

AN OVERVIEW OF THE UNIFORM CHILD CUSTODY JURISDICTION ACT

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Introduction

On July 3, 1979, New Jersey enacted the Uniform Child Custody Jurisdiction Act (hereinafter "U.C.C.J.A.").¹ The U.C.C.J.A. is an effective means of reducing the incidence of interstate child snatching by persons seeking to obtain custody of children.

Child snatching has become a major problem,² with an estimated 100,000 children per year being taken from the custodial parent or guardian.³ In the past, most of these abductions left the person from whose custody the child had been taken without an adequate remedy since most states either had no criminal statutes concerning parental kidnapping or were reluctant to enforce them. The existence of fifty different court systems with fifty different bodies of child custody law (one of the unfortunate results of federalism) operated to encourage child snatching. Child snatchers were able to shop for a forum which would modify an existing custody decree. The U.C.C.J.A. has greatly reduced the number of friendly forums available to child snatchers.

The stated purposes of the U.C.C.J.A. include the avoidance of jurisdictional competition, the promotion of cooperation between the courts of different states, and the assurance that the litigation will take place in the most appropriate forum.⁴ The overriding concern of the U.C.C.J.A. is that no action should be taken by a court if that court is not in a position to further the best interests of the child. The Act is also intended to be a means of preventing multiple litigation of the same case in different jurisdictions, and to facilitate the enforcement of custody decrees of other states.⁵

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¹ Uniform Child Custody Jurisdiction Act (hereinafter cited as U.C.C.J.A.); N.J. STAT. ANN. § 2A:34-28 to -52 (West Supp. 1979-80); The National Commissioners of Uniform State Laws version may be found at 9 UNIFORM LAWS ANN. 99 (1968). For convenience, citations to both versions will be given.

² As of January 3, 1980, the U.C.C.J.A. had been enacted in forty states. The only states not having enacted the U.C.C.J.A. were: Alabama, Kentucky, Massachusetts, Mississippi, New Mexico, Oklahoma, South Carolina, Utah, Vermont, and West Virginia. 105 N.J.L.J. 8 (Jan. 3, 1980).

³ *Moving to Stop Child Snatching*, TIME, Feb. 27, 1978, at 85.

⁴ N.J. STAT. ANN. § 2A:34-29 (West Supp. 1979-80); U.C.C.J.A. § 1, 9 UNIFORM LAWS ANN. 99, 103-104 (1968).

⁵ *Id.*

Under the U.C.C.J.A., the Superior Court of New Jersey is vested with jurisdiction over child custody matters.⁶ The U.C.C.J.A. provides the Superior Court with a set of guidelines which will enable it to decide whether or not it should exercise its jurisdiction over a particular child custody matter.

The Jurisdictional Provisions of the U.C.C.J.A.

The U.C.C.J.A. sets out specific instances in which a court may exercise its jurisdiction to hear child custody matters. Four basic criteria are provided: 1) the home state test; 2) the significant connection test; 3) the physical presence test; and 4) the more appropriate forum test.

The home state test is the major basis of jurisdiction under the Act. The home state test provides that jurisdiction exists if the forum state is the home state of the child when the proceeding commences.⁷ Jurisdiction may also be exercised if the forum state was the child's home state within six months prior to the commencement of the proceeding, and the child is absent due to his removal or retention by a person claiming custody, and a parent or guardian continues to live in the forum state.⁸

An alternative to the home state test is the significant connection test. If it is in the best interest of the child, a court may exercise jurisdiction where the child and at least one contestant for custody have a significant connection with the forum state.⁹ It is important to note that the purpose of this test is to further the best interests of the child rather than to provide the contestants with a means of choosing a forum to serve the parties' convenience.¹⁰ Among the indicia necessary to establish a significant connection with the forum state is the existence in the forum state of substantial evidence concerning the child's present or future care, protection, training, and personal relationships.¹¹

The physical presence test is designed to be used only in emergency situations. Jurisdiction may be exercised under this test only when the child is physically present in the forum state and such exercise is necessary to protect a child who has been abandoned, or subjected to or threatened with mistreatment, or who otherwise has been neglected.¹² This test is not

⁶ N.J. STAT. ANN. § 2A:34-31 (West Supp. 1979-80).

⁷ *Id.* § 2A:34-31a(1)(i); U.C.C.J.A. § 3(a)(1)(i), 9 UNIFORM LAWS ANN. 99, 106 (1968).

⁸ *Id.* § 2A:34-31a(1)(ii); U.C.C.J.A. § 3(a)(1)(ii), 9 UNIFORM LAWS ANN. 99, 106 (1968).

⁹ *Id.* § 2A:34-31a(2); U.C.C.J.A. § 3(a)(2), 9 UNIFORM LAWS ANN. 99, 106 (1968).

¹⁰ U.C.C.J.A. § 3(a)(2), Commissioners' Note, 9 UNIFORM LAWS ANN. 99, 108 (1968).

¹¹ N.J. STAT. ANN. § 2A:34-31a(2)(ii) (West Supp. 1979-80); U.C.C.J.A. § 3(a)(2)(ii), 9 UNIFORM LAWS ANN. 99, 106 (1968).

¹² *Id.* § 2A:34-31a(3); U.C.C.J.A. § 3(a)(3), 9 UNIFORM LAWS ANN. 99, 106 (1968).

applicable in cases of child neglect where there has been no abandonment or where no emergency situation exists.¹³

The more appropriate forum test comes into play when no other state would appear to have jurisdiction under any of the first three tests, or where another state has declined to exercise jurisdiction under which to bring the proceeding.¹⁴ Exercise of jurisdiction under this test, once again, requires a determination that the exercise will serve the best interest of the child.¹⁵

Grounds Upon Which Jurisdiction May Be Declined

1. Simultaneous Proceedings in Other States

The U.C.C.J.A. seeks to avoid the chaotic situation which results when simultaneous proceedings are pending in different states. A court may not exercise jurisdiction under the Act if a proceeding concerning the custody of the child is pending in a court of another state which exercised its jurisdiction substantially in conformity with the Act. Jurisdiction may be exercised only if the other court has stayed its proceeding either because the forum state is the more appropriate jurisdiction, or "for other reasons."¹⁶

Before hearing a child custody petition, a court must examine the child custody register which is established by section 16 of the U.C.C.J.A. to determine whether a proceeding is pending in another state.¹⁷ In addition to the child custody register, valuable information concerning simultaneous proceedings may be obtained from the parties to the proceeding in the forum state since the parties have a continuing duty to inform the court of such proceedings.¹⁸

When the court of the forum state has reason to believe that there are proceedings pending in another state, the court of the forum state will contact the other court to determine whether such proceedings are, in fact, pending.¹⁹ If the court of the forum state is informed during the course of its proceedings that simultaneous proceedings are pending elsewhere, the forum court will stay its proceedings pending communication with the other court, and a determination will be made as to which is the more appropriate forum for the litigation.²⁰

¹³ U.C.C.J.A. § 3(a)(3), Commissioners' Note, 9 UNIFORM LAWS ANN. 99, 108 (1968).

¹⁴ N.J. STAT. ANN. § 2A:34-31a(4)(i) (West Supp. 1979-80); U.C.C.J.A. § 3(a)(4)(i), 9 UNIFORM LAWS ANN. 99, 106-107 (1968).

¹⁵ *Id.* § 2A:34-31a(4)(ii); U.C.C.J.A. § 3(a)(4)(ii); 9 UNIFORM LAWS ANN. 99, 107 (1968).

¹⁶ N.J. STAT. ANN. § 2A:34-34a (West Supp. 1979-80); U.C.C.J.A. § 6(a), 9 UNIFORM LAWS ANN. 99, 111 (1968).

