

NOTES

A PROPOSAL TO END JURISDICTIONAL COMPETITION IN PARENT/NON-PARENT INTERSTATE CHILD CUSTODY CASES

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INTRODUCTION

Fortunately, the time has long past when children in our society were considered the property of their parents. Slowly, but finally, when it comes to children even the law has rid itself of the *Dred Scott* mentality that a human being can be considered a piece of property "belonging" to another human being. To hold that a child is the property of his parents is to deny the humanity of the child.¹

It would be a much simpler world if children were considered their parents' property without rights of their own. However, trends in the law and psychological studies within the past twenty-five to fifty years have increased the awareness that children have rights the law should protect and psychological needs that demand attention.²

In recent years, the volume of child custody disputes has increased dramatically.³ With the rise of divorce and single parenthood in American society, the number of traditional families, in which the father supports the mother and children, has substantially declined in the latter half of the twentieth century.⁴ Multiple marriages, domestic partnerships and other non-traditional arrangements inevitably lead to the development of family relationships between children and non-biological parents living in the same home.⁵ It is not surprising

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1. *In re John Doe*, 627 N.E.2d 648, 651-52 (Ill. App. Ct. 1993).

2. *See infra* subpart I.B. *See generally* JOSEPH GOLDSTEIN, ET AL., *BEYOND THE BEST INTERESTS OF THE CHILD* (new ed. with epilogue, 1979). This book was one of the most controversial and influential studies in the field of children's psychological needs. One of its notable contributions was support for the doctrine of "psychological parents." The authors argued that children have a strong need to preserve their relationship with their primary caretaker even if the caretaker is not a biological parent, and that disruption in this disposition can be very detrimental. *See, e.g., id.* at 40-42, 48-49, 79.

3. One definition of a child custody order is "a judgment, decree, or other order of a court providing for the custody or visitation of a child, and includes permanent and temporary orders, and initial orders and modifications." Parental Kidnapping Prevention Act of 1980, 28 U.S.C. § 1738A(b)(3) (1994).

4. *See* Rhonda R. Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 *HASTINGS L.J.* 799, 906 n.643 (1979).

5. *See generally* *People v. Hasse*, 291 N.Y.S.2d 53, 55 (1968) ("Family" commonly refers to parents

that these non-biological parental figures have sought custody of children with whom they have formed "parent-child" relationships.⁶ Whether the parties seeking custody are two biological parents, one parent and one non-parent, or two non-parents, it is rare that either contestant is clearly the better-suited care-giver.⁷ Rather, because of the parties' emotional attachments to the child in question, each party zealously attempts to persuade the court of his or her superior qualification as care-giver. Courts struggle to make dispositions, but emotional pain to the child usually results no matter what the decision.

Interstate custody disputes have traditionally created intractable jurisdictional dilemmas in two respects: in establishing which state has jurisdiction; and, once that is determined, in making a custody disposition.⁸ The uncertainty does not end there, however. Courts further grapple with the need to determine which jurisdiction may properly modify the first forum's decision.⁹ Often, a second forum asserts this authority.

Three factors combine to complicate interstate child custody disputes: child custody decrees are, by nature, often subject to modification when the child's circumstances change; the fifty states are co-equal sovereigns; and, interstate movement is extremely common.¹⁰ The Uniform Child Custody Jurisdiction Act (UCCJA),¹¹ adopted by all fifty jurisdictions

and children, "a group . . . constituting the fundamental social unit in a civilized society."); *Hartley v. Bohrer*, 11 P.2d 616, 618 (Idaho 1932) (Family is defined as a "collective body of persons who form one household, under one head . . . and who have reciprocal, natural or moral duties to support and care for one another."); *Collins v. Northwest Casualty Co.*, 39 P.2d 986, 989 (Wash. 1935) (Family "conveys the notion of some relationship, blood or otherwise.").

6. Partners of biological parents are not the only ones who seek custody. There are many other arrangements where third parties declare the right to sue for custody, such as relatives or friends with whom a biological parent has voluntarily placed the child (e.g., *Hoy v. Willis*, 398 A.2d 109 (N.J. Super. Ct. App. Div. 1978)), foster parents (e.g., *In re B.G.*, 523 P.2d 244 (Cal. 1974)), and prospective adoptive parents where the adoption fails (e.g., *DeBoer v. Schmidt*, 502 N.W.2d 649 (Mich. 1993), *stay denied sub nom. DeBoer v. DeBoer*, 114 S. Ct. 1 (1993), *stay denied*, 114 S. Ct. 11 (1993)).

7. In disputes between two parents or between two non-parents, the nearly universal standard is the "best interest interests of the child standard." Eric P. Salthe, Note, *Would Abolishing the Natural Parent Preference in Custody Disputes Be In Everyone's Best Interest?*, 29 J. FAM. L. 539, 539 (1990-1991). For a discussion of the split among jurisdictions over which standard to apply in parent/non-parent disputes, see *infra* subpart I.B.2.c.

8. "The United States Supreme Court has failed to remedy the jurisdictional problems that have arisen in child custody disputes, particularly in regard to the application of full faith and credit principles in such cases." Thomas Steele, *Lemley v. Barr: Who Gets Baby Ryan and Who Should Decide?*, 89 W. VA. L. REV. 415, 419 (1987). Although the Court has made known its availability for judicial resolution of jurisdictional disputes under the Parental Kidnapping Prevention Act, it has yet to actually do so. See *Thompson v. Thompson*, 484 U.S. 174, 187 (1988). See also *infra* note 12 and accompanying text.

9. Steele, *supra* note 8, at 419.

10. Roger M. Baron, *Federal Preemption in the Resolution of Child Custody Jurisdiction Disputes*, 45 ARK. L. REV. 885, 886 (1993).

11. UNIF. CHILD CUSTODY JURISDICTION ACT, 9 U.L.A. 123 (1968) [hereinafter UCCJA]. See *infra* subpart II.A. All fifty states and the District of Columbia have adopted versions of the UCCJA, with relatively little alteration to the Uniform Act. See ALA. CODE §§ 30-3-20 to -44 (1989); ALASKA STAT. §§ 25.30.010 to .910 (1991); ARIZ. REV. STAT. ANN. §§ 8-401 to -424 (1989 & Supp. 1991); ARK. CODE ANN. §§ 9-13-201 to -228 (Michie 1993); CAL. FAM. CODE §§ 3400-3425 (West 1994); COLO. REV. STAT. ANN. §§ 14-13-101 to -126 (West

within the last twenty-five to thirty years, and the federal Parental Kidnapping Prevention Act of 1980 (PKPA)¹² were enacted to create guidelines for establishing jurisdiction for and granting full faith and credit to interstate child custody disputes. They apply to almost every interstate custody case.¹³ Unfortunately, the Acts do not completely resolve the complicated jurisdictional problems that arise. The two driving policies of the Acts are to deter childsnatching and to promote children's best interests. However, these two policies cannot always be simultaneously accomplished.¹⁴

This Note focuses on jurisdictional uncertainty in child custody cases, which exists because states follow non-uniform interpretations of the Acts. Jurisdictional uncertainty is particularly prevalent in cases where one contestant is a non-parent: Non-uniform interpretation of the Acts is complicated by the difference in forums' law governing parent/non-parent custody disputes. This Note proposes that courts consider granting a best interests hearing, even if state law does not require it, in order to prevent other states from modifying a previous forum's decision on the basis of the first forum's refusal to adjudicate the child's best interests.

1989 & Supp. 1993); CONN. GEN. STAT. ANN. §§ 46b-90 to -114 (West 1986), DEL. CODE ANN. tit. 13, §§ 1901-1925 (1993); D.C. CODE ANN. §§ 16-4501 to -4524 (1989); FLA. ST. ANN. §§ 61.1302 to .1348 (West 1985); GA. CODE ANN. §§ 19-9-40 to -64 (1991); HAW. REV. STAT. §§ 583-1 to -26 (1993); IDAHO CODE §§ 32-1101 to -1126 (1983); ILL. ANN. STAT. ch. 40, para. 2101-2126 (Smith-Hurd 1980 & Supp. 1991); IND. CODE ANN. §§ 31-1-11.6-1 to -24 (West 1979 & Supp. 1994); IOWA CODE ANN. §§ 598A.1 to .25 (West 1981 & Supp. 1994); KAN. STAT. ANN. §§ 38-1301 to -1326 (1993); KY. REV. STAT. ANN. §§ 403.400 to .630 (Michie/Bobbs-Merrill 1984); LA. REV. STAT. ANN. §§ 13:1700 to :1724 (West 1983 & Supp. 1994); ME. REV. STAT. ANN. tit. 19, §§ 801-824 (West 1981); MD. CODE ANN., FAM. LAW §§ 9-201 to -224 (1991); MASS. GEN. LAWS ANN. ch. 209B, §§ 1-14 (West 1987); MICH. STAT. ANN. §§ 600.651-.673 (West 1981 & Supp. 1994); MINN. STAT. ANN. §§ 518A.01 to .25 (West 1990); MISS. CODE ANN. §§ 93-23-1 to -47 (1994); MO. ANN. STAT. §§ 452.440 to .550 (Vernon 1986); MONT. CODE ANN. §§ 40-7-101 to -125 (1993); NEB. REV. STAT. §§ 43-1201 to -1225 (1988); NEV. REV. STAT. §§ 125A.010 to .250 (1993 & Supp. 1993); N.H. REV. STAT. ANN. §§ 458-A:1 to :25 (1992); N.J. STAT. ANN. §§ 2A:34-28 to -52 (West 1987 & Supp. 1994); N.M. STAT. ANN. §§ 40-10-1 to -24 (Michie 1994); N.Y. DOM. REL. LAW §§ 75-a to -z (McKinney 1988); N.C. GEN. STAT. §§ 50A-1 to -25 (1989); N.D. CENT. CODE §§ 14-14-01 to -26 (1981); OHIO REV. CODE ANN. §§ 3109.21 to .37 (Anderson 1989 & Supp. 1993); OKLA. STAT. ANN. tit. 43 §§ 501-527 (West 1990); OR. REV. STAT. §§ 109.700 to .930 (1989); 23 PA. CONS. STAT. ANN. §§ 5341-5366 (1991); R.I. GEN. LAWS §§ 15-14-1 to -26 (1988 & Supp. 1993); S.C. CODE ANN. §§ 20-7-782 to -830 (Law. Co-op. 1985); S.D. CODIFIED LAWS ANN. §§ 26-5A-1 to -26 (1992); TENN. CODE ANN. §§ 36-6-201 to -225 (1991); TEX. FAM. CODE ANN. §§ 11.51 to .75 (West 1986); UTAH CODE ANN. §§ 78-45c-1 to -26 (1992 & Supp. 1994); VT. STAT. ANN. tit. 15, §§ 1031-1051 (1989); VA. CODE ANN. §§ 20-125 to -146 (Michie 1990 & Supp. 1994); WASH. REV. CODE ANN. §§ 26.27.010 to .930 (West 1986); W. VA. CODE §§ 48-10-1 to -26 (1992); WIS. STAT. ANN. §§ 822.01 to .25 (West 1994); WYO. STAT. §§ 20-5-101 to -125 (1994).

12. 28 U.S.C. § 1738A (1988) [hereinafter PKPA]. See *infra* subpart II.B.

13. See *infra* notes 147-49, 166-68 and accompanying text.

14. For a very recent examination of both Acts urging that they be repealed, see Anne B. Goldstein, *The Tragedy of the Interstate Child: A Critical Reexamination of the Uniform Child Custody Jurisdiction Act and the Parental Kidnapping Prevention Act*, 25 U.C. DAVIS L. REV. 845 (1992) (The "heart of the UCCJA's indeterminacy" is the friction between the goal of flexibility (ability to determine each case individually) and repose (certainty and finality in adjudications). *Id.* at 902.).

I. JURISDICTIONAL UNCERTAINTY

Like many other bodies of law, the law governing interstate child custody decisions has two paramount goals: flexibility and certainty. Flexibility is required because courts must respond to varying sets of circumstances, and an appropriate decision must be made in each particular case. Simultaneously, the law must establish certain, predictable parameters on individuals' behavior in order to deter childsnatching and achieve a state of repose in adjudication of child custody disputes.

