a custody order. Consequently, it failed to detect the crucial difference between enforcement and modification, and that enforcement need not involve a determination of child custody.[136] Judge Edwards understood and

130. 682 F.2d 1039 (D.C. Cir. 1982).

131. *Id.* at 1042. At this point the court cited the RESTATEMENT (SECOND) OF TORTS § 942 (1979) concerning injunctions against tort. This suggests a failure to realize that it was being asked to enforce a judgment, not enjoin a tort.

132. 682 F.2d 1039, 1043 (D.C. Cir. 1982).

133. *Id.*

134. *Id.* (emphasis added).

135. *Sutter* was argued on appeal December 2, 1980, and decided February 11, 1981. The *Bennett* opinion states that the district court denied plaintiff's motion for reconsideration on October 29, 1980. *Id.* at 1041. But the case was not argued before the court of appeals until April 26, 1982. It was decided July 23, 1982. The federal rule is that a statute enacted while a case is on direct review should be applied unless it would result in manifest injustice. Bradley v. Richmond School Bd., 416 U.S. 696, 711 (1973). Because private parties were involved and argument had already been held in *Sutter*, it probably would have been unfair to apply the PKPA, but in *Bennett* argument was 16 months after enactment. *See id.* at 716 (discussion of possible exception for private parties). The exception has been held inapplicable in a child custody case. Tufares v. Wright, 98 N.M. 8, 644 P.2d 522 (1982).

136. Unfortunately, two student notes have approved the majority opinion in *Bennett* because they also failed to recognize that the PKPA now requires differentiation between enforcement and modification. *See* Note, *Federal Jurisdiction—The Domestic Relations Exception and the Tort of Interstate Child-Snatching*, 16 CREIGHTON L. REV. 815, 827 (1983); Note, *supra* note 99, at 684 (critizing *Bennett* result and advocating elimination of the domestic relations exception).

utilized the distinction between enforcement and modification in his dissent. The PKPA supplies the missing legal imperative for his position. In one brief enactment Congress has nationally mandated enforcement by state authorities, not modification, of child custody determinations, thus filling the full faith and credit void and demolishing the practice of routinely entertaining modification requests in interstate child custody enforcement actions. The PKPA forbids the traditional state practice of converting an interstate enforcement action into a modification proceeding. The PKPA eliminates Bodenheimer's third myth.[137] The *Bennett* majority described the situation before it as "profoundly sad."[138] The situation was more profoundly sad than it realized, for the court's holding was based on no more than a destroyed myth.

Although the PKPA by its terms does not apply to federal courts, it obliterates the rationale that had supported the domestic relations exception to diversity jurisdiction in actions to enforce child custody orders. The rationale for the exception had been that the federal court would be forced to determine the merits of a custody relationship whenever requested to enforce a child custody order. The PKPA, if applicable in the diversity action, also would mandate enforcement without regard to the merits in the diversity proceeding. Assuming the PKPA is within the constitutional lawmaking authority of Congress,[139] it would be applicable in a diversity action on one of two bases in the federal Rules of Decision Act,[140] which requires that the laws of the state apply in diversity actions "except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide."[141] One basis for application of the PKPA is the state law clause and the *Erie* doctrine. The theory would be that the law of judgments applicable in the state where the federal court sits is the law to be applied by the diversity court.[142] This is the rationale most often presented by federal courts holding that a federal diversity court must accord the same full faith and credit to another state's judgment as would be accorded to it by the courts of the state where it sits.[143]

The other basis would be the federal law exception in the Act. When a right based on a federal statute is asserted in a diversity action, the federal statute is controlling and the state law provision is not applicable.[144] It has been forcefully argued that the federal statute implementing the full faith and credit clause of the Constitution is the true basis for the rule that federal courts in diversity suits must give full faith and credit to judgments of other state courts.[145] That statute[146] specifies that judicial proceedings of any state "shall have the full faith and credit in every court

137. *See supra* text accompanying note 36.

138. 682 F.2d 1039, 1040 (D.C. Cir. 1982).

