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NOTES

FAMILY LAW—FEDERAL COURTS—NO FEDERAL JURISDICTION UNDER THE PARENTAL KIDNAPPING PREVENTION ACT. *Thompson v. Thompson*, 108 S. Ct. 513 (1988).

Susan Thompson filed a petition for divorce with the Los Angeles superior court in July 1978 to dissolve her marriage to David Thompson. Susan's petition also sought custody of the couple's son Matthew. The superior court initially issued an order providing for joint custody of Matthew. The court subsequently modified the order to give visitation rights to David and sole custody to Susan because of her intention to move to Louisiana. The order granting sole custody to Susan was subject to review pending the completion of a custody investigation to be performed by the court investigator.

In March of 1981, three months after Susan and Matthew moved to Louisiana, Susan filed a petition in Louisiana seeking enforcement of the California decree granting her sole custody of Matthew. Susan also sought to modify the visitation arrangement, claiming that David abused and mistreated Matthew. On April 7, 1981, the Louisiana court awarded sole custody of Matthew to Susan. Subsequently, the California court awarded sole custody to David after reviewing the investigator's custody report.

Without first requesting the Louisiana court to recognize the California order, David filed a complaint in the United States District Court for the Central District of California. The complaint sought a declaration that the California order was valid, and an injunction prohibiting enforcement of the Louisiana decree pursuant to the Parental Kidnapping Prevention Act of 1980 (PKPA).¹ Holding that subject matter jurisdiction and personal jurisdiction over Susan were lacking, the district court granted Susan's motion to dismiss the complaint.² On appeal, the Court of Appeals for the Ninth Circuit held that subject matter and personal jurisdiction existed, but affirmed the dismissal on the ground that David did not have a federal cause of

1. 28 U.S.C. § 1738A (1982).

2. Civ. Action No. 83-5221 (C.D. Cal. April 10, 1984) (cited in *Thompson v. Thompson*, 108 S. Ct. 513, 515-16 (1988)).

action under the PKPA.³ Facing a split of authority among the circuits concerning a federal cause of action under the PKPA, the United States Supreme Court granted certiorari.⁴ The Court held that the PKPA does not contain an implied cause of action for a federal determination of an interstate custody jurisdiction dispute. *Thompson v. Thompson*, 108 S. Ct. 513 (1988).

Requesting a state court to honor a custody decree rendered by another state presents substantial difficulty for a litigant involved in a custody dispute. In *New York ex rel. Halvey v. Halvey*⁵ the United States Supreme Court considered whether the full faith and credit clause of the United States Constitution⁶ protects custody decrees of one state from modification by another. The Court held that the full faith and credit clause requires a state to use the same standards in modifying a decree as the state that issued the decree.⁷ Therefore, because the custody decree could be modified by the original state, another state may subsequently modify the decree in the same manner.⁸ Justice Rutledge, concurring, recognized the effect of the ruling, observing that it could "set up an unseemly litigious competition between the states and their respective courts as well as between parents."⁹

The federal courts have traditionally denied jurisdiction to child custody disputes in complaints brought under diversity jurisdiction. In an early decision construing the extent of diversity jurisdiction, the United States Supreme Court held that federal courts do not have jurisdiction over divorce or alimony cases.¹⁰ In *In re Burrus*¹¹ the Court, in dicta, placed custody disputes under the domestic relations exception to diversity jurisdiction.¹² Thus, prior to the enactment of

3. *Thompson v. Thompson*, 798 F.2d 1547 (9th Cir. 1986).

4. 107 S. Ct. 946 (1987).

5. 330 U.S. 610 (1947).

6. U.S. CONST. art. IV, 1 ("Full Faith and Credit shall be given in each State to the . . . judicial proceedings of every other State.") See 28 U.S.C. § 1738 (1982).

7. 330 U.S. at 614.

8. *Id.* at 615. See also *Ford v. Ford*, 371 U.S. 187 (1962) (custody decree is not final because a court may modify the decree if the child's needs change); *Kovacs v. Brewer*, 356 U.S. 604 (1958) (subsequent state may modify custody decree based on changed circumstances since the original state could modify on that basis).

9. 330 U.S. at 620 (Rutledge, J., concurring).

