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THE UNIFORM CHILD CUSTODY JURISDICTION ACT AND THE PROBLEM OF JURISDICTION IN INTERSTATE ADOPTION: AN EASY FIX?

BERNADETTE W. HARTFIELD*

Introduction

Baby *X* is born in state *A* to Betty, an unmarried woman. Betty learns that Mr. and Mrs. Jones in state *B* want very much to adopt a baby. She agrees to permit the Jones to adopt Baby *X*. Betty assures the Jones that Baby *X*'s biological father, Frank, showed no interest in her pregnancy, has no interest in the baby and will not contest the adoption. The Jones travel to state *A* and return to state *B* with Baby *X*, now a few days old, and Betty's signed consent to the adoption. The Jones file a petition to adopt Baby *X* in state *B*. Does state *B* have jurisdiction to grant this adoption? If Frank chooses to contest the adoption, can he successfully challenge the jurisdiction of state *B*? If Frank files a petition to establish paternity and to obtain custody of Baby *X* in state *A*, would state *A* have jurisdiction? Would it matter whether Frank's petition was filed before Baby *X* was removed from state *A*? Whether Frank's petition was filed before the Jones filed their petition in state *B*? If the court in state *B* terminates Frank's parental rights and grants the Jones' petition to adopt, and the court in state *A* determines that Frank is Baby *X*'s father and awards custody to him, which decision controls? Might Baby *X* have different parents in state *A* than she does in state *B*? And what if the Jones subsequently move with Baby *X* to state *C*?

These questions stimulate spirited discussion in the law school classroom and provide numerous issues to be addressed in examination bluebooks. Indeed, these questions seem ideally suited to the realm of hypothesis. If that were all these were—the source of a good learning experience—there would be little cause for concern. But these questions are not purely hypothetical. They are real questions, affecting real people, who need real answers.¹ Regrettably, there have been few real answers.

The interstate aspect of the Baby *X* adoption makes it far more complex than a similar adoption involving only one state. In an intrastate adoption where all of the parties are domiciliaries of the forum state, subject matter and personal jurisdiction will necessarily exist there, and the forum can render a binding decision. Even if subsequent events required that another

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1. The questions are loosely based on *Gainey v. Olivo*, 258 Ga. 640, 373 S.E.2d 4 (1988), discussed at *infra* text accompanying notes 176-83.

state revisit the controversy, the fact that a judgment was rendered by a state having jurisdiction (including personal jurisdiction over all the parties) will ensure that full faith and credit will be given. But, as in the hypothetical, where more than one state has a colorable claim to subject matter jurisdiction or where the only state having subject matter jurisdiction lacks personal jurisdiction over one of the parties, problems ensue. The problems are most acute in interstate adoptions, like that of Baby *X*, where the parental rights of the biological parents have not been terminated prior to the commencement of an adoption proceeding.

Because of the mobility of our society and the desirability of interstate adoption from the perspective of the best interests of children, various approaches have been developed to facilitate interstate adoption despite the jurisdictional barriers that would otherwise exist. Unfortunately, the approaches developed in traditional conflict of laws and family law jurisprudence have lacked consistency and uniformity and have often lost sight of both the best interests of the child and the rights of biological parents. Renowned scholars have attested to the confusion which is engendered by slavish adherence to fictional concepts of status and theories of jurisdiction developed in unrelated contexts.² None of these traditional approaches has yielded interstate jurisdictional rules that serve the interests of all the parties to the adoption triad (child, adoptive parents and biological parents).

Now, the Uniform Child Custody Jurisdiction Act,³ which has been enacted into law in all states and the District of Columbia,⁴ presents the possibility of answering some, but not all, of the questions posed above.⁵ The focus of this article is whether the UCCJA should apply in adoption proceedings. The Act is silent on the question, as are the comments to its provisions. Most states have enacted the official version of the UCCJA, as it relates to covered proceedings, but two states and the District of Columbia

2. A. EHRENZWEIG, *CONFLICT OF LAWS* 85 (1962) (discussing status as a res in adoption: "The law on this topic is badly confused by the promiscuous treatment of several questions, namely those concerning the validity of a decree of adoption within the adopting state (local jurisdiction); those concerning the recognition of foreign decrees (international and interstate jurisdiction); and finally those concerning the applicable law."); H. CLARK, *THE LAW OF DOMESTIC RELATIONS* 872 (2d ed. 1988) ("Subject matter jurisdiction over adoption can fairly be characterized as both confused and uncertain, largely because the statutes are unclear and because there is little reasoned discussion in the cases.").

3. 9 U.L.A. 115 (1988) [hereinafter UCCJA]. Throughout the text of this article, the Uniform Child Custody Jurisdiction Act will be referred to variously as UCCJA and the Act.

4. UCCJA, 9 U.L.A. 115-16 (1988) ("Table of Jurisdictions Wherein Act Has Been Adopted").

5. Also relevant to the problems of jurisdiction in interstate adoption are the Parental Kidnapping Prevention Act (PKPA), 28 U.S.C. § 1738A (1988), which as a federal law applies to all states, and the Interstate Compact on the Placement of Children (ICPC) (Am. Pub. Welfare Ass'n), which has been entered into by all states. A full consideration of these statutes individually and in conjunction with the UCCJA is beyond the scope of this article. For discussion of the PKPA, see Coombs, *Interstate Child Custody: Jurisdiction, Recognition and Enforcement*, 66 MINN. L. REV. 711 (1982). For discussion of the ICPC, see Hartfield, *The Role of the Interstate Compact on the Placement of Children in Interstate Adoption*, 68 NEB. L. REV. 292 (1988).

have versions that specifically include adoption,⁶ two other states have versions that specifically exclude adoption,⁷ and one state has a version that specifically includes custody determination after an adoption has been denied.⁸ State courts have similarly split when faced with the question of the applicability of the UCCJA to adoption as a matter of statutory interpretation.⁹ Thus, the law is inconsistent from state to state, a result which is antithetical to the purposes of the UCCJA.¹⁰

This article concludes that the better interpretation of the UCCJA extends its coverage to adoption. As interpreted, the Act would provide a fixed set of rules by which all states could determine the appropriate forum to exercise jurisdiction. But effective application of the UCCJA in adoption must include some accommodation of the due process interests of absent parents whose parental rights are subject to termination and restraint on the part of judges where concurrent jurisdiction may exist in more than one state.

The Termination of Parental Rights in Interstate Adoption

As used in this article, adoption means "the legal process by which a child acquires parents other than his natural parents and parents acquire a child other than a natural child."¹¹ Professor Clark has described adoption as a two-step process. In the first step, parental rights are terminated, and, in the second, the new parent-child relationship is created. This frequently occurs in one proceeding, but it is sometimes accomplished in two separate proceedings (a termination of parental rights proceeding followed by an adoption).¹² Whether adoption is accomplished in one proceeding or two is determined by the state adoption statutes applicable to the type of adoption being sought. Adoptions may be either "agency adoptions" in which the child is relinquished to a public or private adoption agency for adoption placement, or "private" or "independent adoptions" in which the child is placed directly, or through an intermediary, with prospective adoptive parents. Often adoptions involving step-parents or relatives are treated differ-

6. Georgia (GA. CODE ANN. § 19-9-42 (Supp. 1981)); Montana (MONT. CODE ANN. § 40-7-103 (1989)); District of Columbia (D.C. CODE ANN. § 16-4502 (1981)). Michigan, which had a version of the UCCJA that included adoption, amended its statute deleting the reference to adoption. MICH. COMP. LAWS § 600.652 (1981), amended by 1982 Mich. Pub. Acts 66. See *supra* text accompanying note 194.

7. New York (N.Y. DOM. REL. LAW § 75-c (1988)) and New Hampshire (N.H. REV. STAT. ANN. ch. 458-A:2 (1983)). Tennessee (TENN. CODE ANN. § 36-6-202(3) (1984)) excludes proceedings pursuant to title 37, which includes the Interstate Compact on the Placement of Children regulating interstate adoption placement.

8. NEB. REV. STAT. § 43-1202 (3)(d) (1988).

9. See *supra* text accompanying notes 140-42.

10. UCCJA § 1, 9 U.L.A. 124 (1988) (One of the purposes of the UCCJA is to "make uniform the law of those states which enact it.").

11. H. CLARK, *supra* note 2, at 850. The terms "natural" and "biological" are used interchangeably to describe a child's birthparents.

12. *Id.*

ently than adoptions involving strangers and form another category of adoption.¹³

State adoption statutes typically require the consent of the biological parent to an adoption, but waive the consent requirement in specified circumstances.¹⁴ If the biological parent has consented to the adoption, or if grounds for waiving the requirement exist, the termination of parental rights and the creation of the new parent-child relationship may occur in one proceeding. This often occurs in independent adoptions. More often in agency adoptions, parental rights are terminated before an adoption petition is filed.¹⁵ However, if consent is required and the biological parent has not consented or relinquished her rights, the adoption can take place only if the biological parent's parental rights are terminated in a separate proceeding according to statutory grounds for termination.¹⁶

While there is considerable support for separate termination of parental rights proceedings before an adoption petition may be filed,¹⁷ many states

13. H. GITLIN, *ADOPTIONS: AN ATTORNEY'S GUIDE TO HELPING ADOPTIVE PARENTS* 8-9 (1987).

14. W. MEEZAN, S. KATZ & E. RUSSO, *ADOPTIONS WITHOUT AGENCIES: A STUDY OF INDEPENDENT ADOPTIONS* 150 (1978). "The consent assures the court that the biological parent is giving up his or her child voluntarily and understands the implication of consenting to the adoption—that the parent-child relationship will be completely and permanently severed. Furthermore, consent affords protection to the prospective adoptive parents as a legal guarantee of the child's availability." *Id.* The consent requirement is usually waived if the parent had abandoned the child. *E.g.*, UNIF. ADOPTION ACT § 6(a)(1), 9 U.L.A. 28 (1971). Consent may also be waived for failure to communicate with or support the child for a specified period when the child is in the custody of another. Waiver on this basis is sometimes limited to adoptions by a step-parent or relative. *E.g.*, GA. CODE ANN. § 74-410 (Supp. 1990). The parental consent requirement is waived where parental rights have been relinquished to an adoption agency or where parental rights have been previously terminated. *E.g.*, UNIF. ADOPTION ACT § 6(a)(4), (5), 9 U.L.A. 29 (1971). In those circumstances consent of the agency or the child's guardian would be required. H. CLARK, *supra* note 2, at 880-81. Until the Supreme Court decision in *Stanley v. Illinois*, 405 U.S. 645 (1972), unwed fathers were largely ignored in adoption. Most pre-*Stanley* statutes required only the mother's consent for the adoption of an out-of-wedlock child. Most statutes now require that notice and an opportunity to be heard must be provided to unwed fathers. H. CLARK, *supra* note 2, at 860-62.

15. This is the recommended practice in agency adoptions. "For the protection of the child, the natural parents and the agency, legally binding termination of parental rights and the establishment of a recognized legal status between the child and the agency should take place prior to any steps being taken toward adoption." CHILD WELFARE LEAGUE OF AMERICA, *STANDARDS FOR ADOPTION SERVICE* § 7.26, at 106 (1978).

16. Typical grounds include, but are not limited to, abuse, neglect, and unfitness. *See generally* H. CLARK, *supra* note 2, at 893-905; S. KATZ, R. HOWE & McGRATH, *CHILD NEGLECT LAWS IN AMERICA* (1975).

