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## The Parental Kidnapping Prevention Act: Thirty Years Later and of No Effect? Where Can the Unwed Father Turn?

Rebecca Miller

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# The Parental Kidnapping Prevention Act: Thirty Years Later and of No Effect? Where Can the Unwed Father Turn?

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I. INTRODUCTION

The voice of Lester Holt rings out on Dateline NBC, “It’s a battle that can cause the most bitter anger, the deepest heartbreak: the vicious tug-of-war over a child.”<sup>1</sup> The story of John Wyatt, a twenty-three year old unwed father begins to unfold.<sup>2</sup> John and Colleen were high school sweethearts who continued to date into college and were even talking about marriage.<sup>3</sup> Things changed forever when the two found out Colleen was pregnant.<sup>4</sup> John was only nineteen at the time, but determined to raise the child.<sup>5</sup> Adoption was never mentioned until the ninth month of the pregnancy when John found out Colleen had contacted an adoption agency in Utah.<sup>6</sup> John was shocked, but Colleen promised him they would make the decision together when the baby was born.<sup>7</sup> A while later, John could not reach Colleen for two days, until he learned Colleen was in the hospital and had given birth to his baby girl.<sup>8</sup> John went to the hospital, only to learn that Colleen left out the side door.<sup>9</sup> After weeks of searching, John discovered that the baby had been placed for adoption with a couple in Utah, despite his lack of consent.<sup>10</sup>

John got a lawyer and went to court to fight for custody of his daughter a week after the birth.<sup>11</sup> However, since the baby was in Utah, John missed Utah’s deadline to contest the adoption.<sup>12</sup> The Utah court would not recognize the Virginia court’s order and months of uncertainty followed.<sup>13</sup> The final blow came to John on July 19, 2011, when the Utah Supreme Court found John waived his right to assert his parental rights by failing to raise the Parental Kidnapping Prevention Act (PKPA)<sup>14</sup> in the lower court.<sup>15</sup>

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1. *Dateline NBC: A Father’s Fight; John Wyatt’s Struggle to Get Custody of Baby Daughter He Never Had Opportunity to Meet* (NBC television broadcast Aug. 19, 2011), available at <http://www.msnbc.msn.com/id/3032600/vp/44209050#> [hereinafter *A Father’s Fight*].

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. 28 U.S.C. § 1738A (2006).

John is now left with the unlikely chance of the United States Supreme Court taking up his case in order to get custody of his now two-and-a-half-year-old daughter.<sup>16</sup> John is also suing the adoptive parents, their attorney, and the adoption agency in a civil suit, claiming fraud, denial of civil rights, and kidnapping.<sup>17</sup> However, the best outcome would only be monetary damages, not custody of the daughter whom John so desperately wants.<sup>18</sup> Despite this uphill battle, John refuses to stop fighting: “Till my heart stops beating. I will never give up. Not until the day I die. I will never give up.”<sup>19</sup>

Unfortunately stories like John’s are not unique, going back to the highly publicized and dramatic “Baby Jessica”<sup>20</sup> and “Baby Richard”<sup>21</sup> cases in the 1990s. The PKPA was passed in 1980, over thirty years ago, yet confusion about how its various provisions should be interpreted and applied remains.<sup>22</sup> One key provision to interpret is jurisdiction<sup>23</sup> and whether it is waivable by the parties.<sup>24</sup>

The PKPA was designed to prevent parents from attempting to “forum shop” to gain advantage in custody disputes.<sup>25</sup> In our increasingly mobile society, more and more custody disputes involve multiple states, all claiming an interest in resolution of the dispute.<sup>26</sup> The Utah Supreme Court’s

15. *A Father’s Fight*, *supra* note 1. The Utah Supreme Court’s decision was *J.M.W. v. T.I.Z. (In re Adoption of Baby E.Z.)*, 266 F.3d 702 (Utah 2011).

16. *A Father’s Fight*, *supra* note 1. The chances of this are slim, first because the Supreme Court is reluctant to rule on issues of family law. *See infra* note 45 and accompanying text. Furthermore, the Supreme Court takes only about eighty appeals each year. Mark Moller, *Procedure’s Ambiguity*, 86 IND. L.J. 645, 667 n.154 (2011).

17. *A Father’s Fight*, *supra* note 1.

18. *Id.*

19. *Id.*

20. *In re Clausen*, 502 N.W.2d 649 (Mich. 1993).

21. *O’Connell v. Kirchner*, 513 U.S. 1303 (1995).

22. *See* Juliet A. Cox, *Judicial Wandering Through a Legislative Maze: Application of the Uniform Child Custody Jurisdiction Act and the Parental Kidnapping Prevention Act to Child Custody Determinations*, 58 MO. L. REV. 427, 427–28 (1993).

23. 28 U.S.C. § 1738A(g) (2006).

24. *See infra* notes 213–29 and accompanying text.

25. *See* *Thompson v. Thompson*, 484 U.S. 174, 181–82 (1988). Forum shopping occurs when a party decides to file a lawsuit in one court rather than another because that court has a higher probability of a favorable outcome, based on the law of that forum. *See* Christopher A. Whytock, *The Evolving Forum Shopping System*, 96 CORNELL L. REV. 481, 485–86 (2011).

26. *See* Anne B. Goldstein, *The Tragedy of the Interstate Child: A Critical Reexamination of the Uniform Child Custody Jurisdiction Act and the Parental Kidnapping Prevention Act*, 25 U.C. DAVIS L. REV. 845, 854 (1992) (“With each interstate move, a new state becomes interested in the child’s welfare or in the parent’s custodial rights, yet the interests of states already concerned with the

interpretation of the law in *J.M.W. v. T.I.Z.*,<sup>27</sup> allowing jurisdiction under the PKPA to be waived entirely if it is not raised in the lower court, defeats the purpose and language of the PKPA's jurisdictional provisions.<sup>28</sup> In today's era and age—where 40.6% of births are to unwed couples<sup>29</sup>—the assumption that unwed fathers are unfit parents is no longer valid. A solution is needed to ensure that unwed fathers who are willing and able to care for their children have adequate opportunities to assert their rights.<sup>30</sup> This may entail clarifying the PKPA in its application to the adoption context and with regard to subject matter jurisdiction.<sup>31</sup> Furthermore, a Supreme Court decision regarding interpretation of the PKPA or allowing a limited federal forum to resolve conflicting state custody decrees could reduce ambiguity and interstate conflict.<sup>32</sup> Other solutions include passing alternative legislation applicable to adoptions or enacting putative father registries to ensure unwed fathers receive notice of proposed adoptions and have the opportunity to contest them.<sup>33</sup> Any solution must balance the rights of the birth father with the rights of the mother and the best interest of the child.<sup>34</sup> Of these solutions, Supreme Court review of state interpretations of the PKPA has the most potential to prevent interstate custody disputes from occurring.<sup>35</sup>

The first section of this Comment examines the background and history of legislation leading to the PKPA and other relevant laws.<sup>36</sup> It also looks at the historic treatment of the rights of unwed fathers.<sup>37</sup> The second part of this Comment looks at how the PKPA's various provisions have been interpreted and applied, particularly in the adoption context.<sup>38</sup> It addresses the ways in which adoptions are distinguishable from custody proceedings, perhaps warranting a separate law to regulate them.<sup>39</sup> However, courts have

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dispute, the child, or the litigants, do no necessarily diminish.”).

27. *J.M.W. v. T.I.Z.* (*In re Adoption of Baby E.Z.*), 266 P.3d 702 (Utah 2011).

28. 28 U.S.C. § 1738A(g).

29. *Births: Final Data for 2008*, 59 CDC NAT'L VITAL STAT. REP. 1, 10 (2010), available at [http://www.cdc.gov/nchs/data/nvsr/nvsr59/nvsr59\\_01.pdf](http://www.cdc.gov/nchs/data/nvsr/nvsr59/nvsr59_01.pdf). This contrasts with fifty years ago when about five percent of children were born to unwed parents. See Jeffrey A. Parness & Therese A. Clarke Arado, *Safe Haven, Adoption and Birth Record Laws: Where Are the Daddies?*, 36 CAP. U. L. REV. 207, 230 (2007).

30. See *Caban v. Mohammed*, 441 U.S. 380, 394 (1979) (unwed fathers cannot be discriminated against when “they have manifested a significant paternal interest in the child”).

31. See *infra* notes 391–407 and accompanying text.

32. See *infra* notes 345–59 and accompanying text.

33. See *infra* notes 360–90 and accompanying text.

34. See *infra* notes 309–40 and accompanying text.

35. See *infra* notes 408–13 and accompanying text.

36. See *infra* notes 45–130 and accompanying text.

37. See *infra* notes 131–78 and accompanying text.

38. See *infra* notes 179–229 and accompanying text.

39. See *infra* notes 186–203 and accompanying text.

ultimately held that the PKPA applies to adoptions, and many of the rationales behind the PKPA are served by its application to adoptions.<sup>40</sup> The third part of this Comment looks at the PKPA's provision on jurisdiction as applied to recent cases,<sup>41</sup> particularly *J.M.W.*<sup>42</sup> The fourth part of this Comment examines the impact of uncertainty on unwed fathers and other involved parties.<sup>43</sup> Finally, the fifth part of this Comment proposes potential solutions to prevent courts from following the dangerous precedent of *J.M.W.*<sup>44</sup>

## II. HISTORY AND BACKGROUND

### A. Prior to the Uniform Child Custody Jurisdiction Act and Parental Kidnapping Prevention Act

Traditionally, the United States Supreme Court has reserved matters of family law for the states.<sup>45</sup> It was not until the mid-nineteenth century that courts began to consider cases of child custody, because it was the legislatures that granted divorces, and even those instances were few.<sup>46</sup> Once courts began to take child custody cases, they were generally reluctant to modify custody agreements on the premise that stability is usually in the best interest of the child and, accordingly, would usually only make modifications if the child was endangered in his or her current environment.<sup>47</sup> However, many state courts failed to grant similar respect to

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40. See *infra* notes 186–203 and accompanying text.

41. See *infra* notes 230–308 and accompanying text.

42. *J.M.W. v. T.I.Z. (In re Adoption of Baby E.Z.)*, 266 P.3d 702 (Utah 2011).

43. See *infra* notes 309–40 and accompanying text.

44. See *infra* notes 341–416 and accompanying text.

45. See Russell M. Coombs, *Interstate Child Custody: Jurisdiction, Recognition, and Enforcement*, 66 MINN. L. REV. 711, 718 (1982). The Supreme Court itself has stated: “The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states, and not to the laws of the United States.” *Ex parte Burrus*, 136 U.S. 586, 593–94 (1890). Therefore, in the case of child custody disputes, a federal forum was not available. See Lance Christopher Kassab, *Child Custody Disputes Litigated on the Jurisdictional Battlefield: Adoptive Parents vs. the Putative Father*, Deboer v. Schmidt, 19 T. MARSHALL L. REV. 401, 415–16 (1994).

46. See Coombs, *supra* note 45, at 717.

47. See Brigitte M. Bodenheimer, *The Rights of Children and the Crisis in Custody Litigation: Modification of Custody In and Out of State*, 46 U. COLO. L. REV. 495, 499 (1975) [hereinafter *The Rights of Children*]; see also Brigitte M. Bodenheimer, *The Uniform Child Custody Jurisdiction Act: A Legislative Remedy for Children Caught in the Conflict of Laws*, 22 VAND. L. REV. 1207, 1209 (1969) [hereinafter *Legislative Remedy*] (noting the importance of a stable environment and routine for a growing child).

original custody determinations in other states.<sup>48</sup> In a 1947 case, the Supreme Court upheld New York's modification of a Florida custody decree and commented that custody decrees are "not irrevocable and unchangeable."<sup>49</sup> However, the Court explicitly declined to rule on the full faith and credit that must be accorded to the prior state's rules for modifying custody agreements.<sup>50</sup> This lack of guidance resulted in each state acting independently, without being held in check by the full faith and credit clause or any clear rules of jurisdiction to modify out-of-state custody awards.<sup>51</sup> Under common law, states took a more flexible jurisdictional approach to child custody.<sup>52</sup> With any child custody case, there is always a tension between certainty and flexibility.<sup>53</sup> Not surprisingly, in the 1960s and 1970s, the number of interstate custody disputes increased enormously.<sup>54</sup>

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

In light of the silence and lack of guidance by the Supreme Court, a Commissioner's Special Committee on the Child Custody Jurisdiction Act was formed in the 1970s in attempt to write uniform legislation to resolve issues in interstate custody law.<sup>55</sup> The result was the Uniform Child Custody

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48. See *The Rights of Children*, *supra* note 47, at 500; Kassab, *supra* note 45, at 415. That is not to say state courts were without reason in declining to enforce the custody awards of other states. See Goldstein, *supra* note 26, at 868. There are several reasons that may warrant a new court assuming jurisdiction: (1) the court making the award lacked jurisdiction, (2) a change of circumstances makes intervention appropriate, or (3) the duty to look to the welfare and needs of the child requires that a court assume jurisdiction. *Id.*

49. *New York v. Halvey*, 330 U.S. 610, 612, 615 (1947). The Court also commented that a forum state has as much power to modify a judgment as the state where it was rendered does, based on the Full Faith and Credit Clause, U.S. CONST. art. IV, § 1. *Halvey*, 330 U.S. at 614–15.

50. *Halvey*, 330 U.S. at 615.

51. See *Legislative Remedy*, *supra* note 47, at 1211; see, e.g., *Minick v. Minick*, 149 So. 483, 491 (Fla. 1933) (holding that custody decrees are "necessarily provisional and temporary in character" and the original court's holding is merely "worthy of consideration"); *Omer v. Omer*, 193 P. 1064, 1065 (Kan. 1920) (holding the Kansas court could proceed in a divorce case notwithstanding proceedings already filed in Oklahoma).

52. See Barbara Ann Atwood, *Child Custody Jurisdiction and Territoriality*, 52 OHIO ST. L.J. 369, 378 (1991). The effect of this was that "the law as it stood before the adoption of the UCCJA and the PKPA fairly invited kidnapping," because a parent could easily take the child to another state to gain a more favorable forum. *Id.* Under the First Restatement of the Conflict of Laws, the child's domicile was used to determine which state had initial jurisdiction, but courts generally did not constrain themselves with that rule. See Sheldon A. Vincenti, *The Parental Kidnapping Prevention Act: Time to Reassess*, 33 IDAHO L. REV. 351, 361 (1997).

53. See Goldstein, *supra* note 26, at 856.

54. See Brigitte M. Bodenheimer, *Progress Under the Uniform Child Custody and Jurisdiction Act and Remaining Problems: Putative Decrees, Joint Custody, and Excessive Modification*, 65 CALIF. L. REV. 978, 979 (1977) [hereinafter *Progress Under the UCCJA*].

55. *Legislative Remedy*, *supra* note 47, at 1217. There were also hopes that the Uniform Child Custody Jurisdiction Act (UCCJA) might have a positive effect on custody determinations in general, by emphasizing informed and carefully considered decisions. *Id.* at 1219.

Jurisdiction Act (UCCJA),<sup>56</sup> which intended to create a method for handling jurisdictional disputes in custody cases in a uniform manner.<sup>57</sup> A “‘custody proceeding’ includes proceedings in which a custody determination is one of several issues, such as an action for divorce, separation, or child neglect and dependency proceedings.”<sup>58</sup>

Under the UCCJA’s basic provisions, full responsibility for the custody determinations of a child is given to a single court.<sup>59</sup> Jurisdiction is dictated by section three and gives preference to the child’s home state or a state with which the child has a significant connection.<sup>60</sup> The purpose of the six month period for the home-state provision is to establish a genuine residence, preventing relocation for forum shopping.<sup>61</sup> As a complement to home-state jurisdiction, significant connection basis for jurisdiction recognizes that there may be several states with legitimate interests in the child’s welfare and resolution of the dispute.<sup>62</sup> However, the two alternative bases for jurisdiction create the possibility of concurrent jurisdiction in situations where there is both a home state and a state with equal or stronger

56. UNIF. CHILD CUSTODY JURIS. ACT, 9 U.L.A. 1 (1968).

57. See *Barndt v. Barndt*, 580 A.2d 320, 324 (Pa. 1990). Some other stated purposes of the act include avoiding jurisdictional competition, promoting cooperation among the states, and reducing controversies to promote a stable home environment. UNIF. CHILD CUSTODY JURIS. ACT § 1.

58. UNIF. CHILD CUSTODY JURIS. ACT § 2(3). Furthermore, a custody determination is defined as “a court decision and court orders and instructions providing for the custody of a child, including visitation rights.” *Id.* § 2(2).

59. See *Legislative Remedy*, *supra* note 47, at 1218.

60. See *id.* at 1218. “Home state” is defined as:

[T]he state in which the child immediately preceding the time involved lived with his parents, a parent, or a person acting as parent, for at least 6 consecutive months, and in the case of a child less than 6 months old the state in which the child lived from birth with any of the persons mentioned.

UNIF. CHILD CUSTODY JURIS. ACT § 2(5). Significant connection jurisdiction is a factor when:

[I]t is in the best interest of the child that a court of this State assume jurisdiction because (i) the child and his parents, or the child and at least one contestant, have a significant connection with this State, and (ii) there is available in this State substantial evidence concerning the child’s present or future care, protection, training, and personal relationships.

*Id.* § 3(a)(2).

61. See Andrea S. Charlow, *Jurisdictional Gerrymandering and the Parental Kidnapping Prevention Act*, 25 FAM. L.Q. 299, 304 (1991). However, it may work counter to that purpose by encouraging parents to keep the child hidden to meet the six-month requirement. *Id.* at 305.

