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Arlin F. Ruby

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MODIFICATION OF AN OUT OF STATE CHILD CUSTODY DECREE UNDER THE UNIFORM CHILD CUSTODY JURISDICTION ACT AND THE PARENTAL KIDNAPPING PREVENTION ACT

*Arlin F. Ruby**

Jurisdiction of child custody matters in Virginia is affected by both the Uniform Child Custody Jurisdiction Act¹ (UCCJA) as adopted in Virginia and the federally enacted Parental Kidnapping Prevention Act of 1980² (PKPA). This article analyzes the jurisdictional requirements under both Acts, discusses the interrelation-

* Judge, Juvenile and Domestic Relations District Court, City of Richmond, 2000 Mecklenburg Street, Richmond, Virginia 23223. LL.B., DePaul University, 1950. The author welcomes comments from the bench and the bar with reference to any views herein addressed.

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1. UNIFORM CHILD CUSTODY JURISDICTION ACT, 9 U.L.A. 111 (1968) [hereinafter cited as UCCJA]. Adopted by the 1979 General Assembly, the Virginia enactment is modeled substantially after the Uniform Law with two major exceptions: (i) the Purposes and Construction section of the Uniform Act and (ii) the section giving calendar priority to jurisdictional/custody questions were not adopted. VA. CODE ANN. §§ 20-125 to -146 (Cum. Supp. 1982). See 9 U.L.A. 111 (Master ed. 1979) for comprehensive notes as to how the principles of the UCCJA should be applied and for section-by-section and state-by-state court annotations. See also Comment, *The Uniform Child Custody Jurisdiction Act in Virginia*, 14 U. RICH. L. REV. 435 (1979).

2. Parental Kidnapping Prevention Act of 1980, Pub. L. No. 96-611, §§ 7-8, 94 Stat. 3568, 3568-71 (§ 8 codified as 28 U.S.C. § 1738A (Supp. IV 1980)) [hereinafter cited as PKPA]. Section 7(c) states its purposes:

The general purposes of sections 6 to 10 of this Act are to—

(1) promote cooperation between State courts to the end that a determination of custody and visitation is rendered in the State which can best decide the case in the interest of the child;

(2) promote and expand the exchange of information and other forms of mutual assistance between States which are concerned with the same child;

(3) facilitate the enforcement of custody and visitation decrees of sister States;

(4) discourage continuing interstate controversies over child custody in the interest of greater stability of home environment and of secure family relationships for the child;

(5) avoid jurisdictional competition and conflict between State courts in matters of child custody and visitation which have in the past resulted in the shifting of children from State to State with harmful effects on their well-being; and

(6) deter interstate abductions and other unilateral removals of children undertaken to obtain custody and visitation awards.

PKPA § 7(c).

ship between the two and suggests a five step analysis by which a Virginia court may determine its jurisdiction in light of this authority.

I. PRELIMINARY CONSIDERATIONS

A. *Enactment of the Parental Kidnapping Prevention Act of 1980*

It was widely recognized, even under the UCCJA, that prior to the enactment of the PKPA, the full faith and credit clause of the United States Constitution³ had no required application to child custody decrees because of their inherently transitory nature. Thus, child custody decrees were always subject to modification for just cause by courts of competent jurisdiction.⁴ The practical consequences of this rule led to a growing number of custody cases in the various state courts, with each court applying its own laws, practices, and procedures in determining jurisdiction to hear such cases and the effect to be given to custody decrees of other states. These legal realities contributed to a tendency by the parties involved in a custody dispute to resort to (1) the seizure, concealment, and interstate transportation of children who were the subjects of the custody disputes; (2) disregard of court orders; (3) excessive relitigation; and (4) obtaining conflicting custody decrees in different states.⁵

3. U.S. CONST. art. IV, § 1 provides that "[f]ull faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof."

4. See PKPA § 7(a)(4) and note 5 *infra*. See also *Ford v. Ford*, 371 U.S. 187 (1962); *Oehl v. Oehl*, 221 Va. 618, 272 S.E.2d 441 (1980); *Osborne v. Osborne*, 215 Va. 205, 207 S.E.2d 875 (1974).