17. The Model Act to Free Children for Permanent Placement, authored by Professor Katz,

declares invalid all non-judicial attempts at severance of the parent-child relationship by contractual arrangements. Termination of a parent-child relationship involves a serious reordering of personal statuses and legal rights and obligations. A judicial proceeding is necessary to ensure that the constitutional rights of all parties are recognized and enforced

MODEL ACT TO FREE CHILDREN FOR PERMANENT PLACEMENT § 1 commentary, *reprinted in*

continue to permit the termination of parental rights to occur as a part of the adoption proceeding. In fact, in some instances, a separate proceeding to terminate parental rights is not feasible, especially in independent adoptions where no agency is available to assume responsibility for the child in the interim between termination of parental rights and adoption.¹⁸ Further, statutes governing termination proceedings may limit the persons who may bring the action,¹⁹ and state law may not authorize the court to terminate parental rights on the same grounds applicable to an adoption proceeding when no adoption is pending or contemplated in that state.²⁰ Finally, a separate termination proceeding would likely involve additional cost and delay. Therefore, while termination of parental rights in a separate proceeding prior to adoption would avoid some of the jurisdictional problems addressed in this article, there remain circumstances in which a separate proceeding would be unavailable or unworkable.

In an interstate adoption such as that in the Baby *X* hypothetical, the Jones would probably be unable to adopt Baby *X* in state *A* because they are neither residents nor domiciliaries of state *A*. The preferred approach would then be to terminate all parental rights in state *A* before initiating an adoption in state *B*, because the state *A* court would have personal jurisdiction over the biological parents. But if the Jones lack standing to initiate a termination of parental rights proceeding or if termination would require the appointment of an agency custodian or if the court lacks subject matter jurisdiction to terminate parental rights because no adoption in state *A* is pending or contemplated, a termination proceeding in state *A* may not be possible. If the adoption, including termination of parental rights, is pursued in state *B*, the problem of personal jurisdiction over the state *A* parent remains. Therefore, an adoption might not be possible because of the jurisdictional barriers, even if it would best serve the interests of Baby *X*.

Katz, *Freeing Children for Permanent Placement Through a Model Act*, 12 FAM. L.Q. 203, 208 (1978). Some provision is made in the Act for relinquishments to be made to agencies with subsequent ratification by the court. *Id.* Compare MODEL STATE ADOPTION ACT (Draft 1984), reprinted in 19 FAM. L.Q. 103 (1985) (no judicial proceeding to terminate parental rights as part of adoption statute; consents and relinquishments must be filed with the court; involuntary terminations based on implied consent as part of adoption proceeding).

18. See H. CLARK, *supra* note 2, at 880.

19. This problem is avoided in the Model Act to Free Children for Permanent Placement as to voluntary termination, because either the parent or an agency may file a petition. MODEL ACT TO FREE CHILDREN FOR PERMANENT PLACEMENT § 8, reprinted in Katz, *supra* note 17, at 222. However, a petition seeking involuntary termination could not be filed by a prospective adoptive parent who is neither the child's guardian, legal custodian or de facto parent (of a child in foster care). *Id.*

20. Cf. H.C.S. v. Grebel, 253 Ga. 404, 321 S.E.2d 321, 322 (1984) (To avoid frustrating interstate adoption, the court held that a termination of parental rights in contemplation of adoption in another state was "in connection with adoption proceedings" within the meaning of the Georgia adoption statute.). The same problem would exist under the revised Uniform Adoption Act which authorizes voluntary and involuntary termination either prior to or in an adoption proceeding. UNIF. ADOPTION ACT § 19, 9 U.L.A. 71-72 (1971).

Theories of Jurisdiction in Adoption Prior to UCCJA

It comes as no great surprise that much of the confusion about "jurisdiction" in adoption results from the use of the single term as a label for widely varying circumstances in which courts may render binding decisions.²¹ Jurisdiction may be "local," that is, binding within the state, or "inter-state," which means binding in other states as well under full faith and credit. Two major categories of local jurisdiction may be identified as subject matter jurisdiction and jurisdiction over persons and property.²² The existence of jurisdiction over persons and property—also known as personal, judicial or territorial jurisdiction—is determined by whether the proceeding is in personam, in rem or quasi in rem.²³

Subject Matter Jurisdiction

There is some authority that subject matter jurisdiction may be further subdivided into (1) "competence" (connotes a decision by the state to limit the controversies a court can decide, as with courts of limited jurisdiction) and (2) the proper presence of the res before the court in an in rem proceeding.²⁴ It is a question of "jurisdiction" whether a particular category of court within a state court system can entertain an adoption proceeding at all.²⁵ It is also a question of "jurisdiction" whether a court, authorized by statute to decide adoption cases, can entertain an adoption proceeding initiated by a certain class of petitioners, such as nonresidents or recent emigres.²⁶ Both of these questions relate to subject matter jurisdiction in the sense of "competence"²⁷ of the court to decide certain controversies. Indeed, they may be viewed as the easy questions of subject matter jurisdiction, because they are typically answered explicitly by the terms of state

21. "The word 'jurisdiction' has too many meanings. Because of that it is a prime source of confusion and ambiguity in the law. About all that can be done about it is to try to be sure of the sense in which the word is being used at any given time." R. LEFLAR, L. MCDUGAL & R. FELIX, *AMERICAN CONFLICTS LAW* 5 (1986) [hereinafter LEFLAR].

22. A. EHRENZWEIG, *supra* note 2, at 72 ("The question which court, if any, 'has' (local) jurisdiction is ambiguous: it may refer to the court's jurisdiction proper (over parties or things) or so-called jurisdiction over the subject matter.").

23. E. SCOLES & P. HAY, *CONFLICT OF LAWS* 211 (1982) [hereinafter SCOLES & HAY].

24. A. EHRENZWEIG, *supra* note 2, at 73 ("[Subject matter jurisdiction], too, is ambiguous: it may designate a type of case over which the state has 'given to the court the power to entertain the action,' [RESTATEMENT OF JUDGMENTS § 7 comment a (1942)] and may in this sense be used 'more or less interchangeably' with the term 'competency'; or it may denote the fact that the res supporting an in rem or quasi in rem action . . . has been properly brought before the court." (citation omitted)); Ratner, *Procedural Due Process and Jurisdiction to Adjudicate*, 75 Nw. U.L. REV. 363, 409 (1980) [hereinafter *Due Process*]; cf. H. CLARK, *supra* note 2, at 869-74. Other authorities use subject matter jurisdiction to mean competency. LEFLAR, *supra* note 21, at 5; R. WEINTRAUB, *COMMENTARY ON THE CONFLICT OF LAWS* 92 (1980); E. SCOLES & P. HAY, *supra* note 23, at 216.

25. H. CLARK, *supra* note 2, at 869.

26. *Id.*

27. RESTATEMENT (SECOND) OF JUDGMENTS § 14 (Tent. Draft No. 5, 1978).

adoption statutes.²⁸ The harder questions of subject matter jurisdiction pertain to the traditional classification of adoption as a proceeding affecting status,²⁹ and are not answered by reference to adoption statutes.³⁰

Jurisdiction Over Persons and Property

Jurisdiction in this sense requires varying degrees of connectedness between the forum state and the person or thing over which that state seeks to exercise authority. Traditionally, the degree of connectedness required has depended upon the classification of the proceeding as in personam, in rem or quasi in rem and the limitations imposed by due process considerations. Most often adoption is classified as a status proceeding to which special jurisdictional rules apply,³¹ but there is also support for the classification of adoption as an in rem or quasi in rem proceeding.³² The res in an adoption proceeding has been identified as the child's status,³³ or, in one case, as the child.³⁴ There is also confusion here as to labelling, with some references to "in rem" jurisdiction over property as subject matter jurisdiction (apparently because subjects or things were 'seized') to distinguish it from 'in personam' jurisdiction over the parties"³⁵

Jurisdiction Based on Status

Adoption has been viewed as a status proceeding, that is, one that affects the existence of the relationship between parent and child.³⁶ Status has been described as a "creature of the law,"³⁷ as having only "an imaginary

28. Most state statutes indicate the court in which an adoption proceeding may be commenced (e.g., juvenile court, superior court, family court, etc.), durational residency requirements for petitioners, if any, (typically six months to one year), and the proper venue (often held to be jurisdictional) based on the residency of one or more of the parties. *E.g.*, N.C. GEN. STAT. § 48-4 (1986) (specifying superior court and six month residency requirement for adoption of unrelated persons); GA. CODE ANN. §§ 74-402 to 74-403 (Supp. 1990) (specifying superior court in where petitioner has resided for six months). *See generally* H. CLARK, *supra* note 2, at 869-70.

29. H. CLARK, *supra* note 2, at 870. *See infra* text accompanying notes 36-50.

30. Professor Clark has criticized the application of common law jurisdictional requirements in adoption cases, because adoption is a statutory proceeding, unknown at common law. H. CLARK, *supra* note 2, at 870.

31. *See infra* text accompanying notes 36-50.

32. Taintor, *Adoption in the Conflict of Laws*, 15 U. PITT. L. REV. 222, 229 (1954) ("There seems to be a more or less inchoate notion that adoption . . . operates *in rem* or *quasi in rem*, though agreement as to the identity of the res and as to its situs does not exist.").

33. H. CLARK, *supra* note 2, at 871 (criticizing the theory as "pseudo-analysis"). The identification of the child's status as the res in an in rem proceeding limits the permissible forums to that of the child's domicile, as contrasted with the status proceeding classification in which the various statuses affected can be considered. *See infra* text accompanying notes 40-50.

34. *Portman v. Mobley*, 158 Ga. 269, 123 S.E. 695, 697 (1924) (Russell, C.J., concurring).

35. *Due Process*, *supra* note 24, at 409.

36. Taintor, *supra* note 32, at 222; LEFLAR, *supra* note 21, at 663; H. CLARK, *supra* note 2, at 870-71.

37. H. CLARK, *supra* note 2, at 870-71.

form;³⁸ nonetheless, it has been located at the state of domicile, and jurisdiction in adoption has been found to exist there, because only the domicile possesses the authority to create status.³⁹ If all the parties to the adoption triad are domiciled in the same state, then jurisdiction to grant the adoption exists there.⁴⁰ But if two or three different domiciles are involved, deciding which state has jurisdiction has proved difficult. The effort has been undertaken, however, because of the realization that some desirable adoptions would otherwise be impossible.

This approach to jurisdiction in adoption is roughly analogous to that utilized in migratory divorce cases.⁴¹ A forum state has jurisdiction to terminate the marriage status if the petitioning spouse is domiciled there.⁴² The forum state may terminate the marriage despite the lack of personal jurisdiction over the other spouse. However, domicile of the petitioner does not confer jurisdiction on the forum state to adjudicate related issues,⁴³ such as custody, alimony, child support, and property division.⁴⁴

Following the divorce analogy, one might expect that, as the petitioning parties, the adoptive parents' domicile at the forum should be sufficient to confer jurisdiction. However, the cases that have looked to domicile as the jurisdictional predicate vary. Some have looked to the domicile of the child, where the domicile of the child is not the same as that of the adoptive parents.⁴⁵ Others have looked to the domicile of the adoptive parents, on the curious basis that the child will, in all instances, benefit from the adoption, but the adoptive parents will be burdened unless the adoptive parents' domicile confers jurisdiction.⁴⁶

The First Restatement provided that the adoption status could be created at either (1) the domicile of the child; or (2) the domicile of the adoptive parents, but only if that state had jurisdiction over the child's custodian or if the child was orphaned or abandoned in that state.⁴⁷ The Second Restatement also accepts the domicile of the child or that of the adoptive parents, but requires that personal jurisdiction exist over the adoptive parents and either the child or the child's custodian.⁴⁸ The Restatement view has been

38. Stumberg, *The Status of Children in the Conflict of Laws*, U. CHI. L. REV. 42, 52 (1940).

39. *Id.* at 52; LEFLAR, *supra* note 21, at 664.

40. SCOLAS & HAY, *supra* note 23, at 541-42; LEFLAR, *supra* note 21, at 664.

41. H. CLARK, *supra* note 2, at 871; Note, *The UCCJA Coming of Age*, 34 MERCER L. REV. 861, 867 (1983).

42. *Williams v. North Carolina*, 317 U.S. 287 (1942) (decision based on full faith and credit).

43. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 77 (1971).

44. Generally, personal jurisdiction over the non-domiciliary spouse would be required to decide the economic issues. *Estin v. Estin*, 334 U.S. 541 (1948); *Vanderbilt v. Vanderbilt*, 354 U.S. 416 (1957). Issues of support might be decided through the use of a version of the Uniform Reciprocal Enforcement of Support Act. For the adjudication of custody issues, jurisdiction would be determined under the UCCJA.

