Florida Journal of International Law

Volume 2 | Issue 1 Article 1

January 1986

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Florida International Law Journal

VOLUME II SPRING 1986 NUMBER 1

THE UNIFORM CHILD CUSTODY JURISDICTION ACT AND ITS EFFECT ON THE INTERNATIONAL KIDNAPPING OF CHILDREN

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I. INTRODUCTION

When the late Brigitte M. Bodenheimer[1] wrote her important work on the international kidnapping of children in 1977,[2] only eight states had adopted the Uniform Child Custody Jurisdiction Act (UCCJA or Act).[3] By adopting the UCCJA, these states were attempting to deter interstate and international abductions undertaken to obtain favorable custody awards.[4] In 1977 UCCJA case law was

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2. Bodenheimer, *International Kidnapping of Children: The United States Approach*, 11 FAM. L.Q. 83 (1977).

3. Unif. Child Custody Jurisdiction Act (U.C.C.J.A.), 9 U.L.A. 99 (1973). The eight states were California, Oregon, Colorado, North Dakota, Wyoming, Hawaii, Michigan, Maryland, Wisconsin and Delaware. *Id.* at 91-92.

4. U.C.C.J.A., Prefatory Note, 9 U.L.A. 111 (1979). *See* Ehrenzweig, *The Interstate Child and Uniform Legislation: A Plea For Extra-Litigious Proceedings*, 64 MICH. L. REV. 1 (1965); Ratner, *Child Custody in a Federal System*, 62 MICH. L. REV. 795 (1964) [hereinafter cited as Ratner I]; Ratner, *Legislative Resolution of the Interstate Child Custody Problem: A Reply to Professor Currie and a Proposed Uniform Act*, 38 S. CAL. L. REV. 183 (1965).

sparse and Professor Bodenheimer could do little more than voice her concerns for today and her predictions for tomorrow. She stated that further study would indicate whether the early cases signified a trend toward growing judicial rationality on the international kidnapping scene.[5] The present study has this purpose and is dedicated to the memory of Professor Bodenheimer.

II. The Problem of Parental Kidnapping

Parental kidnapping is the noncustodial parent's act of taking, abducting, or detaining a child from the parent having lawful custody or control over the child.[6] A recent national study of parental kidnappings conducted by Dr. Richard Gelles of Harvard Medical School estimates there are at least 313,000 abductions a year and possibly as many as 626,000.[7] Previously, much of the professional literature, as well as legislative reform proposals, cited estimates of only 25,000 - 100,000 abductions a year.[8]

The extent to which parental kidnapping occurs on the international level is uncertain. Although no specific numbers are available, State Department statistics may provide an indication of the magnitude of the problem. The Office of Overseas Citizens Services has reported about 300 international abductions each year.[9] Additionally, the Passport Office receives approximately 1200 telephone inquiries each year about the possibility of restricting children's travel documents.[10] These phone calls are presumably from parents concerned that their former spouses have abducted their children intending to take them abroad permanently. Finally, the Bureau of Consumer Affairs is currently investigating 1960[11] international abduction cases

5. Bodenheimer, *supra* note 2, at 97.

6. *Id.*

7. Collins, *Study Finds Child Abductions by Parents Exceeds Estimates*, N.Y. Times, Oct. 23, 1983, at I-63, col. 1.

8. *See Child Kidnapping: Hearings Before the Senate Subcomm. on Juvenile Justice of the Comm. on the Judiciary*, 98th Cong., 1st Sess. (1983) [hereinafter cited as *Senate Hearings*]; *Parental Kidnapping Prevention Act of 1979, Addendum to Joint Hearings on § 105, Before the Senate Subcomm. on Criminal Justice of the Comm. on the Judiciary, and the Subcomm. on Child & Human Dev. of the Comm. on Labor & Human Resources*, 96th Cong., 2d Sess. (1980) (statement of Michael Agopian, Director of the Child Stealing Research Center) [hereinafter cited as *Joint Hearings*].

9. *Senate Hearings*, *supra* note 8, at 56.

10. *Id.*

11. Telephone interview with Monica A. Gaw, Consular Affairs Office, Office of the City Consular Service, State Department (Jan. 27, 1986). This figure is increasing at the rate of approximately 40 children per month. Telephone interview with Peter H. Phund, Esq., Assistant Legal Advisor for Private International Law, State Department (Jan. 27, 1986) [hereinafter cited as Phund Interview].

from the United States to over 102[12] foreign countries.

This article will first discuss the traditional approach of the United States courts to international custody disputes. Next, it will examine a representative jurisdiction, Florida, under the UCCJA. Then, it will examine the most recent international cases applying the UCCJA. Finally, it will attempt to predict the future effectiveness of the UCCJA abroad.

III. The Traditional Approach

Individual states' judicial decisions developed child custody conflicts law without the benefit of the full faith and credit clause.[13] The United States Supreme Court justified the clause's non-application to custody judgments on the ground that each state retained continuing jurisdiction to modify its custody decisions.[14] Therefore, states were free to shape their own judicial policies in this area and to reserve the right to modify custody judgments to comply with their own assessment of the child's best interests.[15] Chaos resulted because the judicial system, the parents, and the children could not rely on any previous custody judgment.

Before a state could modify a custody judgment, however, it had to have custody jurisidiction. Traditionally, the child's mere physical presence within the forum state[16] established whether a court had subject matter jurisdiction to hear a custody dispute and enter a valid order.[17] Unfortunately, this encouraged forum shopping and child abduction through relitigation of custody decrees in more favorable forums.[18] The person who had possession of the child often gained a favorable decision.[19]

Under the traditional approach, courts often automatically re-

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12. *Joint Hearings, supra* note 8, at 7 (CCS Statistics); *see also* Bayles, *International Child-Snatching Growing Complex Problem*, Tampa (Fla.) Tribune-Times, Sept. 30, 1984, at 7c, col. 2. This figure does not include those abductions to the United States.

13. Bodenheimer, *Progress Under the UCCJA and Remaining Problems: Punitive Decrees, Joint Custody and Excessive Modifications*, 65 Calif. L. Rev. 978, 981 (1977).

14. *See, e.g.*, Ford v. Ford, 371 U.S. 187, 191 (1962) (even if the full faith and credit clause is applicable to cases involving custody of children, the South Carolina courts were not bound by the Virginia order of dismissal, since that order was not res judicata in Virginia).

15. *See* U.C.C.J.A., § 14, Commissioners' Note, 9 U.L.A. 154 (1979).

16. This left open the possibility that the child might have been within the court's geographical boundaries only hours before court appearance. Darrah v. Watson, 36 Iowa 116, 119 (1873).

17. Moran, *The UCCJA: An Analysis of Its History, A Prediction of Its Future*, 84 W. Va. L. Rev. 135, 148 (1981).

18. *Joint Hearings, supra* note 8, at 7.

19. Moran, *supra* note 17, at 136.

opened foreign judgments and reexamined the question of custody in a full evidentiary hearing on the merits.[20] Decisions were often based on what the particular judge concluded was in the best interest of the child, regardless of any prior judgment in another state or country.[21] This approach to the law was indeterminate and led to conflicting custody orders among the various jurisdictions.[22]

The indeterminacy of the "best interest of the child" standard stemmed from three of its requirements: needing adequate information; making the necessary predictions; and finding an integrated set of values from which to choose.[23] The "best interest" standard suggests the judge should decide a custody dispute by choosing the alternative that maximizes what is best for the particular child.[24] To make this choice, the judge needs not only considerable information about the child's past home life and the present alternatives, but also the ability to predict the child's future home life in light of each present alternative.[25] For example, the judge must inquire into each parent's past behavior and its effect on the child as well as the child's present condition.[26] The judge must then predict each parent's future behavior and circumstances if the child remains with that parent and how this behavior and these circumstances will affect the child.[27] Unfortunately, a judge often lacks adequate information about the most rudimentary aspects of a child's life with the parents. Still less information is available about either parent's future plans.[28] Even if the judge has substantial information about the child's past home life and present alternatives, current knowledge about human behavior provides no basis for the kind of individual predictions required by the best interest standard.[29] No theory is widely accepted as generat-

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20. Bodenheimer, *supra* note 2, at 87.