¹⁷ *Id.* § 2A:34-34b; U.C.C.J.A. § 6(b), 9 UNIFORM LAWS ANN. 99, 112 (1968).

¹⁸ N.J. STAT. ANN. § 2A:34-37c (West Supp. 1979-80); U.C.C.J.A. § 9(c), 9 UNIFORM LAWS ANN. 99, 117 (1968).

¹⁹ *Id.* § 2A:34-34b; U.C.C.J.A. § 6(b), 9 UNIFORM LAWS ANN. 99, 112 (1968).

²⁰ *Id.* § 2A:34-34c; U.C.C.J.A. § 6(c), 9 UNIFORM LAWS ANN. 99, 112 (1968).

If a court has made a custody decree before being informed of simultaneous proceedings in another state, it will immediately notify the other court of that fact.²¹ A court will likewise communicate with a court in another state if the other court has commenced its proceedings after the first court has exercised its jurisdiction.²² Once again, this communication between courts is intended to facilitate a determination as to which state is the more appropriate forum.²³

2. *Inconvenient Forum*

Under the doctrine of inconvenient forum, a court which has jurisdiction under the U.C.C.J.A. may decline to exercise its jurisdiction if it finds that it is an inconvenient forum and that another state is the more appropriate forum for the litigation.²⁴ This provision is a means of avoiding multiple litigation. A court may make a finding of inconvenient forum upon the motion of a party to the litigation or upon its own motion.²⁵

The Act sets forth five factors which a court should consider in making a determination as to inconvenient forum:

- 1) whether another state was recently the child's home state;
- 2) whether another state has a closer connection with the child and his family or with the child and one or more of the contestants;
- 3) whether substantial evidence concerning the child's present or future care, protection, training, and personal relationships is more readily available in another state;
- 4) whether the parties have agreed upon another forum which is no less appropriate; and
- 5) whether an exercise of jurisdiction by the court would contravene the purposes of the Act, as stated in section 1.²⁶

These factors are listed in the Act for the purpose of facilitating a court's determination as to inconvenient forum, but the list is not intended to be exclusive. A court may consider whatever additional factors it deems necessary to its determination.²⁷ Communication between the courts of different states is encouraged.²⁸

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ N.J. STAT. ANN. § 2A:34-35a (West Supp. 1979-80); U.C.C.J.A. § 7(a), 9 UNIFORM LAWS ANN. 99, 113 (1968).

²⁵ *Id.* § 2A:34-35b; U.C.C.J.A. § 7(b), 9 UNIFORM LAWS ANN. 99, 113 (1968).

²⁶ *Id.* § 2A:34-35c; U.C.C.J.A. § 7(c), 9 UNIFORM LAWS ANN. 99, 113 (1968).

²⁷ U.C.C.J.A. § 7(c), Commissioners' Note, 9 UNIFORM LAWS ANN. 99, 114 (1968).

²⁸ N.J. STAT. ANN. § 2A:34-35d (West Supp. 1979-80); U.C.C.J.A. § 7(d), 9 UNIFORM LAWS ANN. 99, 113 (1968).

When a court makes a finding of inconvenient forum, it may either dismiss or stay the proceedings before it. If the proceedings are stayed, the stay may be granted subject to the condition that proceedings be promptly commenced in another specified state, or upon any other condition which the court imposes.²⁹ Once the proceedings are dismissed or stayed, the court will inform whichever court it determines to be the more appropriate forum of this finding.³⁰

A court may make a finding of inconvenient forum in a case where the custody proceeding is incidental to an action for divorce or other proceeding, while still retaining jurisdiction over that divorce or other proceeding.³¹ This provision allows a court to divide a case, dismissing part of it and retaining the rest, where the child custody matter would best be litigated in another forum.³²

The inconvenient forum provisions also allow a tribunal to assess court costs and the costs of travel, attorney's fees, and other expenses incurred by other parties and witnesses against the party commencing proceedings in a clearly inappropriate forum.³³ This provision is meant to serve as a deterrent to frivolous suits, and is intended to apply only when the forum chosen is seriously inappropriate.³⁴ The New Jersey version of the U.C.C.J.A. provides for the entering of a judgment against a party who has had such costs assessed against him in the event of non-payment.³⁵

3. *Jurisdiction Declined by Reason of Conduct*

Section 9 of the U.C.C.J.A. imposes a "clean-hands" requirement upon persons seeking to litigate child custody claims.³⁶ The court may decline to exercise jurisdiction if the petitioner has wrongfully taken the child from another state or has engaged in "similarly reprehensible conduct."³⁷

A wrongful taking is not necessarily limited to a situation in which a child is taken from the parent or guardian who has a custody decree. Conduct of any party which is so objectionable that a court in the exercise of its equity jurisdiction cannot in good conscience permit that party access to its jurisdiction constitutes a wrongful taking.³⁸ A parent having legal custody

²⁹ *Id.* § 2A:34-35c; U.C.C.J.A. § 7(e), 9 UNIFORM LAWS ANN. 99, 113 (1968).

³⁰ *Id.* § 2A:34-35h; U.C.C.J.A. § 7(h), 9 UNIFORM LAWS ANN. 99, 113 (1968).

³¹ *Id.* § 2A:34-35f; U.C.C.J.A. § 7(f), 9 UNIFORM LAWS ANN. 99, 113 (1968).

³² U.C.C.J.A. § 7(f), Commissioners' Note, 9 UNIFORM LAWS ANN. 99, 115 (1968).

³³ N.J. STAT. ANN. § 2A:34-35g (West Supp. 1979-80); U.C.C.J.A. § 7(g), 9 UNIFORM LAWS ANN. 99, 114 (1968).

³⁴ U.C.C.J.A. § 7(g), Commissioners' Note, 9 UNIFORM LAWS ANN. 99, 115 (1968).

³⁵ N.J. STAT. ANN. § 2A:34-35g (West Supp. 1979-80).

³⁶ *Id.* § 2A:34-36a; U.C.C.J.A. § 8(a), 9 UNIFORM LAWS ANN. 99, 115 (1968).

³⁷ *Id.*

³⁸ U.C.C.J.A. § 8, Commissioners' Note, 9 UNIFORM LAWS ANN. 99, 116 (1968).

may be guilty of a wrongful taking if he or she removes the child from the state in order to frustrate the visitation rights of the parent not in custody. The parent in custody could be denied access to the jurisdiction of the court of another state which has enacted the U.C.C.J.A.³⁹

The court may elect to exercise its jurisdiction in a case where the child has been wrongfully taken from the custody of another only if such action is in the best interests of the child.⁴⁰ Such action may be required when a child is maltreated by the parent or guardian. In such a case, the court should exercise jurisdiction if the harm done to the child by a denial of jurisdiction outweighs the effect of the wrongful taking by the parent.⁴¹

The Act provides that when there has been a wrongful taking, as when there has been a finding of inconvenient forum, the court may assess against the petitioner court costs, and travel and other expenses incurred by other parties and their witnesses. Attorney's fees may also be awarded.⁴² The New Jersey Act provides for the entering of a judgment against a petitioner upon whom such costs have been assessed, in the event of non-payment.⁴³

Notice Provisions of the U.C.C.J.A.

The U.C.C.J.A. requires that notice and an opportunity to be heard must be given to contestants, any parent whose parental rights have not been previously terminated, and any person who has physical custody of the child.⁴⁴ Notice to persons outside the state may be given:

- 1) by personal delivery outside the state in the manner prescribed for service of process inside the state;
- 2) in the manner prescribed in the law of the place in which the service is made for service of process in that place in an action in any of its courts of general jurisdiction;
- 3) by any form of mail addressed to the person to be served and requesting a receipt; or
- 4) as directed by the court.⁴⁵

In the New Jersey Act, the third method of giving notice reads, "(3) By any form of mail addressed to the person to be served."⁴⁶ The requirement that a receipt by request is omitted thereby authorizes notice by forms of

³⁹ *Id.*

⁴⁰ N.J. STAT. ANN. § 2A:34-36b (West Supp. 1979-80); U.C.C.J.A. § 8(b), 9 UNIFORM LAWS ANN. 99, 115 (1968).

