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Comment

PARENTAL KIDNAPPING: CAN THE UNIFORM CHILD CUSTODY JURISDICTION ACT AND FEDERAL PARENTAL KIDNAPPING PREVENTION ACT OF 1980 EFFECTIVELY DETER IT?

I. INTRODUCTION

The kidnapping of children by parents has become a matter of increasing public concern in recent years. Public attention was focused on the parental kidnapping problem in 1976, with the wide publicity given to the successive kidnappings of the children of millionaire Seward Prosser Mellon, between the mother's New York residence and the father's Pennsylvania residence.¹ Also notorious was the case of Baby Lenore, who was the subject of a custody battle between Florida and New York.²

There can be little disagreement with the proposition that a child suffers when he is abruptly snatched from his home and taken to unfamiliar surroundings, cut off from contact with his primary caretaker-parent.³ Psychologists agree that a stable home environment is essential to the emotional well-being of

1. See Foster & Freed, *Child Snatching and Custodial Fights: The Case for the Uniform Child Custody Jurisdiction Act*, 28 HASTINGS L.J. 1011, 1012 n.5 (1977) (citing N.Y. Times, Mar. 21, 1976, at 1, col. 7). Mr. Mellon was first granted custody of his children by a Pennsylvania court in 1974. About a year and a half later, Mrs. Mellon snatched the children to New York and was awarded custody by the New York court in 1976. Mr. Mellon then snatched the children from New York, while they were being watched by armed bodyguards. *Id.*

2. *Id.* at 1012 n.4. Baby Lenore was placed with a potential adoptive family shortly after her birth. The natural mother changed her mind before an adoption order was entered, and instituted and won a habeas corpus action in New York. Before the order was served on the adoptive parents, they moved to Florida where the natural mother again brought a habeas corpus action. Florida denied full faith and credit to the New York decree and awarded custody to the adoptive parents. *Id.*

3. See H. CLARK, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 325-26 (1968); Modlin, *Statement*, READINGS IN LAW AND PSYCHIATRY 319-22 (1968); Plant, *The Psychiatrist Views Children of Divorced Parents*, 10 LAW & CONTEMP. PROBS. 807, 812-13 (1944).

children.⁴ Yet, even though the paramount concern in a legal battle for custody is the best interest of the child,⁵ the problem of parental kidnapping arose in large part because of the willingness of courts to entertain a kidnapping parent's petition for a change in legal custody from the lawful custodian to himself.⁶ Even though detrimental to the welfare of the child, kidnapping by a parent could lead to a second court award of custody, this time to the kidnapper. A chance to relitigate the custody issue in a potentially more favorable forum actually provided the incentive for parents to snatch their children from the lawful custodian.

Public recognition of the problem has led to legislation on both the federal level, by passage of the Parental Kidnapping Prevention Act of 1980,⁷ and on the state level by adoption in forty-four states of the Uniform Child Custody Jurisdiction Act.⁸ These acts are primarily designed to give interstate recognition to child custody decrees in order to remove the forum shopping incentive, promote the general welfare of children by limiting the circumstances in which courts can consider modifying an existing custody decree, and thereby prevent the seemingly endless relitigation of the custody issue.⁹

4. See generally Erikson, *Growth and Crisis of the "Healthy Personality,"* in C. KLUCKHOHN, H. MURRAY & D. SCHNEIDER, *PERSONALITY IN NATURE, SOCIETY AND CULTURE* 185-225 (1955).

5. See, e.g., *May v. Anderson*, 345 U.S. 528, 541-42 (1953) (Jackson, J., dissenting); *Halvey v. Halvey*, 330 U.S. 610, 619 (1947) (Rutledge, J., concurring). In *Halvey* Justice Rutledge pointed out that the lack of a rule requiring that full faith and credit be given to custody decrees "may set up an unseemly litigious competition between the states and their respective courts as well as between parents." *Id.* at 620. See also Hazard, *May v. Anderson: Preamble to Family Law Chaos*, 45 VA. L. REV. 379 (1959).

6. See Parental Kidnapping Prevention Act of 1980, Pub. L. 96-611, §§ 6-10, 94 Stat. 3568 (to be codified in 28 U.S.C. § 1738A and scattered sections of 42 U.S.C.) [hereinafter cited as PKPA]. In particular, PKPA § 7(a)(3) provides in pertinent part: "[C]haracteristics of the law and practice in [custody] cases . . . contribute to a tendency of parties involved in such disputes to frequently resort to the seizure, restraint, concealment, and interstate transportation of children"

7. See note 6 *supra*.

8. UNIFORM CHILD CUSTODY JURISDICTION ACT §§ 1-28 (9 UNIFORM LAWS ANN. 116 (1979)) [hereinafter cited as UNIFORM ACT] (state variations of the Uniform Act). The Act is codified in Pennsylvania at 42 PA. CONS. STAT. ANN. §§ 5341-66 (Purdon 1981).

9. See UNIFORM ACT, *supra* note 8, § 1 which provides in pertinent part:
(a) The general purposes of this Act are to:

This Comment begins with a brief overview of the forum shopping incentive for parental kidnapping, followed by a discussion of the equitable clean hands doctrine incorporated in section 8 of the Uniform Child Custody Jurisdiction Act. Two cases are presented as examples of the use of section 8 by courts to decline to exercise jurisdiction over a custody case in favor of an abducting parent. *Stevens v. Stevens*¹⁰ involves a kidnapping parent's petition for an initial custody decree, and *Zaubi v. Zaubi*¹¹ a petition for modification of an existing foreign custody decree. These cases are used to illustrate that judicial restraint in a decision on whether to entertain a kidnapping parent's petition for custody can be an effective deterrent to parental kidnapping. Finally, the Parental Kidnapping Prevention Act of 1980,¹² recently enacted by Congress, is described, and its interrelationship with state law explained.

II. MOTIVATION FOR PARENTAL KIDNAPPING—BACKGROUND

To understand the various proposed solutions to the problem of parental abductions and the way they are intended to operate, it is necessary to first understand why parents resort to this drastic measure in order to gain custody of their children.

High divorce rates, an increasingly mobile society, and recent court recognition of parents' equal rights to custody together have led to an increasing number of custody battles between citizens of different states, and even different countries. Custody

(1) avoid jurisdictional competition and conflict with courts of other states in matters of child custody which have in the past resulted in the shifting of children from state to state with harmful effects on their well-being;

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

(5) deter abductions and other unilateral removals of children undertaken to obtain custody awards;

(6) avoid re-litigation of custody decisions of other states in this state insofar as feasible;

.....
Id. The PKPA contains provisions similar to those quoted above from the Uniform Act. See PKPA, *supra* note 6, § 7(c).

10. 177 N.J. Super. 167, 425 A.2d 1081 (1981) (per curiam).

11. 492 Pa. 183, 423 A.2d 333 (1980).

12. See note 6 *supra*.

disputes are no longer primarily a matter of local concern, but have become an interstate and international legal problem.¹³

Before the Uniform Child Custody Jurisdiction Act (Uniform Act),¹⁴ any state could entertain the petition of its resident for child custody, as long as the child and the parent were physically present within its borders.¹⁵ Therefore, the parent who retained physical custody of his child after the breakup of a marriage could institute custody proceedings and have a two-fold advantage: he could litigate the custody issue in the forum of his choice, thereby taking advantage of the tendency of a court to favor a local petitioner, and he could put the other parent to the financial disadvantage of litigating in a distant forum.¹⁶ If the noncustodial parent was unable to bear the expense of foreign litigation, the custody issue would be resolved without the benefit of his appearance, and without the benefit of all information relevant to determining which parent would be the better caretaker.¹⁷ As long as the child and a parent were physically

13. PKPA, *supra* note 6, § 7(a)(1) states that Congress finds that: there is a large and growing number of cases annually involving disputes between persons claiming rights of custody and visitation of children under the laws, and in the courts, of different States, the District of Columbia, the Commonwealth of Puerto Rico, and the territories and possessions of the United States.

