


1-15-1989

## Thompson v. Thompson: The Jurisdictional Dilemma of Child Custody Cases Under the Parental Kidnapping Prevention Act

Steven M. Schuetze

Follow this and additional works at: <http://digitalcommons.pepperdine.edu/plr>

 Part of the [Family Law Commons](#), [Jurisdiction Commons](#), [Jurisprudence Commons](#), [Law and Society Commons](#), [Legislation Commons](#), and the [State and Local Government Law Commons](#)

---

### Recommended Citation

Steven M. Schuetze *Thompson v. Thompson: The Jurisdictional Dilemma of Child Custody Cases Under the Parental Kidnapping Prevention Act*, 16 Pepp. L. Rev. 2 (1989)

Available at: <http://digitalcommons.pepperdine.edu/plr/vol16/iss2/7>

This Note is brought to you for free and open access by the School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in Pepperdine Law Review by an authorized administrator of Pepperdine Digital Commons. For more information, please contact [Kevin.Miller3@pepperdine.edu](mailto:Kevin.Miller3@pepperdine.edu).

# ***Thompson v. Thompson: The Jurisdictional Dilemma of Child Custody Cases Under the Parental Kidnapping Prevention Act***

## I. INTRODUCTION

An estimated 25,000 to 100,000 children are "snatched" or "kidnapped" each year by a parent who seeks to gain a favorable custody decree from one state after losing the custody battle in another state.<sup>1</sup> The new forum state, not bound by the judgment of the prior state since child custody determinations are subject to modification when changed circumstances affect the best interests of the child, would often award custody to the snatching parent.<sup>2</sup> As a result, the snatching parent would have a valid custody award in one jurisdiction even though the prior custody decree in favor of the other parent was still valid in the previous jurisdiction.<sup>3</sup>

In an effort to deal with the problem of conflicting custody judgments, many states enacted the Uniform Child Custody Jurisdiction Act (UCCJA).<sup>4</sup> These states sought to avoid jurisdictional conflicts by establishing uniform standards which allowed an adopting state to

---

1. These figures reflect the estimated number per year of children "snatched" or "kidnapped" by a parent as of the time the Parental Kidnapping Prevention Act was enacted. *Thompson v. Thompson*, 108 S. Ct. 513, 517 (1988); see *Parental Kidnapping Prevention Act of 1979: Joint Hearing on S. 105 Before the Subcomm. on Criminal Justice of the Comm. on the Judiciary and the Subcomm. on Child and Human Development of the Senate Comm. on Labor and Human Resources*, 96th Cong., 2d Sess. 10 (1980) [hereinafter *PKPA Hearing*] (statement of Sen. Malcolm Wallop). The Library of Congress estimated the lower figure and Children's Rights, Inc. estimated the higher figure. *Id.*

2. See *infra* notes 18-23 and accompanying text.

3. Often times, such conflicting judgments cause each parent to try to obtain physical custody of the child in order to bring the child into the state in which the favorable custody decree has been entered. See *Commonwealth ex rel. Thomas v. Gillard*, 203 Pa. Super. 95, 198 A.2d 377 (1964) (mother, who had a valid custody decree in Pennsylvania, resnatched the child from the father, who had obtained a valid decree in California); see also *In re Guardianship of Rodgers*, 100 Ariz. 269, 413 P.2d 744 (1966) (mother resnatched daughter in order to obtain an Arizona decree when the father refused to relinquish the child after a visit pursuant to visitation rights in Texas, where he later was awarded full custody).

4. UNIF. CHILD CUSTODY JURIS. ACT §§ 1-28, 9 U.L.A. 116-70 (1979) [hereinafter UCCJA]. The Uniform Child Custody Jurisdiction Act was approved by the National Conference of Commissioners on Uniform State Laws and the American Bar Association in 1968.

determine whether it had jurisdiction over the matter.<sup>5</sup> The standards also imposed an obligation upon other states to recognize and enforce the out-of-state decrees.<sup>6</sup> Dissatisfaction, though, arose when some states did not enact the UCCJA and others enacted variations.<sup>7</sup>

Congress, in recognizing that uniformity was needed to prevent forum shopping by a parent seeking a favorable custody award, passed the Parental Kidnapping Prevention Act (PKPA).<sup>8</sup> The PKPA establishes requirements which must be satisfied before a state court has sufficient jurisdiction to hear the matter<sup>9</sup> and imposes a duty upon "every State [to] enforce according to its terms . . . any child custody determination made consistently with the provisions of this section by a court of another State."<sup>10</sup> Furthermore, once a state exercises jurisdiction pursuant to the Act, no other state can assume jurisdiction over the child custody case.<sup>11</sup>

The issue which arises is whether a federal court is a proper forum to enforce the provisions of the PKPA when one state improperly exercises jurisdiction under the Act and enters a custody decree which conflicts with a prior custody award of another state. Since the PKPA is silent with regard to this issue, the Supreme Court in *Thompson v. Thompson*<sup>12</sup> addressed whether the PKPA creates an implied cause of action in the federal courts to determine the validity of one custody decree over another.<sup>13</sup> In *Thompson*, the Court unanimously held that no such cause of action exists; thus, the federal courts cannot determine whether a state court has acted in compliance with the PKPA.<sup>14</sup>

In this note, the historical problems associated with according full faith and credit to child custody determinations will first be discussed. Additionally, the UCCJA and the PKPA will be examined, with an emphasis on how these legislative solutions have attempted to deal with the full faith and credit problem of child custody cases. Finally, the Supreme Court's opinion in *Thompson* will be analyzed

---

5. UCCJA § 3. See *infra* notes 26-33 and accompanying text.

6. UCCJA § 13. See *infra* note 38 and accompanying text.

7. See *Thompson v. Thompson*, 108 S. Ct. 513, 517 (1988); see also *PKPA Hearing*, *supra* note 1, at 144 (statement of Prof. Coombs).

8. 28 U.S.C. § 1738A (1982).

9. *Id.* § 1738A(c). See *infra* note 58 and accompanying text.

10. 28 U.S.C. § 1738A(a) (1982).

11. *Id.* § 1738A(g). "A court of a State shall not exercise jurisdiction in any proceeding for a custody determination commenced during the pendency of a proceeding in a court of another State where such court of that other State is exercising jurisdiction consistently with the provisions of this section . . ." *Id.*

12. 108 S. Ct. 513 (1988).

13. *Id.* at 516.

14. *Id.* See *infra* notes 94-126 and accompanying text. Justice Scalia wrote a concurring opinion in which Justice O'Connor joined in part.

and the the impact this decision will have on the PKPA and future child custody cases will be considered.

## II. HISTORICAL BACKGROUND

### A. *Full Faith and Credit and Child Custody Decrees*

Article IV, section one of the United States Constitution provides: "Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."<sup>15</sup> Congress, using this constitutionally mandated authority, enacted legislation which not only provides that the legislative acts, records and judicial proceedings of the states shall be authenticated,<sup>16</sup> but also requires that "[s]uch Acts, records and judicial proceedings . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."<sup>17</sup>

The Supreme Court has been confronted with the applicability of the Full Faith and Credit Clause to child custody cases three times.<sup>18</sup> In each case, the Court reserved judgment on whether the Full Faith and Credit Clause is applicable to a child custody decision made by another state.<sup>19</sup> The reason for the Court's abstention with regard to this issue is that even if the Clause was applicable, a state is only required to give the same effect to the custody determination as would be given in the state which entered the decree.<sup>20</sup> In other words, another state "has at least as much leeway to disregard the judgment,

15. U.S. CONST. art. IV, § 1.

16. 28 U.S.C. § 1738 (1982).