⁴¹ U.C.C.J.A. § 8, Commissioners' Note, 9 UNIFORM LAWS ANN. 99, 116 (1968).

⁴² N.J. STAT. ANN. § 2A:34-36c (West Supp. 1979-80); U.C.C.J.A. § 8(c), 9 UNIFORM LAWS ANN. 99, 115 (1968).

⁴³ *Id.* § 2A:34-36c; U.C.C.J.A. § 8(c), 9 UNIFORM LAWS ANN. 99, 115 (1968).

⁴⁴ *Id.* § 2A:34-32; U.C.C.J.A. § 4, 9 UNIFORM LAWS ANN. 99, 109 (1968).

⁴⁵ *Id.* § 2A:34-33a; U.C.C.J.A. § 5(a), 9 UNIFORM LAWS ANN. 99, 110 (1968).

⁴⁶ *Id.* § 2A:34-33; U.C.C.J.A. § 5, 9 UNIFORM LAWS ANN. 99, 110 (1968).

mail other than registered or certified mail, return receipt requested, as provided by N.J. Court Rule 4:4-4(e).⁴⁷

Notice need not be given to persons who submit to the jurisdiction of the court.⁴⁸

Joinder of Parties

In order to prevent relitigation of the custody matter, the court may order the notification and joinder of any person not a party who has physical custody of the child, or who claims custody or visitation rights.⁴⁹ The Act specifies the information which must be included in the pleadings, so that the existence of interested persons may be brought to the attention of the court.⁵⁰

The first pleading of every party must give information under oath as to the child's present address, the places where the child has lived within the last five years, and the names and addresses of the persons with whom the child has lived during that period.⁵¹ In addition, each party must declare under oath whether:

- 1) he has participated in any capacity in any other litigation concerning the custody of the same child;
- 2) he has information concerning any custody proceeding pending in any other state which involves the child; and
- 3) he knows of any person not a party to the proceeding who has physical custody of the child, or who claims to have custody or visitation rights with respect to the child.⁵² Information concerning custody actions occurring in other countries may also be elicited under this section when that information is used in conjunction with Section 23 of the Act.⁵³

The Res Judicata Effect of a Custody Decree

Observance of the jurisdictional standards and due process requirements of the U.C.C.J.A. is necessary in order for a custody decree to be binding on a particular party.⁵⁴

A valid custody decree may be granted only by a court having jurisdiction over the subject matter in accordance with section 3 of the Act.⁵⁵ A

⁴⁷ PRESSLER, CURRENT N.J. COURT RULES (West 1980).

⁴⁸ N.J. STAT. ANN. § 2A:34-33d (West Supp. 1979-80); U.C.C.J.A. § 5(d), 9 UNIFORM LAWS ANN. 99, 110 (1968).

⁴⁹ *Id.* § 2A:34-38 (West Supp. 1979-80); U.C.C.J.A. § 10, 9 UNIFORM LAWS ANN. 99, 117-118 (1968).

⁵⁰ *Id.* § 2A:34-37a (West Supp. 1979-80); U.C.C.J.A. § 9(a), 9 UNIFORM LAWS ANN. 99, 117 (1968).

⁵¹ *Id.*

⁵² *Id.*

⁵³ U.C.C.J.A. § 9, Commissioners' Note, 9 UNIFORM LAWS ANN. 99, 117 (1968).

⁵⁴ *Id.* § 12, Commissioners' Note, 9 UNIFORM LAWS ANN. 99, 119 (1968).

⁵⁵ N.J. STAT. ANN. § 2A:34-40 (West Supp. 1979-80); U.C.C.J.A. § 12, 9 UNIFORM LAWS ANN. 99, 119 (1968). See text accompanying notes 6-14 *supra* for a discussion of section 3.

valid custody decree will bind all parties who were served within the state, who were notified in accordance with section 5 of the Act, or who submitted to the jurisdiction of the court, provided that the parties were given an opportunity to be heard.⁵⁶ The custody determination which is made is conclusive as to these parties unless and until it is modified pursuant to law, including modifications under the provisions of the Act.⁵⁷

Recognition of Out-of-State Custody Decrees

The full faith and credit clause of the United States Constitution provides that each state is to give full faith and credit to the public acts, records, and judicial proceedings of every other state.⁵⁸ The applicability of the full faith and credit clause to child custody decrees has long been at issue.

Although the United States Supreme Court has ruled on the applicability of the full faith and credit clause to several peripheral issues involving child custody, it has yet to decide whether the Constitution requires one state to enforce a custody decree of a sister state.⁵⁹ The failure of the Court to face the constitutional question squarely has not been due to a lack of opportunity to do so. The Court refused to hear the interstate custody case of *Borri v. Siverson*⁶⁰ in 1976. Lacking a clear statement from the United States Supreme Court, a minority of states, including New Jersey, have refused to afford full faith and credit to foreign custody decrees.⁶¹

The refusal to give full faith and credit to foreign custody decrees was justified in New Jersey on the ground that public policy considerations prevent the state from disregarding its duty to make a custody determination which is in the best interest of the child, regardless of the fact that such a determination may have been made by a foreign court.⁶² This holding was

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ U.S. CONST., art. IV, § 1.

⁵⁹ See *New York ex rel. Halvey v. Halvey*, 330 U.S. 610 (1947); *Kovacs v. Brewer*, 356 U.S. 604 (1958) (modification of custody decree); *May v. Anderson*, 345 U.S. 528 (1953) (custody decree embodied in a foreign ex parte divorce judgment); *Ford v. Ford*, 371 U.S. 187 (1962) (effect of a judgment of divorce incorporating the custody terms included in a settlement agreement).

⁶⁰ See *Borri v. Siverson*, 336 So.2d 353 (Fla. Sup. Ct. 1976), *cert. denied*, 429 U.S. 1017, *rehearing denied*, 430 U.S. 941 (1977).

⁶¹ *Rhodes v. Bohn*, 114 So.2d 493 (Fla. Dist. Ct. App. 1959), *aff'd* 121 So.2d 777 (Fla. Sup. Ct. 1960); *Applications of Burns*, 49 How. 20, 407 P.2d 885 (1965); *In re Miracle*, 208 Kan. 168, 490 P.2d 638 (1971); *Casteel v. Casteel*, 45 N.J. Super. 338, 132 A.2d 529 (App. Div. 1957); *Mrowczynski v. Mrowczynski*, 142 N.J. Super. 312, 361 A.2d 554 (App. Div. 1976); *Bachman v. Mejias*, 1 N.Y.2d 575, 154 N.Y.S.2d 903, 136 N.E.2d 866 (1956); *In re Reed*, 152 Neb. 819, 43 N.W.2d 161 (1950); *Faleo v. Grills*, 209 Va. 115, 161 S.E.2d 713 (1968). (Florida, Hawaii, Kansas, New Jersey, and New York subsequently enacted the U.C.C.J.A.).

⁶² *Casteel v. Casteel*, 45 N.J. Super. 338, 352, 132, A.2d 529, 537 (App. Div. 1957).

recently re-affirmed by the Supreme Court of New Jersey, which described it as "constitutionally sound."⁶³ The U.C.C.J.A. will bring about a change in this position.

