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THE UNCONSTITUTIONALITY OF OKLAHOMA'S STATUTE DENYING RECOGNITION TO ADOPTIONS BY SAME-SEX COUPLES FROM OTHER STATES

Robert G. Spector*

I. INTRODUCTION

An incredible amount of ink has been spilled on whether a state will recognize same-sex marriages from other states or foreign countries, while almost no ink has been spilled on the question of whether adoptions of children by same-sex couples will receive recognition. Perhaps the inkwell remains untouched regarding these issues because up until last year no state attempted to deny recognition of such adoptions. This changed when Oklahoma amended its adoption statutes as follows:

> The courts of this state shall recognize a decree, judgment, or final order creating the relationship of parent and child by adoption, issued by a court or other governmental authority with appropriate jurisdiction in a foreign country or in another state or territory of the United States. The rights and obligations of the parties as to matters within the jurisdiction of this state shall be determined as though the decree, judgment, or final order were issued by a court of this state. *Except that, this state, any of its agencies, or any court of this state shall not recognize an adoption by more than one individual of the same sex from any other state or foreign jurisdiction.*[1]

While this section has interpretive problems,[2] the major question is whether

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1. Okla. Stat. tit. 10, § 7502-1.4(A) (Supp. 2005) (emphasis added). The amendment was apparently adopted in response to an opinion by the Oklahoma Attorney General's office to the effect that the United States Constitution and Oklahoma law required an Oklahoma agency to recognize adoption decrees issued to same-sex couples by other states. *See* Okla. Atty. Gen. Op. 04-8, ¶¶ 14, 16 (Mar. 19, 2004).

2. The statute provides that Oklahoma will recognize only one parent of a same-sex adoption from another state. Its interpretation is probably clear if the adoption is by one partner of the other partner's biological child, which is the equivalent of a stepparent adoption. In such a case Oklahoma would probably not recognize the adoption at all and only recognize the biological parent as the legal parent. However, if a same-sex couple adopts a child that is unrelated to either member of the couple, the statute is totally silent in terms of which member of the couple would be recognized as the legal parent. The vast majority of same-sex adoptions appear to be those where one partner adopts the

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Oklahoma can choose to disregard an adoption decree from another state.[3] The author contends that the provision is invalid.[4] First, it violates federal law embodied in the Parental Kidnaping Prevention Act ("PKPA"),[5] which requires states to give full faith and credit to custody determinations of other states if made in accordance with the PKPA's jurisdictional requirements. Second, even if the PKPA did not exist, the Oklahoma statute would violate the Full Faith and Credit Clause of the United States Constitution[6] because an adoption decree is a final judgment and not subject to modification in the state where the judgment is rendered. Therefore, the judgment must be respected by all other states.[7]

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other partner's biological child. Claire Buxton & Kate Warner, *Adoption by Same Sex Couples* 6, http://www.law.utas.edu.au/reform/Publications/adoption/AdoptionEasyPrint.pdf (Feb. 2003); Natl. Ctr. for Lesbian Rights, *Adoption by Lesbian, Gay, and Bisexual Parents: An Overview of Current Law* 5-8, http://www.nclrights.org/publications/pubs/adptn0204.pdf (Jan. 2004). *See generally* Maxwell S. Peltz, *Second-Parent Adoption: Overcoming Barriers to Lesbian Family Rights*, 3 Mich. J. Gender & L. 175 (1995); Ruthann Robson, *Making Mothers: Lesbian Legal Theory & the Judicial Construction of Lesbian Mothers*, 22 Women's Rights L. Rep. 15, 18-19 (2000).

3. The question is phrased in terms of disregarding an adoption granted in another state rather than a foreign country. The number of European countries that allow same-sex adoptions is far fewer than those that authorize same-sex marriages or civil unions. Currently, of those countries that allow same-sex marriages or civil unions, only the Netherlands, Denmark, and Iceland allow same-sex couples to adopt. Norway, France, Sweden, and Germany prohibit same-sex couples from adopting. Symposium, *Developments in the Law—The Law of Marriage and Family*, 116 Harv. L. Rev. 1996, 2011 (2003).

Black letter law provides that a state has far more freedom to refuse to recognize a judicial decision from a foreign country than from another state of the United States. In particular, a state may refuse to enforce a foreign judgment on public policy grounds. While this ground for refusal of recognition of foreign judgments is said to apply only in exceptional circumstances, Eugene F. Scoles, Peter Hay, Patrick J. Borchers, & Symeon C. Symeonides, *Conflict of Laws* § 24.44 at 1335 (4th ed., West 2004), no doubt arises that Oklahoma would find such circumstances in this situation.