Id. The Uniform Act applies to international abduction situations as well as interstate abductions. See UNIFORM ACT, *supra* note 8, § 23.

14. See note 8 *supra*. The Uniform Act was promulgated by the National Conference of Commissioners on Uniform State Laws and approved by the American Bar Association in 1968. 9 UNIFORM LAWS ANN. 111 (1979).

15. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 79 (1971) [hereinafter cited as RESTATEMENT] provides:

A state has power to exercise judicial jurisdiction to determine the custody, or to appoint a guardian, of the person of a child or adult

(a) who is domiciled in the state, or

(b) who is present in the state, or

(c) who is neither domiciled nor present in the state if the controversy is between two or more persons who are personally subject to the jurisdiction of the state.

Id.

16. Bodenheimer, *Progress Under the Uniform Child Custody Jurisdiction Act and Remaining Problems: Punitive Decrees, Joint Custody, and Excessive Modifications*, 65 CAL. L. REV. 978, 995 (1977) [hereinafter cited as Bodenheimer I].

17. In personam jurisdiction over the parents was not required for jurisdiction to decide the question of custody because the issue was not considered one of parental rights to the child, but rather one of status of the child. See RESTATEMENT, *supra* note 15, § 79, Comment a at 295-97.

present in the forum, for no matter how short a time, a court could entertain a petition for custody and issue a decree on whatever information it had available.¹⁸

Once an initial custody decree was issued, the next step often was for the losing parent to gain physical custody of the child by abducting him from his home or school.¹⁹ He would then take the child to his chosen forum to reside with him, with the benefit of neither a court order nor the legal custodian's permission. There was little to deter the abducting parent from thereafter petitioning his forum state court for a modification of the foreign custody decree, hoping for a change in custody to himself. The child's physical presence with one resident parent was normally sufficient for a second court to find that it had jurisdiction to modify the decree.²⁰

Once the second court decided that it had jurisdiction, there was little to prevent it from redetermining the custody issue independent of any findings of fact made by the court in the state of the initial decree. The United States Supreme Court had held that the full faith and credit clause of the United States Constitution²¹ did not bar the relitigation of the custody issue on petition for modification of a foreign decree, nor did it mandate recognition of a sister state's custody determination.²² The only prerequisite for modification of a custody decree was that the petitioner assert that a change in circumstances had occurred

18. Bodenheimer I, *supra* note 16, at 995.

19. The federal kidnapping statute expressly exempts parents from criminal sanctions for abducting their own children. 18 U.S.C. § 1201(a) (1976). State kidnap statutes in general also exempt parents, following the historical precedent that does not treat those with potential custodial rights as falling within the definition of a kidnapper. See 4 W. BLACKSTONE COMMENTARIES, OF PUBLIC WRONGS: OFFENCES AGAINST THE PERSON 168 n.26 (1848). Parental kidnapping was often condoned. See, e.g., *Bachman v. Mejias*, 1 N.Y.2d 575, 136 N.E.2d 866, 154 N.Y.S.2d 903 (1956). For states which have recently placed parental kidnappers within their kidnap statutes, see Fleck, *Child Snatching By Parents: What Legal Remedies for "Flee and Plea"?*, 55 CHI-KENT L. REV. 303, 313-15 (1979).

20. RESTATEMENT, *supra* note 15, § 79.

21. U.S. CONST. art IV, § 1. See note 109 *infra*.

22. See *Ford v. Ford*, 371 U.S. 187 (1962); *Kovacs v. Brewer*, 356 U.S. 604 (1958); *May v. Anderson*, 345 U.S. 528 (1953); *Halvey v. Halvey*, 330 U.S. 610 (1947). See also Hudak, *The Plight of the Interstate Child in American Courts*, 9 AKRON L. REV. 257 (1975).

after the initial decree.²³ Therefore, faced with the same set of facts as were before the initial-decree court, the second court could reach a different conclusion as to which parent would provide the better custodial household,²⁴ easily finding a change in circumstances sufficient to order a change in custody.²⁵

With no real full faith and credit requirement, and with the minimal burden of showing a change in circumstances, the petitioner for modification had a good chance of relitigating the custody issue. The only barrier to the modification petition would be the clean hands doctrine.²⁶ The court could decline to exercise jurisdiction on the equitable ground that the petitioner's act of abduction precluded him from seeking court intervention in his request for custody. However, not all states had recognized this principle as applicable in child custody cases,²⁷ and in those that had, it was not consistently or predictably applied.²⁸ The result of this often chaotic and confusing area of the law was successive attempts by parents who were denied custody of their children to abduct the children, take them to a potentially more favorable forum, and seek a modification of the previous state's decree.²⁹

23. See generally Note, *The Changed Circumstances Rule in Child Custody Modification Proceedings*, 47 NW. U. L. REV. 543 (1952).

24. The custody decision is often analogized to Solomon's choice. See, e.g., Bodenheimer, *The Uniform Child Custody Jurisdiction Act: A Legislative Remedy for Children Caught in the Conflict of Laws*, 22 VAND. L. REV. 1207 (1969) [hereinafter cited as Bodenheimer II]; Ehrenzweig, *Interstate Recognition of Custody Decrees*, 51 MICH. L. REV. 345 (1953) (decision of which household would be better for the child is necessarily a subjective one, reflecting the personal views of the decision maker as to what is good for children) [hereinafter cited as *Interstate Recognition*].

25. See Stansbury, *Custody and Maintenance Law Across State Lines*, 10 LAW & CONTEMP. PROBS. 819, 828 (1944).

26. See 1 A. EHRENZWEIG, CONFLICT OF LAWS 286-90 (1954); *Interstate Recognition*, *supra* note 24, at 357-69.

27. Pennsylvania has never recognized the clean hands principle as applicable in child custody cases. See Note, *Jurisdiction — Uniform Child Custody Jurisdiction Act — 1977 Pa. Laws No. 20 §§ 1-27*, 51 TEMP. L.Q. 139, 143 n.25 (1978) and cases cited therein [hereinafter cited as *Jurisdiction*].

28. Courts are reluctant to apply the principle when a denial of jurisdiction based on the parent's wrongdoing may be detrimental to the child. *Id.* at 143 & n.27.

29. See UNIFORM ACT, Commissioners' Prefatory Note, 9 UNIFORM LAWS ANN. 111, 112 (1979). In describing the pre-Uniform Act custody law, the drafters of the Act note that "[t]here is no statutory law in this area and the

To deter this conduct, both the Uniform Act³⁰ and the Parental Kidnapping Prevention Act of 1980³¹ legislatively impose a full faith and credit requirement of judicial determinations of custody. In addition, incorporated into the Uniform Act is the equitable clean hands doctrine.³²

III. THE CLEAN HANDS DOCTRINE — SECTION 8 OF THE UNIFORM CHILD CUSTODY JURISDICTION ACT.

One major objective of the drafters of the Uniform Act was to eliminate the situation where children are shifted from state to state by parents seeking to find the forum most favorable to their side of the custody dispute.³³ By vesting exclusive jurisdiction in the state that is most likely to have information relevant to determining which parent would provide best for the interest of the child,³⁴ the Act makes the choice of forum independent of where the child is physically located at the time the custody petition is filed.³⁵ In addition, section 8 of the Act gives legislative definition to the clean hands doctrine, providing guidelines for a court to determine whether it should entertain a petition for custody by a parent who has abducted a child from his custodial household without the consent of the custodial parent.³⁶ The remainder of this discussion of the Uniform Act will focus on section 8—the clean hands doctrine.

A. *Pre-litigation Abductions—Section 8(a)*

Section 8(a) deals with the situation where a parent, before an

judicial law is so unsettled that it seems to offer nothing but a 'quicksand foundation' to stand on." *Id.* at 112. They also point out the irony of the result of this chaos in that "persons who are good, law-abiding citizens are often driven into these [child snatching] tactics against their inclinations; and that lawyers who are reluctant to advise the use of maneuvers of doubtful legality may place their clients at a decided disadvantage." *Id.* at 113.