17. *Id.*

18. *Ford v. Ford*, 371 U.S. 187 (1962) (South Carolina court awarded custody to the mother after a Virginia decree entered judgment in favor of the father); *Kovacs v. Brewer*, 356 U.S. 604 (1958) (North Carolina, ignoring a New York decree granting custody to the mother, found that the best interest of the child would be served if the paternal grandfather retained custody); *Halvey v. Halvey*, 330 U.S. 610 (1947) (New York court modified the custody decree of Florida which granted liberal visitation rights to the father, while awarding custody, as did the Florida court, to the mother).

19. *Halvey*, 330 U.S. at 616 (reserved decision on "whether the State which has jurisdiction over the child may, regardless of a custody decree rendered by another State, make such orders concerning custody as the welfare of the child from time to time requires"); see *Kovacs*, 356 U.S. at 607 ("Whatever effect the Full Faith and Credit Clause may have with respect to custody decrees . . ."); see also *Ford*, 371 U.S. at 192.

20. *Halvey*, 330 U.S. at 614. The Court stated, "[A] judgment has no constitutional claim to a more conclusive or final effect in the State of the forum than it has in the State where rendered." *Id.*

to qualify it, or to depart from it as does the State where it was rendered."<sup>21</sup> Thus, since a state usually will retain the right to modify a custody decree due to changed circumstances which affect the best interests of the child, the courts of another state also have the right to modify that custody decree.<sup>22</sup>

Because of this judicial freedom to modify child custody decrees, an unsuccessful parent had an incentive to take the child into another jurisdiction with the hope that the new forum would use its discretion to modify the judgment. Naturally, problems arise because:

individuals who are unsuccessful (or who expect to be unsuccessful) in an action in one state will attempt to evade that state's jurisdiction by taking the child to another state and relitigating the custody issue there. The second state will often switch custody to the parent within its jurisdiction, thereby encouraging 'child snatching' by rewarding the *de facto* physical custodian notwithstanding the existence of an order or decree to the contrary.<sup>23</sup>

This created an obvious anomaly because each parent had a valid custody award in a different jurisdiction. Consequently, doubt arose as to which award superseded the other, not only as far as other states were concerned, but also with regard to the parent who no longer retained physical custody.

#### *B. The Uniform Child Custody Jurisdiction Act*

The National Conference of Commissioners on Uniform State Laws attempted to deal with the problem of conflicting custody decrees in the state courts by promulgating the Uniform Child Custody Jurisdiction Act.<sup>24</sup> The UCCJA is intended to remedy the conflict which arises among the states with regard to child custody cases by creating uniform standards for establishing jurisdiction and providing for recognition and enforcement of out-of-state decrees.<sup>25</sup> The

---

21. *Id.* at 615.

22. *Ford*, 371 U.S. at 191 n.2 (citation omitted).

23. *Parental Kidnapping Prevention Act of 1979: Addendum to Joint Hearing on S. 105 Before the Subcomm. on Criminal Justice of the Comm. on the Judiciary and the Subcomm. on Child and Human Development of the Senate Comm. on Labor and Human Resources*, 96th Cong., 2d Sess. 101 (1980) [hereinafter *PKPA Addendum*] (letter from Assistant Attorney General Patricia Wald to Rep. Peter Rodino).

24. UCCJA §§ 1-28, 9 U.L.A. 116-70 (1979).

25. UCCJA § 1. Some of the stated general purposes are as follows:

1) avoid jurisdictional competition and conflict with courts of other states in matters of child custody . . . ;  
2) promote 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;

...

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

...

7) Facilitate the enforcement of custody decrees of other states;

....

*Id.*

UCCJA thus was a conscious effort to remedy the inherent defects of a child custody award.

The UCCJA establishes strict guidelines that a state must adhere to when asserting jurisdiction over child custody matters.<sup>26</sup> One of the following four criteria must be met before a state court can assert jurisdiction over a child custody case:

- (1) The state is the home state of the child at the time of the proceeding (or the home state within six months prior to the proceeding and the child was removed from the state for purposes of obtaining custody);<sup>27</sup>
- (2) it is in the best interests of the child because the child and at least one parent have a significant connection with the state and there exists substantial evidence in that state as to the child's care and training;<sup>28</sup>
- (3) the child is physically present and has been either abandoned, or subjected to or threatened with abuse or mistreatment;<sup>29</sup> or
- (4) no other state can or will assert jurisdiction and it is in the best interest of the child for the present forum to do so.<sup>30</sup>

Although there are four independent bases for a state court to assert jurisdiction over the matter, the first two criteria, under which mere physical presence of the child is insufficient to confer jurisdiction,<sup>31</sup> are the major bases for a court to assert jurisdiction.<sup>32</sup> Furthermore, this section expressly points out that "[p]hysical presence of the child, while desirable, is not a prerequisite for jurisdiction to determine his custody."<sup>33</sup> Thus, a parent would be unable to establish jurisdiction merely because the child has been successfully removed from another jurisdiction and is presently accompanied by the parent in the new forum.

Not only are jurisdictional standards tightened, but the UCCJA also establishes stringent standards for the modification of a custody decree of another state. In order to prevent forum shopping and to

26. *Id.* § 3.

27. *Id.* § 3(a)(1). Home state is defined 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.

*Id.* § 2(5).

28. *Id.* § 3(a)(2).

29. *Id.* § 3(a)(3).

30. *Id.* § 3(a)(4).

31. *Id.* § 3(b). This section provides that "physical presence in this State of the child . . . is not alone sufficient to confer jurisdiction on a court of this State to make a child custody determination."

32. *Id.* § 3 (1979) (Commissioners' Note).

33. *Id.* § 3(c).

stabilize the child custody arrangement,<sup>34</sup> the UCCJA declares:

If a court of another state has made a custody decree, a court of [the present] 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.<sup>35</sup>

In other words, a state may only modify an existing out-of-state custody decree if the state which entered the decree no longer has competent jurisdiction under the UCCJA or refuses to exercise continuing jurisdiction. It is therefore the intent of this section for "states [to] defer to the continuing jurisdiction of the court of another state as long as that state has jurisdiction under the standards of this Act."<sup>36</sup>

The UCCJA also addresses the issue of whether a judgment by one state is binding on another state court,<sup>37</sup> and whether such a decision should be recognized and enforced in another state.<sup>38</sup> Section 12 of

---

34. *Id.* § 14 (Commissioners' Note).

35. *Id.* § 14(a). A flaw under section 14 is that the new forum state determines whether the state which entered the original custody decree continues to have jurisdiction. Thus, the new forum state, which satisfies the "home state" requirement, might argue that the prior state no longer retains jurisdiction over the matter even though there still may be sufficient evidence within the decree-entering state to satisfy the "best interest" criteria. See *Mace v. Mace*, 215 Neb. 640, 341 N.W.2d 307 (1983). In *Mace*, the Nebraska court, the "home state" of the children, determined it was a more appropriate forum to assert jurisdiction and modify a Mississippi custody decree even though there was evidence of a significant connection between Mississippi and the father and children. An alternative solution to the problem of concurrent jurisdiction would be to allow the decree-entering state to make the determination of whether it retained jurisdiction, thus eliminating the potential problem of another state asserting more "appropriate" jurisdiction over the matter.