10. *Barber v. Barber*, 62 U.S. (21 How.) 582, 584 (1859) ("We disclaim altogether any jurisdiction in the courts of the United States upon the subject of divorce, or for the allowance of alimony . . .").

11. 136 U.S. 586 (1890).

12. *Id.* at 594 ("As to the right to the control and possession of this child . . . it is one in regard to which neither the Congress of the United States nor any authority of the United

the PKPA, resolution of custody disputes lay within the judicial systems of the states.

Piecemeal adoption of the Uniform Child Custody Jurisdiction Act¹³ (UCCJA) was the first significant state response to the problem of interstate custody disputes. The UCCJA designated four circumstances under which a court may exercise its jurisdiction to decide a child custody matter.¹⁴ The purpose of the UCCJA was to "bring some semblance of order into the existing chaos" resulting from jurisdiction disputes.¹⁵ Because the full faith and credit clause does not resolve custody determinations, each state could use its own judgment in deciding whether to modify another state's custody decree.¹⁶ The

States has any special jurisdiction."). See generally C. WRIGHT, A. MILLER, E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3609 (1975).

13. 9 U.L.A. 111-70 (1979) (codified in ARK. CODE ANN. §§ 9-13-201 to -228 (1987)).

14. UCCJA 3(a)-(c), 9 U.L.A. 122 (1979) provides:

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

(1) this State (i) is the home state of the child at the time of commencement of the proceeding, or (ii) had been the child's home state within 6 months before commencement of the proceeding and the child is absent from this State because of his removal or retention by a person claiming his custody or for other reasons, and a parent or person acting as parent continues to live in this State; or

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

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

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

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

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

Id.

15. 9 U.L.A. 114 (1979).

16. See, e.g., *In re Guardianship of Rodgers*, 100 Ariz. 269, 413 P.2d 744 (1966) (Arizona granted custody to mother after she took child from Texas where father had custody); *Moniz v. Moniz*, 142 Cal. App. 2d 527, 298 P.2d 710 (1956) (California gave custody to father after wife had obtained custody under a New Mexico decree); *DiGiorgio v. DiGiorgio*, 153 Fla. 24,

UCCJA, however, did not resolve the jurisdiction dilemma. The broad provisions for jurisdiction¹⁷ allowed state courts to continue to exercise custody jurisdiction even though another state claimed jurisdiction under the UCCJA.¹⁸ One state may claim home state jurisdiction while another may claim substantial evidence jurisdiction.¹⁹ Thus, two states could render conflicting custody orders based on the jurisdiction provisions of the UCCJA.

Against this history of uncertainty in custody decrees, Congress enacted the Parental Kidnapping Prevention Act (PKPA) in 1980.²⁰ The PKPA was designed to provide federal guidance in settling custody jurisdiction disputes by requiring that full faith and credit be given to the decree of another state with proper jurisdiction.²¹ The PKPA largely incorporates the jurisdictional requirements of the

13 So. 2d 596 (1943) (Florida exercised jurisdiction over custody of child even though father kidnapped the child from California where mother initiated a divorce and custody proceeding); *Sharpe v. Sharpe*, 77 Ill. App. 2d 295, 222 N.E.2d 340 (1966) (Illinois granted custody to grandparents upon request of father while Texas granted mother exclusive custody); *Batchelor v. Fulcher*, 415 S.W.2d 828 (Ky. 1967) (mother allowed to litigate custody in Kentucky although father had custody under Indiana decree); *Berlin v. Berlin*, 21 N.Y.2d 371, 288 N.Y.S.2d 44, 235 N.E.2d 109 (1967) (mother given custody by New York although father had custody under Maryland decree). Every state has now adopted a version of the UCCJA. *See* 9 U.L.A. 31-32 (Supp. 1988).

17. UCCJA 3(a), 9 U.L.A. 122 (1979).

18. *See* Lansing and Sherman, *The Legal Response to Child Snatching*, 7 J. JUV. L. 16, 22 (1983); *See also* Note, *The PKPA: Application and Interpretation*, 23 J. FAM. L. 419, 421 (1985).