5. PKPA § 7(a) provides:

The Congress finds that—

(1) there is a large and growing number of cases annually involving disputes between persons claiming rights of custody and visitation of children under the laws, and in the courts, of different States, the District of Columbia, the Commonwealth of Puerto Rico, and the territories and possessions of the United States;

(2) the laws and practices by which the courts of those jurisdictions determine their jurisdiction to decide such disputes, and the effect to be given the decisions of such disputes by the courts of other jurisdictions, are often inconsistent and conflicting;

(3) those characteristics of the law and practice in such cases, along with the limits imposed by a Federal system on the authority of each such jurisdiction to conduct investigations and take other actions outside its own boundaries, contribute to a tendency of parties involved in such disputes to frequently resort to the seizure, restraint, concealment, and interstate transportation of children, the disregard of court orders, excessive relitigation of cases, obtaining of conflicting orders by the courts of

Because of these conditions, Congress, in enacting the PKPA found it necessary to "establish national standards under which courts" of the various states "will determine that jurisdiction to decide" custody "disputes and the effect to be given by each such jurisdiction to such decisions by the courts of other such jurisdictions."⁶ The *tour de force* of the PKPA is the provision which requires that full faith and credit be given to child custody determinations when made by a court of another state consistent with the provisions of the PKPA.⁷ The statute, by giving child custody decrees full faith and credit between the courts of the various states, "makes the most sweeping change in the past 200 years in the implementation of the full faith and credit clause."⁸ The PKPA requires that "[t]he appropriate authorities of every State shall enforce according to its terms, and shall not modify except as provided . . . any child custody determination made consistently with the provisions of [the PKPA] by a court of another State."⁹

The PKPA further refines and buttresses the full faith and credit status of child custody decrees by three additional provisions. The Act (1) specifies what is meant by a child custody determination "made consistently with the provisions" of the PKPA;¹⁰

various jurisdictions, and interstate travel and communication that is so expensive and time consuming as to disrupt their occupations and commercial activities; and

(4) among the results of those conditions and activities are the failure of the courts of such jurisdictions to give full faith and credit to the judicial proceedings of the other jurisdictions, the deprivation of rights of liberty and property without due process of law, burdens on commerce among such jurisdictions and with foreign nations, and harm to the welfare of children and their parents and other custodians.

6. PKPA § 7(b) provides:

For those reasons it is necessary to establish a national system for locating parents and children who travel from one such jurisdiction to another and are concealed in connection with such disputes, and to establish national standards under which the courts of such jurisdictions will determine their jurisdiction to decide such disputes and the effect to be given by each such jurisdiction to such decisions by the courts of other such jurisdictions.

7. 28 U.S.C. § 1738A (Supp. IV 1980). See, e.g., *Leslie L.F. v. Constance F.*, 110 Misc. 2d 381, 441 N.Y.S.2d 911 (1981).

8. Foster and Freed, *Law and the Family: Child-Custody Decrees-Jurisdiction*, N.Y.L.J., Apr. 24, 1981, at 1, col. 1 [hereinafter cited as Foster and Freed]; quoted in *Virginia E.E. v. Albert S.P.*, 110 Misc. 2d 448, _____, 440 N.Y.S.2d 979, 983 (1981).

9. 28 U.S.C. § 1738A(a) (Supp. IV 1980).

10. 28 U.S.C. § 1738A(c) (Supp. IV 1980) provides:

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:

(A) such State (i) is the home State of the child on the date of the com-

(2) confers continuing jurisdiction in the state which made the prior custody decree as long as that state remains the residence of the child or of any contestant;¹¹ and (3) provides for modification by one state of a custody decree made by another state if (i) the modifying state has jurisdiction to make child custody determination and (ii) the court of the prior decree state either no longer has jurisdiction, or still having jurisdiction, has declined to exercise such jurisdiction to modify its prior custody decree.¹²

Therefore, it is now clear that under the PKPA:

mencement of the proceeding, or (ii) had been the child's home State within six months before the date of the commencement of the proceeding and the child is absent from such State because of his removal or retention by a contestant or for other reasons, and a contestant continues to live in such State;

(B)(i) it appears that no other State would have jurisdiction under subparagraph (A), and (ii) it is in the best interest of the child that a court of such State assume jurisdiction because (I) the child and his parents, or the child and at least one contestant, have a significant connection with such State other than mere physical presence in such State, and (II) there is available in such State substantial evidence concerning the child's present or future care, protection, training, and personal relationships;

(C) the child is physically present in such State and (i) the child has been abandoned, or (ii) it is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse;

(D)(i) it appears that no other State would have jurisdiction under subparagraph (A), (B), (C), or (E), or another State has declined to exercise jurisdiction on the ground that the State whose jurisdiction is in issue is the more appropriate forum to determine the custody of the child, and (ii) it is in the best interest of the child that such court assume jurisdiction; or

(E) the court has continuing jurisdiction pursuant to subsection (d) of this section.