A. *Flexibility vs. Certainty*

Analysis of three recent cases reveals the need for both flexibility and certainty in the adjudication of interstate child custody cases. The cases exhibit that courts in different forums vary in the emphasis they place on flexibility to determine an equitable outcome, and on certainty to enforce legal rights. They are similar in that they involve interstate child custody decisions where one contestant is a non-parent. In cases where both contestants are biological parents (or both are non-parents), courts uniformly apply a "best interests of the child" standard.¹⁵ However, where one contestant is a non-parent, forums apply different standards of law to make the custody disposition.¹⁶

One particularly notable case, which received attention both within and outside of the legal community, revealed the tension between these two policies: In a quagmire of jurisdictional complications, the child's best interests may have been undermined in the interest of jurisdictional certainty. Although the United States Supreme Court ultimately declined to hear the case, the dissent from that denial highlighted the incongruity in disputes over jurisdiction in interstate child custody cases involving non-parent contestants.¹⁷ When Cara Clausen,¹⁸ a citizen of Iowa, discovered she was pregnant, she did not inform the father, Daniel Schmidt.¹⁹ Realizing that she was not prepared to care for a baby, she opted for adoption.²⁰ When Jessica was born in February, 1991, the man Cara named as the father signed a release of his parental rights.²¹ The Iowa court system terminated the parental rights of the mother and putative father, and custody of the child was awarded to the prospective adoptive parents, Roberta and Jan DeBoer, Michigan residents.²²

Nine days later, Cara decided to challenge the termination. The real father's parental rights had not been terminated because Daniel Schmidt, not the man named on the birth certificate, was the biological father.²³ Daniel filed an affidavit of paternity and moved to

15. *In re Marriage of Hruby and Hruby*, 748 P.2d 57, 62-63 (Or. 1987) (en banc).

16. *See infra* subpart I.B.2.c.

17. *DeBoer v. Schmidt*, 502 N.W.2d 649 (Mich. 1993), *stay denied sub nom. DeBoer v. DeBoer*, 114 S.Ct. 1 (1993), *stay denied*, 114 S.Ct. 11 (Blackmun, J., and O'Connor, J., dissenting).

18. The mother's name is now Cara Schmidt since she married Daniel Schmidt in April 1992.

19. *In re B.G.C.*, 496 N.W.2d 239, 241 (Iowa 1992).

20. *Id.* at 240.

21. *Id.* at 241.

22. *Id.*

23. *DeBoer v. Schmidt*, 502 N.W.2d 649, 652 (Mich. 1993), *stay denied sub nom. DeBoer v. DeBoer*, 114 S. Ct. 1 (1993), *stay denied*, 114 S. Ct. 11 (1993).

intervene in the adoption.²⁴ The DeBoers filed a motion to terminate the parental rights of Daniel, attempting to show that he was unfit as a parent because he had abandoned two other children.²⁵ The Iowa trial court tried the issues of paternity, termination of parental rights, and adoption, but did not hear arguments nor evidence on the matter of the child's best interests.²⁶ The court decreed that Daniel had established that he was the father of the child, and that the DeBoers had failed to prove that Daniel was an unfit parent.²⁷ Because the grounds for termination of Daniel's parental rights under Iowa law had not been fulfilled, the trial court (in a decision affirmed by the Supreme Court of Iowa) granted custody to him.²⁸ On remand from the Supreme Court of Iowa, the District Court ordered the DeBoers to appear with the child on December 3, 1992.²⁹

Although their attorney informed the court that the DeBoers had received actual notice, they did not appear at this hearing.³⁰ Instead, the DeBoers filed a petition the same day in the Washtenaw Circuit Court in Michigan (the county of their residence) to have that court take jurisdiction under the UCCJA and either enjoin the Iowa order or modify it to give the DeBoers custody.³¹ The court issued a temporary restraining order, and, after a hearing, found that it had jurisdiction to determine the best interests of the child, which had never been adjudicated in Iowa.³² The court concluded that the child should remain with the DeBoers.³³ However, the Michigan Court of Appeals reversed, finding that Michigan lacked jurisdiction under the UCCJA and the PKPA and was mandated to give full faith and credit to the Iowa decision.³⁴ When this decision was affirmed by the Supreme Court of Michigan³⁵ (two and one-half years after the adoption petition was filed immediately following Jessica's birth), the DeBoers complied and relinquished custody.

24. *Id.*

25. *In re B.G.C.*, 496 N.W.2d 239, 244-45 (Iowa 1993).

26. *DeBoer*, 502 N.W.2d at 652-53.

27. *Id.*

28. *In re B.G.C.*, 496 N.W.2d at 241. Another problem with the release was that Iowa's statutory requirements were not fulfilled in regards to the waiting period a mother is guaranteed after birth. "It is undisputed that Cara's release did not satisfy the seventy-two-hour requirement of section 600A.4(2)(d)." *Id.* at 243. See IOWA CODE § 600A.4(2)(d) (1976 & Supp. 1992).

29. *DeBoer*, 502 N.W.2d at 653.

30. *Id.* Subsequent to that proceeding, warrants were issued for the arrest of Jan and Roberta DeBoer. *Id.* at 653 n.9.

31. *Id.* at 653.

32. *Id.* The Iowa courts did not find it necessary to adjudicate the child's interests since the case was disposed of on the grounds of failure to meet the statutory requirements for termination of parental rights. *In re B.G.C.*, 496 N.W.2d 239, 245 (Iowa 1993).

33. *DeBoer*, 502 N.W.2d at 653.

34. *Matter of Clausen*, 501 N.W.2d 193, 196-97 (Mich. Ct. App. 1993), *aff'd sub nom. DeBoer v. Schmidt*, 502 N.W.2d 649 (Mich. 1993), *stay denied sub nom. DeBoer v. DeBoer*, 114 S. Ct. 1 (1993), *stay denied*, 114 S. Ct. 11 (1993).

35. *DeBoer*, 502 N.W.2d at 668.

The DeBoers' appeal to United States Supreme Court for a stay of the Michigan order was denied.³⁶ Justice Blackmun (joined by Justice O'Connor) dissented from the denial of stay, noting:

While I am not sure where the ultimate legalities or equities lie, I am sure that I am not willing to wash my hands of this case at this stage, with the personal vulnerability of the child so much at risk, and with the Supreme Court of New Jersey [in the *E.E.B.* decision] and the Supreme Court of Michigan in fundamental disagreement over the duty and authority of state courts to consider the best interests of a child when rendering a custody decree.³⁷

The case became a *cause celebre* in the national media. Among other things, the legal system received criticism for allowing this situation to persist for so long and for disbanding a very happy trio (Jessica and her adoptive parents).³⁸

The case highlights the inherent tension in interstate cases governed by the UCCJA and PKPA. While Michigan's refusal to modify the Iowa decision creates jurisdictional certainty (in that Michigan did not compete with Iowa for jurisdiction), this refusal may also have jeopardized the child's best interests. Removal of a two and one-half year old child from the family with whom she has bonded since birth jeopardizes her psychological welfare.³⁹ In Jessica's case, certainty of outcome was achieved at the expense of flexibility to reach a resolution of her best interests. In his dissent from the Michigan Supreme Court decision, Justice Levin noted that under the PKPA, Congress did not mandate Iowa nor any other jurisdiction to conduct a best interests hearing since the statute governs only jurisdiction.⁴⁰ However, he also asserted that "[i]t does not follow that a decree rendered without consideration of the child's best interests is entitled to enforcement under the PKPA, where the court rendering the decree *declined to exercise jurisdiction to conduct a hearing to consider whether to modify the decree on the basis of the child's best interests.*"⁴¹ It may be impossible to achieve the right balance between certainty and flexibility in outcome, but two other cases have found different solutions. In his above-quoted dissent to the denial of stay, Justice Blackmun relied on two cases analyzed by Justice Levin that interpreted the Acts

36. *DeBoer v. DeBoer*, 114 S. Ct. 1 (1993), *DeBoer v. Schmidt*, 114 S. Ct. 11 (1993) (Blackmun, J., and O'Connor, J., dissenting).

37. *DeBoer v. Schmidt*, 114 S. Ct. 11, 11-12 (1993). See *infra* notes 42-48.

38. Members of the media made the unfortunate choice to bring cameras to the actual separation, where Jessica was carried out of the house, obviously very upset to be leaving her home. See, e.g., Greg Smith, *Baby Jessica Takes to New Life, New Name*, L.A. TIMES, Aug. 7, 1994, at A10; Geoffrey Cowley, *Who's Looking After the Interest of Children?*, NEWSWEEK, August 16, 1993, at 54. As often happens in child custody disputes, neither side had totally clean hands: Cara committed a fraud on the court by intentionally naming the wrong man as father; and, the DeBoers were criticized by many people for asserting custody rights for almost three years, even though they had notice within weeks of the placement that the adoption could fail. If they had relinquished custody earlier, the separation would have been less traumatic for the child.

39. See generally source noted in *supra* note 2.

40. *DeBoer v. Schmidt*, 502 N.W.2d 649, 682 (Mich. 1993) (Levin, J., dissenting), *stay denied sub nom.* *DeBoer v. DeBoer*, 114 S. Ct. 1 (1993), *stay denied*, 114 S. Ct. 11 (1993). See *infra* subpart II.B.

41. *DeBoer*, 502 N.W.2d at 682.

more liberally, *E.E.B. v. D.A.*, and *Lemley v. Barr*.⁴² In these two cases, the courts were willing to consider the child's rights over the parent's rights.

In *E.E.B. v. D.A.*, a 1982 New Jersey Supreme Court case, a mother decided to give her child up for adoption one month before birth. She and the father, both Ohio residents, signed releases surrendering custody three days after the child's birth. After birth, the child was immediately placed with the prospective adoptive parents, who lived in Ohio at the time. One week after signing the release, the biological mother orally revoked her release of parental rights to the welfare department. The department did not inform the Ohio Juvenile Court and the court validated the original consent. The mother then instituted a habeas corpus proceeding to regain custody of her child.

While appeal of the denial of the writ to the Supreme Court of Ohio was pending, the adoptive parents were transferred to New Jersey. The Supreme Court of Ohio reversed and remanded, finding that the mother had revoked her consent before the juvenile court approved her waiver of rights.⁴³ However, the adoptive parents challenged the Ohio decision in the Superior Court of New Jersey, Chancery Division. The New Jersey court found that it had jurisdiction to hold a hearing to determine the child's best interests, and decided that it was in the best interests of the child to remain with the adoptive parents.⁴⁴ The decision was affirmed by the New Jersey Supreme Court, which framed the issue as whether "by failing to grant a best interest hearing, the Ohio courts declined to exercise jurisdiction to modify the decree awarding custody to the natural mother."⁴⁵ The court reasoned that Ohio's refusal entitled New Jersey to exercise jurisdiction, and justified its position by noting that "[t]his result comports with the congressional intent that child custody decisions be made in the state best able to determine the best interest of the child."⁴⁶ The New Jersey court construed the UCCJA and the PKPA more liberally than the Michigan *DeBoer* courts did⁴⁷ in order to render a decision that would promote the child's best interests: The "UCCJA does not contemplate blind obedience to home state jurisdiction. The state to decide a child custody dispute is not necessarily the home state, but the one best positioned to make the decision based on the best interest of the child."⁴⁸

Four years later, an Ohio custody order again was challenged in another state—West Virginia. In *Lemley v. Barr*, a 1986 case from the Supreme Court of Appeals of West Virginia,⁴⁹ the natural mother signed the parental release twice: once when she was a minor, and again when she was past the age of eighteen (only one week later). Subsequently, the mother and her parents (the "Lemleys") tried to revoke the waiver they had executed with

42. *Id.*, referring to: *E.E.B. v. D.A.*, 446 A.2d 871 (N.J. 1982), *cert. den.*, 459 U.S. 1210 (1983); and, *Lemley v. Barr*, 343 S.E.2d 101 (W. Va. 1986). See *DeBoer*, 502 N.W.2d at 671-72, 680-82. For a criticism of *E.E.B.* as a violation of the policies behind the UCCJA and the PKPA and an inducement to forum shopping, see Goldstein, *supra* note 14, at 906-09, 931-32.

43. *E.E.B.*, 446 A.2d at 874.

44. *Id.*

45. *Id.* at 877.