21. *Id.* Professor Bodenheimer suggested three reasons why judges disregarded decisions of other states. First, the second judge mistrusted or disagreed with the prior custody judgment. *Id.* at 83. Second, judges were loathe to defer to courts of other states. *Id.* at 84. Finally, lawyers and the public often become personally involved in the emotionalism engendered by the basic custody dilemma. *Id.*

22. Mnookin, *Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226 (1975).

23. *Id.* at 256.

24. *Id.* at 255. The judge specifies alternative outcomes associated with different courses of action and then chooses that alternative which maximizes his values, subject to whatever constraints he faces. *See id.*

25. *Id.* at 256.

26. *Id.*

27. *Id.* For example, the judge would have to consider the behavior of each parent if the child were to live with the other parent, and then predict how this might affect the child. *Id.*

28. *Id.* at 257. For example, in juvenile court proceedings, at the time of the final hearing, the judge typically has no information about where the child will be placed if removal is ordered. *Id.*

29. *Id.*

ing reliable predictions about the psychological and behavioral consequences of alternative dispositions for a particular child.[30]

Even with adequate information to accurately predict the child's future home life, a judge still faces the dilemma of choosing the proper set of values to determine what is in the child's best interests.[31] Should the judge primarily be concerned with the child's happiness,[32] or with each parent's present income and future earning potential? Should the judge be concerned with the religious training of the child? Or is the present relationship between the parents and the children or between the siblings more important? Deciding which values should be applied is as complex as determining the values of life itself. Each judge has distinct value preferences and likely will decide a custody battle based on these preferences rather than the parents' or community's value preferences.[33] Thus, if two separate judges in different states decide the same child custody case, they are likely to issue conflicting custody orders.[34] This result consistently occurred under the traditional approach of deciding child custody disputes. This chaotic situation produced a seize-your-child-and-run solution.[35]

IV. THE UCCJA

State legislators responded to the conflicting judicial decisions and parental responses to those decisions with legislation to deter parental kidnapping. The result was the UCCJA,[36] drafted by the National Conference of Commissioners on Uniform State Laws. The

30. *Id.* In spite of advances, there remain factors which make prediction difficult, not the least of which is that "environmental happenings in a child's life will always remain unpredictable since they are not governed by any known laws. . . ." *Id.*

31. *Id.* at 258.

32. *Id.* at 259.

33. *Id.* at 268.

34. *See e.g.*, Stout v. Pate, 120 Cal. App. 2d 699, 261 P.2d 788 (1953) (court awarded custody to the mother); Stout v. Pate, 209 Ga. 786, 75 S.E.2d 748 (1953) (court affirmed modification of divorce decree awarding father custody).

35. *See* U.C.C.J.A., Prefatory Note, 9 U.L.A. 111, 113 (1979). For an alternative to judicial solutions for custody battles, see Bayles, *supra* note 12. In one case, a father kidnapped his child and took him to Ecuador. A private investigator, at the mother's request, had several posters printed up of the father, offering a $500 reward, the equivalent of the average annual income in Ecuador, for the father's capture. The father's attorney was informed of the reward offer and was told that the mother would not be responsible for the consequences of some hungry person's efforts to obtain the reward money. The father was happy to return the child. *See generally* Hudak, *Seize, Run, and Sue: The Ignominy of the Interstate Child Custody Litigation in American Courts*, 39 Mo. L. REV. 521 (1974).

36. U.C.C.J.A., Prefatory Note, 9 U.L.A. 111, 114 (1979). For details on the preparation and provisions of the Act, see Bodenheimer, *The Uniform Child Custody Jurisdiction Act: A Legislative Remedy for Children Caught in the Conflict of Laws*, 22 VAND. L. REV. 1207 (1969).

Commissioners adopted the Act and the ABA approved it in 1968.[37] It is currently in force in all fifty states, the District of Columbia, and the Virgin Islands.[38]

The UCCJA radically changed prior custody jurisdiction law by limiting subject matter jurisdiction in a custody case. First, it eliminated the child's mere physical presence as a jurisdictional basis unless the parents abandon the child or the child is in need of emergency protection.[39] Second, the Act established specific and limiting jurisdictional bases for initial decrees.[40] Under the UCCJA, a court may exercise jurisdiction if the state is the child's "home state"[41] or when the child and at least one contestant have a "significant connection" with the state.[42] The UCCJA also changed prior law by mandating recognition of custody decrees of other states exercising jurisdiction under statutory provisions in substantial accord with the UCCJA.[43] Additionally, the Act established a policy of "deter[ring]

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37. Bodenheimer, *supra* note 2, at 91. *See also* U.C.C.J.A., Historical Note, 9 U.L.A. 111 (1979).

38. Frank, *American and International Responses to International Child Abductions*, 16 N.Y.U. J. INT'L L. & POL. 429 (1984).

39. U.C.C.J.A., § 3(a)(3), 9 U.L.A. 122 (1979). A court has jurisdiction to make a child custody determination if "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]. . . ." *Id.*

40. *Id.* § 3.

41. *See id.* § 2(5), 9 U.L.A. 119, which defines "home state" as

> the state in which the child immediately preceding the time involved lived with his parents, a parent, or a person acting as parent, for at least 6 consecutive months, and in the case of a child less than 6 months old the state in which the child lived from birth with any of the persons mentioned. Periods of temporary absence of any of the named persons are counted as part of the 6-month or other period. . . .

See Joint Hearings, *supra* note 8, at 152 (the development of the concept of "home state" jurisdiction). *See also* Ratner I, *supra* note 4.

42. U.C.C.J.A., § 3, 9 U.L.A. 122 (1979). Section 3(a)(2) provides that a state will have jurisdiction to make a child custody determination if

> 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. . . .

43. *See id.* § 13, 9 U.L.A. 151, which states:

> The courts of this State shall recognize and enforce an initial or modification decree of a court of another state which had assumed jurisdiction under statutory provisions substantially in accordance with this Act or which was made under factual circumstances meeting the jurisdictional standards of the Act, so long as this decree has not been modified in accordance with jurisdictional standards substantially similar to those of this Act.

See also id. § 13, Commissioner's Note, which states in pertinent part: "Although the full faith

abductions and other unilateral removals of children undertaken to obtain custody awards."[44] Finally, section 23 extended the UCCJA's policies and provisions to the international arena.[45]

V. The Development of a Rational Approach: The Early Cases

The fact that the traditional approach had left the law in chaos generated optimistic support for the UCCJA. However, a major concern remained: Whether the spirit of the UCCJA would guide United States courts to use their authority to end international child kidnapping. Generally, all early UCCJA parental kidnapping cases returned the kidnapped children to their custodial parents.[46] Some courts, however, based their decisions on judicial discretion.[47] Still others utilized the Act's policy against kidnapping in their decisions.[48]

An example of those cases which based their decisions on judicial discretion is *Ben-Yehoshua v. Ben-Yehoshua*.[49] In *Ben-Yehoshua*, a California court enforced an Israeli father's Israeli decree awarding him custody of his three children.[50] The father brought the action after his American ex-wife kidnapped the children to the United States.[51] The California court separately examined the jurisdictional provisions of the UCCJA and held it lacked subject matter jurisdiction over the custody issue.[52] First, the court determined California

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and credit clause may perhaps not require the recognition of out-of-state custody decrees, the states are free to recognize and enforce them." Section 13 declares as a matter of law, that custody decrees of sister states will be recognized and enforced.