139. The claimed sources of power are the full faith and credit clause and commerce clause. P. HOFF & J. SCHULMAN, *supra* note 7, at 1–6.

140. 28 U.S.C. § 1652 (1982).

141. *Id.*

142. Hardy v. Bankers Life & Casualty Co., 232 F.2d 205, 208 (7th Cir.), *cert. denied*, 351 U.S. 984 (1956).

143. Degnan, *Federalized Res Judicata*, 85 YALE L.J. 741, 753 (1976).

144. Connecticut Mutual Life Ins. Co. v. Schaefer, 94 U.S. 457, 458 (1877); Grand Bahama Petroleum Co. v. Asiatic Petroleum Corp., 550 F.2d 1320, 1326 (2d Cir. 1977); Chicago & N.W. Ry. v. Davenport, 205 F.2d 589, 594 (5th Cir. 1953), *cert. denied*, 346 U.S. 930 (1954); Cone Mills Corp. v. Hurdle, 369 F. Supp. 426, 432–33 (N.D. Miss. 1974).

145. Degnan, *supra* note 143, at 750–55.

within the United States," thus addressing both state and federal courts. A federal diversity court is required, therefore, by this federal statute to give full faith and credit, and the *Erie* rationale is superfluous. Such straightforward reasoning is not possible under the PKPA because its words are directed only to the "authorities of every State."[147] The federal law rationale would be correct, however, in the sense that the federal statute mandates rights to enforcement that state law cannot ignore or abrogate.[148] Consequently, there is no state law upon which *Erie* could operate. Since either the federal law or the *Erie* interpretation of the PKPA under the Rules of Decision Act would require that federal courts apply the PKPA, drawing the distinction may be purely academic. Some opinions requiring federal courts to recognize other state court judgments have referred to both bases in support of their decision.[149]

What is clear is that the PKPA would apply in a diversity suit for enforcement of a child custody order and would require the differentiation between enforcement and modification for which Judge Edwards argued. Since the primary mandate of the PKPA is to require enforcement without regard to the merits in the second court and modification in the initial court, the rationale for the domestic relations exception to diversity jurisdiction will no longer exist in most cases. In those cases in which the PKPA entitles plaintiff to an order of enforcement in state court, the federal court should fashion whatever comparable federal relief is necessary to enforcement.[150] The remedy need not be labeled in the same way as the appropriate state remedy.[151] The most likely order would be in the nature of an injunction to deliver the child or to refrain from violating the custody order. It would be a tragic irony if it were federal courts that refused to recognize this federally created right to enforcement.

C. *Applying the PKPA in Diversity Actions for Enforcement of Child Custody Orders*

The PKPA requires the court of a second state, when presented with a request to enforce or modify a prior state's decree concerning the child's custody, to determine whether the prior decree is entitled to enforcement under the PKPA.[152] If it is, enforcement without regard to the merits must be granted. The federal court in a diversity action is subject to the PKPA just as a state court to which its terms were addressed. For that reason alone, the federal court in the diversity action should entertain the enforcement request *before* deciding that the domestic relations exception applies. Only if enforcement is not required would dismissal or a continuance until the appropriate state court has modified be in order.

---

146. 28 U.S.C. § 1738 (1982).

147. *Id.* § 1738A.

148. Sola Elec. Co. v. Jefferson Elec. Co., 317 U.S. 173, 176 (1942) (stating that the *Erie* doctrine "is inapplicable to those areas of judicial decision within which the policy of the law is so dominated by the sweep of federal statutes that legal relations which they affect must be deemed governed by federal law having its source in those statutes, rather than from local law").

149. Gambocz v. Yelencsics, 468 F.2d 837, 841 n.4 (3d Cir. 1972); Porter v. Wilson, 419 F.2d 254, 257 (9th Cir. 1969), *cert. denied*, 397 U.S. 1020 (1970).