46. *Id.*

47. See *supra* text accompanying notes 33-35.

48. *E.E.B.*, 446 A.2d at 879. For a more thorough discussion of the UCCJA and the PKPA, see *infra* Part

49. 343 S.E.2d 101.

attorneys for the adoptive parents, and when that proved unsuccessful, instituted a habeas corpus action. The Ohio Court of Common Pleas found that the mother had signed the consent under duress, and that since she did not understand the complaint, it was invalid.⁵⁰ The Ohio Court of Appeals and the Supreme Court of Ohio both affirmed.⁵¹

The adoptive parents (the "Barrs"), were residents of West Virginia. They had been aware of the Ohio proceedings but intentionally chose not to appear and to continue with the adoption process in West Virginia. The Lemleys appealed the adoption in the West Virginia courts. The Supreme Court of Appeals of West Virginia found that under the UCCJA, Ohio had properly exercised jurisdiction.⁵² Therefore, the natural mother had legal custody under the Ohio decisions. However, the court's analysis went one step further in remanding to the lower court to decide whether the mother's legal right was outweighed by the child's equitable rights.⁵³ The Ohio courts had not adjudicated the child's best interests. The West Virginia Supreme Court remanded the case for a decision on whether it was in the child's best interest to remain with the adoptive parents:

The day is long past in the State, if it had ever been, when the right of a parent to the custody of his or her child, where extraordinary circumstances are present, would be enforced inexorably, contrary to the best interest of the child, on the theory solely of an absolute legal right. Instead, in the extraordinary circumstance, when there is a conflict, the best interest of the child has always been regarded as superior to the right of parental custody. Indeed, analysis of the cases reveals a shifting of emphasis rather than a remaking of substance. This shifting reflects more the modern principle that a child is a person, and not a subperson over whom the parent has an absolute possessory interest. A child has rights too, some of which are of a constitutional magnitude.⁵⁴

The different outcomes of these three cases reveal a startling inconsistency between states regarding their willingness to acknowledge that adjudication of a child's best interests must be a part of any custody decision.⁵⁵

B. Two-tiered Jurisdictional Uncertainty

These cases resulted in jurisdictional uncertainty because of two factors: historically, the law has been unresolved as to whether child custody decisions warrant full faith and credit

50. *Id.* at 103.

51. *Id.*

52. *Id.* at 106. In the *DeBoer* case, Justice Levin pointed out that "*Lemley* did not consider the PKPA, but since the PKPA is modeled on the UCCJA, and the relevant language is identical, the analysis of the West Virginia Supreme Court is not to be faulted simply because it did not consider the PKPA separately from the UCCJA." *DeBoer v. Schmidt*, 502 N.W.2d 649, 671 n.18 (Mich. 1993) (Levin, J., dissenting), *stay denied sub nom.* *DeBoer v. DeBoer*, 114 S. Ct. 1 (1993), *stay denied*, 114 S. Ct. 11 (1993). For a discussion of that case, see *supra* notes 17-42 and accompanying text.

53. *Lemley*, 343 S.E.2d at 109.

54. *Id.* (quoting *Bennett v. Jeffreys*, 356 N.E.2d 277, 281 (N.Y. 1976) (citations omitted)).

55. It is beyond the scope of this Note to advocate one of these positions over another. Rather, it is sufficient to note that courts vary in their willingness to balance children's rights against parents' rights. Because of this discrepancy, some jurisdictions are more willing than others to modify a child custody decision.

under the Constitution; and, from state to state, the legal standard applied to parent/non-parent child custody disputes differs. The combination of these two factors makes it difficult for courts to reach a disposition that is both legally and equitably sound. In other words, this combination of factors makes it hard for courts to strike a balance between certainty and flexibility in their adjudication of these cases.

1. *Historic Full Faith and Credit Problems.*—The historic lack of full faith and credit in child custody decisions led to two results: seize-and-run behavior and forum shopping.⁵⁶ A noncustodial individual would “seize” a child and “run” to a forum that was likely to modify a previous custody order and place the child in that individual’s custody. Although kidnapping is often attributed to strangers who abduct children for evil motives, a far more typical scenario occurs when the abductor, although not acting in good faith, is a family member or pseudo-family member (parent, step-parent, grandparent, prospective adoptive parent in a failed adoption, etc.) with at least a quasi-right to custody.⁵⁷ Parental kidnapping has been characterized as “one of the most subtle and brutal forms of child abuse.”⁵⁸ Formerly, it was not uncommon for such a person to obtain a custody decree in their favor in a second forum, using the child’s presence in the state as a basis for jurisdiction, even if the child had been wrongfully removed from the legal custodian and had minimal contacts with the second forum. Before the enactment of the UCCJA and the PKPA, enforcement of interstate child custody orders was loosely based on principles of comity,⁵⁹ but there was very little uniformity in enforcement of interstate orders. Rather, unfettered jurisdictional competition prevented a state of repose in custody determinations.

One commentator has pointed to two pervasive problems that existed prior to the UCCJA and the PKPA in child custody decisions where all parties did not live in the same state: too many interested forums and too little interstate deference.⁶⁰

56. See Brigitte M. Bodenheimer, *Interstate Custody: Initial Jurisdiction and Continuing Jurisdiction under the UCCJA*, 14 FAM. L.Q. 203, 203-04 (1981) (Professor Bodenheimer, the Reporter for the Special Committee appointed by the National Conference of Commissioners to draft the UCCJA, was instrumental not only in drafting the Act, but in lobbying for its enactment in many jurisdictions.). See also UCCJA, Table of Jurisdictions, Prefatory Note, paras. 1-6. For an explanation of the National Conference of Commissioners, see *infra* note 139.

57. See, e.g., *Norsworthy v. Norsworthy*, 713 S.W.2d 451 (Ark. 1986); *Nehra v. Uhlar*, 372 N.E.2d 4 (N.Y. 1977).

58. *Moving to Stop Child Snatching*, TIME, Feb. 27, 1978, at 85 (quoting psychologist Dr. Philip Weeks).

59. Comity has been defined as “[c]ourtesy; complaisance; respect; a willingness to grant a privilege, not as a matter of right, but out of deference and good will.” BLACK’S LAW DICTIONARY 267 (6th ed. 1990).

60. Goldstein, *supra* note 14, at 864-68. Additionally, the United States Congress made the following statement about the problem in the existing system, which prompted enactment of legislation:

(a) The Congress finds that—

(1) there is a large and growing number of cases annually involving disputes between persons claiming rights of custody and visitation of children under the laws, and in the courts, of different States, the District of Columbia, the Commonwealth of Puerto Rico, and the territories and possessions of the United States;

(2) the laws and practices by which courts of those jurisdictions determine their jurisdiction to decide such disputes, and the effect to be given the decisions of such disputes by the courts of other jurisdictions, are often inconsistent and conflicting;

[T]he problem is imbedded in the very structure of our legal system. . . . Some form of the problem is inherent in a federal system like ours, which allocates child custody adjudication to autonomous state tribunals, so long as custody litigants, like other citizens, may move freely from state to state, and our courts continue to use the best interests of the child—or any other indeterminate test—to reach custody decisions that are modifiable during the child's's minority.⁶¹

The United States Supreme Court has always recognized that the field of family law is a matter of state law in which the federal government will not interfere.⁶²

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

(4) among the results of those conditions and activities are the failure of the courts of such jurisdictions to give full faith and credit to the judicial proceedings of other jurisdictions, the deprivation of rights of liberty and property without due process of law, burdens on commerce among such jurisdictions and with foreign nations, and harm to the welfare of children and their parents and other custodians.

(b) For those reasons it is necessary to establish a national system for locating parents and children who travel from one such jurisdiction to another and are concealed in connection with such disputes, and to establish national standards under which the courts of such jurisdictions will determine their jurisdiction to decide such disputes and the effect to be given by each such jurisdiction to such decisions by the courts of other such jurisdictions.

(c) The general purposes of sections 6 to 10 of this Act . . . are to—

- (1) promote cooperation between State courts to the end that a determination of custody and visitation is rendered in the State which can best decide the case in the interest of the child;
- (2) promote and expand the exchange of information and other forms of mutual assistance between States which are concerned with the same child;
- (3) facilitate the enforcement of custody and visitation decrees of sister States;
- (4) discourage continuing interstate controversies over child custody in the interest of greater stability of home environment and of secure family relationships for the child;
- (5) *avoid jurisdictional competition and conflict between State courts in matters of child custody and visitation which have in the past resulted in the shifting of children from State to State with harmful effects on their well-being; and*
- (6) deter interstate abductions and other unilateral removals of children undertaken to obtain custody and visitation awards.

Parental Kidnapping Prevention Act, Pub.L. No. 96-611, 94 Stat. 3568 § 7 (1980) (emphasis added).

61. Goldstein, *supra* note 14, at 853-54.

62. "[T]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States." *Rose v. Rose*, 481 U.S. 619, 625 (1987) (quoting *Ex Parte Burrus*, 136 U.S. 586, 593-94 (1890)).

Historically, the first problem is that in interstate custody decisions, there are too many interested forums. For example, consider a case where a single mother informally places her child with her parents for two to three years while she finishes her education. The grandparents move to another state shortly after the mother places the child with them. When the mother returns for the child, if the grandparents refuse to relinquish custody, two states have an interest in the outcome of the case: the state where the child was born, and the state where the child now lives. Additionally, the grandparents, who have retained custody, would naturally have a serious claim on the child's affection the longer they remained together. As "[m]ost American children are integrated into an American community after living there six months,"⁶³ it could be very detrimental to force the child to leave his or her home. There is an infinite number of possible scenarios where more than one state would be interested in the outcome of custody litigation. Such situations inevitably arise because of state-to-state mobility is so common.

The second historical problem with child custody litigation prior to the UCCJA and the PKPA is closely related to the first. Because there were many interested forums, often there were multiple and conflicting custody orders. If a party did not like the outcome in one decision, they simply went to another state and got another order. If the party deprived of custody did the same thing, the struggle could continue for years and harm to the child was certain to follow.⁶⁴ The drafters of the UCCJA noted that the trend had been to allow "custody claimants to sue in the courts of almost any state, no matter how fleeting the contact of the child and the family was with the particular state, with little regard to any conflict of law rules."⁶⁵ Child custody orders historically have presented a full faith and credit⁶⁶ problem because, as the drafters of the UCCJA noted, "the Supreme Court has never settled the question whether the full faith and credit clause of the Constitution applies to custody decrees."⁶⁷ States modified other states' orders even when it was clear that other states at least potentially had jurisdiction.⁶⁸

Even assuming full faith and credit applies to custody orders, the second forum need only enforce a judgment to the extent that it would be enforced in the first forum. However, by their very nature, custody orders are non-final.⁶⁹ The doctrine of changed circumstances allows a court to modify a custody disposition in response to new circumstances in the child's life.⁷⁰ If a party could show changed circumstances, the second court could decide that the

63. Leonard G. Ratner, *Child Custody in a Federal System*, 62 MICH. L. REV. 795, 818 (1964). See text accompanying *infra* note 134.

64. See UCCJA, Table of Jurisdictions, Prefatory Note, paras. 1-6.

65. *Id.* at para. 4.

66. "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." U.S. CONST. art. IV, § 1 cl. 1. See Note, Ford v. Ford: *Full Faith and Credit to Custody Decrees?*, 73 YALE L.J. 134 (1963).

67. UCCJA, Table of Jurisdictions, Prefatory Note, para. 4.

68. Christopher L. Blakesley, *Child Custody—Jurisdiction and Procedure*, 35 EMORY L.J. 291, 293 (1986).

69. See HOMER H. CLARK, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 460 (1988).

70. See *id.*

first forum would have modified the order.⁷¹ Again, the law rewarded parties who engaged "seize-and-run" activity and forum shopping.⁷²

The Supreme Court has only once considered whether full faith and credit extends to custody decisions. In the 1953 case of *May v. Anderson*,⁷³ the Court held, in a plurality opinion, that an Ohio court was not required to grant full faith and credit to a Wisconsin decree since Wisconsin did not have personal jurisdiction over the mother.⁷⁴ In essence, protection of the parents' rights of due process superseded the child's need for stability. Since personal jurisdiction requires minimum contacts with a forum,⁷⁵ as long as a parent avoided minimum contacts with a forum, it could not obtain personal jurisdiction over the parent, and no state of repose in custody could be achieved. In *May v. Anderson*, not only could the mother prevent enforcement of the Wisconsin decree by avoiding contact with Wisconsin, but she could obtain a more favorable order in a state in which she was subject to personal jurisdiction.