36. UCCJA § 14 (Commissioners' Note). Section 8(b) also seeks to remedy the problem of state courts modifying another state's custody decree, which would encourage a losing parent to snatch the child in order to obtain custody:

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 . . . .

UCCJA § 8(b).

37. *Id.* § 12.

A custody decree rendered by a court of this State which had jurisdiction under section 3 binds all parties who have been served in this State or notified in accordance with section 5 or who have submitted to the jurisdiction of the court, and who have been given an opportunity to be heard. As to these parties the custody decree is conclusive as to all issues of law and fact decided and as to the custody determination made unless and until that determination is modified pursuant to law, including the provisions of this Act.

*Id.*

38. *Id.* § 13.

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,

the UCCJA provides the basis whereby a custody decree can be recognized and enforced by another state in that it addresses the problem of a child custody case being subject to modification and thus not sufficiently final to invoke the doctrine of *res judicata*.<sup>39</sup> Therefore, even though "a child custody decree is normally subject to modification in the interest of the child . . . as long as it has not been modified, it is as binding as a final judgment . . ." <sup>40</sup> Furthermore, the UCCJA bypasses the Full Faith and Credit Clause, which according to the Supreme Court does not require a state to recognize an out-of-state custody decree,<sup>41</sup> by establishing that *as a matter of state law* out-of-state custody decrees should be recognized and enforced.<sup>42</sup> Irrespective of the applicability of the Full Faith and Credit Clause, the UCCJA thus obligates those states which have adopted the Act to give full faith and credit to an out-of-state custody decree as a final adjudication of the matter so long as the decree has not been modified.

Even though the UCCJA dealt with the peculiar problem of the lack of recognition and enforcement of out-of-state custody decrees, its effectiveness was limited since it was subjected to voluntary adoption by the states. Uniformity was needed for the UCCJA's provisions to be effective. That is, so long as one state had not adopted the UCCJA, or had adopted it even with significant alterations, the problem of child snatching for the purpose of forum shopping still existed. By the end of April 1979, only thirty-two states had adopted the UCCJA,<sup>43</sup> and many had enacted variations which destroyed the uniformity that was essential to eliminate forum shopping.<sup>44</sup>

---

so long as this decree has not been modified in accordance with jurisdictional standards substantially similar to those of this Act.

*Id.*

39. UCCJA § 12, 9 U.L.A. 149-50 (1979) (Commissioners' Note). Section 12 "deals with the intra-state validity of custody decrees which provides the basis for their interstate recognition and enforcement . . ." *Id.*

40. *Id.*

41. See *supra* notes 18-23 and accompanying text.

42. UCCJA § 13 (Commissioners' Note).

43. *Parental Kidnapping Prevention Act, 1979: Hearing Before the Subcomm. on Child and Human Development of the Comm. on Labor and Human Resources, 96th Cong., 1st Sess. 167 (1979)* (statement of Sen. Malcolm Wallop). It should be noted that by 1983, three years after the enactment of the PKPA, all fifty states and the District of Columbia had adopted the UCCJA in some form. 9 U.L.A. 31-32 (Supp. 1988).

44. *PKPA Hearing, supra* note 1, at 144 (statement of Prof. Coombs). Compare ILL. REV. STAT. ch. 40, para. 2115(a) (Supp. 1988) (substitutes "or" for "and" between subsections 1 and 2 of section 15) with *supra* note 35 and accompanying text. The Illinois statute allows an Illinois court to modify an existing judgment of another state if the Illinois court merely had jurisdiction pursuant to the UCCJA without regard to



The UCCJA also does not address situations where two state courts construe their respective provisions of the UCCJA differently. In *Webb v. Webb*,<sup>45</sup> the Supreme Court was confronted with a Florida court grant of custody to the mother and a Georgia court award of custody to the father even though both states had adopted the UCCJA.<sup>46</sup> Although the two state courts had entered different custody decrees based on their respective interpretations of the UCCJA, the Supreme Court abstained from determining which decree was valid since the issue required the interpretation of state law.<sup>47</sup> Therefore, a state can enter a judgment which conflicts with another state's custody decree by merely interpreting the UCCJA differently. Furthermore, the losing party has no power to contest this interpretation of state law outside of that state's courts.

### C. Parental Kidnapping Prevention Act

In recognition of the unsatisfactory results of the UCCJA, the inconsistent and conflicting custody decisions by the states, and the continuing problem of child snatching by the losing parent hoping to find a hospitable forum,<sup>48</sup> Congress passed the Parental Kidnapping Prevention Act (PKPA).<sup>49</sup> The general purposes of the PKPA are to promote cooperation between state courts,<sup>50</sup> to facilitate the enforcement of out-of-state custody decrees,<sup>51</sup> to discourage interstate controversies over child custody,<sup>52</sup> and to "avoid jurisdictional competition and conflict between State courts in matters of child custody . . . ."<sup>53</sup>

---

whether the prior state still retained jurisdiction. This change in the Illinois statute thus provides the incentive for a parent to attempt to satisfy one of Illinois' jurisdictional requirements in order to modify the judgment, irrespective of whether the prior state still maintained the requisite jurisdiction pursuant to the Act.

45. 451 U.S. 493 (1981). In *Webb*, Florida assumed jurisdiction as the home state of the child and asserted that Georgia no longer had sufficient contact with the parties to assert jurisdiction. The Georgia court believed that it had jurisdiction since the father obtained custody of the child in an emergency situation created by the mother. *Webb v. Webb*, 245 Ga. 650, 651, 266 S.E.2d 463, 464 (1980). See *supra* notes 27-35 and accompanying text.

46. *Webb v. Webb*, 451 U.S. 493, 494 (1981). The mother filed for an injunction in the Florida court to enforce the original Georgia decree. While that case was pending the father retrieved the child and filed a complaint in Georgia to modify the original decree. Thus, the two courts later entered conflicting judgments. See *Webb*, 245 Ga. 650, 266 S.E.2d 463 (1980).

47. *Webb*, 451 U.S. at 497-99.

48. Congressional Findings and Declaration of Purposes for Parental Kidnapping Prevention Act of 1980, Pub. L. No. 96-611, § 7(c)(1), 94 Stat. 3566, 3569 (1980) (codified at 28 U.S.C. § 1738A (1982)).

49. 28 U.S.C. § 1738A (1982).

50. Congressional Findings and Declaration of Purposes for Parental Kidnapping Prevention Act of 1980, Pub. L. No. 96-611, § 7(c)(1), 94 Stat. 3566, 3569 (1980).

51. *Id.* § 7(c)(3).

52. *Id.* § 7(c)(4).

53. *Id.* § 7(c)(5).

The PKPA begins by stating that "[t]he appropriate authorities of every State shall enforce according to its terms, and shall not modify except as provided in subsection (f) . . . any child custody determination made consistently with the provisions of this section by a court of another State."<sup>54</sup> The PKPA therefore requires that one state give full faith and credit to another state's custody decree if the state which issued the decree did so in compliance with the Act.