45. *E.g.*, Appeal of Wolf, 10 Sad. 139, 13 A. 760 (Pa. 1888).

46. *See, e.g.*, Appeal of Woodward, 81 Conn. 152, 70 A. 453 (1908).

47. RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 142 (1934).

48. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 78 (1971).

criticized on the basis that requiring personal jurisdiction over an abandoning or unknown parent (whose parental rights have not been terminated by a court) would thwart many adoptions.⁴⁹ A slightly modified approach has been recognized in which notice and opportunity to be heard, rather than personal jurisdiction, has been deemed sufficient.⁵⁰

Constitutional Limitations on the Exercise of Jurisdiction Under Traditional Theories

The two primary sources of limitations imposed by the Constitution on the exercise of jurisdiction by the states are the due process clause and the full faith and credit clause.⁵¹ The due process clause of the fourteenth amendment limits the exercise of jurisdiction by a state in the interest of fairness,⁵² while the full faith and credit clause prevents relitigation and promotes federal unity by requiring states to recognize and enforce sister state judgments.⁵³ As noted above, the classification of adoption as a status proceeding has been interpreted to negate the due process requirement of personal jurisdiction.⁵⁴ Instead, the due process clause has traditionally been interpreted to require only the procedural protections of notice and the opportunity to be heard.⁵⁵ Because the Supreme Court has not addressed the issue of whether due process requires personal jurisdiction over a biological parent, whose parental rights have not been terminated, before an adoption can be granted, much attention has been focused on the Court's pronouncements in the area of child custody in divorce. Here again, the Court has not addressed the precise issue of whether due process mandates personal jurisdiction over a parent in a custody action, but the Court has considered the applicability of full faith and credit in custody in *People ex rel. Halvey v. Halvey*,⁵⁶ *May v. Anderson*,⁵⁷ *Kovacs v. Brewer*,⁵⁸ and *Ford v. Ford*⁵⁹—four much-criticized cases.⁶⁰

49. H. CLARK, *supra* note 2, at 872, 874-75.

50. A. EHRENZWEIG, *supra* note 22, at 87.

51. Ratner, *Child Custody in a Federal System*, 62 MICH. L. REV. 795, 795 (1964) [hereinafter *Child Custody*].

52. "In recent years due process requirements for the exercise of jurisdiction by state courts, as delineated by the Supreme Court, have been concerned not so much with the presence of the parties or the subject matter of the litigation within the territory of the state, as with fairness to both parties at the place of trial." *Id.*

53. *Id.*

54. Note, *supra* note 41, at 866 (citing *Pennoyer v. Neff*, 95 U.S. 714, 734-35 (1878)).

55. See *Armstrong v. Manzo*, 380 U.S. 545 (1965); Hazard, *May v. Anderson: Prelude to Family Law Chaos*, 45 VA. L. REV. 379, 397 (1959).

56. 330 U.S. 610 (1947).

57. 345 U.S. 528 (1953).

58. 356 U.S. 604 (1958).

59. 371 U.S. 187 (1962).

60. Commentators criticizing the cases include Hazard, *supra* note 55, at 379; S. KATZ, *CHILD SNATCHING: THE LEGAL RESPONSE TO THE ABDUCTION OF CHILDREN* 56-61 (1981); H. CLARK, *supra* note 2, at 459-63; Bodenheimer & Neeley-Kvarme, *Jurisdiction Over Child Custody and Adoption After Shaffer and Kulko*, 12 U.C. DAVIS L. REV. 229, 248 (1979); *Child Custody*, *supra* note 51; *Due Process*, *supra* note 24.

In *Halvey*, the court held that full faith and credit did not prevent a reviewing court from modifying a custody decree. While the Court did not specifically hold that full faith and credit must be afforded to custody decrees, it implied so. In *May*, a plurality of the court held that a custody decree rendered without in personam jurisdiction over an absent parent need not be afforded full faith and credit. In a concurring opinion, Justice Frankfurter took the position that the decree could be granted comity, but that full faith and credit was not required because the reviewing state has an interest in the welfare of children within its borders that is stronger than "the interest of national unity."⁶¹ Like *Halvey*, *May* seemed to invite relitigation of custody. This trend was continued by the Court in *Kovacs*. There, the Court held that a reviewing court could modify a decree on the basis of changed circumstances without violating the full faith and credit clause.⁶² Finally, in *Ford*, the Court avoided the full faith and credit issue by relying on the doctrine of res judicata, thereby concluding that where custody was decided by an agreement between the parties, the custody order was not res judicata according to the law of the rendering state. Therefore, the reviewing state was free to make an independent determination on the custody issue.⁶³

Viewed together, these cases have been described as reflecting a "hands off" approach to full faith and credit as applied to custody.⁶⁴ Additionally, these cases have been blamed for the confusion surrounding custody jurisdiction and the proliferation of child snatching.⁶⁵ Finally, the implication of *May* that in personam jurisdiction is required by due process called into question the prevailing view that custody jurisdiction existed at the child's domicile.⁶⁶

Professor Hazard has considered the possibility of the extension of *May* to divorce:

This possibility exists, first because in many situations a divorce custody decree is the foundation for a subsequent adoption proceeding. Secondly, the policy consideration—"precious parental right"—said by the Court to underlie the requirement of personal jurisdiction in custody cases, if it applies at all to adoptions, applies with even greater force since adoption results in total termination of the natural parent's rights in the child.⁶⁷

Professor Hazard cautions that the application of *May* to adoptions could nullify thousands of adoptions and constrict opportunities for the adoption of "children of adversity," resulting in their long-term institutionalization.⁶⁸

61. *May*, 345 U.S. at 536.

62. *Kovacs*, 356 U.S. at 607-08.

63. *Ford*, 371 U.S. at 194.

64. S. KATZ, *supra* note 60, at 56.

65. Hazard, *supra* note 55, at 394-95.

66. *May*, 345 U.S. at 539-42 (Jackson, J., dissenting).

67. Hazard, *supra* note 55, at 396.

68. *Id.* at 399.

He sees as the best ground for distinguishing *May* the higher intensity of public interest in adoption, such that "the value of giving the child a legally unassailable parentage" overrides the value of personal service of process.⁶⁹ Professor Clark has suggested that a footnote in *Stanley v. Illinois*⁷⁰ seemed to "relegate *May v. Anderson* to the rubbish heap" because it endorsed service by publication in a termination proceeding to permit an adoption.⁷¹ However, Professor Clark also notes that *May* was cited with approval in *Stanley*.⁷²

A Brief Description of the UCCJA

The UCCJA was approved by the National Conference of Commissioners on Uniform State Laws and the American Bar Association in 1968 in an effort to redress the problems engendered by conflicting custody orders from different states.⁷³ The phenomenon most frequently identified as the focus of the UCCJA was that of parental child snatching following divorce in order to forum shop. Prior to the promulgation of the UCCJA, jurisdictional rules encouraged a parent who lost in a custody battle in one state to grab the child and move to another state where the custody issue could be relitigated.⁷⁴ The loser in the first custody battle would likely prevail in the second, because the court in the second forum would likely reach a result favoring its (new) domiciliary and keeping the child within its jurisdictional reach.

The UCCJA was designed to end the forum shopping and repeated litigation, which were acknowledged by experts in law and mental health to be extremely harmful to the interests of children.⁷⁵ To that end, the Act established (1) jurisdictional rules that limit the permissible forums to those most closely connected to the child, (2) rules of priority and methods of interstate communication between courts to resolve remaining jurisdictional disputes, and (3) rules of comity to provide for recognition and enforcement of sister state custody decisions.⁷⁶ Although the UCCJA came about to remedy the problems of interstate divorce custody litigation, by its terms, it is not limited in its application to divorce custody disputes. Both the definitional section and the comment to that section indicate that the Act covers other custody determination proceedings as well, including those where custody is only one of the issues to be decided.⁷⁷

69. *Id.* at 398.

70. 405 U.S. 645 (1972).

71. H. CLARK, *supra* note 2, at 875.

72. *Id.*

73. UCCJA prefatory note, 9 U.L.A. 116-17 (1988).

74. *See id.*

75. *See generally* S. KATZ, *supra* note 60; Foster, *Child Custody Jurisdiction*, 27 N.Y.L. SCH. L. REV. 297 (1981).

76. *See* UCCJA § 1, 9 U.L.A. 123-24 (1988) (purposes of the Act).

77. "Custody proceeding" is defined in the UCCJA to include "proceedings in which a custody determination is one of several issues, such as an action for divorce or separation, and includes child neglect and dependency proceedings." Further, the comment counsels that

Bases Upon Which Jurisdiction May Be Exercised

The UCCJA sets out four alternative bases upon which a court that is otherwise competent to decide child custody matters can establish jurisdiction to make a custody determination.⁷⁸ For convenience, the four types of jurisdiction are referred to below as "home state," "significant connection," "emergency" and "default." These bases for jurisdiction represent a radical departure from the pre-UCCJA law, which required the presence of the child (and often nothing else) to establish jurisdiction to adjudicate custody.⁷⁹ The UCCJA specifically rejects physical presence alone as the basis for conferring jurisdiction, except in the limited circumstances described under "emergency jurisdiction" and "default jurisdiction."⁸⁰ Further, the Act does not require the child's presence in the forum as a prerequisite to the exercise of jurisdiction.⁸¹ The presence of the child is deemed desirable, however, and the Act includes provisions by which the court can compel the child's attendance.⁸²

"Home State" Jurisdiction

Jurisdiction may be claimed on the basis that the forum is the "home state" of the child.⁸³ "Home state" is defined as the state where the child lived with parents, a parent or a parent substitute for six consecutive months or from birth for a child less than six months of age.⁸⁴ The six-month period must have been immediately prior to the commencement of the proceeding and includes periods of temporary absence. A state that was the home state within six months prior to the commencement of the proceeding can also exercise jurisdiction on this basis, even if the child has been removed from the state, provided that a parent or parent substitute continues to live in the state.⁸⁵ Thus, if a child lived in state A with her mother from January

"custody proceeding" is to be construed broadly. UCCJA § 2(3), 9 U.L.A. 133 (1988). However, the UCCJA does not confer jurisdiction to determine child support or other monetary obligations. The definitional section specifically states that such decisions are not "custody determinations." *Id.* §2(2).

78. UCCJA § 3, 9 U.L.A. 143-44 (1988).

79. Bodenheimer, *Interstate Custody: Initial Jurisdiction and Continuing Jurisdiction Under the UCCJA*, 14 FAM. L.Q. 203, 204 (1981); see also Coombs, *Interstate Child Custody: Jurisdiction, Recognition, and Enforcement*, 66 MINN. L. REV. 711, 719-21 (1982).

80. UCCJA § 3(b), 9 U.L.A. 144 (1988). See *infra* text accompanying notes 99-102.

81. UCCJA § 3(c), 9 U.L.A. 144 (1988).

82. Section 11 of the UCCJA provides that the court may order persons within and without the state to appear with the child. The comment to the section provides in part: "Since a custody proceeding is concerned with the past and future care of the child by one of the parties, it is of vital importance in most cases that the judge has an opportunity to see and hear the contestants and the child. UCCJA § 11 comment, 9 U.L.A. 271 (1988). Section 11 also provides for the payment of travel costs by another party, as ordered by the court. *Id.* § 11(c).