Justice Frankfurter concurred⁷⁶ in an influential opinion⁷⁷ that clarified the scope of the plurality opinion. He noted that, although the Full Faith and Credit Clause did not require Ohio to recognize Wisconsin's decision, Ohio was not *prevented* from doing so by due process considerations, especially since the Ohio Supreme Court had felt that it was bound to do so.⁷⁸ Hence, if a state chose to enforce another state's order, the state could do so, but only under principles of comity.⁷⁹ Although prevalent before *May*, forum shopping increased dramatically after this decision was handed down.⁸⁰ More than one party could be guilty of this strategy: "Even when 'parental kidnapping' was not involved, one or both divorced spouses often moved and sought a different custody order from their new state of residence. The result, seen with depressing frequency, was conflicting custody orders from two states, neither willing to concede the exclusive custody jurisdiction of the other."⁸¹

71. See *New York ex rel. Halvey v. Halvey*, 330 U.S. 610, 614 (1947) (The rationale for the changed circumstances doctrine is that the child's best interests must be met. If circumstances change, the original decision may no longer further the child's interest. See UCCJA, Table of Jurisdictions, Prefatory Note, para. 4.).

72. See UCCJA, Table of Jurisdictions, Prefatory Note, para. 6.

73. 345 U.S. 528 (1953).

74. *Id.* at 528-29.

75. See *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

76. *May*, 345 U.S. at 535-36. Justice Frankfurter's concurrence influenced the drafters of the UCCJA. See *infra* notes 141-42 and accompanying text.

77. See *infra* notes 141-43 and accompanying text.

78. *May*, 345 U.S. at 535-36.

79. See *supra* note 59 for a definition of "comity."

80. Andrea S. Charlow, *Jurisdictional Gerrymandering and the Parental Kidnapping Prevention Act*, 25 FAM. L.Q. NO. 3 299, 303 (1991). See also Albert A. Ehrenzweig, *Interstate Recognition of Custody Decrees*, 51 MICH. L. REV. 345, 358 (1953); Dale F. Stansbury, *Custody and Maintenance Law Across State Lines*, 10 LAW & CONTEMP. PROBS. 819, 828-29 (1944).

81. *Michalik v. Michalik*, 494 N.W.2d 391, 393 (Wis. 1993) (citation omitted). See also *State ex rel. Valles v. Brown*, 639 P.2d 1181, 1184 (N.M. 1984) (The Supreme Court of New Mexico noted the long line of New Mexico cases, which, prior to the PKPA, permitted New Mexico to "modify an out-of-state issued child custody decree based solely on the physical presence of the child and a substantial change of circumstances.").

2. *Parent/Non-Parent Disputes.*—The need to balance a child's best interests against a contestant's legal right to custody is particularly troublesome in cases where one contestant is a parent and one is a non-parent. In these cases, the law presumes that the parent is entitled to custody. However, this presumption is stronger in some forums than others. Combined with varying interpretations of the UCCJA and the PKPA from forum to forum,⁸² courts are prone to modify other forums' custody decisions, and adjudicate them under the standard their own forum applies to a parent/non-parent custody dispute.

Dating back to Roman law, fathers were considered to own their children, including the right of life and death over them.⁸³ However, beginning in the late nineteenth century, the law evolved toward recognition of children's rights, which sometimes stand in contradiction to their parents' rights.⁸⁴ The classic example of this conflict is the abused child who is removed from the home by the state. No matter how strong the right of a parent to raise his or her biological children, every jurisdiction today has a legal standard for removal of abused children.⁸⁵ In custody disputes between two parents or between two non-parents, the universal standard applied by courts is the "best interests of the child" standard;⁸⁶ however, in a dispute between a parent and a non-parent, no consensus exists among states as to what standard to apply. Parent/non-parent cases add a layer of friction to interstate custody decisions. Not only do courts encounter the tension inherent in the UCCJA and the PKPA themselves,⁸⁷ but due to the disparate substantive standards of law, a second forum might be determined to reach the merits of the case and decide it differently from the first forum.

a. *Rights of family and child.*—Any discussion of the rights of family and child requires a definition of "family."⁸⁸ The legal definition of "family" continues to evolve, with an increasing emphasis on relational rather than biological links between caregiver and child. United States Supreme Court Justice Rutledge noted in *Prince v. Commonwealth of Massachusetts*,⁸⁹ a 1944 case, that the constitutionally-protected sphere of family privacy, which the state cannot enter, includes the right of a biological parent to raise his or her child.⁹⁰ Limits on that sphere include the state's right to mandate school attendance and attention to the child's medical needs.⁹¹ In the 1977 case of *Smith v. Organization of Foster*

82. See *infra* Part II.

83. 2 WILLIAM BLACKSTONE, COMMENTARIES *452. See generally, MICHAEL GROSSBERG, GOVERNING THE HEARTH 234-43 (1985) (explaining the shift in the law from paternal property rights in children to standards focusing more on the child's best interests).

84. Suzette M. Haynie, Note, *Biological Parents v. Third Parties: Whose Right to Custody is Constitutionally Protected?*, 20 GA. L. REV. 705, 706-07 (1986).

85. See Marjorie R. Freiman, Note, *Unequal and Inadequate Protection Under the Law: State Child Abuse Statutes*, 50 GEO. WASH. L. REV. 243, 272 (1982).

86. *In re Marriage of Hruby and Hruby*, 748 P.2d 57, 62-63 (Or. 1987) (en banc) ("[I]n custody disputes between natural parents or between parents unrelated to the children, the interests of the children are more nearly the exclusive determinants of the custody determination. This is because the competing custodial rights tend to cancel each other, leaving only the interests of the children as relevant considerations.").

87. See *infra* Part II.

88. See *supra* note 5.

89. 321 U.S. 158 (1944).

90. *Id.* at 165.

91. *Id.* at 165-66.

Families for Equality and Reform,⁹² the Court clarified that within the sphere of privacy, "freedom of personal choice in matters of . . . family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment."⁹³ With that threshold, the Court further analyzed whether a foster family qualified for due process protection. The Court noted that while "family" generally "implies biological relationships . . . biological relationships are not exclusive determination of the existence of a family . . . [and] the importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association."⁹⁴ The Court indicated that relationship, and not merely biology, creates a family.⁹⁵

The relationship-biology analysis calls into question the existence of a family where a biological link, but no relationship, exists between parent and child. One commentator proposed that recent Supreme Court cases have suggested "that the Constitution protects the actual family relationship rather than the biological relationship."⁹⁶ In the 1978 *Quilloin v. Walcott* decision,⁹⁷ the natural father of a child born out of wedlock had never attempted to acknowledge the child legally as his own, had maintained only an irregular relationship with the child, and had born very little responsibility for the child's upbringing. The Court held that adoption of the child by his stepfather over the biological father's objections did not violate the biological father's due process rights, especially since an existing family unit would thereby be fully recognized.⁹⁸ The Court allowed the best interests of the child—determined at the trial level as adoption by the stepfather—to supersede the natural father's rights.⁹⁹

Using a similar line of reasoning, the Court found in the 1983 case of *Lehr v. Robertson*¹⁰⁰ that since the father of a child born out of wedlock had never formed a "substantial relationship" with his daughter, his due process rights were not violated when the state failed to notify him of his daughter's adoption.¹⁰¹ Although the state knew the father's whereabouts, he had failed to protect his legal right to notice of the adoption by registering with the putative father registry. By contrast, in *Caban v. Mohammed*,¹⁰² a 1979 case, both unwed parents made substantial attempts to support and rear the children. The Court upheld the parents' constitutional rights to raise a family.¹⁰³ These cases reveal that biological links between parent and child are not necessarily enough to create a family. The

92. 431 U.S. 816 (1977).

93. *Id.* at 842 (quoting *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40 (1974)).

94. *Id.* at 843-44.

95. *Id.* at 844. The Court ultimately held that foster family relationships are entitled to only a very limited due process protection since they derive solely from statute. *Id.* at 846.

96. Haynie, *supra* note 84, at 706.

97. 434 U.S. 246 (1978).

98. *Id.* at 255.

99. *Id.*

100. 463 U.S. 248 (1983).

101. *Id.* at 266-67.

102. 441 U.S. 380 (1979).

103. *Id.* at 394.

parents must also acknowledge the existence of family. In fact, "[t]he rights to conceive and to raise one's children have been deemed 'essential.'"¹⁰⁴

The rights of children are likewise protected under the Constitution. For example, the Supreme Court has held that children have constitutional rights under the First Amendment,¹⁰⁵ a property right in education protected by the Due Process Clause,¹⁰⁶ rights under the Fourteenth Amendment and Bill of Rights to counsel, confrontation, and cross-examination of witnesses,¹⁰⁷ and the right to have a crime of which they are accused proven beyond a reasonable doubt.¹⁰⁸ Moreover, the Third Circuit has stated that "[t]he existence of a 'best interests of the child' standard, often used in domestic custody disputes, is a further recognition that minors have interests and constitutional rights separate from those of the parents."¹⁰⁹ The differences from state to state between standards governing parent/non-parent custody disputes hinge on policy choices made by state law as to which set of rights is more heavily weighted—parents' or children's.¹¹⁰

b. Standing to sue.—The question of standing depends on whether the party has alleged a sufficient personal stake in the outcome of the controversy.¹¹¹ It has been said that a "non-parent who has a significant connection with the child had standing to assert a claim for custody."¹¹² Under the UCCJA and the PKPA, a "contestant" to an interstate custody action is defined very simply as a person who claims a right to physical custody or visitation, with no requirement that the contestant claim under color of law.¹¹³ The *DeBoer* dissent contended that the DeBoers did have standing to sue, pointing out the language of the PKPA and the UCCJA that a party must have had custody of a child in the past and that the Iowa decision contrary to the DeBoers' wishes did not automatically strip them of their right to sue for custody.¹¹⁴ However, the Supreme Court of Michigan affirmed the Court of Appeals'

104. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). *See also* *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 534-35 (1925).

105. *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 506 (1969).

106. *Goss v. Lopez*, 419 U.S. 565, 573-74 (1975).

107. *In re Gault*, 387 U.S. 1, 29-31 (1967).

108. *In re Winship*, 397 U.S. 358, 368 (1970).

109. *Lehman v. Lycoming County Children's Servs. Agency*, 648 F.2d 135, 153 (3d Cir. 1981), *aff'd*, 458 U.S. 502 (1982).

110. *See infra* subpart I.B.2.c. for a discussion of these standards and the policies behind them.

111. *Flast v. Cohen*, 392 U.S. 83, 99 (1968) (citations omitted). A recent Wisconsin case stated that a third party has standing to seek custody of a child if two conditions are met: "[F]irst, an 'underlying action affecting the family unit has been previously filed'; and second, the child's family is nonintact, so that it may be in the child's best interests to order visitation 'to mitigate the trauma and impact of [the] dissolving family relationship.'" *In re Marriage of Cox v. Williams*, 502 N.W.2d 128, 130 (Wis. 1993) (quoting WIS. STAT. ANN. § 767.245 (West 1988)).

112. *Buness v. Gillen*, 781 P.2d 985, 988 (Alaska 1989) (stepfather who had voluntarily paid child support had standing to sue for custody). *Accord* J. ATKINSON, MODERN CHILD CUSTODY PRACTICE § 8.04 at 413 (1986) ("Most states, by statute or case law, allow a nonparent standing to assert a claim for custody, at least if the nonparent has significant connections with the child."); *see* CLARK, *supra* note 69, § 19.6 at 820-21.

113. *See infra* note 145.

114. *DeBoer v. Schmidt*, 502 N.W.2d 649, 684 (Mich. 1993), *stay denied sub nom. DeBoer v. DeBoer*, 114 S.Ct. 1 (1993), *stay denied*, 114 S.Ct. 11 (1993).

holding that the DeBoers lacked standing to sue because they had been stripped of any legally-protected interest before they filed the Michigan petition.¹¹⁵

Non-parents who wish to sue for custody of a child acquire standing to do so where they have played at least a quasi-parental role with the child in the past. The following types of persons fill a parental role:¹¹⁶

(i) *Psychological parents*.—One expert has asserted that “[o]nly a parent who provides for these [daily emotional, physical and psychological] needs will build a psychological relationship to the child on the basis of the biological one and will become his ‘psychological parent’ in whose care the child can feel valued and ‘wanted.’ An absent biological parent will remain, or tend to become, a stranger.”¹¹⁷ In *Hoy v. Willis*, a 1978 case from the Appellate Division of the New Jersey Superior Court, a child’s foster mother (who was also the child’s aunt), with whom the biological mother had voluntarily placed the child for two years, had standing to sue for custody as the child’s psychological parent.¹¹⁸ An expert testifying during the case replied affirmatively when asked this question:

If a couple kidnapped an infant, kept it for four years and within that four years they became the psychological parents of the child and if both the parents and the kidnappers were equal in all respects would it be in the best interests of the child to continue custody with the kidnappers?¹¹⁹

The bond between psychological parents and children has been protected by courts: “[D]isruption of this relationship can be even more traumatic and devastating on occasion than severing the tie with the natural parent.”¹²⁰ Removal from the psychological parents has even been found to suggest a showing of clear detriment.¹²¹ Standing in stark contrast to the proposition that children are the property of their parents, the doctrine has been invoked to support placement of a child with his or her psychological parents rather than his or her biological parents.