28 U.S.C. § 1738A(b)(4) (Supp. IV 1980) defines "home state" as:

the State in which, immediately preceding the time involved, the child lived with his parents, a parent, or a person acting as parent, for at least six consecutive months, and in the case of a child less than six months old, the State in which the child lived from birth with any of such persons. Periods of temporary absence of any of such persons are counted as part of the six-month or other period.

11. 28 U.S.C. § 1738A(d) (Supp. IV 1980) (emphasis added) provides:

The jurisdiction of a court of a State which has made a child custody determination consistently with the provisions of this section continues as long as the requirement of subsection (c)(1) of this section continues to be met and such State remains the residence of the child or of any contestant.

28 U.S.C. § 1738A(b)(2) (Supp. IV 1980) defines contestant as a "person, including a parent, who claims a right to custody or visitation of a child."

12. 28 U.S.C. § 1738A(f) (Supp. IV 1980) provides:

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

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

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

[o]bligatory full faith and credit extends to every state which shall enforce and shall not modify any child custody determination made consistently with the provisions of the PKPA. . . . The only exception to this mandatory obligation is the section of the statute permitting a state to modify a custody award of a sister state "[A] custody order or decree that does not conform to federal standards may be rejected out of hand. Orders and decrees that are in conformity *must* be honored, even though subject to modification in the first forum. The nonfinal character of custody decrees no longer may serve as an excuse for their non-recognition."¹³

B. *The Relationship Between the UCCJA and the PKPA*

Even a superficial comparison between the grounds for jurisdiction in the UCCJA¹⁴ and the grounds for jurisdiction in the PKPA¹⁵ reflects that there are substantial legal differences in the state and federal statutes. First, the UCCJA provides four grounds for jurisdiction¹⁶ while the PKPA contains five grounds for jurisdiction,¹⁷ the fifth ground providing for "continuing jurisdiction."

Additionally, each of the four grounds for jurisdiction set forth in the Virginia statute is separated from the other by the word "or," thus establishing alternative bases for jurisdiction. In contrast, the PKPA contains important qualifying language between the first ground for jurisdiction ("home state") and the second ground for jurisdiction ("significant connection"), so that a court, under the PKPA, cannot base jurisdiction on a significant connection unless "it appears that no other state would have [home state] jurisdiction . . .,"¹⁸ thus establishing exclusive and continuing jurisdiction in the home state. Therefore, the PKPA relegates "significant connection" jurisdiction "to a contingency status for custody jurisdiction or . . . a 'vacuum situation which makes it superfluous.'"¹⁹

Another important preliminary consideration that must be pointed out is that the PKPA articulates a federal policy of pre-

13. *Virginia E.E. v. Albert S.P.*, 110 Misc. 2d at _____, 440 N.Y.S.2d at 983 (quoting *Foster and Freed*, *supra* note 8, at 1, col. 1).

14. See VA. CODE ANN. § 20-126(A) (Cum. Supp. 1982). See *infra* note 32.

15. 28 U.S.C. § 1738A(c)(2)(A)-(E) (Supp. IV 1980). See *supra* note 10.

16. See *infra* note 29.

17. See *supra* note 10.

18. 28 U.S.C. § 1738A(c)(2)(B)(i) (Supp. IV 1980). See *supra* note 10.

19. *Virginia E.E. v. Albert S.P.*, 110 Misc. 2d at _____, 440 N.Y.S.2d at 983-84; *Bahr v. Bahr*, 110 Misc. 2d 665, _____, 442 N.Y.S.2d 687, 689 (1981). See *infra* note 30.

emption, and under the supremacy clause of the United States Constitution, the PKPA must be accorded priority.²⁰ A careful reading of the federal statute reveals clearly that the assertion of the federal priority of the PKPA does not constitute an interference with the power of a state to determine the substantive law to be applied in resolving an award of custody and/or visitation. This is because priority under the supremacy clause, given to the PKPA over Virginia statutes dealing with jurisdiction of child custody disputes, is invoked only in the context of determining whether or not a prior out of state custody decree should be accorded full faith and credit.

C. In the Process to Determine Jurisdiction to Modify an Out of State Custody Decree, What Consideration if Any Should be Given to Simultaneous Proceedings in Another State, Inconvenient Forum, or Unclean Hands?