4. In addition to the arguments under the Parental Kidnaping Prevention Act and the Full Faith and Credit Clause, which are discussed in this article, there is a potential argument that the Equal Protection Clause, would also invalidate the Oklahoma adoption statute. In *Romer v. Evans*, 517 U.S. 620 (1996), the Court struck down class-based legislation directed at homosexuals as a violation of the Equal Protection Clause. *Romer* invalidated an amendment to Colorado's constitution which named as a solitary class persons who were homosexuals, lesbians, or bisexual either by "orientation, conduct, practices or relationships," and deprived them of protection under state anti-discrimination laws. *Id.* at 624 (quoting Colo. Const. art. II, § 30b). The Court concluded that the provision was "born of animosity toward the class of persons affected" and further that it had no rational relation to a legitimate governmental purpose. *Id.* at 634-35. Later, in *Lawrence v. Texas*, 539 U.S. 558 (2003), the Court found that *Romer* presented a "tenable argument" for invalidating Texas same-sex sodomy laws. *Id.* at 574-75. While such an argument might also be "tenable" in attacking the Oklahoma statute, its success is not clear. However, as discussed later in this article, the statute clearly violates the Parental Kidnaping Prevention Act and the Full Faith and Credit Clause.

5. 28 U.S.C. § 1738A (2000).

6. U.S. Const. art. IV, § 1.

7. The full faith and credit issue is significantly different with regard to adoptions than it is with marriages. Marriage may be a public act, but it is not a judgment of a court in the same way that adoption is. Therefore, the restrictive rules concerning when one state may disregard a judgment of another state, such as a divorce or dissolution of marriage judgment, are not applicable. States have long had the ability to choose to apply their own law in their own court system whenever their public policy requires it. *See e.g. Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308 (1981) (holding that the forum state can apply its own law rather than the law of another state, provided it has a "significant contact or significant aggregation of contacts" with the parties and the occurrence or transaction at issue). With respect to judgments, however, the rules concerning when one state may refuse to respect the judgment of another state are very restrictive. *See Fauntleroy v. Lum*, 210 U.S. 230 (1908). Generally, a state may refuse to give full faith and credit to a judgment of another state only if that court did not have jurisdiction to enter the judgment, the judgment was not on the merits, the judgment is

II. THE CURRENT SPLIT ON SAME-SEX ADOPTION

Most states have not considered the issue of whether same-sex couples can adopt, regardless of whether the adoption is by one partner of the other partner's child or by the couple of a non-biologically related child.[8] Two states, California and Vermont, permit same-sex adoptions by statute.[9] Several other states have interpreted their adoption statutes to allow, or at least not to prohibit, same-sex couples to adopt, particularly when one partner is adopting the biological child of the other partner.[10] Although recognizing that no one has a right to adopt, these courts recognize that the best interests of the child are served because, in the words of the Ohio Supreme Court:

> Permanent placement in a judicially approved home environment through the process of adoption is clearly preferable to confining the child in an institution or relegating the child to a life of transience, from one foster home to another, until such time as the certified organization determines that it is proper to give its consent to an adoption.[11]

In contrast, same-sex adoptions are prohibited by statute in at least two states.[12] Other states have construed their adoption statutes to implicitly deny same-sex couples the ability to adopt.[13] Courts usually rationalize the result as a strict construction of their adoption statutes. Those statutes usually do not allow unrelated parties to adopt without the biological parent relinquishing parental rights. While adoption statutes do allow for adoption without the relinquishment of parental rights in the case of stepparent adoptions, courts have found those provisions not applicable to same-sex couples since they cannot marry.[14]

This dichotomy between jurisdictions will undoubtedly continue. Given the mobility of our population, inevitably same-sex couples will move from states which allow them to adopt to states where such adoptions are prohibited, thus raising the question as to whether the adoptions will receive recognition. The issue is most likely to arise in the context of a proceeding where custody of the

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modifiable, or the judgment was procured by extrinsic fraud. *See generally* Scoles et al., *supra* n. 3, at ch. 22.