(ii) *Equitable parents*.—A Michigan court invoked this doctrine to allow a man, who was married to the biological mother and had always maintained a father-son relationship with her son, to adopt him.¹²² The man wanted to maintain the rights and obligations of fatherhood.¹²³

(iii) *Functional parenthood*.—Functional parenthood arises where the relationship is legally created with the intention that it be a parent-child relationship, such as the foster

115. *Matter of Clausen*, 501 N.W.2d 193, 197 (Mich. Ct. App. 1993), *aff’d sub nom.* DeBoer v. Schmidt, 502 N.W.2d 649 (Mich. 1993), *stay denied sub nom.* DeBoer v. DeBoer, 114 S.Ct. 1 (1993), *stay denied*, 114 S.Ct. 11 (1993).

116. See Sheila McKeown, *Traditional Custody Decisions vs. Modern Nonparental Challenges*, 13 J. JUV. L. 42 (1992).

117. GOLDSTEIN ET AL., *supra* note 2, at 17.

118. 398 A.2d 109.

119. *Id.* at 111-12.

120. *Doe v. Doe*, 399 N.Y.S.2d 977, 982 (N.Y. Sup. Ct. 1977).

121. *Buness v. Gillen*, 781 P.2d 985, 989 n.8 (Alaska 1989). See also *Sorentino v. Family & Children’s Soc. of Elizabeth*, 367 A.2d 1168, 1171 (N.J. 1976).

122. *Atkinson v. Atkinson*, 408 N.W.2d 516 (Mich. Ct. App. 1987), *appeal denied*, 492 Mich. 884 (1987).

123. *Id.*

parent relationship. In the 1974 case *In Re B.G.*,¹²⁴ the California Supreme Court recognized that foster parents have standing to sue for custody.¹²⁵

(iv) *Domestic partnerships*.—In domestic partnerships, two unmarried persons enjoy a marriage-like relationship. So far, however, co-parenting agreements drawn between them have not been generally recognized.¹²⁶

c. *Parental rights vs. best interests of child*.—Parent/non-parent cases can be very difficult for courts because the parents' wishes or rights may be contrary to the child's best interests. Factors courts have considered in determining which claimant will prevail include: the length of time (if any) the child has been in the care of the nonparent; the child's wishes; the child's relationship with other family members; the number of siblings in either household; the child's involvement in school and community; and, the health of all persons concerned.¹²⁷

Courts historically have taken one of three positions in response to parent/non-parent custody disputes. Eight jurisdictions apply a parental rights standard, holding that unless proven unfit by clear and convincing evidence, the biological parent is entitled to custody of the child as against any nonparent custodian.¹²⁸ Twenty-seven jurisdictions apply presumptions in favor of the biological parent but the burden on the nonparent is not as great as under the parental rights standard.¹²⁹ Finally, twelve jurisdictions simply apply a best

124. 523 P.2d 244 (Cal. 1974).

125. *Id.* at 254.

126. See, e.g., *In re K.Z.H.*, 471 N.W.2d 202 (Wis. 1991) (The court held that a single woman had no standing to sue for custody of the minor son of her former partner of eight years under the doctrines of equitable parent and *de facto* parent nor under a co-parenting agreement she and her partner had signed.). See also *Nancy S. v. Michele G.*, 228 Cal.App.3d 831 (1991) (A former domestic partner was entitled to visitation only upon the biological mother's consent.); *A.C. v. C.B.*, 829 P.2d 660 (N.M. Ct. App. 1992) (co-parenting agreement held unenforceable due to procedural errors in the case).

127. See KAN. STAT. ANN. § 60-1610(b)(2) (1983).

128. See *Buness v. Gillen*, 781 P.2d 985 (Alaska 1989); *In re D.A. McW.*, 460 So. 2d 368 (Fla. 1984); *Blackburn v. Blackburn*, 292 S.E.2d 821 (Ga. 1982); *McGregor v. Phillips*, 537 P.2d 59 (Idaho 1975); *In re Guardianship of Williams*, 869 P.2d 661 (Kan. 1994); *Stoker v. Huggins*, 471 So. 2d 1228 (Miss. 1985); *Pierce v. Pierce*, 645 P.2d 1353 (Mont. 1982); *Grover v. Phillips*, 681 P.2d 81 (Okla. 1984).

129. See *Ex Parte Mathews*, 428 So. 2d 58 (Ala. 1983); *Bryan v. Bryan*, 645 P.2d 1267 (Ariz. Ct. App. 1982); *Perkins v. Perkins*, 589 S.W.2d 588 (Ark. Ct. App. 1979), *petition denied*, 589 S.W.2d 29 (Ark. 1979); *In re Angelica M.*, 170 Cal.App.3d 210 (1985); *In re Estate of Becton*, 474 N.E.2d 1318 (Ill. App. Ct. 1985); *Hendrickson v. Binckley*, 316 N.E.2d 376 (Ind. Ct. App. 1974), *cert. denied*, 423 U.S. 868 (1975); *McNames v. Corum*, 683 S.W.2d 246 (Ky. 1984); *Boyett v. Boyett*, 448 So. 2d 819 (La. Ct. App. 1984); *Ross v. Hoffman*, 372 A.2d 582 (Md. 1977); *Freeman v. Chaplic*, 446 N.E.2d 1369 (Mass. 1983); *Zuziak v. Zuziak*, 426 N.W.2d 761 (Mich. Ct. App. 1988); *Westphal v. Westphal*, 457 N.W.2d 226 (Minn. Ct. App. 1990); *In re K.K.M.*, 647 S.W.2d 886 (Mo. Ct. App. 1983); *Nye v. Nye*, 329 N.W.2d 346 (Neb. 1983); *Fisher v. Fisher*, 670 P.2d 572 (Nev. 1983); *In re D.T.*, 491 A.2d 7 (N.J. Super. Ct. App. Div. 1985); *Brito v. Brito*, 794 P.2d 1205 (N.M. Ct. App. 1990); *Merritt v. Way*, 446 N.E.2d 776 (N.Y. 1983); *Plemmons v. Stiles*, 309 S.E.2d 504 (N.C. Ct. App. 1983); *In re Perales*, 369 N.E.2d 1047 (Ohio 1977); *In re Marriage of Hruby and Hruby*, 748 P.2d 57 (Or. 1987) (en banc); *Ferencak v. Moore*, 445 A.2d 1282 (Pa. Super. Ct. 1982); *Mayer v. Mayer*, 397 N.W.2d 638 (S.D. 1986); *Bonwich v. Bonwich*, 699 P.2d 760 (Utah 1985), *cert. denied*, 474 U.S. 848 (1985); *Patrick v. Byerley*, 325 S.E.2d 99 (Va. 1985); *In re Marriage of Allen*, 626 P.2d 16 (Wash. Ct. App. 1981); *Barstad v. Frazier*, 348

interests standard factoring in the parent's right to custody in balancing all the interests affecting the child.¹³⁰ The standard a jurisdiction adopts reflects a policy choice about how much to protect the parent's rights to raise their biological children versus how much to promote the child's best interest if the court finds that the child's best interests conflict with the parents' rights.

(i) *Parental rights*.—The parental rights theory, the traditional view of the law toward parent-child rights, has been justified by the following rationale:

Putting the matter in another way, it is quite correct to say that the welfare of children is always a matter of paramount concern, but the policy of the state proceeds on the theory that their welfare can best be attained by leaving them in the custody of their parents and seeing to it that the parents' right thereto is not infringed upon or denied. . . . And no court should construe its intrusive jurisdiction as extending to cases where parents have done nothing offensive to law, morals, or good conduct, which would forfeit their paramount natural right of parenthood, which is to have the custody of their own children.¹³¹

The value of the parental rights doctrine is that it provides certainty in the law. The presumption in favor of parents is so strong that non-parents are discouraged from suing for custody because courts will almost always decide in favor of the biological parents.

However, the rigidity of the strict parental rights standard has been criticized for exhibiting a startling lack of concern for the interests of the children.¹³² Even if the child has spent a substantial amount of time with a non-parent custodian and has significantly bonded with that individual, courts applying this standard will return the child to the natural parent, causing disruption to the child, unless the nonparent can prove the biological parent unfit by clear and convincing evidence. One commentator noted that this standard is "based on an almost mystical belief in the superiority of biological parents."¹³³

(ii) *Best interests of the child*.—Whereas the parental rights jurisdictions heavily weight the legal right of a parent to raise their child, courts applying the best interests standard are

N.W.2d 479 (Wis. 1984).

130. See HAWAII REV. STAT. § 571-46(2) (1976); *In re C.C.R.S.*, 872 P.2d 1337 (Colo. Ct. App. 1993), cert. granted (May 9, 1994); *McGaffin v. Roberts*, 479 A.2d 176 (Conn. 1984), cert. denied, 470 U.S. 1050 (1985); *D. v. Z.*, 414 A.2d 211 (Del. Super. Ct. 1980); *In re Marriage of Reschly*, 334 N.W.2d 720 (Iowa 1983); *Costigan v. Costigan*, 418 A.2d 1144 (Me. 1980); *Stanley D. v. Deborah D.*, 467 A.2d 249 (N.H. 1983); *Patzer v. Glaser*, 368 N.W.2d 561 (N.D. 1985); *Cook v. Cobb*, 245 S.E.2d 612 (S.C. 1978); *Yancey v. Koonce*, 645 S.W.2d 861 (Tex. Ct. App. 1983); *Florida, Dep't of Health and Rehab. Servs. ex rel. State Dep't of Human Servs. v. Thornton*, 396 S.E.2d 475 (W. Va. 1990); *Elm v. Key*, 480 P.2d 104 (Wyo. 1971).

131. *In re Kailer*, 255 P. 41, 42 (Kan. 1927).

132. "Courts adhering to the parental-right doctrine are also ignoring the contemporary psychological research holding that psychological, not biological, ties are the ones that bind a child to an adult." Michael B. Thompson, *Child-Custody Disputes Between Parents and Non-Parents: A Plan for the Abrogation of the Parental-Right Doctrine in South Dakota*, 34 S.D. L. REV. 534, 572 (1989).

133. Sandra R. Blair, *Jurisdiction, Standing, and Decisional Standards in Parent/Non-Parent Custody Disputes*, *In re Marriage of Allen*, 28 Wn.App. 637, 626 P.2d 16 (1981), 58 WASH. L. REV. 115-16 (1982). See *Behn v. Timmons*, 345 So. 2d 388, 389 (Fla. Dist. Ct. App. 1977) (A biological parent has "a natural God-given legal right to enjoy the custody, fellowship and companionship of his offspring.").

willing to consider the child's rights over the parents'. In a pure best interests jurisdiction, courts weigh all the factors affecting a child's custody disposition, including the legal rights of other parties, and decide what is best for the child in that particular case. To be sure, it is a highly indeterminate, fact-sensitive standard.

The benefit of considering the child's best interests above all is that the law thereby allows enough flexibility to decide each case individually. Justice McFarland of the Kansas Supreme Court has noted that:

As a former district court judge I can certainly recall instances where this statute [abolishing parental preference] would have been highly desirable. The parent . . . may leave a child with relatives for many years, then suddenly want it back in a fit of guilt or due to changed circumstances. The relatives may well be the only home the child has known and a strong family unit has been created. The trial court should have the discretion to preserve the family unit as it now exists.¹³⁴

Mental health professionals agree that the child suffers detriment when removed from the home where he or she has bonded, unless there are extreme circumstances.¹³⁵ One case explained that "bonds of love between parent and child are not dependent upon blood relation and instinct, but may be forged as strongly in the crucible of day to day living."¹³⁶

The advantages of the best interests standard are offset by the criticism of the standard: that it is too flexible. Giving courts *carte blanche* to remove children under such a vague standard gives the state too much power to intrude in the family unit. Moreover, professionals in the juvenile field who assess a family's needs are not invincible in making their judgments.