62. See Goldstein, *supra* note 26, at 870. Furthermore, having only a home state provision is not adequate to cover the wide array of factual situations that may arise in custody disputes, particularly if the child has not lived in one place long enough for it to qualify as a home state. See *Legislative Remedy*, *supra* note 47, at 1225.



connections.<sup>63</sup> Ideally, jurisdiction would vest with one state at a time and if concurrent jurisdiction existed, only one state would exercise it.<sup>64</sup> The UCCJA also contains methods to assist courts in communicating and sharing information.<sup>65</sup> Jurisdiction to modify a custody decree stays with the original court until a sister state meets the jurisdictional requirements, resulting in either concurrent jurisdiction or jurisdiction in the new state alone.<sup>66</sup> Finally, in an effort to deter child-snatching, the UCCJA adopts the “clean hands” doctrine and allows a court to decline to exercise jurisdiction if a child is taken wrongfully from another state.<sup>67</sup>

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63. See *Legislative Remedy*, *supra* note 47, at 1226.

64. See Christopher L. Blakesley, *Comparative Ruminations From the Bayou on Child Custody Jurisdiction: the UCCJA, the PKPA, and the Hague Convention on Child Abduction*, 58 LA. L. REV. 449, 465–66 (1998) [hereinafter *Comparative Ruminations*]. It would be preferable for jurisdiction to lie with the court that has the best access to information about the child and family. See *Legislative Remedy*, *supra* note 47, at 1218. The text of the UCCJA provides:

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

UNIF. CHILD CUSTODY JURIS. ACT § 6(a). There are three devices in the UCCJA designed to prevent conflicting custody decrees in the event of concurrent jurisdiction: (1) obligation of the parties to tell the court of any pending proceedings in other states, (2) communication among the courts to proceed only in the more appropriate forum, and (3) priority-of-filing rule. See Brigitte M. Bodenheimer, *Interstate Custody: Initial Jurisdiction and Continuing Jurisdiction Under the UCCJA*, 14 FAM. L.Q. 210, 210–11 (1981) [hereinafter *Interstate Custody*].

65. UNIF. CHILD CUSTODY JURIS. ACT § 6(b)–(c). However, some courts have interpreted this to mean only that a court must inquire if it may assert jurisdiction under the UCCJA, not whether the state is best suited to decide custody. See Linda M. Demelis, *Interstate Child Custody and the Parental Kidnapping Prevention Act: The Continuing Search for a National Standard*, 45 HASTINGS L.J. 1329, 1335 (1994). To some degree, these provisions may be idealistic, because many judges tend to answer only to the appellate courts and desire to take matters into their own hands. See Henry H. Foster, *Child Custody Jurisdiction: UCCJA and PKPA*, 27 N.Y.L. SCH. L. REV. 297, 323 (1981). The result of this is essentially to sabotage the system created under the UCCJA and to encourage parents who may “seize and run.” *Id.* at 325.

66. UNIF. CHILD CUSTODY JURIS. ACT § 13. Modification of custody decrees is beyond the scope of this article—as it is inapplicable in the adoption context—but is another issue that has been subject to much dispute and conflicting views. See generally *The Rights of Children*, *supra* note 47. Furthermore, courts have often confused initial and continuing jurisdiction, which has reduced the effectiveness of the UCCJA. See *Interstate Custody*, *supra* note 64, at 216.

67. See *Legislative Remedy*, *supra* note 47, at 1219. The UCCJA states, “If the petitioner for an initial decree has wrongfully taken the child from another state or has engaged in similar reprehensible conduct the court may decline to exercise jurisdiction if this is just and proper under the circumstances.” UNIF. CHILD CUSTODY JURIS. ACT § 8(a). This provision helps to close some of the loopholes in the UCCJA, preventing parents from manipulating its provisions in their favor. See *Legislative Remedy*, *supra* note 47, at 1242. However, in order for this provision to be effective, a certain degree of judicial restraint is required to determine if changed circumstances exist for the court to have jurisdiction. See Rita Mankovich Irani, *Parental Kidnapping: Can the Uniform Child Custody Jurisdiction Act and Federal Parental Kidnapping Prevention Act of 1980 Effectively Deter It?*, 20 DUQ. L. REV. 43, 60 (1981).

The success of the UCCJA was limited, due both to variations adopted by each state and to differences in interpretation by the courts.<sup>68</sup> Further, because each state's version may differ and the requirements are self-imposed, a state could use its own law—not the version of the UCCJA enacted by the rendering state—to determine if recognition is required.<sup>69</sup> As one example of differing versions adopted, Alaska's original version of the UCCJA had no provision for significant connection jurisdiction.<sup>70</sup> State versions of the UCCJA have mostly been repealed by state adoption of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA).<sup>71</sup> The jurisdictional provisions of the UCCJA also allow states to interpret the Act to obtain concurrent jurisdiction.<sup>72</sup> Some scholars have said with regard to the enforcement provisions of the UCCJA “that some states interpret even this requirement so that uniformity is an exaggeration and comity is undependable.”<sup>73</sup> Furthermore, courts often failed to give full faith and credit to proceedings in other states, prompting the need for national legislation.<sup>74</sup> Additionally, in the event of child-snatching, the UCCJA had

68. See *Barndt v. Barndt*, 580 A.2d 320, 324 (Pa. 1990). “Both of these phenomena operate to allow for more findings of jurisdiction and less deference to initial states’ orders than the drafters envisaged.” Joan M. Krauskopf, *Remedies for Parental Kidnapping in Federal Court: A Comment Applying the Parental Kidnapping Prevention Act in Support of Judge Edwards*, 45 OHIO ST. L.J. 429, 434 (1984); see also *Progress Under the UCCJA*, *supra* note 54, at 1003–14 (noting the obstacles to interstate solutions, particularly with regard to punitive custody modifications, joint custody, and excessive custody modification); Coombs, *supra* note 45, at 724 (arguing some states will consider jurisdiction under the UCCJA when there are no foreign proceedings pending, but are more reluctant to find they lack jurisdiction or should defer to the jurisdiction of another state); David H. Levy & Nanette A. McCarthy, *A Critique of the Proposed Uniform Child Custody Jurisdiction and Enforcement Act*, 15 J. AM. ACAD. MATRIM. LAW. 149, 149 (1998) (“Unfortunately, different interpretations of the Act have resulted in a hodgepodge of state interpretation of the UCCJA which has created confusion, often worse than before the UCCJA was enacted.”).

69. See *Vincenti*, *supra* note 52, at 368. In addition, “The UCCJA’s dependence on judicial interpretation may place too much discretion in the hands of state judges whose treatment of the statute may differ.” Gaines H. Cleveland, *The Uniform Child Custody Jurisdiction Act and the Parental Kidnapping Prevention Act: Dual Responses to Interstate Child Custody Problems*, 39 WASH. & LEE L. REV. 149, 157 (1982).

70. ALASKA STAT. § 25.30.020 (1983), *repealed by* 1998 Alaska Sess. Laws ch. 133, § 4. For a general discussion of the differing provisions of state’s UCCJAs, see Christopher L. Blakesley, *Child Custody—Jurisdiction and Procedure*, 35 EMORY L.J. 291, 316–25 (1986) [hereinafter *Jurisdiction and Procedure*]. For examples of state versions of the UCCJA, see KY. REV. STAT. ANN. §§ 403.400–403.630 (West 1980), *repealed by* 2004 Ky. Acts ch. 133; 23 PA. CONS. STATS. ANN. §§ 5341–5366 (1980), *repealed by* 2004 Pa. Laws 236, No. 39, § 2; TEX. FAM. CODE ANN. §§ 11.01–11.75 (West 1975), *repealed by* 1995 Tex. Gen. Laws ch. 20, § 2.

71. See *infra* notes 102–07 and accompanying text.

72. See *Kassab*, *supra* note 45, at 416.

73. See Coombs, *supra* note 45, at 716.

74. See Melissa Crawford, *In the Best Interests of the Child? The Misapplication of the UCCJA*

no provisions to assist in finding the abducting parent.<sup>75</sup> Ultimately, most scholars agree that “the UCCJA has not provided a consistently reliable solution to the problem of the interstate child,”<sup>76</sup> leading the need for reform.

### C. The PKPA

In 1980, the PKPA<sup>77</sup> was enacted as a federal attempt to supplement the UCCJA and create uniform interpretation and implementation in cases involving interstate custody disputes.<sup>78</sup> When the PKPA was enacted, only about fifty percent of the states had adopted some version of the UCCJA.<sup>79</sup> One of the PKPA’s main goals was to prevent sister states from issuing competing custody decrees.<sup>80</sup> In addition, the PKPA reduces the incentive to “child snatch”—a kind of “forum shopping” wherein one parent without custody takes the child to another state to re-litigate custody.<sup>81</sup> It requires states to give full faith and credit to child custody determinations from other states.<sup>82</sup> However, full faith and credit does not mean that the determination from the initial state is final, but merely that it must be given the same

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*and the PKPA to Interstate Adoption Custody Disputes*, 19 VT. L. REV. 99, 105–06 (1994).

75. See Krauskopf, *supra* note 68, at 435.

76. Goldstein, *supra* note 26, at 848.

77. 28 U.S.C. § 1738A (2006).

78. See *Barndt v. Barndt*, 580 A.2d 320, 331 (Pa. 1990). Not all scholars agreed on the need for the PKPA; some argued that the UCCJA was working effectively and that “[t]he PKPA needlessly disturbs this cooperative system by mandating the exclusive continuing jurisdiction of the original home state.” Foster, *supra* note 65, at 342. Part of the issue is that the PKPA was enacted shortly after many states had enacted the UCCJA, giving them little time to interpret the UCCJA before having to deal with a new set of rules under the PKPA. *Id.* at 300.

79. See *Comparative Ruminations*, *supra* note 64, at 468.

80. See *In re Marriage of Fontenot*, 232 P.3d 358, 360–61 (Mont. 2010).

81. See *Thompson v. Thompson*, 484 U.S. 174, 181–82 (1988); see also *Progress Under the UCCJA*, *supra* note 54, at 979 (citing in a 1977 article an estimation that 100,000 children are abducted or detained by parents or their agents each year).

82. 28 U.S.C. § 1738A. This is based on the Full Faith and Credit Clause of the Constitution, which states that “[f]ull faith and credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof.” U.S. CONST. art. IV, § 1. In general terms, Congress has codified this clause by statute. 28 U.S.C. § 1738. The Supreme Court has upheld the application of the clause to almost all areas of law. See Cleveland, *supra* note 69, at 149. Practically speaking, this means that a state cannot refuse to grant full faith and credit to another state’s decision merely because of a disagreement with public policy. See Joan H. Hollinger, *The Mobile Family: Interstate Jurisdictional Puzzles and Full Faith and Credit for Adoption and Other Parentage Orders*, 225 PLI/CRIM 85, 116 (2010) [hereinafter *The Mobile Family*]. This has recently become a greater issue with regard to the recognition of adoptions by same-sex couples. *Id.* at 120; see generally Courtney G. Joslin, *Interstate Recognition of Parentage in a Time of Disharmony: Same-Sex Parent Families and Beyond*, 70 OHIO ST. L.J. 563 (2009) (discussing the recognition of prior custody proceedings in other states in the context of lesbian and gay parenting).

respect that would be given to a determination made in the same state.<sup>83</sup> The PKPA adopts the same basic provisions as the UCCJA and includes the same definitions for custody determination, home state, and significant connection.<sup>84</sup> However, unlike the UCCJA, the PKPA gives clear priority to the home state over any other state that may have significant connections.<sup>85</sup> In addition, the PKPA explicitly gives continuing jurisdiction to the original court, as long as either (1) the laws of the state provide for jurisdiction or (2) the child or one of the parties resides in the state.<sup>86</sup> In comparing the PKPA and the UCCJA, the PKPA tends to favor certainty and stability, while the UCCJA is more flexible and focuses on the best interests of the child.<sup>87</sup> If the two statutes conflict with regard to jurisdiction, the PKPA prevails under the Supremacy Clause.<sup>88</sup> With regard to jurisdiction specifically, the PKPA

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83. See Greg Waller, *When the Rules Don't Fit the Game: Application of the Uniform Child Custody Jurisdiction Act and the Parental Kidnaping Preventing Act to Interstate Adoption Proceedings*, 33 HARV. J. ON LEGIS. 271, 275 (1996). Because custody orders are generally modifiable if circumstances have changed, full faith and credit does not mean that a state cannot modify a custody order of an earlier state. *Id.*

84. 28 U.S.C. § 1738A(b)(3) (custody determination); 28 U.S.C. § 1738A(b)(4) (home state); 28 U.S.C. § 1738A(c)(2)(B) (significant connection). For comparable UCCJA provisions, see *supra* notes 58 and 60.

85. 28 U.S.C. § 1738A(c)(2)(A)–(B); see *Comparative Ruminations*, *supra* note 64, at 475. Other notable differences include more detailed court and notice instructions in the UCCJA and specific criteria in the UCCJA for declining jurisdiction for forum non conveniens and party misconduct. See *Jurisdiction and Procedure*, *supra* note 70, at 325–31. Although giving preference to the home state may provide clarity in interpretation, it is also questionable if a “strict domicile basis for jurisdiction” is the best rule. *Id.* at 295 (internal citations omitted). The welfare of children may call for greater flexibility in granting jurisdiction. *Id.*

86. 28 U.S.C. § 1738A(d), (f). This is designed to make modification more difficult under the PKPA, because the state retains jurisdiction in a greater number of circumstances. See Waller, *supra* note 83, at 283. Although this is distinguishable from the provisions under the UCCJA, there is a split in authority as to the importance of continuing jurisdiction. See, e.g., *Jurisdiction and Procedure*, *supra* note 70, at 313.

87. See Foster, *supra* note 65, at 303 (noting that by minimizing significant connection jurisdiction, the PKPA attacks uncertainty and instability).

88. See *Atkins v. Atkins*, 823 S.W.2d 816, 819 (Ark. 1992) (holding that although under the UCCJA there may have been concurrent jurisdiction, the home state has exclusive jurisdiction under the PKPA); *D.B. v. P.B.*, 692 So. 2d 856, 860 (Ala. Civ. App. 1997) (“In areas of conflict between the two statutes on matters of jurisdiction, the PKPA prevails.”) (citing *Blankenship v. Blankenship*, 534 So. 2d 320, 321 (Ala. Civ. App. 1988)). *But see* *Templeton v. Witham*, 595 F. Supp. 770, 772 (S.D. Cal. 1984) (holding PKPA is not a clear case of federal preemption because it expressly incorporates state law); *Jurisdiction and Procedure*, *supra* note 70, at 331 (Congress showed no intent for the PKPA to preempt state UCCJAs, and the fact that the PKPA leaves out subjects covered in the UCCJA indicates preemption was not intended); Demelis, *supra* note 65, at 1340 (“[T]echnically the PKPA cannot preempt the UCCJA because the UCCJA covers many areas that the PKPA does not address.”).

provides that a state should not exercise jurisdiction when another state is currently exercising jurisdiction.<sup>89</sup> This section states:

A court of a State shall not exercise jurisdiction in any proceeding for a custody or visitation determination commenced during the pendency of a proceeding in a court of another State where such court of that other State is exercising jurisdiction consistently with the provisions of this section to make a custody or visitation determination.<sup>90</sup>

“The purpose of this last provision is to avoid the ‘havoc wreaked by simultaneous and competitive jurisdiction.’”<sup>91</sup>

Although the PKPA created uniform law across the states, it did not necessarily create uniform interpretation and application.<sup>92</sup> Furthermore, the Supreme Court explicitly denied a federal cause of action under the PKPA to determine which of two conflicting state custody decrees is valid.<sup>93</sup> The ideal is that the judges of the two states communicate and discuss the matter to agree on the better forum to act in the best interest of the child, avoiding jurisdictional competition.<sup>94</sup> Regrettably, this has not been the case, and many courts have ignored proceedings in another state, exercising their own jurisdiction.<sup>95</sup> In addition, courts interpret the law in creative ways to allow

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89. 28 U.S.C. § 1738A(g).

90. *Id.*

91. *Murphy v. Danforth*, 915 S.W.2d 697, 702 (Ark. 1996) (quoting *Kimmons v. Heldt*, 667 P.2d 1245, 1249 (Alaska 1983)).

92. *See Cox, supra* note 22, at 427–28. As Cox states:

The UCCJA and PKPA establish a maze of procedural hurdles over which a court must jump to determine the proper forum in which to consider child custody issues. The Acts are complex and interrelated. For this reason, many courts . . . have misapplied them and therefore have failed to accommodate the policy considerations that initially gave rise to the Acts.

*Id. See also Levy & McCarthy, supra* note 68, at 149 (“[T]he expansion of federal legislation into the area of family law, and particularly the Parental Kidnapping Prevention Act (‘PKPA’), increased the confusion and conflict not only between the states, but between the federal statute and various state statutes.”).

93. *Thompson v. Thompson*, 484 U.S. 174, 187 (1988) (stating that the “context, language, and history of the PKPA” work against inferring a federal cause of action); *see also Demelis, supra* note 65, at 1355–56.

94. *See Bowden v. Bowden*, 440 A.2d 1160, 1164–65 (N.J. 1982) (noting how this promotes cooperation, one of the key purposes of the UCCJA).

95. *See Norsworthy v. Norsworthy*, 713 S.W.2d 451, 486 (Ark. 1986). In terms of the goals of the legislation:

Those purposes are not served when a court, with knowledge that the subject matter of child custody is pending in another state, totally ignores the foreign proceeding and exercises jurisdiction over a child, who has been in the state for less than a month, for the purpose of making a permanent custody award.

*Id.* at 486 (internal citations omitted). Two newsworthy instances of this were the “Baby Richard”

them to avoid the effects of the PKPA's jurisdictional provisions.<sup>96</sup> Furthermore, in spite of Congress's best efforts, there may still be cases in which there are concurrent exercises of jurisdiction.<sup>97</sup> As a result of these failures, forum shopping by parents and snatching of children has not been eliminated—one of the main intentions of the PKPA.<sup>98</sup> Additionally, the PKPA has no provision for sanctions if its terms are violated, nor any guidance as to exactly how decrees from other states are to be enforced.<sup>99</sup> While the PKPA has provided some clarity in issues of interstate child custody disputes, there have been numerous calls for reformation or new legislation.<sup>100</sup>

#### D. Other Relevant Legislation

In 1997, another attempt was made at uniform legislation with the UCCJEA,<sup>101</sup> adopted by the National Conference of Commissioners on Uniform State Laws.<sup>102</sup> Its purpose was to resolve any ambiguity in the

case, *O'Connell v. Kirchner*, 513 U.S. 1138 (1995), and the "Baby Jessica" case, *In re Clausen*, 502 N.W.2d 649 (Mich. 1993), both highly publicized cases involving interstate adoption and jurisdiction disputes between two states. See *supra* notes 20–21 and accompanying text. For an extensive discussion of the Baby Jessica case, see Marian L. Faupel, *The "Baby Jessica Case" and the Claimed Conflict Between Children's and Parent's Rights*, 40 WAYNE L. REV. 285 (1994); Kassab, *supra* note 45.