19. *See* Note, *Parental Kidnapping in Arkansas Under the Uniform Child Custody Jurisdiction Act and Parental Kidnapping Prevention Act*, 10 UALR L.J. 69, 75 (1987-88) (noting *Sanders v. Sanders*, 1 Ark. App. 216, 615 S.W.2d 375 (1981) where Arkansas claimed significant connection/substantial evidence jurisdiction while California claimed home state jurisdiction); *See also* *Peery v. Superior Court*, 174 Cal. App. 3d 1085, 219 Cal. Rptr. 882 (1985) (Louisiana claimed home state and significant connections jurisdiction while California claimed home state jurisdiction); *Dykes v. Dykes*, 395 So. 2d 188 (Fla. Dist. Ct. App. 1981) (although Maryland had home state jurisdiction, Florida exercised jurisdiction); *Hadley v. Hadley*, 394 So. 2d 769 (La. App. 1981) (Louisiana exercised significant connection jurisdiction when Rhode Island was the child's home state); *Potter v. Potter*, 104 Misc. 2d 930, 430 N.Y.S.2d 201 (N.Y. Fam. Ct. 1980) (Wisconsin claimed home state jurisdiction while New York claimed significant connection jurisdiction); *Scheafnocker v. Scheafnocker*, 356 Pa. Super. 118, 514 A.2d 172 (1986) (Texas claimed home state jurisdiction while Pennsylvania claimed substantial evidence jurisdiction); *Cunningham v. Cunningham*, 719 S.W.2d 224 (Tex. Ct. App. 1986) (Texas yields jurisdiction to North Carolina after both trial courts claimed home state jurisdiction).

20. Pub. L. No. 96-611, 94 Stat. 3568 (codified at 28 U.S.C. § 1738A (1982)).

21. 28 U.S.C. § 1738A (1982); *Parental Kidnapping Prevention Act of 1979: Joint Hearing on S. 105 Before the Sub-Comm. on Criminal Justice of the Senate Comm. on the Judiciary and the Subcomm. on Child and Human Development of the Senate Comm. on Labor and Human Resources*, 96th Cong., 2nd Sess. 4 (1980) [hereinafter *PKPA Hearing*] (statement of Senator Cranston).

UCCJA that govern a court exercising initial jurisdiction.²² A court has jurisdiction under the PKPA if it has jurisdiction under state law,²³ and if: (1) the state is the home state of the child,²⁴ or (2) there is no home state, and the child and a parent have a significant connection with the state which contains substantial evidence bearing on custody,²⁵ or (3) the child was abandoned in the state,²⁶ or (4) no other state has jurisdiction, or, if another state had jurisdiction, it has relinquished jurisdiction.²⁷

The PKPA gives preference to home state jurisdiction but allows significant connections/substantial evidence jurisdiction if no state has home state jurisdiction.²⁸ Further, under the PKPA, a state court cannot modify a custody decree while another state has jurisdiction unless that state declines to exercise jurisdiction.²⁹ Finally, the PKPA provides that the state with proper initial jurisdiction retains jurisdic-

22. 28 U.S.C. § 1738A(c)(1)-(2)(D) (1982); *See supra* note 14. The PKPA follows the jurisdiction system of the UCCJA but preferentially ranks the circumstances for jurisdiction to avoid simultaneous orders of several states. *See infra* text accompanying notes 24-28. *See also* Note, *Child Snatching: Remedies in the Federal Courts*, 41 WASH. & LEE L. REV. 185, 195 (1984).

23. 28 U.S.C. § 1738A(c)(1).

24. *Id.* § 1738A(c)(2)(A) provides:

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

Id.

25. *Id.* § 1738A(c)(2)(B) provides:

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

Id.

26. *Id.* § 1738A(c)(2)(C) provides: "(C) the child is physically present in such State and (i) the child has been abandoned, or (ii) it is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse[.]"

Id.

27. *Id.* § 1738A(c)(2)(D) provides:

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

Id.

28. *Id.* § 1738A(c)(2)(B) (1982); *See Note, supra* note 22.