Because the strict parental rights standard is criticized as too rigid, and the best interests standard as too flexible, most courts fall somewhere between the two standards.¹³⁷ In these jurisdictions, parental and children's rights are more evenly balanced than in states that follow one of the polar standards. The presumption in favor of biological parents can be overcome by less than a clear and convincing showing of parental unfitness.

II. THE CURRENT SOLUTION TO JURISDICTIONAL UNCERTAINTY

A. *The UCCJA*¹³⁸

Adopted at the 1968 National Conference of Commissioners on Uniform State Laws, the UCCJA was intended to "bring some semblance of order into the existing [jurisdictional] chaos."¹³⁹ The problems in rendering child custody decisions showed the need for a uniform

134. *Sheppard v. Sheppard*, 630 P.2d 1121, 1129 (Kan. 1981) (McFarland, J., dissenting), *cert. denied*, 455 U.S. 919 (1982).

135. See Blakesley, *supra* note 68, at 378; GOLDSTEIN, ET AL., *supra* note 2, at 113-33; Elizabeth Scott & Andre Derdeyn, *Rethinking Joint Custody*, 45 OHIO STATE L.J. 455, 488-90 (1984); Joan G. Wexler, *Rethinking the Modification of Child Custody Decrees*, 94 YALE L.J. 757, 789-92 (1985).

136. *Borsdorf v. Mills*, 275 So. 2d 338, 340 (Ala. Civ. App. 1973).

137. See *supra* note 129 and accompanying text.

138. See *supra* note 11 for citations to the UCCJA in all fifty jurisdictions.

139. UCCJA, Table of Jurisdictions, Prefatory Note, para. 8. The UCCJA provides:
SECTION 1. [*Purposes of Act; Construction of Provisions*]

body of law.¹⁴⁰ Although the states would continue to be sovereign, the hope was that, with uniform laws, the outcome in interstate child custody cases would be more certain. By 1984, it was enacted in all fifty states with only minor differences among the different versions.¹⁴¹ It was influenced by Justice Frankfurter's concurrence in *May*¹⁴² in that it permits one state to enforce another state's custody order even if one claimant was not subject to personal jurisdiction in the rendering state, as long as the claimant received notice and an opportunity

(a) The general purposes of this Act are to:

- (1) avoid jurisdictional competition and conflict with courts of other states in matters of child custody which have in the past resulted in the shifting of children from state to state with harmful effects on their well-being;
- (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;
- (3) assure that litigation concerning the custody of a child take place ordinarily in the state with which the child and his family have the closest connection and where significant evidence concerning his care, protection, training, and personal relationships is most readily available, and that courts of this state decline the exercise of jurisdiction when the child and his family have a closer connection with another state;
- (4) discourage continuing controversies over child custody in the interest of greater stability of home environment and of secure family relationships for the child;
- (5) deter abductions and other unilateral removals of children undertaken to obtain custody awards;
- (6) avoid re-litigation of custody decisions of other states in this state insofar as feasible;
- (7) facilitate the enforcement of custody decrees of other states;
- (8) promote and expand the exchange of information and other forms of mutual assistance between the courts of this state and those of other states concerned with the same child; and
- (9) make uniform the law of those states which enact it.

(b) This Act shall be construed to promote the general purposes stated in this section.

See generally, UCCJA, Publisher's Explanation:

The National Conference of Commissioners on Uniform State Laws is composed of Commissioners from each of the states, the District of Columbia, and Puerto Rico. In thirty-three of these jurisdictions the Commissioners are appointed by the chief executive acting under express legislative authority. In the other jurisdictions the appointments are made by general executive authority. There are usually three representatives from each jurisdiction The object of the National Conference, as stated in its constitution, is 'to promote uniformity in state laws on all subjects where uniformity is deemed desirable and practicable'. The National Conference works through standing and special committees If the National Conference decides to take up the subject, it refers the same to a special committee with instructions to report a draft of an act When finally approved by the National Conference, the uniform acts are recommended for general adoption throughout the jurisdiction of the United States and are submitted to the American Bar Association for its approval.

140. UCCJA, Table of Jurisdictions, Prefatory Note.

141. *See supra* note 11 for citations to the UCCJA in all fifty jurisdictions.

142. *May v. Anderson*, 345 U.S. 528 (1953); *see supra* notes 77-79 and accompanying text.

to be heard.¹⁴³ The drafters noted that the Act would not reach its intended results unless a large number of jurisdictions adopted it.¹⁴⁴

The substantive provisions of the Act attempt to provide certainty or repose in the law of jurisdiction governing custody determinations, while leaving some flexibility to decide each case individually. Under the Act, there are four ways in which a forum can obtain jurisdiction to decide a case: 1) the forum state was the home state of the child at the time of the commencement of the proceeding; 2) the child and at least one person claiming a right to custody have a "significant connection" with the forum state and there is a substantial amount of evidence in the forum state relating to the child's welfare; 3) the child is present in the state and emergency conditions, such as abandonment or threat of injury, require the court to take jurisdiction; or, 4) no other state has jurisdiction or another state has declined jurisdiction because the forum can more appropriately exercise jurisdiction.¹⁴⁵

143. The UCCJA provides:

SECTION 4 [*Notice and Opportunity to be Heard*]

Before making a decree under this Act, reasonable notice and opportunity to be heard shall be given to the contestants, any parent whose parental rights have not been previously terminated, and any person who has physical custody of the child. If any of these persons is outside this State, notice and opportunity to be heard shall be given pursuant to section 5.

[Section 5 sets forth guidelines for how notice is to be made.]

See Wayne Everett Waite, Note, *Child Custody: Substantial Justice Toward Children or Procedural for Parents?*—*Pasqualone v. Pasqualone*, 63 Ohio St.2d 96, 406 N.E.2d 1121 (1980), 7 U. DAYTON L. REV. 217, 225; UCCJA § 13, Commissioner's Note. See also *Goldfarb v. Goldfarb*, 268 S.E.2d 648, 651 (Ga. 1980); *Pratt v. Pratt*, 431 A.2d 405, 409-10 (R.I. 1981); *Hudson v. Hudson*, 670 P.2d 287, 293-95 (Wash. Ct. App. 1983) (cases holding that the UCCJA does not violate a party's right to due process even though one party lacked minimum contacts with the forum that adjudicated the child's custody).

144. UCCJA, Table of Jurisdictions, Prefatory Note, para. 11.

145. The UCCJA provides:

SECTION 2 [*Definitions*] As used in this Act:

(1) "contestant" means a person, including a parent, who claims a right to custody or visitation rights with respect to a child;

(2) "custody determination" means a court decision and court orders and instructions providing for the custody of a child, including visitation rights; it does not include a decision relating to child support or any other monetary obligation of any person;

(3) "custody proceeding" includes proceedings in which a custody determination is one of several issues, such as an action for divorce or separation, and includes child neglect and dependency proceedings;

(4) "decree" or "custody decree" means a custody determination contained in a judicial decree or other order made in a custody proceeding, and includes an initial decree and a modification decree;

(5) "home state" means the state in which the child immediately preceding the time involved lived with his parents, parent, or a person acting as parent, for at least 6 consecutive months, and in the case of a child less than six 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;

(6) "initial decree" means the first custody decree concerning a particular child;

If, at the time the petition is filed, a proceeding is pending in another forum that is “substantially in conformity” with the UCCJA, the court may not exercise jurisdiction.¹⁴⁶ Under the broad definition of “custody determination” given in the UCCJA, the Act is now generally held to apply to almost all interstate custody determinations, including, for

(7) “modification decree” means a custody decree which modifies or replaces a prior decree, whether made by the court which rendered the prior decree or by another court;

(8) “physical custody” means actual possession and control of a child;

(9) “person acting as a parent” means a person, other than a parent, who has physical custody of a child and who has either been awarded custody by a court or claims a right to custody; and

(10) “state” means any state, territory, or possession of the United States, the Commonwealth of Puerto Rico, and the District of Columbia.

SECTION 3 [*Jurisdiction*]

(a) A court of this State which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if:

(1) this State (i) is the home state of the child at the time of commencement of the proceeding, or (ii) had been the child’s home state within 6 months before commencement of the proceeding and the child is absent from this State because of his removal or retention by a person claiming his custody or for other reasons, and a parent or person acting as parent continues to live in this State; or

(2) it is in the best interest of the child that a court of this State assume jurisdiction because (i) the child and his parents, or the child and at least one contestant, have a significant connection with this State, and (ii) there is available in this State substantial evidence concerning the child’s present or future care, protection, training, and personal relationships; or

(3) the child is physically present in this State and (i) the child has been abandoned or (ii) it is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse or is otherwise neglected [or dependent]; or

(4) (i) it appears that no other state would have jurisdiction under prerequisites substantially in accordance with paragraphs (1), (2), or (3), or another state has declined to exercise jurisdiction on the ground that this State is the more appropriate forum to determine the custody of the child, and (ii) it is in the best interest of the child that this court assume jurisdiction.

(b) Except under paragraphs (3) and (4) of subsection (a), physical presence in this State of the child, or of the child and one of the contestants, is not alone sufficient to confer jurisdiction on a court of this State to make a child custody determination.

(c) Physical presence of the child, while desirable, is not a prerequisite for jurisdiction to determine his custody.

146. The UCCJA provides:

SECTION 6 [*Simultaneous Proceedings in Other States*]

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

(Emphasis added).

example, guardianships¹⁴⁷ and adoption proceedings,¹⁴⁸ which are not expressly named in the Act.¹⁴⁹ Although section three (which gives the four bases of jurisdiction) intended that jurisdiction exist “only if it is in the *child’s* interest,”¹⁵⁰ the drafters further stated that the section “was phrased in general terms in order to be flexible enough to cover many fact situations too diverse to lend themselves to exact description. But its purpose is to limit jurisdiction rather than to proliferate it.”¹⁵¹

The two most significant bases of jurisdiction are the “home state” test and the “significant connection” test, although the language does not state that either alternative is preferred.¹⁵² But, since the Act was intended to reduce jurisdictional confusion, there is a “strong presumption that the decree state will continue to have modification jurisdiction until it loses all or almost all connection with the child.”¹⁵³ Once the court has properly exercised jurisdiction under the Act, if a party seeks to modify that decision in another forum, the second forum must refer to section fourteen of the Act which governs modification of prior decrees. A second forum may modify a previous decision from another forum if it finds that: 1) the first forum no longer has jurisdiction under principles of the Act or has declined to exercise jurisdiction; and, 2) the second forum does have jurisdiction.¹⁵⁴

In deciding whether or not to exercise jurisdiction under the UCCJA, courts use a three-step analysis. First, does the first court no longer have jurisdiction (Did the first court never properly have it? Has the first court declined to exercise jurisdiction? Does the first court no longer have jurisdiction for another reason?)? Second, if the first court no longer has

147. See *Guardianship of Donaldson*, 223 Cal. Rptr. 707, 712-13 (Cal. Ct. App. 1986).

148. *Gainey v. Olivo*, 373 S.E.2d 4, 6 (Ga. 1988).

149. The UCCJA provides:

SECTION 2 [Definitions] As used in this Act:

(2) “custody determination” means a court decision and court orders and instructions providing for the custody of a child, including visitation rights. It does not include a decision relating to child support or any other monetary obligation of any person;

(3) “custody proceeding” includes proceedings in which a custody determination is one of several issues, *such as an action for divorce or separation, and includes child neglect and dependency proceedings*;

(Emphasis added).

150. UCCJA, § 3, Official Cmt. (emphasis in original).

151. *Id.*

152. See *supra* note 145.

153. *Adoption of Zachariah K.*, 8 Cal. Rptr.2d 423, 429 (Cal. Ct. App. 1992).

154. The UCCJA provides:

SECTION 14 [*Modification of Custody Decree of Another State*]

(a) If a court of another state has made a custody decree, a court of this State shall not modify that decree unless (1) it appears to the court of this State that the court which rendered the decree does not now have jurisdiction under jurisdictional prerequisites substantially in accordance with this Act or has declined to assume jurisdiction to modify the decree and (2) the court of this State has jurisdiction.

(b) If a court of this State is authorized under subsection (a) and section 8 to modify a custody decree of another state it shall give due consideration to the transcript of the record and other documents of all previous proceedings submitted to it in accordance with section 22.