Virginia has enacted those sections of the UCCJA which deal with a court's declining to exercise jurisdiction due to simultaneous proceedings in other states,²¹ the finding of inconvenient forum,²²

20. See Foster and Freed, *supra* note 8, at 1, col. 1; Virginia E.E. v. Albert S.P., 110 Misc. 2d at _____, 440 N.Y.S.2d at 983; Leslie L.F. v. Constance F., 110 Misc. 2d at _____, 441 N.Y.S.2d at 913-14.

U.S. CONST. art. VI provides in part:

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the Constitution or laws of any state to the contrary notwithstanding.

Preemption occurs under the supremacy clause of Article VI when Congress enacts federal legislation which either (i) supersedes state authority, or (ii) is in conflict with state law, or (iii) when state regulation would interfere unduly with the accomplishment of congressional objectives. G. GUNTHER, CONSTITUTIONAL LAW 343-44 (10th ed. 1980).

21. VA. CODE ANN. § 20-129 (Cum. Supp. 1982) states:

A. A court of this State shall not exercise its jurisdiction under this chapter if at the time of filing the petition a proceeding concerning the custody of the child was pending in a court of another state exercising jurisdiction substantially in conformity with this chapter, unless the proceeding is stayed by the court of the other state because this State is a more appropriate forum or for other reasons.

B. Before hearing the petition in a custody proceeding the court shall examine the pleadings and other information supplied by the parties under § 20-132 and shall consult the child custody registry established under § 20-139 concerning the pendency of proceedings with respect to the child in other states. If the court has reason to believe that proceedings may be pending in another state it shall direct an inquiry to the clerk of the court or other appropriate official of the other state.

C. If the court is informed during the course of the proceeding that a proceeding concerning the custody of the child was pending in another state before the court assumed jurisdiction it shall stay the proceeding and communicate with the court in

which the other proceeding is pending to the end that the issue may be litigated in the more appropriate forum and that information be exchanged in accordance with §§ 20-142 through 20-145. If a court of this State has made a custody decree before being informed of a pending proceeding in a court of another state it shall immediately inform that court of the fact. If the court is informed that a proceeding was commenced in another state after it assumed jurisdiction it shall likewise inform the other court to the end that the issues may be litigated in the more appropriate forum.

In a comparable but not identical provision, the PKPA, 28 U.S.C. § 1738A(g) (Supp. IV 1980), provides:

A court of a State shall not exercise jurisdiction in any proceeding for a custody determination commenced during the pendency of a proceeding in a court of another State where such court of that other State is exercising jurisdiction consistently with the provisions of this section to make a custody determination.

However, the application of this subsection (g) is conditioned upon the out of state court's exercising jurisdiction "consistently" with the PKPA. In order to adjudicate such consistency the Virginia court must still determine first, whether it has jurisdiction to inquire into such consistency (*see* Step I of Part II *infra*); second, whether the out of state court's exercise of jurisdiction is consistent with the PKPA (*see* Step 3 of Part II *infra*); and third, if the out of state court is proceeding in a modification hearing of its prior custody decree, then the Virginia court must inquire into and determine if such other state is still the residence of either any contestant or the child (*see* Step 5 of Part II *infra*).

22. VA. CODE ANN. § 20-130 (Cum. Supp. 1982) provides:

A. A court which has jurisdiction under this chapter to make an initial or modification decree may decline to exercise its jurisdiction any time before making a decree if it finds that it is an inconvenient forum to make a custody determination under the circumstances of the case and that a court of another state is a more appropriate forum.

B. A finding of inconvenient forum may be made upon the court's own motion or upon motion of a party or a guardian ad litem or other representative of the child.

C. In determining if it is an inconvenient forum, the court shall consider if it is in the interest of the child that another state assume jurisdiction. For this purpose it may take into account the following factors, among others:

1. If another state is or recently was the child's home state;
2. If another state has a closer connection with the child and his family or with the child and one or more of the contestants;
3. If substantial evidence concerning the child's present or future care, protection, training, and personal relationships is more readily available in another state; and
4. If the parties have agreed on another forum which is no less appropriate.

D. Before determining whether to decline or retain jurisdiction the court may communicate with a court of another state and exchange information pertinent to the assumption of jurisdiction by either court with a view to assuring that jurisdiction will be exercised by the more appropriate court and that a forum will be available to the parties.

E. If the court finds that it is an inconvenient forum and that a court of another state is a more appropriate forum, it may dismiss the proceedings, or it may stay the proceedings upon condition that a custody proceeding be promptly commenced in another named state or upon any other conditions which may be just and proper, including the condition that a moving party stipulate his consent and submission to the jurisdiction of the other forum.

