

# The Uniform Child-Custody Jurisdiction and Enforcement Act: Affording Enhanced Protection for Victims of Domestic Violence and Their Children

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Legislatures around the nation soon will have the opportunity to decide, if they have not already decided, whether to adopt the new Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) as replacement for their states' enactment of the old Uniform Child Custody Jurisdiction Act (UCCJA). For a number of reasons, the UCCJEA is superior, especially in the protections that it affords victims of domestic violence and their children.

## **Background on Uniform Orders Pertaining to Child Custody**

Before 1968, no uniform laws existed concerning jurisdiction of child custody issues involving more than one state. As a result, multiple contrary rulings on the same facts involving the same parties were common, as were races to the courthouse and forum shopping. In that year, and because of these problems, the National Conference of Commissioners on Uniform State Laws pro-

mulgated the UCCJA, and all fifty states, the District of Columbia, and the Virgin Islands in due course adopted it with few variations.

Although the UCCJA partially solved the problems that it had been designed to address, it did not entirely take care of conflicts; and its effectiveness lessened over the years with the enactment of subsequent federal legislation. One of the problems with the UCCJA is that its goals were mutually incompatible.<sup>1</sup> It sought first to prevent parental kidnapping of children by attempting to provide clear rules of jurisdiction and enforcement; and second to provide that the forum which decided the custody determination would be the forum which could make the most informed decision. Because the court having jurisdiction under the UCCJA was not always the court able to make the most informed decision, courts divided doctrinally as they accorded primacy to one or the other of the goals.<sup>2</sup>

A second problem of the UCCJA is that it established four bases of jurisdiction and did not prioritize them. On occasion therefore, multiple courts were able to demonstrate jurisdiction over the same case and reached incon-

<sup>1</sup> *Uniform Child-Custody Jurisdiction and Enforcement Act*, 32 FAM. L.Q. 306 n.5 (with prefatory note and comment by Robert G. Spector).

<sup>2</sup> *Id.*

sistent results. For instance, one state might qualify as the home state because the child had lived there for the six months immediately prior to the filing; another might qualify as a state with significant contacts in that the same child had lived there for years and maintained strong social, family, school, church, counseling, and other contacts there.

A third problem with the UCCJA is its inconsistency with the subsequently passed Parental Kidnapping Prevention Act (PKPA), 28 U.S.C. § 1738A, and with the full-faith-and-credit requirements of the Violence Against Women Act (VAWA), 18 U.S.C. § 2265, which were enacted by Congress in 1980 and 1994, respectively. The PKPA accords full faith and credit to the custody determinations of other jurisdictions made in conformity with the PKPA itself, that is, which give priority to home state jurisdiction. Inconsistencies in the interpretation of the UCCJA, with its multiple bases for jurisdiction, and the PKPA over the years reduced the uniformity that the UCCJA was intended to achieve.<sup>3</sup>

To complicate matters even further, the PKPA accords full faith and credit only to those custody decisions made after notice and a reasonable opportunity to be heard. The VAWA, by contrast, accords full faith and credit to ex parte order provisions where there will be notice and a reasonable opportunity to be heard. Moreover, it expressly excludes custody orders from its definition of protective order.<sup>4</sup> Victims of domestic violence frequently receive ex parte protective orders, which also grant temporary custody of the children. The PKPA and the VAWA, taken together, produce the result that, while the protection order provisions of such an order merit full faith and credit should a victim then flee with the chil-

dren across state lines, the custody provisions of the same order do not, unless the court interprets those as safety provisions rather than as pure custody rulings. The UCCJA is of no help in reconciling these results.

As a result of the thirty years' worth of deteriorating uniformity under the UCCJA, the National Conference of Commissioners on Uniform State Laws undertook in 1994 to draft a replacement act for the UCCJA, a replacement act which it hoped would resolve these inconsistencies.<sup>5</sup> Although the new act, the UCCJEA, is not the perfect solution, it does recognize at least tacitly what the UCCJA did not, that most of the time when interstate custody disputes arise, domestic violence is at the root of the trouble; and it does offer a number of tools which, used effectively, drastically enhance protections for such victims and their children.

### Specific Improvements in the UCCJEA

In a number of ways the UCCJEA affords both better protection for victims of domestic violence and their children and better protection for the due process rights of all parties than did its predecessor. Sections 108 and 109, for example, serve both goals. The former allows notice to persons outside the state by any method allowed by either of the states involved, the one issuing the notice or the one where notice is received. Thus the party to be served is more likely than previously to get actual notice of the proceeding. For the battered woman, this should prove to be an improvement over the typical situation where she takes the children and flees to the refuge state for safety; the abuser files in the home state for an award of custody; the victim, with no actual notice, fails to appear; the court awards custody to the abuser; and the

<sup>3</sup> Patricia M. Hoff, *The ABCs of the UCCJEA*, 32 FAM. L.Q. 275–76 (1998).

<sup>4</sup> 18 U.S.C. § 2266.

<sup>5</sup> National Conference of Commissioners on Uniform State Laws, *Uniform Child-Custody Jurisdiction and Enforcement Act with Prefatory Note and Comments* 3.

victim then discovers that she is in peril of federal kidnapping charges.<sup>6</sup>

The second of these sections, 109, allows a person not subject to a court's personal jurisdiction to make a special appearance in a custody proceeding or an enforcement action without subjecting oneself to the general jurisdiction of the court. While this provision safeguards the due process rights of all parties, in the case of the domestic violence victim, it is likely to be especially helpful where the abuser takes the children, flees with them in an attempt to coerce the victim back into his control, and files for custody in the new state. If the victim chooses to engage in the custody contest in that court she may do so without according that court jurisdiction over the other aspects of the case, a divorce proceeding, for example.

