ENFORCEMENT OF CHILD CUSTODY ORDERS

THURSDAY, APRIL 23, 1998

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS AND
INTELLECTUAL PROPERTY,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:59 a.m., in Room 2226, Rayburn House Office Building, Hon. Howard Coble [chairman of the subcommittee] presiding.

Present: Representatives Howard Coble, Edward A. Pease, and James E. Rogan.

Staff Present: Debbie Laman, Majority Counsel; Eunice Goldring, Majority Staff Assistant, and Melody Sloan, Minority Counsel.

OPENING STATEMENT OF PRESIDING CHAIRMAN COBLE

Mr. COBLE [presiding]. Good morning, ladies and gentlemen. I'll give an opening statement, and I'll be glad to hear from you, Ed, if you have an opening statement as well. This is a very crucial issue. I have met with my constituents in North Carolina.

Have you met, Mr. Pease, with anybody in your State concerning this issue? I thought you had. My aunt is a grandparent who is very interested in this as well. I must ask your indulgence today, folks. I have to manage a bill on the floor, another Judiciary bill, and Mr. Ed Pease, the very able and distinguished Congressman from Indiana has agreed to chair this hearing today. Mr. Andrews, who is the sponsor of the bill, is on his way. So we will commence.

Today the subcommittee is conducting a legislative hearing on H.R. 1690 which focuses on one aspect of the very important issue of grandparents' rights. This bill, introduced by Representative Andrews—is he your Congressman by the way?

Ms. D'ANTONIO. Yes, sir.

Mr. COBLE. It is intended to alleviate the legal, financial, and emotional hurdles that grandparents who have visitation rights to their grandchildren must cross and negotiate in order to enforce those rights if the children are subsequently moved to another jurisdiction or another State.

H.R. 1690 ensures that a visitation order granted to grandparents in one State would be recognized in any State where the grandchildren may be moved. This is important because many grandparents do not have the financial, physical, and emotional strength to wage extended or lengthy court battles in another State. The unfortunate result is that the grandchildren lose contact with a valuable part of their family. It seems to me that this is a

lose-lose situation. The grandchildren are deprived of participating in their grandchildren's lives, and on the other hand, the children are robbed of the opportunity to develop a special relationship that can only exist between a grandparent and a child. I have said on many occasions that children who have been deprived of a close relationship with their grandparents have missed a very important slice of life. I had the privilege of knowing three of my four grandparents well. Those are memories that I have nurtured to this day.

In my district I often hear from grandparents about the many difficulties they face in trying to achieve contact with their grandchildren. I'm glad to see many of you in the audience today—by the way, is anybody from North Carolina here today from my district? The folks I've talked to in my district said they were going to try to come up here. I appreciate your enthusiasm and dedication. I'm sympathetic to your situation and continue to support the efforts to make changes in North Carolina as well as other States. While we are not able to cover all the many important aspects of grandparents' rights today, we will be taking a significant step forward in protecting visitation rights for grandparents.

Mr. Pease, do you have an opening statement?

OPENING STATEMENT OF PRESIDING CHAIRMAN PEASE

Mr. PEASE. Thank you, Mr. Chairman. I want also to express my gratitude to the Chair for conducting this hearing.

As the chairman knows, during the period that I chaired the Judiciary Committee in the Indiana senate, we addressed this issue at the State level. Indiana, like many States, did not, in its common law, recognize any rights in grandparents to visitation with their grandchildren in the event of death or dissolution of marriage. And I worked with others and carried the legislation that established our visitation rights for grandparents under appropriate circumstances, after the death of the parents or the dissolution of the marriage of the parents, only to see after all of that progress was made, that it be frustrated in cases where the grandchildren were moved to another State.

And so while I don't have all the answers in this area and while I do respect this sovereignty of the various States, I also understand the need for the Federal Government to address giving full faith and credit to the decisions of other States in this important arena and I'm grateful to the Chair for holding this hearing.

Mr. COBLE. And at this time I will surrender the gavel to Mr. Pease again. I hope you all understand why I have to be away, and I doubt that I will return before you adjourn.

So Ed, if you will assume the Chair, I'd like to get back.

Mr. PEASE [presiding]. The first witness on our panel is the Honorable Robert E. Andrews, who represents the 1st District of New Jersey. Rob's in his fourth full term. He serves on the Economic and Educational Opportunities Community and the International Relations Committee. He will be joining us, so we will move him to the end of the order of the presentation.

The other two witnesses are Josephine D'Antonio—Ms. D'Antonio is a grandparent whose professional experience includes being a materials manager at Burlington Memorial Hospital Operating

Room. She is currently president of Grandparents Count in New Jersey.

And our final witness to be presented, although the second to be heard from, is Ann—now, Ann, we just met in the hall——

Ms. HARALAMBIE. Haralambie.

Mr. PEASE [continuing]. Haralambie, who is here representing the American Bar Association. She's a certified domestic relations specialist and president of the Arizona Association of Counsel for Children. Her publications include "The Child's Attorney: A guide to representing children in custody, adoption and protection cases," and the two-volume treatise, "Handling Child Custody, Abuse and Adoption Cases." She writes and lectures nationally and internationally on child welfare and custody law.

We have written statements of all the witnesses on this panel, which I ask unanimous consent—I guess of myself—to submit into the record in their entirety, and I ask that all witnesses limit their oral statements to 5 minutes or less.

We'll begin with Ms. D'Antonio.

STATEMENT OF JOSEPHINE D'ANTONIO, PRESIDENT, GRANDPARENTS COUNT

Ms. D'ANTONIO. Thank you. Good morning honorable Chairman, Mr. Coble, and members of the subcommittee.

I am honored to have the opportunity to address you today on behalf of grandparents around the country. Thank you for holding these important hearings. Thank you, Congressman Rob Andrews, and to your staff, especially Ms. Maureen Doherty. I hope you have had an opportunity to read my written statement in support of H.R. 1690.

Picture, if you will, how helpless I felt when I presented a New Jersey court order granting me a weekend visit with my grandsons to a North Carolina municipal clerk, only to be told the court order could not be enforced. I had driven eight and a half hours from New Jersey, made arrangements at a hotel in Nags Head, North Carolina. This hotel was the nearest to my grandsons, but was an hour away from the children; they lived in a very remote area. I felt all the years of court hearings in New Jersey was a waste of time and energy—Not only mine, but the court's as well. The registered, certified court order was worthless now because in the—to quote the clerk—a signature of a North Carolina judge was not on it. I sat in the chair and felt my life stand still. The closest attorney I believe, could present me and whom I came to respect, was located in Washington, North Carolina—again, almost 2 hours from the court house and 3 hours from where I was lodging.

My problem is not unique. One member of our organization travelled by plane from Philadelphia to Arizona. I submitted to Congressman Hyde the many letters I received by e-mail and post from grandparents all over this country who are denied visitation with a grandchild. Our laws have not kept pace with parents who are savvy and State-hop. A grandparent's love does not change. It is the world itself that is changing. In such times we must focus upon one thing that is unchanging and imperishable: a grandparent's commitment to a child.

I hope you will join me, all of you. I hope you will understand by my written testimony in support of H.R. 1690, the devastation, additional financial burdens, and importance of this issue. This Congress can give our custody and visitation orders teeth in other States. I strongly believe that this subcommittee can come up with the solutions which will allow grandparents to enjoy the precious years of watching a grandchild grow without continued legal cost.

I will be happy to answer any of your questions. Thank you.

[The prepared statement of Ms. D'Antonio follows:]

PREPARED STATEMENT OF JOSEPHINE M. D'ANTONIO, PRESIDENT GRANDPARENTS COURT

Good morning, Honorable Chairman Mr. Coble and members of the subcommittee. I am honored to have the opportunity to address you today on behalf of Grandparents around the country. Thank you for holding these important hearings. Thank you Mr. Congressman Robert Andrews and members of your staff especially Maureen Doherty for her patience, dedication and professionalism to this legislation. I appreciate your setting aside this time to discuss H.R. 1690.

My name is Josephine M. D'Antonio; I am president of Grandparents Count. It has been my responsibility to offer comfort and support to grandparents and other family members who have lost contact with their grandchildren. Mr. and Mrs. David Feldman established this group in 1991. Because of their efforts, New Jersey passed legislation granting visitation to grandparents.

As president, I can tell you first hand that cases brought before a judge are done so because grandparents witness some form of abuse or neglect of helpless children. Grandparents seek the help of our courts when there is no where else to turn. Grandparents also seek the help of our courts when there is divorce or death and visitation has been denied.

Many poor or emotionally drained grandparents never get to court. They just give up and try to live with the knowledge of never again seeing their grandchild. They come to meetings to try to cope. We encourage love letters into a journal that our grandchildren may never read; we celebrate birthdays we never attended, we exchange hope and faith.

Like divorce, child support, burning of our national flag, or any number of bills that come before the courts and the Congress, these are all really moral issues. However, by today's standard it is becoming necessary to define laws and make them enforceable and fair. Fair for the children.

Grandparents don't divorce their grandchildren. These relationships are not disposable.

Many of us were given the role of guardians for our grandchildren by our children. This was done so that one or in some cases both parents were able to, in their own words "straighten themselves out" either financially or emotionally. Too often, after they tried to rehabilitate themselves, we found ourselves denied visitation with grandchildren. The very same grandchildren we were now bonded to, and who were bonded to us.

We became grandparents in our 40's and 50's . We were educated and knowledgeable about court proceedings. The people I represent recognize both the good and bad points of this legislation. We recognize families do not want more government in our lives, nor do we want the courts deciding how we raise our children or whom they may see. Yet, these very courts have not come up with uniform laws of "best interest" of the child. Today our grandchildren's world is often filled with images of greed, materialism and no value for human relationships. The recent rash of school killings is not the image of a loving world. Our laws encourage disposable relationships all in the same of interfering in an intact family. Young children lack skills necessary to work out and the issues they face. Teenagers are killing their babies. Children are raising without any parenting skills. Today, more than ever, grandparents can be a buffer.

There is an alarming increase of abuse and neglect of our nation's children. Child protective agencies are incapable of protecting children from parents and other who beat, starve, burn and rape their own flesh and blood. To deny grandchildren of their biological inherited rights to family access and protection severely narrows their resources.

How people of good intentions can deny children love spelled t-i-m-e which grandparents offer is beyond my understanding. We listen with the heart to words unspoken. Children must not be denied access to their extended families, yet they

are. Our grandchildren fulfill our need to love. Often, grandparents are children's link to memories, family historians and sources of unconditional love and stability. Our life forces endure as long as there are children present to pass it on to.

Opponents argue that this bill could allow parents who have been denied legal custody or visitation rights to use the grandparent exception to gain unlawful, and perhaps harmful access to their children. I believe wholeheartedly no grandparent in his or her right mind would deliberately risk loosing visitation and waste all the emotional and financial resources they have incurred over this issue.

The grandchildren and grandparents are in the middle because the parents have not worked out their responsibilities with maturity. Conflicts are absent between grandchild and grandparent. Family ties are broken when grandchildren need their grandparents most.

It has been my experience from hearing daily conversations with grandparents from London, England to California , that many grandparents will distance themselves from our own child for the sake and safety of a grandchild.

How tragic and embarrassed we feel that our grandparents must come to Congress for help and relief in the form of laws. But we are of an age and experience tells us to do things through the courts, quietly, no marches, no pickets. Many on this committee are grandparents yourselves. *Grandparents are a voice for children.*

May of us look to our courts when our grandchildren are needlessly taken from our lives. Emotional and financial help no longer needed from us, it became easy for our children to yell "interference" in their new intact families. Thus, we were denied any and all contact.