150. 28 U.S.C. § 1651(a) (1982) provides that federal courts may issue all "necessary" and "appropriate" writs. The fact that the purpose of the order would be to enforce and not modify a valid decree renders irrelevant the *Bennett* majority's distinctions between retrospective and prospective relief. *See* 682 F.2d 1039, 1042 (D.C. Cir. 1982).

151. Stern v. South Chester Tube Co., 390 U.S. 606 (1968).

152. 28 U.S.C. § 1738A(f) (1982).

The *Bennett* situation is complicated by the fact that the decree sought to be enforced is that of the jurisdiction within which the federal court was sitting. The PKPA requires "[t]he appropriate authorities of every State" to enforce any child custody determination made "by a court of another State."[153] If the enforcement proceeding were brought as an independent injunction action in a District of Columbia court, assuming that the District is a state for purposes of the Act,[154] the PKPA would not be applicable because a decree of *another* state is not involved.[155] Enforcement in *Bennett* was not of a custody determination of *another* state, but rather, for a decree of the same jurisdiction in which the federal court was sitting. Technically, the PKPA could be ignored. The majority decision in *Bennett* would be supportable because the decree was modifiable within the District, enforcement proceedings in the District would include a modification request, and the domestic relations exception could apply. This would be technically accurate, but "profoundly sad."

The newly enacted national policy of the PKPA, to discourage interstate child abductions through enforcement of decrees, would be furthered by granting the injunction. The national policy of distinguishing enforcement from modification and favoring the former would be furthered by entertaining the action unless modification were requested. If it were, then dismissal or continuance of the action until the district court had ruled on the modification request would be appropriate. There is no indication in the *Bennett* opinion that the mother would request modification. The petitioner father was seeking an effective way to enforce the custody order against an interstate child abductor who had violated the order. The policy of differentiating between enforcement and modification undermines the rationale for the domestic relations exception as surely as would the technical application of the statute. Since enforcement does not require a consideration of modification, there is no more reason to

153. *Id.* § 1738A(a).

154. *Id.* Section 1738A(b)(8) defines the term "State" to include the District of Columbia. *Cf.* Washington Gas Light Co. v. Hsu, 478 F. Supp. 1262 (D. Md. 1979).

155. An entirely different way to analyze *Bennett* requires full application of the PKPA to the District of Columbia decree. This may be best understood by considering other PKPA litigation in which state courts have been asked to enter a new order after the enactment of the PKPA. These courts have applied the PKPA "provisions" to orders made prior to the PKPA's passage to determine whether they now have jurisdiction to modify. *See, e.g.*, Mitchell v. Mitchell, 437 So. 2d 122 (Ala. App. 1982); Flannery v. Stephenson, 416 So. 2d 1034 (Ala. App. 1982); Leslie L.F. v. Constance F., 110 Misc. 2d 86, 441 N.Y.S.2d 911 (Fam. Ct. 1981); Virginia E. E. v. Alberto S. P., 110 Misc. 2d 448, 440 N.Y.S.2d 979 (1981); Quenzer v. Quenzer, 653 P.2d 295 (Wyo. 1982), *cert. denied*, 103 S. Ct. 1436 (1983). The PKPA provides that the authorities of every state shall enforce "any child custody determination made consistently with the provisions of this section by a court of another State." 28 U.S.C. § 1738A(a) (1982). If a decree entered prior to the PKPA was made consistently with its provisions, after the passage of the PKPA it would be entitled to enforcement and modification would be precluded. Conversely, if a decree entered prior to the PKPA, although valid and enforceable under state law, was not in accord with the PKPA provisions, then by the terms of the PKPA it would not be entitled to enforcement and could be modified. *Cf.* Coombs, *Enforcement*, *supra* note 34, at 8–2. In *Bennett* the 1979 District of Columbia decree was a modification of the initial order entered in Ohio, which had awarded custody to the mother. Ohio was the home state of the children at the time of the Ohio order. Since the children had been in the district only one year prior to the 1979 order, Ohio may have had continuing jurisdiction under its version of the UCCJA, OHIO REV. CODE ANN. § 3109.21 to .37 (Page 1980). If so, under the PKPA, the district court would have been forbidden to enter a new order and the order it entered would not have been consistent with any of the PKPA "provisions." Therefore, although the order would be valid because the District of Columbia had not enacted the UCCJA, it would not be entitled to enforcement under the PKPA. The limiting words of the PKPA require a different result than under the full faith and credit statute, under which the Supreme Court has held that the third forum court must enforce a judgment of the second forum that failed to give full faith and credit to a first forum judgment. Trienies v. Sunshine Mining Co., 308 U.S. 66, 78 (1939). Retroactivity and collateral attack are beyond the scope of this Article.