[Section 22 of the UCCJA is titled “Request for Court Records of Another State.”]

jurisdiction, does the forum state have jurisdiction? Finally, *should* the forum state exercise jurisdiction? In the last step, the court considers the “clean hands doctrine”¹⁵⁵ and *forum non conveniens*.¹⁵⁶ This step of the analysis involves weighing the child’s best interests against the forum state’s interest in deterring forum shopping and kidnapping. “Jurisdiction shall not be declined unless the trial court determines that the child’s best interests will not be injured by such a decision.”¹⁵⁷

155. The UCCJA provides:

SECTION 8 [*Jurisdiction Declined by Reason of Conduct*]

(a) If the petitioner for an initial decree has wrongfully taken the child from another state or has engaged in similar reprehensible conduct the court may decline to exercise jurisdiction if this is just and proper under the circumstances.

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

(c) In appropriate cases a court dismissing a petition under this section may charge the petitioner with necessary travel and other expenses, including attorneys’ fees, incurred by other parties or their witnesses.

See UCCJA § 8, Official Cmt. (“This section incorporates the ‘clean hands doctrine.’”).

156. The UCCJA provides:

SECTION 7. [*Inconvenient Forum*]

(a) A court which has jurisdiction under this Act to make an initial or modification decree may decline to exercise its jurisdiction any time before making a decree if it finds that it is an inconvenient forum to make a custody determination under the circumstances of the case and that a court of another state is a more appropriate forum.

....

(c) In determining if it is an inconvenient forum, the court shall consider if it is in the interest of the child that another state assume jurisdiction. For this purpose it may take into account the following factors, among others:

- (1) if another state is or recently was the child’s home state;
- (2) if another state has a closer connection with the child and his family or with the child and one or more of the contestants;
- (3) if substantial evidence concerning the child’s present or future care, protection, training, and personal relationships is more readily available in another state;
- (4) if the parties have agreed on another forum;
- (5) if the exercise of jurisdiction by a court of this state would contravene any of the purposes stated in section 1.

See also *Willoughby v. Willoughby*, 525 N.Y.S.2d 46 (N.Y. App. Div. 1988) (New York declined, in the best interests of the children, to take jurisdiction even though Indiana, the state of original jurisdiction, no longer had jurisdiction because Florida had the most significant connection to the children in that they lived and attended school there.).

157. *Pierce v. Pierce*, 640 P.2d 899, 905-06 (Mont. 1982).

In order to deter lawless childsnatching, courts are instructed to exercise their powers of equity. If one party's conduct is so objectionable that the court, in its "inherent equity powers cannot in good conscience permit that party access to its jurisdiction," the court can decline jurisdiction.¹⁵⁸ Sometimes, however, even the policy against deterring lawless childsnatching is outweighed by considerations of the child's best interests. In *Van Houten v. Van Houten*,¹⁵⁹ a 1989 case from the Appellate Division of the New York Supreme Court, the father ignored a Florida divorce decree granting custody to the mother and absconded with the child. The father and child were located in New York eight years later. The mother sought to enforce the Florida order, but the court found that the Florida decree was not entitled to full faith and credit, even though Florida had originally exercised jurisdiction properly.¹⁶⁰ The court said that the case was "one of those rare instances" where the best interests of the child must prevail over other individuals' legal rights.¹⁶¹

The intention of the Act was that custody be decided in the forum that could most appropriately litigate the best interests of the child.¹⁶² Professor Bodenheimer, the Reporter for the Special Committee that drafted the Act, has written that the Act was not intended to create concurrent jurisdiction between two states:

When a child stays in a state for six months or more as a visitor or a victim of abduction, the question arises whether the new state has power to modify the custody decree. The answer is that the Act does not permit the second state to take jurisdiction because the paramount jurisdiction of the prior state continues. Section 3 of the Act, the basic provision on subject matter jurisdiction, must be read in conjunction with section 14, which does not permit modifications by another state as long as the prior state's exclusive jurisdiction continues. This is true whether or not another state has technically become the child's home state.¹⁶³

The narrower a court interprets the provision on continuing jurisdiction, the more likely the court will find itself able to modify a sister state's order. In *E.E.B. v. D.A.*, the Supreme Court of New Jersey found that Ohio's refusal to exercise jurisdiction on best interests entitled New Jersey to do so. But in *DeBoer*, even though Iowa had not decided best interests, Michigan found that the Iowa order had to be enforced.¹⁶⁴ This discrepancy reveals the fact that various jurisdictions interpret the UCCJA differently, making it impossible to predict whether a custody order will be given full faith and credit uniformly throughout the country.

158. UCCJA, § 8, Official Cmt.

159. 549 N.Y.S.2d 452.

160. *Id.* at 454.

161. *Id.*

162. See *McAtee v. McAtee*, 323 S.E.2d 611, 615 (W. Va. 1984); Brigitte Bodenheimer, *The Uniform Child Custody Jurisdiction Act: A Legislative Remedy for Children Caught in the Conflict of Laws*, 22 VAND. L. REV. 1207, 1221 (1969).

163. Brigitte Bodenheimer, *Progress under the Uniform Child Custody Jurisdiction Act and Remaining Problems: Punitive Decrees, Joint Custody, and Excessive Modifications*, 65 CAL. L. REV. 978, 988 (1977). See *supra* notes 145-46.

164. See *supra* notes 34-35, 46-48 and accompanying text.

*B. The PKPA*¹⁶⁵

“When the UCCJA proved an imperfect remedy for the staggering national problem of child-snatching and forum shopping in interstate child custody disputes, Congress enacted the PKPA to provide a uniform federal standard to ascertain the one state with jurisdiction to modify an existing child custody order.”¹⁶⁶ Congress adopted the PKPA, which is very similar to the UCCJA, as a gap-filler for states that did not adopt a version of the UCCJA.¹⁶⁷ For example, New Mexico had not adopted the UCCJA in 1980 and had a long line of cases rewarding seize-and-run behavior. The PKPA ended that line of cases by setting guidelines for states to grant full faith and credit to custody orders of other jurisdictions.¹⁶⁸ Although the PKPA was enacted to further the same goals and policies as the UCCJA, there are two differences between them. First, whereas the UCCJA provides a forum with jurisdiction to decide a case, the PKPA only addresses whether another state’s order is entitled to full faith and credit. Second, the language of the PKPA is precise in areas where the UCCJA is vague.

In 1988, the United States Supreme Court noted in *Thompson v. Thompson*¹⁶⁹ that Congress intended the PKPA as an addendum to the Full Faith and Credit Clause of the Constitution.¹⁷⁰ The Court concluded that the PKPA confers no cause of action in the federal courts for a claimant to request that the court determine which of two conflicting orders is valid.¹⁷¹ However, the Court made the qualification that “ultimate review remains available in this Court for truly intractable jurisdictional deadlocks.”¹⁷²

The PKPA is, nonetheless, a federal law, which preempts state law under the Supremacy Clause of the Constitution of the United States where state law conflicts.¹⁷³ As the

165. 28 U.S.C. § 1738A (1980).

166. *Murphy v. Woerner*, 748 P.2d 749, 750 (Alaska 1988).

167. “The PKPA, drafted after the UCCJA, is directed to the same child custody problems, and provisions of both statutes are nearly identical.” Adoption of Zachariah K., 8 Cal. Rptr.2d 423, 428 (Cal. Ct. App. 1992). *But see In re A.L.H.*, 630 A.2d 1288, 1291 n.2 (Vt. 1993) (“The courts are divided on whether the PKPA applies to neglect and dependency proceedings.”). When the PKPA was adopted, 43 states had adopted a version of the UCCJA. See P. HOFF, LEGAL REMEDIES IN PARENTAL KIDNAPPING CASES: A COLLECTION OF MATERIALS 8 (5th ed. 1986).

168. *State ex rel. Valles v. Brown*, 639 P.2d 1181, 1184 (N.M. 1981).

169. 484 U.S. 174 (1988).

170. *Id.* at 183. U.S. CONST., art. IV, § 1; see *supra* subpart I.B.1.

171. *Thompson*, 484 U.S. at 182-84. Before this case, there was a circuit court split as to whether a federal court was permitted to enforce the PKPA. For support of the argument that federal courts should be allowed to do so, see Ann T. Wilson, *The Parental Kidnapping Prevention Act: Is There an Enforcement Role for the Federal Courts?*, 62 WASH. L. REV. 841 (1987).

172. *Thompson*, 484 U.S. at 187. However, the court has not yet decided such a case.

173. *Murphy v. Woerner*, 748 P.2d 749, 750 (Alaska 1988); *Garrett v. Garrett*, 732 S.W.2d 127, 128 (Ark. 1987); *Archambault v. Archambault*, 555 N.E.2d 201, 204-05 (Mass. 1990); *Shute v. Shute*, 607 A.2d 890, 893 (Vt. 1992); *Michalik v. Michalik*, 494 N.W.2d 391, 394 (Wis. 1993). See also U.S. CONST., art. VI, cl. 2, which states:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing

Massachusetts Supreme Court pointed out, however, preemption occurs only where the state law does “major damage” to “clear and substantial” federal interests.¹⁷⁴ Thus, a federal court must defer to state family law unless Congress has clearly indicated a contrary intention.¹⁷⁵ One way for states to avoid preemption is to construe their state laws in accordance with federal law.¹⁷⁶ Since the UCCJA and the PKPA are so similar, a court deciding whether to grant full faith and credit to another forum’s order under the PKPA would use an analysis much like the one provided in the UCCJA.¹⁷⁷

However, in two places the PKPA is more precise than the UCCJA. First, the UCCJA does not prioritize the different types of jurisdiction. Although the Official Comment notes a strong presumption in favor of “home state” jurisdiction, the language of the statute itself does not expressly state that preference.¹⁷⁸ By contrast, the PKPA provides that if home state jurisdiction exists, then only the home state forum’s orders are entitled to full faith and credit (unless the court is responding to an emergency situation).¹⁷⁹ Secondly, whereas the PKPA

in the Constitution or Laws of any State to the Contrary notwithstanding.

174. *Archambault*, 555 N.E.2d at 205 (citations omitted).

175. *Id.*

176. *See Kumar v. Superior Court*, 652 P.2d 1003, 1011 (Cal. 1982) (“[F]ederal legislation would compel the result we reach in the instant case.”); *In re Marriage of Leyda*, 398 N.W.2d 815, 820 (Iowa 1987) (“Both the UCCJA and the Federal Parental Kidnapping Prevention Act of 1980 lead to the conclusion that Michael’s rights under the Iowa decree are unaffected by the order of the Florida court.”); *State ex rel. D.S.K.*, 792 P.2d 118, 128 (Utah Ct. App. 1990) (“In this case, we reach the same resolution under the UCCJA as we would under the PKPA.”).

177. *See supra* subpart II.A.

178. *See supra* notes 145-46 and accompanying text.

179. Subsection (c) of the PKPA states:

(c) A child custody determination made by a court of a State is consistent with the provisions of this section only if—

- (1) such court has jurisdiction under the law of such State; and
- (2) one of the following conditions is met:

(A) such State (i) is the home State of the child on the date of the commencement of the proceeding, or (ii) had been the child’s home State within six months before the date of the commencement of the proceeding and the child is absent from such State because of his removal or retention by a contestant for other reasons, and a contestant continues to live in such State;

(B) (i) it appears that no other State would have jurisdiction under subparagraph (A), and (ii) it is in the best interest of the child that a court of such State assume jurisdiction because (I) the child and his parents, or the child and at least one contestant, have a significant connection with such State other than mere physical presence in such State, and (II) there is available in such State substantial evidence concerning the child’s present or future care, protection, training, and personal relationships;

(C) the child is physically present in such State and (i) the child has been abandoned, or (ii) it is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse;

(D) (i) it appears that no other State would have jurisdiction under subparagraph (A), (B), (C), or (E), or another State has declined to exercise jurisdiction on the ground that

gives an express standard for continuing jurisdiction, the UCCJA does not. The PKPA says that if the forum made the custody order consistently with the provisions of its own state law (the forum's version of the UCCJA), and the forum continues to be the residence of the child or any contestant,¹⁸⁰ then the forum has exclusive jurisdiction.¹⁸¹ In these two areas, the PKPA provides more certainty than the UCCJA. Two primary ways under the PKPA to attack a prior custody order rendered in another state arise from the language of subsection (d).¹⁸² The party would argue that either the first party failed to exercise jurisdiction properly under its own state laws or that the first forum is no longer the residence of the child nor a contestant.