8. The question of whether same-sex adoptions ought to be allowed is beyond the scope of this article. That entire topic, especially in light of *Lawrence v. Texas*, is surveyed in Martin R. Gardner, *Adoption by Homosexuals in the Wake of* Lawrence v. Texas, 6 J.L. & Fam. Stud. 19 (2004).

9. Cal. Fam. Code Ann. §§ 9000(b), 297(a)-(b) (West 2004); Vt. Stat. Ann. tit. 15A, § 1-102 (2002).

10. *See e.g. In re Pet. of K.M.*, 653 N.E.2d 888 (Ill. App. 1st Dist. 1995); *In re Adoption of K.S.P.*, 804 N.E.2d 1253 (Ind. App. 2004); *Adoption of Tammy*, 619 N.E.2d 315 (Mass. 1993); *In re Adoption of Two Children*, 666 A.2d 535 (N.J. Super. App. Div. 1995); *In re Jacob*, 660 N.E.2d 397 (N.Y. 1995).

11. *In re Adoption of Charles B.*, 552 N.E.2d 884, 889 (Ohio 1990) (quoting *State v. Summers*, 311 N.E.2d 6, 13 (Ohio 1974)) (authorizing the adoption of an eight-year-old boy by his counselor even though the counselor was homosexual).

12. Fla. Stat. Ann. § 63.042(3) (West Supp. 2005); Miss. Code Ann. § 93-17-3 (2004). The Utah statute prohibits adoption by persons living together in a sexual relationship outside of marriage. Utah Code Ann. § 78-30-1(3)(b) (2002). The constitutionality of the Florida statute was upheld in *Lofton v. Sec. of Dept. of Children and Fam. Servs.*, 377 F.3d 1275 (11th Cir. 2004), *cert. denied*, 125 S. Ct. 869 (2005).

13. *See e.g. In re Adoption of T.K.J.*, 931 P.2d 488 (Colo. App. 1996); *In re Adoption of Luke*, 640 N.W.2d 374 (Neb. 2002); *In re Angel Lace M.*, 516 N.W.2d 678 (Wis. 1994).

14. *See supra* n. 13.

adopted child is at issue. If the adoption were recognized, the court would decide the case as it would decide a custody case between two parents.[15] However, if the adoption were not recognized, the court would decide the case as if it were a case between the biological parent and a third-party. In many states this situation would result in the application of a very different standard, one favoring the biological parent.[16]

Clearly, a state that does not authorize same-sex adoptions cannot lawfully refuse to recognize a same-sex adoption from another state. To do so violates both the PKPA and the Full Faith and Credit Clause of the Constitution.

III. THE PARENTAL KIDNAPING PREVENTION ACT[17]

The PKPA was enacted in 1980 to provide full faith and credit to child custody adjudications made in conformity with the PKPA's jurisdictional standards. The PKPA is best understood against the background of interstate child custody adjudications and the Uniform Child Custody Jurisdiction Act ("UCCJA").[18] The UCCJA was designed to bring some order out of the chaos that constituted interstate custody litigation at the time.[19] Prior to the enactment of the UCCJA, a disappointed litigant in a custody case could remove the child from the original decree-granting state to another state and begin litigation all over again. Since the original custody determination could be modified in the state that rendered it, it could be modified in another state. Such modifications had the very unfortunate tendency "to reduce the law of [interstate] custody to a rule of seize-and-run."[20]

Section 3 of the UCCJA provided that jurisdiction to make a child custody determination would lie in either the child's home state, the state where the child had significant contacts, the state where an emergency arose, or, if no other state had jurisdiction under the Act, the current forum. Other sections of the UCCJA resolved concurrent jurisdiction problems by giving priority to the first to file. The

15. In Oklahoma, as in most states, the standard would be the best interests of the child. Okla. Stat. tit. 43, § 109(A) (2001).

16. Oklahoma authorizes courts to grant custody to third parties only in limited circumstances, usually requiring a finding that the parent is unfit. *See In re Grover*, 681 P.2d 81, 83 (Okla. 1984). Oklahoma statutes identify other circumstances where custody might be granted to third parties. Okla. Stat. tit. 10, § 21.1 (Supp. 2004); Okla. Stat. tit. 43, § 112.2 (Supp. 2005). *See generally* Robert G. Spector, *Family Law: Third Party Custody After* Baby Girl L. *and* A.G.S.*: Now Where Are We?* 56 Okla. L. Rev. 415 (2003). Whether a domestic partner can be considered *in loco parentis* for purposes of the application of the best interest standard is beyond the scope of this article. However, for an example of a case concerning this issue, see *In re A.B.*, 818 N.E.2d 126 (Ind. App. 2004).