83. UCCJA § 3(a)(1), 9 U.L.A. 143.

84. UCCJA § 2, 9 U.L.A. 133 (1988).

85. UCCJA § 3(a)(1)(ii), 9 U.L.A. 143 (1988).

through July and was taken by her father to state *B* in August, state *A* could exercise jurisdiction in a proceeding filed there in November, although the child had not lived in state *A* for the six consecutive months from May to November. The comment to this paragraph explains that by giving a stay-at-home parent six months to initiate custody proceedings, forum shopping is discouraged.⁸⁶

While the text of the UCCJA does not state a preference for "home state" jurisdiction, the comment to section 3 indicates that "[i]n the first place, a court in the child's home state has jurisdiction"⁸⁷ Some courts have viewed the Act as giving "home state" jurisdiction priority,⁸⁸ while others have not.⁸⁹

Significant Connection Jurisdiction

The second basis upon which jurisdiction may be founded is the best interest of the child where there is (1) a significant connection to and (2) substantial evidence in the forum.⁹⁰ Both requirements of contacts with the forum and availability of evidence in the forum must be satisfied. The significant connection must exist between the child and his parents, and the forum state, or between the child and at least one contestant, and the forum state.⁹¹ The conjunctive suggests that the significant connection test would not be met if the parent or contestant had significant connections in the forum, but the child had none. Conversely, a forum with which the child had significant connections (but which was not the "home state") could not claim jurisdiction on that basis in the absence of connections to a parent or contestant.

Although the text of the statute does not require it, the comment indicates that "significant connection" jurisdiction is a secondary or alternative ground. The preferred basis for establishing jurisdiction is the existence of a "home state." The comment provides that "if there is no home state or the child and his family have equal or stronger ties with another state, a court in that state has jurisdiction."⁹² The text of the statute and the comment do not prohibit a state with significant connections from exercising jurisdiction, even where a home state exists. Much of the criticism of the UCCJA has been directed toward this concept of concurrent jurisdiction and its potential

86. UCCJA § 3 comment, 9 U.L.A. 144 (1988).

87. This approach to "home state" jurisdiction may be contrasted with that of the PKPA, which permits the exercise of significant connection jurisdiction as an alternative to "home state" jurisdiction only if no other state would have "home state" jurisdiction. If another state would have home state jurisdiction, "significant connection" jurisdiction may not be exercised by the forum, unless the "home state" declines to exercise jurisdiction. 28 U.S.C. §1738A(c) (1988).

88. *E.g.*, *Grayson v. Grayson*, 454 A.2d 1297 (Del. 1982); *Hattoum v. Hattoum*, 295 Pa. Super. 169, 441 A.2d (1982).

89. *E.g.*, *Brokus v. Brokus*, 420 N.E.2d 1242 (Ind. Ct. App. 1981); *William L. v. Michele P.*, 99 Misc.2d 346, 416 N.Y.S.2d 477 (Fam. Ct. 1979).

90. UCCJA § 3(a)(2), 9 U.L.A. 143 (1988).

91. *Id.*

92. UCCJA § 3 comment, 9 U.L.A. 144 (1988).

to invite jurisdictional competition.⁹³ The drafters recognized that concurrent jurisdiction would be troublesome; to their credit, they included both procedures to be followed when a court learns of simultaneous proceedings elsewhere⁹⁴ and authority for a court having jurisdiction to decline to exercise it in favor of a "more convenient forum."⁹⁵

They also underscored the need for the Act to be interpreted according to "the spirit of the legislative purposes," especially the purpose "to limit jurisdiction rather than proliferate it."⁹⁶ Moreover, the first clause of section 3(a)(2) is to be viewed as an overarching term of limitation, such that "jurisdiction exists only if it is in the *child's* interest. The interest of the child is served when the forum has optimum access to relevant evidence about the child and family. There must be maximum rather than minimum contact with the state."⁹⁷ Despite the exhortations of the drafters, some courts have claimed jurisdiction when a forum with stronger contacts and better access to evidence was available.⁹⁸ This has led to judicial standoffs, with courts issuing conflicting decrees, thereby signalling to custody contestants that forum shopping remains a viable option under the UCCJA.

Emergency Jurisdiction

Jurisdiction on this basis requires both that the child be physically present in the forum and that the child has been abandoned or is in danger because of abuse or neglect.⁹⁹ The text of the statute does not use the term "emergency" in relation to jurisdiction based on abandonment; instead, an emergency is required if jurisdiction is based on threatened or actual abuse or neglect. However, the comment provides that the jurisdiction conferred by this section is a reaffirmation of the *parens patriae* jurisdiction of the forum "when a child is in a situation requiring immediate protection."¹⁰⁰ This section has been interpreted to confer jurisdiction to make temporary orders only.¹⁰¹

Default Jurisdiction

If it is in the best interest of the child to do so, a court may exercise jurisdiction if no other state has jurisdiction under the preceding provisions

93. *E.g.*, Blakesley, *Child Custody—Jurisdiction and Procedure*, 35 EMORY L.J. 291 (1986); Coombs, *Interstate Child Custody*, 66 MINN. L. REV. 711 (1982); Foster, *Child Custody Jurisdiction: UCCJA and PKPA*, 27 N.Y.L.S. L. REV. 297, 342 (1981) (stating that the concurrent jurisdiction is preferable despite its shortcomings, because it allows for flexibility in the interest of the child).

94. UCCJA § 6, 9 U.L.A. 219-20 (1988).

95. UCCJA § 7, 9 U.L.A. 233 (1988).

96. UCCJA § 3 comment, 9 U.L.A. 145 (1988).

97. *Id.*

98. *E.g.*, *Lustig v. Lustig*, 99 Mich. App. 716, 299 N.W.2d 375 (1980).

99. UCCJA § 3(a)(3), 9 U.L.A. 144 (1988).

100. UCCJA § 3 comment, 9 U.L.A. 145 (1988).

101. *Hache v. Riley*, 186 N.J. Super. 119, 1 A.2d 971 (1982); *Nussbaumer v. Nussbaumer*, 442 So.2d 1092 (Fla. Dist. Ct. App. 1983).

or if another state declines to exercise jurisdiction in favor of the forum.¹⁰²

Resolution of Conflicting Claims to Jurisdiction

The UCCJA provides two primary means of resolving conflicting claims of jurisdiction. First, section 6 establishes a "first in time" rule to force a state to defer to the jurisdiction of another state where a proceeding is already pending. Under section 6, if the first state's exercise of jurisdiction was "substantially in conformity with [the] Act," the second state must yield. Second, section 7 provides authority for an inconvenient forum to decline to exercise jurisdiction in favor of "a more convenient forum." Thus, the first state to exercise jurisdiction may determine that, pursuant to section 7, "it is in the interest of the child that another state assume jurisdiction."¹⁰³ Using what the comment describes as "novel methods,"¹⁰⁴ courts involved in simultaneous proceedings are required to communicate with each other for the purpose of exchanging information and, where possible, to reach an agreement as to which court will exercise jurisdiction.¹⁰⁵ The discovery of potentially conflicting assertions of jurisdiction is aided by section 9, which requires that parties submit affidavits disclosing prior and pending custody proceedings and identifying others who have physical custody or who claim rights to custody or visitation.¹⁰⁶

Notice Provisions

Two notice provisions are contained in the UCCJA. The first pertains to notice within the state and provides that notice be given to contestants, parents (whose parental rights have not been terminated), and persons with physical custody of the child.¹⁰⁷ The method of providing notice is not

102. UCCJA § (a)(4), 9 U.L.A. 144 (1988).

103. UCCJA § 7(c), 9 U.L.A. 233 (1988). The full text provides:

(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;
- (4) if the parties have agreed on another forum which is no less appropriate; and
- (5) if the exercise of jurisdiction by a court of this state would contravene any of the purposes stated in section 1.

Id.

104. UCCJA § 6 comment, 9 U.L.A. 220 (1988).

105. Under section 6, a court having reason to believe that a prior proceeding is pending elsewhere must inquire of the appropriate officials in the other state. *Id.* § 6(b). The court is required to communicate with the court in another state upon learning of a pending proceeding there, regardless of which proceeding was commenced first. *Id.* §6(c).

106. UCCJA § 9, 9 U.L.A. 266 (1988).

107. UCCJA § 4, 9 U.L.A. 208 (1988).

specified, but the comment to the section states that notice is to be provided pursuant to state law.¹⁰⁸ The second notice provision applies to persons outside the state who are to be given notice "in a manner reasonably calculated to give actual notice," which may be by personal delivery, by mail, or as directed by the court.¹⁰⁹ The notice requirement is waived "if a person submits to the jurisdiction of the court."¹¹⁰ The comment to section 5 warns that "notice and opportunity to be heard must always meet due process requirements as they exist at the time of the proceeding."¹¹¹ Neither the text of this section nor the comment discusses the implicit result of the existence of the out-of-state notice provision in the context of a custody jurisdiction statute—the rights of out-of-state parents may be adjudicated by a court that lacks personal jurisdiction over them.¹¹² That this was the intended result is confirmed by section 12, which declares a decree binding on all parties notified pursuant to section 5,¹¹³ and by the comment to section 12.¹¹⁴ While the comment attempts to distinguish away any conflict between the UCCJA approach and the Supreme Court's decision in *May v. Anderson*,¹¹⁵ there remains a question of whether due process requires more than notice to an out-of-state parent.¹¹⁶

Recognition and Enforcement of Sister State Decrees

Once a custody decree is rendered by a state having jurisdiction under the UCCJA, the decree is valid within that state and is binding on those who were provided with notice and an opportunity to be heard.¹¹⁷ Although some decrees may be modified,¹¹⁸ until a decree is modified, it is to be treated as a final judgment and accorded *res judicata* effect.¹¹⁹ Just as section 12 outlines the final and binding nature of a decree in the rendering state, section 13 establishes a rule of comity that requires a sister state to recognize and enforce a valid decree as well.¹²⁰ The essential inquiry is

108. UCCJA § 4 comment, 9 U.L.A. 208 (1988).

109. UCCJA § 5, 9 U.L.A. 212 (1988). The comment to § 5 expresses the intent to comply with the due process requirements of *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) and *Schroeder v. City of New York*, 371 U.S. 208 (1962), and acknowledges reliance on § 2.01 of the UNIFORM INTERSTATE AND INTERNATIONAL PROCEDURE ACT, 9B U.L.A. 315 (1966). UCCJA § 5, 9 U.L.A. 213 (1988).

110. UCCJA § 5(d), 9 U.L.A. 212 (1988).

111. *Id.* § 5 comment.

112. See *In re Marriage of Leonard*, 122 Cal. App. 3d 443, 175 Cal. Rptr. 903 (1981).

113. UCCJA § 12, 9 U.L.A. 274 (1988).

114. "There is no requirement for technical personal jurisdiction, on the traditional theory that custody determinations, as distinguished from support actions . . . are proceedings in rem or proceedings affecting status." UCCJA § 12 comment, 9 U.L.A. 274 (1988).

115. 345 U.S. 528 (1953).

116. See Hogue, *Enforcing the Full Faith and Credit Clause: Congress Legislates Finality for Child Custody Decrees*, 1 GA. ST. U.L. REV. 157, 177-79 (1985). The problem of due process and personal jurisdiction is discussed *infra* text accompanying notes 196-97.