The wisdom of the courts saw through these cases and granted us visitation time. But it didn't stop there. Families moved to states where grandparents were denied visitation and were forced because of state laws to begin the legal battles again. Children are being shuffled from state to state by immature parents who do not understand children and and grandchildren don't divorce each other. If enacted.H.R.1690 would allow a grandparent who has already been granted visitation in one state to have that visitation order fully recognized by every state simply by registering their order.

In the state of New Jersey my family and I were granted visitation, access to education and medical records six weeks visitation in the summer, school holidays and one weekend a month with my grandsons. The courts recognized by a lengthy and costly process these children needed protection and that visitation was in their best interest. Short of custody, the New Jersey Courts knew by documents presented, reports submitted by court appointed psychologists, schools, clergy, family and friends that our collective , genuine concerns for their safety and care was found in truth. However, to get rid of our family and me the children were taken like thieves in the night to go live in North Carolina.

I had to make a decision to either let go of my ties with my grandsons or continue our course to try to ensure the children would not be neglected or abused. My family reminded me that Grandparents don't divorce their grandchildren.

Loan upon loan and the selling off of any of my remaining assets and resources were exhausted . It became necessary to obtain the services of a North Carolina attorney that would speak with our New Jersey attorney and begin the legal process again in another state. In addition, it became necessary for me to travel 8 hours from my home in New Jersey, stay in a motel sometimes, waiting until the district court would be in session for that county. I am disabled with post-polio. This was an additional burden, mentally, physically, and financially.

North Carolina is among the states that deny grandparent visitation in intact families. My heart was broken , but my faith in God kept me going. My North Carolina attorney, Mrs. Debra Gaskins pointed out to me the strengths and weaknesses of Title 28 enforcement of child custody orders. I knew the daily turmoil that my grandsons were living demanded the stability my family offered them. Our family sacrificed, but with the courts help, the beautiful state of North Carolina accepted New Jersey's court orders and allowed New Jersey to keep jurisdiction. It was a long and financially disastrous experience that should need not happen had H.R. 1690 been in effect. To gain full faith and credit it cost us an additional $10,000.

For the second time my ex-daughter-in-law left my son for a boyfriend, left the boyfriend for a new husband and has once more moved to another state. The oldest child (who is my grandson's step brother) has two stepfathers and one live in boyfriend as role models. The youngest child is multiply handicapped. We remain the most stable forces in the lives of these children.

My story is not unique. It is obvious to anyone who lives this kind of nightmare that there is a need to pass this legislation. It would be a mistake to ask grandparents to continue to petition family courts from state to state. This practice

wastes financial resources on out of state attorneys fees and further burdens valuable court time.

I quote from an excerpt written by Justice Pashman in February 1975 in the case of Mimkon vs. Ford, 66 N.J. 436. "It is a biological fact that grandparents are bound to their grandchildren by the unbreakable links of heredity. It is common human experience that the concern and interest grandparents take in the welfare of their grandchildren far exceeds anything explicable in purely biological terms. A very special relationship often arises and continues between grandparents and their grandchildren. Visits with a grandparent are often a precious part of a child's experience and there are benefits, which devolve upon the grandchild from the relationship with his grandparents, which he cannot derive from any other relationship. Neither the legislature nor this court is blind to human truths which grandparents and grandchildren have always known.

Finally, distinguished members of this committee I come before you and plead to you in the strongest terms to support and pass a bipartisan uniform law, which is enforceable. We are painfully aware that neither this Congress nor any other is willing to pass a uniform grandparent law. We cannot legislate good parenting classes before children are born. And we cannot be ordered to first complete family therapy and meditation. By passing H.R. 1690 this congress ensures grandparents granted visitation in one state is assured full faith and credit in all states.

I come here today for my grandsons Joey and John. I will always love them no matter where they are or where I am. I come here because ordinary people can do great things if first they do no harm. Thank you for allowing me to be heard. It is an honor to come here.

Mr. PEASE. Thank you so much, Ms. D'Antonio, and we will come back to you for questions.

Ms. Haralambie.

STATEMENT OF ANN HARALAMBIE, ATTORNEY

Ms. HARALAMBIE. Thank you. I'm Ann Haralambie. I have been an attorney in private practice in Tucson, Arizona for the last 21 years, specializing primarily in custody and child abuse. While I'm here in the D.C. area I'm actually staying in Reston, Virginia with my grandson, so I also understand the importance of a grandparental relationship.

I appear today as the designee of Jerome J. Shestack, who is the president of the American Bar Association, and my first remarks will be directed specifically to the ABA's position.

In August 1988, the ABA House of Delegates passed a resolution which urged Congress to provide Federal district court jurisdiction to enforce the PKPA, the Parental Kidnapping Prevention Act. Except in a couple of circuit cases, the Federal courts had construed the PKPA as giving Federal courts jurisdiction. However, in January 1988, the United States Supreme Court decided the case of Thompson v. Thompson, which stated based on Congressional intent, that Federal district courts were not intended to have subject matter jurisdiction to enforce the PKPA. The resolution remains the policy of the American Bar Association, and it is the request of the American Bar Association that Congress amend the PKPA to provide explicitly or subject matter jurisdiction to reside in the Federal courts on the limited issue of construing which State has proper jurisdiction. In addition, I would like to address several issues that are broader than the ABA policy and the remainder of my remarks are based on my own views and experience and do not reflect official ABA policy.

As I was riding the Metro down here this morning I was catching up on some of my legal reading from the Family Law Reporter and came across an Ohio Supreme Court case of Justice versus Justice

decided April 1st, 1998, which basically said that the North Carolina court erred in not enforcing an Ohio custody decision and there were problems there. This has continued to happen. The PKPA, which originally was derived from the State Uniform Child Custody Jurisdiction Act, which exists in all of the States at this time, made a few very minor changes which basically eliminated some of the concurrent jurisdiction that the Uniform Child Custody Jurisdiction Act provided.

It also provided what we all thought was a Federal remedy in the circumstance of two State courts disagreeing, and very often people are home-towned in custody matters. It may happen more with grandparents than it does with parents. I'm not sure about that, but it is a tremendous problem for grandparents and for parents to have a custody decision in one State. Somebody moves away, tries to get another custody order and the parent who is left behind in the original State, whose order is supposed to be enforced under the terms of the PKPA, has a great deal of difficulty in going to another State with their court order saying, here it is. The PKPA and even the UCCJA say you don't have to get an order with that State's judge's signature but sometimes the law enforcement officer is going to say no, this is someone else's decision.

I believe that H.R. 690 does not change the existing state of the law. Personally, I have no problem with that language being added. I think that courts around the country have construed the existing definitions with respect to "custody determination" and the definition with respect to "contestant," to include grandparents or anybody else. If the bill adds the language, "parent or grandparent," I just hope the legislative history is clear that that does not mean to exclude other third parties or agencies who would otherwise at this point, be within the rather broad definition of "contestant."

That said, I'm strongly urging that a new amendment be added to this bill to explicitly provide for subject matter jurisdiction in the Federal courts. It is the quickest, least expensive way for anybody, grandparents or parents, to enforce interstate the custody decrees that are properly entered, and entitled to full faith and credit under the terms of the PKPA. Sometimes State courts, because they're used to dealing with the merits of custody cases—and those are highly discretionary issues, they're based on the best interest of children—sometimes the courts aren't as interested in looking at the niceties of jurisdictional law. The Federal courts, because they don't deal with the merits of custody cases, are much more interested in looking at what the law actually says about jurisdiction. I do not think it would be a major burden on the Federal judiciary. It was not during the 6 years or more that it was applied in Federal courts before the Thompson decision. That was the majority rule, and I would like it to see it go back to that.

This grandmother or any other litigant could then go into a Federal district court, and with a hearing of less than an hour, get the Federal judge to say yes, you have to enforce this. It would be far less expensive and more expedient.

[The prepared statement of Ms. Haralambie follows:]

PREPARED STATEMENT OF ANN M. HARALAMBIE, ATTORNEY

SUMMARY

The most pressing need for amendment to the Parental Kidnapping Prevention Act (PKPA) is to restore the jurisdiction of federal district courts to construe the PKPA with respect to which state has jurisdiction to hear the merits of custody and visitation cases (i.e., how to apply the federal law). This had been the majority position among federal courts until the 1988 U.S. Supreme Court case of Thompson v. Thompson ruled that federal courts did not have jurisdiction in such cases. H.R. 1690 should be amended to include such a provision.

The amendment currently proposed in H.R. 1690 makes explicit that the PKPA applies to custody and visitation cases and to grandparent custody and visitation cases. The existing language of the PKPA is broad enough to include these categories, and courts have typically assumed that they apply broadly. Therefore, the existing amendments would have only a clarifying effect and do not change existing law.

STATEMENT

I am Ann M. Haralambie, a lawyer from Tucson, Arizona, where I have a trial and appellate practice specializing in custody and child abuse cases. I appear today as the designee of Jerome J. Shestack, President of the American Bar Association.

In August 1988 the American Bar Association adopted a resolution urging Congress to confirm that federal district courts have the power to resolve the issue of conflicting state claims concerning jurisdiction over child custody disputes, based on the federal Parental Kidnapping Prevention Act (PKPA) and Title III of the Constitution. It remains the policy of the American Bar Association to amend the PKPA to provide explicitly for subject matter jurisdiction to reside in the federal courts. Therefore, the ABA would support an amendment to the PKPA which provides explicitly that federal courts have subject matter jurisdiction to enter declaratory and injunctive relief to determine which state has PKPA jurisdiction to decide a custody or visitation case. I strongly support the position of the ABA.

In addition, I want to address several issues before the Subcommittee today that are broader than those addressed by the ABA policy position. In addressing these broader concerns, my remarks reflect my own experience and views and not the official views of the ABA.

Clarification of Application to Grandparent Custody and Visitation

The Parental Kidnapping Prevention Act (PKPA) applies to custody determinations, which are defined at 28 U.S.C. §1738A(b)(3) to mean "a judgment, decree, or other order of a court providing for the custody or visitation of a child," including permanent and temporary orders. That definition is broad, and on its face, it would apply to grandparent custody and visitation cases. Because the term "contestant" is defined in §1738A(b)(2) as "a person, including a parent, who claims a right to custody or visitation of a child," the definition is not meant to apply exclusively to parents. Grandparents would appear already to be included in the definition if they claim a right to custody or visitation.

I am personally unaware that there is a problem with courts failing to apply the PKPA to cases involving grandparent custody and visitation cases. Courts have generally applied the PKPA to grandparent custody and visitation cases, usually not even considering that the Act might not apply to grandparent cases. [1] The proposed amendments merely make more explicit what appears to be implicit in the existing language. My only concern is that the addition of the word "grandparent" not be construed to limit the categories of parties considered "persons" under §1738A(b)(2), and the legislative history should include a clear record on this point.

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[1] *See, e.g., Godwin v. Bogart*, 674 So.2d 606 (Ala. App. 1996); *In re Appeal in Pima County Juvenile Action No. J-78632*, 147 Ariz. 584, 712 P.2d 431 (1986); *Brossoit v. Brossoit*, 31 Cal. App. 4th 361, 36 Cal. Rptr. 2d 919 (1995); *Perez v. Perez*, 212 Conn. 63, 561 A.2d 907 (1989); *Richie C.H. v. Diane E.D.*, 1997 WL 297000 (Del. Fam. Ct. 1997); *Golding v. Golding*, 667 So.2d 404 (Fla. App. 1995); *Harris v. Simmons*, 110 Md. App. 95, 676 A.2d 944 (1996); *Owens by and through Mosely v. Huffman*, 481 So.2d 231 (Miss. 1985); *In re Aldridge*, 841 S.W.2d 793 (Mo. App. 1992); *Maureen S. v. Margaret S.*, 184 A.D.2d 159, 592 N.Y.S.2d 55 (1992); *Williams v. Williams*, 110 N.C. App. 406, 430 S.E.2d 277 (1993); *Carpenter v. Carpenter*, 326 Pa. Super. 570, 474 A.2d 1124 (1984); *Brown v. Brown*, 847 S.W. 496 (Tenn. 1993); *Coots v. Leonard*, 959 S.W.2d 299 (Tex. App. 1997).