96. See Waller, *supra* note 83, at 283.

97. See Kassab, *supra* note 45, at 418. In particular, if the original state is not acting in conformity with the PKPA, a second state may exercise jurisdiction. *Id.* The text of the PKPA reads, "where such court of that other State is exercising jurisdiction consistently with the provisions of this section to make a custody or visitation determination." 28 U.S.C. § 1738A(g) (2006). In terms of modification, the PKPA states, "The appropriate authorities of every State shall enforce according to its terms, and shall not modify except as provided in subsections (f), (g), and (h) of this section, any custody determination or visitation determination made consistently with the provisions of this section by a court of another State." *Id.* § 1738A(a). Provisions also exist for emergency situations. *Id.* § 1738A(c)(2)(C). Emergency jurisdiction has created one possible loophole under the PKPA, because the second state determines if an emergency exists and can obtain jurisdiction unless the judgment is clearly erroneous. See Foster, *supra* note 65, at 340.

98. See Charlow, *supra* note 61, at 300–01.

99. See Foster, *supra* note 65, at 335; see also Krauskopf, *supra* note 68, at 437 ("The PKPA does not create or specify enforcement remedies."). Essentially, by omitting the "clean hands" provision of UCCJA section 8, the PKPA leaves it to the states to decide how strong of a policy they will adopt to deter parental kidnapping. See Irani, *supra* note 67, at 60.

100. See, e.g., Goldstein, *supra* note 26, at 850–51 (arguing the PKPA "has not solved the problem of the interstate child any more than the UCCJA did"); Vincenti, *supra* note 52, at 352.

101. UNIF. CHILD CUSTODY JURIS. & ENFORCEMENT ACT, 9 U.L.A. 1 (1997).

102. See Levy & McCarthy, *supra* note 68, at 150.

UCCJA and to resolve conflicts between the UCCJA and the PKPA.<sup>103</sup> If enacted, the UCCJEA replaces a state's UCCJA.<sup>104</sup> The UCCJEA adopts the provisions of the PKPA and gives jurisdictional priority to the child's home state.<sup>105</sup> In terms of interstate cooperation, the UCCJEA alters the UCCJA in an attempt to decrease interstate judicial competition by making it clear that courts should use modern communications technology to aid in the resolution of interstate battles.<sup>106</sup> While the UCCJEA may provide further clarity in typical child custody cases, it specifically excludes adoptions and defers to the Uniform Adoption Act (UAA).<sup>107</sup>

The UAA<sup>108</sup> was first proposed in 1994 and has yet to be adopted by all states.<sup>109</sup> Its goals in the adoption context are analogous to the goals of the UCCJEA for divorce and other custody proceedings.<sup>110</sup> Namely, the UAA

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103. See Celia Guzaldo Gamrath, *UCCJEA: A New Approach to Custody Jurisdiction and Interstate Custody and Visitation*, 92 ILL. B.J. 204, 206 (2004). Like the UCCJA, the main goal of the UCCJEA is to avoid jurisdictional competition and conflict between state courts in child custody cases. See *Hindle v. Fuihu*, 33 So. 3d 782, 784 (Fla. Dist. Ct. App. 2010). Like the PKPA, the UCCJEA specifically states that full faith and credit must be given to orders of other states, unlike the UCCJA. See Gamrath, *supra*, at 208.

104. See Patricia M. Hoff, *The ABC's of the UCCJEA: Interstate Child-Custody Practice Under the New Act*, 32 FAM. L.Q. 267, 268 (1998); see also *The Mobile Family*, *supra* note 82, at 89 (as of 2010, the UCCJEA supersedes the UCCJA in all but one or two states). For examples of state UCCJEA laws, see, for example, ALA. CODE §§ 30-3B-101 to 30-3B-404 (2011); CAL. FAM. CODE §§ 3400–3465 (West 2011); FLA. STAT. ANN. §§ 61.501–61.542 (West 2011); GA. CODE ANN. §§ 19-9-40 to 19-9-104 (West 2011); KAN. STAT. ANN. §§ 38-1336 to 38-1377 (West 2011); NEB. REV. STAT. §§ 43-1226 to 43-1266 (2011); OKL. STAT. ANN. tit. 43, §§ 551-101 to 551-402 (West 2011).

105. See Levy & McCarthy, *supra* note 68, at 150–51. The UCCJEA eliminates use of the best interest of the child standard, which created confusion under the UCCJA, as a way to obtain jurisdiction. See Gamrath, *supra* note 103, at 207. However, the home state jurisdiction provision under the UCCJEA has still been subject to varying interpretations. See generally Ann K. Wooster, Annotation, *Construction and Application of the Uniform Child Custody Jurisdiction and Enforcement Act's Home State Jurisdiction Provision*, 57 A.L.R. 6TH 163 (2010). The similarity between the PKPA and UCCJEA leads to the conclusion that courts' interpretations under the UCCJEA may dictate interpretations under the PKPA in the adoption context.

106. See Hoff, *supra* note 104, at 287. It also combines and clarifies several provisions of the UCCJA that courts previously ignored, further reducing competition. *Id.*

107. UNIF. CHILD CUSTODY JURIS. & ENFORCEMENT ACT § 103, 9 U.L.A. 1 (1997).

108. UNIF. ADOPTION ACT, 9 U.L.A. 45 (1994).

109. See *The Mobile Family*, *supra* note 82, at 88–89. For state adoptions of the UAA, see, for example, ARK. CODE ANN. §§ 9-9-201 to 9-9-224 (West 2011); 750 ILL. COMP. STAT. ANN. 50/1–50/24 (West 2011); MONT. CODE ANN. § 40-7-134 (2011); N.D. CENT. CODE ANN. §§ 14-15-01 to 14-15-23 (West 2011). Some states have explicitly declined to adopt the UAA as a whole. See, e.g., OKLA. STAT. ANN. tit. 10, § 7501-1.1 (West 2011); VA. CODE ANN. §§ 63.2-1200 to 63.2-1220.1 (West 2011). For a further discussion of the differences between the Virginia Adoption Code and the UAA, see generally Erin Green, *Unwed Fathers' Rights in Adoption: The Virginia Code vs. the Uniform Adoption Act*, 11 WM. & MARY J. WOMEN & L. 267 (2005).

110. See *The Mobile Family*, *supra* note 82, at 92. Under the UAA, the emphasis is on having cases heard in the forum that has the closest connections to a proposed adoptive family, as well as the most substantial evidence regarding that family. *Id.* The need for separate adoption legislation may be warranted by the increased rate of adoptions, as well as the current pro-adoption stance of the federal government. See Mary Beck, *Toward a National Putative Father Registry Database*, 25

seeks to eliminate the confusion caused by different state laws and to create adoption laws that promote certainty, predictability, and stability.<sup>111</sup> However, the lack of widespread enactment of the UAA, along with the exclusion of adoptions from the UCCJEA, has created a void in jurisdictional rules applicable to interstate adoptions.<sup>112</sup> The UAA requires consent of both parents for adoption of a minor child if the parent has manifested parenting behavior in assuming some parental duties.<sup>113</sup> By contrast, men who have performed no parental duties waive the right to veto an adoption.<sup>114</sup> If a father is vested with consent rights under the UAA, then he must be served with notice of an adoption proceeding.<sup>115</sup> In terms of jurisdiction, the UAA mirrors the UCCJA, but allows a child to be living with “a prospective adoptive parent” to meet the requirement under the home state provision.<sup>116</sup> In addition, the UAA makes it clear that adoption decrees are final.<sup>117</sup> In terms of international adoption and custody disputes, the International Child Abduction Remedies Act (ICARA) applies.<sup>118</sup>

Finally, the Interstate Compact on the Placement of Children (ICPC) is another example of uniform legislation written in attempt to facilitate interstate adoption.<sup>119</sup> The ICPC has been enacted into law in almost all

HARV. J. L. & PUB. POL'Y 1031, 1034–36 (2002) [hereinafter *Toward a Database*].

111. See Mishannock Robbins Arzt, *In the Best Interests of the Child: The Uniform Adoption Act*, 25 STETSON L. REV. 835, 842 (1996).

112. See Hoff, *supra* note 104, at 276–77.

113. UNIF. ADOPTION ACT § 2-401(a)(1)(iii)(A).

114. UNIF. ADOPTION ACT § 2-402(a)(2). The language of the UAA provides a clearer standard, considering only whether the father has made support payments or communicated with the child. See Arzt, *supra* note 111, at 868. This contrasts with other state standards that consider whether there is “evidence of willful rejection of . . . parental obligations.” *G.T. v. Adoption of A.E.T.*, 725 So. 2d 404, 407 (Fla. Dist. Ct. App. 1999) (applying FLA. STAT. ANN. § 63.032 (West 2011)).

115. UNIF. ADOPTION ACT § 3-401(a); see also Scott A. Resnik, *Seeking the Wisdom of Solomon: Defining the Rights of Unwed Fathers in Newborn Adoptions*, 20 SETON HALL LEGIS. J. 363, 413–14 (1996). The burden on providing notice falls on the natural mother, prospective adoptive parents, and the court itself. See Arzt, *supra* note 111, at 874.

116. UNIF. ADOPTION ACT § 3-101. This alteration gives clarity to the home state for adoption of infants, resolving many issues under the UCCJA. See Herma Kill Kay, *Adoption in the Conflict of Laws: The UAA, Not the UCCJA, is the Answer*, 84 CALIF. L. REV. 703, 744–45 (1996).

117. UNIF. ADOPTION ACT § 3-706. The UAA also prevents a decree from being challenged after six months have passed. *Id.* § 3-707.

118. INT'L CHILD ABDUCTION REMEDIES ACT, 42 U.S.C. §§ 11601–11611 (2006). This was implemented at the Hague Convention on the Civil Aspects of International Child Abduction in 1988. This Comment focuses on interstate adoptions, not international adoptions, but for a general discussion of ICARA and the application of the UCCJA in the international arena, see *Comparative Ruminations*, *supra* note 64, at 524–38.

119. INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN (1960); Bernadette W. Hartfield, *The Role of the Interstate Compact on the Placement of Children in Interstate Adoption*, 68 NEB. L.



states.<sup>120</sup> In terms of jurisdiction, the ICPC retains jurisdiction by the sending adoption agency if a child is placed in another state.<sup>121</sup> The ICPC's main functions are mostly procedural, dictating how states should coordinate with each other during interstate adoptions.<sup>122</sup> Therefore, a court is not required to comply with the ICPC in order to exercise jurisdiction.<sup>123</sup> In addition, the ICPC has been subject to the same deficiencies as other legislative attempts, namely varying degrees of interpretation and noncompliance, as well as lack of awareness.<sup>124</sup> Furthermore, its main purpose was "to prevent States from unilaterally 'dumping' their foster care responsibilities on other jurisdictions."<sup>125</sup> Therefore, it is less applicable in the adoption context, because in the new state the child's welfare is taken care of by the adoptive parents.<sup>126</sup>

The focus of this Comment is on domestic interstate adoption and will therefore emphasize the PKPA.<sup>127</sup> Model legislation, such as the UAA, provides some guidance in courts' interpretation and application, but varies too much from state to state in enactment and language to establish uniform precedent.<sup>128</sup> Furthermore, the PKPA is the relevant legislation addressed by the Utah Supreme Court in *J.M.W.*<sup>129</sup> However, due to the similarity in their language, older cases often address the PKPA and UCCJA simultaneously, and these acts may be used interchangeably in some circumstances.<sup>130</sup>

#### *E. Unwed Fathers' Rights*

While these various forms of uniform legislation have defined the rights of unwed fathers to a certain extent, Supreme Court precedent and state legislation also provide a basis for rights. Historically, a man's ability to

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REV. 292, 293 (1989).

120. See Hartfield, *supra* note 119, at 293; see, e.g., CAL. FAM. CODE §§ 7900–7912 (West 2011); DEL. CODE ANN. tit. 31, § 381 (West 2011); W. VA. CODE ANN. §§ 49-2A-1 to 49-2A-2 (West 2011).

121. INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN art. V(a).

122. See *J.D.S. v. Franks*, 893 P.2d 732, 740 (Ariz. 1995).

123. See *id.* The UCCJA (and PKPA) are specifically designed to deal with jurisdiction, and therefore the ICPC should not negate those provisions. *Id.* at 745. See also *Adoption of Zachariah K.*, 8 Cal. Rptr. 2d 423, 431 (Ct. App. 1992) ("[T]he ICPC could not take precedence over any conflicting provisions in the PKPA."); *In re D.N.*, 858 So. 2d 1087, 1093 (Fla. Dist. Ct. App. 2003) (UCCJA and PKPA control, not the ICPC).

124. See Hartfield, *supra* note 119, at 293.

125. *In re Shaida W.*, 649 N.E.2d 1179, 1182 (N.Y. 1995).

126. See *In re Jarrett*, 660 N.Y.S.2d 916, 920 (App. Div. 1997).

127. The UCCJEA is inapplicable to adoptions, see *supra* note 107 and accompanying text, and international adoptions are not at issue in this Comment. See *supra* note 118 and accompanying text.

128. See *supra* note 109 and accompanying text.

129. *J.M.W. v. T.I.Z. (In re Adoption of Baby E.Z.)*, 266 P.3d 702, 704 (Utah 2011).

130. See, e.g., *Doe v. Baby Girl*, 657 S.E.2d 455, 462 (S.C. 2008).

raise children was seen as inferior to a woman's ability.<sup>131</sup> Under this theory, the consent of an unwed father was not required for an adoption.<sup>132</sup> By statute, many states restricted the rights of unwed fathers to prevent them from contesting an adoption if the birth mother desired to place the child for adoption.<sup>133</sup> However, new technology in the form of DNA testing has helped lessen the stigma of children born out of wedlock.<sup>134</sup> Furthermore, since 1972 the Supreme Court and state courts have begun to delineate the rights of unwed fathers and the scope of those rights.<sup>135</sup>

### 1. Supreme Court

The first Supreme Court case to address this issue was *Stanley v. Illinois*.<sup>136</sup> In that case, the Court held that a statutory presumption that an unwed father is unfit is unconstitutional.<sup>137</sup> In doing so, the Court struck down an Illinois law that declared children of unmarried fathers to be dependents of the state, without a hearing or proof of neglect.<sup>138</sup> The Court further stated that “[t]he rights to conceive and to raise one’s children have been deemed ‘essential.’”<sup>139</sup> Six years later in *Quilloin v. Walcott*, the Court retracted the rights of unwed fathers when it held: (1) that due process only required the state to find that the adoption was consistent with the best interests of the child and (2) that equal protection rights are not violated if the unwed father has never assumed any responsibility for the child.<sup>140</sup> In *Quilloin*, the Court upheld a Georgia law requiring only the birth mother’s

131. See Kimberly Barton, *Who’s Your Daddy?: State Adoption Statutes and the Unknown Biological Father*, 32 CAP. U. L. REV. 113, 115 (2003).

132. See 2 C.J.S. *Adoption of Persons* § 58 (1938); Barton, *supra* note 131, at 116. Generally speaking, “[t]he requirement of parental consent derives from the principle of parental autonomy, which, in turn, is a product of cultural traditions and theories of natural law and delegated duties that endow biological parents with superior rights to the possession and control of their offspring.” Joan Heifetz Hollinger, *State and Federal Adoption Laws*, in FAMILIES BY LAW: AN ADOPTION READER 37, 39 (Naomi R. Cahn & Joan Heifetz Hollinger eds., 2004) [hereinafter *State and Federal Adoption Laws*].

133. See Barton, *supra* note 131, at 116. Some states even defined the “parent” of an illegitimate child to be only the mother. *Id.*

134. See Sarah McGinnis, *You Are Not the Father: How State Paternity Laws Protect (And Fail to Protect) the Best Interests of Children*, 16 AM. U. J. GENDER SOC. POL’Y & L. 311, 315 (2007).

135. See Barton, *supra* note 131, at 117.

136. 405 U.S. 645 (1972).

137. *Id.* at 658.

138. *Id.*

139. *Id.* at 651 (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)).

140. *Quilloin v. Walcott*, 434 U.S. 246, 255–56 (1978).

consent for the adoption of an illegitimate child, and requiring the father to marry the mother or acknowledge the child as his own in order to obtain veto power over the adoption.<sup>141</sup> Shortly after *Quilloin*, the Court in *Caban v. Mohammed* declared a New York statute giving a mother, but not a father, the right to consent to adoption unconstitutional.<sup>142</sup> The Court held that a statute cannot constitutionally distinguish between unwed mothers and unwed fathers.<sup>143</sup>

After seemingly progressing in recognizing the rights of unwed fathers with *Caban*, the Court took a step back in *Lehr v. Robinson*.<sup>144</sup> *Lehr* held that an unwed father who had not established a relationship with his child was not constitutionally entitled to notice and the opportunity to be heard prior to the child's adoption.<sup>145</sup> The Court rejected an unwed father's due process and equal protection claims because he failed to enter his name on the putative father registry and did not meet any of the state's classes of possible fathers who were required to be given notice of an adoption.<sup>146</sup> Finally, in *Michael H. v. Gerald D.*, the Court denied an unwed father's opportunity to establish paternity on the grounds that a child is presumed to be the result of a married couple.<sup>147</sup> The Court also distinguished an irrebuttable presumption from a conclusive presumption, finding the latter to be constitutional.<sup>148</sup>

While these cases grant an unwed father some constitutional rights if he has developed a substantial relationship with the child, many questions are still unanswered, particularly in the context of adoption of newborns born out of wedlock.<sup>149</sup> All these cases involved older children, leaving a void in precedent with regard to newborn children.<sup>150</sup> Newborn children represent a unique situation, because, unlike with older children, unwed fathers are less likely to have had the chance to develop a relationship with the child.<sup>151</sup> The

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141. *Id.*

142. *Caban v. Mohammed*, 441 U.S. 380, 394 (1979).