F. The court may decline to exercise its jurisdiction under this chapter if a custody determination is incidental to an action for divorce or another proceeding while retaining jurisdiction over the divorce or other proceeding.

G. If it appears to the court that it is clearly an inappropriate forum it may require

or misconduct or "unclean hands."²³ The query now posed is whether consideration of these circumstances must be taken into account and applied in the step-by-step legal analysis to determine whether a Virginia court has jurisdiction to modify a prior out of state custody decree. It is submitted that the correct answer to this question is a short and simple NO! Consideration of simultaneous proceedings in other states, misconduct, unclean hands and forum non conveniens is premature in determining whether jurisdiction lies in a Virginia court to modify a prior out of state custody decree.

This conclusion relies on a review of the various Commissioners' Notes to the UCCJA,²⁴ dealing with sections 6, 7, and 8 of the Uniform Act.²⁵ The Commissioners' Note to section 6 states that sections 6 and 7 of the UCCJA, dealing respectively with simultaneous proceedings in other jurisdictions and inconvenient forum, "must be read together," and "[i]n a proper case jurisdiction is

the party who commenced the proceedings to pay, in addition to the costs of the proceedings in this State, necessary travel and other expenses, including attorneys' fees, incurred by other parties or their witnesses.

H. Upon dismissal or stay of the proceedings under this section the court shall inform that court found to be the more appropriate forum of this fact, or if the court which would have jurisdiction in the other state is not certainly known, shall transmit the information to the court administrator or other appropriate official for forwarding to the appropriate court.

I. Any communication received from another state informing this State of a finding of inconvenient forum because a court of this State is the more appropriate forum shall be filed in the appropriate court. Upon assuming jurisdiction the court of this State shall inform the original court of this fact.

23. VA. CODE ANN. § 20-131 (Cum. Supp. 1982) provides:

A. If the petitioner for an initial decree has wrongfully taken the child from another state or has engaged in similar reprehensible conduct the court may decline to exercise jurisdiction if this is just and proper under the circumstances.

B. Unless required in the interest of the child, the court shall not exercise its jurisdiction to modify a custody decree of another state if the petitioner, without consent of the person entitled to custody, has improperly removed the child from the physical custody of the person entitled to custody or has improperly retained the child after a visit or other temporary relinquishment of physical custody. If the petitioner has violated any other provision of a custody decree of another state the court may decline to exercise its jurisdiction if this is just and proper under the circumstances.

C. In appropriate cases a court dismissing a petition under this section may charge the petitioner with necessary travel and other expenses, including attorneys' fees, incurred by other parties or their witnesses.

24. 9 U.L.A. 134-35, 139, 142-43 (Master ed. 1979).

25. Section 6 of the UCCJA corresponds to VA. CODE ANN. § 20-129 (Cum. Supp. 1982); section 7 corresponds to VA. CODE ANN. § 20-130 (Cum. Supp. 1982); and section 8 corresponds to VA. CODE ANN. § 20-131 (Cum. Supp. 1982).

yielded to the other state.”²⁶ It is submitted that the word “yielded” contemplates giving up something already acquired which, in this context, clearly means giving up jurisdiction that the court has. Therefore, consideration of simultaneous proceedings in other states is not involved in the initial analytical process of determining whether a state has jurisdiction, but is considered only after that court, having determined that it has jurisdiction, will yield the same to another state.

The Commissioners’ Note to section 7 of the UCCJA states: “[T]his provision . . . serves as a second check on jurisdiction once the test of sections 3 [Grounds for jurisdiction] or 14 [Modification of custody decree of another state] has been met.”²⁷ It is submitted that sections 6 and 7 of the UCCJA apply to situations where it has been determined that two states have concurrent jurisdiction and a decision must be made as to which state is the most appropriate forum to act in light of the child’s best interests. The Commissioners’ Note to section 7 contemplates that sections 6 and 7 become applicable only after jurisdiction has been determined in the affirmative under sections 3 or 14. Thus, “[t]he issue of whether it is appropriate to exercise jurisdiction is secondary to, and distinct from, the issue of whether jurisdiction lies.”²⁸

The Commissioners’ Note to section 8 of the UCCJA, dealing with “unclean hands,” states that: “[s]ubsection (a) extends . . . to cases in which a custody decree has not yet been rendered in any state. . . . Subsection (b) does not come into operation unless the court has power under section 14 to modify the custody decree of another state.”²⁹

II. THE FIVE STEP PROCESS

Keeping the foregoing preliminary considerations in mind, how and by what process should the Virginia attorney in his office and the Virginia judge at the bench proceed to analyze whether the Virginia court has jurisdiction to hear a certain custody case and modify³⁰ a child custody decree³¹ previously rendered by a court of

26. 9 U.L.A. 135 (Master ed. 1979).