Although full faith and credit may not be constitutionally required for child custody decrees, the U.C.C.J.A. specifies circumstances under which foreign decrees are to be enforced as a matter of state law.⁶⁴ A foreign custody decree will be recognized and enforced if the state which rendered it assumed jurisdiction under statutory provisions substantially in accordance with the U.C.C.J.A., as long as the decree has not been modified pursuant to the provisions of section 14 of the Act.⁶⁵ The New Jersey policy of refusing to give full faith and credit to all foreign custody decrees is inconsistent with the U.C.C.J.A.; however, no out-of-state decree will be recognized unless the jurisdictional requirements of section 3 of the Act have been met.⁶⁶

Modification of Out-of-State Custody Decrees

The willingness of the courts of one state to modify the custody decrees granted by courts in other states operates to encourage the practice of child snatching. Child snatching will continue to be a frequent occurrence as long as the parent seeking custody is able to shop for a friendly forum.

*New York ex rel. Halvey v. Halvey*⁶⁷ is the leading case on modification of out-of-state custody decrees. In *Halvey*, the parties had been residents of New York. Mrs. Halvey removed her minor son to Florida where she obtained an *ex parte* divorce and was granted exclusive custody over the child. Mr. Halvey, who returned the child to New York without the permission of his ex-wife, petitioned the New York courts to have the custody decree modified in his favor.⁶⁸ The New York court ruled that Mrs. Halvey should retain custody of the child, but granted Mr. Halvey visitation rights.⁶⁹

On appeal, the United States Supreme Court was faced with the question of whether New York should have enforced the Florida court's decree under the full faith and credit clause of the United States Constitution. In reaching its decision, the Court relied upon the "finality of the judgment" test, holding that since the custody decree was subject to modification in Florida, it could also be modified in New York.⁷⁰ The opinion of the

⁶³ *Borys v. Borys*, 76 N.J. 103, 120, 386 A.2d 366, 374 (1977).

⁶⁴ U.C.C.J.A. § 13, Commissioners' Note, 9 UNIFORM LAWS ANN. 99, 120 (1968).

⁶⁵ N.J. STAT. ANN. § 2A:34-41 (West Supp. 1979-80); U.C.C.J.A. § 13, 9 UNIFORM LAWS ANN. 99, 120 (1968).

⁶⁶ *Id.*

⁶⁷ *New York ex rel. Halvey v. Halvey*, 330 U.S. 610 (1947).

⁶⁸ *Id.* at 611-612.

⁶⁹ *Id.* at 612.

⁷⁰ *Id.*

Court, by Mr. Justice Douglas, stated that, "[s]o far as the Full Faith and Credit Clause is concerned, what Florida could do in modifying the decree, New York may do."⁷¹

The rule stated in *Halvey* continues to be the law in states which have not enacted the U.C.C.J.A. The confusing and costly result of *Halvey* is the frequent litigation of identical cases in different jurisdictions. This result was predicted by Mr. Justice Rutledge in his concurring opinion in *Halvey*:

The result seems unfortunate in that, apparently, it may make possible a continuing round of litigation over custody, perhaps also of abduction, between alienated parents. That consequence hardly can be thought conducive to the child's welfare. And, if possible, I would avoid such a distressing result, since I think that the controlling consideration should be the best interests of the child, not only for disposing of such cases as a matter of local policy, as it is in Florida and New York, but also for formulating federal policies of full faith and credit as well as of jurisdiction and due process in relation to such dispositions.⁷²

Until the advent of the U.C.C.J.A., one could be comforted only by Mr. Justice Rutledge's somber assurance that, "[s]ometime, somehow, there should be an end to litigation in such matters."⁷³

Under the U.C.C.J.A., one state cannot modify the custody decree of another state unless either the state which granted the decree fails to meet the jurisdictional requirements of section 3 of the Act,⁷⁴ or that state has declined to assume jurisdiction or modify the decree.⁷⁵ In either case, the forum state must have jurisdiction under Section 3 before it can modify a foreign decree.⁷⁶ It is expected that this provision will discourage forum shopping, thereby affording greater stability to custody arrangements than is attainable under the *Halvey* standard.⁷⁷

Enforcement Procedures

The U.C.C.J.A. also provides the means by which custody decrees of other states may be enforced by the court of a forum state. Upon the filing of a certified copy of an out-of-state custody decree in the office of the clerk

⁷¹ *Id.* at 614.

⁷² *Id.* at 619-620 (Rutledge, J., concurring).

⁷³ *Id.* at 620 (Rutledge, J., concurring).

⁷⁴ See text accompanying notes 6-14, *supra*.

⁷⁵ N.J. STAT. ANN. § 2A:34-42 (West Supp. 1979-80); U.C.C.J.A. § 14(a), 9 UNIFORM LAWS ANN. 99, 121-122 (1968).

⁷⁶ *Id.*

⁷⁷ U.C.C.J.A. § 14, Commissioners' Note, 9 UNIFORM LAWS ANN. 99, 122 (1968).

of the appropriate court of the forum state, such a decree would have the same effect and will be enforced in the same manner as a custody decree of the forum state.⁷⁸ In New Jersey, the Clerk of the Superior Court is empowered to receive such filing.⁷⁹ This provision has several important limitations. Only those out-of-state custody decrees required to be recognized under section 13 of the Act are subject to being so enforced.⁸⁰ The authority granted by the Act to enforce out-of-state decrees does not include the power to modify those decrees.⁸¹ Such power is vested only in a court of competent jurisdiction as delineated under section 14 of the Act.⁸²

Visitation rights may be enforced like any other provision of an out-of-state decree.⁸³ If enforcement has become impractical, the party seeking enforcement may petition the appropriate court of the forum state for modification.⁸⁴ The party entitled to custody may recover his or her expenses, witness' fees, and attorney's fees.⁸⁵

The Clerk of the Superior Court of New Jersey is responsible for receiving and maintaining a registry of documents pertaining to out-of-state custody decrees.⁸⁶ This registry allows those seeking to assert an out-of-state decree or to challenge a court's jurisdiction to present all evidence to the court considering the custody matter. The court of the forum state may request any information that is filed in the registry in order to get a more complete view of the entire circumstances in a particular case.⁸⁷ Since information in the registry is limited to either those files which have been specifically requested by the court or papers which have been filed as communication relative to jurisdiction, the court may have to resort to other means of investigation.⁸⁸ All information concerning in-state custody decrees is to be made available to other states in a similar fashion.⁸⁹ The Act

⁷⁸ N.J. STAT. ANN. § 2A:34-43a (West Supp. 1979-80); U.C.C.J.A. § 15(a), 9 UNIFORM LAWS ANN. 99, 124 (1968).

⁷⁹ *Id.* § 2A:34-43a; U.C.C.J.A. § 15(a), 9 UNIFORM LAWS ANN. 99, 124 (1968).

⁸⁰ U.C.C.J.A. § 15, Commissioners' Note, 9 UNIFORM LAWS ANN. 99, 124 (1968).

⁸¹ *Id.*

⁸² U.C.C.J.A. § 14, Commissioners' Note, 9 UNIFORM LAWS ANN. 99, 124 (1968).

⁸³ *Id.* § 15, Commissioners' Note, 9 UNIFORM LAWS ANN. 99, 124 (1968).

⁸⁴ *Id.*

⁸⁵ N.J. STAT. ANN. § 2A:34-43b (West Supp. 1979-80); U.C.C.J.A. § 15, 9 UNIFORM LAWS ANN. 99, 124 (1968).

⁸⁶ *Id.* § 2A:34-44; U.C.C.J.A. § 15(a), 9 UNIFORM LAWS ANN. 99, 124 (1968). Documents contained in this registry shall include: certified copies of out-of-state custody decrees; communications concerning pending custody proceedings in other states; communications concerning a finding of inconvenient forum by a court of another state; and any other documents concerning custody proceedings in another state which may affect either the disposition of a custody proceeding in this state or the jurisdiction of a court of this state over the custody proceeding.