44. *Id.* § 1(a)(5), 9 U.L.A. 116.

45. Section 23 states:

> The general policies of this Act extend to the international area. The provisions of this Act relating to the recognition and enforcement of custody decrees of other states apply to custody decrees and decrees involving legal institutions similar in nature to custody institutions rendered by appropriate authorities of other nations if reasonable notice and opportunity to be heard were given to all affected persons.

Id. § 23, 9 U.L.A. 167.

46. *See e.g.*, Miller v. Superior Court, 22 Cal. 3d 923, 587 P.2d 723, 151 Cal. Rptr. 6 (1978) (children returned to their father in Australia); Ben-Yehoshua v. Ben-Yehoshua, 91 Cal. App. 3d 259, 154 Cal. Rptr. 80 (1979) (children returned to their father in Israel); Woodhouse v. District Court, 196 Colo. 558, 587 P.2d 1199 (1978) (children returned to their mother in England).

47. Miller v. Superior Court, 22 Cal. 3d 923, 587 P.2d 723, 151 Cal. Rptr. 6 (1978); Ben-Yehoshua v. Ben-Yehoshua, 91 Cal. App. 3d 259, 154 Cal. Rptr. 80 (1979).

48. Woodhouse v. District Court, 196 Colo. 558, 587 P.2d 1199 (1978).

49. 91 Cal. App. 3d 259, 154 Cal. Rptr. 80 (1979).

50. *Id.* at 263, 154 Cal. Rptr. at 82.

51. *Id.* at 262, 154 Cal. Rptr. at 82. Consistent with the definition given in the beginning of this article, "kidnapped" will be used interchangeably with retained, child snatched, snatched, childnapped, and abducted.

52. *Id.* at 263, 154 Cal Rptr. at 83. Prior to the UCCJA, one of the main reasons for the

was not the children's home state because from birth they had lived in Israel.[53] Second, California was not the state with the most significant relationship to the children because the evidence concerning the present and future care of the children was in Israel.[54] Finally, the court determined it was not in the best interests of the children to assume jurisdiction because Israel had optimum access to relevant evidence about the children and thus had the best opportunity to investigate the facts.[55]

As *Ben-Yehoshua* illustrates, the language of the UCCJA continues to invite judicial discretion, when, for example, it repeatedly refers to the best interests of the child or to significant connection as jurisdictional alternatives.[56] Such language may justify a decision based upon the values of the particular judge deciding the case.[57]

The *Ben-Yehoshua* court mentioned the father was a scientist with a Ph.D. and had "permanent employment" in Israel, presumably indicating a significant relationship to that country.[58] On the other hand, the court referred to the mother as having a "full-time job" and secretarial employment experience.[59] This demonstrates that UCCJA guidelines were not the only guidelines involved in the decision.[60] The judge's own guidelines, based on social value prefer-

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ever-increasing number of child snatchings was the ease with which a parent would find a second court in a second state that would willingly accept jurisdiction. An interesting variation on the problem of child snatching involved a man who ran a heating and air conditioning business and moonlighted as a child snatcher in custody cases. Huey, *To Man Whose Job Is Child Snatching, End Justifies Means*, Wall St. J., Mar. 24, 1976, at 1, col. 4.

53. 91 Cal. App. 3d at 265-66, 154 Cal. Rptr. at 84. The home state jurisdictional prerequisite was not satisfied because the children were only in California for about two weeks before the filing of the custody petition and spent a total of approximately one month there.

54. *Id.* at 266, 154 Cal. Rptr. at 85. The father's evidence consisted of a letter from the children's pediatrician and pediatric neurologist, a letter from a clinical and educational psychologist who was head of school psychological services, and a letter from the head welfare official; all from Israel. Additionally, the court noted that the children attended school in Israel, had a number of peer acquaintances and relatives there, and "though they miss[ed] their mother, . . .[had] adjusted well under the circumstances." *Id.* The only contact the children had in California was the presence of their mother and maternal grandmother. *Id.*

55. *Id.* at 267, 154 Cal. Rptr at 85.

56. *See* U.C.C.J.A., § 3(a)(2), 9 U.L.A. 122 (1979). *See also* W. WEYRAUCH, AMERICAN FAMILY LAW IN TRANSITION 548-49 (1983). Professor Weyrauch writes that whether the Act is as effective as it was meant to be is subject to conjecture because the language of the Act continues to invite judicial discretion. According to Professor Weyrauch, any of the discretionary provisions can be used to foster parochial interests. *Id.*

57. W. WEYRAUCH, *supra* note 56, at 535.

58. 91 Cal. App. 3d at 266, 154 Cal. Rptr. at 84.

59. *Id.*

60. This dichotomy between "permanent employment," earning $690 a month, versus "full-time job," with a net monthly pay of $258.75, was analyzed under significant connection jurisdiction in the opinion. *Id.* The test for determining significant connection jurisdiction is maximum rather than minimum contact with the state. U.C.C.J.A., § 3, Commissioners' Note, 9 U.L.A. 123 (1979). Clearly, then, significant connection jurisdiction is dictated by the balance

ences, also influenced the outcome of this case.[61] Instead of introducing new vagueness into the law, the UCCJA's discretionary jurisdictional rules may operate to clarify it by inviting judges to discuss the grounds for their decisions.

Ben-Yehoshua illustrates the way in which the UCCJA jurisdictional provisions invite judicial discretion.[62] Other early decisions reflect the influence of the judges' own value preferences resulting in an abuse of this invited discretion.[63] For example, in *Miller v. Superior Court*,[64] the California Supreme Court disregarded a mandatory provision of the UCCJA in order to foster its own parochial interests. In *Miller*, an Australian court granted a mother custody of her children in 1967.[65] In 1976 the children's father reapplied to the court for custody.[66] The court determined custody should remain with the mother.[67] The mother subsequently decided to leave Australia permanently with the children.[68] On July 23, 1976, without informing the father or the court, she left Australia while the children were in the middle of a school term.[69] On July 28 the father again applied to the court for custody.[70] After an ex parte hearing, the Australian court awarded the father temporary custody.[71] The mother, however, received neither notice nor opportunity to be heard in the Australian proceedings.[72] On October 22, 1976, the father initiated a proceeding in a California superior court seeking recognition and enforcement of the 1976 Australian decree.[73] The mother demanded custody, claiming she had no notice or opportunity to be heard in the original pro-

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between the contacts one has with the forum state with the contacts one has with the foreign state. It is not dictated by economic considerations especially, as here, where there is no evidence to show that an attempt was made to adjust the wages for cost of living differences between the two countries.

Additionally, significant connection jurisdiction should not be dictated by whether employment is full-time or permanent because it is common for employees in the United States to merely have full-time employment, as opposed to permanent employment. Rarely is there the protection of permanent employment in America unless one is a tenured professor. Even our President does not have permanent employment.