29. 28 U.S.C. § 1738A(f)(1)-(2) (1982).

tion as long as that state continues to be the home state of the child or either of the parents.³⁰ Thus, if a state has proper initial jurisdiction under the PKPA when it renders a custody decree, that decree cannot later be modified by another state as long as the child or either parent resides in the state which rendered the decree. In this manner the PKPA makes subsequent decree modifications by other states more difficult than under the UCCJA.³¹ The PKPA, however, does not expressly authorize federal jurisdiction for the determination of which of two conflicting state decrees is valid.³²

In light of this ambiguity, the federal courts of appeals reached different decisions on the question of federal jurisdiction under the PKPA.³³ The Third Circuit was one of the first courts to allow a federal complaint under the PKPA in *Flood v. Braaten*.³⁴ In considering federal jurisdiction under the PKPA, the court in *Flood* emphasized that a federal court would have a very restricted role under the PKPA.³⁵ The court ruled that the domestic relations exception to diversity jurisdiction only applied to diversity complaints and not to complaints under a federal statute.³⁶ Thus, the court held that a federal court may decide which state has PKPA jurisdiction without deciding the underlying custody dispute.³⁷ Construing the silence of the PKPA as to federal jurisdiction together with the legislative history,³⁸

30. *Id.* § 1738A(d) (1982).

31. For a comparison of the UCCJA and PKPA, *See* Blakesley, *Child Custody—Jurisdiction and Procedure*, 35 EMORY L.J. 291, 325-30 (1986).

32. 28 U.S.C. § 1738A(a) (1982) (only orders the state authorities to follow the provisions of the Act).

33. Several district courts also rendered decisions on whether the PKPA contains a federal cause of action. Some courts held that the PKPA does not grant federal jurisdiction. *See, e.g.,* Crouse v. Creanza, 658 F. Supp. 1522 (W.D. Wis. 1987); Leyda v. Roach, 650 F. Supp. 951 (S.D. Iowa 1987); Siler v. Storey, 587 F. Supp. 986 (N.D. Tex. 1984). Others, however, found that the PKPA does contain a federal cause of action. *See, e.g.,* Davis v. Davis, 638 F. Supp. 862 (N.D. Ill. 1986); Olmo v. Olmo, 646 F. Supp. 233 (E.D.N.Y. 1986); Martinez v. Reed, 623 F. Supp. 1050 (E.D. La. 1985); Wyman v. Lerner, 624 F. Supp. 240 (S.D. Ind. 1985). *See also* Hoff, *Federal Court Remedies in Interstate Child Custody and Parental Kidnapping Cases*, 19 FAM. LAW Q. 443 (1985-86) for a discussion of federal jurisdiction under the PKPA prior to *Thompson*.

34. 727 F.2d 303 (3rd Cir. 1984) (New Jersey awarded custody to mother while North Dakota awarded custody to father).

35. *Id.* at 306.

36. *Id.* at 307-08.

37. *Id.* at 310. The court found a great difference between the full faith and credit statute and the PKPA. Under the former, a federal court would have to determine whether changed circumstances existed before it could order a state court to render full faith and credit to a foreign decree. However, under the PKPA, a federal court would only have to determine which state complied with the PKPA. In this fashion the federal court, under the PKPA, would avoid the underlying custody dispute. *Id.* at 309.

38. *PKPA Hearing, supra* note 21.

the court in *Flood* found that Congress intended for the initial custody decision to remain in the states.³⁹ However, the court concluded that Congress could not have "intended to render [the PKPA] virtually nugatory" by denying a federal forum to complaints arising under the PKPA.⁴⁰ The Third Circuit subsequently reaffirmed the *Flood* decision in *DiRuggiero v. Rodgers*.⁴¹

Other circuits subsequently adopted *Flood's* reasoning and analysis. In *Heartfield v. Heartfield*,⁴² the Court of Appeals for the Fifth Circuit expressly adopted the *Flood* analysis and held that the PKPA grants federal jurisdiction.⁴³ The court, however, reversed a district court injunction forbidding a party to litigate custody in Louisiana when Texas was the proper forum under the PKPA.⁴⁴ The court reversed the injunction because it found that the PKPA requires two inconsistent state orders before federal jurisdiction under the PKPA applies.⁴⁵

Without reaching the question of legislative intent, the Court of Appeals for the Eleventh Circuit, in *McDougald v. Jenson*,⁴⁶ found that federal question jurisdiction⁴⁷ resulted from the PKPA even if Congress did not intend to create a federal cause of action.⁴⁸ The court stated that federal question jurisdiction results when a plaintiff must "establish . . . the correctness and the applicability . . . of federal law."⁴⁹

The Court of Appeals for the Fourth Circuit in *Hickey v. Baxter*,⁵⁰ found with little discussion of the matter, that federal jurisdiction existed under the PKPA.⁵¹ The court in *Hickey* held that the PKPA allows a federal court to serve as a "referee between conflicting

39. 727 F.2d at 310-11.