For a state court to render a child custody determination which is consistent with the PKPA, that court must have jurisdiction under its own state laws and satisfy one of the conditions specified by the Act.<sup>55</sup> The conditions set forth are nearly identical to the jurisdictional requirements of the UCCJA.<sup>56</sup> These conditions are: the court sits in the home state of the child; the best interests of the child are served because there is a significant connection with the state and substantial evidence within the state concerning the child's welfare; the child is abandoned or mistreated within the state; and no other state has jurisdiction or another state declines to exercise jurisdiction.<sup>57</sup> The major difference from the UCCJA with regard to the jurisdictional requirements is that the PKPA provides express preference to the home state of the child.<sup>58</sup> Thus, if a conflict arises as to which PKPA jurisdictional requirement is to be satisfied, the home state of the child takes precedence.

The PKPA also addresses the unique situation of a child custody case being subject to modification at a future date. Three separate provisions attempt to solve the problem of two state courts asserting concurrent jurisdiction in order to modify the original decree. First, the state court which issued the decree *continues* to have jurisdiction over the matter if it still maintains jurisdiction under state law and if that state is the residence of a parent or the child.<sup>59</sup> Second, another state court cannot exercise concurrent jurisdiction over the matter if

54. 28 U.S.C. § 1738A(a) (1982).

55. *Id.* § 1738A(c).

56. *See supra* notes 26-33 and accompanying text.

57. 28 U.S.C. § 1738A(c)(2) (1982).

58. *Id.* § 1738A(c)(2)(A)(i). Under the UCCJA, a court could exercise jurisdiction, in spite of the child's home state, if another condition could be met, such as a substantial connection with the state or evidence of physical abuse. *See* UCCJA § 3, 9 U.L.A. 123 (1979) (Commissioners' Note).

59. 28 U.S.C. § 1738A(d) (1982).

The jurisdiction of a court of a state which has made a child custody determination consistently with the provisions of this section continues as long as the requirement of subsection (c)(1) of this section continues to be met and such State remains the residence of the child or of any contestant.

the first state retains and exercises jurisdiction as provided by the PKPA.<sup>60</sup> Finally, a court of one state with jurisdiction over the case may modify a custody award entered by another state only if the other state no longer has jurisdiction or refuses to exercise continuing jurisdiction.<sup>61</sup> The PKPA therefore establishes uniform guidelines for determining whether a state court can properly exercise jurisdiction over a child custody case in order to modify the decree entered by another state.

#### *D. Conflicting State Decrees Under the PKPA*

The PKPA provides explicit provisions for determining the appropriate state court to exercise jurisdiction in a child custody matter; however, it is silent as to situations where one state improperly exercises jurisdiction and issues a custody decree conflicting with a decree properly awarded by another state. That is, "under the rules defined by § 1738A, if two states concurrently render custody decrees, one state has asserted jurisdiction in violation of federal law."<sup>62</sup> While the PKPA does note that "[t]he appropriate authorities of every State shall enforce according to its terms . . . any child custody determination"<sup>63</sup> made by another state, it does not expressly state a course of action in the event that two states exercise concurrent jurisdiction irrespective of the PKPA.

The question thus arises whether the federal courts may be used to determine which of two conflicting states is exercising proper jurisdiction under the PKPA. The circuits are split as to whether the federal courts are an appropriate arena to address the issue of conflicting custody decrees by two states. The Eleventh, Fifth and Third Circuits have held that a federal court can determine which of two conflicting states properly exercised jurisdiction under the Act.<sup>64</sup> However, before *Thompson*, the Seventh and District of Columbia Circuits in dicta stated that the federal courts could not be used to resolve a conflict between states concerning a child custody decree.<sup>65</sup>

---

60. 28 U.S.C. § 1738A(g) (1982). *See supra* note 11.

61. 28 U.S.C. § 1738A(f) (1982).

A court of a State may modify a determination of the custody of the same child made by a court of another State, if (1) it has jurisdiction to make such a child custody determination; and (2) the court of the other State no longer has jurisdiction, or it has declined to exercise such jurisdiction to modify such determination.

*Id.*

62. *Flood v. Braaten*, 727 F.2d 303, 310 (3d Cir. 1984).

63. 28 U.S.C. § 1738A(a) (1982).

64. *McDougald v. Jenson*, 786 F.2d 1465 (11th Cir. 1986); *Heartfield v. Heartfield*, 749 F.2d 1138 (5th Cir. 1985); *Diruggiero v. Rodgers*, 743 F.2d 1009 (3d Cir. 1984); *Flood v. Braaten*, 727 F.2d 303 (3d Cir. 1984).

65. *Lloyd v. Loeffler*, 694 F.2d 489, 493 (7th Cir. 1982) (finding that PKPA does not expressly prohibit federal jurisdiction as a matter of policy); *Bennett v. Bennett*, 682

Federal court involvement when two states issue conflicting custody decrees under the PKPA was first upheld in *Flood v. Braaten*.<sup>66</sup> In *Flood*, after noting that the language of the PKPA did not provide any assistance, the court stated that even though Congress did not want the federal courts to make custody determinations or enforce custody decrees in the first instance, Congress did create a body of federal law which addressed the problem of conflicting state custody decisions.<sup>67</sup>

By enacting one set of rules binding all the states, Congress sought to eliminate the inconsistency and close the loopholes that encouraged child snatching under the old system in which each state exercised unreviewable power to modify decrees. Absent some tribunal capable of enjoining violations of the strict and uniform requirements of § 1738A, the Congressional policy underlying the enactment would be thwarted.<sup>68</sup>

The court believed that Congress must have intended the federal courts to be used when conflicting state custody awards are entered because to do otherwise would "render § 1738A virtually nugatory by so restricting the availability of a federal forum that state compliance with the legislation would become optional."<sup>69</sup> In allowing federal courts to resolve conflicting decrees, other circuits have substantially adhered to the rationale of *Flood*.<sup>70</sup>

Two circuits have stated that the federal courts should not be used to resolve conflicts among the states under the PKPA, reasoning that if these matters were intended to be addressed in the federal courts, Congress would have expressly provided for such a cause of action.<sup>71</sup> These courts based their conclusions on two grounds. First, the federal courts typically are not as competent to handle this area of do-

---

F.2d 1039, 1043 (D.C. Cir. 1982) (noting that PKPA is silent as to whether federal courts have any role in child custody determinations).

66. 727 F.2d 303 (3d Cir. 1984) (New Jersey state court awarded custody to the mother, while a North Dakota court awarded custody to the father).

67. *Id.* at 310.

68. *Id.*

69. *Id.* at 312.

70. *McDougald v. Jenson*, 786 F.2d 1465, 1475 (11th Cir. 1986) (holding that "an action seeking an authoritative federal construction of section 1738A to resolve a conflict concerning the validity of conflicting state court custody orders may be maintained in federal district court"); *Heartfield v. Heartfield*, 749 F.2d 1138, 1141 (5th Cir. 1985). In *Heartfield*, the court determined: "When the courts of two states assert that they have jurisdiction over a custody determination, it is clear that Congress' purpose in enacting the Act would be thwarted without some means of determining which state has the right to exercise its jurisdiction under the terms of the Act." *Id.*

71. See *supra* note 66. It should be noted that *Lloyd* did not involve conflicting state decrees, but rather a custody decree in favor of the father issued in Maryland which he sought to enforce in Wisconsin. *Lloyd v. Loeffler*, 694 F.2d at 489, 490 (7th Cir. 1982).

mestic relations as the state courts, which have traditionally exercised exclusive jurisdiction over such matters.<sup>72</sup> Second, the legislative history of the PKPA suggests that "Congress deliberately and emphatically omitted such a role."<sup>73</sup> Therefore, if Congress had intended the federal courts to address conflicting custody decrees, it would have expressly stated this intent.