27. *Id.* at 139 (emphasis added). Section 3 of the UCCJA corresponds to VA. CODE ANN. § 20-126 (Cum. Supp. 1982), and section 14 corresponds to VA. CODE ANN. § 20-137 (Cum. Supp. 1982).

28. *Pierce v. Pierce*, _____ Mont. _____, 640 P.2d 899, 904 (1982).

29. 9 U.L.A. 142-43 (Master ed. 1979) (emphasis added).

30. 28 U.S.C. § 1738A(b)(5) (Supp. IV 1980) defines “modification” and “modify” as fol-

another state? Given the facts of the particular case, the following five step analysis should be applied.

STEP 1: DETERMINE WHETHER VIRGINIA'S JURISDICTION IS PREDICATED UPON ANY OF THE GROUNDS SET FORTH IN VIRGINIA CODE SECTION 20-126A.³²

If the answer is NO, then STOP. Go no further in your inquiry, as a Virginia court would not have jurisdiction to even entertain such a custody dispute, let alone modify a prior custody order of a sister state.

If the answer is YES, then proceed on to Step 2.³³

lows: " 'modification' and 'modify' refer to a custody determination which modifies, replaces, supersedes, or otherwise is made subsequent to, a prior custody determination concerning the same child, whether made by the same court or not"

31. 28 U.S.C. § 1738A(b)(3) (Supp. IV 1980) defines "custody determination" as "a judgment, decree, or other order of a court providing for the custody or visitation of a child, and includes permanent and temporary orders, and initial orders and modifications:"

32. The basis for Step 1 is found in 28 U.S.C. § 1738A(f)(1) (Supp. IV 1980). See *supra* note 12.

VA. CODE ANN. § 20-126 (Cum. Supp. 1982) provides:

A. A court of this State which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if:

1. This State (i) is the home state of the child at the time of commencement of the proceeding, or (ii) had been the child's home state within six months before commencement of the proceeding and the child is absent from this State because of his removal or retention by a person claiming his custody or for other reasons, and a parent or person acting as parent continues to live in this State; or

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

3. The child is physically present in this State and (i) the child has been abandoned, or (ii) it is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse or is otherwise neglected or dependent; or

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

B. Except under paragraphs 3 and 4 of subsection A physical presence in this State of the child, or of the child and one of the contestants, is not alone sufficient to confer jurisdiction on a court of this State to make a child custody determination.

C. Physical presence of the child, while desirable, is not a prerequisite for jurisdiction to determine his custody.

33. *Caveat*. If the Virginia court takes jurisdiction under VA. CODE ANN. § 20-126(A) (Cum. Supp. 1982), on any ground other than subsection 1 ("home state" jurisdiction) (see *supra* note 32), there exists some risk that at a subsequent time a court of another state

STEP 2: DETERMINE WHETHER THE STATE WHOSE COURT RENDERED THE PRIOR CHILD CUSTODY DECREE STILL HAS CONTINUING JURISDICTION.³⁴

The correct answer to Step 2 necessarily is predicated upon the following three subordinate steps.

STEP 3: DETERMINE WHETHER THE PRIOR CHILD CUSTODY DECREE WAS MADE CONSISTENTLY WITH PKPA SECTION 8(c)(2), AND WHETHER AT THE TIME THE COURT TOOK JURISDICTION THAT STATE WAS THE CHILD'S "HOME STATE."³⁵

If the answer is YES to Step 3, then proceed on to Step 4.

If the answer to Step 3 is NO, having found that the other state court did not base its jurisdiction upon "home state," it is the author's opinion that such decree is *not* entitled to full faith and credit under the PKPA, because such custody determination in the other state was *not* "made consistently" with PKPA Section 8(c)(2)(A).³⁶ Therefore, the Virginia court would have jurisdiction

would find under 28 U.S.C. § 1738A(a) and (c)(2) that the Virginia custody determination was not "made consistently" with the provisions of the federal act. Therefore, such Virginia custody decree would not be accorded full faith and credit. *See supra* notes 9 and 10 and accompanying text. The thrust of this caveat is concerned only with the issue of full faith and credit status of a Virginia custody decree (predicated upon jurisdictional grounds other than "home state") and not as to the invalidity of such a custody decree. *But see*, Foster and Freed, *supra* note 8, at 2, col. 5, which states that "a custody decree or order that does not conform to the new federal standards really is a nullity and *must* be so treated by the courts, res judicata principles to the contrary notwithstanding." *See infra* note 36.