17. 28 U.S.C. §1738A.

18. 9(IA) U.L.A. 270 (1999).

19. The background of the UCCJA is discussed in the Prefatory Note to the Act, 9(IA) U.L.A. 262-64 (1999). The Reporter for the UCCJA, Professor Brigitte M. Bodenheimer, wrote a series of very influential articles providing the background as well as indicating how the UCCJA should be implemented. *See* Brigitte M. Bodenheimer, *The Uniform Child Custody Jurisdiction Act: A Legislative Remedy for Children Caught in the Conflict of Laws*, 22 Vand. L. Rev. 1207 (1969); Brigitte M. Bodenheimer, *Progress Under the Uniform Child Custody Jurisdiction Act and Remaining Problems: Punitive Decrees, Joint Custody, and Excessive Modifications*, 65 Cal. L. Rev. 978 (1977).

20. *May v. Anderson*, 345 U.S. 528, 542 (1953) (Jackson, J., dissenting).

UCCJA also provided that a child custody determination made in accordance with the jurisdictional standards of the Act would be enforced in other states.

The UCCJA was adopted as law in all 50 states, the District of Columbia, and the Virgin Islands. A number of states, however, significantly departed from the original text.[21] In addition, the years of litigation after the promulgation of the UCCJA produced substantial inconsistency in interpretation by state courts.[22] As a result, the goals of the UCCJA were rendered unobtainable in many cases.[23]

In 1980, the federal government enacted the PKPA to address the interstate custody recognition problems that continued to exist after the adoption of the UCCJA. The PKPA mandates that state authorities give full faith and credit to other states' custody determinations, so long as those determinations were made in conformity with the provisions of the PKPA. The PKPA provisions regarding bases for jurisdiction, restrictions on modifications, preclusion of simultaneous proceedings, and notice requirements are similar to those in the UCCJA. However, some significant differences exist between the PKPA and the UCCJA. For example, the PKPA authorizes continuing exclusive jurisdiction in the original decree state so long as one parent or the child remains there and that state has continuing jurisdiction under its own law.[24] Unlike the PKPA, the UCCJA did not directly address this issue. To further complicate the process, the PKPA partially

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21. For example, Alaska omitted the "significant connection" jurisdiction basis of UCCJA §3(a)(2). Alaska Stat. § 25.30.020 (repealed 1998). Texas prioritized home state jurisdiction over the other jurisdictional bases. Tex. Fam. Code Ann. §152.003 (repealed 1999). Arizona equated "domicile" with "home state." Ariz. Rev. Stat. § 25-433 (repealed 2000).

22. For examples on the issue of whether an order entered pursuant to emergency jurisdiction must be a temporary order or whether it can be a permanent order, compare *Curtis v. Curtis*, 574 So. 2d 24 (Miss. 1990) (temporary), with *Cullen v. Prescott*, 394 S.E.2d 722 (S.C. Ct. App. 1990) (can be permanent if no other custody case is pending).

23. One of the main reasons why the goals of the UCCJA were not accomplished is because the goals were incompatible. The UCCJA embodied two main goals: first to prevent parental kidnaping of children by attempting to provide clear rules of jurisdiction and enforcement, and second to provide that the forum which decided the custody determination would be the forum that could make the most informed decision. These goals proved to be mutually incompatible. As a result, courts rendered decisions that were doctrinally inconsistent as they provided for the primacy of one goal or another depending on the result they wished to accomplish in an individual case. Ann B. Goldstein, *The Tragedy of the Interstate Child: A Critical Reexamination of the Uniform Child Custody Jurisdiction Act and the Parental Kidnaping Prevention Act*, 25 U. Cal. Davis L. Rev. 845 (1992) (exhaustively and authoritatively documenting how the inconsistency of the UCCJA goals produced inconsistent court decisions).

The inconsistency of the UCCJA reflects the dichotomy in substantive custody law between certainty of result and individual decisionmaking in the "best interest" of the child. Since many of the participants in the Drafting Committee for the Uniform Child Custody Jurisdiction and Enforcement Act (the replacement for the UCCJA) were family law practitioners, this dichotomy loomed large throughout the Committee's discussions. Ultimately the Drafting Committee concluded that no coherent act could be drafted which effectively maintained the primacy of both goals. Therefore, the drafters of the UCCJEA determined that it was more important to identify which state has jurisdiction to make a determination than to find the "best" state court to make the determination. *See Uniform Child-Custody Jurisdiction and Enforcement Act (with Prefatory Note and Comments by Robert G. Spector)*, 32 Fam. L.Q. 303, 305-06 (1998) [hereinafter *UCCJEA*] (the author was the Reporter for the UCCJEA).