30. UNIFORM ACT, *supra* note 8, § 13.

31. PKPA, *supra* note 6, § 8(a).

32. UNIFORM ACT, *supra* note 8, § 8.

33. UNIFORM ACT, Commissioners' Prefatory Note, 9 UNIFORM LAWS ANN. 111-14 (1979). *See also* Fry v. Ball, 190 Colo. 128, 544 P.2d 402 (1975).

34. *See* UNIFORM ACT, *supra* note 8, § 3.

35. *See id.* A detailed discussion of the jurisdictional requirements of the Act is beyond the scope of this Comment. For a full discussion of the entire Act, *see* Bodenheimer II, *supra* note 24.

36. *See* UNIFORM ACT, *supra* note 8, § 8.

initial custody decree has been made, "wrongfully" takes a child from the physical custody of the other parent in one state, or engages in "similar reprehensible conduct," and then petitions the court of a second state for legal custody.³⁷ Even if the abducting parent can meet the jurisdictional requirements of the Act, the court in the second state may decline to exercise jurisdiction because of the petitioner's conduct, if the denial is "just and proper under the circumstances."³⁸ Key words in section 8(a) are "wrongfully taken" and "reprehensible conduct."

The question arises as to what constitutes a wrongful taking when there has yet been no judicial determination of legal custody. The drafters of the Uniform Act describe a wrongful taking as "conduct which is so objectionable that a court in the exercise of its inherent equity powers cannot in good conscience permit that party access to its jurisdiction."³⁹ This, however, appears to be a more adequate description of "reprehensible conduct," and is of little assistance in determining what would be a wrongful taking.⁴⁰ Additional guidance in interpreting this section of the Act can be found in section 1(b) which provides that the Act "shall be construed to promote its general purposes."⁴¹ These purposes include "detering abductions and other unilateral removals of children undertaken to obtain custody awards."⁴² Therefore, any abduction could be a wrongful taking in the pre-decree situation, but the court is left with wide discretion to determine whether to entertain the abductor's petition.⁴³ The inclusion of section 8(a) in the Act indicates the intent of the drafters that the question of a parent's abduction should enter into the decision of whether to exercise jurisdiction over an initial custody petition.

37. UNIFORM ACT, *supra* note 8, § 8(a) provides: "If the petitioner for an initial decree has wrongfully taken the child from another state or has engaged in similar reprehensible conduct the court may decline to exercise jurisdiction if this is just and proper under the circumstances."

38. UNIFORM ACT, Commissioners' Note, 9 UNIFORM LAWS ANN. 143 (1979). There is no definition of what constitutes "reprehensible conduct" in the Commissioners' Note.

39. *Id.*

40. *Id.*

41. UNIFORM ACT, *supra* note 8, § 1(b).

42. UNIFORM ACT, *supra* note 8, § 1(a)(5).

43. The conclusion that the court is left with wide discretion follows from the absence of a precise legal definition of the phrase "wrongfully taken."

1. *Stevens v. Stevens*⁴⁴

The New Jersey Superior Court case of *Stevens v. Stevens* provides an example of the use of section 8(a) as authority for a court to decline to exercise jurisdiction over a kidnapper's petition for custody in the pre-decree situation. In *Stevens*, the child resided with his father in Arizona after the mother and father had separated. Before either parent filed for legal custody, the mother forcefully snatched the child from Arizona and took him to New Jersey without notice to the father.⁴⁵ On the day of the abduction, the father filed a petition for custody in Arizona. One month later the mother filed a petition for custody in New Jersey.⁴⁶

In the New Jersey action the father moved to dismiss the mother's petition for temporary custody, arguing that New Jersey did not have jurisdiction under the Act. The motions judge granted the dismissal, finding that under the Uniform Act New Jersey should decline to exercise jurisdiction and defer to Arizona because "the purpose of the Act was to avoid duplicate custody litigation and removal of a child to another state to establish jurisdiction."⁴⁷ The mother appealed this dismissal to the superior court.

The appellate court reviewed the record and concluded that it could decline to exercise jurisdiction under section 8(a) because the mother wrongfully took the child and engaged in reprehensible conduct by forcefully snatching the child from Arizona.⁴⁸ Furthermore, even if the jurisdictional requirements of the Act were now met in New Jersey,⁴⁹ they were only met because the

44. 177 N.J. Super. 167, 425 A.2d 1081 (1981) (per curiam).

45. *Id.* at 171, 425 A.2d at 1083. At the time of the abduction, the child was in the care of a competent babysitter, in the sitter's home. The court noted that the sitter had been physically assaulted by the mother at the time of the abduction. *Id.*

46. *Id.* at 169, 425 A.2d at 1082.

47. *Id.* at 170, 425 A.2d at 1082.

48. *Id.* at 172, 425 A.2d at 1084.

49. *Id.* at 170-71, 425 A.2d at 1083. The court assumed, without finding, that the mother might be able to invoke jurisdiction of the New Jersey court under § 3(a)(2) of the Uniform Act, which provides in pertinent part:

A court . . . has jurisdiction . . . if:

. . . .

(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

mother succeeded in snatching the child; therefore, entertaining the mother's petition under these circumstances would frustrate the very purpose of the Act, namely, deterring parental abductions.⁵⁰ Finally, the court noted that Arizona had been the child's residence from birth until his abduction, and that the denial of jurisdiction hardly seemed unfair because the parties could still litigate the custody issue in Arizona.⁵¹

Stevens illustrates how the language of section 8(a) retains the equitable nature of the judicially created clean hands doctrine⁵² and incorporates the doctrine into the statute.⁵³ If it is "just and proper under the circumstances" to decline to exercise jurisdiction over a petition for an initial custody decree brought by an abducting parent, a court may do so.⁵⁴ Whether the parent's conduct is reprehensible remains a decision for the court.

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
Id. This is generally referred to as the significant connection/substantial evidence basis for jurisdiction.

50. 177 N.J. Super. at 172, 425 A.2d at 1084. New Jersey could have declined to exercise jurisdiction under the Uniform Act because a proceeding was pending in Arizona at the time of the New Jersey petition. *See* UNIFORM ACT, *supra* note 8, § 6(a). In addition it should be noted that under these circumstances Arizona would have more information concerning the child's welfare, and that one month's residence in New Jersey would be unlikely to yield a great deal of evidence in this regard. The Commissioners' Note to section 3 indicates that the state with maximum contacts with the child should be the one to exercise jurisdiction when two states can meet the section 3 requirements. UNIFORM ACT, Commissioners' Note, 9 UNIFORM LAWS ANN. 124 (1979). *See also* Bodenheimer II, *supra* note 24, at 1234. In addition, Arizona had not declined to exercise jurisdiction over the father's petition there, so the New Jersey court could have declined to exercise jurisdiction on the ground of being an inconvenient forum. *See* UNIFORM ACT, *supra* note 8, § 7.

The paucity of cases using section 8(a) is understandable in view of the other possible grounds for declining to exercise jurisdiction which would not necessitate a finding of unclean hands. *See* UNIFORM ACT, *supra* note 8, §§ 3(a), 6(a) & 7.

51. 177 N.J. Super. at 173, 425 A.2d at 1084. *See Williams v. Zacher*, 35 Or. App. 129, 481 P.2d 91 (1978); *Stubblefield v. Dong My Ha*, 10 Pa. D. & C.3d 751 (1978).

52. Professor Albert A. Ehrenzweig of the University of California at Berkeley is credited with naming the doctrine. *Interstate Recognition*, *supra* note 24, at 345. *See* UNIFORM ACT, Commissioners' Note, 9 UNIFORM LAWS ANN. 142 (1979).

53. *See* note 32 and accompanying text *supra*.