143. *Id.*

144. 463 U.S. 248 (1983).

145. *Id.* at 267–68.

146. *Id.* at 250–51. Essentially, the state required unwed fathers to meet a “biology plus” standard before recognizing their rights. See Laura Oren, *Unmarried Fathers and Adoption: “Perfecting” or “Abandoning” an Opportunity Interest*, 36 CAP. U. L. REV. 253, 254 (2007). This means that if the father shows a commitment to parenthood, he has a right that receives protection, but “the mere existence of a biological link does not merit equivalent constitutional protection.” *Lehr*, 463 U.S. at 261.

147. *Michael H. v. Gerald D.*, 491 U.S. 110, 125 (1989).

148. *Id.* at 120.

149. See Barton, *supra* note 131, at 126.

150. See Tonya M. Zdon, *Putative Fathers' Rights: Striking the Right Balance in Adoption Laws*, 20 WM. MITCHELL L. REV. 929, 939 (1994).

151. See Barton, *supra* note 131, at 114. Furthermore, the identity of the biological father may not even be known. *Id.* Newborn child adoptions make up nearly half of all adoptions in the United

Court has not spoken on whether an unwed father has a right to veto the adoption of a child born out of wedlock if he has been denied the opportunity to develop a relationship.<sup>152</sup> Furthermore, Supreme Court precedent appears to set up two portraits that unwed fathers may fit: (1) a father who is involved in the child's life and (2) a father who ignored the child and waited to assert his rights.<sup>153</sup> This leaves great uncertainty as to how a father who falls in the middle—or one who tried to assert his rights but was thwarted—should be treated.<sup>154</sup> After *Lehr* and *Michael H.*, unwed fathers' best chance of having their rights acknowledged was in the state courts.<sup>155</sup>

Outside of the unwed father context, the Supreme Court also has made several key rulings on the nature of the parent-child relationship.<sup>156</sup> In *Lassiter*, the Court stated, "A parent's interest in the accuracy and justice of the decision to terminate his or her parental status is, therefore a commanding one."<sup>157</sup> A year later in *Santosky*, the Court went further to hold, "Before a State may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State supports its allegations by at least clear and convincing evidence."<sup>158</sup> Finally, the Court has also held that a state cannot deny an indigent parent appellate review in a parental rights termination proceeding.<sup>159</sup>

## 2. State Courts

Whether or not an unwed father is entitled to notice of a proposed adoption varies from state to state.<sup>160</sup> Based on natural rights alone, if there

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States and are usually finalized while the child is still under the age of two. See Zdon, *supra* note 150, at 939.

152. See Barton, *supra* note 131, at 127.

153. See David D. Meyer, *Family Ties: Solving the Constitutional Dilemma of the Faultless Father*, in *FAMILIES BY LAW: AN ADOPTION READER*, *supra* note 132, at 52.

154. See Meyer, *supra* note 153, at 52; see, e.g., *supra* notes 1–19 and accompanying text.

155. See Barton, *supra* note 131, at 127.

156. See Oren, *supra* note 146, at 281.

157. *Lassiter v. Dep't of Soc. Servs. of Durham Cnty.*, 452 U.S. 18, 28 (1981). In that case, the court held that an indigent mother's rights were not violated when the trial court failed to appoint her counsel, because she did not make an effort to contest the parental termination proceeding. *Id.* at 33.

158. *Santosky v. Kramer*, 455 U.S. 745, 747–48 (1982). In doing so, the Court struck down a New York statute allowing parental rights to be terminated by only a "fair preponderance of the evidence" finding. *Id.* at 747.

159. *M.L.B. v. S.L.J.*, 519 U.S. 102, 107 (1996).

160. See Barton, *supra* note 131, at 127; Lisa M. Simpson, *Adoption Law: It May Take a Village to Raise a Child, But it Takes National Uniformity to Adopt One*, 3 PHX. L. REV. 575, 579–81

is no statute in place, a parent's consent is required to sever his parental rights and establish them with adoptive parents.<sup>161</sup> However, states have enacted statutes governing the rights of unwed fathers, with some states granting rights based on the father's legal status and whether he has acknowledged paternity.<sup>162</sup> Other states may require a specific period of time for an unwed father to file a notice of paternity.<sup>163</sup> In terms of consent, states may go as far as having "absolute consent requirements," or they may adopt lesser requirements of "conditional consent."<sup>164</sup> After an adoption has been finalized, an unwed father is limited in the amount of time in which he may challenge the adoption, also with variance among the states.<sup>165</sup> To some extent, states may be subject to federal paternity law guidelines if they participate in federal welfare programs under the Social Security Act.<sup>166</sup>

A growing trend among the states is a putative father registry, which allows unwed men who believe they may have fathered a child out of wedlock to file notice with the appropriate state agency.<sup>167</sup> The main

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(2010). From a due process standpoint, under the Fourteenth Amendment, U.S. CONST. amend. XIV, "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." *Baldwin v. Hale*, 68 U.S. (1 Wall.) 223, 233 (1863). Regardless, "[S]tates have almost complete discretion to determine the rights of a putative father at proceedings to terminate parental rights or adoption proceedings. Further, there is a lack of uniformity among states as to the level of protection available to unwed fathers." MARGARET C. JASPER, *THE LAW OF ADOPTION* 44 (2008).

161. See *In re Adoption of B.G.S.*, 556 So. 2d 545, 548 (La. 1990).

162. See, e.g., *Adoptive Parents of M.L.V. v. Wilkens*, 598 N.E.2d 1054, 1056-57 (Ind. 1992) (putative father did not establish paternity previously as provided by statute and thus his consent was not required for adoption); *In re Adoption of Baby Girl H.*, 635 N.W.2d 256, 260 (Neb. 2001) (putative father who did not properly file petition for adjudication of paternity was not entitled to any further notice of adoption proceeding).

163. Compare ARIZ. REV. STAT. ANN. § 8-106.01(B) (2011) (notice of a claim of paternity and father's willingness and intent to support the child must be filed within thirty days of the child's birth), and MINN. STAT. § 259.52(7) (2011) (notice must be filed no later than thirty days after the birth of the child), with NEB. REV. STAT. § 43-104.02 (2011) (notice of objection to adoption and intent to obtain custody must be filed within five business days after the birth of the child).

164. See Resnik, *supra* note 115, at 391-93.

165. See *id.* at 399-400.

166. See Jeffrey A. Parness, *New Federal Paternity Laws: Securing More Fathers at Birth for the Children of Unwed Mothers*, 45 BRANDEIS L.J. 59, 60 (2006). For instance, states accepting funds must "[e]stablish goals and take action to prevent and reduce the incidence of out-of-wedlock pregnancies, with special emphasis on teenage pregnancies, and establish numerical goals for reducing the illegitimacy ratio of the State." 42 U.S.C. § 602(a)(1)(A)(v) (2006).

167. See *Toward a Database*, *supra* note 110, at 1039. This is in part due to the Supreme Court's decision in *Lehr*, and by 2007 at least thirty-four states had codified such registries. See Tyler M. Hawkins, Comment, *Adoption of Infants Born to Unaware, Unwed Fathers: A Statutory Proposal That Better Balances the Interests Involved*, 2009 UTAH L. REV. 1335, 1348; see, e.g., ALA. CODE § 26-10C-1 (2011); ARIZ. REV. STAT. ANN. § 8-106.01 (2011); ARK. CODE ANN. §§ 20-18-701 to 20-18-705 (West 2011); MO. ANN. STAT. § 192.016 (West 2011); TENN. CODE ANN. § 36-2-318 (West 2011); VT. STAT. ANN. tit. 15A, § 1-110 (West 2011) (called a "notice of intent to retain parental rights"). For a detailed structure of putative father registries, see UNIF. PARENTAGE ACT (amended 2002), 9A U.L.A. 579 (1979); see generally Dale Joseph Gilsinger, Annotation, *Requirements and*

purpose of putative father registries is to protect unwed fathers by giving them notice of pending adoption proceedings.<sup>168</sup> These registries also protect the birth mother's privacy rights, because she is not required to identify the father or reveal her pregnancy.<sup>169</sup> Generally, putative father registries require men either to assume responsibility in a timely manner or have their rights terminated.<sup>170</sup> However, even regulations for putative father registries vary from state to state.<sup>171</sup> For instance, some states require a putative father to register or else lose the right to notice of and objection to an adoption proceeding; other states require birth mothers to use due diligence in naming and notifying the putative father.<sup>172</sup> As an alternative to a putative father registry, some states require notice by publication.<sup>173</sup>

*Effects of Putative Father Registries*, 28 A.L.R. 6TH 349 (2007).

168. See Mary Beck, *Birthfather Registries*, ADOPTIVE FAM. (2002), available at <http://www.adoptivefamilies.com/articles.php?aid=233> [hereinafter *Birthfather Registries*].

169. See *Birthfather Registries*, *supra* note 168.

170. See *id.* As one scholar stated,

At first glance, the attractiveness of a paternity registration system is that it appears to be a rather simple and inexpensive method to protect fathers' parental rights in the adoption process, and, simultaneously, to provide a means to expedite and stabilize the adoption process by readily identifying which fathers are interested in assuming their rights and which are not.

Laurence C. Nolan, *Preventing Fatherlessness Through Adoption While Protecting the Parental Rights of Unwed Fathers: How Effective are Paternity Registries?*, 4 WHITTIER J. CHILD. & FAM. ADVOC. 289, 307–08 (2005).

171. See *Toward a Database*, *supra* note 110, at 1039–42 (discussing various provisions of state putative father registries). In 2003, the Florida Putative Father Registry, FLA STAT. ANN. § 63.054 (West 2011), was enacted and subjected to criticism, because it created a legal presumption that all unwed fathers knew about the registry and its requirements. See Timothy L. Arcaro, *No More Secret Adoptions: Providing Unwed Biological Fathers with Actual Notice of the Florida Putative Father Registry*, 37 CAP. U. L. REV. 449, 449 (2008). In *Heart of Adoptions, Inc. v. J.A.*, the Florida Supreme Court ruled that an unwed father must be served with actual notice of an intended adoption plan, and must be informed that he has thirty days to register with the Putative Father Registry. 963 So. 2d 189, 202 (Fla. 2007).

172. See Oren, *supra* note 146, at 267. States that have enacted strict registry laws mainly seek to avoid putative fathers appearing late in the process and disrupting adoptions. *Id.* at 269. In some states, an unwed father is not excused from failing to register—even if the birth mother concealed her intent to place the child up for adoption. See, e.g., *Heidbreder v. Carton*, 645 N.W.2d 355, 368–69 (Minn. 2002) (applying MINN. STAT. § 259.52 (2011)).

173. See Barton, *supra* note 131, at 133. This may mean that the court must publish notice of an adoption hearing if the father is unknown. See, e.g., KAN. STAT. ANN. § 59-2136(c) (West 2011). It could also mean that the person seeking the adoption must serve notice on the unknown father. See, e.g., N.C. GEN. STAT. ANN. § 48-2-401(c)(3) (West 2011). However, publication notice laws often invade the birth mother's privacy interests and provide little protection to the unknown biological father if he never sees the publication. See Barton, *supra* note 131, at 143–44.

Differing state laws create an array of problems—including which law applies if the adoption is contested.<sup>174</sup> Furthermore, some states have held that birth fathers and mothers may be treated differently by law if the law is rationally related to the best interest of the child in a stable home,<sup>175</sup> creating further issues as to the rights of the parties. There has been movement toward enacting a national putative father registry database, in the interest of protecting the rights of unwed fathers, particularly in the interstate adoption context.<sup>176</sup> A national putative father registry may be one possible solution to conflicts in interstate adoptions.<sup>177</sup> Whatever the solution, “[t]he putative father who genuinely wants to parent his child and assume full custody should be given notice of the adoption so that he may ‘grasp’ his opportunity to develop a relationship with the child before it is too late.”<sup>178</sup>

### III. CURRENT STATE OF THE LAW

In applying the PKPA and considering if a proceeding is pending in another state, there are five key issues that need to be addressed.<sup>179</sup> Since the PKPA adopts the basic language of the UCCJA, courts frequently use the two terms interchangeably,<sup>180</sup> and this Comment will do likewise unless explicitly stated. First, is there a “custody proceeding” covered by the UCCJA or the PKPA?<sup>181</sup> Second, is there another proceeding “pending” when the petition is filed?<sup>182</sup> Third, is the other court’s exercise of

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174. See Simpson, *supra* note 160, at 581–83. One example of this is the case *In re Baby Girl P.*, 802 A.2d 1192 (N.H. 2002). In that case, the court acknowledged that generally the laws of the forum state apply to adoption cases, but that rule is not strictly construed and a state may apply the laws of a foreign state. *Id.* at 1194. Ultimately, although the child was born in Arizona, New Hampshire law applied because the adoptive parents lived there and the mother indicated the adoption would take place under New Hampshire law. *Id.* at 1193–95.

175. See *In re Jarrett*, 660 N.Y.S. 2d 916, 915 (App. Div. 1997).

176. See Mary Beck, *A National Putative Father Registry*, 36 CAP. U. L. REV. 295, 298 (2007) [hereinafter *National Registry*]. In 2006, the Proud Father Act was introduced in the Senate. Protecting Rights of Unknowing Dads and Fostering Access To Help Encourage Responsibility (Proud Father) Act of 2006, S. 3803, 109th Cong. (2006).

177. See *infra* notes 368–90 and accompanying text.

178. Zdon, *supra* note 150, at 949. As important as this interest is, it also must be balanced against the child’s need for stability and committed parents to raise it, as well as the mother’s interests. *Id.* at 949–50.

179. David Carl Minneman, Annotation, *Pending Proceeding in Another State as Ground for Declining Jurisdiction Under § 6(a) of the Uniform Child Custody Jurisdiction Act (UCCJA) or the Parental Kidnapping Prevention Act (PKPA)*, 28 U.S.C.A. § 1738A(g), 20 A.L.R. 5TH 700 (1994).

180. See *supra* note 84 and accompanying text.

181. *Id.*

182. *Id.* This may bring up an issue of the point at which the proceeding is commenced. See *Jurisdiction and Procedure*, *supra* note 70, at 349. Some states use the time when the petition is filed, while others use the time when process is served. *Id.* at 349–50. In *Doe v. Baby Girl*, the court found that a birth father filing a petition in Illinois court did not give Illinois first-in-time jurisdiction, because the Illinois order was not a “custody determination,” with no pleadings and no

jurisdiction in substantial conformity with the UCCJA or PKPA?<sup>183</sup> Fourth, has the other state's proceeding been stayed?<sup>184</sup> Finally, do any extenuating circumstances exist to override the UCCJA or PKPA?<sup>185</sup> In addressing these questions, there are several provisions of the UCCJA and PKPA that need a closer look in their application.

#### A. Custody Proceeding

The application of the UCCJA and PKPA to the adoption context has been the source of much controversy.<sup>186</sup> Particularly in the adoption context, the lack of coherency and legal uniformity creates many problems.<sup>187</sup> Unlike custody cases, in adoption cases, parental rights are fully severed.<sup>188</sup> Thus, jurisdiction procedures under the PKPA or UCCJA may not be adequate for adoption cases.<sup>189</sup>

Most courts have found that the PKPA applies to adoptions.<sup>190</sup> In fact, some states expressly include adoptions in the language of their versions of the UCCJA.<sup>191</sup> Based on both the plain language of the statute and the statute's stated purpose of minimizing interstate disputes over child custody, it is logical to apply the PKPA to adoptions.<sup>192</sup> In adoption proceedings, as

written order. 657 S.E.2d 455, 461 (S.C. 2008). Under that reasoning, the later in time order by South Carolina that determined custody made South Carolina the first-in-time court, giving it jurisdiction. *Id.*

183. Minneman, *supra* note 179.

184. *Id.*

185. *Id.* This topic is beyond the scope of this Comment and will not be addressed.

186. See generally Bernadette W. Hartfield, *The Uniform Child Custody Jurisdiction Act and the Problem of Jurisdiction in Interstate Adoption: An Easy Fix?*, 43 OKLA. L. REV. 621 (1990); Danny R. Veilleux, Annotation, *What Types of Proceedings or Determinations Are Governed by the Uniform Child Custody Jurisdiction Act (UCCJA) or the Parental Kidnapping Prevention Act (PKPA)*, 78 A.L.R. 4TH 1028 (1990).

187. See *State and Federal Adoption Laws*, *supra* note 132, at 37. These discrepancies in interpretations between jurisdictions are even more troubling in the context of interstate adoptions. *Id.*

188. See *Interstate Custody*, *supra* note 64, at 498. "[A]doption is conceptually quite different from custody or guardianship because adoption involves a final and permanent termination of parental rights." *Jurisdiction and Procedure*, *supra* note 70, at 308.

189. See *Jurisdiction and Procedure*, *supra* note 70, at 308.

190. See, e.g., *J.D.S. v. Franks*, 893 P.2d 732, 739 (Ariz. 1995); *In re Clausen*, 501 N.W.2d 193, 196 (Mich. Ct. App. 1993) (adoption is a custody proceeding under UCCJA); *E.E.B. v. D.A.*, 446 A.2d 871, 876 (N.J. 1982); *Doe v. Baby Girl*, 657 S.E.2d 455, 463 (S.C. 2008); *J.M.W. v. T.I.Z. (In re Adoption of Baby E.Z.)*, 266 P.3d 702, 706 (Utah 2011).

191. See, e.g., N.Y. DOM. REL. LAW § 75-a(4) (McKinney 2011) ("termination of parental rights"); MONT. CODE ANN. § 40-7-103 (2011) ("termination of parental rights").