24. 28 U.S.C. § 1738A(d).

incorporates state UCCJA law in its language.[25] The relationship between these two statutes became "technical enough to delight a medieval property lawyer."[26]

In response to the difficulties of reading the UCCJA and the PKPA together, the National Conference of Commissioners on Uniform State Laws revised the UCCJA to conform to the PKPA. The result is known as the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA").[27]

The critical question with regard to the recognition of an adoption decree is whether such a decree is a "child custody determination" within the meaning of these acts. The answer is clear with regard to the UCCJEA. Section 102 provides that "this Act does not govern an adoption proceeding." The reason why the UCCJEA does not govern adoption proceedings is that the National Conference of Commissioners on Uniform State Laws had recently promulgated the Uniform Adoption Act ("UAA"),[28] which contained jurisdictional provisions at variance with those set forth in the UCCJEA. The Conference could hardly put forth two acts on the same subject with different rules, although most members of the Drafting Committee would have preferred to regulate adoption jurisdiction via the UCCJEA rather than the UAA.[29]

However, the answer was quite different under the UCCJA and, most importantly, under the PKPA. For example, in *In re E.H.H.*,[30] the father and mother of E.H.H. divorced in California.[31] The mother was granted sole legal and physical custody of E.H.H., while the father was granted conditional visitation rights. The wife remarried and she and her husband filed in a Utah juvenile court for termination of the father's parental rights and adoption of E.H.H. by the mother's new husband. The father moved for dismissal of the petition, claiming it involved determination of custody and visitation, which were outside the jurisdiction of the Utah court system under the terms of the PKPA. The trial court denied the father's motion to dismiss and held that the termination of parental rights was not a custody or visitation determination.[32]

The appellate court reversed, finding that termination of parental rights via an adoption is "the ultimate custody and visitation determination as to the party whose rights are terminated."[33] The court then concluded that, under the PKPA,

25. The incorporation occurs because the PKPA provides that a custody determination "is consistent with the provisions of this section only if—(1) such court has jurisdiction under the law of such State." 28 U.S.C. § 1738A(c)(1). The law of the state means that state's version of the UCCJA or the UCCJEA.

26. Homer H. Clark, Jr., *The Law of Domestic Relations in the United States* § 12.5 (2d ed., West 1988).

27. 9(IA) U.L.A. 655 (1999).

28. 9(IA) U.L.A. 11 (1999).

29. *See UCCJEA*, *supra* n. 23, at 321 n. 39.

30. 16 P.3d 1257 (Utah App. 2000).

31. *Id.* at 1258.

32. *Id.*

33. *Id.* at 1259.

the subsequent adoption and the termination of parental rights did affect prior custody and visitation determinations. Thus, the Utah court lacked jurisdiction.[34]

Another case to the same effect is *In re Adoption of Asente.*[35] This case concerned whether Kentucky or Ohio had jurisdiction to consider contested adoption proceedings.[36] The child, Justin, was born in Kentucky.[37] The Asentes adopted their first child from Justin's mother and decided to adopt Justin as their second child. After giving birth to Justin, the mother changed her mind. Eleven months later, the mother contacted the Asentes and discussed her renewed willingness to put Justin up for adoption. The termination proceeding was to take place in Kentucky and during the time prior to the proceeding the mother stated her understanding that she could change her mind at any time prior to the culmination of the termination proceeding.[38]

The mother and father of the child signed separate documents entitled "voluntary and informed consent to adoption."[39] The form stated that "consent was final and irrevocable twenty days after execution of the document."[40] Shortly thereafter, the Asentes signed a legal risk document acknowledging that the natural parents could revoke their consent anytime prior to the hearing on the termination of parental rights.[41] The Kentucky and Ohio Offices of Interstate Compact on the Placement of Children "approved the placement of the child with the Asentes."[42] Justin was transported to Ohio, where he continued to reside.[43]

On the day of the final hearing for the termination of parental rights in Kentucky, the natural parents informed their attorney that they no longer wished to go forward with the adoption and wanted the child to be returned to them. The child had been in Ohio for 37 days at this point in time. The hearing in the Kentucky court for termination was then cancelled pending further action.[44]

The Asentes then filed a petition for adoption of Justin in Ohio. The Kentucky court issued an order asserting that it had jurisdiction over any issues relating to the custody and best interests of Justin.[45] Ultimately both the Ohio court and the Kentucky court determined they had jurisdiction.