54. Pennsylvania has uniquely altered section 8(a) in its version of the

B. *Post-decree Abductions — Section 8(b)*

Section 8(b) of the Uniform Act deals with a parent who abducts his child in violation of an existing decree, then seeks modification of the foreign decree in a new state.⁵⁵ This section mandates, subject to one exception, that a court decline to exercise jurisdiction in a petition for modification of a valid foreign custody decree if the petitioner has "improperly removed" the child from his lawful custodial household, or "improperly retained" the child after a visit, in violation of the existing foreign custody decree. The exception in 8(b) is contained in the prefatory language: "Unless required in the interest of the child." The drafters of the Uniform Act indicate that this interest-of-the-child exception should be applied only if "the harm done to the child by a denial of jurisdiction outweighs the parental misconduct."⁵⁶

The recent Pennsylvania case of *Zaubi v. Zaubi*⁵⁷ illustrates an interpretation of section 8(b) in light of the Act's overall purpose of deterring parental abductions. The trial court's opinion⁵⁸ and

Uniform Act by replacing the phrase "reprehensible conduct" with "conduct intending to benefit his position in a custody hearing." 42 PA. CONS. STAT. ANN. § 5349(a) (Purdon 1981). This language explicitly incorporates the Act's general purpose, to "deter abductions . . . undertaken to obtain custody awards," into the clean hands section. UNIFORM ACT, *supra* note 8, § 1(a)(5); 42 PA. CONS. STAT. ANN. § 5342(a)(5) (Purdon 1981).

Other states have also altered section 8(a) to leave less discretion to courts faced with an initial decree petition by an abducting parent. *See* 9 UNIFORM LAWS ANN. 143-44 (1979); ALASKA STAT. § 25.30.070 (1977) (mandates denial of jurisdiction unless necessary in emergency to protect child); OHIO REV. CODE ANN. § 3109.26 (Page 1980) (deletes "reprehensible").

55. UNIFORM ACT, *supra* note 8, § 8(b) provides:

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

Id. *See also* 42 PA. CONS. STAT. ANN. § 5349(b) (Purdon 1981).

56. *See* UNIFORM ACT, Commissioners' Note, 9 UNIFORM LAWS ANN. 143 (1979).

57. 492 Pa. 183, 423 A.2d 333 (1980).

58. *Zaubi v. Zaubi*, No. 39 (C.P. Greene, July 28, 1978).

the supreme court dissent by Justice Nix show how the interest-of-the-child exception can be used to avoid the mandatory language prohibiting the exercise of modification jurisdiction in the case of a parental abductor. In contrast, the superior court⁵⁹ and supreme court⁶⁰ majority opinions illustrate an interpretation of the section that significantly narrows the grounds for using the exception.

Initially it is significant to note that, before adoption of the Uniform Act, Pennsylvania had not judicially recognized the clean hands doctrine as applicable to custody disputes.⁶¹ Nevertheless, Pennsylvania not only legislatively adopted the doctrine, but strengthened the language in the portion of 8(b) concerning the denial of jurisdiction when the petitioner has violated some provisions of a custody decree other than the provision that actually confers custody. Instead of allowing the court to decline to exercise jurisdiction if it is just and proper under the circumstances, the Pennsylvania version imposes on the violating petitioner the burden of showing "that conditions in the custodial household are physically or emotionally harmful to the child."⁶² Both the trial court and the superior court in *Zaubi* expressly relied on section 8(b) to reach opposite conclusions on whether to exercise modification jurisdiction.

1. *Zaubi v. Zaubi*⁶³

In *Zaubi*, the mother of two small children had been originally awarded temporary custody of the children by the courts of Denmark in an ex parte proceeding.⁶⁴ Thereafter the father in-

59. 275 Pa. Super. Ct. 294, 418 A.2d 729 (1980).

60. 492 Pa. 183, 423 A.2d 333 (1980) (4-3 decision, Roberts & Larsen, JJ., concurring; Nix, J., dissenting).

61. See *Jurisdiction*, *supra* note 27, at 143 n.25.

62. 42 PA. CONS. STAT. ANN. § 5349(b) (Purdon 1981) provides in pertinent part that "the court may decline to exercise its jurisdiction unless the petitioner can show that conditions in the custodial household are physically or emotionally harmful to the child, the burden of proof being on the petitioner requesting the court to take jurisdiction."

63. 492 Pa. 183, 423 A.2d 333 (1980).

64. 275 Pa. Super. Ct. at 297, 418 A.2d at 730. The provisions of the Uniform Act as adopted by Pennsylvania apply equally to foreign countries and sister states. See UNIFORM ACT, *supra* note 8, § 23; 42 PA. CONS. STAT. ANN. § 5365 (Purdon 1981).

stituted a suit, in Denmark, for permanent custody of the children. After a full hearing on the father's petition, the mother was awarded custody. The father then appealed the decision through the courts of Denmark.⁶⁵

While the father's final appeal to the highest court was pending, he took the children without the mother's permission or knowledge, brought them to the United States, and concealed their whereabouts for some nine months.⁶⁶ The mother filed for a writ of habeas corpus to obtain physical custody of the children after determining that they were living with her former husband's family in Pennsylvania.

Upon learning of the mother's petition, the father fled to Ohio with the children.⁶⁷ A contempt citation was issued, after which the father returned to Pennsylvania and a full hearing was had with all parties present.⁶⁸ In his answer to the petition, the father sought modification of the Danish decree and a change in custody. The father argued that the conditions in the mother's household were dangerous to the welfare of the children because the maternal grandfather had sexually abused the mother in her childhood. He supported his argument with evidence that the relationship of the grandfather to the children posed a threat of his likewise sexually abusing them.⁶⁹

65. 275 Pa. Super. Ct. at 297-98, 418 A.2d at 730-31.

66. *Id.* at 298, 418 A.2d at 731. The temporary custody award was granted on April 8, 1975. The father instituted his suit shortly thereafter. In April, 1976, the lower court's order granting the mother custody was affirmed by the highest appellate court of Denmark. When the mother obtained her final divorce decree in June, 1977, the father again appealed to the High Court of Denmark. The abduction occurred in August, 1977, while this appeal was pending, over two and one-half years after the initial temporary decree. *Id.* at 297-98, 418 A.2d at 730-31.

67. The father abducted the children in August, 1977, and the mother petitioned for the writ in May, 1978. No. 39, slip op. at 3 (C.P. Greene July 28, 1978). During this time, the father had transferred the children between Ohio and Pennsylvania. The children were not enrolled in school, and were kept under close surveillance by the father's family. 275 Pa. Super. Ct. at 298, 418 A.2d at 731.

68. 275 Pa. Super. Ct. at 298, 418 A.2d at 731. The father's counsel, at the first hearing on the writ, entered a special appearance and moved to dismiss for lack of jurisdiction. The motion was denied. No. 39, slip op. at 3 (C.P. Greene July 28, 1978).

69. No. 39, slip op. at 8 & 9 (C.P. Greene July 28, 1978). The father also argued that the mother was guilty of removing the children from the marital residence in Ohio to Denmark, without the father's permission, before any

After conceding that the Uniform Act required the Pennsylvania court to give full faith and credit to the Danish decree,⁷⁰ the trial court nonetheless held that it was required to examine the evidence of sexual abuse and decide whether a modification of the Danish decree should issue as in the best interest of the children.⁷¹ The court relied on the Danish court's power to "review the matters and circumstances as they now exist in a fuller and more recent light"⁷² and reasoned that it had both the power and the duty to do likewise. The court cited a pre-Act case, *Friedman v. Friedman*,⁷³ to support its perceived duty to decide the custody question "on its own best judgment, unfettered but not necessarily uninfluenced by a prior adjudication."⁷⁴ Recognizing that the Uniform Act has neutralized much of that earlier doctrine, the court nonetheless found that it could modify the decree if "the present circumstances of the child's custody [are] of such a nature as to amount to a state of emergency vitally jeopardizing his or her physical, emotional, or mental well being."⁷⁵ The trial court then reviewed all the evidence⁷⁶ and, despite the Danish court's decision that this evidence did not support the father's argument that the grandfather's conduct posed a substantial threat of sexual abuse, held that a return of physical custody to the mother would jeopardize the welfare of the children.⁷⁷ The court therefore modified the Danish decree and awarded custody of the children to the father.⁷⁸

The court recognized that the father's abduction of the children from Denmark was a wrongful taking, and that section

custody proceedings. The court held that "she violated no law nor decree when she did so." *Id.* at 7.