61. *See* W. WEYRAUCH, *supra* note 56, at 535.
62. *Id.* at 549.
63. *See id.* at 535.
64. 22 Cal. 3d 923, 587 P.2d 723, 151 Cal. Rptr. 6 (1978).
65. *Id.* at 925, 587 P.2d at 724, 151 Cal. Rptr. at 7.
66. *Id.* at 926-27, 587 P.2d at 725, 151 Cal. Rptr. at 7-8.
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.* at 927, 587 P.2d at 726, 151 Cal. Rptr. at 8.
72. *Id. See* U.C.C.J.A., § 23, 9 U.L.A. 167 (1979) (text quoted *supra* note 45).
73. 22 Cal. 3d at 927, 587 P.2d at 726, 151 Cal. Rptr. at 8.

ceedings.[74] The court rejected this argument because the mother could contest the custody proceedings in Australia.[75]

The UCCJA's international provision provides for recognition and enforcement of other states' or countries' custody judgments so long as all affected persons were given proper notice and an opportunity to be heard.[76] The mother in *Miller* had neither.[77] Yet the California court enforced the decree, finding the Australian court had subject matter jurisdiction because the mother caused irreparable harm to the children.[78] The irreparable harm resulted from the children's removal from Australia frustrating performance of the father's visitation rights and interrupting the children's education.[79]

By disregarding the mandatory provision of the UCCJA, the court was able to foster its parochial interests.[80] The California court stated emphatically that the Australian court did not intend to punish the mother for removing the children to Los Angeles.[81] Yet, it seems the California court sought to punish the mother. This theory is speculative and the judge would probably deny it. Support for this theory, however, is found in the opinion.

First, the court noted the mother's deliberate failure to inform the court or the father of her intent to leave Australia with the children.[82] Yet, there was no evidence in the opinion showing whether she had tried to inform the court or the father of her departure. The court also referred to the detrimental effect on the children by their withdrawal and continued absence from school.[83] The record was again devoid of any evidence showing the mother's intention to keep the children out of school. Additionally, the court stated the mother had made no effort to appeal the custody decree.[84] However, the lack

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74. *Id. See* U.C.C.J.A., § 23, 9 U.L.A. 167 (1979).

75. 22 Cal. 3d at 928-29, 587 P.2d at 727, 151 Cal. Rptr. at 9. The court stated that the Australian decree was not intended to effect a permanent change in custody. Rather, the order contemplated that the father would have custody pending a hearing and determination whether he or the mother should have custody. The period contemplated for the father's custody was short, at most six days. Far from denying the mother the opportunity to be heard, the order was designed to permit her a full right to be heard. *Id.*

76. U.C.C.J.A., § 23, 9 U.L.A. 167 (1979) (text quoted *supra* note 45).

77. 22 Cal. 3d at 937, 587 P.2d at 732, 151 Cal. Rptr. at 14. Notice was not served on the mother or her solicitor. Rather, it was served on a solicitor who had handled a previous matter for the mother, but was not presently serving as her solicitor. This solicitor was unable to contact the mother, and therefore, she did not appear at the hearing. *Id.*

78. *Id.* at 929, 587 P.2d at 727, 151 Cal. Rptr. at 10.

79. *Id.*

80. *See* W. WEYRAUCH, *supra* note 56, at 549.

81. 22 Cal. 3d at 928, 587 P.2d at 726, 151 Cal. Rptr. at 9.

82. *Id.* at 926, 587 P.2d at 725, 151 Cal. Rptr. at 7.

83. *Id.* at 929, 587 P.2d at 727, 151 Cal. Rptr. at 10.

84. *Id.* at 928, 587 P.2d at 726, 151 Cal. Rptr. at 9.

of appeal is apparently irrelevant to the issue of whether the American court must recognize that decree. Finally, the court stated the mother's disappearance with the children frustrated performance of the father's visitation rights and caused irreparable harm to the children.[85] An insufficient factual basis existed to show that the children would suffer irreparable harm if the father were not awarded immediate custody.

Miller illustrates the difficulty the early courts had with the broad discretionary powers under the UCCJA. Also apparent is the confusion some of the early courts had in applying the UCCJA provisions to deter parental kidnapping and to prevent shifting children from one jurisdiction to another.[86] After the California decision, the *Miller* children were sent back to Australia.[87] Presumably, the mother then returned to Australia to reopen the custody proceedings. If the mother should once again be awarded custody of the children, the possibility remains that she will subsequently bring the children back to America. This is precisely the kind of shifting back and forth that the Act sought to prevent.

Similarly, *Woodhouse v. District Court*[88] illustrates the deference that American courts show to the continuing jurisdiction of foreign courts when the parent seeking custody has wrongfully taken the child. In *Woodhouse*, a father kidnapped his son from his former wife who had custody by an English court.[89] The Colorado Supreme Court stated the UCCJA specifically sought to avoid this situation.[90] The court reasoned that because significant connections with England existed and because the English court had not declined jurisdiction, the Act required the English court to determine any modification. The supreme court therefore held it lacked subject matter jurisdiction to determine the father's application for custody modification.[91]

The *Woodhouse* court, like the *Ben-Yehoshua* court, returned the kidnapped children to their custodial parent. In an additional important step, the *Woodhouse* court strongly reiterated the UCCJA's policy against kidnapping. Unlike *Ben-Yehoshua*, the sole basis of the *Woodhouse* decision was the policy to deter kidnapping. However,

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85. *Id.* at 929, 587 P.2d at 727, 151 Cal. Rptr. at 10.

86. U.C.C.J.A., § 1(a), 9 U.L.A. 116-17 (1979) (text substantially quoted *infra* note 127).

87. 22 Cal. 3d at 929, 587 P.2d at 727, 151 Cal. Rptr. at 10.

88. 196 Colo. 558, 587 P.2d 1199 (1978).

89. *Id.* at 559, 587 P.2d at 1200. The father visited England in July of 1977. In August of that year he abducted his son and brought him to the United States without the consent of the boy's mother. An English court order directing the father to return the child was ignored by him. *Id.*

90. *Id.*

91. *Id.* at 561, 587 P.2d at 1201.

both *Ben-Yehoshua* and *Woodhouse* indicated the United States courts would use their authority to end international kidnapping. On the other hand, the *Miller* court seemed to take the child from the custodial parent in an abuse of judicial discretion. The court treated the mother as if she had kidnapped her children and referred to her departure from Australia as a "disappearance." This indicated the court's apparent confusion in its application of the UCCJA, but clearly showed the court's intent to use its authority to end international kidnapping.

VI. The Florida Experience

Florida is one of two states which originally showed disdain for prior custody decisions.[92] Prior to Florida's enactment of the UCCJA, courts held *de novo* custody trials without acknowledging the foreign states' prior decrees.[93] With the advent of the UCCJA, Florida entered a new era in which courts replaced their egocentrism with sincere efforts to deter international kidnapping.[94]

The UCCJA cases[95] illustrate Florida's adoption of a strong policy against parental kidnapping. Florida courts have successfully used the various UCCJA provisions to effectuate this policy. Utilizing the UCCJA's "clean hands doctrine,"[96] Florida courts have determined

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92. Foster & Freed, *Child Snatching and Custodial Rights: The Case for the UCCJA*, 28 Hastings L.J. 1011, 1014 (1977). *See also* Frumkes & Elser, *The UCCJA: The Florida Experience*, 53 Fla. B.J. 684 (1979); Kathun, *Closing the Custody Floodgate: Florida Adopts the UCCJA*, 6 U. Fla. L. Rev. 409 (1978).

The other state was New York. *See generally* Stern, *"Stemming the Proliferation of Parental Kidnapping: N.Y.'s Adoption of The UCCJA,"* 45 Brooklyn L. Rev. 89 (1978).