### **New Protections for Victims of Domestic Violence**

Other sections of the UCCJEA especially protective of the safety of battered women and their children follow:

- Section 204, the temporary emergency jurisdiction section, offers three major improvements over the emergency jurisdiction afforded in the UCCJA. First, unlike the UCCJA, which gave a court emergency jurisdiction only if a child were in need, this new provision accords a court emergency jurisdiction if a child, a sibling, or a parent is threatened with or subjected to mistreatment or abuse. Second, an order entered by a court having emergency jurisdiction becomes a final order if it so provides, no other order has been entered or proceeding started in another court, and the state becomes the child's home state. This section empowers the court having emergency jurisdiction to take evidence in each case and make a determination, based upon the victim's needs and the limitations imposed by the docket of the home state court, of how long the order should remain in effect. The aim is to afford the

victim, given her personal circumstances, a reasonable opportunity to file for a permanent order in the court which would have original jurisdiction and to avoid placing her in the predicament where her emergency order expires before her case can be docketed in the home state. Because, in a typical case, a victim fleeing for safety with the children has few if any financial resources, especially shortly after her flight, and generally is coping with the inconveniences and expenses of relocating—finding housing for herself and the children, arranging for employment and transportation, getting the children enrolled in school, and so forth—this power of the court to enter an order good for a length of time tailored to her needs is especially helpful.

- Section 207, the inconvenient forum section, establishes the circumstances under which the home state court may decline to take jurisdiction because it constitutes an inconvenient forum. In performing an inconvenient-forum assessment, the court is to take into account all relevant factors, including eight enumerated ones. Numbers two through eight are standard jurisdictional factors such as the length of time the child has been gone from the state, the distance of the parties from the court, and so forth. With number one, however, a new factor is whether domestic violence has occurred and is likely to continue and which court can best protect the parties and child.

- Section 208 is the section under which a court may decline jurisdiction by reason of the conduct of the petitioner, the so-called unclean hands doctrine. The language instructs the court to decline jurisdiction if the person seeking to invoke it has engaged in unjustifiable conduct. The provision specifically exempts cases brought under section 204 emergency jurisdiction and calls for deference to those state statutes which provide that a victim fleeing domestic violence shall, as a matter of law, be deemed not to have

<sup>6</sup> I recognize that not all victims of domestic violence are women in heterosexual relationships. However, since the vast majority of them are, in this article I refer to such victims as battered women and to abusers as men. The Uniform Child Custody Jurisdiction and Enforcement Act itself is gender-neutral in both terms and application.

engaged in unjustifiable conduct even if she is technically noncompliant with the terms of an existing order. The comments on this section explain further the intent of the section to exempt victims of domestic violence from application of the unclean hands doctrine.

■ Section 209 deals with information which is to be submitted to the court and how identifying information which would endanger the parties or child can be kept confidential. Salient features especially helpful to battered women are the requirement that the parties must inform the court of any proceedings in the past involving violence between them or relating in any way to the child and have an ongoing duty to inform of any additional such proceedings; and the provision that, upon the request of a party under sworn pleadings or an affidavit that disclosure would endanger a child or party, identifying information will be sealed unless ordered otherwise after a hearing in which the court takes into consideration the health, safety, or liberty of a child or party and determines that disclosure is in the interest of justice.

### **Additional Due Process Protections**

Sections 201 through 203 of the UCCJEA establish a framework of jurisdictional priorities designed to ensure that the court has personal jurisdiction over all parties. In that regard, it complies with the PKPA. Under the construct of these sections, home state jurisdiction is given priority; and home state is defined as the state where the child has been for at least six months before any proceeding is filed and where a parent or person acting as a parent continues to live (sec. 201). Exclusive continuing jurisdiction remains in the home state so long as the child or the child and a

parent or person acting as a parent continue to reside there and substantial evidence concerning the child's care, protection, training, and personal relations remain there. The home state court is the only court authorized to determine when it no longer has such jurisdiction unless neither the child nor any parent or persons acting as a parent remain there; once everyone has moved, any state may make the determination that the former home state no longer has jurisdiction (sec. 202). Jurisdiction to modify a determination remains with the home state exclusively so long as it has exclusive continuing jurisdiction except where emergency jurisdiction is invoked (sec. 203).

The UCCJEA further complies with the PKPA in its section 205 requirement that, in order for an order to be valid and merit full faith and credit, each party be given notice and opportunity to be heard. The comments on this section say that a temporary ex parte order may be enforceable, against due process objections, for a short period if issued as a temporary restraining order to protect a child from harm. Even if that is true, this statutory scheme leaves unresolved the predicament where a victim of domestic violence obtains an ex parte protection order which is valid under the VAWA and which contains as well temporary custody provisions. Such a victim still has an order enforceable in other jurisdictions as to certain of its provisions and not as to others. However, model state legislation cannot repair what will take an amendment of the federal PKPA to achieve: a domestic violence exception according full faith and credit to ex parte temporary custody provisions within protection orders, where there will be notice and a reasonable opportunity to be heard. . . .