70. *Id.* at 6. The trial court relied on its earlier decision that full faith and credit is required even if the forum which issued the decree had not adopted the Uniform Act, as long as the decree "was made under factual circumstances meeting the jurisdictional standards of the act." *Id.* at 6 (quoting Commonwealth of Pa. *ex rel.*, Scott Alan Moyers, No. 149 (C.P. Greene Aug. 1977).

71. No. 39, slip op. at 10 (C.P. Greene July 28, 1978).

72. *Id.*

73. 224 Pa. Super. Ct. 530, 307 A.2d 292 (1974).

74. No. 39, slip op. at 9 (C.P. Greene July 28, 1979) (quoting 224 Pa. Super. Ct. at 533, 307 A.2d at 295 (1974)).

75. No. 39, slip op. at 10 (C.P. Greene July 28, 1978).

76. *Id.* at 8 & 9.

77. *Id.* at 10.

78. *Id.* at 12.

8(b) of the Uniform Act would apply.⁷⁹ In the court's view, however, its duty of "protecting these children from an international tug of war," in light of the interest-of-the-child exception in section 8(b), required it to exercise jurisdiction; the danger to the children required it to modify the foreign decree.⁸⁰

The superior court found error in the trial court's modification of the Danish decree in the absence of the father's showing that conditions in the custodial household had changed after the initial decree and had become physically or emotionally harmful to the children. The court held that the only changed circumstance in this case was that the father had abducted the children in violation of a valid foreign custody decree.⁸¹ In the court's view, the burden of changed circumstances requires that the petitioner for modification of a valid decree show that "the court issuing the original decree was not acting in the child's best interest."⁸²

Noting that none of the father's evidence of threatened sexual abuse by the grandfather involved instances occurring subsequent to the final Danish custody decree, the court reasoned that the Danish court had considered this evidence and found that it did not warrant any change in custody.⁸³ The superior court found error in the trial court's refusal to defer to the finding of fact the Danish court that there was little actual threat of harm.⁸⁴

The superior court weighed the father's misconduct against the potential for abuse by the grandfather in the mother's household, and found that the misconduct outweighed the mere possibility of abuse by the grandfather, who was not residing in the children's home.⁸⁵ Using section 8(b) of the Uniform Act and the Commissioners' Note,⁸⁶ the court held that it did not have jurisdiction to modify the Danish decree under these circumstances. Therefore, the court reversed the trial court's modification in favor of the father, ordered the children returned to the mother, and authorized her to take the children to Denmark.⁸⁷

79. *Id.* at 6 & 7.

80. *Id.* at 7 & 8.

81. 275 Pa. Super. Ct. at 299, 418 A.2d at 731.

82. *Id.* at 300, 418 A.2d at 732.

83. *Id.* at 301, 418 A.2d at 732.

84. *Id.* at 302, 418 A.2d at 733.

85. *Id.*

86. See notes 55 & 56 and accompanying text *supra*.

87. 275 Pa. Super. Ct. at 304, 418 A.2d at 734.

On appeal, the Pennsylvania Supreme Court affirmed the superior court's order.⁸⁸ In construing Pennsylvania's version of section 8(b) of the Uniform Act, the court stated:

We agree with the Superior Court that the Act compels Pennsylvania courts not only to recognize valid custody decrees from foreign nations but also to decline to accept jurisdiction to modify custody decrees in the absence of a showing, based on evidence not previously considered, of conditions in the custodial household that are physically or emotionally harmful to the children.⁸⁹

To support its conclusion that the petitioner must meet with new evidence his burden of showing dangerous conditions in the custodial household, the supreme court cited section 13 of the Uniform Act, which makes the custody decree conclusive as to all issues of law and fact decided.⁹⁰ The majority agreed with the superior court that the father had not met his burden in the case.⁹¹

Writing in dissent, Justice Nix noted that Pennsylvania had home state jurisdiction because the children had lived with their father in Pennsylvania for more than the requisite six months.⁹² He then disagreed with the majority's conclusion that section 8(b) precluded the exercise of jurisdiction to modify the Danish decree. Referring to section 8(b)'s interest-of-the-child exception, the dissent argued that the legislature did not intend that the court decline to exercise jurisdiction when the child would suffer as a consequence.⁹³

Because he believed that section 8(b) did not preclude the court from exercising modification jurisdiction,⁹⁴ Justice Nix next

88. 492 Pa. 183, 423 A.2d 333 (1980).

89. *Id.* at 185-86, 423 A.2d at 334.

90. *Id.* at 190, 423 A.2d at 336.

91. *Id.*

92. *Id.* at 199, 423 A.2d at 341 (Nix, J., dissenting). None of the other opinions in *Zaubi* mentioned the section 3 basis for jurisdiction. The home state requirement was met because the father had successfully abducted the children and successfully concealed their whereabouts for the requisite six month time period. See UNIFORM ACT, *supra* note 8, § 3.

93. *Id.* at 202, 423 A.2d at 343 (Nix, J., dissenting).

94. *Id.* at 203, 423 A.2d at 343 (Nix, J., dissenting). The dissent relied on the use of the term "petitioner" in referring to the party with unclean hands in section 8(b) to support his conclusion that, when the modification issue is raised

addressed the issue of whether the court had modification jurisdiction under section 14 of the Uniform Act.⁹⁵ Section 14 provides that a Pennsylvania court may not modify a foreign custody decree unless the foreign court no longer meets the Act's jurisdictional prerequisites and the Pennsylvania court has jurisdiction.⁹⁶ Based on his decision that Pennsylvania now had home state jurisdiction,⁹⁷ he concluded that the Danish court no longer had jurisdiction to modify its own decree.⁹⁸ Pennsylvania, therefore was the only state with jurisdiction to modify the decree.

Finally, the dissent disagreed that the trial court erred in making its own independent judgment of the propriety of the award of custody to the mother based on the same facts considered by the Danish court. In Justice Nix' view, because a Pennsylvania court petitioned for enforcement of its own decree would be required to review the entire record and make an independent judgment on the custody issue, full faith and credit would not require the court to give more deference to a foreign decree than to a decree of its own state.⁹⁹ Any other interpreta-

as a defense to an enforcement action, the clean hands section should not apply. *Id.* The Federal Act removed this problem by substituting the term "contestant." See note 132 and accompanying text *infra*.

95. 492 Pa. at 204, 423 A.2d at 344 (Nix, J., dissenting).

96. UNIFORM ACT, *supra* note 8, § 14. The Commissioners' Note to section 14 describes the situation where children are abducted and their whereabouts not discovered by the legal custodian for "several years," and states that "[t]he abductor would be denied access to the court of another state under section 8(b) and state 1 [the decree state] would have modification jurisdiction in any event under section 3(a)(4)." Commissioners' Note, 9 UNIFORM LAWS ANN. 154-55 (1979). See *Grubs v. Ross*, 291 Or. 263, 630 P.2d 353 (1981). For criticism of allowing an abductor to establish home state jurisdiction because of his abduction and concealment, see Ratner, *Procedural Due Process and Jurisdiction to Adjudicate*, 75 NW. U.L. REV. 363, 392 (1980).

97. See note 92 and accompanying text *supra*.

98. 492 Pa. at 205, 423 A.2d at 344 (Nix, J., dissenting). It is not clear that Denmark no longer had jurisdiction to modify its own decree based on section 3(a)(2), because it would appear that it still had a significant connection with the mother and child, and substantial evidence concerning the child would be available in Denmark. See UNIFORM ACT, *supra* note 8, § 3(a)(2); 42 PA. CONS. STAT. ANN. § 5344(a)(2) (Purdon 1981).