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34. Interestingly, the *E.H.H.* court refuted the mother's contention that the earlier case of *In re R.N.J.*, 908 P.2d 345 (Utah App. 1995) (finding that, for purposes of the UCCJA, termination of parental rights is not a custody determination) applied to the present case. *E.H.H.*, 16 P.3d at 1260. The court distinguished *R.N.J.* by noting that the UCCJA and the PKPA are two separate statutes and that the PKPA preempted the UCCJA. *Id.*

35. 734 N.E.2d 1224 (Ohio 2000).

36. *Id.* at 1225.

37. *Id.* at 1226.

38. *Id.*

39. *Id.*

40. 734 N.E.2d at 1226.

41. *Id.* at 1227.

42. *Id.*

43. *Id.*

44. *Id.*

45. 734 N.E.2d at 1227.

The Ohio Supreme Court reversed the trial court and determined that the trial court should have given full faith and credit to the Kentucky determination.[46] The court recognized that "adoption proceedings are truly custody proceedings requiring application of the PKPA and the UCCJA because the end result of an adoption is the complete termination of the rights of the birth parents."[47] The court then found fault with the Ohio trial court's previous decisions not to give full faith and credit to the Kentucky declarations because the petition for termination of voluntary rights was not considered a custody proceeding.[48] The court also determined that although the child had significant contacts with Ohio, Kentucky was the appropriate forum to assert jurisdiction over the matter, and the Ohio court should have given full faith and credit to the Kentucky ruling that the consent forms were not valid.[49]

No cases exist holding that an adoption is not a custody determination within the meaning of the PKPA. Thus, if an adoption decree were rendered in a proceeding that complied with the PKPA's jurisdictional requirements (i.e., the court which rendered the decree was within the child's home state, or, if no home state existed, then a state with significant connections to the child and with substantial evidence concerning the child), then all other states must recognize the decree. The Oklahoma statute, which would refuse to recognize such adoptions, therefore violates the Act and is unconstitutional under the Supremacy Clause.

IV. THE FULL FAITH AND CREDIT CLAUSE

Persuasive arguments have been made that the PKPA does not fit adoption cases very well and ought not be used to determine interstate jurisdiction and recognition.[50] Adoptions do not fit very well into the jurisdictional scheme of UCCJA, upon which the PKPA was based. A state rarely qualifies as the home state. In most cases, the child is born in one state, the relinquishment takes place in that state, and the prospective adoptive parents take the child to another state

46. *Id.* at 1231.

47. *Id.* at 1231-32.

48. *Id.* at 1232.

49. *Id.* at 1234. Other cases to the same effect are *Adoption of Zachariah K.*, 8 Cal. Rptr. 2d 423 (Cal. App. 2d Dist. 1992); *People ex rel A.J.C.*, 88 P.3d 599 (Colo. 2004), *cert. denied sub nom. C.M.C. v. G.A.L.*, 125 S. Ct. 495 (2004); *In re Custody of K.R.*, 897 P.2d 896 (Colo. App. 1995); *In re B.B.R.*, 566 A.2d 1032 (D.C. 1989); *In re Adoption of Child by T.W.C. and P.C.*, 636 A.2d 1083 (N.J. Super App. Div. 1994); *In re Aja Juan Hayes*, 979 P.2d 779 (Or. App. 1999).

50. *See* Bernadette W. Hartfield, *The Uniform Child Custody Jurisdiction Act and the Problem of Jurisdiction in Interstate Adoption: An Easy Fix?* 43 Okla. L. Rev. 621 (1990); Herma Hill Kay, *Adoption in the Conflict of Laws: The UAA, Not the UCCJA, Is the Answer*, 84 Cal. L. Rev. 703 (1996). Regardless of whether one agrees with Professors Kay and Hatfield concerning adoption decrees generally, it is clear that some aspects of the post-adoption process are custody proceedings. For example, if a state follows the UAA and provides that if an adoption is denied or set aside, the court is to determine the child's custody and the prospective adoptive parents would have standing to seek custody. 9(IA) U.L.A. 11, § 3-704. Such a proceeding is a custody proceeding and subject to the provisions of the UCCJEA and the PKPA. *See* Joan Heifetz Hollinger, *The Uniform Adoption Act: Reporter's Ruminations*, 30 Fam. L.Q. 345 (1996). This point is not always perceived by courts. *See e.g. A.J.C.*, 88 P.3d 599 (finding that the PKPA, but not the UCCJEA, is applicable to custody disputes following a failed adoption, but not recognizing a Missouri decree setting aside the adoption for reasons related to the UCCJA, which is still the law in Missouri).