192. See *J.M.W.*, 266 P.3d 702. It is also significant that Congress has twice amended the PKPA



with custody determinations, a child may be subject to conflicting decrees from two different states.<sup>193</sup> The Supreme Court of Georgia stated, “The application of the UCCJA to this adoption proceeding would have, among other things, prevented jurisdictional competition, promoted interstate cooperation, and, most importantly, prevented the continued disruption of a child’s life.”<sup>194</sup>

However, several courts have held that the PKPA (or, equivalently, the UCCJA) does not apply to adoptions.<sup>195</sup> While the text is in general terms, some argue that the UCCJA was specifically targeting custody awards after a family has been split apart by divorce or separation, situations which often lack stability.<sup>196</sup> Some states expressly exclude adoption from their definition of a “custody proceeding” in their UCCJA.<sup>197</sup> This position is supported by several factors.<sup>198</sup> Adoption proceedings result in a permanent award of custody, which is not modifiable.<sup>199</sup> Furthermore, certain terms under the PKPA that determine jurisdiction, such as home state and significant connection, are more difficult to apply in the interstate adoption context.<sup>200</sup> Finally, state courts may manipulate the provisions of the PKPA to obtain the result they desire, focusing on either parental rights or the best

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and has not chosen to alter the language to exclude adoptions. *Id.*

193. *See Souza v. Superior Court*, 193 Cal. App. 3d 1304, 1310 (Ct. App. 1987). Furthermore, other purposes of the PKPA, like deterring abductions and promoting exchange of information, are furthered by its application to the adoption context. *Id.*

194. *Gainey v. Olivo*, 373 S.E.2d 4, 6–7 (Ga. 1988). Applying the UCCJA to adoption would also give states a fixed set of rules to determine where jurisdiction exists. *See Hartfield, supra* note 186, at 623.

195. *See, e.g., Kessel v. Leavitt*, 511 S.E.2d 720, 796 (W. Va. 1998) (UCCJA does not apply and govern adoption proceedings); *William v. Knott*, 690 S.W.2d 605, 608 (Tex. Ct. App. 1985) (“[A]ctions to terminate parental rights are not child custody cases”).

196. *See Kay, supra* note 116, at 712. Furthermore, neither the UCCJA nor the PKPA include the word “adoption,” supporting an argument it was not meant to be included. *Id.* at 713–14.

197. *See Hartfield, supra* note 186, at 622–23; *see, e.g., N.H. REV. STAT. ANN. § 458-A:2* (III) (2011) (“This chapter does not govern an adoption proceeding or a proceeding pertaining to the authorization of emergency medical care for a child.”).

198. *See Crawford, supra* note 74, at 100. For a general discussion of the issues in applying the PKPA to interstate adoption, *see id.* at 120–30. *See also Kay, supra* note 116, at 704 (arguing the UCCJA is not the answer to interstate adoption and states should enact the UAA).

199. *See Crawford, supra* note 74, at 100; *Kay, supra* note 116, at 720 (arguing court orders granting adoptions are final judgments, making provisions of the UCCJA that deter modification unnecessary). This provision becomes even more problematic in the adoption context if some courts decide adoption custody awards are modifiable, leading to unstable custody determinations. *See Crawford, supra* note 74, at 108.

200. *See Crawford, supra* note 74, at 100; *see also Kay, supra* note 116, at 717 (“[T]here is no ‘home state’ in the vast majority of interstate stranger adoption cases, where the child is relinquished shortly after birth and taken to live in a different state with prospective adoptive parents who have had no prior contact with the child.”). If there is no home state, multiple states may argue over significant connection jurisdiction, causing the very conflict the PKPA attempts to avoid. *See Kay, supra* at 717.

interest of the child.<sup>201</sup> In spite of this minority view, most courts have held that adoptions are custody proceedings, and that the UCCJA and PKPA are applicable.<sup>202</sup> However, the inconsistency from state to state defeats the very purpose of the UCCJA, which is to create uniform application and interpretation.<sup>203</sup>

### B. Home State

The home state provision of the PKPA and UCCJA is particularly difficult to apply in the adoption context (especially for newborns) because, in most cases, the child has not lived in any state for more than six months and is often taken to a new state after birth.<sup>204</sup> One approach taken by states is that if the baby “is born in one state, but within days of birth is transported to another State, the baby simply has no home state.”<sup>205</sup> This essentially creates “a ‘race-to-the-courthouse’ rule of jurisdiction,” because the first state to be filed in will likely satisfy substantial connection jurisdiction.<sup>206</sup> Other courts have held that the birth state is the home state, as long as a parent continues to reside there.<sup>207</sup> This lack of uniformity is one reason why

201. See Crawford, *supra* note 74, at 101.

202. See Gainey v. Olivo, 373 S.E.2d 4, 4 (Ga. 1988) (“[T]he UCCJA does apply to adoption proceedings.”); *In re Custody of K.R.*, 897 P.2d 896, 899–900 (Colo. App. 1995) (adoptions “inherently determine custody issues”).

203. See Hartfield, *supra* note 186, at 623.

204. See Kay, *supra* note 116, at 717.

205. See, e.g., Doe v. Baby Girl, 657 S.E.2d 455, 463 (S.C. 2008); see also Adoption of Zachariah K., 8 Cal. Rptr. 2d 423, 430 (Ct. App. 1992); Rogers v. Platt, 199 Cal. App. 3d 1204, 1211–14 (Ct. App. 1988); *In re Adoption of Baby Girl B.*, 867 P.2d 1074, 1079–80 (Kan. Ct. App. 1994); *In re Adoption of Child by T.W.C.*, 636 A.2d 1083, 1088 (N.J. Super. Ct. App. Div. 1994).

206. See Waller, *supra* note 83, at 291. Such a rule is more troublesome when applied in the adoption context. *Id.* at 291–92. In custody disputes between biological parents, both may have equal legal interests. *Id.* However, in the case of adoption, the biological parents have distinct interests from prospective adoptive parents. *Id.* at 292. See also *infra* notes 335–40 and accompanying text.

207. See, e.g., *Ex parte D.B.*, 975 So. 2d 940, 950 (Ala. 2007). The Alabama Supreme Court interpreted the following rule based on the PKPA:

[A] state that has home-state status remains the home state for up to six months after the child leaves that state if the following two conditions exist: (1) the reason for the child’s absence from the state is that a ‘contestant’ has removed the child from the state; and (2) ‘a contestant continues to live in’ the state.

*Id.*; see also Martinez v. Reed, 623 F. Supp. 1050, 1056 (E.D. La. 1985) (“[A] child’s ‘home state’ is not destroyed by the fact that he or she is removed by a contestant to another state.”); *In re Clausen*, 502 N.W.2d 649, 658–59 (Mich. 1993); *In re Burk*, 252 S.W.3d 736, 741 (Tex. App. 2008); Meyeres v. Meyeres, 196 P.3d 604, 607 (Utah Ct. App. 2008).

the UCCJA and PKPA may be less applicable to adoptions.<sup>208</sup>

### C. Substantial Conformity

One of the alternative jurisdictional grounds of the PKPA allows a state to exercise jurisdiction if the prior state is not acting in substantial conformity with the PKPA.<sup>209</sup> This often creates issues when a state uses this as grounds for obtaining jurisdiction and refuses to recognize the custody determinations of the other court.<sup>210</sup> In addition, there is a strong argument that if the question of initial jurisdiction has already been decided in another state, in conformity with the UCCJA (or equivalently, the PKPA), then full faith and credit should be given to that decision, even if the later court, applying its own version of the law, would have come to a different conclusion.<sup>211</sup> Even when the first state has not adopted the UCCJA, a court may still recognize that state's custody determination if the former state was acting in substantial conformity with the later state's UCCJA.<sup>212</sup>

### D. Jurisdiction

One key issue in interpreting the jurisdictional provisions of the PKPA is whether it refers to subject matter jurisdiction or territorial jurisdiction.<sup>213</sup> The personal jurisdiction requirements of the PKPA are beyond the scope of this article.<sup>214</sup> Subject matter jurisdiction is “jurisdiction over the nature of

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208. See *supra* note 200 and accompanying text.

209. See *supra* note 97 and accompanying text.

210. See, e.g., *In re L.S.*, 257 P.3d 201, 205 (Colo. 2011) (refusing to recognize a custody determination from Nebraska where the child had lived in Colorado for more than six consecutive months, making Colorado, not Nebraska, the home state).

211. See *id.* at 211 (Coats, J., dissenting). As Justice Coats stated:

Once the question of initial jurisdiction has been fully and finally litigated in another state, according to provisions in substantial conformity with the UCCJEA, that determination is entitled to credit, whether or not a court of this state would have reached the same conclusion. To conclude otherwise not only undermines the fundamental rationale behind both the PKPA and UCCJEA, but also perpetuates a jurisdictional stalemate among the states and leaves unreconciled their competing enforcement orders.

*Id.*

212. See, e.g., *Indiana ex rel. Marcrum v. Marion Cnty.* Superior Court, 403 N.E.2d 806, 808–09 (Ind. 1980); *Barcus v. Barcus*, 278 N.W.2d 646, 649 (Iowa 1979).

213. See *Atwood*, *supra* note 52, at 374–75. In addition, some scholars categorize both of these as subject matter jurisdiction, with the distinction being “local subject matter jurisdiction” versus “territorial subject matter jurisdiction.” See Ralph U. Whitten, *Choice of Law, Jurisdiction, and Judgment Issues in Interstate Adoption Cases*, 31 CAP. U. L. REV. 803, 818 (2003). However, many courts do not make this distinction and do not follow different rules for collateral attack based on lack of subject matter jurisdiction. *Id.* at 818, 835–36. Under these rules, local subject matter jurisdiction cannot be conferred by waiver, consent, or estoppel, but lack of territorial jurisdiction may be cured by estoppel. *Id.*

214. The Supreme Court in *May v. Anderson*, 345 U.S. 528, 534 (1953), ruled that a court must

the case and the type of relief sought; the extent to which a court can rule on the conduct of persons or the status of things.”<sup>215</sup> Extraterritorial jurisdiction is “[a] court’s ability to exercise power beyond its territorial limits.”<sup>216</sup> Generally, subject matter jurisdiction cannot be conferred on a court by waiver, consent, or estoppel, while territorial jurisdiction may be granted by estoppel.<sup>217</sup> The issue of whether territorial jurisdiction is equivalent to subject matter jurisdiction or waivable is a matter debated outside the context of the PKPA.<sup>218</sup> For instance, the South Carolina Supreme Court held in a criminal case that “[a]lthough territorial jurisdiction is not a component of subject matter jurisdiction, we hold that it is a fundamental issue that may be raised by a party or by a court at any point in the proceeding.”<sup>219</sup>

Many courts have held that the PKPA creates an affirmative duty for a state court to question its jurisdiction when it learns of proceedings in another state.<sup>220</sup> Courts have expressly stated that the jurisdictional

have personal jurisdiction over a mother in order to deprive her of her right to custody of her children. Even the holding in *May* left courts without clear guidance. See Coombs, *supra* note 45, at 737. Some courts have interpreted *May* to mean that due process is violated if custody is awarded without personal jurisdiction over the parent, in accord with *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). Coombs, *supra* note 45, at 736. However, other courts have interpreted *May* more narrowly, and, as such, have not reached the due process issue. *Id.* This disparity in treatment leads to a lengthy discussion that this article will not address, but for a further discussion of the relationship between personal jurisdiction and the UCCJA, see *Comparative Ruminations*, *supra* note 64, at 517–24. See generally Atwood, *supra* note 52.

215. BLACK’S LAW DICTIONARY 396 (3d Pocket ed. 2006). By statute, a state may grant jurisdiction to exclusive courts, such as a court of domestic relations, foreclosing other courts in the state from exercising jurisdiction. See Whitten, *supra* note 213, at 818.

216. BLACK’S LAW DICTIONARY 394 (3d Pocket ed. 2006). Other scholars have described territorial jurisdiction as “indicating that there are sufficient geographic connections between the dispute and the forum to support the forum court’s power.” Atwood, *supra* note 52, at 376. The sources of the rules of territorial jurisdiction are “the rules that define the political authority of the state itself,” such as the provisions of the Constitution. See Whitten, *supra* note 213, at 826. A state may always choose not to exercise the full range of territorial jurisdiction allowed under the Constitution. *Id.* Based on Supreme Court precedent, it is unclear if territorial rules of jurisdiction are incorporated in the Due Process Clause or if they are merely common law rules, allowing states to refuse to enforce the judgments of other states. *Id.* at 829.

217. See Whitten, *supra* note 213, at 835–36.

218. See Emily Nanette Swalm, *State v. Dudley: Defining the Theory of Extraterritorial Criminal Jurisdiction*, 55 S.C. L. REV. 543, 544, 568 (2004) (examining territorial jurisdiction in the criminal context and arguing that it should not be considered a component of subject matter jurisdiction, but still be capable of being raised for the first time on appeal).

219. *South Carolina v. Dudley*, 614 S.E.2d 623, 625–26 (S.C. 2005). The reasoning behind this is that territorial jurisdiction goes to a state’s sovereignty, which is an elemental question that cannot be waived, even by consent. *Id.*

220. See, e.g., *Fuge v. Uiterwyk*, 613 So. 2d 717, 719–20 (La. Ct. App. 1993); *Renno v. Evans*,

provisions under the UCCJA “are equivalent to declarations of subject matter jurisdiction.”<sup>221</sup> Several courts have held that, like subject matter jurisdiction, jurisdictional defects under the PKPA may be raised at any time and jurisdiction cannot be conferred on the court by consent.<sup>222</sup> Significantly, Brigitte Bodenheimer, a Reporter for the Special Committee of the Commissioners on Uniform State Laws, which prepared the UCCJA,<sup>223</sup> specifically stated “[s]ubject matter jurisdiction . . . may not be conferred by the parties’ appearance in the proceedings.”<sup>224</sup>

However, other courts have treated the jurisdictional provisions under the PKPA more like territorial considerations, such as venue, and therefore have held that lack of jurisdiction may be waived.<sup>225</sup> If courts find that the PKPA does not refer to subject matter jurisdiction, they may rely on state statutes regulating adoption, which may grant jurisdiction to several states: the child’s domicile, the parent’s residence, the adoptive parent’s residence, or the adoption agency’s location.<sup>226</sup> Under this standard, multiple states could have subject matter jurisdiction, disrupting the smooth resolution of interstate adoption and destabilizing relationships.<sup>227</sup> These disparities in interpretation show the courts’ struggle to find the correct approach to child

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580 So. 2d 945, 947 (La. Ct. App. 1991); *see also The Mobile Family*, *supra* note 82, at 104 (“[A] court hearing an adoption petition should always inquire whether the child is subject to a prior custody or visitation order or pending custody proceeding in the adoption state or any other state.”).

221. *Renno*, 580 So. 2d at 948.

222. *See, e.g.*, *Leighton v. Leighton*, 596 P.2d 8, 9–10 (Alaska 1979); *Sholty v. Carruth*, 616 P.2d 918, 919 (Ariz. Ct. App. 1980); *Moore v. Richardson*, 964 S.W.2d 377, 380–81 (Ark. 1998); *Brooks v. Brooks*, 546 So. 2d 100, 100 (Fla. Dist. Ct. App. 1989); *Wambold v. Wambold*, 651 A.2d 330, 332 (Me. 1994).

223. *Legislative Remedy*, *supra* note 47, at 1207.

224. *Progress Under the UCCJA*, *supra* note 54, at 998. Furthermore, Bodenheimer argues that the Commissioners specifically chose to not have jurisdiction by consent in order to further the purposes of the UCCJA. *Id.* at 999.

225. *See, e.g.*, *B.J.P. v. R.W.P.*, 637 A.2d 74, 78–79 (D.C. 1994). That court stated:

The purported lack of subject matter jurisdiction based on territorial considerations—a fair characterization of the asserted defect here—has been held to be analytically similar to improper venue; it does not go to the *power* of the court to adjudicate the case, and may be waived if not asserted in timely fashion.

*Id.*; *see also Williams v. Williams*, 555 N.E.2d 142, 145 (Ind. 1990); *E.N. v. E.S.*, 852 N.E.2d 1104, 1115 n.26 (Mass. App. Ct. 2006). Factors in support of this argument include the ability of courts to then accept consensual jurisdiction and to avoid belated objections. *See Atwood*, *supra* note 52, at 401–02. Furthermore, the UCCJA § 5(d) allows notice requirements to be waived in the event of a party submitting to the jurisdiction of the court, perhaps suggesting that jurisdiction may also be waived by consent. *See Demelis*, *supra* note 65, at 1352.

226. *See Kay*, *supra* note 116, at 729. Furthermore, others have argued that the provisions of the PKPA are more akin to jurisdictional requisites, not requirements imposed by federal law to obtain initial jurisdiction. *See Krauskopf*, *supra* note 68, at 436. Therefore, it is state law or the UCCJA that determines whether jurisdiction to make an initial order exists. *Id.* This is precisely what the Utah Supreme Court did in *J.M.W.* *See infra* note 246 and accompanying text.

227. *See Kay*, *supra* note 116, at 729.

custody jurisdiction.<sup>228</sup> These two distinct views interpreting jurisdiction under federal legislation may make federal judicial review of state supreme court decisions an appropriate method for resolving issues related to PKPA interpretation.<sup>229</sup>

#### IV. RECENT APPLICATIONS OF THE PKPA

##### A. *J.M.W. v. T.I.Z.*

One recent example of a state supreme court attempting to apply the PKPA to an interstate adoption case is *J.M.W.*<sup>230</sup> The facts on record paint a slightly different and less personal story than that put forth in the national news.<sup>231</sup> In the case, a baby was born in Virginia to unwed parents, both residents of Virginia, on February 10, 2009.<sup>232</sup> The mother had been in contact with an adoption agency prior to the birth, and, on February 12, she relinquished her parental rights and consented to the adoption.<sup>233</sup> Prospective adoptive parents were found, and, on February 17, they received permission to travel to Utah with the baby.<sup>234</sup> The birth father initiated custody and visitation proceedings in Virginia the following day.<sup>235</sup> While this case was pending, the prospective parents filed a Petition for Adoption on February 23 in a Utah Court.<sup>236</sup> The birth father registered as the putative father of the baby in Virginia on April 8.<sup>237</sup> On April 28, the birth father moved to contest the adoption in Utah and requested permission to intervene, but never raised the PKPA or challenged Utah's jurisdiction.<sup>238</sup>

The Utah court denied the motion, finding that the birth father had waived his rights to the child, could not intervene, and did not need to provide consent in order for the adoption to proceed.<sup>239</sup> Back in Virginia, on

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228. See Atwood, *supra* note 52, at 375.