Background of the PKPA and Current Application

The PKPA was derived from the Uniform Child Custody Jurisdiction Act (UCCJA), with one major difference. Consistently with the Commentary to the UCCJA and the law review writings of its drafters, Congress expressed a clear preference for custody jurisdiction in the child's home state, absent declination of jurisdiction by that state's court, and for providing clearly that only one state had custody jurisdiction at a time.

Some state court judges, often elected to their positions, favored in-state litigants despite PKPA prohibition on their exercise of custody. Others too broadly construed "emergency" jurisdiction and otherwise found an implied "best interests" exception to the clear PKPA jurisdictional requirements. Still others believed that the poorly named PKPA applied only in cases of parental kidnapping, not in all enforcement or modification actions. I do judicial training and continuing legal education presentations around the country, and there continues to be a surprising number of lawyers and judges who analyze cases solely with respect to the UCCJA, without regard to the PKPA. In general, courts appear to be becoming more familiar with the PKPA; however, there are still cases which go to the supreme courts of two competing states, with resulting conflicting custody orders. In more cases litigants cannot afford to appeal adverse decisions, resulting in conflicting trial court decisions. This is exactly the situation which the PKPA was designed to remedy. Such inconsistent results discourage compliance even with one's own state's visitation provisions, because if the child is permitted to go to the other parent's state for a visit, then that state's conflicting custody order will be enforced.

Even where appellate courts eventually apply the PKPA correctly, such as in the well-publicized Baby Jessica case, the child's custody is in limbo for years. Custody jurisdiction experts generally agreed that in the Baby Jessica case, Iowa had home-state jurisdiction and that, pursuant to the PKPA, Michigan was required to enforce without modifying the Iowa order. After the Iowa Supreme Court affirmed the trial court's decision, more than a year later, and the DeBoers were ordered to return the child to Iowa, the DeBoers filed an application in Michigan seeking to get around the Iowa orders. Another year passed before the Michigan appellate courts eventually agreed that Michigan lacked subject matter jurisdiction and was required to give the Iowa order full faith and credit. Unfortunately for Baby Jessica, her emotional ties to the DeBoers were based on the time she spent with them while the litigation dragged on in two consecutive states, not on niceties of the federal law.

Federal District Court Jurisdiction

In previous practice, when state courts refused to honor the PKPA restrictions on their jurisdiction, litigants had access to federal district courts to answer the narrow question of which state had jurisdiction under the PKPA. This remedy was quick, consumed little time in the federal court, and spared the children years of appellate litigation in two different states, with the possibility of conflicting state supreme court decisions at the end of the appeals process.

One example from my personal practice may be illustrative. I represented an agency which filed a dependency action concerning a young child. Both parents appeared at the trial, the Arizona mother agreeing that the child should be placed in a foster home, and the Texas father arguing for custody. After a full trial, at which all parties (including the child) were represented by counsel, the court adjudicated the child dependent and ordered that he be placed in a foster home. The father requested that he be permitted to take the child out for dinner before he left town, and the court and agency agreed. Instead, he drove the child to Texas. An arrest warrant was issued for felony custodial interference, and the father was picked up in Texas. The child was placed in a receiving home until the agency could send someone to pick the child up. The father objected to a Texas state judge, who ordered the father released and entered a custody order in favor of the father, stating that he seemed like a nice guy, and that it is better for the child to be raised by a parent in Texas than in a foster home in Arizona. The agency retained counsel in Texas who filed an action in federal district court. The federal hearing took less than one hour. Within two weeks of the child's being taken to Texas unlawfully, the federal judge determined that Arizona was the child's home state, that the mother and agency continued in Arizona, that the Arizona order had been entered with notice, and that the Texas state court had no jurisdiction to enter an inconsistent order. Rather than wait for a year while the Texas appellate courts determined that the PKPA required enforcement of the Arizona order, the child was timely returned, with little cost to the parties.

On January 12, 1988 the United States Supreme Court rendered its decision in *Thompson v. Thompson*, 184 U.S. 174, 108 S.Ct. 513, 98 L.Ed.2d 512 (1988), holding that the PKPA did not create an implied cause of action in federal court to deter-

mine which of two conflicting state custody decrees is valid. This holding was based on the Supreme Court's determination of Congressional intent in enacting the statute. Custody lawyers and other commentators overwhelmingly expressed disappointment in this decision.

Most of the federal district courts which considered the issue prior to *Thompson* had ruled that federal courts did have subject matter jurisdiction over the narrow jurisdictional issue.[2] The Third, Fourth, Fifth, and Eleventh Circuit Courts of Appeals based their finding of jurisdiction on the proposition that, without a federal forum to enforce the restrictions imposed by the federal statute upon state courts, those restrictions would be rendered nugatory, and Congress' intent would be thwarted.[3] The Ninth Circuit disagreed,[4] as did dicta contained in decisions by the D.C. Circuit[5] and the Seventh Circuit.[6]

Federal court jurisdiction would not permit litigants to address the merits of custody determinations, but rather, in the words of the Fourth Circuit Court of Appeals, to serve "as a referee between conflicting state custody decrees."[7] This function is limited to determining which of two competing states has the *jurisdiction* to decide the merits of the case under the requirements of the PKPA. The federal court would be limited to granting declaratory and injunctive relief only.[8] The hearings, because they deal with only a narrow legal issues, are typically quite short and do not pose an unreasonable burden on the federal dockets. The federal remedy would greatly reduce the duplicative state court proceedings, which often require parties to conduct lengthy evidentiary trials on the merits in two different states. It also prevented middle- and lower-income parties from being forced into defaults in distant and improper venues because they could not afford litigate trials in those states. Again, this result is contemplated by the PKPA.

In closing, I urge you to support an amendment to the PKPA which provides explicitly that federal courts have subject matter jurisdiction to enter declaratory and injunctive relief to determine which state has PKPA jurisdiction to decide a custody or visitation case.

Mr. PEASE. Thank you very much Ms. Haralambie. I have questions for both, but I wanted to follow up your last point so we'll start there.

In the experience in the Federal courts before the Supreme Court decision in the Thompson case, do you have any idea of the volume of those cases that were considered in the Federal courts? And the reason that I ask that, obviously, is the concern about a potential burden on the Federal system. Now let me back up and point out that I'm one, as you know from my opening statement, that believes strongly we need to find a way to enforce these orders. But I'm wondering what that impact might be or whether we have enough history to predict what that impact might be?

Ms. HARALAMBIE. I don't know what any of the numbers are and given the types of cases these are and how limited they are, most of the decisions that were made by Federal courts entered orders enforcing one State's order or the other State's order, and did not result in published opinions. So it's hard for me to know. I'm sure there is probably some entity that had statistics on that. The two decisions which I cite in my written testimony where there is dicta

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[2] *See, e.g., McDougald v. Jenson*, 786 F.2d 1465 (11th Cir. 1986); *Heartfield v. Heartfield*, 749 F.2d 1138 (5th Cir. 1985); *Hickey v. Baxter*, 800 F.2d 430 (4th Cir. 1986); *Meade v. Meade*, 812 F.2d 1473 (4th Cir. 1987); *DiRuggiero v. Rodgers*, 743 F.2d 1009 (3rd Cir. 1984); *Flood v. Braaten*, 727 F.2d 303 (3rd Cir. 1984); *Templeton v. Witham*, 595 F. Supp. 770 (S.D. Cal. 1984) [but reversed 805 F.2d 1039 (9th Cir. 1986)]; *Davis v. Davis*, 638 F. Supp. 862 (N.D. Ill. 1986); *Wyman v. Larner*, 624 F. Supp. 240 (S.D. Ind. 1985); *Martinez v. Reed*, 623 F. Supp. 1050 (E.D. La. 1985); *Alexander v. Ferguson*, 648 F. Supp. 282 (D. Md. 1986); *Olmo v. Olmo*, 646 F. Supp. 233 (E.D. N.Y. 1986); *Maxie v. Fernandez*, 649 F. Supp. 627 (E.D. Va. 1986).

[3] *See, e.g., McDougald v. Jenson*, 786 F.2d at 1477 (11th Cir. 1986); *Heartfield v. Heartfield*, 749 F.2d at 1141 (5th Cir. 1985); *Flood v. Braaten*, 727 F.2d at 312 (3rd Cir. 1984).

[4] *See Thompson v. Thompson*, 798 F.2d 1547 (9th Cir. 1988).

[5] *See Bennett v. Bennett*, 682 F.2d 1039, 1043 (D.C. Cir. 1982).

[6] *See Lloyd v. Loeffler*, 694 F.2d 489, 493 (7th Cir. 1982).

[7] *See Hickey v. Baxter*, 800 F.2d at 431 (4th Cir. 1986).

[8] *See, e.g., Meade v. Meade*, 812 F.2d at 1476 (4th Cir. 1987).

from the D.C. Circuit and one other circuit, those were both 1982 cases. The cases after that seemed to come down very clearly in favor of finding Federal court jurisdiction, i.e. finding that otherwise to have no Federal court remedy would render the action of Congress nugatory, which in fact has happened in many cases.

I believe that because of the tremendous amount of litigation in interstate custody cases, there are a lot of people who don't understand how to apply the PKPA in determining which state ought to do it. But I believe that given the much narrower scope that the Federal courts would be addressing or either declaratory or injunctive relief, that while the number of cases—and I don't know how large—might reach a certain mass, at least in the beginning, once people understood that the Federal court knows how to construe the Federal law telling the States what to do, I imagine that the precedent would become much clearer and there would be less of the extended litigation. I think a lot of litigants are motivated to litigate even in States that they know they aren't jurisdictionally supposed to hear the case because State court judges are so willing to get into the merits of those cases.

I have never been aware that the Federal judiciary was concerned, except for those two 1982 cases and then the 9th Circuit in 1988 in the Thompson case which ultimately the Supreme Court did affirm, said we don't have jurisdiction here. But I think that if there had been a tremendous problem, we probably would have heard something at least in the family law bar that Federal courts were objecting to exercising jurisdiction.

Mr. PEASE. Thank you, Ms. Haralambie. If you could in your role as representing the ABA, ask the ABA whether it does have any information on the volume of work that was done during that time period or maybe in its consultation with the Judicial Conference, if that information is available I think it would be helpful to the committee.

Ms. HARALAMBIE. I'll do that. In fact, on Saturday I serve on the governing board of the ABA Center on Children and the Law, and we are having our meeting this Saturday and I know they do maintain a fair number of statistics, so I may know even before I leave Washington and I would be happy to let counsel have that information.

Mr. PEASE. We appreciate it. Thank you.

[The information referred to follows:]

In response to Congressman Pease's request, I contacted the Judicial Conference to see if there were any statistics concerning numbers of PKPA cases heard by the Federal district courts prior to the Thompson decision.

Catherine Whitaker of the Analysis and Reports Branch, Statistics Division, AOUSC replied to my inquiry by stating that: "[o]ur statistical data on civil findings have not been collected at that level of detail, so we cannot identify the number of cases that were filed under this act."

Mr. PEASE. Ms. D'Antonio, you talked about financial difficulties involved in trying to enforce a New Jersey visitation order in North Carolina. Without asking to pry into your personal life, can you tell us a little bit more what that was like, the impact on you, the problems you faced? And second, whether other people, either from your direct experience in your organization or conversations you've had with other individuals face similar problems?