93. Scarpetta v. DeMartino, 254 So. 2d 813 (Fla. 3d D.C.A. 1971), *cert. denied*, 409 U.S. 1011 (1972). *See also* Foster & Freed, *supra* note 92, at 1014.

94. *See* Brown v. Tan, 395 So.2d 1249, 1252 (Fla. 3d D.C.A. 1981). The Florida court declined to exercise jurisdiction because to do so would encourage child snatching. "The practice is abhorred. . . . " *Id.*

95. *See* Mainster v. Mainster, 466 So. 2d 1228 (Fla. 2d D.C.A. 1985). *See also* Ortega v. Puvals, 465 So. 2d 607 (Fla. 3d D.C.A. 1985).

96. U.C.C.J.A., § 8(a) & (b), 9 U.L.A. 142 (1979), provides:

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

that parents who kidnap their children will be deprived access to Florida courts. For example, in *Brown v. Tan*,[97] the court held that a parent's wrongful conduct in kidnapping his child justified a court's finding of lack of jurisdiction. In *Brown*, the child was a citizen and resident of Singapore where he had lived continuously since birth with his father.[98] The parents had entered into an agreement giving the father custody of their child.[99] However, the mother, a resident of Florida, refused to return her son after his visit, and instead commenced custody proceedings in Florida.[100] The *Brown* court declined jurisdiction under Florida's UCCJA because of the mother's wrongful conduct.[101] Under a writ of habeas corpus,[102] the court ordered the child returned to his father in Singapore thereby restoring the status quo. The court stated that assuming jurisdiction to determine custody after a wrongful detention may encourage child snatching.[103]

Similarly, the UCCJA's modification provision[104] gave Florida the means to effectuate its policy against parental kidnapping. Utilizing this provision, Florida courts have determined a foreign custody de-

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97. 395 So. 2d 1249 (Fla. 3d D.C.A. 1981).

98. *Id.* at 1251. The father was also a resident and citizen of the Republic of Singapore. *Id.*

99. *Id.* There was no showing that Singapore had declined to determine custody. *Id.* On the other hand, the court stated that the initial custody of the father was not wrongful and was with the mother's consent. *Id.* at 1252. The technical point, whether this was a pre-decree abduction or a decree abduction, was not an issue.

100. *Id.* at 1251. Father and son left their home in Singapore for an extended tour of the Far East, Hawaii, and California. The father put his son on a plane from California to Miami with the understanding that the boy's custody would remain with his father, and that he would return to his father in 16 days. The mother subsequently refused to relinquish possession. *Id.*

101. *Id.* at 1252. The court stated that except in cases of abandonment, abuse or neglect, mere physical presence in the state of the child, or of the child and one of the contestants, is insufficient to confer jurisdiction on a court of this state to make a child custody determination. *Id.* at 1251.

102. *Id.* at 1252 ("[A]s a general rule, a habeas corpus proceeding is an independent action, legal and civil in nature, designed to secure prompt determination as to the legality of a restraint in some form . . . there is no question but that habeas corpus is a proper proceeding to obtain custody of a child wrongfully withheld[.]") (citing Crane v. Hayes, 253 So. 2d 435 (Fla. 1971)).

103. *Id. See also supra* note 94.

104. U.C.C.J.A., § 14, 9 U.L.A. 153-54 (1979), states:

> (a) If a court of another state has made a custody decree, a court of this State shall not modify that decree unless (1) it appears to the court of this State that the court which rendered the decree does not now have jurisdiction under jurisdictional prerequisites substantially in accordance with this Act or has declined to assume jurisdiction to modify the decree and (2) the court of this State has jurisdiction.
>
> (b) If a court of this State is authorized under subsection (a) and section 8 to modify a custody decree of another state it shall give due consideration to the transcript of the record and other documents of all previous proceedings submitted to it in accordance with section 22.

cree could be modified if it was issued to a parent who kidnapped his child to a foreign jurisdiction merely to obtain a favorable custody decree. In *Sheikha Al Fassi v. Sheik Al Fassi*,[105] the court modified such a foreign custody decree. In *Al Fassi*, a California court awarded the mother custody of her children.[106] Following entry of the decree, the father kidnapped his children to the Bahamas.[107] The mother subsequently petitioned the Bahamian court for enforcement of the California decree.[108] The court awarded the father custody, stating that if the mother gained custody she could not prevent the children from becoming "little Americans."[109] After the decree was entered, the father and his children immediately moved to Florida.[110] The mother then filed a petition in Florida to modify the Bahamian custody decree.[111]

Traditionally, Florida courts assumed jurisdiction to modify out-of-state custody decrees without respect to the other state's preexisting jurisdiction.[112] Today, Florida courts generally cannot modify existing custody awards.[113] The legislature changed the law to achieve greater stability of custody arrangements and to avoid forum shopping.[114] The Florida court, however, may modify another state's decree if that state no longer has jurisdiction at the time of filing.[115] This exception controlled the *Al Fassi* decision. The court held Florida had jurisdiction to modify the decree because when the mother filed the petition, the Bahamian court lacked jurisdiction over the parties.[116] The court rejected the argument that the UCCJA mandated recognition of the foreign decree, and expressed its objective to

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105. 433 So. 2d 664 (Fla. 3d D.C.A. 1983).
106. *Id.* at 664.
107. *Id.* at 665.
108. *Id.*
109. *Id.* at 666.
110. *Id.* The court noted that the father and his royal entourage left the Bahamas within hours after the decree was entered and never returned. *Id.*
111. *Id.* The court granted home state jurisdiction because the children had been living in Florida for almost a year.
112. *See supra* note 92 and accompanying text.
113. FLA. STAT. § 61.133(1)(a)-(b) (1983) states:

> (1) If a court of another state has made a custody decree, a court of this state shall not modify that decree unless:
> (a) It appears to the court of this state that the court which rendered the decree does not now have jurisdiction under jurisdictional prerequisites substantially in accordance with this act or has declined to assume jurisdiction to modify the decree; and
> (b) The court of this state has jurisdiction.

114. U.C.C.J.A., § 14, Commissioners' Note, 9 U.L.A. 153-54 (1979).
115. FLA. STAT. § 61.133(1)(a)(1) (1983) (text quoted *supra* note 113).
116. 433 So. 2d at 668.

deter child abductions.[117] The court stated recognition of the Bahamian decree would invite defiance of lawful custody orders by encouraging flight to the Bahamas solely for the purpose of obtaining a more favorable child custody ruling.[118]

Finally, Florida courts have used the simultaneous and competitive jurisdiction provision of Florida's UCCJA to effectuate the policy against parental kidnapping.[119] Under this provision, when the courts of different states have jurisdiction in substantial conformity with the UCCJA, the first court assuming jurisdiction will proceed with the action.[120] This eliminates forum shopping and the parental kidnapping which it promotes.[121]

Herraro v. Matas[122] is a recent Florida case in which the court refused to engage in simultaneous and competitive jurisdiction with a Puerto Rican court, thereby discouraging parental kidnapping. Puerto Rico, an American territory, has not adopted the UCCJA. Puerto Rico is therefore important because this study concerns judicial attitudes of those jurisdictions which have adopted the UCCJA toward those jurisdictions which have not.

In *Herraro*, the Puerto Rican court granted the father temporary custody of his daughter.[123] Pending a final hearing, the father sent his daughter to visit her mother in Miami.[124] The mother refused to return the daughter and subsequently filed a petition in Miami for modification of the Puerto Rican judgment.[125] The court refused to exercise jurisdiction to modify the judgment because custody proceedings were pending in another state exercising jurisdiction in conformity with the UCCJA.[126]

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117. *Id.*
118. *Id.*
119. FLA. STAT. § 61.1314(1) (1983).