229. See *infra* notes 345–49 and accompanying text.

230. *J.M.W. v. T.I.Z. (In re Adoption of Baby E.Z.)*, 266 P.3d 702 (Utah 2011).

231. See *supra* notes 1–19 and accompanying text.

232. *J.M.W.*, 266 P.3d at 704–05.

233. *Id.* at 705.

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.* This is because the birth father failed to meet Utah's stringent requirements for establishing paternity. See *infra* notes 251–57 and accompanying text.

December 11, 2009, the court issued an order giving the birth father custody of the child and holding that the Virginia court had exclusive jurisdiction under the PKPA.<sup>240</sup> On appeal in Utah, the birth father raised the PKPA, arguing that it strips Utah of subject matter jurisdiction.<sup>241</sup>

The Utah Supreme Court issued its decision on July 19, 2011, and first held that the PKPA applies to adoption proceedings and would thus be applicable in the case.<sup>242</sup> However, the court then found that the PKPA was subject to waiver and did not deprive Utah of subject matter jurisdiction.<sup>243</sup> The court reasoned that “subject matter jurisdiction [is] when [a court] has ‘the authority . . . to decide the case.’”<sup>244</sup> Accordingly, the court focused on whether “the court has authority over the general class of cases,” not “on the specific facts presented by any individual case.”<sup>245</sup> Under the Utah Code, Utah district courts have subject matter jurisdiction over custody proceedings.<sup>246</sup> The court bolstered its findings by arguing that if Congress intended the PKPA to divest courts of subject matter jurisdiction, it would have clearly stated such intent.<sup>247</sup> It also submitted that interpreting the PKPA to relate to subject matter jurisdiction would increase uncertainty in interstate adoptions because any decisions made by courts lacking jurisdiction would be void from the outset, capable of being collaterally attacked at any time after judgment.<sup>248</sup> Furthermore, the court pointed out that the PKPA was not placed with other federal statutes dealing with judicial jurisdiction, but instead as an addendum to the full faith and credit statute.<sup>249</sup> Based on these findings, the court held that the birth father could not raise the PKPA on appeal because he failed to raise it in the lower court.<sup>250</sup>

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240. *J.M.W.*, 266 P.3d at 705.

241. *Id.* at 706.

242. *Id.* at 708. Although the concurrence goes to great lengths to argue that, based on the statutory language, the statute’s purpose, and the statute’s legislative history, the PKPA does not apply to adoptions. *Id.* at 722–23 (Lee, J., concurring).

243. *Id.* at 710–11. In doing this, the court overruled *Curtis v. Curtis*, 789 P.2d 717 (Utah Ct. App. 1990). In that case, the court held that a party making a general appearance did not waive her jurisdictional challenge under the PKPA. *Id.* at 726. The court expressly held that a lack of subject matter jurisdiction under the PKPA can be raised at any time and cannot be waived. *Id.* As an alternative argument to the majority’s holding in *J.M.W.*, the concurrence finds—based on the “exercise” of jurisdiction language of the PKPA—that it is more comparable to territorial jurisdiction, not subject matter jurisdiction. 266 P.3d at 718 (Lee, J., concurring). Therefore, it is waived if not raised in the lower court. *Id.*

244. *Id.* at 711 (citing *Johnson v. Johnson*, 234 P.3d 1100, 1102 (Utah 2010)).

245. *J.M.W.*, 266 P.3d at 711.

246. *Id.* (citing UTAH CODE ANN. § 78A-5-102(1) (West 2011)).

247. *J.M.W.*, 266 P.3d at 712.

248. *Id.*

249. *Id.* Because of this, the PKPA is subject to waiver, like full faith and credit claims. *Id.*

250. *Id.* at 712.

After reaching this decision, the court then assessed whether the birth father waived his right to withhold consent to the adoption, applying Utah law.<sup>251</sup> Under Utah law, an unwed father's consent is not required for adoption unless he files a paternity action in a Utah court prior to the time the mother consents to the adoption.<sup>252</sup> He may preserve his right to refuse consent if he meets three requirements.<sup>253</sup> First, he must have reasonably lacked knowledge of a qualifying circumstance.<sup>254</sup> Next, he must meet all requirements to establish parental rights, either in the last state where the mother resided or in the state where the child was conceived.<sup>255</sup> Finally, the unwed father must show a "full commitment to his parental responsibilities."<sup>256</sup> Under these requirements, the court found that the birth father did not establish his parental rights under Virginia law until after the mother had consented to the adoption.<sup>257</sup>

*B. Ex parte D.B.*

Other state supreme courts have interpreted the jurisdictional provisions of the PKPA as relating to subject matter jurisdiction, which is not subject to waiver, and have declined to exercise jurisdiction on those grounds.<sup>258</sup> One such example of this is the Alabama Supreme Court in *Ex parte D.B.*<sup>259</sup> In that case, the child was born in Nebraska to Nebraska residents on January 21, 2004.<sup>260</sup> The mother placed the child into the physical custody of the adoptive parents on January 25.<sup>261</sup> The birth father did not learn of the potential adoption until January 30, at which point he filed notice of his

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251. *Id.* at 713.

252. *Id.* at 704 (citing UTAH CODE ANN. § 78B-6-121(3) (West 2011)).

253. *J.M.W.*, 266 P.3d at 713.

254. *Id.* (citing UTAH CODE ANN. § 78B-6-122(1)(c)(i)(A) (West 2011)).

255. *J.M.W.*, 266 P.3d at 713 (citing UTAH CODE ANN. § 78B-6-122(1)(c)(i)(B)).

256. *J.M.W.*, 266 P.3d at 713 (citing UTAH CODE ANN. § 78B-6-122(1)(c)(i)(C)).

257. *J.M.W.*, 266 P.3d at 713. The mother consented to the adoption on February 12, but the birth father did not file a custody proceeding in Virginia until February 18 and did not register with the Putative Father Registry until April 8. *Id.* The court found that either of these steps would have established the birth father's parental rights under Virginia law. *Id.* However, interestingly, the Virginia court apparently found that the birth father had adequately asserted his rights under Virginia law, because it granted him custody. *See id.* at 704.

258. *See supra* note 222 and accompanying text.

259. 975 So. 2d 940 (Ala. 2007).

260. *Id.* at 942.

261. *Id.*



intent to claim paternity and obtain custody in Nebraska.<sup>262</sup> On February 2, the adoptive parents moved with the child to Alabama and initiated an adoption proceeding there on February 12.<sup>263</sup> Shortly thereafter, the adoptive parents were awarded custody by the Alabama court.<sup>264</sup> In Nebraska, the father filed a petition on February 20 to adjudicate his claim of paternity and right to custody.<sup>265</sup> On March 17, a pretrial hearing was held with the birth father and mother present, as well as the attorney for the adoptive parents, but no official appearance was made on their behalf.<sup>266</sup> The Nebraska court found that it had jurisdiction over the parties and the subject matter of the case.<sup>267</sup> In Alabama, the birth father moved to stay the adoption proceedings on March 30.<sup>268</sup>

The Nebraska court held a trial on April 21, without the mother present.<sup>269</sup> According to the birth father's testimony, he attempted to maintain contact with the mother and sought to participate in the upbringing of the child.<sup>270</sup> The child was put up for adoption without the father's consent, and notice of the potential adoption was mailed to the wrong address, so the birth father did not receive it.<sup>271</sup> Notice of the potential adoption was also posted in a local newspaper and stated that the father had until five days after February 12 to file notice of his intent to claim paternity.<sup>272</sup> Based on these findings, the Nebraska court granted the father physical custody and all rights.<sup>273</sup> Six days later, the Nebraska court supplemented the judgment, ordering that the adoption proceedings in Alabama be dismissed.<sup>274</sup> The father moved to enforce the Nebraska judgment in Alabama on April 29.<sup>275</sup> On May 10, the adoption proceeding was transferred from the probate court to the juvenile court, upon the request of the adoptive parents.<sup>276</sup> In the juvenile court, the adoptive couple filed a

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262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.*

266. *Id.* This fact is crucial to the court's holding that the "reasonable notice and opportunity to be heard" requirement of the PKPA was not met, because although the adoptive couple had actual notice, there was no attempt at service of process. *Id.* at 955.

267. *Id.* at 942.

268. *Id.* at 943.

269. *Id.*

270. *Id.*

271. *Id.*

272. *Id.* The father filed his notice of intent on January 30, well within the timeframe allotted. *Id.*

273. *Id.* at 944.

274. *Id.*

275. *Id.*

276. *Id.*

response to the birth father's motion to dismiss on June 4, claiming that the Nebraska judgment was invalid because they had not been served.<sup>277</sup> On September 22, the juvenile court entered a judgment, finding that jurisdiction was proper in Nebraska, Nebraska had never given up jurisdiction, and the case should be transferred to Nebraska.<sup>278</sup> Ultimately, the adoptive parents appealed to the Alabama Supreme Court.<sup>279</sup>

The Alabama Supreme Court first addressed the issue of the home state provision.<sup>280</sup> It held that Alabama could not be the home state because the child was born in Nebraska and moved to Alabama after birth to live with the adoptive parents.<sup>281</sup> Next, the court found that, although the birth father did not file his action in Nebraska until eight days after the adoptive parents filed their action in Alabama, Nebraska still had priority jurisdiction as the child's home state.<sup>282</sup> In support of this argument, the court found that a state remains the home state for up to six months after the child leaves if both (1) the child left the state because a "contestant" removed the child and (2) a "contestant" continues to live in the state.<sup>283</sup> Nebraska was therefore the home state because the child was born in Nebraska and was taken from the state by the adoptive parents—contestants—while the father—also a contestant—remained in the state.<sup>284</sup>

While Nebraska may have been the home state, the Alabama Supreme Court next addressed whether the judgment was enforceable, requiring for enforceability that Nebraska have been exercising jurisdiction consistent with the PKPA.<sup>285</sup> The PKPA requires that the adoptive parents be given notice of the proceedings in Nebraska.<sup>286</sup> Although the adoptive parents had actual notice, they were never given service of process.<sup>287</sup> Therefore,

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277. *Id.*

278. *Id.*

279. *Id.* at 946.

280. *Id.* at 947.

281. *Id.* at 948.

282. *Id.* at 949–50.

283. *Id.* at 950; *see also supra* note 207 and accompanying text.

284. *Ex parte D.B.*, 975 So. 2d at 950.

285. *Id.* at 951; *see also supra* notes 209–12 and accompanying text.

286. *Ex parte D.B.*, 975 So. 2d at 951. The text of the PKPA states: "Before a child custody or visitation determination is made, reasonable notice and opportunity to be heard shall be given to the contestants, any parent whose parental rights have not been previously terminated and any person who has physical custody of a child." 28 U.S.C. § 1738A(e) (2006).

287. *Ex parte D.B.*, 975 So. 2d at 951. Although the birth father contended that actual notice was sufficient, the court ultimately held that there was a lack of proper notice and service of process. *Id.* at 953–54.

Nebraska did not have personal jurisdiction over the adoptive parents because no notice was given, meaning the Nebraska judgment did not substantially conform to the PKPA.<sup>288</sup> Thus, the Nebraska judgment was not enforceable in Alabama.<sup>289</sup> However, it does not necessarily follow that Alabama may exercise jurisdiction.<sup>290</sup> Nebraska, as the home state, is still the preferred jurisdiction under the PKPA, and Alabama cannot exercise significant-connection jurisdiction.<sup>291</sup> Therefore, the case was transferred to Nebraska, and Alabama terminated all proceedings.<sup>292</sup>

### C. Analysis of Interpretation of Jurisdiction Under the PKPA

The interpretation of the PKPA in *J.M.W.* sets a dangerous precedent.<sup>293</sup> While there are various provisions subject to multiple interpretations and creating confusion, such as custody proceeding, home state, and substantial conformity,<sup>294</sup> the application of the jurisdictional provisions of the PKPA is particularly troublesome.<sup>295</sup> Ultimately, the issue becomes one of whether the jurisdictional provisions of the PKPA refer to subject matter jurisdiction or territorial jurisdiction.

*J.M.W.*<sup>296</sup> and *Ex parte D.B.*<sup>297</sup> show how two courts may reach opposite conclusions when faced with similar situations—namely, newborn babies being transported across state lines for adoption. The court in *J.M.W.* completely ignored the prior proceedings in Virginia and concluded that it properly exercised jurisdiction.<sup>298</sup> In contrast, the court in *Ex parte D.B.* deferred to the prior proceedings in Nebraska, even though Nebraska was not exercising jurisdiction in accordance with the PKPA.<sup>299</sup>

The difference in these interpretations has the greatest impact on the party with the burden of challenging jurisdiction. Under the holding in *J.M.W.*, the unwed father has the burden to raise the PKPA in the lower

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288. *Id.* at 953.

289. *Id.* at 955.

290. *Id.*

291. *Id.* at 956.

292. *Id.* at 944.

293. The Utah Supreme Court has already relied on *J.M.W.* in another case, holding jurisdictional claims under the PKPA to be waived if not raised in the district court. *Donjuan v. McDermott*, 266 P.3d 839, 843 (Utah 2011).

294. See *supra* notes 186–212 and accompanying text. In addition, the weight given by courts to the child’s best interests as opposed to the biological parents’ rights may lead to different outcomes in two states faced with similar facts. See Crawford, *supra* note 74, at 122.

295. See *supra* notes 213–29 and accompanying text.

296. *J.M.W. v. T.I.Z. (In re Adoption of Baby E.Z.)*, 266 P.3d 702 (Utah 2011).

297. *Ex parte D.B.*, 975 So. 2d 940.

298. *J.M.W.*, 266 P.3d at 704.

299. *Ex parte D.B.*, 975 So. 2d at 956.

court, or he waives the right to raise it on appeal.<sup>300</sup> In *Ex parte D.B.*, even though the unwed father did not raise the PKPA in the lower court, the court deferred to Nebraska because it found that it did not have jurisdiction under the PKPA since it was not the home state.<sup>301</sup> This is consistent with other courts that have placed the burden of evaluating jurisdiction and inquiring into proceedings in other states on the court.<sup>302</sup>

While state courts are without Supreme Court precedent to aid them in interpreting the PKPA, looking to the intent behind the Act is useful in determining which interpretation Congress intended.<sup>303</sup> The purpose of the PKPA was to resolve interstate custody disputes in a uniform manner and prevent conflicting custody decrees.<sup>304</sup> In *J.M.W.*, the court's interpretation resulted in two conflicting custody decrees: one from Utah granting the adoption and one from Virginia giving the unwed father custody.<sup>305</sup> The holding in *Ex parte D.B.* resulted in only one court, Nebraska, assuming jurisdiction to make the custody determination.<sup>306</sup> Looking solely at promoting the purpose of the PKPA, the holding in *Ex parte D.B.* aligns with the intent behind the PKPA because there are not two conflicting custody decrees; in contrast, the court's decision in *J.M.W.* results in the very problem the PKPA sought to fix, namely two courts issuing different custody decrees.<sup>307</sup> These inconsistencies have widespread impact and have resulted in various calls for reform.<sup>308</sup>

## V. PROBLEMS WITH UNCERTAINTY

### A. Problems for Unwed Fathers

Uncertainty in the interpretation and application of the PKPA creates myriad problems for unwed fathers. For example, it is unclear whether a state should defer to the substantive and procedural laws of another state in

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300. *J.M.W.*, 266 P.3d at 705; see also *supra* note 225 and accompanying text.

301. *Ex parte D.B.*, 975 So. 2d at 949–50.

302. See *supra* notes 220–24 and accompanying text.

303. See *Progress Under the UCCJA*, *supra* note 54, at 998–99. Bodenheimer, in assessing the UCCJA—which has provisions similar to the PKPA—reasons that the purposes of the UCCJA are promoted by not allowing jurisdiction by consent. *Id.*

304. See *supra* note 78 and accompanying text.

305. *J.M.W.*, 266 P.3d at 702, 713.

306. *Ex parte D.B.*, 975 So. 2d at 956.

307. See *supra* note 80 and accompanying text.

308. See *supra* note 100 and accompanying text.

which the birth parent may be located.<sup>309</sup> This issue is further aggravated by varying state laws for consent, relinquishment, and termination.<sup>310</sup> The impact of this was seen in *J.M.W.*, where the father followed Virginia law for establishing paternity but failed to follow the stringent requirements of Utah law and lost custody of his child because of it.<sup>311</sup> There are also differences among state laws for birth father notification requirements.<sup>312</sup> Birth fathers who fail to initially contest the adoption face an even tougher battle in appealing the adoption, often taking several years to resolve the conflict.<sup>313</sup>

As culture and society have evolved, previous stereotypes regarding unwed fathers may no longer be applicable or representative of reality.<sup>314</sup> With today's higher birth rate to unmarried women and dating standards, a

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309. See *The Mobile Family*, *supra* note 82, at 99. There is a tension between the argument that the state with subject matter jurisdiction should apply its substantive laws because of "significant connections" and the argument that it is more appropriate to apply the substantive law of the state in which the parent attempts to oppose the adoption. *Id.* In terms of the actual adoption, the substantive law is the law of the forum state. See Whitten, *supra* note 213, at 805–06.