99. 492 Pa. at 205-06, 423 A.2d at 344-45 (Nix, J., dissenting). Both the Uniform Act and the Pennsylvania Act provide that "[a]s to these parties the custody decree is conclusive as to all issues of law and fact decided and as to the custody determination made unless and until that determination is modified pursuant to law including the provisions of this Act." UNIFORM ACT, *supra* note 8, § 12; 42 PA. CONS. STAT. ANN. § 5353 (Purdon 1981). Because the dissent con-

tion of the legislation would, according to the dissent, "lose sight of the cardinal precept in the custody area, to wit: the best interest of the child."¹⁰⁰

C. *Judicial Restraint*

The majority opinion in *Zaubi* represents the kind of judicial restraint that is essential for the clean hands provision of the Uniform Act to be effective in deterring parental kidnapping. It clearly defines the changed circumstances necessary before a court can entertain a parental abductor's request for a change in custody after a foreign jurisdiction has granted custody to the other parent. It is the abductor's burden to show that conditions *in the custodial household* have changed *after* the foreign decree *and* have become dangerous to the child.¹⁰¹ Cases decided before the Act cannot be relied on as precedent for entertaining a petition for modification of a foreign decree. The Act has substantially narrowed the discretionary power of Pennsylvania courts to modify foreign decrees, legislatively imposed the equitable clean

cluded that it could modify the Danish decree pursuant to the Uniform Act, it did not view this section as barring a review of the entire record, including the evidence considered by the Danish court. 492 Pa. at 205 & n.13, 423 A.2d at 344 & n.13 (Nix, J., dissenting). *See also* May v. Anderson, 345 U.S. 528 (1953).

100. 492 Pa. at 206, 423 A.2d at 345 (Nix, J., dissenting). After the supreme court affirmed, suit was brought in federal district court charging that enforcing the Danish decree and allowing the mother to take the children out of the country was a denial of the children's constitutional rights as United States citizens. *Zaubi v. Hoejme*, No. 80-1567 (W.D. Pa. Nov. 17, 1980). The district court dismissed the complaint because entertaining the petition would have a disruptive effect on the custody issues, creating a change in circumstances which would result in relitigation of the custody issues. *Id.* at 6 & 8. Also, there exists a long standing proscription against the intervention of federal courts in domestic relations cases. *Id.* at 5.

The plaintiff then petitioned the United States Court of Appeals for the Third Circuit for an injunction and stay of the superior court's order granting the mother permission to remove the children from the United States. Judge Aldisert, writing for the court, ordered a stay pending a decision on the injunction petition, but the mother could not be served. The appeal was nevertheless argued and the district court's judgment affirmed. *Zaubi v. Hoejme*, No. 80-2679 (3d Cir. May 12, 1981).

This writer contacted counsel for the mother and learned that subsequent to the mother's return to Denmark, her son disappeared and was believed to have been again snatched by the father, whose whereabouts were unknown.

101. *See* text accompanying notes 89-91 *supra*.

hands doctrine, and mandated full faith and credit to foreign decrees as to conclusions of both law and fact.

Even though the uniform version of the Act does not define the petitioner's burden as explicitly as does Pennsylvania's version,¹⁰² the *Zaubi* result can be reached if section 8 is interpreted in light of the Act's general purpose of deterring unilateral removal of children from their lawful custodian.¹⁰³ If courts refuse to exercise modification jurisdiction in favor of an abducting parent except in the most extraordinary circumstances, the incentive for parents to engage in this detrimental conduct will be significantly diminished. On the other hand, if the old, flexible, changed-circumstances rule is retained, the abducting parent can frequently show that something has changed, either in his household or in the previous custodial household, and the court can decide again which household would best serve the interest of the child. This would defeat the Act's express purpose of avoiding relitigation of custody decisions of other states, and would lead to a continuing round of abductions and relitigations.

IV. THE PARENTAL KIDNAPPING PREVENTION ACT OF 1980

A. *Introduction: Rationale for Federal Intervention in Interstate Custody Disputes*

In *Zaubi*, the legal custodian sought enforcement of her foreign custody decree in a state that had adopted the Uniform Act. As of February 10, 1981, the Uniform Act had been adopted in forty-four states, leaving six states that had not legislatively required their courts to give full faith and credit to foreign custody decrees.¹⁰⁴ These remaining states were thus potential

102. Compare note 37 *supra* with note 62 *supra*.

103. See, e.g., *Murphy v. Murphy*, 404 N.E.2d 69 (Mass. 1980); *Grubs v. Ross*, 291 Or. 263, 630 P.2d 353 (1981). For an interesting reverse situation, where the party with unclean hands petitions in the decree state, see *Bosse v. Superior Ct.*, 89 Cal. App. 3d 440, 152 Cal. Rptr. 665 (1979) (holding that the Uniform Act does not cover this; defer to the custodial parent's new home state and dismiss the petition in the decree state).

104. 7 FAM. L. REP. (BNA) 2228 (1981). The six states which had not legislatively adopted the Uniform Act include: Massachusetts (adopted judicially, *Murphy v. Murphy*, 404 N.E.2d 69 (Mass. 1980)), Mississippi, New Mexico, South Carolina, Texas (which has legislation similar to the Uniform Act), and West Virginia. The District of Columbia and Puerto Rico also had not adopted the Uniform Act. 7 FAM. L. REP. (BNA) 2228 (1981).

havens for would-be parental abductors. Kidnapping parents could still flee to a non-adopting state, file a petition for custody, and obtain a *de novo* consideration of the basic custody issue before a court with potentially different views of what is best for the children.¹⁰⁵ The incentive for kidnapping would not be effectively removed unless *no* jurisdiction would provide a forum for relitigation of the custody issue.

Impressed with the magnitude of the parental kidnapping problem,¹⁰⁶ and impatient with the slow process of individual state adoption of the Uniform Act,¹⁰⁷ Congress recently attempted a federal solution to the problem. Despite the long-standing policy of avoiding federal intervention in domestic relations cases,¹⁰⁸ Congress approved limited federal intervention in this area.

The full faith and credit clause of the Constitution¹⁰⁹ gives Congress the authority to prescribe the effect that one state's judicial decisions will have in another state. Under this authority, Congress has the power to remove the incentive for child abductions by simply mandating that all states give full faith and credit to custody decrees of sister states. This is precisely what the Parental Kidnapping Prevention Act of 1980 (Federal Act) is designed to do.¹¹⁰ Accordingly, the Federal Act requires that full faith and credit be given to the child custody determinations of sister states.¹¹¹

In addition to its full faith and credit provisions, the Federal

105. See text accompanying notes 20-24 *supra*.

106. PKPA, *supra* note 6, § 7(a)(1). It is estimated that over 100,000 parental kidnappings occur annually. Pick, *Kidnapped!*, STUDENT LAW, Oct. 1980, at 28 [hereinafter cited as Pick].

107. Eighteen of the current 44 states which have adopted the Uniform Act have done so between 1979 and 1981, even though it was promulgated in 1968. See 9 UNIFORM LAWS ANN. 8 (Supp. 1981).

108. Federal courts have invoked the domestic relations exception whenever possible to avoid federal involvement in domestic relations cases. See, e.g., *Moore v. Sims*, 442 U.S. 415 (1977).

109. U.S. CONST. art. IV, § 1 provides: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

110. See PKPA, *supra* note 6, § 7(c)(5), which is identical to UNIFORM ACT, *supra* note 8, § 1(a)(1).

111. PKPA, *supra* note 6, § 8.

Act provides for assistance to legal custodians who are unable to locate the kidnapping parent and children.¹¹² Because a state acting alone is limited in its ability to aid a resident in locating a kidnapping parent who flees its jurisdiction, federal assistance in this area was deemed an essential part of the solution to the parental kidnapping problem.¹¹³ Limited state power contributes to the tendency of parties in a custody dispute to seize, restrain, and conceal the children involved. This has a disruptive effect on the occupations and commercial activities of the parties involved and interstate commerce generally.¹¹⁴ Therefore, pursuant to its commerce clause power, Congress has approved the use of both the Parent Locator Service¹¹⁵ and the FBI¹¹⁶ to aid in locating parental abductors.