> (1) A court of this state shall not exercise its jurisdiction under this act if, at the time the petition is filed, a proceeding concerning the custody of the child was pending in a court of another state exercising jurisdiction substantially in conformity with this act, unless the proceeding is stayed by the court of the other state because this state is a more appropriate forum or for other reasons.

Id. See also U.C.C.J.A., § 6(a), 9 U.L.A. 134 (1979).
120. U.C.C.J.A., § 14, Commissioners' Note, 9 U.L.A. 154 (1979).
121. *Id.*
122. 447 So. 2d 335 (Fla. 3d D.C.A. 1984).
123. *Id.* at 336. Under the facts, the mother was originally awarded custody in Puerto Rico. She subsequently moved to Miami. She then gave the father temporary custody and he took the child to the Dominican Republic. The Puerto Rican court later awarded the father temporary custody. *Id.*
124. *Id.*
125. *Id.*
126. *Id.* at 337.

Herraro comports with the spirit and letter of the UCCJA.[127] The *Herraro* court enforced the Puerto Rican judgment and ordered the child returned to her father in Puerto Rico.[128] This action was consistent with the policy to deter abductions of children undertaken to facilitate changes in custody. The refusal to engage in simultaneous and competitive jurisdiction with the Puerto Rican court similarly discouraged parental kidnapping by refusing to provide a forum for the abducting parent.

The Florida decisions indicate a growing judicial rationality in the parental kidnapping arena. If these decisions are upheld, parents who have kidnapped their children will be deprived access to Florida courts. Additionally, foreign custody decrees issued to kidnapping parents will be modified. Finally, courts will refuse to engage in competitive and simultaneous jurisdiction and, therefore, will deter parental kidnappings when custody proceedings are pending in another country.[129]

VII. Recent International Cases

The recent decisions confirm that the United States courts will be guided by the spirit of the UCCJA and will deter the international

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127. Section 1 of the UCCJA sets forth the purposes of the Act:

(I) [A]void jurisdictional competition and conflict with other 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;

(2) [P]romote cooperation with the courts of other states to the end that a custody decree is rendered in that state which can best decide the case in the interest of the child;

(3) [A]ssure that litigation concerning the custody of the child take place ordinarily in the state with which the child and his family have the closest connection and where significant evidence concerning his care, protection, training, and personal relationships is most readily available, and that courts of this state decline the exercise of jurisdiction when the child and his family have a closer connection with another state;

(4) [D]iscourage continuing controversies over child custody in the interest of greater stability of home environment and of secure family relationships for the child;

(5) [D]eter abductions and other unilateral removals of children undertaken to obtain custody awards;

(6) [A]void re-litigation of custody decisions of other states in this state insofar as feasible;

(7) [F]acilitate the enforcement of custody decrees of other states;

(8) [P]romote and expand the exchange of information and other forms of mutual assistance between the courts of this state and those of other states concerned with the same child; and

(9) [M]ake uniform the law of those states which enact it.

U.C.C.J.A., § 1(a)(1)-(9), 9 U.L.A. 116-17 (1979).

128. 447 So. 2d at 337.

129. *See* U.C.C.J.A., Prefatory Note, 9 U.L.A. 111 (1979).

kidnapping of children. The cases consistently state that the UCCJA's primary purpose is to discourage both childnapping and relitigation resulting in the parents' shifting children from jurisdiction to jurisdiction.

In 1980 the Supreme Court of Pennsylvania decided the leading case of *Commonwealth ex rel. Zaubi v. Zaubi.*[130] The *Zaubi* court refused to exercise custody jurisdiction based on the UCCJA's clean hands provision.[131] In *Zaubi,* a Danish court granted the mother custody of her children after numerous hearings and an appeal to the High Court of Denmark.[132] This award preceded the mother's divorce from the children's father.[133] When the divorce became final one year later, the father appealed the custody decree to the High Court of Denmark.[134] The father fled with his children to the United States while the custody appeal was pending.[135] The mother finally located her children in Pennsylvania eight months later and petitioned the Pennsylvania court to enforce the Danish decree.[136] This court modified the Danish decree and granted the father custody. The mother appealed and the superior court reversed; whereupon the father appealed to the Pennsylvania Supreme Court.[137]

Pennsylvania initially acquired jurisdiction to modify the Danish decree under the UCCJA because it was now the children's home state.[138] However, the supreme court found the lower court should have refused to exercise jurisdiction, thereby frustrating the goals of the kidnapping father.[139] The court held that absent a showing of physically or emotionally harmful conditions in the custodial household, it would not exercise jurisdiction to modify a valid foreign custody decree particularly when the petitioner had abducted the child from the true custodial parent.[140] The court therefore recognized the Danish decree. It reasoned that the father had attempted to circumvent the UCCJA's intent by evading the jurisdiction of the Danish court, flouting its decree, and relitigating custody in a friendlier forum.[141] Such a result is precisely what the UCCJA was designed to

130. 423 Pa. 183, 423 A.2d 333 (1980).
131. *See* U.C.C.J.A., § 8, 9 U.L.A. 142 (1979) (text quoted *supra* note 96).
132. 423 Pa. at 186, 423 A.2d at 334.
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.* at 185, 423 A.2d at 334.
138. *Id.* at 198, 423 A.2d at 341.
139. *Id.* at 188, 423 A.2d at 336.
140. *Id.*
141. *Id.* at 190, 423 A.2d at 338.

prevent.[142]

In order to effectively deter parental kidnappings, the recent cases promote cooperation between the courts concerned with the same child.[143] For example, in *Evans v. Evans*,[144] the High Court of Justice in Israel and the New York Supreme Court worked in conjunction to handle an international custody dispute. In May 1977 the New York court awarded the mother custody of her son.[145] The mother subsequently moved with the child to Connecticut and then to Pennsylvania.[146] In retaliation, the father petitioned the New York court for a change in custody.[147] In February 1979 the New York court reaffirmed custody in the mother, despite the relocation's adverse effect on the father's visitation privileges and the father's contentions that the mother and child would return to Israel.[148]

In the summer of 1979 the father kidnapped his son and went to Florida.[149] Subsequently, the mother obtained an order directing the return of her son.[150] The father again kidnapped his son in September 1979.[151] This time they went to Georgia where the father successfully concealed their identity for four months.[152] In February 1980, after a private investigator located the father and son, the mother obtained an order from the local Georgia court ordering the father to return his son.[153] The mother finally fled with her son to Israel in March 1980, thereby affirming the father's original contentions.[154]

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142. *Id.* The dissent charged that the majority ignored the best interests of the children and presented these uncontroverted facts pertinent to the best interests of the children:

> 1) The maternal grandfather had taken [the boy] into the bathroom with him and encouraged the child to hold part of his genitals. . . .
> 2) The paternal grandfather . . . stated, in reference [to the girl], "I can see by the way she is cuddling on your shoulder, she will be good in bed in about eleven (11) or twelve (12) years."

Id. at 207, 423 A.2d at 344.

143. *See* U.C.C.J.A., § 1(a)(8), 9 U.L.A. 117 (1979); *supra* note 127.

144. 112 Misc. 2d 537, 447 N.Y.S.2d 200 (1982).

145. *Id.* at 538, 447 N.Y.S.2d at 200.

146. *Id.* For a discussion on a custodial parent's right to relocate with her child from the state awarding her custody, see Spitzer, *Moving and Storage of Post Divorce Children: Relocation, the Constitution and the Courts*, 1985 ARIZ. ST. L.J. 1.