117. UCCJA § 12, 9 U.L.A. 274 (1988).

118. For example, divorce custody decrees are modifiable, but adoption decrees are not.

119. UCCJA § 12 comment, 9 U.L.A. 275 (1988).

120. UCCJA § 13, 9 U.L.A. 276 (1988).

whether the decree was rendered by a court having "jurisdiction under statutory provisions substantially in accordance with this Act" ¹²¹ Alternatively, if the factual circumstances would have supported jurisdiction in the rendering court under the UCCJA, the decree is entitled to recognition and enforcement. ¹²²

Jurisdiction to modify a decree is not directly relevant to adoption, which results in a final nonmodifiable judgment, except to the extent of reinforcing the policy of the UCCJA as found in its provisions that restrict modification. To limit relitigation, the UCCJA prohibits a state from modifying the custody decree of another state unless two conditions are met. First, the state that rendered the decree must lack jurisdiction at the time modification is sought; and, second, the forum state must have jurisdiction. ¹²³ Thus, a state that can establish that it is now the home state of the child may not modify a decree rendered by a court in the child's former home state, unless the former home state has lost jurisdiction. The former home state would have lost jurisdiction if "all the persons involved have moved away or the contact with the state has otherwise become slight" ¹²⁴

Although a court may refuse to recognize an out-of-state custody decree rendered without substantial compliance with the UCCJA, it may not modify such a decree if the rendering court would have jurisdiction under the Act at the time the modification is sought. ¹²⁵ If the two conditions are met to authorize modification, the forum court is required to consider the record from prior proceedings in order to make a better informed decision in the interest of the child. ¹²⁶

Whether the UCCJA Applies in Adoption

The issue of whether the UCCJA applies in adoption proceedings arises because the Act is silent as to adoption. In the UCCJA's definitional section, "custody determination" is defined as "a court decision and court orders and instructions providing for the custody of a child, including visitation rights; it does not include a decision relating to child support or any other monetary obligation of any person." ¹²⁷ "Custody proceeding" is defined as including "proceedings in which a custody determination is one of several issues, such as an action for divorce or separation, and includes child neglect and dependency proceedings." ¹²⁸ The question then becomes whether an

121. *Id.* Of course, to be recognized and enforced, a decree must not have been modified by a court exercising jurisdiction under standards "substantially similar" to those of the UCCJA. *Id.*

122. *Id.*

123. UCCJA § 14, 9 U.L.A. 292 (1988).

124. UCCJA § 14 comment, 9 U.L.A. 292 (1988).

125. *Id.*

126. UCCJA § 14(b) & comment, 9 U.L.A. 292, 293 (1988).

127. UCCJA § 2, 9 U.L.A. 133 (1988).

128. *Id.* For state versions of the UCCJA that have specifically included or excluded adoption, see *infra* notes 193-94.

adoption proceeding is a "custody proceeding" within the meaning of the Act.

Several influential commentators have concluded that an adoption proceeding is, or should be considered, a custody proceeding for purposes of the UCCJA. In an article coauthored by the late Professor Bodenheimer, who was the reporter for the UCCJA, the term "child custody proceedings" was given an expansive meaning.

Child custody proceedings in the broad sense used in this article include divorce custody disputes, guardianship, neglect and abuse cases, adoptions and actions to terminate parental rights. In all of these cases the core question is where and with whom a child should live when something has occurred to disrupt the family.¹²⁹

Similarly, it has been observed that "the state's concerns in private custody disputes, adoptions, and neglect/abandonment actions are similar, and logically the same jurisdictional rules should govern the resolution of all such issues which have interstate elements."¹³⁰ Finally, Professor Clark has written:

There is no question that [the definitions of custody determination and custody proceeding] could be more specific. They do, however, seem literally to apply to proceedings for the involuntary termination of parental rights on the grounds of dependency or neglect, the most common grounds for that kind of remedy. And certainly most of the cases in which parental rights are voluntarily relinquished, or in which an adoption is in issue also result in orders for the custody of a child along with orders respecting the parental rights over that child. For these reasons it seems justified to believe that the UCCJA now governs adoption and similar proceedings.¹³¹

Given the UCCJA's silence as to whether an adoption proceeding is a custody proceeding within the meaning of the Act, the plain-meaning approach to statutory interpretation is not particularly helpful.¹³² A strong argument can be made that, if adoption proceedings were intended to be included, the list of covered proceedings would have included adoption explicitly, in the same manner as child neglect and dependency proceedings. The meaning of the silence, then, is that adoptions are not covered by the UCCJA. On the other hand, one could argue that custody proceedings are, in the words of the statute, those in which a "custody determination" is

129. Bodenheimer & Neeley-Kvarme, *Jurisdiction Over Child Custody and Adoption After Shaffer and Kulko*, 12 U.C. DAVIS L. REV. 229, 232 (1979).

130. McGough & Hughes, *Charted Territory: The Louisiana Experience with the Uniform Child Custody Jurisdiction Act*, 44 LA. L. REV. 19, 27 (1983) (citations omitted).

131. H. CLARK, *supra* note 2, at 873-74.

132. This approach has little viability in current law; however, courts continue to use the language, typically as a starting point before seeking the legislative purpose of the statute. See *United States v. American Trucking Ass'ns*, 310 U.S. 534 (1940).

one of the issues. Thus, the meaning of custody proceeding is derivative from that of custody determination. In adoption proceedings custody is one of the issues to be decided; if a petition to adopt is granted, the adoptive parent acquires the right to custody of the child. While these arguments have some logical merit and find support in the plain-meaning rule,¹³³ neither argument is adequate to resolve the question. Nevertheless, the existence of two plausible arguments might establish that the statute is ambiguous, and thus invite the use of intrinsic and extrinsic aids to statutory construction.

Given the drafters' contemporaneous statement that the UCCJA was intended to cover "habeas corpus actions, guardianship petitions, and *other proceedings* available under general state law to determine custody,"¹³⁴ most courts have been unwilling to infer from the silence of the text that the exclusion of adoption was intended. Some of these courts have concluded that adoption is covered without giving any explanation of how the result was reached,¹³⁵ while most have found it necessary to resort to methods of statutory interpretation to determine whether adoption is within the reach of the UCCJA.¹³⁶ As shown below, the great weight of authority favors application of the UCCJA in adoption proceedings. The only reported cases cited in the literature that hold to the contrary are arguably distinguishable because they involve proceedings to terminate parental rights.¹³⁷

Cases Holding UCCJA Applicable In Adoption Proceedings Without Explanation

In two cases involving adoption—*In re Adoption of K.C.P.*¹³⁸ and *In re Adoption of Baby Boy W*¹³⁹—the UCCJA was applied without any discussion of whether an adoption proceeding is a custody proceeding within the meaning of the Act.¹⁴⁰ Apparently, the inclusion of adoption was assumed in both cases, as the courts focused on whether the UCCJA had been

133. Additional support could also be found for these arguments in the maxims or canons of construction; but for each maxim, another maxim leading to a contrary result could be cited. See Llewellyn, *Remarks of the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed*, 3 VAND. L. REV. 395 (1950).

134. UCCJA § 2 comment, 9 U.L.A. 134 (1988) (emphasis added).

135. See *infra* text accompanying notes 140-49.

136. See *infra* text accompanying notes 166-96.

137. See *infra* text accompanying notes 198-207. In a recent termination of parental rights case that did not involve adoption, the court held that the UCCJA was applicable. *In re A.E.H.*, 152 Wis. 2d 182, 448 N.W.2d 662, 667-68 (Ct. App. 1989), *review granted sub nom.* P.C. v. C.C., 449 N.W.2d 275 (Wis. 1989) (No. 88-2022).

138. 432 So. 2d 620 (Fla. Dist. Ct. App. 1983).

139. 701 S.W.2d 534 (Mo. Ct. App. 1985).

140. In a concurring opinion, a justice of the Colorado Supreme Court looked to the UCCJA, together with the Interstate Compact on the Placement of Children, to resolve a jurisdictional conflict between Colorado, where an adoption petition had been filed, and Ohio, where the children had been adjudicated dependent and neglected. *Denver Dep't of Social Servs. v. District Court*, 742 P.2d 339, 342-43 (Colo. 1987) (Mullarkey, J., specially concurring). The opinion for the court decided the jurisdictional issue on the basis of the Interstate Compact alone. *Id.* at 342.

violated or complied with, rather than whether the Act applied. In *K.C.P.*, the Florida District Court of Appeals reversed and remanded a trial court judgment granting an adoption on the basis that the trial court had exercised jurisdiction in violation of the UCCJA.¹⁴¹ There, a child was brought from New York to Florida by his aunt and uncle. The child's putative father initiated custody proceedings in New York and served notice on the aunt and uncle. The aunt and uncle then initiated adoption proceedings in Florida. The New York court notified the Florida court of the pending New York proceeding, and, in response, the Florida court initially stayed the adoption proceeding.

However, the attitude of the Florida court changed after the aunt and uncle failed to persuade New York to decline jurisdiction. The Florida court, despite notification from the New York court that New York had exercised jurisdiction, vacated its stay. The Florida court then ignored the order of the New York court awarding custody to the putative father, which was filed twice in the Florida proceedings, and granted the adoption. This meant that before the adoption was granted, the Florida court had been advised of New York's exercise of jurisdiction on four separate occasions. The district court of appeals found that the action of the trial court "flagrantly ignore[d] and contradict[ed] the salutary intentions of the Act."¹⁴² The court quoted extensively from the purpose and simultaneous proceedings provisions of the UCCJA, vacated and reversed the final judgment granting the adoption, and remanded "to allow enforcement of the New York custody decree pursuant to [the Florida version of the UCCJA]."¹⁴³

The Missouri Court of Appeals also applied the UCCJA in an adoption proceeding without discussing whether adoption is within its scope. In *Baby Boy W*, the Court reversed and remanded a trial court order denying a petition for transfer of legal custody to prospective adoptive parents and transferring custody to the Missouri Division of Family Services for the purpose of delivering the child to Indiana authorities. The court explicitly concluded that Indiana's jurisdiction under the UCCJA was dubious, and implicitly concluded that Missouri could exercise jurisdiction consistently with the Act.¹⁴⁴ *Baby Boy W* was born in Indiana and was brought to Missouri when he was five days old by the prospective adoptive parents, who had obtained the biological mother's consent to the adoption and had notified the Interstate Compact offices in both states.¹⁴⁵ Subsequently, the

141. *K.C.P.*, 432 So. 2d at 622.

142. *Id.*

143. *Id.*

144. *Baby Boy W*, 701 S.W.2d at 546.

145. The trial court determined that *Baby Boy W* had been brought to Missouri in violation of the Interstate Compact and ordered his return to Indiana. *Id.* at 541. The appellate court opined that the evidence supported the conclusion that compliance had occurred, but that no determination had been made as to whether the Compact applied in private adoptions. *Id.* at 542. On remand, the trial court would be required to make that determination first, before considering whether there had been compliance. The trial court's decision was based on the Interstate Compact and the lack of consent to the adoption. There is no indication that UCCJA issues were raised or decided by the trial court.

biological father, who had not consented to the adoption, initiated paternity proceedings in Indiana.¹⁴⁶ The prospective adoptive parents were not parties to the paternity proceeding and no summons was issued to them. It is unclear whether the prospective adoptive parents had actual knowledge of the pending paternity proceeding when they initiated adoption proceedings in Missouri two weeks later.¹⁴⁷ The paternity proceeding culminated in an order establishing paternity, awarding child support, awarding custody to the biological mother, and granting visitation to the biological father. The Indiana court was not advised of the pending adoption or of the fact that the child was in Missouri.

The biological parents appeared and participated in the Missouri adoption proceeding. Rather than relying on the Indiana judgment in their effort to block the adoption, the biological mother sought to revoke her consent on the basis of duress and coercion, while the biological father maintained that his consent was required because he had not abandoned or neglected the child.

Under these facts, the Missouri Court of Appeals held that the UCCJA required that the biological parents disclose to the Indiana court the existence of the adoption proceeding then pending in Missouri, the fact that the mother had signed a consent form, and the fact that the child was physically present in Missouri. Further, the court found that the UCCJA required issuance of a summons to the prospective adoptive parents and their joinder as parties. As a result of these deficiencies, the court concluded that the Indiana judgment "can have no effect upon the custody of the child as it may relate to other parties."¹⁴⁸ Implicit in the court's decision was the determination that under the UCCJA, the Indiana judgment was not entitled to recognition and enforcement in Missouri and that Missouri had jurisdiction in the adoption proceeding under the Act.¹⁴⁹

Another case contains explicit language to the effect that the UCCJA applies in adoption, but provides no explanation in support of that conclusion. In *Noga v. Noga*¹⁵⁰ the Illinois Court of Appeals upheld a trial court decision that a pending adoption proceeding in Arkansas deprived Illinois of jurisdiction over a grandmother's petition for visitation.¹⁵¹ There, the parents were divorced in Illinois, and the mother remarried. The mother,

146. The paternity proceeding encompassed issues of filiation, custody, visitation and support. *Id.* at 538.

147. The opinion of the Court of Appeals does not disclose any evidence in this regard. If the prospective parents knew of the paternity proceeding and the claims to custody made by the biological parents, the UCCJA would require that the information be disclosed to the Missouri court and that the Missouri court communicate with the Indiana court.