### III. THOMPSON V. THOMPSON

#### A. Facts of the Case

In July 1978, respondent (Susan Thompson) filed for a divorce from petitioner (David Thompson) in Los Angeles Superior Court. She also sought to obtain custody of their son Matthew.<sup>74</sup> The Thompsons were initially awarded joint custody of Matthew.<sup>75</sup> In November of 1980, Susan, planning a move to Louisiana, was awarded sole custody of the child without prejudice.<sup>76</sup> The court also ordered an investigator to review the custody issues of the case.<sup>77</sup> Susan moved to Louisiana in December 1980; in March 1981, she sought to enforce the California custody decree in a Louisiana state court and obtain a modification of David's visitation privileges.<sup>78</sup> Her petition was granted in Louisiana in April 1981.<sup>79</sup> Meanwhile, after reviewing the report of the court investigator, the California court retained jurisdiction over the matter and awarded sole custody to the boy's father in June 1981.<sup>80</sup>

In August 1981, David filed a complaint in the United States District Court for the Central District of California in which he sought an injunction against the Louisiana decree and a declaratory judgment that the California decree was valid.<sup>81</sup> The district court dismissed the complaint for lack of subject matter and personal

---

72. *Id.* at 492; see also *Bennett v. Bennett*, 682 F.2d 1039, 1042-43 (D.C. Cir. 1982).

73. *Bennett*, 682 F.2d at 1043.

74. *Thompson v. Thompson*, 108 S. Ct. 513, 515 (1988).

75. *Id.*

76. *Thompson v. Thompson*, 798 F.2d 1547, 1548-49 (9th Cir. 1986), *aff'd*, 108 S. Ct. 513 (1988). It is not clear from the record who actually filed this motion in the California court. *Id.* at 1548 n.1.

77. *Id.* at 1549. This report was to be submitted by April 1981.

78. *Id.*

79. *Id.*

80. *Id.* Since California retained jurisdiction over the matter, and David still lived in California, the California court's jurisdiction *continued* pursuant to section (d) of the PKPA, and thus Louisiana *improperly* modified the custody arrangement under section (f). Furthermore, since the California court's final determination may have been construed to be pending until the investigator's report, Louisiana also improperly exercised jurisdiction over the matter under section (g). See *supra* notes 60-62 and accompanying text.

81. *Thompson v. Thompson*, 798 F.2d 1547, 1549 (9th Cir. 1986), *aff'd*, 108 S. Ct. 513 (1988).

jurisdiction.<sup>82</sup> David appealed the dismissal to the United States Court of Appeals for the Ninth Circuit.<sup>83</sup> The court found that the district court erred in dismissing the case for lack of jurisdiction<sup>84</sup> because Susan had the requisite minimum contacts with California to establish personal jurisdiction.<sup>85</sup> Furthermore, the court determined that the case raised a sufficient federal question so as to confer subject matter jurisdiction.<sup>86</sup>

After determining that the PKPA did apply to the case, the court addressed whether a claim was stated upon which relief could be granted.<sup>87</sup> The court examined the language, legislative history, and context of the PKPA and concluded that Congress did not intend to create a federal cause of action to enforce the Act's terms.<sup>88</sup> The Ninth Circuit stated that "the problem identified by Congress was not the absence of a federal cause of action, but lack of uniform standards governing assertion of jurisdiction over child custody matters by state courts."<sup>89</sup> According to the court, Congress had rejected a proposal for enforcement of the PKPA in a federal forum.<sup>90</sup> The court of appeals, in conclusion, stated that "[a]bsent a clear command from Congress, the longstanding prohibition against federal court in-

82. *Id.*

83. *Thompson v. Thompson*, 798 F.2d 1547 (9th Cir. 1986), *aff'd*, 108 S. Ct. 513 (1988).

84. *Id.* at 1549-50.

85. *Id.* Susan's marital domicile and dissolution of the marriage took place in California; Matthew was born in California, and the custody order was a California judgment. Furthermore, "she invoked the benefits and protections afforded by California law by initiating an action for dissolution and child custody." *Id.* at 1549.

86. *Id.* at 1550. The court stated that the failure to state a claim upon which relief can be granted is not the same as dismissing the case for lack of subject matter jurisdiction; the former is an adjudication on the merits whereas the latter is not. *Id.*

87. *Id.* at 1550-51. The major issue with regard to whether the PKPA applied to the present case depended on what date the Act became effective. The court concluded that the enactment date, December 28, 1980, was the date on which section 1738A became effective, and therefore was applicable to the conflicting Louisiana and California decrees which were entered after that date. *Id.*

88. *Id.* at 1552-54.

89. *Id.* at 1554.

90. *Id.* at 1557-58. The court argued that the "colloquy" between Congressmen Fish and Conyers demonstrated that Congress did address the issue of enforcement of this Act in the federal courts but actually favored leaving the enforcement of this full faith and credit proposal with regard to child custody cases to the states. *Id.* As the dissenting opinion pointed out, however, this colloquy "reflects an intent by Congress not to eliminate the judicially created 'domestic relations' exception to diversity jurisdiction by enacting 1738A. Specifically, Congressman Fish proposed to amend 28 U.S.C. § 1332 to authorize diversity jurisdiction in custody cases and to eliminate the \$10,000 minimum amount in controversy requirement." *Id.* at 1560 (Alarcon, J., concurring in part and dissenting in part).

volvement in such matters should not be disregarded.”<sup>91</sup> Therefore, although disagreeing with the district court’s rationale in dismissing the case for lack of jurisdiction, the court of appeals affirmed the dismissal for failure to state a cause of action upon which relief could be granted.

### B. Supreme Court Opinion

The Supreme Court granted certiorari to address the issue of whether the PKPA “furnishes an implied cause of action in federal court to determine which of two conflicting state custody decisions is valid.”<sup>92</sup> In a unanimous decision, with concurrences by Justices O’Connor and Scalia, the Court affirmed the holding of the court of appeals.<sup>93</sup>

After setting forth the relevant provisions of the PKPA and the facts of the case, the Court addressed whether a federal cause of action could be inferred from the Act.<sup>94</sup> The Court stated that the main inquiry must be whether Congress intended to create an implied federal cause of action.<sup>95</sup> To ascertain intent, the majority relied on the “four factors set out in *Cort v. Ash*”<sup>96</sup> . . . along with other tools of statutory construction.”<sup>97</sup>

Although the Court acknowledged the applicability of the *Cort* test, it never expressly enumerated the four factors, nor did it explain how *Cort* has been modified by later decisions. In *Cort*, the majority listed four inquiries requisite to determining if an implied private remedy is available under a federal statute:

First, . . . does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? . . . And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?<sup>98</sup>

These four factors have been interpreted as merely relevant in deter-

---

91. *Id.* at 1559.