34. The basis for Step 2 is set forth in 28 U.S.C. § 1738A(f)(2) (Supp. IV 1980). *See supra* note 12.

35. The basis for Step 3 is set forth in 28 U.S.C. § 1738A(c)(2)(A)-(D) (Supp. IV 1980). *See supra* note 10 and accompanying text.

36. The UCCJA provides for alternative bases for jurisdiction with emphasis placed on the "home state." Virginia *E.E. v. Alberto S.P.*, 110 Misc. 2d 448, _____, 440 N.Y.S.2d 979, 983-84 (1981). A review of VA. CODE ANN. § 20-126(A) (Cum. Supp. 1982) (grounds for jurisdiction) shows that each of the grounds for jurisdiction therein set forth is separated from each other by the word "or." *See supra* note 32. The Commissioners' Notes to section 3 of the UCCJA (which corresponds to VA. CODE ANN. § 20-126 (Cum. Supp. 1982)) state that the "alternative test" between the home state ground and the next ground could create concurrent jurisdiction in more than one state. 9 U.L.A. 123 (Master ed. 1979). Unlike the UCCJA which provides an alternative basis for jurisdiction with emphasis placed upon "home state" jurisdiction, the PKPA establishes *exclusive and continuing* jurisdiction in the "home state." This difference in concept of jurisdiction between "alternative" jurisdiction under the UCCJA and "*exclusive and continuing*" jurisdiction in the "home state" as set forth in the PKPA is predicated upon specific language in the PKPA which does not appear in the UCCJA. In 28 U.S.C. § 1738A(c)(2)(B)(i) (Supp. IV 1980) (which immediately follows the delineation of "home state" jurisdiction in subparagraph (A)), there appears qual-

to entertain such a child custody dispute and to modify the custody decree of the court of another state (providing, of course, that the answer to Step 1 was YES). Again, if the answer to Step 3 is NO, the Virginia court has jurisdiction and it is not necessary to go to Step 4.

STEP 4: DETERMINE WHETHER THE COURT OF THE

ifying language immediately preceding the second ground of jurisdiction ("significant connection") in subparagraph (B) which states: "[I]t appears that no other State would have jurisdiction under subparagraph (A) . . ." See *supra* note 10; 110 Misc. 2d _____, 440 N.Y.S.2d at 983-84. This language then is the reason why under the PKPA the second ground of jurisdiction should be invoked only when no home state exists. Therefore, if a court acting under the UCCJA assumes jurisdiction of a child custody dispute on the second alternative ground ("significant connection") when in fact, there exists a "home state" for such child, such second alternative ground of jurisdiction is not consistent with the PKPA because it does not satisfy the PKPA qualifying language which requires that "it appears that no other State would have jurisdiction" under the "home state" ground. This lack of consistency with the provisions of the PKPA denies such a custody decree its full faith and credit status. In *Virginia E.E. v. Alberto S.P.*, 110 Misc. 2d _____, 440 N.Y.S.2d at 983-84, the court, quoting Foster and Freed, *supra* note 8, at 2, col. 1, stated that the qualifying language of the PKPA had the effect of "regulating subparagraph (B) to a contingency status for custody jurisdiction or . . . a vacuum situation which makes it superfluous." See *supra* note 33.