⁸⁷ See U.C.C.J.A. § 16, Commissioners' Note, 9 UNIFORM LAWS ANN. 99, 125 (1968).

⁸⁸ *Id.*

⁸⁹ N.J. STAT. ANN. § 2A:34-45 (West Supp. 1979-80); U.C.C.J.A. § 17, 9 UNIFORM LAWS ANN. 99, 125 (1968).

allows any party representing a child in a custody proceeding to obtain the testimony of a witness beyond the jurisdiction of the forum state.⁹⁰ The court of the forum state may request a court of another state to take the testimony of a witness who is beyond its own jurisdiction.⁹¹

The information-gathering power of the court of the forum state is further expanded by the Act. A court of the forum state may request the appropriate court of another state to gather evidence, order the production of evidence, or order that sociological studies be made with respect to the custody of the child in question.⁹² Certified copies of these reports may be requested by the court of the forum state.⁹³ All costs of producing such evidence are to be borne by either the parties to the proceeding, or by the county where the child resides.⁹⁴ All evidence so requested is subject to the evidentiary procedures of the non-forum state.⁹⁵ The court of the forum state may utilize the contempt power of the assisting court by requesting that the out-of-state court order a party to a custody proceeding in the forum state to appear in the proceedings.⁹⁶ Costs incurred in connection with this request, including travel expenses, will be assessed against the other party or otherwise paid to the clerk of the court for remittance to the proper party.⁹⁷ An important addition to New Jersey's version of the U.C.C.J.A. preserves the right of a non-resident, appearing under these conditions, to contest the jurisdiction of the forum court.⁹⁸

The courts of any state enacting the U.C.C.J.A. are required by Section 20 of the Act to lend reciprocal assistance to out-of-state courts in the determination of custody matters.⁹⁹ Any documents or records adduced during a custody proceeding under the Act must, as specified in the statute, be preserved until the child who is the subject of that proceeding reaches the age of majority.¹⁰⁰ Certified copies of these records must be sent to the appropriate courts of other states upon request.¹⁰¹ The court of a state enacting the U.C.C.J.A., upon taking jurisdiction of a custody proceeding,

⁹⁰ *Id.* § 2A:34-46 (West Supp. 1979-80); U.C.C.J.A. § 18, 9 UNIFORM LAWS ANN. 99, 126 (1968).

⁹¹ U.C.C.J.A. § 18, Commissioners' Note, 9 UNIFORM LAWS ANN. 99, 126 (1968).

⁹² N.J. STAT. ANN. § 2A:34-47a (West Supp. 1979-80); U.C.C.J.A. § 19(a), 9 UNIFORM LAWS ANN. 99, 126 (1968).

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ U.C.C.J.A. § 19, Commissioners' Note, 9 UNIFORM LAWS ANN. 99, 127 (1968).

⁹⁶ *Id.*

⁹⁷ N.J. STAT. ANN. § 2A:34-47a (West Supp. 1979-80); U.C.C.J.A. § 19(a), 9 UNIFORM LAWS ANN. 99, 127 (1968).

⁹⁸ N.J. STAT. ANN. § 2A:34-47c (West Supp. 1979-80).

⁹⁹ *Id.* § 2A:34-48 (West Supp. 1979-80); U.C.C.J.A. § 20, 9 UNIFORM LAWS ANN. 99, 127-128 (1968).

¹⁰⁰ *Id.* § 2A:34-49 (West Supp. 1979-80); U.C.C.J.A. § 21, 9 UNIFORM LAWS ANN. 99, 128 (1968).

¹⁰¹ *Id.* § 2A:34-50 (West Supp. 1979-80); U.C.C.J.A. § 22, 9 UNIFORM LAWS ANN. 99, 129 (1968).

must request certified copies of any documents or records of any out-of-state custody proceedings.¹⁰² All of these provisions are designed to enable the court to gather as much of the essential information concerning a custody determination as is possible.¹⁰³

The general policies of the U.C.C.J.A. are to be applied in international custody disputes as well.¹⁰⁴ The Act provides that the decisions of competent institutions, responsible for determining custody matters in foreign countries, will be given full force and effect within the jurisdiction of the forum state.¹⁰⁵ The only condition placed on such recognition is that reasonable notice and an opportunity to be heard be given to all interested parties.¹⁰⁶ Of course, a foreign institution would be exercising jurisdiction over the proceeding according to its own local law and not under the U.C.C.J.A.¹⁰⁷

Due to the nature of child custody proceedings and their potentially disruptive effects upon the child, prompt and expeditious adjudication is imperative.¹⁰⁸ In order to avoid delays or unwarranted litigation, a forum state may, at the request of a party, give calendar priority not only on the issue of jurisdiction, but also on the determination of the custody question itself.¹⁰⁹ This section was not enacted with New Jersey's version of the U.C.C.J.A. since a blanket priority was already available for cases where the principle issue at bar is the status or custody of minors.¹¹⁰ The reason for the grant of a blanket priority in custody matters is expressed by the Supreme Court in *Sorentino v. Family and Children's Society of Elizabeth*.¹¹¹ In *Sorentino*, the Court noted that in making a determination of a child's legal parentage, it possessed an overriding interest in bringing an end to custody proceedings, finalizing the child's status, and ending the torment which such proceedings involve.¹¹² This concern is expressly set out in section 1 of the U.C.C.J.A.¹¹³ and has been included in the New Jersey version as well.¹¹⁴ The method by which the right to calendar priority in appellate matters may be exercised is by stating the grounds for the preference in the notice of appeal.¹¹⁵

¹⁰² *Id.*

¹⁰³ U.C.C.J.A. § 20, Commissioners' Note, 9 UNIFORM LAWS ANN. 99, 128 (1968).

¹⁰⁴ N.J. STAT. ANN. § 2A:34-51 (West Supp. 1979-80); U.C.C.J.A. § 23, 9 UNIFORM LAWS ANN. 99, 129 (1968).

¹⁰⁵ U.C.C.J.A. § 23, Commissioners' Note, 9 UNIFORM LAWS ANN. 99, 129-130 (1968).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ U.C.C.J.A. § 24, 9 UNIFORM LAWS ANN. 99, 130 (1968).

¹⁰⁹ *Id.*

¹¹⁰ PRESSLER, CURRENT N.J. COURT RULES, R. 1:2-5 (1980).

¹¹¹ 74 N.J. 313, 378 A.2d 18 (1977).

¹¹² *Id.* at 321, 378 A.2d at 22.

¹¹³ N.J. STAT. ANN. § 2A:34-29(d) (West Supp. 1979-80); U.C.C.J.A. § 1(a)(4), 9 UNIFORM LAWS ANN. 99, 104 (1968).

¹¹⁴ *Id.* § 2A:34-29; U.C.C.J.A. § 1, 9 UNIFORM LAWS ANN. 99, 104 (1968).

¹¹⁵ PRESSLER, CURRENT N.J. COURT RULES, R. 2:5-1(f)1.

The remaining provisions of the Act deal with the technical requirements necessary for implementation. Any provision found to be invalid may be severed from the remaining provisions without invalidating the entire Act.¹¹⁶ Any conflicting legislation is repealed,¹¹⁷ and an effective date established.¹¹⁸

It may be noted that New Jersey has not had to repeal any existing legislation in the adoption of the Act.

Federal Legislation

At this writing, Congress is considering the Parental Kidnapping Prevention Act of 1979¹¹⁹ which would make the law of interstate child custody uniform throughout the United States. Although the purposes of the federal act mirror the purposes of the U.C.C.J.A., the federal legislation is not merely a copy of the U.C.C.J.A.¹²⁰ The federal bill makes available resources not provided by the U.C.C.J.A.