except that form of enforcement from diversity jurisdiction than there is to except the tort cause of action.[156]

Once it is recognized that none of the reasons for the exception are applicable, Judge Edward's criticism is even more credible. He noted that to refuse the injunction but to allow tort damages permitted the abducting parent to purchase the illegal custody of the child.[157] The incentive to abduct a child and go to a second jurisdiction lies partially in the knowledge that it will be difficult for the rightful custodian to proceed with an enforcement action, either in federal or state court at the distant location to which the child is taken. If there is no possibility of the federal court of the first jurisdiction granting an injunction that can reach the abductor, the disgruntled parent is encouraged to try to reach the relative safety of the second state. An abductor who is either judgment proof or willing to pay may succeed in retaining the child. The reasoning of the *Harrison*[158] court in enforcing future alimony orders to prevent their evasion is now applicable to child custody orders.

A second reason why the *Bennett* court should have entertained the enforcement action is the illogical and adverse result of different domestic relations exceptions depending upon whether the federal court is sitting where the decree was rendered or at the location of the second state to which the child has been taken. The result the Seventh Circuit reached in *Lloyd v. Loeffler*[159] is evidence of the danger. In *Lloyd* the custody decree had been granted in Maryland and the mother, apparently in violation of the decree, took the child to Wisconsin, where her parents cooperated to conceal the child's whereabouts. The suit was filed in the federal District Court for the Eastern District of Wisconsin. Wisconsin had enacted the UCCJA in a form that may have required the courts of Wisconsin to enforce and not modify the Maryland decree,[160] and the PKPA had been enacted well before the argument and decision on appeal.[161] Consequently, the enforcement principles of the UCCJA and the PKPA should have been even more applicable in *Lloyd* than in *Bennett*. However, neither were discussed. The trial court recognized a tort cause of action against the grandparents for conspiracy to interfere with Lloyd's custody of the child. This was affirmed on appeal.[162] The trial court also entered a damage award of $2,000.00 every month until the child was returned to her father's lawful custody. The court of appeals, in a lengthy dictum, characterized this as the equivalent of an injunction order.[163] It said that the district court should have considered whether it had the

156. Economy of litigation calls for combining the two causes of action rather than encouraging separate suits for different remedies in the state and federal courts as *Bennett* does. *See* Note, *supra* note 99, at 673–74.

157. 682 F.2d 1039, 1045 (D.C. Cir. 1982).

158. 214 F.2d 571 (4th Cir.), *cert. denied*, 348 U.S. 896 (1954). *See supra* text accompanying notes 118–20.

159. 694 F.2d 489 (7th Cir. 1982).

160. WIS. STAT. ANN. § 822.14 (West Supp. 1983).

161. *Lloyd* was argued Oct. 5, 1982 and decided Nov. 30, 1982.

162. 694 F.2d 489, 497 (7th Cir. 1982).

163. *Id.* at 494.

164. *Id.* The court mentioned the PKPA only to say that it did not preclude federal remedies. *Id.* at 493.