40. *Id.* at 312. The court felt that direct appeal to the United States Supreme Court from the state courts would be impractical because of the Court's crowded docket.

41. 743 F.2d 1009 (1984) (*Flood* analysis used to support a jurisdiction claim and tort claim for interference with custody).

42. 749 F.2d 1138 (5th Cir. 1985).

43. *Id.* at 1140-41.

44. *Id.* at 1139.

45. *Id.* at 1143. The father attempted to enjoin the wife from litigating custody in Louisiana prior to the issuance of a decree by any Louisiana court.

46. 786 F.2d 1465 (11th Cir. 1986).

47. 28 U.S.C. § 1331 (1982).

48. 786 F.2d at 1480.

49. *Id.* (citing P. BATOR, P. MISHKIN, D. SHAPIRO, H. WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 889 (2d ed. 1973)).

50. 800 F.2d 430 (4th Cir. 1986).

51. *Id.* at 431. The court held that the domestic relations exception did not apply to an action under the PKPA, relying on *McDougald*, *Heartfield*, and *Flood*. *Id.*

state custody decrees."⁵² In *Meade v. Meade*⁵³ the Fourth Circuit reaffirmed its holding that the PKPA established federal jurisdiction.⁵⁴

In contrast, however, the Courts of Appeals for the Ninth, Seventh, and District of Columbia Circuits have expressly stated that the PKPA does not allow federal question jurisdiction. In *Bennett v. Bennett*⁵⁵ the Court of Appeals for the District of Columbia briefly reviewed the legislative history of the PKPA⁵⁶ and found that Congress did not intend for federal jurisdiction to exist under the PKPA.⁵⁷ Subsequently, in *Rogers v. Platt*,⁵⁸ the same court, engaging in a more extensive discussion of federal jurisdiction, affirmed its earlier holding in *Bennett*.⁵⁹ As a prerequisite to federal question jurisdiction,⁶⁰ the court stated that a claim must require resolution of a substantial federal law question.⁶¹ The court noted, however, that if "Congress affirmatively determines that there should be *no* private federal cause of action that is effectively the end of the matter."⁶² The court then found that the legislative history of the PKPA demonstrates that Congress intended no federal jurisdiction.⁶³ The Court of Appeals for the Seventh Circuit has also briefly stated that the PKPA declined to create a federal remedy.⁶⁴

The Ninth Circuit Court of Appeals in *Thompson v. Thompson*⁶⁵ also found that Congress did not intend for federal courts to construe

52. *Id.*

53. 812 F.2d 1473 (4th Cir. 1987).

54. *Id.* at 1476 (relying on *Hickey, McDougald, Heartfield and Flood*).

55. 682 F.2d 1039 (D.C. Cir. 1982).

56. *See supra* note 21.

57. 682 F.2d at 1043. The court noted that a provision "creating or recognizing a direct role for the federal courts" was "conspicuously absent" from the PKPA. *Id.*

58. 814 F.2d 683 (D.C. Cir. 1987).

59. *Id.* at 696 n.18.

60. *See* 28 U.S.C. § 1331 (1982).

61. 814 F.2d at 688 (quoting *Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 13 (1983)).

62. *Id.* (citing *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 106 S. Ct. 3229, 3237 (1986)).

63. *Id.* at 690-94. The court found that the PKPA was merely an addendum to the full faith and credit statute which does not contain federal jurisdiction. *Id.* at 690. The court also found that Congress rejected alternative proposals to the PKPA which would have established federal jurisdiction, and that such jurisdiction would involve the federal courts in the underlying custody dispute. *Id.* at 692-93.

64. *Lloyd v. Loeffler*, 694 F.2d 489 (7th Cir. 1982). The court allowed a diversity based tort for interference with custody, but stated briefly in dicta that the PKPA did not contain a federal remedy. *Id.* at 493.