to begin adoption proceedings. The first state cannot be the home state because the child has not lived there since birth. The second state cannot be the home state because the child has not lived there for six months. Thus, jurisdiction and recognition would have to be based on significant connection jurisdiction. In practice, this scenario leads to a race to the courthouse and conflicting assertions of jurisdiction that take months, maybe even years, to resolve.[51]

A second, and more persuasive argument, is that the PKPA was not necessary to provide full faith and credit protection to adoption decrees, or decrees setting aside adoptions, as it was with custody decisions. Custody decisions were modifiable in a second state since they could be modified in the state that originally determined custody. On the other hand, adoption decrees and orders setting aside adoptions are final judgments and are no more modifiable than a contract, tort, or other judgment of a court. As such, a decree of adoption is entitled to the same full faith and credit protection as those judgments. Therefore, even without the enactment of the PKPA, an adoption decree could only be denied recognition when the original court lacked jurisdiction, or when the decree was obtained by extrinsic fraud.[52]

That adoption decrees were entitled to full faith and credit prior to the enactment of the PKPA seemed to be relatively uncontroversial.[53] For example, in *Ex Parte Osborne*,[54] the petitioner adopted a child in 1922 under the laws of Virginia.[55] She contended that the biological mother consented to the adoption. In 1933, the biological mother asked to take the child to West Virginia for a two-week visit. The adoptive mother consented to the trip, but the biological mother never brought the child back to Virginia. Instead, the biological mother moved to North Carolina with the child. When the adoptive mother petitioned for the child's return, the North Carolina trial court determined that it was in the best interest of the child to remain in the care of her biological mother.[56]

The North Carolina Supreme Court found that the child was legally adopted in Virginia and that the adoption decree from Virginia must be given full faith and

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51. The classic case involving a failed interstate adoption is, of course, the Baby Jessica case, which ultimately found its way to the highest court of two states and took almost four years to resolve. *See In re B.G.C.*, 496 N.W.2d 239 (Iowa 1992); *In re Clausen*, 501 N.W.2d 193 (Mich. App. 1993), *aff'd*, 502 N.W.2d 649 (Mich. 1993), *stay denied sub. nom. DeBoer v. DeBoer*, 509 U.S. 1301 (1993) (referring to the Iowa decree setting aside the adoption as a "custody" order), *and stay denied sub nom. DeBoer v. DeBoer*, 509 U.S. 938 (1993).

52. The "lack of finality" and "not on the merits" defenses to the full faith and credit requirement are obviously not applicable to an adoption decree.

53. *See* Scoles et al., *supra* n. 3, at 703. This applies to the adoption itself. The incidental effects of the adoption can be treated differently. A second state can apply its own law to determine the rights of adopted children and does not have to accord adopted children the same rights they would enjoy under the law of the state that decreed the adoption. *See Hood v. McGehee*, 237 U.S. 611 (1915); *Restatement (Second) of Conflict of Laws* § 290 (1971). Oklahoma law provides that an adoption from another state provides the same rights as if the adoption had taken place in Oklahoma. Okla. Stat. tit. 10, § 7502-1.4(A). However, the Oklahoma statute that refuses to recognize adoptions by same-sex couples from other states purports to modify the adoption itself and is not simply concerned with the incidental effects of the adoption.

54. 172 S.E. 491 (N.C. 1934).

55. *Id.*

56. *Id.*

credit in North Carolina.[57] The biological mother contended that the Virginia court did not have jurisdiction to issue a decree of adoption because she did not consent to the adoption. The court refused this argument and found that the biological mother failed to show fraud or that the Virginia court did not have jurisdiction to issue the decree.[58]

Another example is *Stewart v. Stewart*.[59] In West Virginia, the natural father contested the adoption of his child in Virginia by the natural mother's second husband.[60] This issue came before the trial court because the natural mother moved back to the county where her divorce was originally obtained and the father petitioned the trial court for expanded visitation rights. The natural mother defended the action by producing the Virginia adoption decree and moving for summary judgment under the Full Faith and Credit Clause of the U.S. Constitution.