310. See *The Mobile Family*, *supra* note 82, at 100.

311. See *supra* note 251–57 and accompanying text. Another interesting example of this is *H.U.F. v. W.P.W.*, 203 P.3d 943, 951 (Utah 2009), where the court held that the putative father failed to meet the requirements under Arizona law and knew the birth mother was in Utah. In that case, the mother served notice of the pending adoption to two men and published the notice in Arizona newspapers. *Id.* at 946–47. The putative father filed a Notice of Claim of Paternity and later filed a petition for paternity but not within the thirty days required and failed to properly serve the mother, leading to his petition being denied. *Id.* at 947. The putative father was aware that the mother had moved to Utah but did not file any petitions there. *Id.* Distinguishably, in *J.M.W.*, the birth father met the Virginia statutory requirements and was granted custody in the Virginia court. *J.M.W. v. T.I.Z. (In re Adoption of Baby E.Z.)*, 266 P.3d 702, 704 (Utah 2011). Furthermore, in *H.U.F.*, the Arizona court ceded jurisdiction. 203 P.3d at 953. For a general discussion of *H.U.F.* and the rights of unwed fathers in Utah, see Deborah Bulkeley, Note, *Who's My Daddy?! A Call for Expediting Contested Adoption Cases in Utah*, 12 J.L. & FAM. STUD. 225 (2010).

312. See Simpson, *supra* note 160, at 581. As one author observed:

Based on the author's observations over seventeen years in this field, there is a great deal of confusion as to really knowing what law will apply in the event of disputes such as whether the birth father responded within the time required or whether his response time has expired; or, whether the birth father was properly given notice or deprived of that right.

*Id.* at 581 n.39.

313. See Bulkeley, *supra* note 311, at 231. For instance, since 1999, the average time to finalize a contested adoption in Utah is almost three years. *Id.*

314. See *supra* note 29 and accompanying text. Even in the 1870s and 1880s, some courts acknowledged that fathers could be more fit than mothers. See, e.g., *Verser v. Ford*, 37 Ark. 27, 30 (1881) ("As between the father, too, and the mother . . . the father is generally to be preferred."); *McShan v. McShan*, 56 Miss. 413, 415 (1879) ("[T]he husband, as head of the family . . . has, therefore, a better right to their custody."). However, there are still some who believe the rights of the father should not be favored over the rights of the mother and the best interest of the child. See Michelle Kaminsky, Note, *Excessive Rights for Putative Fathers: Heart of Adoptions Jeopardizes Rights of Mother and Child*, 57 CATH. U. L. REV. 917, 922 (2008).

new solution is needed to protect the rights of unwed fathers.<sup>315</sup> Our society has been moving toward greater equality between genetic mothers and genetic fathers, whether or not they are married.<sup>316</sup> While the Supreme Court has recognized some rights of unwed fathers,<sup>317</sup> the lack of clarity in its holdings has given the states little guidance for solving the problem of unwed fathers in the adoption context.<sup>318</sup> Some states, such as Louisiana, have gone so far as to say an unwed father has “a liberty interest within the protection of due process” in his child.<sup>319</sup> On the other end of the spectrum, Utah has some of the most stringent requirements for an unwed father to assert his rights.<sup>320</sup> Most states fall somewhere in the middle and are willing to recognize the rights of unwed fathers if they have indicated a desire to form a relationship.<sup>321</sup> There may always be some inequality between mothers and fathers, simply based on the fact that the mother’s identity is verifiable from birth.<sup>322</sup> However, the paternity interests of unwed fathers

315. See *Toward a Database*, *supra* note 110, at 1077.

316. See Parness & Arado, *supra* note 29, at 207. Both recent court decisions and statutes enacted show support of this trend. *Id.* at 207–09.

317. See *supra* note 136–59 and accompanying text.

318. See Resnik, *supra* note 115, at 389–90.

319. *In re Adoption of B.G.S.*, 556 So.2d 545, 551 (La. 1990).

320. The Utah Supreme Court has stated: “a biological relationship alone is insufficient to establish constitutionally protected parental rights.” *In re Adoption of B.B.D.*, 984 P.2d 967, 970 (Utah 1999); see also Bulkeley, *supra* note 311, at 227 (stating that in addition to requiring unwed fathers to register before birth, Utah adds the burden of requiring a statutory outlined paternity action to be filed).

321. New York has recognized the unusual nature in an unwed father being able to establish a relationship with his newborn child and held:

[I]n an adoption proceeding by strangers, an unwed father who has been physically unable to have a full custodial relationship with his newborn child is also entitled to the maximum protection of his relationship, so long as he promptly avails himself of all the possible mechanisms for forming a legal and emotional bond with his child.

*In re Raquel Marie X.*, 559 N.E.2d 418, 424 (N.Y. 1990).

322. See Parness & Arado, *supra* note 29, at 209–10. Some courts specifically recognize the responsibilities of an unwed mother, who is:

[F]aced with the responsibility of making crucial decisions about the future of a newborn child, is entitled to privacy, and has the right to make timely and appropriate decisions regarding her future and the future of the child, and is entitled to assurance regarding the permanence of an adoptive placement.

*In re Adoption of B.B.D.*, 984 P.2d at 970–71 (citing UTAH CODE ANN. § 78-30-4.12(2)(b) (West 1996), *repealed by* 2008 Utah Laws ch. 3, § 1474). Furthermore, “The birthmother is responsible for the child during pregnancy and her financial obligations arise immediately upon the child’s birth.” *In re Jarrett*, 660 N.Y.S.2d 916, 925 (App. Div. 1997).

still need to be fully respected in adoption laws to give them the full rights they deserve.<sup>323</sup>

### B. Problems for Children

Jurisdiction in the child custody and adoption contexts requires different considerations than in typical cases, due mostly to the fact that it is the child, not the parents, who may have the greatest interest in the outcome of the litigation. Yet, this generally plays a passive role in the litigation.<sup>324</sup> As stated in the core values of the Child Welfare League of America, “All children have a right to receive care, protection, and love.”<sup>325</sup> The court can never forget that “[a] custody dispute is more than a jurisdictional chess game in which winning depends on compliance with predetermined rules of play. A child is not a pawn.”<sup>326</sup> Generally speaking, courts use the “best interests of the child” doctrine in making decisions, meaning they act “in whatever manner best advances the child’s position.”<sup>327</sup> Most courts presume that it is in the best interest of the child to remain with one or both of the birth parents.<sup>328</sup> However, not all courts weigh this preference equally and will balance the best interests of the child with the rights of the parents.<sup>329</sup> Furthermore, many birth parents themselves may be unfit, and it could be in the best interest of the child to be raised by adoptive parents.<sup>330</sup>

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323. See Parness & Arado, *supra* note 29, at 219.

324. See *Jurisdiction and Procedure*, *supra* note 70, at 294.

325. Child Welfare League of America, *Adoption as a Child Welfare Service: CWLA 2000 Standards*, in *FAMILIES BY LAW: AN ADOPTION READER*, *supra* note 132, at 45.

326. *E.E.B. v. D.A.*, 446 A.2d 871, 879 (N.J. 1982). Furthermore, “The ones who suffer most from the increased litigation resulting from state custody law disparity are the children whose home lives are at stake.” Cleveland, *supra* note 69, at 150–51.

327. See McGinnis, *supra* note 134, at 314. However, states interpret and apply this standard differently. *Id.* at 313. Furthermore, defining what is in the best interest of the child is never an easy task. *Id.* at 331. One solution may be to provide an extensive list of factors for courts to consider. *Id.*

328. See Carrie L. Wambaugh, Comment, *Biology is Important, But Does Not Necessarily Always Constitute a “Family”*: A Brief Survey of the Uniform Adoption Act, 32 AKRON L. REV. 791, 796 (1999). This is further reflected in state parentage laws that make the birth mother the legal parent. See James G. Dwyer, *A Constitutional Birthright: The State, Parentage, and the Rights of Newborn Persons*, 56 UCLA L. REV. 755, 766 (2009).

329. See Kassab, *supra* note 45, at 425–26. There is a danger in relying solely on the best interest of the child, and most states require some showing of parental unfitness for a child to be removed from the custody of a birth parent. See *Nale v. Robinson*, 871 S.W.2d 674, 680 (Tenn. 1994) (invalidating portion of a statute that allowed adoption based solely on the best interest of the child, regardless of the lack of judicial termination of the father’s parental rights); Resnik, *supra* note 115, at 410. *But see In re Baby Boy C.*, 630 A.2d 670, 671 (D.C. 1993) (granting adoption based on findings that adoption was in child’s best interest).

330. See Dwyer, *supra* note 328, at 756–57. However, the Supreme Court has recognized the right of parents to rear their children—preventing state interference, and generally finding that a child is better off with his or her biological parents. See *Comparative Ruminations*, *supra* note 64, at

While older children can voice their opinions and preferences about where they would like to live, it is uncertain whether newborn children have any constitutional rights in the adoption process.<sup>331</sup> Whatever is in the newborn child's best interest, the child deserves to have a smooth and certain adoptive process, unimpeded by an unknown or non-participating father, if he does not wish to assert his rights.<sup>332</sup> In fact, many courts emphasize the child's best interest as a deciding factor, even over the language of the statute.<sup>333</sup> However, legislation that does not adequately protect the rights of unwed fathers may deny a child the chance to have a relationship with his or her biological father.<sup>334</sup>

### C. Problems for Adoptive Parents

Uncertainty in litigation also disrupts any bond formed between a child and prospective adoptive parents, who may have raised the child since birth.<sup>335</sup> While it is not often that a biological father will emerge to contest an adoption, that potential alone may make couples hesitant to adopt.<sup>336</sup> The biological father may not always prevail, but, either way, there remains the uncertainty and personal toll inherent in a custody fight.<sup>337</sup> The different uniform legislations vary in the degree of consideration given to the adoptive parents.<sup>338</sup> For instance, the UCCJEA considers the residence of the birth

452–53. Often the custody battle may come down to both the natural and adoptive parents asserting that it is in the best interest of the child to live with them. See Waller, *supra* note 83, at 272.

331. See Dwyer, *supra* note 328, at 758. Based on Supreme Court decisions, a child is a person with rights under the Constitution. *Id.* at 790. However, the Supreme Court has not considered whether a newborn child has constitutional rights with respect to adoptions, such as avoiding a legal parent-child relationship. *Id.* at 758.

332. See *National Registry*, *supra* note 176, at 297. There may also be an interest based on substantive due process, equal protection, and freedom of religion in a child “being reared by the person with whom they have established a sense of love, security, and stability.” See *Jurisdiction and Procedure*, *supra* note 70, at 376. Furthermore, “minimum delay in the adoption process and finality of adoption fosters the child’s sense of well-being and adjustment.” Nolan, *supra* note 170, at 296.

333. See Crawford, *supra* note 74, at 124. To quote one court: “In exercising its discretion within the confines of UCCJA and PKPA, a court should consider not only the literal wording of the statutes but their purpose: to define and stabilize the right to custody in the best interest of the child.” *E.E.B. v. D.A.*, 446 A.2d 871, 879–80 (N.J. 1982).

334. See *Toward a Database*, *supra* note 110, at 1055.

335. See Barton, *supra* note 131, at 141–42; Resnik, *supra* note 115, at 365.

336. See Resnik, *supra* note 115, at 365. Furthermore, state and national legislatures cannot ignore the issue merely because of the small number of unwed father custody disputes. *Id.*

337. See *id.*

338. See *The Mobile Family*, *supra* note 82, at 93.



parents, while the UAA focuses on the residence of the adoptive parents.<sup>339</sup> Ultimately, for all parties involved, “[a]dopted children, birth mothers, unmarried birth fathers, adoptive parents, and their respective attorneys require a solution upon which they can comfortably rely.”<sup>340</sup>

## VI. POTENTIAL SOLUTIONS

The PKPA has been criticized in various contexts for its failure to create uniform interpretation and application in child custody disputes.<sup>341</sup> This Comment specifically addresses the issue of waiver of jurisdiction under the PKPA.<sup>342</sup> Uncertainty in interpretation of this issue has a wide impact on unwed fathers, children, and adoptive parents.<sup>343</sup> There are several potential solutions that could resolve this uncertainty and lead to more uniform interpretation and application.<sup>344</sup>

### A. Federal Judicial Review of State Supreme Court Interpretations

The most promising solution to assist in interpretation of the PKPA is federal judicial review.<sup>345</sup> As one scholar stated, “It would take very few Supreme Court decisions to determine which of several conflicting interpretations of specific portions of the act are controlling.”<sup>346</sup> There is sufficient case law to establish a split among the states as to whether jurisdiction under the PKPA is waivable.<sup>347</sup> Under the rules of the Supreme Court, conflict between two state supreme courts is one ground for granting a petition for writ of certiorari.<sup>348</sup> The PKPA is national legislation, meaning PKPA cases involve a federal question and review by federal courts is appropriate.<sup>349</sup>

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339. See *id.* at 94.

340. See *Toward a Database*, *supra* note 110, at 1037.

341. See *supra* note 92 and accompanying text.

342. See *supra* notes 293–308 and accompanying text.

343. See *supra* notes 309–40 and accompanying text.

344. See *infra* notes 345–407 and accompanying text.

345. See Demelis, *supra* note 65, at 1371.

346. Charlow, *supra* note 61, at 312.

347. See *supra* notes 222–25 and accompanying text.

348. SUP. CT. R. 10. A petition for writ of certiorari may be granted if “[a] state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort.” *Id.*

349. See Christine L. Jones, *The Parental Kidnaping Prevention Act: Is There New Hope For a (Limited) Federal Forum?*, 18 TEMP. POL. & CIV. RTS. L. REV. 141, 174 (2008).

*B. Federal Cause of Action*

Closely related, yet distinct from Supreme Court review of state supreme court decisions, is allowing a cause of action in federal district courts in the event of conflicting state custody orders under the PKPA.<sup>350</sup> Aside from the Supreme Court's rejection of this remedy of federal question jurisdiction,<sup>351</sup> there are several other barriers to this being an effective solution, such as overburdening the federal courts, as well as the time and money required to appeal.<sup>352</sup> However, there is still some logic to allowing a limited federal forum, which may reduce delays and eliminate confusion in interstate custody disputes.<sup>353</sup> Furthermore, enforcement by federal courts guards against the "notorious local prejudice" of state courts,<sup>354</sup> which caused so many problems even before the UCCJA and PKPA.<sup>355</sup> This could mean as little as allowing federal courts to determine which state has jurisdiction, without making an actual custody determination.<sup>356</sup> This entails interpretation of a federal statute regarding full faith and credit, a matter with which federal courts are fully familiar.<sup>357</sup> In fact, prior to *Thompson*, several circuit courts allowed a cause of action for violation of the PKPA, stating: "We cannot believe that Congress intended to render § 1738A virtually nugatory by so restricting the availability of a federal forum that state

350. See *id.* at 144–45. Alternatively, if the parents are from different states, jurisdiction could be found based on diversity of citizenship, outside the PKPA. See Krauskopf, *supra* note 68, at 442. Although, to satisfy diversity jurisdiction, tort damages would need to meet the amount in controversy requirement. *Id.*

351. *Thompson v. Thompson*, 484 U.S. 174, 186–87 (1988). "Instructing the federal courts to play Solomon where two state courts have issued conflicting custody orders would entangle them in traditional state-law questions that they have little expertise to resolve." *Id.* at 186. The Supreme Court also based its holding on an examination of the intent of Congress in passing the PKPA, finding no intent to provide a cause of action in federal courts. *Id.* at 185. Some find support in later Supreme Court holdings, and suggest that there may be precedent for a limited federal forum to resolve jurisdictional conflicts, relying on *Marshall v. Marshall*, 547 U.S. 293, 299 (2006) (federal action allowed in spite of probate exception), and *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308, 310 (2005) (federal forum for federal tax litigation). See Jones, *supra* note 349, at 172.

352. See Demelis, *supra* note 65, at 1371. The cost factor alone would prevent most parents from appealing. *Id.* In addition, after a lengthy appeal, the child may no longer be a minor. *Id.*

353. See Jones, *supra* note 349, at 144.

354. Krauskopf, *supra* note 68, at 442. In addition, "Federal enforcement would make effective the policy of the PKPA by finally insuring uniform national standards for jurisdiction to enforce and to modify child custody determinations, which could significantly reduce child abduction." *Id.* at 454.

355. See *supra* note 48 and accompanying text.

356. See Jones, *supra* note 349, at 144.

357. See Charlow, *supra* note 61, at 322.

compliance with the legislation would become optional.”<sup>358</sup> Furthermore, the traditional view that family law is the exclusive territory of state courts has been eroding over the past thirty years, making a federal cause of action more reasonable.<sup>359</sup>

### C. The UAA

The UAA was proposed in 1994 in an attempt to create uniformity in adoption laws.<sup>360</sup> While the Act gives greater procedural protections and provides more information about a child’s background, it has been subject to criticism.<sup>361</sup> Most importantly for the context of newborn adoption, it lacks consent rights for unwed fathers, basically requiring birth fathers to marry—or attempt to marry—the birth mother.<sup>362</sup> Furthermore, it has not been widely enacted.<sup>363</sup> Without widespread enactment, the legislation is not truly uniform, and issues arise if one state has adopted the UAA while another has not.<sup>364</sup> However, some argue that the UAA would provide certainty, stability, and expeditious resolution of adoption disputes.<sup>365</sup> It would also make adoption laws compatible across the country and eliminate challenges that so often impede the adoption process, such as notice and timing.<sup>366</sup> Furthermore, in terms of preventing child abductions, the UAA tracks minor children placed for adoption, discouraging unlawful placements.<sup>367</sup>

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358. *Flood v. Braaten*, 727 F.2d 303, 312 (3d Cir. 1984); *see also* *Meade v. Meade*, 812 F.2d 1473, 1476 (4th Cir. 1987); *Hickey v. Baxter*, 800 F.2d 430, 431 (4th Cir. 1986); *McDougald v. Jenson*, 786 F.2d 1465, 1475 (11th Cir. 1986). *But see* *Rogers v. Platt*, 814 F.2d 683, 694–95 (D.C. Cir. 1987).

359. *See* Ann Laquer Estin, *Sharing Governance: Family Law in Congress and the States*, 18 CORNELL J.L. & PUB. POL’Y 267, 269–70 (2009). However, for the argument that states should remain sovereign over family law, *see* generally Anne C. Dailey, *Federalism and Families*, 143 U. PA. L. REV. 1787 (1995).

360. *State and Federal Adoption Laws*, *supra* note 132, at 38.