B. *Legislative History of the Federal Act*

As early as 1973, bills were introduced in Congress¹¹⁷ to extend federal and FBI authority to child-snatching cases.¹¹⁸ These first proposals were defeated primarily because of the reluctance of legislators and law enforcers to classify parental kidnapping

112. PKPA, *supra* note 6, § 9-10.

113. PKPA, *supra* note 6, § 7(b) provides: "[I]t is necessary to establish a national system for locating parents and children who travel from one such jurisdiction to another and are concealed in connection with such disputes"

114. PKPA, *supra* note 6, § 7(3) provides:

[T]hose characteristics of the law and practice in such cases, along with the limits imposed by a Federal system on the authority of each such jurisdiction to conduct investigations and take other actions outside its own boundaries, contribute to a tendency of parties involved in such disputes to frequently resort to the seizure, restraint, concealment, and interstate transportation of children, the disregard of court orders, excessive relitigation of cases, obtaining of conflicting orders by the courts of various jurisdictions, and interstate travel and communication that is so expensive and time consuming as to disrupt their occupations and commercial activities.

Id.

115. PKPA, *supra* note 6, § 9(b).

116. PKPA, *supra* note 6, § 10.

117. See Comment, *Prevention of Child Stealing: The Need for a National Policy*, 11 LOY. L.A. L. REV. 829, 861 (1978).

118. *Id.* The 1973 bill would have made child stealing by a parent a misdemeanor. See 123 CONG. REC. H1479 (daily ed. Feb. 24, 1977). In 1975, a bill was introduced in the House to remove the parental exception in the federal Kidnap Act. See H.R. 113, 94th Cong., 1st Sess. (1975).

as a federal crime.¹¹⁹ Subsequent proposals were drafted in order to provide a deterrent, avoid harsh criminal penalties, and still confer authority for FBI assistance in tracing abducted children.¹²⁰

The first bill incorporating the full faith and credit and jurisdictional provisions of the Uniform Act was introduced in the Senate in 1978, by Senator Wallop, as an amendment to the Senate's Criminal Code Reform Act.¹²¹ The Reform Act was passed by the Senate on January 30, 1978, but later stalled in conference and committee. The Wallop proposal was then appended to the Domestic Violence Prevention and Services Act of 1980, which was passed by the House¹²² but subsequently failed to pass in the Senate. In the closing days of the 96th Congress, Senator Wallop offered the proposal as a rider to the Pneumococcal Vaccine Medicare Coverage legislation.¹²³ The Pneumococcal Vaccine Act was signed into law by President Jimmy Carter on December 28, 1980¹²⁴ with the rider intact. The rider is the Federal Act, which is contained in sections 6 through 10 of the Pneumococcal Vaccine Act.¹²⁵

C. *Provisions of the Federal Act*

1. *Full Faith and Credit*

The Federal Act mandates that full faith and credit be given to child custody determinations of sister states.¹²⁶ If the initial

119. H.R. 988, 95th Cong., 1st Sess. (1977). See 123 CONG. REC. H54 (daily ed. Jan. 4, 1977) (remarks of Rep. Moss).

120. Speaking to the Senate on the Wallop proposal, Senator Thurmond stated: "The new section is drafted so as to deal less harshly and more effectively with such offenses." 124 CONG. REC. S502 (daily ed. Jan. 24, 1978) (remarks of Sen. Thurmond).

121. *Id.* at S499-500. This proposal contained criminal provisions not contained in the Federal Act as ultimately enacted.

122. 67 A.B.A. J. 704 (1981).

123. 6 FAM. L. REP. (BNA) 2904 (1981).

124. Pub. L. 96-611, 94 Stat. 3566 (1980).

125. The Act was not to become effective until July 1, 1981. *Id.* at 3567. There may be some question about whether Congress intended to delay the effective date of the PKPA as well. See, e.g., 7 FAM. L. REP. (BNA) 2353 (1981).

126. PKPA, *supra* note 6, § 8(a) provides: "The appropriate authorities of every State shall enforce according to its terms, and shall not modify except as provided in subsection (f) of this section, any child custody determination made consistently with the provisions of this section by a court of another state."

decree state has exercised jurisdiction in conformity with the jurisdictional requirements of the Federal Act¹²⁷ (which are identical to those contained in section 3 of the Uniform Act),¹²⁸ then a second state must enforce and not modify this custody decree.¹²⁹ The second state may modify the initial decree only if it satisfies these requirements, and the decree state no longer has jurisdiction or has declined to exercise its jurisdiction to modify the decree.¹³⁰

Initially, a question arises about whether the remaining states need to adopt the Uniform Act as a matter of state law in view of the federally mandated full faith and credit provisions of the Federal Act. Significantly, the Federal Act does not contain the procedural guidelines necessary to assure a complete solution to the problem faced by a custodial parent when the other parent has kidnapped the children.¹³¹ In particular, there is nothing in the Federal Act relating to how the custodial parent is to regain custody of the children. This is a procedural matter that should be handled as a matter of state law.

There is also no provision equivalent to the Uniform Act section 8 clean hands principle. The only explicit mention of a sanction for parental abductions is contained in a section that encourages states to assess the costs of litigation and enforcement of a valid custody decree against a contestant who has wrongfully removed the child from the physical custody of his lawful custodian, or wrongfully detained the child after a visit.¹³² Con-

127. PKPA, *supra* note 6, § 8(a).

128. UNIFORM ACT, *supra* note 8, § 3.

129. PKPA, *supra* note 6, § 8(a).

130. *Id.*

131. The Uniform Act provides these guidelines in section 15 (Filing and Enforcement of Custody Decree of Another State), section 16 (Registry of Out-of-State Custody Decrees and Proceedings), and section 17 (Certified Copies of Custody Decree). UNIFORM ACT, *supra* note 8, §§ 15-17.

132. PKPA, *supra* note 6, § 8(c) provides in pertinent part:

State courts are encouraged to—

.....
 (2) award to the person entitled to custody or visitation pursuant to a custody determination which is consistent with the provisions of such section 1738A, necessary travel expenses, attorneys' fees, costs of private investigations, witness fees or expenses, and other expenses incurred in connection with such custody determination in any case in which—

(A) a contestant has, without the consent of the person entitled to custody or visitation pursuant to a custody determination which is consis-

gress has thereby enunciated its view that parental kidnapers should be discouraged, but has left it to the states to define the strength of the policy against this conduct, leaving them free to decline to exercise jurisdiction by reason of the conduct of a petitioner.¹³³

There is only one provision in the Federal Act requiring a court to decline to exercise jurisdiction, even though it may meet the requirements: when there is a custody proceeding pending in another state which meets the jurisdictional requirements of the Federal Act.¹³⁴ Otherwise, there are no guidelines such as those contained in the Uniform Act for when a state should decline to exercise jurisdiction as an inconvenient forum.¹³⁵ The Uniform Act, therefore, is still needed in order that the states can provide a uniform and consistent policy for the exercise of jurisdiction when a parent has been guilty of kidnapping his children.

Finally, there is no provision in the Federal Act that requires that decrees rendered by foreign countries be afforded full faith and credit, although the Uniform Act contains a provision covering its international application.¹³⁶ It is doubtful that such a provision could be included in federal legislation under the full faith and credit clause of the Constitution.¹³⁷ However, the Hague Convention has completed a final draft of the text of a treaty on the Civil Aspects of International Child Abductions, with twenty-seven countries, including the United States, participating in its drafting. The draft will be presented to Congress for approval in the near future,¹³⁸ and will be a step toward solution of the international kidnapping problem.

tent with the provisions of such section 1738A, (i) wrongfully removed the child from the physical custody of such person, or (ii) wrongfully retained the child after a visit or other temporary relinquishment of physical custody; or

(B) the court determines it is appropriate.

Id.