Ms. D'ANTONIO. Yes, I welcome the question. For myself personally, I went to court from 1994 in New Jersey. That was approximately $15-$20,000. In addition to that, to get a court order recognized and honored in North Carolina, that was an additional $10,000. Now, of those monies—I'm =talking about transportation, travel, attorneys' fees—in 1 day my attorney at $195 an hour, sat in a district court the entire 8 hours until our case was heard. We heard traffic violations, we heard farmers' problems. It's very different from other area courts that I was used to. We heard everything: Pigs, squealing. It was quite an education.

As far as other grandparents, I find the biggest problem are the minority grandparents, and I particularly have to say in the city of Camden, the black and Hispanic community, have no representation. They don't know how to go to court and represent themselves just to visit a child. They are actually raising their grand babies more than we are. And once a new boyfriend, or a new lover, or a new interest comes into that household, the grandmother and grandfather are no longer needed. So they don't even get to court because of the financial burden. For myself I took two house loans, I'm disabled with post polio, and I owe my life away but I think it'll come back in the long run.

Mr. PEASE. So just in your case alone we're talking $25,000, maybe more——

Ms. D'ANTONIO. Easily.

Mr. PEASE [continuing]. To enforce your rights to visit with your grandchildren and be part of their lives. What about the time involved in this? And the reason that I ask that is, first to know how long it takes, but secondly because delay in a matter like this means that even if you win you lose because you've lost that time as the kids are growing up and getting away.

Ms. D'ANTONIO. Yes. It has been my experience that the children need grandparents when they're little. When they become a little older and teenaged, they don't need us as much. So we are losing those very precious infant lives when they do need to go the park or to picnics, learn how to sew, learn how to golf; whatever it is a grandparent can give to that child. And you lose so much time because it takes at least six to 8 weeks to be heard in a local court—I'm speaking about New Jersey—just to be heard. And then if you're going to have any court appointed psychologist, that takes another 6 months to a year. It could go on that way. I think you're familiar with this.

Mr. PEASE. Well, sure. Why don't you tell us about your situation? I mean how long it took for you first to get your order, and then when your child moved to North Carolina how long it took you to get it eventually resolved in North Carolina. We're talking two or 3 months or are we talking two or 3 years here, total?

Ms. D'ANTONIO. We were granted visitation—short of custody I might say, short of custody—we were granted all of these wonderful things because of the preponderance of evidence to the State of New Jersey. Short of custody, I didn't want custody. They deserved their mother and dad. This was in 1995. It took until 1997 to visit them in North Carolina. I would say, may I come and visit them? Their answer was yes. I was there. I visited them and I was turned away as soon as I got there. After driving 8 hours it became a

game. It was so frustrating, I can't tell this committee how frustrating it is to try to be quiet, to try to please them and to try to be a little mouse just to be able to see that child.

Mr. PEASE. You mentioned the concerns, at least that you're directly familiar with in New Jersey, about some people not having the financial means—obviously you don't have, but yet, because you had assets you mortgaged them. What happens to people who don't have those assets at all?

Ms. D'ANTONIO. They come to our meetings; they write love letters into journals that their grandchildren never read. We celebrate birthdays at our meetings; we cry, we hug, and we let go.

Mr. PEASE. So there is no resolution for them?

Ms. D'ANTONIO. No. No.

Mr. PEASE. At least no legal resolution?

Ms. D'ANTONIO. No.

Mr. PEASE. Have you in your work, either directly personally or with other grandparents, come into contact with those who would oppose this legislation? And if so, why?

Ms. D'ANTONIO. Yes. Yes. And I welcome them. On the Internet I get maybe 8 positive to 1 negative that are very negative. And I respect, I deeply respect a parent's right to raise their child as they want, who they want to see. But I have a deep problem with someone who says because I don't like you, because you are Jewish and I am Catholic, I don't want to see you anymore. The spouse dies in some instances and they feel that this is a carte blanche to just take up and leave. And as I said in my written statement, grandparents don't divorce children. You didn't ask us if you wanted them in our lives. Don't take them away now.

Mr. PEASE. Well, I understand that because I've dealt with the same thing at the State level when we were doing this legislation, but how do folks—how can folks respond that oppose this legislation, moving away from the merits of whether visitation ought to have been granted at all to the fact that there is now a court order, like it or not, that you're entitled to visitation. How do they justify being able to ignore a court order or make it difficult for you to enforce that order?

Ms. D'ANTONIO. Unfortunately, I find personally, it's very difficult to enforce any court order. You have the order but try to enforce it. It's more difficult.

Mr. PEASE. And it's more difficult when you're in another State obviously, than if you're in——

Ms. D'ANTONIO. Yes, yes. You're the stranger. You're this person coming into your State and saying I would like to have this honored and it doesn't work. It sounds nice.

Mr. PEASE. Ms. Haralambie, you testified that you think that this proposal minus the suggestion that you've made about jurisdiction would simply be a clarification of existing law. That being the case, assuming that's correct, and I have no reason to disagree with you, what leads us to believe then that the Supreme Court's going to feel any differently if this is just a clarification of the existing law and they've said there isn't any jurisdiction.

Ms. HARALAMBIE. Well, I think that if all the bill does is what it currently does, it's not going to change the Thompson decision and you're still going to have the issue brought before State courts.

And I think the basic problem is not so much as to whether it touches grandparents; grandparents happen to be one group of people who have had the same experience that parents trying to go into another State have had. I think it's interesting to hear about how expensive it is to litigate—in the case that I cite in my written testimony where we were trying to enforce an Arizona order in Texas and had less than an hour's worth of Federal district court time, i.e. the bill for that case was under $2,000 from the lawyers in Texas because the issue is so narrow and you don't have to deal with all of the other issues, and the Federal district courts don't have the same kind of investment in trying to do public policy on whether grandparents should be involved or whether this parent is better than that parent.

But I don't think that the existing change in language is ultimately going to address the problem that it seeks to address, which is to make it easier and less costly to enforce what the PKPA already tells you you need to do. To me the key for that is having that Federal district court remedy.

Mr. PEASE. And I do understand that and I've noted your suggestion on that. Do you think absent that, this act would be helpful for instance, in educating judges at the State level about the intent of the act initially and therefore hopefully reducing the amount of time and expense for folks involved in this kind of litigation?

Ms. HARALAMBIE. You know, since I first read this act last fall, I've spoken to a number of attorneys around the country. I've also done at least one judicial training and spoke to some of the judges there, and I have yet to have come across one judge or attorney who would have thought that the act does not apply to enforcing grandparents' visitation or custody orders. Because if you read the act itself, the definition of custody determination includes any order affecting the custody or visitation of a child, and it doesn't say only between the parents.

The only other thing I could suggest is renaming the act, which I know isn't going to happen, to be the Federal Child Custody Jurisdiction Act.

Mr. PEASE. Okay, thank you. We've been joined by our colleague, Mr. Rogan from California. And Jim, I know you weren't able to be with us to hear the testimony but I do want to give you the opportunity if you have questions to proceed.

Mr. ROGAN. Mr. Chairman, thank you. Please accept my apology and I hope the witnesses will also accept my apology. Unfortunately, I was on the floor engaged in other matters. Although I did not have the opportunity to hear the testimony, I did have the opportunity to review the written testimony.

Let me just say, Mr. Chairman, that I'm extremely sympathetic to the plight that's been set forth here. I was raised by both of my maternal grandparents from the time of my birth, and I know how devastating it would have been as a young child to have been caught up in any kind of custody situation, and be pulled away from them. So I commend the witnesses for their effort on this bill.

Thank you, Mr. Chairman. I yield back the balance of my time.

Mr. PEASE. Thank you, Mr. Rogan. Ms. Haralambie, you obviously are a specialist in this area. You didn't caption yourself but your resume certainly indicates that you're a specialist in this area.

Do you have any feel for the prevalence of these kinds of issues in the State courts? Are we seeing an increase in this kind of litigation? Has it been relatively static over the last decade?

Ms. HARALAMBIE. With respect to interstate custody jurisdiction or grandparents visitation?

Mr. PEASE. Well, let's do both. I was going to ask you the former but let's do both.

Ms. HARALAMBIE. Well, actually the answer is probably the same. There has been an increase in litigation in general. In these areas there are more people vying for the child's time; that's even true between mothers and fathers. Before maybe the last 10 or 15 years it was pretty much assumed mother got custody, father got visitation, if mother wanted to move to another State with the child she could. And now fathers have said no, we want to be more important players in our children's lives. People have moved much more often.

In my two volume treatise that you mentioned, I have to write pocket part updates every year to those and two of the areas that I see the greatest change where I'm taking out cases and adding new cases every year that I write those pocket parts, is in interstate relocation, and in grandparent custody and visitation. States are going up and down in trends, favoring it, not favoring it. For a while there was a major legislative trend to the point where now all 50 States have grandparent visitation laws. Some of them extend to other people, some of them are limited to grandparents, but now I'm seeing a change in the tide somewhat where some of the courts and State legislatures are now saying maybe we've gone too far; maybe we've intruded too much; maybe we ought to limit some of the circumstances; maybe we ought to clarify that we meant to give standing and not a vested right. And there is a real change and shift.

Since 1983 when the first edition of my book when it was only one volume came out, trends disfavoring third party custody were changed to trends favoring third party custody. It's now starting to move back the other way. Relocation cases are changing a great deal from, of course you can relocate, to very strong restrictions on relocation. Now that is starting to move back toward making it easier for people to relocate. And of course any time you have people relocating, you're going to have more questions of interstate enforcement. So I'm expecting to see—and I'm already seeing somewhat, a greater request on the State court level, which is our only forum to try and enforce or change orders that some other State has entered.

Mr. PEASE. I'm obviously not the national expert on this—I don't even know if I was a State expert in Indiana. But in our State what we did was confer standing under the traditional, we thought, traditional test of "best interest of the child." Would you say that's the predominant position among the States or are there some that have gone to an absolute conferral of a right?

Ms. HARALAMBIE. No, almost everybody that I'm aware of has standing. The best interest being the test is the minority view. The majority view is that you have to show something more than just that the visitation is in the child's best interest. I'm sorry, well,

custody, for third party custody, it has to be more than best interest, giving the parents' superior rights to custody there.

Mr. PEASE. Visitation.

Ms. HARALAMBIE. But visitation, the States certainly require best interest in every statute that I can think of off the top of my head. Some States also require some additional trigger—almost no States permit grandparent visitation in intact families although there are a couple of court decisions that say that. The early statutes said if you were the parent of the parent who is the non-custodial parent or the deceased parent, then you have standing. But if you are the parent of the custodial parent or the surviving parent, you don't have standing. That was changed, and most States moved to state that between the two grandparents, they both have the same rights. Now some States are starting to go back to restrict it to the parent who is not related to the custodial parent.

Mr. PEASE. I appreciate that very much. Let me suspend our questioning for a moment because we've been joined by our colleague.

Congressman Andrews, if you would like to make your presentation or statement——

Mr. ANDREWS. I'd be happy to wait for the other witness.

Mr. PEASE. We have finished their presentation and we're in the question time so we want to accommodate your schedule however we best can.

STATEMENT OF HON. ROBERT E. ANDREWS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW JERSEY

Mr. ANDREWS. Thank you, Mr. Chairman. First of all, thank you about your graciousness about our tardiness this morning. It is "take your daughters to work day," so I have taken my daughters Jacqueline and Josey with me. Where are we girls? Where did we come?

So we appreciate your indulgence and I'm also very honored that my constituent, Josephine D'Antonio, is going to join us this morning. It is, I assure you, a coincidence that her name is Josephine and that my youngest daughter is named Josephine. It is not by design, but we certainly do appreciate the fact that she's here.