Since the UCCJA and the PKPA are jurisdictional statutes only, they do not impose substantive principles of law on states, and the states have different substantive standards of law in parent/non-parent cases. If both parents are biological parents (or both are non-parents), the universal standard is that of the child's best interests.¹⁸³ But where one contestant is a non-parent, state standards differ.¹⁸⁴ The difference between the three cases noted in subpart I.A. of this Note—*DeBoer*,¹⁸⁵ *E.E.B.*,¹⁸⁶ and *Lemley*¹⁸⁷—is the strictness with which they construe the Acts in deciding whether to grant full faith and credit to a sister state's custody order. They present an issue that merges state substantive law with these jurisdictional statutes: If the first court does not adjudicate the child's best interests, do the jurisdictional statutes allow another forum to do so if the merits of the case indicate that a best interests determination is in order?

the State whose jurisdiction is in issue is the more appropriate forum to determine the custody of the child, and (ii) it is in the best interest of the child that the court assume jurisdiction; or

(E) the court has continuing jurisdiction pursuant to subsection (d) of this section.

(Emphasis added). Compare UCCJA § 3 (text given in *supra* note 145) and §14 (the relevant portion of which is given in *supra* note 154).

180. The PKPA defines a contestant as "a person, including a parent, who claims a right to custody or visitation of a child." 28 U.S.C. § 1738(b)(2).

181. Subsection (d) of the PKPA states:

(d) The jurisdiction of the 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.

[For the text of subsection (c)(1), see *supra* note 179]. See, e.g., *McBride v. Sokol*, 469 So. 2d 645 (Ala. Civ. App. 1985); *Clark v. Boreanaz*, 552 N.Y.S.2d 760 (N.Y. App. Div. 1990).

182. For the text of subsection (d), see *supra* note 181.

183. See *supra* note 86 and accompanying text.

184. See *supra* subpart I.B.2.c.

185. See *supra* notes 17-42 and accompanying text.

186. See *supra* notes 42-48 and accompanying text.

187. See *supra* notes 42, 49-54 and accompanying text.

III. THE PROPOSED SOLUTION TO JURISDICTIONAL COMPETITION

A. *Inadequacy of the Current Solution*

Described as "schizophrenic legislation," the UCCJA and the PKPA attempt to provide both flexibility and certainty in custody decisions.¹⁸⁸ Disputes involving non-parents lead to a greater degree of jurisdictional uncertainty given the diverse standards of law from forum to forum in parent/non-parent disputes.¹⁸⁹

In order to bring more certainty into the jurisdictional problem, one commentator has recommended that every jurisdiction adopt a Revised UCCJA.¹⁹⁰ She proposes that one decree court have exclusive power to modify its decision for anywhere up to five years. At that point, only if that state remains the child's home state may the court continue jurisdiction. If not, the child's new home state gains exclusive jurisdiction. The one exception would be genuine emergency situations, in which any court in a state where the child is found may enter a temporary order.¹⁹¹ Another proposal is that another court should not exercise jurisdiction unless the first court has expressly declined to exercise further jurisdiction.¹⁹²

But what if, in a particular instance, the abduction is in the child's best interest? In 1992, the Supreme Court of Wisconsin found that even though the best interests of the children would be served by adjudicating their custody modification in Wisconsin, their home state at the time of the suit, Wisconsin was prevented from doing so by the PKPA, since the original forum had properly exercised jurisdiction and remained the residence of the children's father: "These jurisdictional provisions of the PKPA . . . cannot be circumvented in favor of an individual best interests test."¹⁹³ Adjudication of the children's best interests was subjugated to the goal of reaching a more certain outcome. But the more flexible the standards in custody disputes, the less the impact on the elimination of childsnatching.¹⁹⁴ The goal of flexibility requires that courts should be free to decide each case individually, which means that the result is not predictable. As the *Lemley* court phrased it in the oft-repeated language, "we are not ordering the transfer of a piece of property, but rather with [sic] a feeling, vulnerable, and sorely put upon little human being."¹⁹⁵

Is it possible to promote the best interests of a child in a custody battle while, at the same time, furthering a policy designed to counter the phenomenon of childsnatching? . . . Courts will invariably interpret the same legislation in differing

188. Professor Blakesley repeatedly used the term "schizophrenic" to describe the UCCJA. See Blakesley, *supra* note 68, at 374.

189. It is beyond the scope of this Note to respond to the many criticisms that the UCCJA and the PKPA inadequately resolve jurisdictional deadlock in all cases. Rather, this Note focuses on cases involving one parent and one non-parent.

190. Goldstein, *supra* note 14, at 942-46.

191. *Id.*

192. James C. Murray, *One Child's Odyssey Through the Uniform Child Custody Jurisdiction and Parental Kidnapping Prevention Acts*, 1993 WIS. L. REV. 589, 610-11.

193. *Michalik v. Michalik*, 494 N.W.2d 391, 398 (Wis. 1993).

194. See *supra* subpart I.A.

195. *Lemley v. Barr*, 343 S.E.2d 101, 104 (W. Va. 1986).

ways, depending on the policy seen as paramount. . . . Thus, even with the advent of the UCCJA, the jurisdictions have been troubled by these competing policies. While the legislation shaped policy by expressing a preference in favor of suppression of child-snatching, the law has not resolved the conflict inherent in the nature of child custody litigation.¹⁹⁶

Even though society does not want to reward the lawless, "circumstances may require that, in the best interest of the child, the unlawful acts be blinked."¹⁹⁷ One commentator urges that, since children have a constitutional interest in the custody proceeding, due process requires balancing the child's right to be reared by the person with whom he or she has bonded against any legal right claimed by a contestant under the UCCJA and the PKPA.¹⁹⁸

B. Proposal for a Prophylactic Measure

What can courts do to avoid the sticky situations that arise from parent/non-parent interstate custody disputes? Due to the risk that another court will find that the first forum declined to exercise jurisdiction to determine best interests, there is a very simple solution. In every interstate case, the first forum should consider adjudicating the child's best interests. This proposal does not mean that every state should apply the best interests standard. It does mean that the first forum should close the door to jurisdictional uncertainty by precluding a second forum from claiming jurisdiction based on the first forum's refusal to adjudicate that issue.

The UCCJA embeds the highly indeterminate, fact-sensitive, "best interests of the child" standard in every jurisdictional determination. . . . This virtually ensures that in every interstate custody matter each court will consider the children's best interests—that is, the merits of the case—in deciding whether to exercise jurisdiction or to defer to another court's decision-making. Whenever the forum, after examining the merits, comes to a conclusion that differs from the decree court's decision, it is bound to be strongly tempted to remedy what it perceives as a wrong, by asserting and exercising jurisdiction.¹⁹⁹

The original fora in *E.E.B. v. D.A.*, (the Ohio courts) and *DeBoer* (the Iowa courts) refused to grant such a hearing, thereby opening the door for another forum to do so.²⁰⁰ In *DeBoer*, Michigan's Washtenaw Circuit Court claimed jurisdiction due to Iowa's refusal to hold a best interests hearing.²⁰¹

At first blush it may appear that jurisdictional statutes would thereby meddle with substantive law; but it is also true that, under the existing system of wide disparity of interpretation of the UCCJA and the PKPA, a custody decision in one state might not be

196. Blakesley, *supra* note 68, at 373-74.

197. *Bennett v. Jeffreys*, 356 N.E.2d 277, 284 (N.Y. 1976).

198. Blakesley, *supra* note 68, at 378-79.

199. Goldstein, *supra* note 14, at 940-41.

200. *E.E.B. v. D.A.*, 446 A.2d 871, 873 (N.J. 1982), *cert. den.*, 459 U.S. 1210 (1983); *DeBoer v. Schmidt*, 502 N.W.2d 649, 652-53 (Mich. 1993), *stay denied sub nom. DeBoer v. DeBoer*, 114 S.Ct. 1 (1993), *stay denied*, 114 S.Ct. 11 (1993).

201. *DeBoer*, 502 N.W.2d at 653 (Levin, J., dissenting).

recognized in a sister state whose substantive standard for parent/non-parent cases differs if the second state interprets the jurisdictional Acts so as to allow it to reach the merits of the case. The differences in interpretation of these Acts from state to state has been widely documented.²⁰² In order to prevent a sister state from interpreting the Acts differently in order to find that it has jurisdiction to modify the first forum's decision, the first forum can protect its decision by holding a best interests hearing as part of its adjudication process. Ultimately, if this tension in the law induces courts to grant best interests hearings where they otherwise would not, both policies behind the jurisdictional Acts would be promoted: children's best interests would be furthered because courts would actually hear arguments on and decide that issue; and, certainty of outcome would be achieved because sister states would lose the opportunity of refusing to grant full faith and credit to the first finding, leaving no room for the sister state to exercise that jurisdiction itself. Examination of the Acts and the state standards supports this solution.

One compelling argument is that the failure of a court to apply a "best interests of the child" standard is a failure to exercise jurisdiction "substantially in compliance" with the Acts. But the Acts were adopted by individual jurisdictions entitled to apply their own standard to a parent/non-parent custody dispute. They need not follow the best interests standard. In *DeBoer*, the Michigan Supreme Court noted that the PKPA is a procedural statute that does not impose "principles of substantive law" on the individual states.²⁰³ The court found that because the PKPA was not a substantive statute, it could not mandate that Michigan conduct a best interests test since this would infringe on Iowa's right to apply its own rules of law. Even if the Acts do not *require* a best interests hearing, such a test is definitely consistent with the Acts.

One recent article views the PKPA optimistically, arguing that the Act does not deserve all the criticism it receives since progress and uniformity in the law are slowly evolving and must be expected to take time.²⁰⁴ Given time, under this proposal, even more uniformity and repose could be achieved in child custody decisions. Under the state substantive standard, factors affecting the custody disposition can be considered in order to decide whether the child's best interests are being served. Since some states weigh parents' rights more heavily than other states, the best interests adjudication in those states would take into account the greater weight. In this way, federal law would not infringe upon states' rights to determine their own family law. Moreover, certainty in the law would result in the long run. If states litigated the best interests of children from the start, other forums would have no basis to deny full faith and credit to the first forum's decision, and, eventually, the UCCJA's and the PKPA's goal of reducing volume of litigation would be realized. Whether or not a second forum is right in taking jurisdiction because of refusal of the first forum to decide best interests, the fact is that the risk exists. Courts inevitably interpret the Acts differently, which leads to jurisdictional uncertainty. As a prophylactic measure, granting a best interests in the first place closes that door of uncertainty.

The UCCJA and the PKPA were enacted for cases in which the contestants are two parents, where the universal standard is that of the best interests of the child.²⁰⁵ But when

202. See, e.g., Goldstein, *supra* note 14, at 938-41; Blakesley, *supra* note 68, at 373-75.

203. *DeBoer*, 502 N.W.2d at 658 n.24.

204. See Baron, *supra* note 10, at 911-12.

205. See *supra* note 86 and accompanying text.

these Acts are applied where one contestant is a non-parent, standards vary from state to state, some of them giving very little weight to the child's best interests. Since the "underlying theme of the PKPA and the UCCJA is that a determination of custody and visitation should be made according to the child's best interests,"²⁰⁶ then that goal would be furthered. Presumably (or ideally), if the court from the child's statutorily-determined home state conducted a best interests hearing and found that another state with significant connections to the child would be the better place to dispose of the case, the court would decline jurisdiction. Of course, this proposal will not avoid all jurisdictional uncertainty, but if the amount of uncertainty decreases, courts, litigants, and the children themselves would benefit.

CONCLUSION

Because jurists, litigants, and people outside the legal field inevitably will disagree over which approach to the UCCJA and the PKPA is appropriate, and how best to promote the policies behind them, courts cannot always be certain whether their child custody decisions will be enforced in the courts of a sister-state. Commentary on the Acts is voluminous, ranging from strong support for their effectiveness to recommendations for their repeal.²⁰⁷ At the very least, disagreement over how to apply the Acts exists. Therefore, a court would be wise to end the jurisdictional competition in parent/non-parent cases by adjudicating best interests even where state substantive law does not mandate it. In cases of this kind, the policy choices are so complex that there can never be any easy answers. But if confusion can be reduced while the best interests of children are furthered, the Acts would be more effective.

206. *DeBoer*, 502 N.W.2d at 676.

207. *See, e.g.*, Baron, *supra* note 10 (contending that, although progress is slow, the Acts will eventually solve the problem of jurisdictional competition); Nancy S. Erickson, *The Parental Kidnapping Prevention Act: How Can Non-Marital Children be Protected?*, 18 GOLDEN GATE U. L. Rev. 529 (1988) (arguing that although the UCCJA and the PKPA effectively protect children born in wedlock, they do not protect children born out of wedlock); Goldstein, *supra* note 14 (urging repeal of the Acts).