65. 798 F.2d 1547 (9th Cir. 1986).

the PKPA.⁶⁶ The *Thompson* court held that federal question jurisdiction exists when a complaint arguably presents a violation of federal law, unless the complaint is clearly erroneous.⁶⁷ The court then reviewed the PKPA and its legislative history, holding that Congress did not intend for the PKPA to create a federal cause of action for which relief could be granted.⁶⁸

In view of the multiple approaches to the PKPA and the inconsistent decisions of the circuit courts, the United States Supreme Court granted certiorari in *Thompson*⁶⁹ to resolve the dilemma of federal jurisdiction under the PKPA.

In *Thompson v. Thompson*,⁷⁰ the Court held that the PKPA does not contain a federal cause of action.⁷¹ The Court stated that a cause of action by implication does not require an express intent in the congressional record.⁷² Otherwise, the doctrine of implied cause of action would be limited to "correcting drafting errors" made by Congress.⁷³ The Court stated that congressional intent to create a cause of action was the crucial consideration, and that intent can be inferred from the language of the statute, the statutory structure, or the circumstances of the statute's enactment.⁷⁴

The Court noted that the history of interstate custody disputes resulted from the inability of courts to apply full faith and credit to custody decrees.⁷⁵ The UCCJA attempted to alleviate this problem,

66. *Id.* at 1559.

67. *Id.* at 1550 (citing *Bell v. Hood*, 327 U.S. 678, 682 (1946)). The court felt that subject matter jurisdiction existed for a determination on the merits as to whether the complaint stated a proper cause of action. *Id.*

68. *Id.* at 1559. The court viewed the PKPA as an addition to the full faith and credit statute which contains no federal cause of action. *Id.* at 1555-56. The court found that Congress rejected alternative proposals to the PKPA that provided for a federal cause of action. *Id.* at 1556. The court also expressed the view that a federal cause of action would involve federal courts in custody determinations contrary to the diversity exception concept. *Id.* at 1558.

69. 107 S. Ct. 946 (1987).

70. 108 S. Ct. 513 (1988).

71. *Id.* at 520.

72. *Id.* at 516.

73. *Id.* (quoting *Cannon v. University of Chicago*, 441 U.S. 677 (1979)). The Court reasoned that "[t]he implied cause of action doctrine would be a virtual dead letter" if limited to situations where Congress clearly intended a cause of action but neglected to provide for one. *Id.*

74. *Id.* The Court cited *Cort v. Ash*, 422 U.S. 66 (1975), which listed the following as factors to consider in determining congressional intent: (1) the class intended to be benefited by the statute, (2) legislative intent, (3) purpose of the statute, and (4) whether the area is traditionally dominated by state or federal law. *Id.* at 78.

75. 107 S. Ct. at 517. The Court noted that a state may modify another state's custody decree in the same manner as the initial state could modify its own decree. *Id.*

but failed.⁷⁶ Thus, the Court viewed the PKPA as a federal attempt to require the states to render full faith and credit to custody decrees.⁷⁷ The Court found this "full faith and credit approach" significant because neither the full faith and credit clause nor its statutory counterpart contains a federal cause of action.⁷⁸

Reviewing the legislative history of the Act, the Court found that Congress clearly did not intend to create a federal cause of action.⁷⁹ The Court placed special emphasis on Congress' rejection of an alternate proposal to the PKPA which provided for federal jurisdiction.⁸⁰ A debate between Congressmen Conyers and Fish demonstrated that Congress rejected an alternative to the PKPA that contained provisions for federal jurisdiction.⁸¹ The alternative would have allowed federal courts to enforce custody orders under diversity jurisdiction.⁸² The legislative history also contained a letter to Congress written by Assistant Attorney General Ward contrasting the various proposals arguing for the "full faith and credit approach" adopted in the PKPA.⁸³ The Court concluded that this history provides "strong evidence against inferring a federal cause of action."⁸⁴

The Court also expressed concern that federal jurisdiction under the PKPA would involve federal courts in the underlying domestic dispute,⁸⁵ and would allow the federal courts to act as regular courts of appeal from the states.⁸⁶ The Court stated that it was not prepared

76. *Id.* The Court viewed the failure of the UCCJA as attributable to the fact that some states refused to enact it, while others modified its provisions.