The two most important examples I can give you as to why I support this legislation and why I introduced it, are the two little people I brought with me this morning. They're very fortunate that they have a terrific relationship with three living grandparents, and I have seen a bond evolve between my daughters and their grandparents over their short lives that I would never want to see severed, irrespective of the circumstances. Irrespective of any legal or practical circumstances. I think that the relationships that exist between grandchildren and their grandparents are unique and special and the law ought to recognize that uniqueness and specialty and that's why we introduced this bill.

I'm aware of the fact that it is a fairly highly technical proposition and I appreciate the indulgence the committee has shown in studying the bill and understanding its technicalities but you know, when you sort through the technicalities it gets back to the basic point: That the law ought to be on the side of recognizing and

preserving the sanctity of relationships that exist between grandparents and grandchildren.

It's important to point out two things this bill does not do. The first thing this bill does not do is impose a Federal decision about grandparents' rights on any State. It simply calls for the reciprocal recognition of grandparents' rights once a State has duly adjudicated that those rights ought to exist.

The second thing that this bill does not do is preclude a new proceeding in which changed circumstances could be brought to the forefront which might render the continuation of the grandparent-grandchild relationship inappropriate. Let me say what I mean by that. If State A enters an order which gives grandparents the rights of visitation or perhaps even greater rights for the grandchild, and State B under our bill would be compelled to recognize that order which in fact is the case. If there were changed circumstances; if the grandparents had a medical crisis or if they exhibited some kind of inappropriate behavior toward the child, nothing in this bill precludes either State from hearing proper proceedings which would revise, modify, or revoke the underlying order under the right circumstances. It's very important to understand that what this bill does is to recognize and affirm the sanctity and value of the relationship between grandchildren and grandparents.

What it does not do, what it does not do, is impose the judgment of the Federal judiciary upon that of any State or of this Congress upon any State, in terms of the substantive criteria for affording those kind of rights.

And the second thing that this bill does not do is preclude a reconsideration on the merits of a changed relationship between grandparents and grandchildren that would be appropriate.

So I would urge the committee to expeditiously consider and report out the bill so that we could bring it to the full committee and into the floor. And I thank the chairman for his time.

[The prepared statement of Mr. Andrews follows:]

U.S. CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
Washington, DC, July 15, 1997.

DEAR COLLEAGUE: Could this be one of your constituents?

After a day in the park with their grandchildren, Mr. and Mrs. Smith come home to a surprise: their estranged son has returned to take the children to another state. The Smiths have visitation rights in the state in which they reside, but do not in the state to which the children are moving. What can they do? Under current law in most states the Smiths would have to petition again for visitation rights. Senior citizens on a fixed income may face high court costs which could financially devastate them, and they would have no guarantee that the new state would grant them the right to visit their grandchildren.

Is this fair to the grandparents? Is it fair to the grandchildren?

Of course not. Grandparents provide children with a built-in family mentor, friend, playmate, confidant, and link to the family's past. Although some parents may have difficulties in their relationship with their adult children, a parent should not be able to sever the relationship between grandparent and grandchild—especially if the grandparents and grandchildren have a meaningful, established relationship, and the grandparents have been found fit to have visitation rights.

I have introduced a bill that will go a long way toward empowering grandparents. H.R. 1690 provides for full enforcement of the full faith and credit clause with respect to child custody determinations. In plain English, my bill allows a grandparent who has already won visitation rights in one state, to have those rights fully recognized by any other state. Under my proposal, the Smiths would never have to worry about losing contact with their grandchildren since the custody determination from their home state would be recognized by the state to which the children moved.

I have heard from many grandparents who have lost their relationship with their grandchildren becase the state which the parents moved would not grant visitation rights. You may have heard from grandparents with similar stories. More than 75% of older Americans are grandparents. Let's help them keep in contact with their grandchildren.

If you would like to co-sponsor my bill, H.R. 1690, or would like more information, please contact me or Maureen Doherty of my staff at 5-6501.

Sincerely,

ROB ANDREWS, *Member of Congress*

Mr. PEASE. Thank you, Congressman Andrews. Jim, you have the opportunity if you wish to ask any questions of our colleague at this time. If not, we'll move back to our witnesses.

Mr. ROGAN. Mr. Chairman, I simply wish to thank our colleague for bringing this bill and congratulate him on his efforts. Now that I've had the opportunity to see his charming daughters, I understand his incredible appeal back home. [Laughter.]

Mr. ANDREWS. The only reason.

Mr. ANDREWS. Thank you. Thank you, Jim.

Mr. PEASE. Congressman Rogan, you have two daughters about the same age as Congressman Andrews, do you not?

Mr. ROGAN. I believe I do. [Laughter.]

Mr. ANDREWS. How old are your daughters?

Mr. ROGAN. And that definitely accounts for my being here. It has nothing to do with my policies. My girls are twins. They are 5 years old.

Mr. ANDREWS. Jacqueline is five and Josey is three, so you're involving yourself in the same issues that we are.

Mr. PEASE. We do appreciate you being here and I had about concluded my questioning of these witnesses. You're free, even though you're on the panel, to ask them questions if you would like, which is kind of an aberration from our procedure but——

Mr. ANDREWS. I would decline, thank you.

Mr. PEASE. Ms. Haralambie, I want to ask you the same question I asked Ms. D'Antonio, and that is do you know of other than pragmatic concerns of administration, do you know of substantive opposition to the bill that we ought to address?

Ms. HARALAMBIE. I am not aware of any.

Mr. PEASE. Okay, that's easy. Well, let me just say thank you to everyone. I do appreciate—I know it has to be terribly difficult Ms. D'Antonio, for you and others who are in your position, to have to come to Washington to add that to the list of things that you've already had to do to try and enforce your rights with your grandchildren. We are fortunate that you and others like you are willing to do that so that we can get this issue, through Congressman Andrews, before us.

I'm sorry for your circumstances but I'm grateful for your time. And if you and others that are similarly situated have other information you would like to share with us, please get it to Congressman Andrews or to Chairman Coble so that we can include it in the record. We will keep the record of this hearing on H.R. 1690 open for 1 week, and if you or others would like to submit materials, please feel free to do so. Ms. Haralambie also. And if you can follow up with the ABA or the Judicial Conference on those requests that we made I would appreciate that.

Thank you all of you for your time, for your willingness to be with us. We look forward to working with you. We thank you for your cooperation and the subcommittee is adjourned.

[Whereupon, at 10:40 a.m., the subcommittee adjourned subject tot he call of the Chair.]

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APPENDIX

APRIL 23, 1998

ADDITIONAL MATERIAL SUBMITTED FOR THE HEARING RECORD

AMERICAN BAR ASSOCIATION

9ECTION OF FAMILY LAW

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

BE IT RESOLVED, That the American Bar Association urge the Congress of the United States to confirm that Federal District Courts have the power to resolve the issue of conflicting state claims concerning jurisdiction over child custody disputes, based on the Federal Parental Kidnapping Prevention Act, and Title III of the Constitution.

REPORT

State legislatures and Congress have enacted civil and criminal statutes to curtail interstate parental kidnapping and to resolve disputes over jurisdiction that typically arise in interstate child custody and visitation cases. In 1980, Congress enacted the Parental Kidnapping Prevention Act (PKPA), which was expressly intended to "avoid jurisdictional competition and conflict between state courts." The PKPA requires States to afford full faith and credit to child custody determinations entered by sister state courts if the court that made the determination exercised jurisdiction consistently with the provisions of the federal Act. Specifically, the PKPA directs the appropriate authorities of every State to enforce and not modify child custody determinations made consistently with its provisions. It further imposes on state courts a federal duty to refrain from conducting simultaneous child custody proceedings when an action is already pending in a court which is exercising jurisdiction in conformity with the PKPA. It also imposes an obligation upon state courts to defer to the continuing jurisdiction of sister state courts under specified circumstances.

Since its enactment in 1980, numerous state courts have ignored, or been ignorant of, the requirements of the PKPA. The result has been continuing "jurisdictional impasses"—competing claims by courts in sister states of jurisdiction over child custody cases involving the same child(ren).

In actions filed in federal courts by plaintiffs seeking relief from alleged violations of the PKPA by sister state courts, four Federal Circuits—Circuits 3, 4, 5 and 11—have held that Federal Courts have jurisdiction to decide which of two state courts have acted in conformity of the PKPA. But the 9th Circuit ruled that the PKPA did not create a cause of action in Federal Court for a child custody contestant seeking relief from an alleged violation of the PKPA. In January, 1988, the United States Supreme Court affirmed the 9th Circuit decision in the case of *Thompson v. Thompson*. The Court ruled that the PKPA does not provide an implied cause of action in federal court to determine which of two conflicting state custody decisions is valid. However, the Court acknowledged that "Congress may choose to revisit the issue."

It is the collective opinion of family law practitioners that the original legislation, the PKPA, was intended to resolve what can now be an irrevocable impasse between state courts, that the Ninth Circuit was wrong, and that the U.S. Supreme Court decision in *Thompson* was unfortunate and should be remedied by Congress at the earliest possible date. Absent enactment of remedial legislation, there is a risk that the matter could be left in the scandalous state it was before the Act, with two states vehemently asserting jurisdiction and two whipsawed parents and children caught in the middle. Passing the recommended clarifying legislation will further public policy against parental kidnapping and prevent the interminable delay in resolving custody disputes that the present state of the law would otherwise promote. We urge the adoption of this resolution.

HARVEY L. GOLDEN, *Chairman*
August, 1988

ANN NICHOLSON HARALAMBIE,
ATTORNEYS AT LAW,
Tucson, AZ, April 30, 1998.

Subcommittee on Courts and Intellectual Property,
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR SUBCOMMITTEE ON COURTS AND INTELLECTUAL PROPERTY: Enclosed are the following:

1. annotated (by one) Westlaw citation list of federal cases mentioning the PKPA.
2. portions of executive summary and portions of report from *Obstacles to the Recovery and Return of Parentally Abducted Children* (note, pursuant to 42 U.S.C. §5778, Congress directed the Office of Juvenile Justice and Delinquency Prevention (OJJDP) to conduct this study; the first recommendation of the study is to amend the PKPA to reverse *Thompson*); the ABA Center on Children and the Law prepared this report on contract for OJJDP
3. §14.01 from A. HARALAMBIE, HANDLING CHILD CUSTODY, ABUSE, AND ADOPTION CASES (2nd ed, Clark Boardman Callaghan 1993) concerning adoption cases and the PKPA

I would like the second and third item to be added to the record as a part of my personal testimony last week. I would also like to supplement the record by including my comments concenung the Hague Convention, which are on the next page of this letter. These supplements reflect my own views and opinions and are not policy of the American Bar Association.

In response to Congressman Pease's request, I have requested that the statistics office of the Judicial Conference research the number of PKPA cases heard in federal courts between 1980 and January 1988, but I have not yet heard whether they have or can obtain that information. My Westlaw search has identified a number of cases which mention the PKPA, but do not concern federal court jurisdiction to decide PKPA jurisdictional disputes when there are competing state court orders or proceedings. As more fully noted in the annotated citation list, there are 22 decisions between 1980 and the Supreme Court decision in *Thompson* which deal with the relevant jurisdictional matters. Of those 22 cases, 8 are duplicate cases (i.e., 4 district court cases that were then decided by the Circuit Courts of Appeal. This is obviously an underestimate of the number of cases, because there are appellate decisions in cases for which no district court decision is listed. There have been 10 decisions since the *Thompson* decision. For comparison purposes, a Westlaw search shows 47 federal cases from 1989 through February 1998 dealing with jurisdictional issues concerning the Hague Convention on the Civil Aspects of International Child Abduction (Hague Convention).