92. *Thompson v. Thompson*, 108 S. Ct. 513, 514 (1988). Justice Marshall delivered the opinion of the Court. Conspicuously absent from the Court’s opinion is the acknowledgment that the circuits were split with regard to this issue.

93. *Id.* at 516.

94. *Id.* at 514-16. The Court did note that “the legislative scheme suggests, and as Congress explicitly specified, one of the chief purposes of the PKPA is to ‘avoid jurisdictional competition and conflict between State courts.’” *Id.* at 515.

95. *Id.* at 516.

96. 422 U.S. 66, 78 (1975).

97. *Thompson*, 108 S. Ct. at 516. Although the court of appeals did not specify it was using a *Cort* analysis, the format of the Supreme Court’s opinion follows that set up by the court of appeals. See *Thompson v. Thompson*, 798 F.2d 1547, 1552-58 (9th Cir. 1986), *aff’d*, 108 S. Ct. 513 (1988).

98. *Cort v. Ash*, 422 U.S. 66, 78 (1975) (citations omitted) (holding that a stockholder’s derivative suit cannot be implied in the federal courts under 18 U.S.C. § 610).

mining whether a private remedy should be implied, with the central inquiry being "whether Congress intended to create, either expressly or by implication, a private cause of action."<sup>99</sup> Furthermore, the other "three factors discussed in *Cort*—the language and focus of the statute, its legislative history, and its purpose . . . are ones traditionally relied upon in determining legislative intent."<sup>100</sup> Nevertheless, the four factors of *Cort* still remain the "criteria through which [legislative] intent could be discerned,"<sup>101</sup> even if the main inquiry is whether Congress *intended* to create such a cause of action.<sup>102</sup> Based on *Cort* and its progeny, Justice Marshall acknowledged that the intent of Congress to create a cause of action, absent specific language, must be inferred.<sup>103</sup>

The Court first examined the "context of the PKPA with an eye toward determining Congress' perception of the law that it was shaping or reshaping."<sup>104</sup> Even though the Court did not determine whether child "custody orders were sufficiently 'final' to trigger full faith and credit requirements,"<sup>105</sup> it did note that the Full Faith and Credit Clause only requires states to give the same effect to judgments of other states as would be given in the state which entered the decree.<sup>106</sup> Thus, a child custody award could be modified by any state because the state which entered the decree retained that right.

---

99. *Touche Ross & Co. v. Redington*, 442 U.S. 560, 575 (1979) (holding no implied private cause of action available under section 12(a) of the Securities Exchange Act of 1934).

100. *Id.* at 575-76.

101. *Davis v. Passman*, 442 U.S. 228, 241 (1979) (holding an implied cause of action in the federal courts is not created under the Constitution when a violation of the due process clause of the fifth amendment is alleged).

102. See *California v. Sierra Club*, 451 U.S. 287 (1981) (private action not implied by violation of section 10 of the Rivers and Harbors Appropriation Act of 1899); see also *Daily Income Fund, Inc. v. Fox*, 464 U.S. 523 (1983).

[O]ur focus must be on the intent of Congress when it enacted the statute in question . . . That intent may in turn be discerned by examining a number of factors, including the legislative history and purposes of the statute, the identity of the class for whose particular benefit the statute was passed, the existence of express statutory remedies adequate to serve the legislative purpose, and the traditional role of the States in affording the relief claimed.

464 U.S. at 536.

103. *Thompson v. Thompson*, 108 S. Ct. 513, 516 (1988); see *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979). "Such an intent may appear implicitly in the language or structure of the statute, or in the circumstances of its enactment." *Id.*

104. *Thompson*, 108 S. Ct. at 516.

105. *Id.* Thus, the Court acted in accordance with the prior cases of *Halvey*, *Kovacs* and *Ford* in refraining from making a determination of the applicability of the Full Faith and Credit Clause to custody cases. See *supra* notes 18-23 and accompanying text.

106. *Thompson*, 108 S. Ct. at 517. See *supra* notes 18-26 and accompanying text.



As a result, many parents who lost in one state were “rewarded” for snatching the child by being able to relitigate the claim in another forum.<sup>107</sup> Justice Marshall, after outlining the unique problems involved in child custody cases, glossed over the ineffectiveness of the UCCJA in providing an adequate solution. Indeed, the failure of the UCCJA led to the enactment of the PKPA.<sup>108</sup>

The Court concluded that the context of the PKPA “suggests that the principal problem Congress was seeking to remedy was the inapplicability of full faith and credit requirements to custody determinations.”<sup>109</sup> The Full Faith and Credit Clause does not create an implied federal cause of action but, rather, demarcates the extent to which one state is to be guided by another state’s acts, records, and judicial proceedings.<sup>110</sup> The purpose and context of the PKPA therefore does not imply a cause of action “[b]ecause Congress’ chief aim in enacting the PKPA was to extend the requirements of the Full Faith and Credit Clause to custody determinations . . . .”<sup>111</sup>

Justice Marshall then turned to the language and placement of the statute. Because the PKPA was an addendum to the full faith and credit statute,<sup>112</sup> the intent of Congress in enacting the PKPA must have been that it should have the same effect as that statute.<sup>113</sup> Furthermore, the language of the Act is expressly directed toward the states, without mentioning the role of the federal government.<sup>114</sup> Thus, due to these factors, the Court could not infer a cause of action.<sup>115</sup>

Finally, Justice Marshall looked at two passages in the legislative

---

107. *Thompson*, 108 S. Ct. at 517.

108. *Id.* While the majority did state that “[t]he UCCJA prescribed uniform standards for deciding which State could make a custody determination and obligated enacting States to enforce the determination made by the State with proper jurisdiction,” the Court failed to discuss the relevant provisions of the UCCJA after which much of the PKPA is patterned. *Id.* See *supra* notes 24-48 and accompanying text.

109. *Thompson*, 108 S. Ct. at 517. The Full Faith and Credit Clause:

only prescribes a rule by which courts, Federal and state, are to be guided when a question arises in the progress of a pending suit as to the faith and credit to be given by the court to the public acts, records, and judicial proceedings of a state other than that in which the court is sitting.

*Minnesota v. Northern Securities Co.*, 194 U.S. 48, 72 (1904).

110. *Thompson*, 108 S. Ct. at 518.

111. *Id.*

112. 28 U.S.C. § 1738 (1982).

113. *Thompson*, 108 S. Ct. at 518. Congress’s intent to create merely a full faith and credit obligation can be inferred from the placement of the statute after the full faith and credit statute as an addendum. In fact, the heading of the PKPA is “Full faith and credit given to child custody determinations.” 28 U.S.C. § 1738A (1982).

114. Section 1738A(a) of the PKPA states: “The appropriate authorities of every State shall enforce according to its terms . . . any child custody determination made consistently with the provisions of this section by a court of another State.” 28 U.S.C. § 1738A(a) (1982). Furthermore, the PKPA contains repeated references to the states.