PKPA § 8, 28 U.S.C. § 1738A(c)(2)(C) (Supp. IV 1980) (*see supra* note 10), which closely parallels VA. CODE ANN. § 20-126(A)(3) (Cum. Supp. 1982) (*see supra* note 32), provides for "emergency" jurisdiction based upon physical presence of the child in the state and either (i) abandonment of the child, or (ii) necessary emergency to protect the child because of actual or threatened mistreatment or abuse. Although the PKPA contains no specific qualifying language which would impair the full faith and credit status of such "emergency" jurisdiction, it is submitted that this "emergency" ground for jurisdiction is not a viable alternative for the "home state" jurisdiction for the following reasons: First, physical presence of the child is the only prerequisite. Second, this ground is usually exercised by a juvenile court in cases "requiring immediate protection." See VA. CODE ANN. § 16.1-241(A)(1) and (2) (Repl. Vol. 1982). This "extraordinary jurisdiction is reserved for extraordinary circumstances. When there is child neglect without emergency or abandonment, jurisdiction cannot be based upon this paragraph". 9 U.L.A. 125 (Master ed. 1979) (emphasis added). Third, the "emergency" jurisdiction is intended for the intervention of a court for the protection of a child from abuse, and not for the purpose of providing another forum for the modification of another court's custody order or for the reopening of a fully litigated and decided custody battle by circumventing the jurisdiction of the "home state". Fourth, in actual child abuse cases, the juvenile court can adequately protect the child whose home state is elsewhere, not necessarily by exercising full jurisdiction to make a permanent change in legal custody, but rather by maintaining temporary custody and shelter care until the court of the child's "home state" can invoke its exclusive and continuing jurisdiction to make a permanent change in legal custody. See VA. CODE ANN. §§ 16.1-228(Q), 16.1-251, 16.1-252 and 16.1-253 (Repl. Vol. 1982). Fifth, it is suggested that there exists a paucity of true *bona fide* "emergency" cases upon which jurisdiction can be predicated to trigger full faith and credit status; therefore, such ground of jurisdiction is in reality only a "paper" ground devoid of practical application of the full faith and credit provisions of the PKPA. *But see*, Foster and Freed, *supra* note 8, at 2, col. 4, for what appears to be the opposite view.

*OTHER STATE HAVING JURISDICTION HAS DECLINED TO EXERCISE SUCH JURISDICTION TO MODIFY ITS DECREE.*³⁷

If the answer is YES, then the Virginia court has jurisdiction to entertain the custody dispute before it. The court may thus modify the prior custody decree of the other state (providing, of course, the answer to Step 1 was YES), and therefore it is unnecessary to go on to Step 5.

If the answer is NO, then go on to Step 5.

*STEP 5: DETERMINE WHETHER THE STATE WHOSE COURT MADE THE PRIOR CHILD CUSTODY DECREE REMAINS THE RESIDENCE OF EITHER THE CHILD OR ANY CONTESTANT.*³⁸

If the answer to Step 5 is YES, then the concept of PKPA's *exclusive* and *continuing* jurisdiction in the "home state" is fully satisfied so long as the state of the prior custody decree remains the residence of either the child or of any contestant. The Virginia court, having no authority to modify the prior out of state child custody decree, must, therefore, accord full faith and credit to the out of state custody decree and decline to entertain jurisdiction to hear the child custody dispute.

If the answer to Step 5 is NO, having found that neither the child nor any contestant still resides in the other state whose court made the prior custody decree, then that court no longer has jurisdiction. The Virginia court may then entertain jurisdiction to hear the custody dispute and in so doing may modify the child custody decree of such other state (providing, of course, the answer to Step 1 was YES).

III. CONCLUSIONS

Following the step-by-step analysis set forth above, one concludes that a child custody decree of another state can either fail to attain or lose its full faith and credit status conferred by the federal PKPA, and therefore be subject to modification by a Vir-

37. The basis for Step 4 is set forth in 28 U.S.C. § 1738A(f)(2) (Supp. IV 1980). See *supra* note 12 and accompanying text.

38. The basis for Step 5 is set forth in 28 U.S.C. § 1738A(d) (Supp. IV 1980). See *supra* note 11.

ginia court of competent authority under the UCCJA³⁹ in the following circumstances:

1. when the out of state court's jurisdiction was predicated on other than the "home state" jurisdictional factor because such other state's child custody determination was not "made consistently" with the PKPA and is therefore contrary to the PKPA concept of *exclusive* and *continuing* jurisdiction in the "home state"⁴⁰;

2. when the out of state court has declined to exercise jurisdiction to modify its prior determination;⁴¹ or

3. when the other state whose court made the prior child custody decree no longer remains the residence of either the child or any contestant.⁴²

39. See *supra* note 32.

40. It would seem that the only constitutional limitation on the prerogatives of the home state which remains important is due process. If there is a violation of due process by the "home state" its order or decree must be disregarded. However, both PKPA and the UCCJA specifically require what amounts to procedural due process, and a failure to meet their respective standards in that regard, vitiates the order or decree. So only a substantive due process issue may arise under the PKPA and UCCJA.

Foster and Freed, *supra* note 8, at 2, col. 5 (footnotes omitted).

41. 28 U.S.C. § 1738A(f)(2) (Supp. IV 1980). See *supra* note 12 and accompanying text.

42. 28 U.S.C. § 1738A(d) (Supp. IV 1980). See *supra* note 11 and accompanying text.