The comparison to the Hague Convention cases is important because the federal courts clearly have subject matter jurisdiction to hear those cases pursuant to the implementing legislation, the International Child Abduction Remedies Act, P.L. 10–300 (ICARA). Section 4(a) of ICARA says, "The courts of the States and the United States district courts shall have concurrent original jurisdiction of actions arising under the Convention." I am unaware of any claim that such subject matter jurisdiction is adding to the burden of federal courts. The inquiry in Hague Convention cases is which country has jurisdiction to decide custody and visitation cases, the international equivalent of the interstate inquiry which the proposed amendment to the PKPA addresses. In fact, the federal PKPA inquiry would be narrower, because there are defenses under Article 13 of the Hague Comention which permit limited inquiry into substantive issues of the child's environment in the other country.

I would not expect federal jurisdiction in PKPA cases to be any more burdensome to the federal court docket than federal jurisdiction in Hague Convention cases has been. District courts have overwhelming made the correct interpretation of the jurisdictional issues in Hague Comention cases, and there is no reason to believe that they would be less well equipped to construe the PKPA in cases of interstate conflict.

If I can be of any further assistance in this matter, please do not hesitate to contact me.

Sincerely,

ANN M. HARALAMBIE, *Attorney.*

Obstacles to the Recovery and Return of Parentally Abducted Children

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EXECUTIVE SUMMARY

Introduction

Parental Child Abduction

"Is my child custody decree worth the paper it is written on?" Many custodial parents ask these questions when faced with the knowledge that the other parent has taken the children and fled: "Who will help me find my children?" "How can my custody decree be enforced?" "When will I ever see them again?"

An estimated 354,100 children were abducted by parents or family members in the United States in 1988.[1] According to NISMART, the abductors of an estimated 163,200 children, or nearly one half of all of the abducted children, took the children across state lines, concealed them or prevented contact, and/or intended to keep the children indefinitely or have the custody changed.

The term "parental abduction" refers to the taking, retention, or concealment of a child or children by a parent, other family member, or their agent, in derogation of the custody rights, including visitation rights, of another parent or family member.

The parents of an abducted child may be separated, divorced, or unwed. Abductors may be sole custodial, joint custodial, or noncustodial parents, other family members, or persons acting on their behalf. Abductions can occur before or after an order regarding the custody of a child is issued by a court. Efforts to find children abducted by a parent often are based on the marital and custodial status of the left-behind parent.

Often people do not think of parental abductions as harmful. Yet many of these children already have lived through their parents' stormy relationship, failed marriage and difficult divorce. They are taken from the other parent and uprooted from their home, school, and community--possibly living on the run--changing names, schools, and homes. The lack of stability and continuity can have lasting detrimental effects on their development. They are children at risk.

The U.S. Congress, under 42 U.S.C. § 5778, directed the Office of Juvenile Justice and Delinquency Prevention, U.S. Department of Justice, to conduct a two-year research study to identify the

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[1]National Incidence Studies, Missing, Abducted, Runaway, and Thrownaway Children in America, Washington, D.C.: U.S. Department of Justice, May 1990 (hereinafter referred to as NISMART).

legal, policy, procedural, and practical obstacles to the location, recovery, and return of parentally abducted children and to make recommendations to overcome or reduce these obstacles. An overview of the results of the research, which combined legal and social science approaches to the problem, are presented below. A description of the research components and a guide to the report can be found at the end of the executive summary.

Existing Solutions to Parental Abductions

The Civil Legal Response

The civil legal response to the problem of parental abduction was designed mainly to prevent a child custody proceeding from going forward in more than one state (i.e., simultaneous proceedings) and custody orders from being issued in more than one jurisdiction (i.e., conflicting orders). State and federal laws were enacted to prevent "forum-shopping," the act of parents seeking out a different jurisdiction for the purpose of obtaining a favorable custody determination, and to require every state to honor and enforce (i.e., give "full faith and credit" to) child custody orders properly issued by the court of another state. Three key laws were enacted to address interstate and international parental child abductions.

The Uniform Child Custody Jurisdiction Act (UCCJA)

- The UCCJA is a uniform act which was enacted with some variation in all states, the District of Columbia, and the Virgin Islands between 1969-1983.
- The UCCJA is primarily a jurisdictional statute, which addresses when a court has subject matter jurisdiction in a custody case, whether it should exercise jurisdiction, and whether it must enforce or can modify the decree of another state.
- There are four bases of jurisdiction pursuant to the UCCJA:
  - The state is the "home state" of the child,
  - The child has "significant connections" with the state,
  - The state has emergency jurisdiction, or
  - The state assumes jurisdiction when no other state has jurisdiction, or another state has declined jurisdiction because it is in the best interests of the child for the first court to assume jurisdiction.
- Other key aspects of the UCCJA which were designed to prevent simultaneous proceedings include:

- Communication and coordination with parents, attorneys, law enforcement and other agencies;

- Assistance in the location and recovery of parentally abducted children; and

- Service as state contact under the Hague Convention in international abduction cases.

Research Findings and Recommendations

Despite the laws described above, obstacles to the location, recovery and return of parentally abducted children still persist. The following summary includes the major obstacles identified in the research and the recommendations proposed to overcome them. Recommendations requiring Congressional action are identified. Those necessitating state legislative changes follow. Recommendations to law enforcement and prosecutors, to the civil bench and bar, and, finally, to the public and multiple groups are provided.

Recommendations for Congressional Action

1. Obstacle: Conflicting Custody Orders

Despite the UCCJA and the PKPA, parents still obtain conflicting custody orders from courts in different states. There is no guaranteed forum for resolving which state's order is valid.

Commentary:

Under these circumstances, each parent may believe she or he has a valid order and is entitled to have it enforced, while simultaneously being in violation of the other state's order. To seek review of the custody orders through each state's appellate process is expensive and time-consuming. It still may not lead to a resolution, unless the U.S. Supreme Court, in its discretion, agrees to grant review.

Prior to the U.S. Supreme Court decision in the case of Thompson v. Thompson 484 U.S. 174 (1988), some federal courts acted as tie-breakers between state courts in custody cases involving conflicting judicial claims. In Thompson the Supreme Court held that there is no implied right to go into federal court under the PKPA, but that Congress may wish to revisit the issue.

Recommendation:

Congress should amend the PKPA to include an express federal cause of action (i.e., the right to take the case to federal

court) in cases involving conflicting child custody decrees resulting from courts of two or more states regarding the same children.

2. Obstacle: Lack of Procedures for Identifying Other Custody Proceedings or Orders

Presently there are no consistent, specific, effective, and widespread procedures for determining whether a custody proceeding is pending in, or a custody order has been issued by, a court of another state. Consequently, simultaneous proceedings and conflicting orders result.

Commentary:

Although the UCCJA requires interstate judicial communication to prevent simultaneous proceedings, these procedures are not uniformly followed, as evidenced by recent case law and findings from a nationwide survey of judges and attorneys with experience in parental abduction cases. Under half of the judges in the survey reported that they routinely initiated communication in cases that came before them. Only one-quarter of the attorneys said that judges routinely granted their requests for intercourt communication.

The UCCJA also requires that courts establish registries for the filing of out-of-state child custody orders. Most courts have never established a child custody registry and procedures for filing remain unclear. As a result, courts and law enforcement are hampered in enforcing orders.

Recommendation:

Congress should pass legislation establishing a national computerized child custody registry so that all child custody determinations and information about child custody-related filings will be readily accessible to courts throughout the country. The registry could be combined with a national child support registry.

3. Obstacle: Confusion Regarding Continuing Modification Jurisdiction

The concept that the state which exercised jurisdiction in issuing the initial child custody decree may retain jurisdiction even after the custodial parent and child leave the state is a key provision of the PKPA, designed to prevent forum-shopping and conflicting orders. However, it appears that this aspect of the PKPA is most often misunderstood, overlooked or ignored.

Commentary:

Courts in various states have exhibited widely diverse views as to how long a state keeps jurisdiction over the custody of a child after the custodial parent and the child have moved out of that state. Furthermore, courts in other states have often modified a custody decree when the initial state still had continuing modification jurisdiction. Thus, despite the intent of this provision, conflicting orders have resulted.

Recommendation:

Congress should amend the PKPA to provide a time limitation on continuing modification jurisdiction after the custodial parent and the child have left the state, which would only apply if the state has not set a specific time limit of its own.

4. Obstacle: Confusion Regarding Emergency Jurisdiction

Lack of clarity and specificity in the emergency jurisdiction provision of the PKPA, and varied court interpretations of it, compound problems of simultaneous proceedings and the enforceability of child custody orders.

Commentary:

The PKPA does not specify whether emergency jurisdiction may only be exercised to protect a child on a temporary basis (until the court with jurisdiction to issue a long-term order can act). Court interpretations also vary on this matter. In addition, the PKPA does not specify whether emergency jurisdiction is an exception to the rule that one state cannot modify the custody order of another state when the state which issued the order still has continuing modification jurisidiction, as explained above. Some courts have ruled that it does create an exemption; other courts have ruled the opposite, making enforcement difficult. Finally, emergency proceedings are often held ex parte (i.e., without the other party receiving notice or having the opportunity to be heard). The PKPA is silent and courts have varied as to whether emergency ex parte orders should be enforceable in another state.

Recommendation:

Congress should amend the PKPA to clarify what constitutes the proper exercise of emergency jurisdiction, including:

- **Specifying that it can only be temporary;**

- **Clarifying that it can be used to modify custody, but only temporarily, even when another state has continuing jurisdiction;**

- **Exempting emergency orders from the prohibition against simultaneous proceedings; and**

- **Providing for a short-term exemption from the notice requirement in limited emergency circumstances.**

5. Obstacle: Ambiguity in and Inconsistency Regarding the PKPA

Definitional ambiguity in the PKPA and inconsistency in court interpretations of this federal statute contribute to the occurrence of simultaneous proceedings and issuance of conflicting custody orders. Under these circumstances, enforcement of custody orders can be complicated.

Commentary:

Due to lack of specificity in the PKPA, certain definitional problems have arisen. For example, recent case law reveals varying interpretations of "custody determination," resulting in the PKPA not being applied to cases as intended. In addition, the PKPA provides no clear guidance as to what constitutes the declination of jurisdiction, or whether Native American Tribes are considered "States" for PKPA purposes.

Recommendation:

Congress should amend the PKPA to clarify ambiguous and confusing language, including:

- **Specifying, to the greatest extent possible, the various types of custody determinations to which the PKPA should be applied;**

- **Defining what constitutes declination of jurisdiction; and**

- **Expanding the definition of State to include Native American Tribe.**

Recommendations for State Legislative Action

1. Obstacle: Lack of Effective Enforcement Procedures

No cost-effective, specific, speedy, and uniform enforcement procedures exist from state to state to assist left-behind parents who seek to have their child custody order enforced, with the exception of California, which mandates a role for

which state's court should decide the matter, not a decision on the merits as to which contestant should have custody of the child.[324] A Massachusetts court explained that it had "no reason to believe that [the other state's] courts are any less concerned than courts of the Commonwealth with the welfare of children who are the subjects of custody disputes. Nor do we perceive any less ability on the part of [the other state] to protect adequately children under its jurisdiction than is available in the Commonwealth."[325] Both of these courts were mindful of the importance of being willing to defer to another jurisdiction when appropriate under the UCCJA and the PKPA.

A. Obstacles and Recommended PKPA Amendments[326]

1. Obstacle: Conflicting Custody Orders[327]

Despite PKPA and UCCJA provisions to deter simultaneous and competitive proceedings in sister state courts over custody of the same children, case law reveals that parents engaged in struggles over child custody can still get conflicting custody orders in courts of different states.[328]

When conflicting custody orders have been issued, the existing system for resolving the jurisdictional conflict stands as a significant block to the recovery of the abducted child. The appellate process for seeking review of custody orders is time-consuming and expensive. Even if litigation proceeds through the highest courts of the two competing states, there may still be no resolution unless and until the United States Supreme Court agrees to grant review of the case. This review is discretionary, and predictably will not be granted in every custody case.