The Jurisdictional Provisions

The jurisdictional provisions of the federal legislation consist of an amendment to Title 28 of the U.S. Code.¹²¹ The circumstances under which a federal court will hear a child custody case are set out under the heading, "Full Faith And Credit Given To Child Custody Determinations."¹²² This heading is rather misleading since the Act does not require the court to give full faith and credit to all custody determinations made by state courts. The Act requires that full faith and credit be afforded to foreign custody decrees only where such decrees are made in accordance with procedures which are identical to the jurisdictional requirements set out in section 3 of the U.C.C.J.A.¹²³ The procedure necessary in order to have a foreign custody decree modified utilizes the basic prerequisites set forth in U.C.C.J.A. section 14.¹²⁴ The federal bill also contains a provision which would prevent a federal court from modifying the decree of the court of a foreign state where simultaneous proceedings are in progress in that state.¹²⁵

¹¹⁶ N.J. STAT. ANN. § 2A:34-52 (West Supp. 1979-80); U.C.C.J.A. § 25, 9 UNIFORM LAWS ANN. 99, 130 (1968).

¹¹⁷ U.C.C.J.A. § 27, 9 UNIFORM LAWS ANN. 99, 131 (1968).

¹¹⁸ N.J. STAT. ANN. § 2A:34-28 (West Supp. 1979-80); U.C.C.J.A. § 28, 9 UNIFORM LAWS ANN. 99, 131 (1968).

¹¹⁹ S. 105, 96th Cong., 1st Sess. (1979) (an identical bill is before the House of Representatives, H.R. 1290, 96th Cong., 1st Sess. (1979)).

¹²⁰ *Id.*

¹²¹ *Id.* § 3.

¹²² *Id.* § 4.

¹²³ *Id.*

¹²⁴ U.C.C.J.A. § 14, 9 UNIFORM LAWS ANN. 99, 121-122 (1968).

¹²⁵ *Id.*

Criminal Sanctions

The establishment of criminal sanctions for child snatching is not unique to the federal proposed legislation. Many states, including New Jersey,¹²⁶ have enacted such provisions. The problem with these statutes has been a reluctance on the part of law enforcement officials to seek the imposition of criminal penalties in cases where one parent has taken his or her child away from the other.

The federal legislation would create the crime of parental kidnapping by means of an amendment to Title 18 of the United States Code.¹²⁷ Under this section, it would be a crime if a parent, relative, guardian, or agent of such person restrains a child of not more than fourteen years of age in violation of the custody or visitation rights of another person, provided that the right arose from a custody decree granted in accordance with the provisions of the Act.¹²⁸ The penalty provided for a violation of this section would depend upon whether the child was "concealed" without good cause or "restrained" without good cause. Concealment without good cause for more than seven days in a place where the child is not likely to be found could result in a \$10,000 fine, or imprisonment for up to thirty days, or both.¹²⁹

The parental kidnapping provisions would be applicable only under the following circumstances:

- 1) when the child is transported in foreign commerce;
- 2) when the exercise of custody or visitation rights require the crossing of a state or United States boundary;
- 3) when the act is done against the child within the special maritime, territorial, or aircraft jurisdictions of the United States; or
- 4) when the child is a foreign official, an international protected person, or an official guest of the United States.¹³⁰

The Act also establishes a presumption of federal jurisdiction in cases where the child is not released within sixty days of the offense, and where no facts are present to indicate a lack of such jurisdiction.¹³¹

Two defenses to prosecution under the parental kidnapping section appear in the bill. The first defense is that no person claiming entitlement to custody or visitation reported the offense to local authorities within ninety days after the restraint of the child began.¹³² The second defense is that the alleged violator returned the child unharmed not later than thirty days after

¹²⁶ N.J. STAT. ANN. § 2C:13-4 (West 1979).

¹²⁷ S. 105, 96th Cong., 1st Sess., § 5 (1979).

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

a warrant for his arrest was issued.¹³³ This generous provision recognizes the fact that child snatchings are not occasioned by the same motives which occasion other crimes.

The U.C.C.J.A. seeks to protect the best interests of the child. Because this goal is paramount, the Act provides that if a person is convicted under the Act, his or her sentence will be reduced if the child is returned unharmed.¹³⁴

The Parent Locator Service

The federal legislation contains an amendment to the Social Security Act¹³⁵ which would delegate to the Federal Bureau of Investigation the task of discovering the whereabouts of any parent or child who has been absent for at least sixty days.¹³⁶ Because estimates place the number of child snatchings up to 100,000 per year,¹³⁷ the F.B.I. has expressed opposition to the federal legislation.¹³⁸ The F.B.I. maintains that it cannot afford to commit a great amount of manpower to conduct investigations into an activity which, in its consideration, should not be a federal crime.¹³⁹ The F.B.I.'s opposition may also be attributed to the fact that participation in the Parent Locator Service may be perceived as a blow to the esteem of the Bureau, since parent location is a task which is usually undertaken by county welfare agencies. Yet, since there is no guarantee of interstate cooperation between state investigators, and given the fact that local Parent Locator Services such as those in existence in the various counties of New Jersey are typically understaffed and overworked, the Federal proposal seems to be a viable alternative.

International Custody Disputes

The limitations of the U.C.C.J.A. as it applies to the international sphere are recognized in the comment to the Uniform Act.¹⁴⁰ No foreign state is bound to apply the Act.¹⁴¹ This deficiency has not alleviated the increasing problem of international child abduction.¹⁴² Clearly, such ab-

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.* § 4.

¹³⁶ *Id.*

¹³⁷ 123 CONG. REC. H54 (daily ed. Jan. 4, 1977) (remarks of Rep. Moss).

¹³⁸ Most, *The Child Snatching Epidemic*, THE NATION, May 7, 1977, at 560.

¹³⁹ *Id.*

¹⁴⁰ U.C.C.J.A. § 23, Commissioners' Note, 9 UNIFORM LAWS ANN. 99, 129-130 (1968).

¹⁴¹ *Id.*

¹⁴² Children's Rights, Inc., *Resource*, Vol. 5, No. 3, 5 (Summer 1979) (this organization has created an international task force to confront this problem and to develop a handbook to aid the parents of children victimized by international abductions).

ductions violate the purpose of the Act.¹⁴³ Two scenarios frequently arise under the U.C.C.J.A. with respect to the international abductions of children. The first is where a child is brought from a foreign country into a state governed by the U.C.C.J.A. in violation of that foreign country's custody order. The second arises when a child, subject to a custody order issued by a state under the U.C.C.J.A., is abducted from that state and removed to a foreign country.

The first problem has been confronted in two recent California decisions. *Miller v. Superior Court of Los Angeles County*¹⁴⁴ involved a complicated fact pattern. The plaintiff, Patricia Ann McGuinness, (formerly Miller) a United States citizen, married Harry Miller, an Australian citizen, in 1962.¹⁴⁵ The couple had two children prior to their divorce in 1967.¹⁴⁶ The children are citizens of both Australia and the United States under United States federal law.¹⁴⁷ In 1968, Patricia, with Harry Miller's consent, moved to California with the two children.