163. *Id.* at 494. Interestingly, the court expressed concern for the welfare of the child in wrenching her from the abductors who had had her in custody for three years, and concern for the "costly option" of her abductors to go back to Maryland for a modification while the monthly damage award continued. This has an Alice in Wonderland quality to it. Both the state UCCJA and the federal PKPA evidence legislative policy decisions that the welfare of the child should be determined in Maryland so long as that state's courts continued to have jurisdiction. The welfare of a particular child may

power to enjoin the grandparents directly, and that "[a]n affirmative answer would produce a collision" with *Bennett*.[164] The court assumed, as had the majority in *Bennett*, that an injunction action necessarily would involve consideration of the merits of the dispute. It commented that deciding to put pressure on the grandparents necessarily would answer the question of who should have custody of the child at the time of attempted enforcement.[165]

What is most dangerous in the *Lloyd* language is its assumption that any enforcement proceedings will reach the merits, and its apparent ignorance of the necessity to determine whether there would be jurisdiction to consider the merits in the state court. The UCCJA, the law of Wisconsin, and the PKPA (which is federal law controlling in every state), require that that inquiry be made first. In contrast to the *Bennett* situation, the decree sought to be enforced in *Lloyd* was that of a court of another state. Thus, both the UCCJA and the PKPA would mandate that the Wisconsin authorities enforce, not modify, the decree, unless Maryland no longer had jurisdiction. The enforcement/modification dichotomy, which now obtains everywhere, applies with particular force when the diversity proceeding for enforcement is brought in a federal court of a state other than the one where an initial decree was entered. Then the Rules of Decision Act would require application of the PKPA. Thus, the principles supporting the domestic relations exception to diversity jurisdiction would no more apply than in the tort cause of action. The reasoning of *Bennett* was not only wrong, but is singularly inapt in the *Lloyd* situation.

V. CONCLUSION

The erroneous rationales of *Bennett* and *Lloyd* carry a special danger for undermining the purposes and goals of the PKPA, because the two together prevent the rightful custodian of an abducted child from obtaining enforcement in the federal court of either his own or the abductor's state. The custodian is forced into the courts of the abductor's state, which have shown an alarming tendency to continue their parochial protection of their own residents even under the PKPA. Since the terms of the PKPA were not analyzed in either opinion, the decisions should have little precedential value. When federal courts in the future are presented squarely with the question of the PKPA's effect on enforcement of child custody determinations in federal court, the errors of *Bennett* and *Lloyd* should be avoided.[166]

---

be sacrificed, but the legislative decision is that continuing jurisdiction in the initial court will decrease the overall horrors of child abduction. It is ironic that the federal court, in the name of a court-created exception to diversity jurisdiction designed to protect it from having to consider the merits of the welfare of the child, considered the merits and made a decision contrary to the legislative mandate that it not consider them. If the court had applied the UCCJA or the PKPA, it might have decided that Maryland no longer had jurisdiction, and, therefore, that the courts of Wisconsin did have power to modify and the domestic relations exception applied. But its erroneous application of the law precluded it from making the key determination under the PKPA that could have resulted in enforcement, *i.e.*, that Maryland's jurisdiction continued. In that situation, Congress has decided that the expense of going back to Maryland for modification is warranted.

166. Flood v. Braaten, 727 F.2d 303 (3d Cir. 1984) (reported after this manuscript was submitted for publication) was the first such decision. The court held that federal intervention to stay a state modification proceeding was permissible. The court clearly differentiated between enforcement and modification, noting that "[b]ecause § 1738A permits only one state at a time to assert jurisdiction, a federal court could enforce a decree without becoming enmeshed in the underlying custody dispute." *Id.* at 310. The court explained that Congress could not have intended to render § 1738A virtually nugatory by precluding a federal forum from insuring compliance. *Id.* at 312.

The Parental Kidnapping Prevention Act indirectly requires federal courts in diversity actions to entertain a request to enforce the prior custody determination of another state. The PKPA has removed the domestic relations exception rationale for not doing so. Additionally, the federal courts should be available to enforce child custody determinations of the state where the federal court sits when the determinations are not modifiable in that state, or when no request for modification has been made. Federal enforcement would make effective the policy of the PKPA by finally insuring uniform national standards for jurisdiction to enforce and to modify child custody determinations, which could significantly reduce child abduction.