This bleak picture stems in part from a recent decision of the United States Supreme Court in the case of Thompson v. Thompson, 484 U.S. 174 (1988). That court opinion held that there is no right under the PKPA to go into federal

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[324] In the Matter of B.B.R., 566 A.2d 1032, 1041 (D.C. 1989).

[325] Archambault v. Archambault, 555 N.E.2d 201, 207-8 (Mass. 1990).

[326] Recommended UCCJA amendments are provided in Section IX. B. 1. of this chapter.

[327] This discussion was prepared by Patricia M. Hoff, Esq.

[328] See Chapter 4, Part II for a discussion of simultaneous proceedings and relief from conflicting custody determinations.

court for a determination as to which of two states that have issued custody orders has done so pursuant to the federal law. By eliminating federal courts as tie-breakers in interstate child custody jurisdictional impasses, the Supreme Court removed a remedy that had been made available by numerous federal courts prior to the Thompson decision in 1988. A line of cases beginning with Flood v. Braaten, 727 F.2d 303 (3rd Cir. 1984), had held that federal court action to break jurisdictional deadlocks was appropriate.

In reaching its decision, the Court in Thompson noted that "...ultimate review remains in this Court for truly intractable jurisdictional deadlocks" (Id. at 192). However, its denial of certiorari in the hopelessly deadlocked case of C.C. v. P.C., No. 91-353, U.S.S.C. cert. denied, 10/21/91 (see also In re A.E.H., 468 N.W.2d 190 (Wisc. 1991), wherein the highest courts of California and Wisconsin had reached a jurisdictional impasse, underscores a very different reality: Supreme Court review is rarely available and custody contestants are left without a legal remedy once the highest courts in two states have entered conflicting orders.

Importantly, the Thompson case did not turn on constitutional issues. Indeed, the court noted that Congress might choose to revisit the issue should state courts prove to be either unable or unwilling to enforce the provisions of the Act. Id. at p. 192.

Recommendation:

Congress should enact legislation creating a federal court role in resolving which of two states has complied with the PKPA. This would remove a major obstacle to determining which of two custody orders is enforceable, which in turn would result in the prompt enforcement of the valid custody order.

Quick resolution of the jurisdictional issue by a federal forum is necessary for children whose custody remains in limbo until a decision is reached about which court has jurisdiction to make a custody determination. Hence the proposed legislation provides for calendar priority and expeditious handling of a case brought in federal court to resolve jurisdictional questions.

In the suggested legislation set forth below, the aggrieved party may decide to pursue appeal of the jurisdictional issue within the state court system in lieu of, or concurrently with filing an action in a federal court. The pendency of state court appeals relating to the

jurisdictional dispute would not require the federal court to abstain from its consideration of the issue.

Providing access to federal courts in child custody-related matters is not without precedent. The International Child Abduction Remedies Act expressly authorizes federal courts to hear actions for the return of children brought pursuant to the Hague Convention on the Civil Aspects of International Child Abduction. 42 U.S.C. 11603.

Suggested language:

Amend the Parental Kidnapping Prevention Act, 28 U.S.C. 1738A, by adding a new section (h) as follows:

Cause of Action

When the trial courts of two or more states have made conflicting custody determinations, a cause of action shall lie in federal district court founded on federal question jurisdiction, 28 U.S.C. 1331, for a declaration [decision] [determination] as to which of the custody determinations was granted in conformity with the Parental Kidnapping Prevention Act, 28 U.S.C. 1738A.

Parties

A civil action under this section may be brought by any custody contestant claiming that a court of a state has issued a custody order in violation of 28 U.S.C. 1738A.

Notice

The action shall be served upon all adverse parties [custody contestants to the conflicting state custody proceedings] in accordance with the Federal Rules of Civil Procedure.

Venue

A civil action under this section may be brought in any judicial district in which a state court has issued a custody determination in conflict with another state's custody determination concerning the same child(ren). If actions are brought in more than one judicial district, the actions shall be consolidated for hearing in the judicial district in which the first action was filed.

Hearings and evidence

(a) There shall be no right to trial by jury.
(b) All evidence shall be submitted to the district court by affidavits and declarations unless the court orders otherwise.
(c) The court shall limit its review to jurisdictional facts.

Priority

Any action filed pursuant to this section shall be given calendar priority and handled expeditiously.

Relief

(a) The court shall issue declaratory relief [in accordance with 28 U.S.C. 2201] as to which custody order was granted in conformity with 28 U.S.C. 1738A. Notwithstanding any provision of law to the contrary, the court may issue injunctive relief as necessary to compel compliance with 28 U.S.C. 1738A.
(b) A decision of the court regarding which custody determination was granted in conformity with 28 U.S.C. 1738A is not a determination on the merits of any custody issue.

Fees and costs

The court shall require the losing party to pay the costs of the federal court proceedings, attorneys fees and any related travel expenses incurred by the prevailing party in this action unless the losing party establishes that such order would be clearly inappropriate.

Remedies not exclusive

(a) The remedies established by this Act shall be in addition to remedies available under state law for resolving jurisdictional disputes between states.
(b) The filing of a federal court action pursuant to this section shall not automatically preclude state courts from addressing the underlying jurisdictional issues.

Alternative Approach

An alternative approach would simply add a new section (h), as follows:

"The district courts shall have jurisdiction of any action to determine, in the case of a dispute involving custody determinations of different states, whether

such custody determinations were made consistently with the provisions of this section."

2. Obstacle: Confusion Regarding Continuing Modification Jurisdiction[329]

The concept of exclusive continuing custody modification jurisdiction of the decree state is probably the single most important concept embodied in the PKPA. This concept is central to preventing the issuance of conflicting custody orders by courts of different states, and discouraging parental abductions undertaken for the purpose of forum-shopping. However, this concept is also probably the aspect of the PKPA that is most often misunderstood, overlooked, or ignored.

Courts in various states have exhibited widely diverse views on how long custody jurisdiction continues after a child has moved out of the decree state. Some courts have held that modification jurisdiction continues until the last contestant leaves the state, regardless of how many years the child has lived outside the state or how tenuous the child's connections to the state have become. Other courts have held that continuing modification jurisdiction ends as soon as the child's new home state is established elsewhere, regardless of how significant the child's connections to the decree state (and to the noncustodial parent in the decree state) remain. Still other courts have held that modification jurisdiction lasts as long as the child retains significant connections with the decree state, which depends upon the facts of each case. Unless a court in another state can readily ascertain how long jurisdiction continues in the first state, there is a danger that the court in the other state will exercise jurisdiction to modify the decree while the first state still has continuing jurisdiction. Hence, the divergence of views can result in simultaneous proceedings and conflicting custody orders.

Courts have also exhibited a lack of understanding of the importance of refusing to act when a court of another state has, and has not declined to exercise, continuing modification jurisdiction. Other courts have found that continuing modification jurisdiction exists, while ignoring the important issue of whether there is still a state law basis for jurisdiction (e.g., the UCCJA significant connections basis). Even when a court exhibits a clear understanding of those concepts, the court often fails to

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[329]Further discussion of these obstacles is provided in Section II.A.5. of this chapter.

recognize that if a case raises the possibility of another state (the decree state) still having continuing modification jurisdiction, the court should first determine whether the decree state does still have continuing modification jurisdiction, and, if not, then determine whether the forum state has any basis for jurisdiction. To do the reverse risks wasting judicial time and effort determining whether the forum state has any basis for jurisdiction, since that determination becomes irrelevant if another state has (and has not declined to exercise) continuing modification jurisdiction.

Recommendation:

Several alternatives to simplify current law regarding continuing modification jurisdiction have been considered.

One option is to delete the PKPA requirement that a current state basis for jurisdiction must exist (an option favored by one Senator who has introduced a bill in Congress to that effect). Under that system, a decree state would retain continuing modification jurisdiction as long as a contestant or the child continues to live in that state.

Another option would be to provide that custody modification jurisdiction lapses as soon as a new home state is established elsewhere (similar to the Texas approach).

Another would be to establish by federal law a time limit on continuing jurisdiction (e.g., three years) that runs from the time the child leaves the state.

The preferred option would be to establish by federal law a time limit on continuing jurisdiction after the custodial parent and the child have left the state, that would only apply if the state has not set a specific time limit of its own. The federal time limit would thus be a "default" provision, only effective in the absence of state legislation specifying how long jurisdiction shall continue in that state.

Suggested language:

Amend PKPA [28 U.S.C. 1738A (d)] to read:

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

or of any contestant, provided that, if the statutes of such state do not establish a time limit on continuing jurisdiction when a child is absent from such state, the jurisdiction of a court of such state shall not continue if the child has been absent from such state for more than three years.

3. Obstacle: Confusion Regarding Emergency Jurisdiction[330]

The current language of the PKPA does not specify that emergency jurisdiction may only be exercised to protect the child on a temporary basis until the court with jurisdiction to issue a long-term order can act. Some courts have interpreted it in that manner. Other courts, however, have held that there is no time limit on the relief that can be granted pursuant to the exercise of emergency jurisdiction. Again, simultaneous proceedings and conflicting custody orders can result from these differing court interpretations of the PKPA. In a number of the cases which held that emergency jurisdiction only provides a basis for temporary orders, the courts have issued orders which last until the state with PKPA jurisdiction to issue a long-term order does so, provided that a custody proceeding in that state is commenced within a specified brief period of time (e.g., 60 days). [In cases initiated by the state rather than by a contestant (e.g., abuse and neglect cases), the court would have to transfer the case to the proper jurisdiction within 60 days.] The purposes of the PKPA (see, e.g., the text accompanying footnote 340 of this chapter) are better served by such a limit on the duration of emergency relief that can be granted.

In addition, the PKPA emergency jurisdiction provision does not explicitly protect children harmed by violence perpetrated by one parent against another parent, or against the child's sibling.

Finally, the PKPA provides no exception to the notice requirement [28 U.S.C. § 1738A (e)] or to the simultaneous proceedings ban [28 U.S.C. § 1738A (g)] in emergency cases. Therefore, custody orders issued on a temporary emergency basis (e.g., child abuse orders or domestic violence orders of protection), prior to notice being given to all contestants or during the pendency of another custody proceeding in another state, would not currently be enforceable in any other state pursuant to the PKPA.

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[330]Further discussion of these obstacles is provided in Section II.A.4. of this chapter.

Recommendation:

Amend the PKPA to eliminate the current section on emergency jurisdiction [28 U.S.C. § 1738A (c) (2) (C)], and to include a new section on emergency jurisdiction to issue temporary relief (as described in the Obstacle #3 discussion, above); and amend the PKPA sections on notice [28 U.S.C. § 1738A (e)] and on simultaneous proceedings [28 U.S.C. § 1738A (g)] to provide for an exception in emergency cases.

Suggested language:

(h) (1) Notwithstanding any provision of subsections (c), (f) and (g), a court of a State may exercise temporary emergency jurisdiction to make a child custody determination only if, as of the date of the commencement of the proceeding:

(a) the child is physically present in such State: and

(b) (i) the child has been abandoned, or (ii) it is necessary in an emergency to protect the child because the child, the child's sibling, or the child's parent has been subjected to or threatened with mistreatment or abuse, or because the child is otherwise neglected.

(2) The appropriate authorities of every state shall enforce any emergency custody determination made pursuant to subsection (h)(1):

(a) until 60 days after the issuance of the custody determination pursuant to subsection (h)(1), if no custody proceeding was commenced during that period in a court of the State which may exercise jurisdiction pursuant to subsection (c); or

(b) until a subsequent custody determination is made by a court of the State which may exercise jurisdiction pursuant to subsection (c) or (h).