148. *Id.* at 545-46.

149. The court did not identify the UCCJA grounds upon which Missouri's exercise of jurisdiction would be based. However, the court stated that "[a]ll of the parties asserting any claim have submitted to the jurisdiction of the court and do not contest the jurisdiction." *Id.* Even so, consent of the parties, though adequate for personal jurisdiction, would not confer subject matter jurisdiction if it was otherwise lacking under the UCCJA.

150. 111 Ill. App. 3d 328, 443 N.E.2d 1142 (1982).

151. *Id.*, 443 N.E.2d at 1145.

children, and stepfather relocated to Arkansas, where a proceeding for a step-parent adoption was commenced. The court stated, "As the adoption appears to be a custody proceeding within the scope of the UCCJA over which the Arkansas courts have asserted jurisdiction, the Illinois courts must decline to do so."¹⁵² The court cited as authority the Illinois version of section 6 of the UCCJA¹⁵³ and a pre-UCCJA case, which held that a divorce court's continuing jurisdiction over child custody is terminated by an adoption.¹⁵⁴ The court did not elaborate on why adoption appears to be within the scope of the Act, but moved on to apply the simultaneous proceeding provision and to determine that under the circumstances Arkansas was the more appropriate forum.¹⁵⁵ Less direct language is found in *E.E.B. v. D.A.*,¹⁵⁶ which has been cited for the proposition that the UCCJA applies in adoptions.¹⁵⁷ In fact, *E.E.B.* involved conflicting habeas corpus proceedings in Ohio and New Jersey, not an adoption proceeding. Perhaps the cases citing *E.E.B.* relied on the statement of the New Jersey Supreme Court that "[w]hile UCCJA focuses on custody disputes between family members, its operative provisions are broad enough to include a dispute between a natural parent and adoptive parents."¹⁵⁸ This statement does lend support to the view that the UCCJA applies in adoptions where natural parents and adoptive parents may be disputants. However, in the context of the facts of the case, the court's statement may be more narrowly and correctly interpreted to establish that the Act applied in habeas corpus proceedings.¹⁵⁹

The facts of *E.E.B.* show that all of the parties resided in Ohio when the adoption placement occurred. The biological mother soon changed her mind about the adoption and sought to revoke her surrender of parental rights.¹⁶⁰ She initiated a habeas corpus proceeding to regain custody of the

152. *Id.*, 443 N.E.2d at 1145.

153. ILL. REV. STAT. ch. 40, para. 2107(a) (1979) (simultaneous proceedings).

154. *Noga*, 443 N.E.2d at 1145 (citing *People ex rel. Bachleda v. Dean*, 48 Ill. 2d 16, 268 N.E.2d 11, 13 (1971)).

155. *Id.* at 1145. There was no indication in the case whether the father continued to reside in Illinois, thereby preserving Illinois' continuing jurisdiction. The Court viewed his residence as immaterial because he had subjected himself to the jurisdiction of the Arkansas courts and was in the process of appealing the termination of his parental rights there. *Id.*

156. 89 N.J. 595, 446 A.2d 871 (1982), *cert. denied*, 459 U.S. 1210, *reh'g denied*, 460 U.S. 1104 (1983). The decision in this case was based on both the UCCJA and the PKPA.

157. *Gainey v. Olivo*, 258 Ga. 640, 373 S.E.2d 4, 6 n.5 (1988); *In re Adoption of B.E.W.G.*, 379 Pa. Super. 264, 549 A.2d 1286, 1290 (1988), *appeal denied*, 521 Pa. 628, 558 A.2d 530 (1989) ("New Jersey Court had jurisdiction of *adoption proceeding* under Uniform Child Custody Jurisdiction Act, notwithstanding habeas corpus/custody action in Ohio, where Ohio court had declined to exercise its jurisdiction.") (emphasis added) (citation omitted).

158. *E.E.B.*, 446 A.2d at 878.

159. *Id.* "We conclude that the Ohio habeas corpus decree is included within the operative provisions of UCCJA." *Id.*

160. Within a week of the child's birth, the mother informed the agency that she had changed her mind and wanted her child back. The agency failed to inform the court, and the mother's surrender was approved by the court without knowledge of her attempted revocation. *Id.* at 873.

child from the prospective adoptive parents and was unsuccessful at both the trial (juvenile court) and intermediate appellate court levels. Ultimately, she prevailed in the Ohio Supreme Court, but by that time the prospective adoptive father's employment had required that the family move to New Jersey. Upon remand, the juvenile court in Ohio issued a writ of habeas corpus on behalf of the biological mother, but without holding a best interests hearing as requested by the prospective adoptive parents. In search of relief from the Ohio writ of habeas corpus, the prospective adoptive parents initiated a custody proceeding in New Jersey. The biological mother challenged the jurisdiction of the New Jersey court to conduct a best interests hearing on the basis of the full faith and credit clause, the Parental Kidnapping Prevention Act (PKPA) and the UCCJA.

The New Jersey Supreme Court characterized the New Jersey proceeding as a modification of the Ohio writ and held that, pursuant to the UCCJA, New Jersey could exercise jurisdiction because Ohio, by failing to hold a best interests hearing, had declined to do so.¹⁶¹ The court reached the same conclusion under the PKPA.¹⁶² Since neither proceeding was an adoption proceeding, the court's task with regard to the applicability of the UCCJA was made easier. A habeas corpus proceeding is specifically mentioned in the official commentary to the UCCJA as included within the definition of a custody proceeding;¹⁶³ the same is not true of adoption.

The value of *E.E.B.* in resolving the issue of the applicability of the UCCJA in adoption is in its use for purposes of analogy. The relationship between the parties to the habeas corpus proceeding in *E.E.B.* is the same as the relationship between the parties in an adoption proceeding, that is, the adoptive parents are vying against the biological parents for the right to rear the child. However, the fundamental differences between the two proceedings caution against interpreting *E.E.B.* as holding that the UCCJA applies in an adoption proceeding. An adoption accomplishes a change in existing legal relationships with a consequential effect on the right to custody. Adoptive parents acquire the right to custody of the child as a result of the creation of the parent-child relationship between them and the termination of the parent-child relationship between the biological parent and the child.¹⁶⁴ In contrast, the parent-child relationship is unaffected in a habeas corpus proceeding in which the objective is the enforcement of a preexisting claim to custody.¹⁶⁵

161. *Id.* at 880. The Court did not consider whether a habeas corpus proceeding in Ohio is broad enough to permit a best interests inquiry before concluding that the failure to do so is equivalent to declining jurisdiction. *Cf.* H. CLARK, *supra* note 2, at 793 ("although there are some states in which habeas corpus addresses only the limited question of who has a legal right to the child under a prior decree or on some other basis providing a clear legal right, in most jurisdictions the petition for the writ opens up the broad question of what jurisdiction will best serve the child's interest . . .") (citations omitted).

162. *E.E.B.*, 446 A.2d at 880.

163. UCCJA § 2 comment, 9 U.L.A. 134 (1980).

164. H. CLARK, *supra* note 2, at 850.

165. *Id.* at 792-93.

Cases Holding UCCJA Applicable by Statutory Interpretation

Fortunately, most of the other cases that have held that the UCCJA applies to adoptions have arrived at that result through the use of one or more methods of statutory interpretation. Most begin with something akin to a plain-meaning approach, supplemented by consideration of the purpose of the legislation.

In *Souza v. Superior Court*, a case involving a step-parent adoption, the California Court of Appeal held that where Hawaii had exercised continuing jurisdiction over custody, a California court was required either to stay a pending adoption and contact the Hawaii court or to dismiss the adoption proceeding.¹⁶⁶ In that case, the adoption proceeding was commenced in California *before* the natural father filed a motion for visitation in Hawaii, where custody had first been determined in divorce proceedings. By analogy to guardianship proceedings, the court concluded that both the UCCJA and the PKPA are applicable to adoption proceedings.¹⁶⁷ In response to the stepfather's argument that the UCCJA is inapplicable in an adoption proceeding, the court said:

This argument is clearly wrong. The UCCJA regulates custody of children. An adoption proceeding to terminate parental custody rights is clearly a custody-determining proceeding of the most drastic kind Patently, a stepparent adoption, with its potential for completely terminating the natural father's custodial rights, is a custody-determining procedure and is . . . subject to the UCCJA and the PKPA.¹⁶⁸

The court first used the plain-meaning approach to statutory interpretation and found that adoption is a custody-determining procedure. By reference to the definition of custody as set out in California case law, the court rejected the existence of any ambiguity. Then, the court buttressed its conclusion by considering the question in light of the purposes for which the UCCJA was enacted. If the Act were not applied, children would be "vulnerable to the very abuses the Act seeks to cure."¹⁶⁹ Subsequent cases have not viewed the persuasive authority of *Souza* as limited to step-parent adoptions.¹⁷⁰ The same risk of permanent loss of custody exists in third-party adoptions unless the biological parent's rights have been terminated previously. In *In re Adoption of B.E.W.G.*,¹⁷¹ the Pennsylvania Superior Court held that the UCCJA deprived Pennsylvania of jurisdiction in an adoption proceeding when a custody proceeding was pending in New York. Like the court in *Souza*, the court in *B.E.W.G.* sought to interpret the Act

166. *Souza v. Superior Court*, 193 Cal. App. 3d 1304, 1312, 238 Cal. Rptr. 892, 897 (1987).

167. *Id.*, 238 Cal. Rptr. at 892-93.

168. *Id.*, 238 Cal. Rptr. at 895 (citations omitted).

169. *Id.*

170. See, e.g., *In re Adoption of B.E.W.G.*, 379 Pa. Super. 264, 549 A.2d 1286 (1988); *Gainey v. Olivo*, 258 Ga. 640, 373 S.E.2d 4 (1988).

171. *B.E.W.G.*, 549 A.2d at 1290.

consistently with its purposes. Rather than focus on the similarity between adoption and other proceedings covered by the UCCJA, as did the *Souza* court, the court in *B.E.W.G.* focused on the need to avoid frustration of the UCCJA's goals. The facts of *B.E.W.G.* provide a clear illustration of an attempt by the biological father to evade the intended result of the UCCJA. After the father murdered the mother in New York, the maternal grandparents sought custody of the children in the courts there. Initially, they were denied custody but were granted visitation rights, pending the outcome of the father's criminal case. Upon his conviction, they were granted temporary, then permanent, custody.

While the custody proceeding was pending, but before custody was awarded to the grandparents, the father relinquished the children to a Pennsylvania agency for adoption placement. The children were placed, and an adoption petition was filed in Pennsylvania. The Pennsylvania court was informed that a custody proceeding had been initiated in New York and sought assurance from the attorney for petitioners that New York had not already exercised jurisdiction. There is no indication of assurance having been given; however, the adoption was granted on the basis of the father's consent. A year later, the grandparents learned of the children's whereabouts and sought to obtain access to the adoption records and to vacate the adoption. Following a successful appeal of a trial court determination that they lacked standing,¹⁷² the grandparents argued on remand that Pennsylvania lacked jurisdiction in the adoption under the UCCJA. Again, they were unsuccessful at the trial court, but on appeal the Pennsylvania Superior Court held that "[i]n order to prevent by adoption that which cannot be achieved by custody proceedings, the provisions of the Uniform Act must also be applied to adoption proceedings."¹⁷³ Thus, the court interpreted the UCCJA in a manner that would not frustrate its purposes.

Citing the Pennsylvania version of the purposes section of the UCCJA, the court continued:

Our holding is consistent with the reasons for adopting the Uniform Child Custody Jurisdiction Act and the stated purposes thereof. These include, inter alia, the avoidance of "jurisdictional competition and conflict with courts of other states in matters of child custody"; the promotion of "cooperation with the courts of other states to the end that a custody decree is rendered in that state which can best decide the case in the interest of the child"; the assurance "that litigation concerning the custody of a child takes place ordinarily in the state with which the child and his family have the closest connection"; the deterrence of "abductions and other unilateral removals of children undertaken to obtain custody awards."¹⁷⁴

172. *In re Adoption of B.E.W.G.*, 355 Pa. Super 554, 513 A.2d 1061 (1986), *appeal denied*, 521 Pa. 628, 558 A.2d 530 (1989).