133. See UNIFORM ACT, *supra* note 8, § 8.

134. PKPA, *supra* note 6, § 8(a).

135. See UNIFORM ACT, *supra* note 8, § 7.

136. UNIFORM ACT, *supra* note 8, § 23.

137. See note 109 *supra*.

138. See 7 FAM. L. REP. (BNA) 2185 (1981). A final draft of the Hague Convention on Civil Aspects of International Child Abduction has been prepared to require ratifying countries to return children who have been taken by one parent from their residence country. State Department officials have been

2. Parent Locator Service

In order to utilize the Uniform Act's provisions for enforcement of a valid custody decree, the legal custodian must first know in which state the abducting parent is residing with the children.¹³⁹ Before the Federal Act, parents were forced to hire private investigators to locate their children.¹⁴⁰ Now, they may be able to avoid this cost by using the already established Parent Locator Service (PLS). The PLS has been available for locating parents who disappear and fail to make child support payments.¹⁴¹ Section 9 of the Federal Act extends this service to parents who request it for the purpose of enforcing state or federal law prohibiting the unlawful taking or restraining of a child, or for the purpose of making or enforcing a child custody determination.¹⁴² It is significant to note that the PLS is thus available both to a parent seeking an initial custody decree and to one seeking to enforce an existing decree.¹⁴³ This is essential for the parent who seeks a custody decree in a state having jurisdiction, so that he can comply with the due process provision requiring that notice of the action be given to the other parent.¹⁴⁴

The only information that can be obtained through the PLS is the most recent address and place of employment of any absent parent or child, if it is contained in any files or records maintained by the Department of Health and Human Services, or if it can be obtained by the Department under its authority to obtain

authorized to sign the tentative draft of the treaty for the United States, but it still would have to be ratified by the Senate. There is some question of what federal legislation would be needed to implement the treaty should it be ratified, and whether a state or federal agency should supervise its operation. *Id.* at 2185-86. See also Foster & Freed, *A Legislative Beginning to Child-Snatching Prevention*, TRIAL, April 1981, at 38 [hereinafter cited as Foster & Freed].

139. See UNIFORM ACT, *supra* note 6, § 4 (notice provision).

140. See, e.g., Pick, *supra* note 106, at 54.

141. 42 U.S.C. § 653 (1976).

142. PKPA, *supra* note 6, § 9(b).

143. PKPA, *supra* note 6, § 9(b) provides that requests for information shall be honored "when such information is to be used to locate such parent or child for the purpose of (1) enforcing any State or Federal law with respect to the unlawful taking or restraint of a child; or (2) making or enforcing a child custody determination." (emphasis added).

144. See PKPA, *supra* note 6, § 8(a); UNIFORM ACT, *supra* note 8, § 4.

such information from any other department or agency of the state or federal government.¹⁴⁵

3. *FBI Assistance*

Title 18, section 1073 of the United States Code, entitled "Flight to avoid prosecution or giving testimony,"¹⁴⁶ makes it a federal crime for a person to move or travel in interstate or foreign commerce with the intent of avoiding prosecution under the laws of the place from which he flees. The Federal Act amends this section to include "cases involving parental kidnapping and interstate or international flight to avoid prosecution under applicable state felony statutes."¹⁴⁷ It will have no effect when the child is abducted from a state in which there are either no criminal laws prohibiting child-snatching by a parent, or in which such an offense is not designated a felony.¹⁴⁸

In the situations where an abduction is from a state which classifies child-snatching as a felony, section 1073 must be examined to determine the scope of federal intervention. Section 1073 provides for prosecution only upon formal approval in writing by the Attorney General or an assistant attorney

145. PKPA, *supra* note 6, § 9(b).

146. 18 U.S.C. § 1073 (1976) provides in pertinent part:

Whoever moves or travels in interstate or foreign commerce with intent either (1) to avoid prosecution . . . under the laws of the place from which he flees, for a crime . . . which is a felony under the laws of the place from which the fugitive flees . . . shall be fined not more than \$5,000 or imprisoned not more than five years, or both.

Id. The Federal Kidnapping Act specifically excludes parents from its provisions. 18 U.S.C. § 1201(a) (1976).

147. PKPA, *supra* note 6, § 10(a).

148. Only about half the states make child snatching a felony. Foster & Freed, *supra* note 137, at 37. Pennsylvania designates child snatching a misdemeanor in 18 PA. CONS. STAT. ANN. § 2904 (Purdon 1973) which provides in pertinent part:

(a) Offense defined.—A person commits an offense if he knowingly or recklessly takes or entices any child under the age of 18 years from the custody of its parent, guardian or other lawful custodian, when he has no privilege to do so.

(b) Defenses.—It is a defense that:

(3) the actor is the child's parent or guardian or other lawful custodian and is not acting contrary to an order entered by a court of competent jurisdiction.

Id.

general of the United States.¹⁴⁹ In order to encourage the Justice Department to comply with the spirit of this provision, the amendment of section 1073 further requires the Attorney General to report to Congress data concerning the number of applications for complaints under this section pertaining to parental kidnapers, the number of complaints issued, and other data relating to steps taken by the Attorney General to comply with the intent of Congress in this regard.¹⁵⁰ This reporting requirement indicates that Congress intends that the Justice Department actively assist parents in locating abductors, despite the Department's stated reluctance to interfere in domestic relations cases.¹⁵¹

Because interstate or international flight with a child in violation of state law is now a federal offense, the FBI has the authority to intervene in attempting to locate the parental abductor. Whether or not this authority will be exercised remains to be seen.¹⁵² Nevertheless, the provision may be an effective, additional deterrent to a parent contemplating the abduction of his children. The mere threat of federal prosecution may provide a powerful disincentive to would-be abductors.¹⁵³

V. CONCLUSION

The Uniform Child Custody Jurisdiction Act and the Parental Kidnapping Prevention Act of 1980 together have the potential for providing an effective deterrent to parental kidnapping, and should go far toward preventing the harm done to children by over-zealous parents who would resort to extra-legal means of obtaining custody. The clean hands provision of section 8 of the Uniform Act, as interpreted in Pennsylvania, provides a powerful disincentive for any parent contemplating both a child-

149. 18 U.S.C. § 1073 (1976).

150. PKPA, *supra* note 6, § 10(b). The report of the Attorney General is due within 120 days of the enactment of section 10. *Id.*

151. Testimony of United States Deputy Attorney General John C. Keeney before the Subcommittee on Crime of the United States House of Representatives' Committee on the Judiciary, *reprinted in* Cal. Dep't. of Justice, Report to the Legislature—ACR 236, Appendix 3 (1975). *See also* Bodenheimer I, *supra* note 16, at 1003; Foster & Freed, *supra* note 137, at 37; Pick, *supra* note 108, at 30.

152. *See* Foster & Freed, *supra* note 137, at 38 (section 10 of the PKPA is of limited help in the absence of a court order or warrant).

153. *Id.*

snatching, and ultimately, a petition for legal custody. The Federal Act provides a disincentive for the parent who would attempt to conceal his whereabouts in order to retain de facto custody of his children after a child-snatching.

If the remaining states act quickly to adopt the Uniform Act, and if the Pennsylvania lead in interpreting section 8 is followed by other jurisdictions,¹⁵⁴ the parental abductor will not be able to invoke the jurisdiction of his haven state. Instead, if the legislation works as it was intended, the parent with the custody decree will have federal assistance in locating the abductor, and then will be able to enforce his decree in any state where the children can be found. In addition, the lawful custodian will not be required to prove again his superior fitness as a parent in order to regain custody, absent a significant change in circumstances after the decree issued, and before the abduction. Therefore, the primary source of the parental kidnapping problem can be eliminated by this combined legislation, provided it is interpreted in light of its express purpose—to deter parental abductions.

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154. For recent state cases denying jurisdiction in cases of parental abduction, see *Etzion v. Evans*, 247 Ga. 390, 276 S.E.2d 577 (1981); *Grubs v. Ross*, 291 Or. 263, 630 P.2d 353 (1981); *Pratt v. Pratt*, No. 80-509 (R.I. June 12, 1981).