Also: amend the PKPA simultaneous proceedings section [28 U.S.C. § 1738A (g)] to add, at the beginning: "Except in emergency cases as provided for in subsection (h),".

Also: amend the PKPA notice section [28 U.S.C. § 1738A(e)] to add, at the beginning: "(1) Except in certain emergency situations as provided for in subsection (e)(2),"; and add: "(2) If there is an imminent risk of substantial harm to the child, a court may temporarily waive the notice required pursuant to (e)(1) to make an ex parte emergency child custody determination, pursuant to subsection (h), of a duration not exceeding twenty days."

Handling Child Custody, Abuse and Adoption Cases

Family Law Series

Volume 2
Chapters 13-24

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§14.01 Adoption Generally

Adoption is the legal creation of a parent-child relationship apart from genetic parentage. The purpose of adoption is not to provide children for infertile couples, although that may be a by-product. Adoption is designed to provide permanent homes for children who need them. The adoptive parents become the child's legal parents, with all of the rights and responsibilities of parenthood. Upon the child's adoption the biological parents lose legal parenthood in most cases.[1] While they are living, they must either voluntarily relinquish their parental rights[2] or have their rights involuntarily terminated in a separate proceeding[3] or in a contested adoption proceeding prior to the court's granting a final decree of adoption.[4] The fact that an adoption is in the child's best interests is a necessary, but not sufficient, prerequisite. The court cannot dispense with the biological parents' consent merely because the prospective adoptive parents might be able to provide a better home.[5]

This point was demonstrated dramatically in the highly publicized "Baby Jessica" case, which pitted the birth parents, Cara and Dan Schmidt, against the prospective adoptive parents, Jan and Roberta DeBoer. In that case the mother's consent to the adoption had been executed a day prior to the expiration of the statutory waiting period, and she had named the wrong person as the father. When the father learned that he was the child's father, he objected to the proposed adoption, and the mother sought to revoke her consent. After a trial, which was not scheduled for many months, the trial court found that there were no legal grounds upon which to dispense with the father's consent; therefore the mother's rights were reinstated, and the temporary custody order in favor of the DeBoers was terminated, a ruling upheld by the Iowa Supreme Court.[6] The DeBoers ignored the Iowa orders and sought to gain custody in

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[1] The most typical exception to this is that in a stepparent adoption, the birthparent who is married to the adopting stepparent does not lose his or her legal rights of parenthood. A few recent cases have extended the exception to adoption by the parent's homosexual partner. *See, e.g., In re* Evan, 583 NYS2d (Surr Ct 1992); *In re* Adoption of a Child by AR, 378 A2d 87 (NJ Prob Div 1977); *In re* Adoptions of BLVB & ELVB, 19 Fam L Rep (BNA) 1403 (Vt 1993). *See generally* Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and other Nontraditional Families*, 78 Geo LJ 459 (1990); Comment, Second Parent Adoption for Lesbian-Parental Families: Legal Recognition of the Other Mother, 19 UC Davis L Rev 729 (1986). *See also* cases cited in note 43. Because adoption terminates the legal rights of the birthparent, unless there is an exception, another person will not be permitted to adopt a child where one birthparent's rights are desired to remain intact. *See, e.g., In re* Appeal in Pima County Juvenile Adoption Action No. 8-13795, 19 Fam L Rep (BNA) 1353 (Ariz Ct App 1993).

[2] *See* §14.11.

[3] *See* ch 13.

[4] *See, e.g.*, Fla Stat Ann §§63.022, 63.232 (West 1985 & Supp 1993); Tex Fam Code Ann §16.03(b) (West 1986). However, some states do not permit termination of parental rights as part of an adoption action. *See, e.g.*, NY Soc Serv Law §384-b(7)(a) (McKinney 1992).

[5] *See, e.g., In re* Adoption of Milam, 27 Ark App 100, 766 SW2d 944 (1989).

[6] *See In re* BGC, 496 NW2d 239 (Iowa 1992).

Michigan, but the Michigan Supreme Court ruled that Michigan was jurisdictionally required to enforce the Iowa orders without modification.[7]

There are several lessons to be learned from the tragedy for Jessica DeBoer. The tragedy is not that she was taken from the DeBoers, however. The tragedy is that the legal system took so long to give this little girl finality. In fairness to young children, especially newborns placed for adoption, and the families who love them, decisions on the child's freedom for adoption should be made quickly. A final ruling by the trial court should be made within 30 days. Appellate courts should treat appeals in such cases in an extremely expedited fashion, perhaps with shortened times for filing appeals. A final appellate decision should be rendered within three months. It is a terrible thing for Baby Jessica to have waited for more than a year for a final Iowa decision and another year for a final Michigan decision. Children simply cannot tolerate such delays.

Another lesson to be learned from the Baby Jessica case is the importance of having ongoing contact between children and birth parents if there is a reasonable likelihood that they may be returned home. Had the court ordered and the DeBoers allowed ongoing contact between Jessica and the Schmidts, even in a supervised setting where they were not identified as her birth parents, they would not have been total strangers to her when, as a two-year-old, she began to live full-time with them.

Finally, the Baby Jessica case shows why Congress needs to amend the Parental Kidnapping Prevention Act of 1980 (1980) to provide the federal district courts subject matter jurisdiction to construe the act, jurisdiction which most federal courts exercised until the United States Supreme Court's ruling to the contrary in *Thompson v Thompson*.[8] Such jurisdiction would have allowed the immediate review of the propriety of Michigan's exercising jurisdiction, perhaps saving Jessica another year of growing attachment to psychological parents she ultimately would be taken away from.

Adoption is a creature of statute, and the controlling statutes are strictly construed.[9] Therefore, the attorney should be careful to research local law.[10] Where the child sought to be adopted has any Indian heritage, the provisions of the Indian Child Welfare Act of 1980 (ICWA)[11] should be consulted to determine whether the child is subject to the Act.[12] If so, the ICWA preempts state

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[7] *See* DeBoer v Schmidt, 442 Mich 648, 502 NW2d 649 (1993).

[8] 484 US 174 (1988).

[9] *See, e.g., In re* Appeal in Maricopa County Juvenile Action No A-25646, 130 Ariz 589, 637 P2d 1092 (Ct App 1981); Dodson v Donaldson, 10 Ark App 64, 661 SW2d 425 (1983); *In re* Adoption of Biery, 164 Mont 353, 522 P2d 1377 (1974); *In re* Adoption of Bradfield, 97 NM 611, 642 P2d 214 (Ct App 1982); *In re* Adoption of Huitzil, 29 Ohio App 3d 222, 504 NE2d 1173 (1985); *In re* Adoption of VAJ, 660 P2d 139 (Okla 1983).

[10] For a comprehensive resource on all aspects of adoption law, see Adoption Law and Practice (Joan H. Hollinger ed 1988, supplemented annually).

[11] 25 USC §§1901 *et seq, reprinted in* app 15-1.

[12] For a more complete discussion of the ICWA, see ch 15.

law, and vastly different procedural and substantive rules apply. An adoption which violates the Act may be set aside.[13] Similarly, there are special procedures which must be followed for interstate adoptions.[14]

In addition to the legal procedures involved with the adoption, the attorney for the adoptive parents should have the parties check their medical and life insurance policies and wills to see if the adopted child will be covered. The adoptive parents may also want to talk to relatives about their wills if they live in a jurisdiction which makes a distinction between natural and adopted children.

> It is well known that children thrive best in a stable home environment and that long lasting psychic wounds can result from uncertainty, unwarranted changes in custody, or the uprooting of a child from a family with whom close bonds have been forged.
>
> One way to ease the suffering of a child caught in the crossfire of a custody battle is to ensure that the trial and appeal of custody cases are expedited. The need for speedy adjudication is compelling whether the custody dispute is between parents or between biological families and third parties. Time does not stand still for children, and we do them grave harm when we permit their cases to linger in the courts.
>
> Justice Felice K. Shea
> Supreme Court of the State of New York
> New York, New York

§14.02 Jurisdiction

Most states require that the adoption petition be filed in the state where the child is present. The court does not need to have jurisdiction over the parents.[15] Some states also have jurisdictional residency requirements precluding nonresidents from filing for adoption.[16] The attorney must consult the local law to ascertain the specific jurisdictional requirements.

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[13] *See, e.g.*, Mississippi Band of Choctaw Indians v Holyfield, 490 US 30 (1989).

[14] *See* §14.18.

[15] *See, e.g., In re* Adoption of J.L.H., 737 P2d 915 (Okla 1987).

[16] *See, e.g.*, Ariz Rev Stat Ann §8-103 (1989); Conn Gen Stat Ann §45-63a-4(a) (West 1991); Del Code Ann tit 13, §903 (Michie 1981 and Supp 1992); DC Code Ann §16-301 (Michie 1989) (one year prior to filing petition); Fla Stat Ann §63.185 (West Supp 1993); Ga Code Ann §19-8-3(a)(3) (Harrison 1990); 750 Ill Comp Stat Ann §50/2 (Smith-Hurd 1993) (six months prior to filing petition, except where adoptive parent is related to child or agency placed the child); Ind Code Ann §31-3-1-2 (Michie 1987 and Supp 1992); Ky Rev Stat Ann §199.470 (Michie 1991) (12 months prior to filing petition); Minn Stat Ann §259.22 (West 1992) (one year, but may be waived by court); Miss Code Ann §93-17-3 (1973 & Supp 1992) (90 days prior to filing petition); Nev Rev Stat Ann §127.060 (Michie 1993) (six months prior to final decree); NH Rev Stat Ann §170-B-12 (1990 & Supp 1992) NM Stat Ann §40-7-33 (Michie 1989); NC Gen Stat §48-4 (Michie 1991) (six months, except where adoptive parent is stepparent or grandparent); SC Code Ann §20-7-1670 (Law Co-op 1976 & Cum Supp 1992) (except for adopting special

CONFERENCE OF CHIEF JUSTICES

RESOLUTION III

IN OPPOSITION TO CREATING A NEW FEDERAL CAUSE OF ACTION TO RESOLVE CHILD CUSTODY JURISDICTIONAL CONFLICTS BETWEEN STATE COURTS

WHEREAS, The Child Custody Reform Act of 1995, introduced in the U.S. Senate, addresses issues with full faith and credit enforcement of interstate child custody orders under the *Parental Kidnapping Prevention Act of 1980* (PKPA, 28 U.S.C. Sect. 1738A) by requiring that the Attorney General and the Secretary of Health and Human Services establish a national registry of child custody orders; and

WHEREAS, the American Bar Association, based on two legislative options developed by its Project on Obstacles to Recovery and Return of Parentally Abducted Children (ORRPAC), has proposed language that would create a new federal cause of action to resolve jurisdictional disputes between state courts; and

WHEREAS, the Uniform Child Custody Jurisdiction Act (UCCJA), enacted in every state between 1969 and 1983, and the *Parental Kidnapping Prevention Act of 1980* (PKPA, 28 U.S.C. Sect. 1738A) address judicial procedures for determining the controlling order when there are conflicting state custody decrees by requiring states to give full faith and credit to valid custody order determinations of a sister state;

NOW, THEREFORE, BE IT RESOLVED that the Conference of Chief Justices (Conference) opposes any legislation that would create a federal cause of action to resolve conflicts between state courts on the issue of jurisdiction over child custody orders.

BE IT FURTHER RESOLVED that the Conference in the spirit of comity, encourages all state court systems to support judicial education on the effective implementation of the full faith and credit provisions of PKPA and UCCJA.

Adopted as proposed by the Courts and Children Committee of the Conference of Chief Justices in Williamsburg, Virginia, at the 19th Midyear Meeting, on March 23, 1996.

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