147. 112 Misc. 2d at 538, 447 N.Y.S.2d at 200.

148. *Id.* The constitutional issues in relocation disputes include the right to travel and to rear one's children in accordance with one's principles. The latter right has come to include noncustodial parents' rights to meaningful access to their children. Spitzer, *supra* note 146, at 11.

149. 112 Misc. 2d at 538, 447 N.Y.S.2d at 200.

150. *Id.*

151. *Id.*

152. *Id.* at 538, 447 N.Y.S.2d at 201.

153. *Id.*

154. *Id.*

After the mother fled with her son to Israel, the father petitioned the local Georgia court to hold the mother in contempt.[155] The court reversed its earlier decision and granted the father custody stating its initial order was based on the mother's vigorous denial of an intention to remove the child to Israel.[156] The father petitioned Israel's High Court of Justice in October 1980 to enforce the Georgia decree and to grant him custody of his son.[157] The Israeli court refused, holding the child's best interests were served by remaining with his mother pending an Israeli custody hearing.[158] In April 1981 the mother appealed the Georgia decision granting the father custody of the son.[159] This decision was reversed on the basis that the court lacked subject matter jurisdiction to decide the custody issue.[160] The father then petitioned the original New York court to obtain custody of his son.[161]

The critical issue in this case was which court would assume jurisdiction to determine the custody issue in light of the UCCJA policy to deter kidnapping.[162] The Israeli court severely criticized both parents' kidnapping antics.[163] It accepted jurisdiction to hear the custody dispute, however, stating that bouncing from place to place, country to country, and parent to parent had already adversely affected the child.[164] The Israeli court held the best interests of the child required the court to deliberate the custody dispute to prevent the son's further removal to another jurisdiction.[165] The New York court agreed and declined to exercise jurisdiction.[166] It held that New York was not the home state of the child, that no significant connection existed with the state, and that Israel's jurisdiction of the proceedings could have been predicated on the jurisdictional provisions of the UCCJA.[167] Therefore, by working in conjunction, the New York and Israeli courts prevented another snatching by the father to

155. *Id.*

156. *Id.* This decision was later reversed by the Georgia Supreme Court on the mother's appeal. The court found Georgia did not have proper jurisdiction because the father had illegally removed the child to the state and the mother was not a Georgia resident. *Id.*

157. *Id.* at 539, 447 N.Y.S.2d at 202.

158. *Id.*

159. *Id.*

160. *Id. See supra* note 156.

161. 112 Misc. 2d at 537, 447 N.Y.S.2d at 200.

162. *Id.* at 539, 447 N.Y.S.2d at 201.

163. *Id.* at 540, 447 N.Y.S.2d at 202. Arguably, because the mother had lawful custody of her son, she did not kidnap the child when she brought him to live in Israel. However, the Israeli court, when deciding the case, referred to her actions as "kidnapping." *Id.*

164. *Id.* at 539, 447 N.Y.S.2d at 201.

165. *Id.*

166. *Id.* at 542, 447 N.Y.S.2d at 203.

167. *Id.* at 540, 447 N.Y.S.2d at 202.

remove his son from Israel to New York.[168]

A specific problem developing in international kidnapping cases is pre-decree abductions.[169] Pre-decree abductions are those removals or retentions of the child from the home state prior to a court custody order and usually prior to the initiation of any custody litigation.[170] In many cases the parent who is left behind has no knowledge of the location of the child and the abducting parent.[171] In other cases, the snatching parent refuses to return the child after an agreed-upon out-of-state visitation or trip.[172] The extension of the policy against kidnapping into the area of pre-decree abductions indicates the judicial commitment to deter this conduct.

Consistent with the UCCJA's policy to deter parental kidnappings, if an abducting parent files for custody in the refuge state, the court should refuse to exercise jurisdiction and vest it in the child's former home state.[173] In *Plas v. Superior Court*,[174] a California appellate court reversed a lower court order awarding custody to an abducting parent in a pre-decree abduction case. The mother and her son left France for a holiday visit with the child's maternal grandparent in California.[175] The mother subsequently contacted the father and informed him that they would not be returning to France.[176] Four months later a California superior court granted the mother temporary custody of the son, finding that the son had a significant connection with California sufficient to support jurisdiction.[177] A French court subsequently entered an award of temporary custody to the father.[178]

The issue in *Plas* was whether the California court had jurisdiction to decide the custody issue.[179] The California appellate court held the trial court erred in finding jurisdiction under the significant relationship test and vested jurisdiction in France, the child's former home state.[180] The court noted the Act's express purposes of discouraging both forum shopping and the unilateral removal of children

168. *Id.* at 541, 447 N.Y.S.2d at 201.

169. *See* Grubs v. Ross, 630 P.2d 353 (Or. 1981) (discusses the need for and the ability of the courts to use the UCCJA to discourage and deter pre-decree abduction).

170. P. HOFF, J. SCHULMAN & A. VOLENIK, INTERSTATE CHILD CUSTODY DISPUTES AND PARENTAL KIDNAPPING: POLICY, PRACTICE, AND LAW 3-20 (1982) [hereinafter cited as P. HOFF].

171. *Id.*

172. *Id.*

173. *Id.*

174. 155 Cal. App. 3d 1008, 202 Cal. Rptr. 490 (1984).

175. *Id.* at 1010, 202 Cal. Rptr. at 492.

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.* at 1011, 202 Cal. Rptr. at 493.

180. *Id.* at 1014, 202 Cal. Rptr. at 496.

from one forum to another.[181] The mother admitted to unilaterally removing her son with the intent to remain in California.[182] The court reasoned that the trial court's reliance on facts occurring subsequent to the son's removal to California encouraged the prohibited conduct of parental kidnapping.[183]

In the pre-decree abduction cases, problems arise when the abducting parent waits to file an action in the refuge state attempting to acquire home state or significant connection jurisdiction in that state.[184] The UCCJA does not require the nonabducting parent to follow the abducting parent and file for custody in the refuge state.[185] The parent left behind may also file in the child's former home state prior to the child's relocation.[186] Immediate filing preserves the nonabducting parent's home state jurisdiction.[187] Unfortunately, delay in filing jeopardizes the jurisdiction of the nonabducting parent's state and serves to further the goals of the abducting parent.[188] Each state could eliminate this problem by amending its UCCJA providing the nonabducting parent's state with home state jurisdiction in pre-decree abduction cases.

Brauch v. Shaw[189] illustrates this point. In *Brauch*, an English mother had custody of her son for nine years, pursuant to an agreement with the father. There was no formal custody decree.[190] The mother sent her son to visit his American father in New York during the Christmas holidays.[191] The father subsequently moved to New Hampshire and retained custody of his minor son.[192] The mother commenced custody proceedings in England fourteen months later.[193]

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181. *Id.* at 1013, 202 Cal. Rptr. at 495.
182. *Id.*
183. *Id.* at 1013, 202 Cal. Rptr. at 495-96.
184. P. HOFF, *supra* note 170, at 3-20.
185. *Id.*
186. *Id.* at 3-21.
187. U.C.C.J.A., § 3(a)(1)(ii), 9 U.L.A. 122 (1979), states:

> 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 . . . this State . . .(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. . . .