115. *Thompson*, 108 S. Ct. at 518.

history which he believed provided unusually conclusive evidence that Congress did not intend the PKPA to be enforced in the federal courts.<sup>116</sup> These passages involve the exchange between Congressmen Fish and Conyers, which the court of appeals examined,<sup>117</sup> and a letter from Assistant Attorney General Patricia Wald to the Chairman of the House Judiciary Committee.<sup>118</sup> Based on these two pieces of legislative history, the Court concluded that the enforcement of the provisions of the PKPA in federal court was rejected in favor of a full faith and credit approach to be exercised by the states.<sup>119</sup>

The Court also addressed petitioner's argument that he was only seeking a federal court determination as to which of two conflicting states has exclusive jurisdiction over the matter.<sup>120</sup> Petitioner argued that the federal courts did not have to reach a decision on the merits of the case.<sup>121</sup> In a footnote, Justice Marshall rejected this argument because determining jurisdiction under the PKPA could require the resolution of a substantive issue.<sup>122</sup>

Therefore, the Court affirmed the appellate court's decision because the "context, language, and history of the PKPA together make out a conclusive case against inferring a cause of action in federal court to determine which of two conflicting state custody decrees is valid."<sup>123</sup> Thus, the Supreme Court concluded that while the Full Faith and Credit Clause has been extended to encompass child cus-

---

116. *Id.*

117. *Thompson v. Thompson*, 798 F.2d 1547, 1557-58 (9th Cir. 1986), *aff'd*, 108 S. Ct. 513 (1988). See *supra* note 92. The Supreme Court argued that even though Congressman Fish wanted to create an exception for the \$10,000 diversity requirement, the *policies* that were enunciated in the "colloquy" equally applied to the argument that Congress did not intend the federal courts to enforce the PKPA. *Thompson*, 108 S. Ct. at 519.

118. The Wald letter specified a number of paths Congress could take to solve the problem of parental child snatching, including enforcement in a federal forum and the full faith and credit approach which was subsequently codified. See *PKPA Addendum*, *supra* note 23.

119. *Thompson*, 108 S. Ct. at 519-20.

120. *Id.* at 519. Petitioner thus did not ask the Court to determine whether one state acted in compliance with the Act's jurisdictional requirements when no other state asserted concurrent jurisdiction over the matter, and therefore there was no conflict.

121. *Id.* at 520 n.4.

122. *Id.* "Under the Act, jurisdiction can turn on the child's 'best interest' or on proof that the child has been abandoned or abused." *Id.* Marshall fails to acknowledge, however, that "if two states concurrently render custody decrees, one state has asserted jurisdiction in violation of federal law [and that] [i]dentifying that errant state under § 1738A requires only preliminary inquiry into jurisdictional facts." *Flood v. Braaten*, 727 F.2d 303, 310 (3d Cir. 1984).

123. *Thompson*, 108 S. Ct. at 520.

tody cases, it is up to the states *sua sponte* to enforce the provisions of the PKPA. Finally, it noted that if Congress wanted to create a cause of action in the federal courts, then it could do so expressly.<sup>124</sup>

### C. Justice Scalia's Concurring Opinion

Justice Scalia in the first part of his concurring opinion, joined by Justice O'Connor, pointed out several flaws in the Court's analysis. First, he disagreed with the Court's statement that members of Congress need not actually have in mind the creation of a private cause of action in order for there to exist evidence of intent.<sup>125</sup> Scalia believed that intent meant "that Congress had in mind the creation of a private right of action."<sup>126</sup> Scalia also believed that the Court's reliance on *Cort* was misplaced since later cases have converted "one of its four factors (congressional intent) into the *determinative factor*, with the other three merely indicative of its presence or absence."<sup>127</sup> Even though Scalia argued that *Cort* was overruled by later cases,<sup>128</sup> he misread those later decisions. While the focus of the Court may be on intent, the factors enunciated in *Cort* are still indicative of that intent.<sup>129</sup> As such, *Cort* has not been overruled, but has merely been limited.

Justice Scalia further argued that "the 'context' of the enactment is immaterial."<sup>130</sup> Context has been relevant in the past only when the statutory language is similar to or the same as the prior legislation.<sup>131</sup> Yet, Scalia ignores the fact that "context" may be relevant in order to interpret legislative purpose and history, especially in the present case since the PKPA is based on the UCCJA. Thus, while context alone will not suffice, it is not accurate to say context is immaterial.

---

124. *Id.*

125. *Id.* at 520-21 (Scalia, J., concurring). The Court made the following statement with which Scalia disagrees: "Our focus on congressional intent does not mean that we require evidence that members of Congress, in enacting the statute, actually had in mind the creation of a private cause of action." *Id.* at 521 (Scalia, J., concurring).

126. *Id.* at 521 (Scalia, J., concurring).

127. *Id.* (Scalia, J., concurring).

128. *Id.* (Scalia, J., concurring); *see also* *Touche Ross & Co. v. Reddington*, 442 U.S. 560, 575-76 (1979); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 18 (1979).

129. *See supra* notes 100-105 and accompanying text.

130. *Thompson*, 108 S. Ct. at 521 (Scalia, J., concurring).

131. *Id.* (Scalia, J., concurring); *see also* *Merrill Lynch v. Curran*, 456 U.S. 353, 353-54 (1982) (indicating a party may maintain an action for damages caused by a violation of the Commodity Exchange Act since the 1974 amendment left intact the provisions under which the federal courts had an implied cause of action); *Cannon v. University of Chicago*, 441 U.S. 677, 694-703 (1979). In *Cannon*, the Court held that a suit can be maintained under Title 18 of the Education Amendments of 1972, absent express authorization, since the Act was patterned after Title VI of the Civil Rights Act of 1964 and was assumed to be interpreted in the same manner. *Id.*

A point of emphasis with which Justice Scalia concluded the first part of his concurrence is the fact that implied federal causes of action are very difficult to establish.<sup>132</sup> He thus pointed out "that the congressional intent test for implying private rights of action as it has evolved since . . . *Cort v. Ash* is much more stringent than the Court's dicta in the present case suggest."<sup>133</sup>

In the second part of his concurrence, Scalia argues, as a matter of policy, that the judiciary should not imply federal causes of action.<sup>134</sup> The process by which a bill becomes law, although not free from errors, gives the lawmakers a sufficient opportunity to decide whether or not a federal cause of action should be part of the law. If the judiciary examines "intent," it assumes that all those engaged in lawmaking have the same intent. This increases the risk that the judges might be influenced by their own personal beliefs.<sup>135</sup> Out of fear of hindering the constitutionally mandated process for enacting laws, Scalia believes that "a flat rule that private rights of action will not be implied in statutes"<sup>136</sup> should be adopted by the Court.

#### IV. IMPACT

In *Thompson*, the Court properly held that the provisions of the PKPA cannot be enforced in the federal courts when two states exercise concurrent jurisdiction. As the Court points out, the context, language, and history of the PKPA suggest that Congress intended to extend only the full faith and credit statute.<sup>137</sup> Congress merely wanted to remedy the historical problems encountered in child custody matters by creating a federal obligation upon the states to recognize, enforce and give deference to child custody decrees entered by another state. Therefore, the court of appeals noted that since no court has held "the Full Faith and Credit Clause or its implementing statute, section 1738, authorized private suit in federal district court to require a state court to give full faith and credit to the judgment of

---

132. *Thompson*, 108 S. Ct. at 521-22 (Scalia, J., concurring). "In the 23 years since Justice Clark's opinion for the court in *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964), we have *twice* narrowed the test for implying a private right . . ." *Id.* at 522 (Scalia, J., concurring) (emphasis in original).