361. *Id.* Among these criticisms are that the Act: favors adoptive parents, over protects the birth parents’ right to place their children directly, and insufficiently addresses the needs of adopted children to access their original birth certificates. *Id.* Many groups have opposed the UAA, because it “does not allow genetic ties by themselves to trump the interests of children in having secure legal and psychological ties to the people who are actually parenting them.” Joan Heifetz Hollinger, *Analysis of the Proposed Uniform Adoption Act (UAA) of 1994*, in *FAMILIES BY LAW: AN ADOPTION READER*, *supra* note 132, at 47 [hereinafter *Analysis of the Proposed UAA*].

362. *See* Resnik, *supra* note 115, at 416–17. This becomes even more of an issue when a unwed father does not know of the child’s birth, making it impossible for him to provide support or communicate with the child. *See* Arzt, *supra* note 111, at 868–69.

363. *See supra* note 109 and accompanying text.

364. *See* Waller, *supra* note 83, at 304–05. There is also the issue of states adopting varying versions of the UAA, as occurred with the UCCJA. *Id.* at 305.

365. *See* Wambaugh, *supra* note 328, at 832. For a general discussion in favor of enactment of the UAA over the UCCJA and PKPA for adoptions, *see* Kay, *supra* note 116.

366. *See* Simpson, *supra* note 160, at 589.

367. *See Analysis of the Proposed UAA*, *supra* note 361, at 49.

*D. National Putative Father Registry*

A national putative father registry is another possible solution that would help protect the rights of unwed fathers and reduce the number of contested adoptions, although it would not resolve opposing interpretations of the PKPA.<sup>368</sup> Such a registry would protect the parental rights of responsible fathers and provide permanency for adopted children where the birth father has not assumed responsibility.<sup>369</sup> Congress considered legislation that would implement a database through the Proud Father Act<sup>370</sup> in 2006.<sup>371</sup> Ultimately, the Proud Father Act was not enacted, but its proposal shows movement toward legislation to protect the rights of unwed fathers and increase the efficiency and stability of interstate adoptions.<sup>372</sup> Model uniform legislation does exist in the Uniform Parentage Act (UPA),<sup>373</sup> providing a model for state putative father registries, but with no national database.<sup>374</sup> In the concurrence to *Ex parte D.B.*, Justice Bolin submitted that as our society becomes increasingly mobile, state putative father registries are less capable of protecting the interests of unwed fathers.<sup>375</sup> He also argued, “A national putative-father registry would further protect against extended litigation caused by multijurisdictional disputes as is the case here.”<sup>376</sup>

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368. See *National Registry*, *supra* note 176, at 297. A complement or alternative to a putative father registry might be requiring and clarifying paternity laws with voluntary paternity requirements. See generally Parness, *supra* note 166.

369. See *National Registry*, *supra* note 176, at 297.

370. Protecting Rights of Unknowing Dads and Fostering Access to Help Encourage Responsibility (Proud Father) Act of 2006, S. 3803, 109th Cong. (2006). The Proud Father Act defined a putative father as “a man who has had sexual relations with a woman to whom he is not married and is therefore [on notice] that such woman may be pregnant as a result of such relations.” *Id.* § 440(8).

371. See *National Registry*, *supra* note 176, at 298.

372. See *id.*

373. UNIF. PARENTAGE ACT (amended 2002), 9A U.L.A. 579 (1979).

374. See *Toward a Database*, *supra* note 110, at 1049. The UPA requires a father to register prior to the child’s birth or within thirty days of birth in order to receive notice of proceedings. UNIF. PARENTAGE ACT § 402(a). However, the UPA has only been enacted in nine states to date. UNIF. PARENTAGE ACT Refs. & Annos.

375. *Ex parte D.B.*, 975 So. 2d 940, 964 (Ala. 2007) (Bolin, J., concurring).

376. *Id.* at 967. Justice Bolin goes further to say that a national putative-father registry would not be hard to implement. *Id.* In closing, he “call[s] upon Congress to stop this madness—stop this madness before another father, another child, and another adoptive family endure this inconceivable and insoluble heartache.” *Id.* at 969.

There are several benefits to a national putative father registry. The first is that it would reduce problems with notice of adoptions to unwed fathers.<sup>377</sup> Instead of needing to publish notice or provide personal service, courts in an adoption case would merely have to search the database.<sup>378</sup> Second, a national putative father registry gives greater privacy and safety to the birth mother, who no longer has to name sexual partners or publish notice.<sup>379</sup> Third, a national registry provides adoptive parents with greater security that the adoption will not be contested or reversed.<sup>380</sup> Finally, it may also resolve jurisdictional issues by having states amend their long arm statutes, which grant jurisdiction over registered fathers, and thereby prevent multiple state court actions.<sup>381</sup>

A national putative father registry is not without its critics.<sup>382</sup> One issue is that many men are unaware that registries exist and that they need to register for their rights to be protected.<sup>383</sup> One commentator stated: “[P]ractically, registries are ineffective in protecting the father’s parental rights because most fathers are unaware of their existence.”<sup>384</sup> There are also constitutional issues regarding the unwed father’s ignorance of the conception and the burdens of requiring registration.<sup>385</sup> The Supreme Court addressed the constitutionality of putative father registries in general in *Lehr*, and held that an unwed father who did not register with the putative father registry was not denied equal protection rights.<sup>386</sup> With a putative father registry, the rights of the child could be affected, because the child may be denied the opportunity to be raised by a biological father if he has failed to register.<sup>387</sup> The birth mother’s rights could also be violated if the judge

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377. See *Toward a Database*, *supra* note 110, at 1042.

378. See *id.* However, there are jurisdictional issues regarding whether a state has personal jurisdiction over a non-resident father and whether such notice satisfies constitutional requirements. *Id.*

379. See *id.* at 1047.

380. See *id.* at 1048.

381. See *National Registry*, *supra* note 176, at 309.

382. See *Toward a Database*, *supra* note 110, at 1049.

383. See *id.* Furthermore, this affirmative action by the putative father means the mother is not required to find the putative father to tell him about the pregnancy or adoption, which many men assume the birth mother will do. See *National Registry*, *supra* note 176, at 310.

384. Nolan, *supra* note 170, at 322.

385. See *Toward a Database*, *supra* note 110, at 1050. It is questionable whether sexual intercourse alone is sufficient to constitute notice. *Id.* at 1049–50.

386. *Lehr v. Robinson*, 463 U.S. 248, 250–51 (1983); see also *supra* notes 144–46 and accompanying text. The main result of *Lehr* was that statutes must treat mothers and fathers alike when they are similarly situated, but if the father has not assumed parental responsibilities, then the notice requirements of putative father registries are constitutional. See *Toward a Database*, *supra* note 110, at 1059–60. State court decisions usually recognize putative father registries as facially constitutional, though most also recognize that the registries can be unconstitutional as applied to certain cases. *Id.* at 1060.

387. See *Toward a Database*, *supra* note 110, at 1053.

forces her to name the father.<sup>388</sup> Furthermore, a national registry may require the federal government to give funds to the states to create and maintain registries that are compatible.<sup>389</sup> Although a national putative father registry has its flaws, national legislation may be the only effective way to solve waiver and jurisdictional problems currently plaguing interstate adoptions and the cases of unwed fathers.<sup>390</sup>

#### E. Amendment of the PKPA

Part of the issue is that both the PKPA and UCCJA give more than one basis for jurisdiction in custody cases.<sup>391</sup> While this flexibility leaves room to act in the best interest of the child, it creates confusion in interpretation and application.<sup>392</sup> One possible resolution is amendment to the PKPA.<sup>393</sup> This potentially could clear up the definition of home state and custody proceeding, as well as clarify jurisdictional requirements.<sup>394</sup> One author proposes an amendment that would grant jurisdiction solely to the court where the adoption petition is filed.<sup>395</sup> Other proposals have included

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388. See *id.* at 1052–53. However, almost any law that grants greater legal rights to unwed fathers would necessarily disrupt the privacy interests of the mother. See Parness & Arado, *supra* note 29, at 232.

389. See *Toward a Database*, *supra* note 110, at 1038.

390. See *id.* at 1073.

391. *Jurisdiction and Procedure*, *supra* note 70, at 314.

392. See *id.* at 314–15 (noting “a sort of schizophrenic aura about these laws”).

393. See DeMelis, *supra* note 65, at 1372. There are those who argue against further federal legislation. See Hoff, *supra* note 104, at 299. With regard to the UCCJEA, Hoff urges Congress to study the UCCJEA and avoid enacting new “legislation that would create new federal-state tensions, undermining the gains made by this Act.” *Id.* However, the need for further legislation in the adoption context may remain, because “the exclusion of adoption proceedings from the UCJEA [sic] definition of ‘custody proceedings’ leaves adoption in something of a jurisdictional wilderness without sufficiently clear trail markers.” *The Mobile Family*, *supra* note 82, at 112. Others still have argued that states adopting a modified UCCJA would be more effective than amendment to the PKPA. See Goldstein, *supra* note 26, at 942.

394. See DeMelis, *supra* note 65, at 1372. Custody proceeding could be explicitly defined to exclude adoptions, removing some confusion, but then there would be a void in the law for resolving jurisdictional issues in adoption cases. See Waller, *supra* note 83, at 302. The home state provision could be amended to allow jurisdiction if the child has lived in the state “a majority of the time” since birth. *Id.* at 303.

395. See Crawford, *supra* note 74, at 131. This scholar further proposes that if an adoption petition has not been filed, then the court where a custody contestant files first has jurisdiction. *Id.* Such an amendment would have denied Utah jurisdiction in *J.M.W.*, because the birth father filed the custody case in Virginia before the adoption petition was filed in Utah. *J.M.W. v. T.I.Z. (In re Adoption of Baby E.Z.)*, 266 P.3d 702, 704 (Utah 2011).

granting jurisdiction to the court that is in the child's best interests<sup>396</sup> and focusing on the home state of the biological parents.<sup>397</sup> However, as scholars have commented, "[c]ourts will invariably interpret the same legislation in differing ways, depending on the policy seen as paramount."<sup>398</sup> Furthermore, there remains the fact "the courts seem to favor litigants who reside in the forum."<sup>399</sup>

Some have called for repeal of the UCCJA and PKPA, allowing courts to focus on the individual cases instead of interpretation of statutes.<sup>400</sup> However, the PKPA has been successful to some degree, and, in our increasingly mobile society, the need for uniform legislation is even greater for interstate custody battles.<sup>401</sup> As an alternative type of amendment, members of Congress have proposed making interstate parental kidnapping a crime, in contrast to the current parental exemption in the kidnapping statute.<sup>402</sup> While this provision was rejected in the final draft of the PKPA, international parental kidnapping has since been made a federal crime,<sup>403</sup> perhaps making amendment appropriate for interstate kidnapping cases.<sup>404</sup>

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396. See Crawford, *supra* note 74, at 133. This proposal eliminates the uncertainty in interpreting the home state provision of the PKPA. *Id.* at 133–34. However, it is highly subjective and likely to produce varying results as courts are reluctant to cooperate with each other. *Id.* at 134.

397. See Waller, *supra* note 83, at 306–07. This would be more logical than focusing on the adoptive parents. *Id.* at 307. However, under Waller's proposal, this does not resolve disputes if the biological parents are from two competing states. Under Charlow's proposal, if the parents live in two states, jurisdiction is granted to the state where one parent currently lives and both parents were last residents together, if it exists, or else wherever a case was first filed. Charlow, *supra* note 61, at 314. Another issue with this proposal is minimum contacts problems in establishing personal jurisdiction over a nonresident. *Id.* at 315.

398. *Jurisdiction and Procedure*, *supra* note 70, at 374; see also Charlow, *supra* note 61, at 324 ("[A]s long as the substantive rules for custody determinations remain so vague that it is simple to justify awarding custody to either parent in almost any case, no jurisdictional statute will solve the problem of child snatching").

399. See Charlow, *supra* note 61, at 313.

400. See Goldstein, *supra* note 26, at 851 (repeal would "eliminate the superfluous delays and transaction costs that impede the courts' search for justice in individual child custody cases"). Others who do not believe the PKPA should apply to adoptions call to modify it "to exclude interstate 'stranger' adoption from the general jurisdictional dictates." See Crawford, *supra* note 74, at 130.

401. See DeMelis, *supra* note 65, at 1373.

402. See Estin, *supra* note 359, at 304. Although one of the goals of the PKPA and UCCJA was to prevent child snatching, it remains to be seen how effective they have been in that area. See *Jurisdiction and Procedure*, *supra* note 70, at 362. The UCCJA specifically allows a court to decline jurisdiction in the event of wrongful removal, but it also allows the court to exercise jurisdiction if it is in the best interest of the child. UNIF. CHILD CUSTODY JURIS. ACT § 8, 9 U.L.A. 1 (1968). That is not to say there will not be dangers in making parental kidnapping a criminal offense. See *The Rights of Children*, *supra* note 47, at 505–06. For instance, there are concerns with prosecuting the wrong parent and that prosecution would only cause more turmoil in the life of the child. *Id.* at 506.

403. 18 U.S.C. § 1204 (2006).

404. See Estin, *supra* note 359, at 305.

Still others believe the PKPA is working just fine and only needs time for issues to be resolved.<sup>405</sup> However, “Other commentators believe that such optimism in the success of the PKPA is misplaced and that courts continue to assert jurisdiction when they think it is appropriate, crafting a judicial argument to ignore or evade the PKPA.”<sup>406</sup> The Utah Supreme Court’s decision in *J.M.W.* is one such instance of the court crafting a way to obtain jurisdiction in spite of the proceeding concurrently pending in Virginia, where the child was born and the parents were residents.<sup>407</sup>

#### F. Proposed Solution

Of these proposed solutions, Supreme Court review of these interpretations has the most potential to resolve conflicting views and ensure that the PKPA is applied uniformly.<sup>408</sup> With a single decision the Supreme Court could definitively state whether the jurisdictional provision of the PKPA refers to subject matter jurisdiction and is therefore not waivable, or is more akin to territorial jurisdiction and considered waived if not raised in the lower court.<sup>409</sup> Interpreting the PKPA to find that jurisdiction is not waivable would support the goals of the PKPA to encourage courts to inquire into custody proceedings that may be pending in other states.<sup>410</sup> With today’s technology, courts are in a better position to make this determination than the unwed father, who may not even know of the existence of the PKPA.<sup>411</sup> This Comment urges the Supreme Court to take up review of a case and eliminate the years of uncertainty that have occurred since the passage of the PKPA.<sup>412</sup>

In the alternative, amendment to the PKPA may also be a viable solution. This would not be as advantageous as Supreme Court review because inevitably the newly amended statute would suffer from various

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405. See Roger M. Baron, *Federal Preemption in the Resolution of Child Custody Jurisdiction Disputes*, 45 ARK. L. REV. 885, 911–12 (1993). Although Baron’s article was written in 1993, many of the issues in interpretation then present are still present today. However, other authors agree that the UCCJA and PKPA have reduced widespread jurisdictional competition. See Atwood, *supra* note 52, at 369.

406. DeMelis, *supra* note 65, at 1338. Ultimately, it is difficult to measure the success of the PKPA, because success is best determined by cases not brought. *Id.* at 1338–39.

407. See *id.*

408. See *supra* notes 345–49 and accompanying text.

409. See *supra* notes 346–47 and accompanying text.

410. See *supra* note 94 and accompanying text.

411. See *supra* note 383 and accompanying text.

412. See *supra* notes 92–100 and accompanying text.



interpretations, leading to more calls for clarification.<sup>413</sup> However, a well-crafted amendment that specifically addresses the current waiver issues under the PKPA may reduce some ambiguity. While allowing for a federal cause of action has potential to be of some assistance in preventing conflicting decrees, the dangers of flooding the federal court system with new cases and getting federal courts involved in matters traditionally left to the states likely outweigh the benefits of this option.<sup>414</sup> Any uniform legislation, such as the UAA or UCCJEA, is inherently subject to various versions passed by states and discrepancies in interpretation and application.<sup>415</sup> A national putative father registry has potential to protect the rights of unwed fathers to some degree but would not eliminate many cases of custody disputes wherein the unwed father is not aware of the registry or fails to meet its requirements.<sup>416</sup>

## VII. CONCLUSION

While no single one of these proposed solutions may solve all of the problems under the PKPA and fully protect the rights of unwed fathers, thirty years of uncertainty in case law is too much. As shown by the opposing views in *J.M.W.*<sup>417</sup> and *Ex parte D.B.*,<sup>418</sup> both decided in the last five years, courts continue to misapply this statute and fail to protect the interests of unwed fathers who may be capable of raising their children and desire to do so. Ultimately, something needs to be done to allow interstate adoption disputes to be resolved without producing headline news stories.<sup>419</sup> While it may be too late for John to get back the daughter he so desperately wants to raise, he still has a chance on appeal to the Supreme Court.<sup>420</sup> If it is too late for John, one can only hope that his struggle will spur others to action to find a solution that is in the best interest of all the parties involved. Jurisdiction under the PKPA should not be waivable, and parties should be able to raise it on appeal.<sup>421</sup> Whatever the solution may be, “[c]hild custody jurisdictional decisions must balance a need for flexibility with a desire for certainty and finality.”<sup>422</sup> To a certain degree, “[i]t matters less *which* court takes jurisdiction, but that the courts of the several states concerned join in

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413. See *supra* note 398 and accompanying text.

414. See *supra* note 352 and accompanying text.

415. See *supra* note 68 and accompanying text.

416. See *supra* note 383 and accompanying text.

417. *J.M.W. v. T.I.Z. (In re Adoption of Baby E.Z.)*, 266 P.3d 702 (Utah 2011).

418. 975 So. 2d 940 (Ala. 2007).

419. See *supra* notes 1, 20–21 and accompanying text.

420. See *supra* note 16 and accompanying text.

421. See *supra* notes 293–308 and accompanying text.

422. DeMelis, *supra* note 65, at 1376.

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the effort and act in partnership to bring about the best possible solution for the child's future."<sup>423</sup>

Rebecca Miller\*

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423. See *Legislative Remedy*, *supra* note 47, at 1243.

\* J.D. Candidate, Pepperdine University, 2013; B.S. in Chemistry, University of Kansas, 2010. I thank my family and friends for all their support. Thanks to Pepperdine Law Review for their hard work.

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