Patricia Miller remarried in 1972 and returned to Australia with the children and her new husband, Kevin McGuinness, an Australian citizen.¹⁴⁸ At this time, further custody agreements were reached between the parties, but subsequent disputes arose.¹⁴⁹ The Family Court of Australia granted Patricia McGuinness custody of the children with specific visitation rights given to Harry Miller.¹⁵⁰ The court noted specific provisions of an agreement reached earlier by the parties which provided that Harry would be responsible for all school arrangements for the children and that he would have custody during any period in which the children's mother was out of Australia without the children.¹⁵¹

On July 23, 1976, Mrs. McGuinness left Australia to take up permanent residence in California with the children.¹⁵² On July 28, 1976, Mr. Miller filed an application with the Australian Court for an order which would give him custody of the children and restrain Mrs. McGuinness from removing the children. After hearing the order *ex parte*, the court awarded temporary custody to Harry Miller and served the order on Patricia McGuinness' solicitors.¹⁵³ On the return date of the order, August 3, 1976, Patricia

¹⁴³ See N.J. STAT. ANN. § 2A:34-29 (West Supp. 1979-80); U.C.C.J.A. § 1, 9 UNIFORM LAWS ANN. 99, 103 (1968).

¹⁴⁴ 69 Cal. App. 3d 267, 138 Cal. Rptr. 123 (1977), *aff'd* 22 Cal. 3d 923, 587 P.2d 723, 151 Cal. Rptr. 6 (1978).

¹⁴⁵ 138 Cal. Rptr. at 125.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*; see also 8 U.S.C. § 1401(a)(7) (1970).

¹⁴⁸ 138 Cal. Rptr. at 125.

¹⁴⁹ *Id.* at 126.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* (These provisions were not specifically incorporated into the order).

¹⁵² *Id.*

¹⁵³ *Id.*

McGuiness failed to appear, and a warrant for custody of the children was issued.¹⁵⁴

On October 22, 1976, Mr. Miller instituted proceedings in Los Angeles Superior Court which resulted in a determination that the orders of the Australian Court were valid and that Patricia McGuiness had deliberately violated them.¹⁵⁵ Mrs. McGuiness petitioned for a writ of mandamus to compel the Superior Court to vacate the order.¹⁵⁶ The Court of Appeal for the Second District of California held that, under the Uniform Child Custody Jurisdiction Act as enacted in California,¹⁵⁷ the Superior Court of Los Angeles County was without jurisdiction to decide the custody matter.¹⁵⁸ The court further decided that Patricia McGuiness received sufficient notice of the Australian proceeding.¹⁵⁹ The court found that it lacked jurisdiction to modify the custody decree of Australia due to the lack of a significant connection between the parties and the State of California. The absence of substantial evidence concerning the children's present and future care contributed to the court's decision not to act.¹⁶⁰ The court also determined that service of the July 28 order upon Mrs. McGuiness' solicitors of record in California constituted a form of service reasonably calculated to give knowledge of the action and opportunity to be heard, as required by the Act.¹⁶¹

The children's mother also alleged that her removal of the children in violation of the custody order of the Australian Court did not constitute grounds for a denial of jurisdiction under the U.C.C.J.A. as enacted in California. She claimed that the Australian order was punitive in nature.¹⁶²

An *amicus curiae* brief by Professor Brigitte M. Bodenheimer¹⁶³ pointed out that "[s]ection 5157(2) of the Act, which provides that a court 'shall not exercise jurisdiction to modify a custody decree of another state,' in this situation unless required in the interest of the child, is not mandatory, but always subject to the best interests of the child. . . ."¹⁶⁴ A change of custody for punitive reasons is disruptive of family stability and is not entitled to recognition under the Act.¹⁶⁵ The court found that the change in

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 132.

¹⁵⁶ *Miller v. Superior Court of Los Angeles County*, 69 Cal. App. 3d 267, 138 Cal. Rptr. 123 (1977).

¹⁵⁷ CAL. CIV. CODE § 5150 to 5174 (West Supp. 1979).

¹⁵⁸ 138 Cal. Rptr. at 131.

¹⁵⁹ *Id.* at 132.

¹⁶⁰ *Id.* at 128-29.

¹⁶¹ *Id.* at 132.

¹⁶² *Id.* at 129.

¹⁶³ *Id.* at 130 (Professor Bodenheimer served as a reporter for the special Committee of the Commissioners on Uniform State Laws which drafted the U.C.C.J.A.).

¹⁶⁴ *Id.* (citing *amicus curiae* brief by Professor Bridgette M. Bodenheimer); see also N.J. STAT. ANN. § 2A:34-36b (West Supp. 1979-80); U.C.C.J.A. § 8, 9 UNIFORM LAWS ANN. 99, 115 (1968).

¹⁶⁵ *Id.*

custody by the Australian court was not punitive in nature.¹⁶⁶ The custody order did not deprive Harry Miller of custody rights, but rather it vested legal custody in both parents. The order contemplated that Harry Miller's right to oversee the children's educational activities and his right to visit them would be exercised in Australia.¹⁶⁷ Patricia Miller's surreptitious removal of the children clearly violated that order.¹⁶⁸

A major dissent by Justice Roth accompanied this opinion.¹⁶⁹ Justice Roth found that the Australian court's order was issued without a clear showing of violation of any court order, without due process, and without sufficient evidence to warrant a change of custody. He declared that the only purpose of the order was to punish Patricia McGuiness.¹⁷⁰ Justice Roth found that no order of the Australian court was violated or flaunted.¹⁷¹ Furthermore, he noted that reasonable notice and opportunity to be heard were not adhered to under either Australian law or the U.C.C.J.A.¹⁷² Finally, Justice Roth argued that the July 28, 1976 order effecting a change in custody was in reality a contempt order based upon no facts which demonstrated that it was ordered in the best interests of the children.¹⁷³

The Supreme Court of California reviewed this decision and upheld the majority opinion.¹⁷⁴ Justice Clark, writing for the court, found that it could be presumed from Mrs. McGuiness' violation of the custody order and the unexplained absence of the children that the children were in danger of suffering irreparable injury.¹⁷⁵ Considering Mr. Miller's extensive visitation rights, the restraint sought was not severe.¹⁷⁶ Due to the temporary nature of the Australian court's restraining order, no motive of punishment could be inferred.¹⁷⁷

In a lengthy dissent, Chief Justice Bird charged that the requirements of due process were not adhered to, as Patricia was neither personally served nor was she given actual notice.¹⁷⁸ The procedure followed was not in accordance with Australian law which provides that a hearing must not be held for at least forty-two days if the party to be served is not in Aus-

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 132 (Roth, J., dissenting).

¹⁷⁰ *Id.* at 138 (Roth, J., dissenting).

¹⁷¹ *Id.* at 139 (Roth, J., dissenting).

¹⁷² *Id.* at 142 (Roth, J., dissenting).

¹⁷³ *Id.* at 143 (Roth, J., dissenting).

¹⁷⁴ *Miller v. Superior Court of Los Angeles County*, 22 Cal. 3d 923, 587 P.2d 723, 151 Cal. Rptr. 6 (1979).

¹⁷⁵ *Id.* at 929, P.2d at 727, 151 Cal. Rptr. at 9.

¹⁷⁶ *Id.* at 930, P.2d at 727, 151 Cal. Rptr. at 9.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 937, P.2d at 732, 151 Cal. Rptr. at 14. (Bird, C.J., dissenting).

tralia.¹⁷⁹ Harry Miller's affidavit did not meet the urgency requirements necessary to validate an *ex parte* order in a custody proceeding under Australian law.¹⁸⁰

This case represents only one of the myriad of considerations involved in the decision to give force to an out-of-state custody decree under the Act. The court must always return to the purposes of the Act in reaching its final determination. Associate Justice Compton stated in the majority opinion that refusal to enforce the orders of the Australian court would amount to a modification of the orders by the California Court, resulting in an open invitation to resort to self-help.¹⁸¹

In *Ben-Yenoshua v. Ben-Yenoshua*¹⁸² the respondent, a United States citizen, had left her husband, a citizen of Israel, and returned to the United States with their children.¹⁸³ After arriving in California, she filed for divorce.¹⁸⁴ Petitioner came to the United States to adjudicate the divorce. The parties stipulated that the wife should have custody of the children with visitation rights granted to the husband.¹⁸⁵ The husband then removed the children to Israel in violation of an injunction issued by the California Court.¹⁸⁶ The wife obtained a modification of the custody award in California and the husband subsequently obtained an award of custody in Israel.¹⁸⁷

The Court of Appeal in California failed to find sufficient evidence in the record to support the exercise of jurisdiction by the lower court with respect to the custody issue. Neither the "Home State" rule nor the significant connection test of section 5152 of the California Act could be satisfied.¹⁸⁸ Sufficient evidence concerning the child's present and future care to warrant the issuance of the custody decree was also lacking.¹⁸⁹ The California court found that the court of Israel, having greater access to information about the children and the family, was better able to weigh the best interests of the children and therefore was the more appropriate forum to decide the custody issue.¹⁹⁰

¹⁷⁹ *Id.* (Bird, C.J., dissenting).