133. *Id.* at 522 (Scalia, J., concurring).

134. *Id.* (Scalia, J., concurring). "[A]s the likelihood that Congress would leave the matter to implication decreases, so does the justification for bearing the risk of distorting the constitutional process." *Id.* at 523 (Scalia, J., concurring).

135. *Id.* at 522 (Scalia, J., concurring).

136. *Id.* (Scalia, J., concurring).

137. See *supra* notes 106-121 and accompanying text.

a court of another state,"<sup>138</sup> then the PKPA, as an extension of the full faith and credit obligation to the unique circumstances of child custody cases, should not be construed to require more.<sup>139</sup>

The broader question, though, is whether the effectiveness of the PKPA is limited by not inferring such a cause of action in the federal courts. Even though a situation might arise, such as in *Thompson*, where one state assumes jurisdiction improperly under the PKPA,<sup>140</sup> the Court did note that "ultimate review remains available in this Court for truly intractable jurisdictional deadlocks."<sup>141</sup> In other words, "[i]f a state court refuses to honor the decision of a court of another state, review may ultimately be sought in the Supreme Court since a federal question is raised: the meaning of the Full Faith and Credit Clause . . . ."<sup>142</sup>

The reason the Court in *Thompson* did not invoke this type of review is that the petitioner did not exhaust all avenues of relief in the state courts. That is, he sought "to have a California District Court enjoin enforcement of a Louisiana state-court judgment before the intermediate and supreme courts of Louisiana even have had an opportunity to review that judgment."<sup>143</sup> Thus, if petitioner had appealed the judgment through the Louisiana state court system, without success, he could have appealed to the Supreme Court.

To argue, as petitioner did, that not allowing the PKPA to be enforced in the federal courts would destroy its effectiveness places little faith in the state court systems. The Court in *Thompson* notes that "[s]tate courts faithfully administer the Full Faith and Credit Clause every day; now that Congress has extended full faith and credit requirements to child custody orders . . . [there is] no reason why the courts' administration of federal law in custody disputes will be any less vigilant."<sup>144</sup> Despite the historical problems associated

---

138. *Thompson v. Thompson*, 798 F.2d 1547, 1555-56 (9th Cir. 1986), *aff'd*, 108 S. Ct. 513 (1988).

139. *Id.* at 1556.

It seems highly unlikely Congress would follow the pattern of the Full Faith and Credit Clause and section 1738 by structuring section 1738A as a command to state courts to give full faith and credit to the child custody decrees of other states, and yet, without comment, depart from the enforcement practice followed under the Clause and section 1738.

*Id.*

140. *See supra* note 63 and accompanying text.

141. *Thompson v. Thompson*, 108 S. Ct. 513, 520 (1988).

142. *Thompson*, 798 F.2d at 1556 n.15. In *Flood*, the court suggests that this approach may be impractical due to the lack of time and resources of the modern-day Supreme Court. *Flood v. Braaten*, 727 F.2d 303, 312 (3d Cir. 1984).

143. *Thompson*, 108 S. Ct. at 520 n.5; *accord Flood*, 727 F.2d at 312. "Litigants who have exhausted their state remedies could appeal directly to the United States Supreme Court from the state supreme court that they contend has violated § 1738A."

*Id.*

144. *Thompson*, 108 S. Ct. at 520. The Court fails to acknowledge the argument

with according full faith and credit to child custody decrees, Congress extended that obligation into this area and provided that another state cannot exercise concurrent jurisdiction. The states, assuming that the decree-entering state maintains jurisdiction pursuant to the Act, must accord the same faith and credit to child custody cases as they would under any other type of matter.

Yet, if the state courts do not adhere to the PKPA, Congress may then choose to revisit the issue.<sup>145</sup> In other words, if the PKPA does not appear to be a satisfactory solution to the problem of conflicting custody decrees, it is the legislature's function to supply a new course of action. The Supreme Court does not wish to engage in judicial legislation.<sup>146</sup> "Congress alone has the responsibility for determining the jurisdiction of the lower federal courts. . . . When Congress chooses not to provide a private civil remedy, federal courts should not assume the legislative role of creating such a remedy and thereby enlarge their jurisdiction."<sup>147</sup> Absent clear and convincing evidence that Congress intended to create a federal cause of action, the Court will not imply one.

The present Court, however, is not prepared to adopt Justice Scalia's position that a federal cause of action will be implied only if Congress expressly provides for such an action. The Court, in *Thompson*, expressed its willingness to examine the context, language and legislative history of a statute to determine whether Congress intended the federal courts to be an available forum. If the intent can be inferred from all the surrounding circumstances, the Court may "imply" this type of action.

Justice Scalia's argument is not without merit. It is hard to believe that a law could emerge from the cumbersome legislative process without including such a vital provision as whether the federal courts are available to enforce the law's provisions.<sup>148</sup> Furthermore, since

---

that the purposes of the PKPA would be destroyed if the federal courts are not allowed to resolve the disputes which might arise between the states. This was the underlying rationale of the Eleventh, Fifth and Third Circuits. See *supra* notes 67-71 and accompanying text.

145. See *California v. Sierra Club*, 451 U.S. 287, 297 (1981) (indicating Court "will not engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide").

146. *Cannon v. University of Chicago*, 441 U.S. 677, 730-31 (Powell, J., dissenting).

147. *Id.* See *supra* note 133.

148. *Thompson*, 108 S. Ct. at 523 (Scalia, J., concurring). Justice Scalia commented, "A legislative act so significant, and so separable from the remainder of the statute, as the creation of a private right of action seems to me so implausibly left to implication that the risk should not be endured." *Id.* (Scalia, J., concurring).

the Court has affirmatively stated its reluctance to imply causes of action, Congress is likely to expressly include such a provision when it intends to create a federal cause of action.<sup>149</sup>

If the PKPA proves to be unworkable by states' unwillingness to substantially adhere to the Act, Congress will have to reexamine the problem. However, the legislative solution must not go beyond that which is necessary. Thus, it would be unnecessary for the federal courts to be granted jurisdiction in order to render a custody decision on the merits in the first instance. Congress would only have to provide the federal courts with jurisdiction to determine "whether a state has improperly taken jurisdiction under § 1738A [and] need not implicate a federal court in questions of 'changed circumstances' and modifiability."<sup>150</sup> Until such time as the PKPA does not resolve the jurisdictional dilemma of child custody cases, the federal government would be best advised to abstain from the matter in order to give the states an opportunity to successfully interpret and apply the PKPA in a manner consistent with its provisions.

#### V. CONCLUSION

The PKPA was created to remedy the unique jurisdictional problems encountered in child custody cases. Congress, by implementing this statute, intended to impose a federal duty on the state to not exercise concurrent jurisdiction over child custody cases and to recognize the child custody awards of another jurisdiction. The PKPA is not a statute which was written to confer jurisdiction on the federal courts; rather, it was written to establish uniform standards for determining which state has jurisdiction over a child custody case and to eliminate the historical problem of forum shopping by a parent seeking to obtain a favorable judgment. Hopefully, the parents and states involved will consider the "best interests" of the child, and will not require Congress to revisit the issue in the future.

STEVEN M. SCHUETZE

---

149. *Id.* (Scalia, J., concurring).

150. *Flood v. Braaten*, 727 F.2d 303, 310 (3d Cir. 1984).