77. *Id.*

78. *Id.* at 518 (citing *Minnesota v. Northern Securities Co.*, 194 U.S. 48 (1904)). The Court noted that the "PKPA . . . is an addendum to the full faith and credit statute" and is titled "Full faith and credit given to child custody determinations." *Id.*

79. *Id.*

80. *Id.*

81. *Id.* at 518-19 (citing *Parental Kidnapping: Hearing on H.R. 1290 Before the Subcommittee on Crime of the House Committee on the Judiciary*, 96th Cong. 2d Sess. 14 (1980)). Mr. Fish felt federal jurisdiction would ease the litigant's task while Mr. Conyers viewed the federal courts as inexperienced in custody matters. *Id.*

82. *Id.*

83. *Id.* (citing *PKPA: Addendum to Joint Hearing on S. 105 Before the SubComm. on Criminal Justice of the Senate Comm. on the Judiciary and the Sub-Comm. on Child and Human Development of the Senate Comm. on Labor and Human Resources*, 96th Cong. 2d Sess. 104-05 (1980)). The letter argued that federal jurisdiction would over-extend the federal docket and involve the federal courts in matters of which they have little experience. *Id.*

84. *Id.*

85. *Id.* at 520 n.4. The Court felt that disputes resulting in conflicting state decrees would be more likely to involve a federal court in the underlying custody dispute. *Id.*

86. *Id.* n.5.

to presume that state courts would not enforce the PKPA.⁸⁷

Application of the Court's decision in *Thompson* is clear. A parent facing two conflicting custody decrees cannot rely on federal jurisdiction under the PKPA to resolve the custody entanglement. However, the effect of *Thompson* remains unclear. Whether or not a lack of federal jurisdiction under the PKPA will render it useless, as suggested by some,⁸⁸ depends on the interpretation that the state courts give to the PKPA. The provisions of the PKPA restrict the ability of a court to modify an existing custody decree, resolving some of the difficulty present in the UCCJA. The critical question is whether state courts will apply a strict interpretation to the provisions of the PKPA.⁸⁹ A strict application of the PKPA, with consideration given to its underlying policy, would prevent its circumvention. The very existence of cases such as *Thompson* indicate that some states either do not apply the PKPA strictly or do not apply it in relation to its policy of preventing child kidnapping.

Thompson leaves the policy and effectiveness of the PKPA to the states. A parent involved in a child custody dispute should expressly raise the PKPA before the state court. A party should also argue the policy considerations of the PKPA as well as the particular jurisdictional sections. Such use of the PKPA may allow a litigant to avoid flexible readings of the UCCJA because the PKPA, as a federal statute, controls the custody question under the supremacy clause.⁹⁰ Raising the PKPA custody question in a state court is also important in the event a petition for certiorari is made to the United States Supreme Court.⁹¹

In view of the legislative history of the PKPA, the Court's decision in *Thompson* was technically correct. However, the lack of federal jurisdiction greatly reduces the possible effectiveness of the PKPA. The developing line of cases which allowed federal jurisdiction provided a readily accessible forum for resolution of child custody disputes. Even if states strictly comply with the PKPA, a parent is now limited to the expensive and time consuming task of arguing before a foreign state court for this compliance. Thus, the Court's

87. *Id.* at 520. The Court felt there was no reason to believe the state courts would refuse to apply the PKPA since the states apply the full faith and credit statute every day. *Id.*

88. *Flood v. Braaten*, 727 F.2d 303, 310-11 (3rd Cir. 1984). See *supra* text accompanying note 40.

89. Note, *supra* note 19 at 81 (Arkansas strictly applies the provisions of the PKPA).

90. See U.S. CONST. art. VI, cl. 2.

91. See *Webb v. Webb*, 451 U.S. 493 (1981) (wife failed to bring federal issue before state court, resulting in dismissal for lack of jurisdiction).

decision greatly increases the hardship of a litigant involved in a jurisdictional battle between two states by denying the aid of federal courts.

Until Congress decides to re-evaluate the role of the federal court under the PKPA, a litigant in such a dispute is limited to actions in state courts and to certiorari. In the state courts it is essential to argue the provisions and policy of the PKPA. However, the ultimate question of the effectiveness of the PKPA will depend on whether the state courts will attempt to fully comply with the language and policy of the PKPA.

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