The trial court denied the natural mother's request for summary judgment and refused to give full faith and credit to the Virginia decree because the court found it was not required to afford full faith and credit to a decree predicated on an unconstitutional statute. The trial court found that the Virginia adoption statute was unconstitutionally vague because it authorized an adoption if the adoption was in the best interests of the child.[61] The West Virginia Supreme Court reversed.[62] It determined that the assertion in one state that another state's statute is unconstitutional is not permissible in a full faith and credit context. Since neither party alleged that the Virginia court lacked jurisdiction or that the decree was obtained by extrinsic fraud, West Virginia was required to give full faith and credit to the Virginia decree.[63]

Because states must give full faith and credit to an adoption decree from a state that authorizes same-sex adoptions, states that do not allow such adoptions would still have to recognize adoption decrees from other states. In *Russell v. Bridgens*,[64] one member of a same-sex couple adopted a child in Pennsylvania.[65] Later, the other member also adopted the child in what the decree referred to as a "co-parent" adoption. Upon moving to Nebraska, the second adopting parent filed a petition seeking custody of, and support for, the child. The first adopting parent responded and filed a motion for summary judgment alleging that the "co-parent" adoption was invalid under Pennsylvania law, and therefore the petitioner

57. *Id.* at 493.
58. *Id.*
59. 289 S.E.2d 652 (W. Va. 1980).
60. *Id.* at 653.
61. *Id.*
62. *Id.* at 656.
63. *Id.* For other cases to the same effect, see e.g. *Hubbard v. Super. Court of Cal.*, 11 Cal. Rptr. 700 (Cal. Dist. App. 3d Dist. 1961); *Petition of J.E.G. and M.K.G*, 357 A.2d 855 (D.C. 1976); *In re Benfield*, 468 S.W.2d 156 (Tex. Civ. App. 1971).
64. 647 N.W.2d 56 (Neb. 2002).
65. *Id.* at 58.

was not a legal parent of the child.[66] The trial court found for the respondent and petitioner appealed.[67]

The Nebraska Supreme Court found that the dispositive question was whether the Pennsylvania court had subject matter jurisdiction.[68] It agreed with the petitioner that if the Pennsylvania court did have subject matter jurisdiction, then it was required under the full faith and credit clause to recognize the adoption.[69] The respondent argued that the requirements of the Pennsylvania adoption statutes were not met. The Nebraska Supreme Court remanded the case to the trial court to take evidence to determine whether the violations of the Pennsylvania adoption law, if any, related to the court's subject matter jurisdiction or whether they were simply errors of law. If the latter then the adoption would be entitled to full faith and credit.[70]

V. CONCLUSION

The conclusion is inescapable. Whether one analyzes the issue as recognition under the PKPA or under the Full Faith and Credit Clause, the answer is the same. Oklahoma has no choice but to recognize adoptions by same-sex couples that are granted in states where such adoptions are valid. Indeed this conclusion was recognized by the Oklahoma Attorney General's office when it issued its opinion indicating that Oklahoma would have to recognize adoptions validly decreed by other states, regardless of whether the parents were of the same or opposite sexes.[71] Therefore, Oklahoma's statute refusing to do so is unconstitutional.[72]

66. *Id.*
67. *Id.* at 58-59.
68. *Id.* at 59.
69. 647 N.W.2d at 60.
70. *Id.*
71. Okla. Atty. Gen. Op. 04-8, *supra* n. 1.
72. The statute is currently the subject of a proceeding in the Western District of Oklahoma to enjoin its enforcement. *Finstuen v. Edmondson*, No. CIV-04-1152-C (filed Sept. 15, 2004). The State's motion to dismiss on the ground that the suit violated the Eleventh Amendment was denied on December 7, 2004. Order, *Finstuen*, No. CIV-04-1152-C (filed Dec. 7, 2004), available at http://www.lambdalegal.org/binary-data/LAMBDA_PDF/pdf/350.pdf (accessed Mar. 6, 2005). The State has taken an appeal to the Tenth Circuit. *Finstuen v. Henry*, No. 04-6395 (filed Dec. 17, 2004).