173. *B.E.W.G.*, 549 A.2d at 1290.

174. *Id.* (citation omitted).

The court vacated and set aside the adoption decree without discussion of the best interests of the children, who had been with the adoptive parents for more than four years at the time the decision was rendered.¹⁷⁵

In *Gainey v. Olivo*, the Georgia Supreme Court held that, "considering [its] purposes and language," the UCCJA should be construed to include adoption.¹⁷⁶ The court was persuaded by the official comment to the UCCJA that "'custody proceeding' is to be understood in a broad sense,"¹⁷⁷ and, giving a broad reading to the term, agreed with the court in *Souza* that adoption is a "custody-determining procedure."¹⁷⁸ The court also cited approvingly two law review articles that favor construing the UCCJA to include adoption.¹⁷⁹ The article written by "the drafter and reporter for the UCCJA"¹⁸⁰ appears to have carried great weight with the court. Emphasizing the purpose of the Act, the court noted that "[t]he application of the UCCJA to this adoption proceeding would have, among other things, prevented jurisdictional competition, promoted interstate cooperation, and, most importantly, prevented the continued disruption of a child's life."¹⁸¹ Like the courts in *Souza* and *B.E.W.G.*, the Georgia Supreme Court perceived that the broader interpretation of the Act was needed because interstate adoption posed the same problems as other forms of interstate custody litigation.

The facts of *Gainey*¹⁸² present another picture of the kind of forum shopping and judicial parochialism that the UCCJA seeks to avoid. Over the opposition of the putative father, the biological mother of a child born in New York placed the child for adoption with a New York agency. Both the putative father and the biological mother lived in New York. The putative father initiated paternity and custody proceedings in New York, and the agency transferred the child to an attorney who brought the child to Georgia for placement with the Gainey's as prospective adoptive parents. Before the New York court had ruled on paternity and custody, but after

175. *Id.* at 1291.

176. *Gainey v. Olivo*, 258 Ga. 640, 373 S.E.2d 4, 6 (1988). *Gainey* was decided on the basis of GA. CODE ANN. § 19-9-42(3) (1982) prior to its amendment to specifically include adoption. The Georgia Supreme Court was aware of the amendment. *Gainey*, 373 S.E.2d at 4. The bill amending the UCCJA was introduced in response to objections to the intermediate appellate court's holding that was reversed in *Gainey*. Note, *Domestic Relations*, 5 GA. ST. U.L. REV. 377 n.5 (1988). The court held in *Olivo v. Gainey*, 185 Ga. App. 427, 364 S.E.2d 279, 280 (1987), *modified*, 258 Ga. 640, 373 S.E.2d 4 (1988), that the UCCJA did not apply in adoption.

177. *Gainey*, 373 S.E.2d at 6 (citing UCCJA § 2 comment, 9 U.L.A. 134 (1988)).

178. *Id.* at 6 (quoting *Souza v. Superior Court*, 193 Cal. App. 3d 1304, 238 Cal. Rptr. 892, 895 (1987)).

179. *Id.* at 6 (citing Bodenheimer & Neeley-Kvarme, *supra* note 121; McGough & Hughes, *Chartered Territory: The Louisiana Experience with the Uniform Child Custody Jurisdiction Act*, 44 LA. L. REV. 19, 27 (1983)).

180. *Id.* It is not apparent whether the Court viewed the Bodenheimer and Neeley-Kvarme article as authority that the legislature had the specific intent to include adoption or as authority that the purpose of the UCCJA was broad enough to include adoption.

181. *Gainey*, 373 S.E.2d at 6.

182. *Id.* at 4, 5.

the New York court ordered the attorney to disclose the child's whereabouts, the Gainey's filed a petition in Georgia to terminate the putative father's parental rights and to adopt the child. The putative father contested the adoption and raised the issue of the New York proceeding. Subsequently, the New York court issued orders establishing the putative father as the legal father of the child, reserving jurisdiction to determine custody and forbidding the adoption in Georgia until the custody issue was determined. Despite the transmittal of certified copies of the New York court's orders to the Georgia court, the Georgia court proceeded to terminate the father's parental rights and grant the adoption. On these facts, the Georgia Supreme Court concluded that the trial court "should have deferred to the New York court . . . because the New York court was 'exercising jurisdiction substantially in conformity with [the UCCJA]' (citation omitted)."¹⁸³ Most recently, in *Foster v. Stein*,¹⁸⁴ a Michigan court joined the ranks of those concluding that the UCCJA applies in adoption. The Michigan case is especially interesting because the Michigan legislature had amended its version of the Act to delete language that specifically included adoption as a custody proceeding.¹⁸⁵ Notwithstanding that affirmative act of the legislature, the Michigan Court of Appeals used the plain-meaning approach to statutory construction to conclude that adoption remains within the scope of the UCCJA.¹⁸⁶ Instead of limiting the inquiry to whether adoption is a proceeding in which a "custody determination" is made, as the courts did in *Souza, B.E.W.G.*, and *Gainey*, the *Foster* court sought the plain meaning of "dependency proceeding," one of the specified proceedings in the UCCJA. Using the Black's Law Dictionary definition of "dependency,"¹⁸⁷ the court held that "adoption proceedings are included in the definition of a 'custody proceeding' because they are in the nature of a dependency proceeding."¹⁸⁸ The court also agreed with the *Souza* and *Gainey* courts that "an adoption proceeding to terminate parental custody rights is clearly a custody-determining proceeding of the most dramatic kind"¹⁸⁹

By relying on the legislative history of the amendment, the court avoided the seemingly logical conclusion that the deletion of adoption proceedings

183. *Id.* at 7 (citation omitted).

184. 183 Mich. App. 424, 454 N.W.2d 244 (1990).

185. The former Michigan version of section 2(c) of the UCCJA provided: "'Custody proceeding' includes proceedings in which a custody determination is one of several issues, such as an action for divorce or separation, and includes child neglect, dependency, and adoption proceedings." *Id.*, 454 N.W.2d at 246 (court's emphasis). The amended version that was construed by the court provided: "'Custody proceeding' includes proceedings in which a custody determination is 1 of several issues, such as an action for divorce or separation, and includes child neglect and dependency proceedings." *Id.*

186. *Id.*, 454 N.W.2d at 246-47.

187. "A relation between two persons, where one is sustained by another or looks to or relies on aid of another for support or for reasonable necessities consistent with dependent's position in life." *Id.*, 454 N.W.2d at 246 (quoting BLACK'S LAW DICTIONARY 393 (5th ed. 1979)).

188. *Id.*

189. *Id.*

from the definition of custody proceedings showed the intent of the legislature to exclude adoption from the coverage of the UCCJA. Initially, the court acknowledged that the first analysis of the amending bill "states that the bill would amend the statute to exclude adoption proceedings from the custody proceedings covered by the Act, but [the first analysis] gives no indication as to why the change was to be made."¹⁹⁰ The court then sought the reasons for the change and found that "one of the primary reasons for amending the statute was to make the language of the statute consistent with that of other states under the UCCJA."¹⁹¹ With consistency identified as the goal of the amendment, the court made a great leap in logic to conclude that, notwithstanding the change in language, the statute should be interpreted to include adoption.¹⁹²

Missing in the court's analysis is something to indicate that the legislative intent was to conform Michigan's version of the UCCJA to that of the states where adoption is included rather than to that of the states where adoption is excluded. While the court noted approvingly that Georgia had amended its version of the Act to include adoption,¹⁹³ the court did not consider the two states whose versions explicitly excluded adoption.¹⁹⁴ Further, the court failed to reconcile its conclusion with the portion of the legislative history that explained the amendment as removing the "requirement that in all adoption proceedings courts be notified as to whether there are any competing custody proceedings for the child in another state."¹⁹⁵ The requirement was described as "extraneous and irrelevant" because it was rarely enforced within the state, other states did not have the same requirement, and competing custody disputes in other states were rare.¹⁹⁶ Given this strong evidence of the intent of the legislature to remove adoption from the scope of the UCCJA, the court's method of divining a legislative intent to the contrary remains unknown. In support of the result reached by the court, it may be argued that the legislative facts that formed the basis for the amendment were erroneous (the majority of the courts that have considered the issue have held that the UCCJA applies in adoption)

190. *Id.*, 454 N.W.2d at 247.

191. *Id.*

192. The court ignored the fact that 43 states have versions of the UCCJA that are silent on adoption and that, of the 43, the courts in only a few have interpreted the UCCJA to include adoption. See *supra* text accompanying notes 140-91.

193. *Foster*, 454 N.W.2d at 247. Montana (MONT. CODE ANN. § 40-7-103 (1989)) and the District of Columbia (D.C. CODE ANN. § 16-4503 (1989)) also have versions of the UCCJA that specifically include adoption.

194. N.H. REV. STAT. ANN. § 458-A:2 (1983); N.Y. DOM. REL. LAW § 75-c (McKinney 1988). Other versions of the UCCJA that indicate a lack of consistency among states include TENN. CODE ANN. § 36-6-202 (1984) (excludes "other proceedings pursuant to Title 37" where the Interstate Compact on the Placement of Children is codified) and NEB. REV. STAT. § 43-1202(3) (1988) (defining custody proceeding to include "proceedings to determine custody . . . after a court has denied a petition for adoption").

195. *Foster*, 454 N.W.2d at 247 (quoting Fact Sheet on Legislation for House Bill 4577, May 19, 1981).

196. *Foster*, 454 N.W.2d at 247.

and that the result promotes the purposes of the Act. Yet, the court's usurpation of the legislative function raises serious doubt about the correctness of this case.

In an unreported case, the Ohio Court of Appeals held that the UCCJA applied in an adoption proceeding and that dismissal of the action was appropriate where the requirements of the Act were not satisfied.¹⁹⁷

Cases Holding UCCJA Inapplicable

Two cases—*Williams v. Knott*,¹⁹⁸ from Texas, and *In re Johnson*,¹⁹⁹ from Indiana—have been cited as holding that the UCCJA is inapplicable in adoption proceedings.²⁰⁰ Both cases may be read narrowly to hold that the UCCJA is inapplicable in proceedings to terminate parental rights. Although *Williams* involved the appeal of a judgment terminating parental rights and granting an adoption, the court focused exclusively on the termination issue.²⁰¹ In *Johnson*, the action was for termination only, but the termination statute was codified as part of the chapter governing adoption.²⁰²

In *Williams*, the parents were divorced in Oklahoma, the mother was awarded custody and, after her remarriage, moved to Texas with the stepfather and child. An action for termination of the father's parental rights and adoption by the stepfather was brought in Texas. The father, who remained an Oklahoma domiciliary and resident, challenged the jurisdiction of the Texas court on the basis that Oklahoma had continuing jurisdiction under both the UCCJA and the PKPA.

In upholding jurisdiction in Texas, the court applied section 11.051 of the Texas Family Code, which allows status or subject matter jurisdiction in termination actions to be based on the jurisdictional provisions contained in the Texas version of the UCCJA.²⁰³ Section 11.051 is not a part of the Texas UCCJA, but it incorporates by reference the Act's provisions. The court reasoned that the jurisdictional requisites of the UCCJA, as incor-

197. *Roth v. Hatfield*, Nos. 92CA19-82CA20, -82CA21 (Ohio Ct. App. Dec. 28, 1983) (LEXIS, State library). Two other unreported Ohio cases have considered the applicability of the UCCJA in adoption with conflicting results. In *In re Adoption of Woodruff*, No. 1125 (Ohio Ct. App. December 31, 1984) (LEXIS, State library), the court held that an application for a preadoptive placement is a custody proceeding to which the UCCJA applies. In *In re Adoption of White*, No. 80-CA-25 (Ohio Ct. App. Feb. 16, 1982) (LEXIS, State library) the court held UCCJA inapplicable in adoption proceeding which is governed exclusively by adoption statutes.