¹⁸⁰ *Id.* at 940, P.2d at 734, Cal. Rptr. at 16. (Bird, C.J., dissenting).

¹⁸¹ *Miller v. Superior Court of Los Angeles County*, 69 Cal. App. 3d 191, 138 Cal. Rptr. 123, 127 (1977), *aff'd* 22 Cal. 3d 923, 587 P.2d 723, 151 Cal. Rptr. 6 (1979).

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

¹⁸³ *Id.* at 262, 154 Cal. Rptr. at 82.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 263, 154 Cal. Rptr. at 82.

¹⁸⁸ *Id.* at 265, 154 Cal. Rptr. at 83-84.

¹⁸⁹ *Id.* at 266, 154 Cal. Rptr. at 84-85.

¹⁹⁰ *Id.* at 268, 154 Cal. Rptr. at 85.

Miller and *Ben-Yenoshua* represent the considerations which must be taken into account when deciding cases brought under the U.C.C.J.A. Respect for the purposes of the Act and for the best interests of the child are of paramount importance.

There is far less guidance in dealing with cases involving the removal of children from the United States to a foreign state. To date, no international agreement guarantees that custody determinations of the United States will be given the same respect that decrees of foreign states are accorded under the U.C.C.J.A.¹⁹¹ Efforts are being made to remedy this problem, however.

In March of 1979, representatives of twenty-three nations met at The Hague, Netherlands in an attempt to resolve the question of how to treat international child abductions.¹⁹² Areas to which the representatives addressed themselves were the protection of foreign children who have been brought to and integrated into a new country, the formulation of strict time limits on actions for the return of abducted children, and the drafting of provisions allowing abducted children to return to their home country.¹⁹³ While the U.C.C.J.A. provides some recourse to parents and children by directing that custody determinations emanate from only one jurisdiction, only a multilateral agreement can bridge the international gap in child custody disputes.

Flaws in the U.C.C.J.A.

No statute is perfect, and the U.C.C.J.A. is no exception. The major drawback of the Act lies not with its draftsmanship, but with the American system of jurisprudence itself.

Judges enjoy a great deal of discretionary authority. Many provisions of the U.C.C.J.A. are, of necessity, couched in general terms which lend themselves to the exercise of judicial discretion.¹⁹⁴ While the use of such general terms as "best interest of the child" and "significant connection" serve to extend the Act's applicability to a wider range of situations, the result is that the "good faith" of state court judges must be relied upon to a great extent.¹⁹⁵ Given the fact that states have traditionally taken a pater-

¹⁹¹ N.J. STAT. ANN. § 2A:34-51 (West Supp. 1979-80); U.C.C.J.A. § 23, 9 UNIFORM LAWS ANN. 99, 129-30 (1968).

¹⁹² Telephone interview with Professor Bridgette Bodenheimer, United States representative to the International Convention discussing child abductions, at the University of California at Davis (November 1979).

¹⁹³ *Id.*

¹⁹⁴ Stern, *Stemming the Proliferation of Parental Kidnapping: New York's Adoption of the UCCJA*, 45 BROOKLYN LAW REV. 89, 124 (1978).

¹⁹⁵ Most, *The Child Snatching Epidemic*, THE NATION, May 7, 1977, at 560.

nalistic attitude towards family law matters, this assumption of good faith is sometimes misplaced.¹⁹⁶

The U.C.C.J.A. makes an attempt to prevent judicial competition between state courts by means of its "inconvenient forum"¹⁹⁷ and "clean hands"¹⁹⁸ provisions. These provisions may be circumvented, however, by a judicial determination that the "best interest of the child" requires an extension of jurisdiction under the "physical presence" or "more appropriate forum" jurisdictional tests.¹⁹⁹

The "full faith and credit" provisions of the U.C.C.J.A. present another opportunity for evasion of the purposes of the Act by state courts. The U.C.C.J.A. does not attempt to require mandatory enforcement of foreign custody decrees. It requires enforcement only of those decrees which were rendered "substantially in accordance" with the provisions of the U.C.C.J.A.²⁰⁰ Once again, courts are provided with considerable discretion as to whether the provisions of the Act have been "substantially" complied with by the parties.

Proponents of the U.C.C.J.A. do not claim that it will prevent all "wrong" custody decisions. Given the inclination of state courts to maintain local control over child custody decisions, the best that can be expected is that the frequency of such "wrong" decisions will be minimized.

Conclusion

The adoption of the U.C.C.J.A. by New Jersey is a clear statement of concern for the well being of the youth of this and other states. Unfortunately, as long as adoption of the Act is less than unanimous among all the states, its effectiveness is hampered.

Proposed federal legislation would relieve this problem to a large extent. Federal agencies charged with enforcing the procedures could more readily stem the tide of "child snatching" incidents. However, parents with both the resources and the desire could still circumvent this law by seeking foreign havens. This traveling, however, would include the added expense of expatriations. To deal with this problem, international accords are being sought, but again, unanimity at least in principle is a prerequisite to the effectiveness of any such agreement.

¹⁹⁶ *Id.* at 559; see *Nelson v. District Court*, 186 Colo. 381, 387, 527 P.2d 811, 814 (1974) (held that a litigant could voluntarily submit to a court's jurisdiction under the U.C.C.J.A. despite a Uniform Law Commissioners' Note clearly stating that voluntary submission to a court's jurisdiction is insufficient to confer jurisdiction on a court unless the jurisdictional prerequisites of the U.C.C.J.A. have been met).

¹⁹⁷ N.J. STAT. ANN. § 2A:34-35 (West Supp. 1979-80); U.C.C.J.A. § 7, 9 UNIFORM LAWS ANN. 99, 113 (1968).

¹⁹⁸ *Id.* § 2A:34-36 (West Supp. 1979-80); U.C.C.J.A. § 8, 9 UNIFORM LAWS ANN. 99, 115 (1968).

¹⁹⁹ *Id.* § 2A:34-31a (West Supp. 1979-80); U.C.C.J.A. § 3(a), 9 UNIFORM LAWS ANN. 99, 108 (1968).

²⁰⁰ *Id.* § 2A:34-41 (West Supp. 1979-80); U.C.C.J.A. § 13, 9 UNIFORM LAWS ANN. 99, 120 (1968).

Adoption of the U.C.C.J.A. recognizes that the best interests of a child do not always coincide with the purely chauvinistic exercise of state jurisdiction in custody disputes. The underlying circumstances of the children, the parents, and the family as a whole must be examined. The Act provides the alternative of effective recourse to the courts, previously unavailable to parents seeking to regain custody of their children. This remedy can serve to end the snatching and re-snatching of children by often well-meaning but frustrated parents. The Act also serves to protect the children subject to these custody disputes from the emotional and psychological trauma which can accompany child snatching. The Act further allows the courts to provide for the best interests of the child as opposed to those of the parents.