188. P. HOFF, *supra* note 170, at 3-22.
189. 121 N.H. 562, 432 A.2d 1 (1981).
190. *Id.* at 566, 432 A.2d at 2.
191. *Id.* at 566, 432 A.2d at 3.
192. *Id.* The father was granted an extension of his visitation period and subsequently took the child from New York to live in Rio de Janeiro. Eventually, the father moved to New Hampshire with his son. *Id.*
193. *Id.* During this time, the father twice offered the mother the opportunity to visit her

The father then commenced custody proceedings in New Hampshire.[194] The English court stayed its proceedings pending final determination of the American proceedings.[195]

The New Hampshire Supreme Court engaged in a two-pronged examination: first, it ascertained whether the superior court had jurisdiction to determine custody; and second, it examined whether the superior court could properly exercise jurisdiction in this case.[196] The supreme court found the superior court had jurisdiction to decide the issue.[197] New Hampshire had become the child's home state because he lived there for the nine months immediately preceding the commencement of the custody determination.[198] Additionally, the court held it should exercise jurisdiction to prevent relitigation resulting in the child's shifting from jurisdiction to jurisdiction.[199] The court recognized the father's improper retention of the child was the sole basis for the child's presence in New Hampshire.[200] The court could have declined to exercise jurisdiction in this circumstance[201] under the UCCJA's unclean hands doctrine.[202] However, it refused this doctrine's application because the parent's punishment would occur at the expense of the child's well-being.[203] The court stated the child's welfare was the paramount consideration in determining whether to exercise jurisdiction.[204] If the court declined to exercise jurisdiction, the child would be returned to England to comply with what would have been a tentative decree if the English court subsequently awarded the father custody.[205] Thus, applying the UCCJA policy of achieving greater stability of the home environment, the court granted the father custody of the son.[206]

In *Brauch*, the decision seemed to further the abducting parent's goals. Subordinating the policy of deterring kidnapping to the policy of providing a stable home environment will ultimately encourage parental kidnapping. If a stable home environment were the primary goal of the UCCJA, then a court must always grant custody to the

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child at his expense. The mother declined both offers. *Id.*

194. *Id.* at 567, 432 A.2d at 3.
195. *Id.* at 567, 432 A.2d at 4.
196. *Id.* at 571, 432 A.2d at 5.
197. *Id.*
198. *Id.* at 571-72, 432 A.2d at 5-6.
199. *Id.* at 573, 432 A.2d at 7.
200. *Id.* at 572, 432 A.2d at 6.
201. *See supra* notes 96 & 101 and accompanying text.
202. *See* U.C.C.J.A., § 8(a) & (b), 9 U.L.A. 142 (1979) (text quoted *supra* note 96).
203. 121 N.H. at 573, 432 A.2d at 7.
204. *Id.* at 572, 432 A.2d at 6.
205. *Id.*
206. *Id.* at 574, 432 A.2d at 8.

abducting parent to retain the status quo.

The *Brauch* court found immediate initiation of custody proceedings to preserve the nonabducting parent's home state jurisdiction was imperative in this pre-decree abduction case. The *Brauch* case illustrates that ignorance of the law frequently results in loss of home state jurisdiction because the left-behind parent does not file custody proceedings immediately. The courts must foreclose the abducting parent from benefiting from his or her conduct in such cases by making the clean hands doctrine mandatory instead of discretionary in pre-decree abduction cases.[207]

VIII. The Effect of the UCCJA Abroad

The effect of the UCCJA on those cases where the children are removed from the United States to a foreign country is uncertain. In this unfortunately common situation, a foreign court will not likely recognize or enforce an American state court order.[208] The UCCJA may, however, have influence in this area as well.

Foreign courts have been hesitant to recognize United States court decrees because of the absence of reciprocity provisions in United States laws and because of uncertainty over which state's law would apply.[209] A uniform law like the UCCJA avoids these problems by mandating that each enacting jurisdiction grant comity to valid custody decrees of other countries, and by standardizing the law among the American states.[210] To the foreign country, the UCCJA will assure that American courts will increasingly enforce custody orders against a fleeing noncustodial parent.[211] To the extent that the foreign jurisdiction recognizes the positive force and effect of the UCCJA on its own laws, the UCCJA may lead to a higher level of international comity.

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207. *See* Brown v. Tan, 395 So. 2d 1249 (Fla. 3d D.C.A. 1981) (pre-decree abduction case in which Florida court declined to exercise jurisdiction to hear the custody dispute because the petitioning parent had illegally retained the child in Florida).

208. P. Hoff, *supra* note 170, at 10-6.

209. Lecture by Professor E.L. Roy Hunt, University of Florida College of Law (Jan. 1986).

210. Crouch, *Effective Measures Against International Child Snatching*, 131 New L.J. 592 (1981). The New Law Journal is published in London, England, and is apparently the first foreign printed recognition of the UCCJA.

211. *Id.*

IX. CONCLUSION

The UCCJA has had a positive effect on international child kidnapping of children brought to the United States. The decisions reveal judicial rationality in this area. United States courts increasingly perceive themselves as links in an international network and now willingly honor international custody decrees. Additionally, kidnapped and detained children are being returned. More importantly, courts now recognize deterring kidnapping as the primary function of the UCCJA.

Although a triumph in American law, the UCCJA alone cannot eliminate international child abductions.[212] An international response is necessary. The Hague Conference recognized the necessity of an international response and, in 1980, representatives of the twenty-eight states present unanimously adopted a Convention on the Civil Aspects of International Child Abduction.[213] The Hague Convention's intent is to deter child abductions by putting potential abductors on notice that a child's removal to or retention in a country other than the child's habitual residence will result in the child's prompt return.[214]

The United States signed the Hague Convention on December 31, 1981.[215] On October 30, 1985, President Reagan sent the Hague Convention to the Senate which subsequently referred it to the Senate Foreign Relations Committee for discussion.[216] Hearings regarding the ratification of the Hague Convention are expected to commence before the 1986 Summer recess.[217]

On December 26, 1985, the State Department submitted the Hague Convention's implementing legislation to the Office of Management and Budget[218] where it is currently pending administrative clearance.[219] Federal legislation would better insure full and uniform

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212. Frank, *supra* note 38, at 426.

213. *Id.* at 440 (reprinted in R. CROUCH, INTERSTATE CUSTODY LITIGATION: A GUIDE TO USE AND COURT INTERPRETATION OF THE UNIFORM CHILD CUSTODY JURISDICTION ACT 93 (1981)).

214. *Id.* at 441. The Hague Convention does not permit a decision on the merits of the custody dispute. The court may order an immediate return of the child on the showing that the child was removed wrongfully and that proceedings to return the child were instituted within the Convention's one year statute of limitations. Morgenstern, *The Hague Convention on the Civil Aspects of International Child Abduction: The Need for Ratification*, 10 N.C.J. INT'L & COM. REG. 463, 480 (1985).

215. Morgenstern, *supra* note 214, at 482.

216. Phund Interview, *supra* note 11.

217. *Id.*

218. *Id.*

219. *Id.* Once clearance is obtained, the State Department will send the legislation to the congressional judiciary committees to be introduced as a bill. *Id.*

national application of the Hague Convention.[220] However, implementing legislation is not absolutely essential to the Hague Convention.[221]

In the absence of administrative clearance the Senate should ratify the Hague Convention.[222] Ratification by the United States should serve as a catalyst for ratification in other nations, including those which are not yet members of the Hague Conference.[223] Therefore, the Hague Convention has the potential to provide a uniform international law and, in conjunction with the UCCJA, may provide the force to eliminate international child abduction.

220. *Id.*
221. *Id.*
222. *Id.*
223. *Id.* The major advantage of the Hague Convention is that nations which are not members of the Hague Conference may join the Convention. Frank, *supra* note 38, at 449.