198. *Williams v. Knott*, 690 S.W.2d 605 (Tex. Ct. App. 1985).

199. *In re Johnson*, 415 N.E.2d 108 (Ind. Ct. App. 1981).

200. See *Gainey v. Olivo*, 258 Ga. 640, 373 S.E.2d 4, 6 n.5 (1988).

201. *Williams*, 690 S.W.2d at 605. Since the judgment terminating the father's parental rights was reversed, there was no need for the court to reach the issue of adoption. Absent consent or termination of parental rights, an adoption may not be granted. TEX. FAM. CODE ANN. § 16.03 (Vernon 1986).

202. *Johnson*, 415 N.E.2d at 110-11.

203. *Williams*, 690 S.W.2d at 607. "In a suit affecting the parent-child relationship, the court may exercise status or subject matter jurisdiction over the suit as provided by Subchapter B of this chapter [UCCJA]." TEX. FAM. CODE ANN. § 11.051 (Vernon 1986).

porated into section 11.051, were satisfied because Texas had home state and significant connection jurisdiction.²⁰⁴ However, the court did not apply the UCCJA; it applied section 11.051. The court did not reach the question of whether the Act applies in adoption because of its reliance on section 11.051. However, the court did determine that a termination of parental rights proceeding is not a custody determination within the meaning of the PKPA.²⁰⁵

In *Johnson*, the father sought to terminate the mother's parental rights in Indiana, the state of his residence. The mother was a California resident. The child resided in Illinois with her paternal grandparents who were her custodians. The father had not remarried, and apparently no adoption was then contemplated. The mother challenged the jurisdiction of Indiana on the basis that Indiana lacked subject matter jurisdiction under the UCCJA.

The court held that termination proceedings were governed by the jurisdictional requisites of the adoption statutes, not by the UCCJA. While conceding that a termination proceeding is "the ultimate determination of child custody as to that parent," the court nonetheless concluded that "[t]ermination of parental rights is a statutory mechanism which permits a child to be adopted without the consent of a parent," and not an action to establish or modify a custody decree.²⁰⁶ Because no adoption petition had been filed and because no adoption was contemplated, this case could be read narrowly to address the issue of the applicability of the UCCJA to termination of parental rights. However, the termination statute was codified as part of the adoption statutes, and, therefore, such a narrow reading would appear unwarranted.

Regardless of whether a narrow or broad reading is given to the case, *Johnson* is scant authority. A rule that jurisdiction exists for purposes of termination of parental rights where the only connection to the forum is the petitioner father's residence is clearly wrong. Moreover, if the forum would lack jurisdiction to adjudicate custody, how could it exercise jurisdiction to adjudicate a final and irrevocable end to the parent-child relationship.²⁰⁷ Thus, neither *Williams* nor *Johnson* provides any significant basis for disagreement with the weight of case authority that the UCCJA applies in adoption.

The Unresolved Issue of the Constitutionality of the UCCJA

The advantages of applying the UCCJA in adoption proceedings are the same as in divorce custody proceedings—certainty, predictability, and consistency from state to state, at least to the extent that any uniform act can achieve truly uniform results.²⁰⁸ Although the cases and commentators gen-

204. *Williams*, 690 S.W.2d at 607-08.

205. *Id.* at 608-09.

206. *Id.*

207. *Cf. In re A.E.H.*, 152 Wis. 2d 182, 448 N.W.2d 662, 667 (Ct. App. 1989).

208. Because uniform acts can be amended by state legislatures, their uniformity can be undercut. Other approaches to obtain uniformity in interstate state matters, such as federal

erally favor applying the UCCJA in adoption, there are some concerns yet to be addressed, especially when an absent parent's rights are to be adjudicated. As noted earlier, many of the concerns expressed here are applicable only when termination of parental rights occurs as part of the adoption. The problem of personal jurisdiction over the nonresident biological parent could be avoided if parental rights were terminated in a state having personal jurisdiction.²⁰⁹ The adoption, the second step of the procedure in which a new parent-child relationship is created, could then be accomplished in the state having jurisdiction for that purpose.²¹⁰ The requirement of a separate termination action could easily have the effect of thwarting desirable adoptions.²¹¹

The due process limits on UCCJA jurisdiction in adoption have not been articulated by the courts. The Supreme Court has not passed on the constitutionality of the Act as applied in a divorce custody where in personam jurisdiction over a parent is lacking. However, state courts have consistently held that due process does not require personal jurisdiction for a state to exercise UCCJA jurisdiction over an absent parent in a divorce custody proceeding. Notice and the opportunity to be heard pursuant to the Act have been deemed sufficient.²¹² *In re Marriage of Leonard*²¹³ relied on the provisions of the UCCJA permitting the forum court to obtain evidence in another state with the assistance of the court there and the provision in the Act for payment of costs of transportation as mitigating factors in assessing the inconvenience to the nonresident parent.²¹⁴ The same alternatives would be available in adoption, but, given the higher stakes, a court could conclude that due process should afford greater protection.

It has been argued from the U.S. Supreme Court's decision in *Kulko v. Superior Court*²¹⁵ that the Court might apply *International Shoe*²¹⁶ requirements of minimum contacts to custody disputes.²¹⁷ *Kulko* involved the application of a long-arm statute to subject an out-of-state parent to the

legislation and interstate compacts allow for less variation. Reisman & Simson, *Interstate Agreements in the American Federal System*, 27 RUTGERS L. REV. 70, 81-82 (1973).

209. H. CLARK, *supra* note 2, at 461, 875.

210. Adoption, i.e., the second step, may not be possible in the state that has personal jurisdiction over the biological parent because the adoptive parents have neither residence nor domicile there.

211. The potentially catastrophic effects of requiring personal jurisdiction in adoption have been recognized by Professors Clark and Hazard. H. CLARK, *supra* note 2, at 461, 875; Hazard, *May v. Anderson: Prelude to Family Law Chaos*, 45 VA. L. REV. 379 (1959).

212. *Morrell v. Giesick*, 188 Mont. 89, 610 P.2d 1189 (1980); *Goldfarb v. Goldfarb*, 246 Ga. 24, 268 S.E.2d 648 (1980).

213. 122 Cal. App. 3d 443, 175 Cal. Rptr. 903 (1951).

214. *Leonard*, 175 Cal. Rptr. at 911-12.

215. 436 U.S. 84, 100-01, *reh'g denied*, 438 U.S. 908 (1978) (California lacked jurisdiction to modify child support pursuant to a long arm statute, where father lacked minimum contacts with California; assertion of jurisdiction violated due process).

216. *International Shoe v. Washington*, 326 U.S. 310 (1945).

217. *See, e.g., Due Process, supra* note 24, at 414-17.

jurisdiction of the court in an action to increase child support. Professor Bodenheimer and Neeley-Kvarme have acknowledged that *Kulko* might preclude the use of a long-arm statute to acquire custody jurisdiction, but they have argued that it does not portend the imposition of minimum contacts requirements in custody.²¹⁸ *Shaffer v. Heitner*, on which *Kulko* relied, recognized an exception to the minimum contacts requirement for status adjudications,²¹⁹ and, they argue, as a status proceeding with particularized jurisdictional rules, custody falls within the exception.²²⁰ Bodenheimer and Neeley-Kvarme have also argued that the apprehension that *May v. Anderson* will be applied to require personal jurisdiction has little foundation.²²¹ In addition to the historical evidence that courts have not done so in the past, they point to the "demonstrated increasing concern for children" shown by the Supreme Court in recent years.²²²

Others have not been as confident that the UCCJA could withstand a constitutional challenge.²²³ Even if Bodenheimer and Neeley-Kvarme have correctly anticipated the law as it relates to divorce custody, the differences between divorce custody and adoption suggest the possibility of a different result. Adoption proceedings differ from interparental custody disputes in at least two important respects. First, divorce custody disputes may result in the temporary suspension of some parental rights, but adoption has the effect of terminating parental rights permanently. A parent who loses custody retains residual parental rights.²²⁴ Indeed, that parent's rights may be restored fully by a subsequent custody determination. A parent whose child is adopted by another loses not only custody, but also loses *forever* the right to have any further contact with the child.²²⁵

Second, and relatedly, a custody determination does not result in a final judgment; the order is modifiable.²²⁶ While prerequisites may exist, custody can be reexamined and if necessary changed. Changes in custody are not rare nor are they especially difficult to obtain.²²⁷ An adoption, on the other hand, results in a final judgment that is not subject to modification.²²⁸

218. Bodenheimer & Neeley-Kvarme, *supra* note 129, at 238-40 (citing *Shaffer v. Heitner*, 433 U.S. 186 (1977)).

219. 433 U.S. 186, 208 n.30 (1977).

220. Bodenheimer & Neeley-Kvarme, *supra* note 129, at 240.

221. *Id.* at 243, 248-52.

222. *Id.* at 250-52.

223. *See, e.g.*, Blakesley, *supra* note 86, at 347-48.

224. Residual rights may include the right to custody upon the death of the custodial parent, the right to consent to the marriage of the child, or the right to obtain certain information about the child, such as information contained in school records.

225. There may be an opportunity for the natural parent to have contact with the child through the intercession of a state adoption registry. However, the consent of the child is required. Thus, there is no right of the natural parent to have contact.

226. H. CLARK, *supra* note 2, at 836.

227. *See generally* Wexler, *Rethinking the Modification of Child Custody Decrees*, 94 YALE L.J. 757 (1985).

228. *See* Howe, *Adoption Practice, Issues and Laws 1958-1983*, 17 FAM. L.Q. 173, 178 (1983).

Although the judgment may be vacated on the basis of fraud or lack of jurisdiction,²²⁹ the virtue of finality is apparent where new family relationships have been created and the child has been integrated into the adoptive family. Absent extraordinary circumstances, in adoption the biological parent has but one opportunity to litigate her continued relationship with her child. Thus, the potential loss to a parent who is required to litigate an adoption proceeding in an out-of-state forum is far greater than the potential loss to a parent who is required to litigate a custody dispute long distance, and fairness considerations may differ accordingly.

Despite these differences, Professor Clark has argued that a line of adoption cases after *Stanley v. Illinois*²³⁰ gives "little prospect that *May v. Anderson* will be relied upon to require personal jurisdiction over fathers in proceedings for adoption or for termination of parental rights."²³¹ Because these cases dealt with the rights of unwed fathers, not mothers, and did not involve out-of-state parents, their use is necessarily limited. However, to the extent that they reflect the Court's recognition of the pragmatic difficulties presented by adoption and the need to tailor due process requirements in a manner that does not frustrate adoption, they lend some support to the view that the constitutionality of the UCCJA as applied to adoption would be upheld.

Conclusion

The overwhelming weight of case authority favors applying the UCCJA in adoption. In situations like that described in the introductory hypothetical, the Act would provide some answers. The jurisdictional competition between states *A* and *B* could be resolved, if not on the basis of the jurisdictional grounds set out in the UCCJA, then on the basis of the Act's first in time rule. Although the application of the Act would bring far more certainty and predictability to an area of law that lacks both, it is not an easy fix. Constitutional questions remain to be answered when the parental rights of an out-of-state parent are terminated in an adoption proceeding without in personam jurisdiction. However, it seems likely, given the nature of the interests involved, that some accommodation to facilitate adoption will be made.

229. H. CLARK, *supra* note 2, at 936-38.

230. 405 U.S. 645 (1972). The subsequent cases were: *In re Adoption of Malpica-Orsini*, 36 N.Y.2d 568, 331 N.E.2d 486, 370 N.Y.S.2d 511 (1975), *appeal dismissed*, 423 U.S. 1042 (1976); *Quilloin v. Walcott*, 434 U.S. 246 (1978), *reh'g denied*, 435 U.S. 918 (1978); *Caban v. Mohammed*, 441 U.S. 380 (1979); *Lehr v. Robertson*, 463 U.S. 248 (1983).

231. H. CLARK, *supra* note 2, at 861 (citations omitted).

