

Ohio's Uniform Child Custody Jurisdiction and Enforcement Act: A Focused Introduction*

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I. Historical Background

A. No Constitutional Mandate To Enforce Custody Orders Across State Lines.

1. **United States Constitution, Article IV, Sec. 1** requires each state to give “Full Faith and Credit [to] the public acts, records and judicial proceedings of every other state.”
2. **28 U.S.C. §1738**, which codifies the constitutional mandate of full faith and credit, has consistently been interpreted as not applicable if the first state’s judgment or order was not “final.”
 - a. **First Obstacle: Personal Jurisdiction.** *May v. Anderson*, 345 U.S. 528 (1953), held that, under the United States Constitution, an *ex parte* custody order rendered in one state (there Wisconsin) that had not acquired *personal* jurisdiction over the other, non-resident parent was not entitled to full faith and credit in that non-resident’s state (there Ohio).
 - b. **Second Obstacle: Finality.** Because custody orders are never truly “final” (they are always subject to modification in light of changed circumstances by the court that originally rendered them), the Supreme Court had held that custody decrees were not *res judicata* or entitled to full faith and credit in other states if “changed circumstances” required a different arrangement to protect the child’s health, safety or welfare. *Halvey v. Halvey*, 330 U.S. 610 (1947); *Kovacs v. Brewer*, 356 U.S. 604 (1958); *Ford v. Ford* 371 U.S. 187 (1962).
 - c. **Extralegal Obstacle: Chauvinism and Parochialism.** Local judges were often reluctant to let children’s futures be dictated by unknown judges in another state.¹

B. Lack of Any Reliable Mechanism to Enforce One State’s Custody or Visitation Orders in Any Other State Created A Predictable Set of Problems:

- a. Parents unilaterally abducting children to another state and refusing to return them. Parental kidnaping had become epidemic by the 1980's, when it was estimated that between 25,000 and 100,000 children were kidnaped every year by their parents and taken to other states, where effective remedies to compel return were nearly absent.
- b. Multiple and conflicting child custody/visitation orders – each in different states.²
- c. Well-justified reluctance/refusal by parents *and* courts to allow out-of-state visitation.
- d. Extrajudicial self-help was encouraged by the lack of effective judicial remedies.

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¹ See, e.g., *Painter v. Bannister*, 258 Iowa 1390, 140 N.W.2d 152 (1966) (Custody dispute over a 7 year old boy whose mother had died. Trial court in Iowa awarded custody to child’s northern California, politically liberal father, in whose home the son’s life would be “unstable, unconventional, arty, Bohemian and probably intellectually stimulating.” Iowa Supreme Court *reversed*, favoring the maternal grandparents – 60 year old farmers from Ames, Iowa, who were “stable, dependable, conventional, middle class [and] Midwestern....”– despite the mother’s nomination of the father as guardian, Iowa’s parental preference law, and the grandparents’ advanced age.)

² See, e.g., *Stout v. Pate*, 209 Ga. 786, 75 S.E.2d 748 (1953) [joint cust.] and *Stout v. Pate*, 120 Cal.App.2d 699, 261 P.2d 788 (1953) [sole custody to Mom], *cert. denied* in both cases 347 U.S. 968, 74 S.Ct. 744, 776 (1954).

II. First Attempts At a Solution

A. Uniform Child Custody Jurisdiction Act (UCCJA)

1. **Promulgated in 1968** by the National Conference of Commissioners on Uniform State Laws (Chicago, IL). Adopted by all 50 states and DC by 1981. (Adopted in 1977 in Ohio as R.C. 3109.21 to 3109.37; 137 Ohio Laws, Part I, 359)

2. Principal Purposes & Effects

- a. Facilitate enforcement of one state's custody orders in other states by allowing only one state to exercise jurisdiction to decide a child custody case.
- b. Protect the resulting custody order from modification in other states by allowing modification only in the original issuing state *unless* that state has lost all connections to the parents and child OR unless it cedes jurisdiction under *forum non conveniens* principles.
- c. Deter interstate jurisdictional competition and interstate abductions by parents
- d. Promote cooperation between courts in different states to the end that custody be decided in the forum with the closest connection with the child and/or the best access to relevant evidence
- e. Avoid/prevent relitigation of custody decisions in multiple states
- f. Assure that litigation take place in state with closest connection to child and best access to evidence about the child's care, training, protection, and relationships.
- g. Requirement of personal jurisdiction replaced by criteria-based Subject-Matter jurisdiction *plus* the requirements of reasonable notice and opportunity to be heard.

3. General Statutory Scheme

a. Two Tier System – Initial Jurisdiction and Modification Jurisdiction

1) **For Initial Jurisdiction** (no prior custody order in any state), either

- a) **Home State.** The state must be child's "home state" (home for past 6 months) **or**
- b) **Significant Connection.** The child and at least one parent must have "a significant connection" with the state, **and** there must be "substantial evidence" about the child available in the state **or ...**
- c) **Emergencies.** Child is present in state and has either been abandoned or has been subjected to or threatened with abuse, mistreatment, neglect or is dependent, **or**
- d) **Vacuum.** Either no other state would have jurisdiction to decide the case or a state that does have jurisdiction had expressly declined to exercise it.

2) **For Modification Jurisdiction**, no state may modify another state's initial determination, unless it appears that the original state no longer has jurisdiction under the above rules.

b. **Due Process.** Specific provisions for giving of reasonable notice to respondents and requiring that they have an opportunity to be heard. Though this looks like a basic due process provision (which it *is*), the requirements are more liberal than most states' typical service requirements. For example, service by mail is permitted with no requirement that personal service first have been attempted without success. Significantly, since notice is not required if the person to be served "submits to the jurisdiction of the court," the Act strongly implies that *personal* jurisdiction is *not* required so long as prior notice is given.

- c. **Procedures established to resolve priority** when a simultaneous proceeding has been filed in another state. Stays, judges to communicate, etc.
- d. **Provision for ceding jurisdiction** to another state on the basis of inconvenient forum.
- e. **Bar on exercising jurisdiction** when petitioner's conduct is wrongful or inequitable.
- f. **Binding in Other States.** Other state's custody orders made binding and enforceable in this state, so long as the issuing state had jurisdiction under statutory standards substantially in accordance with the Act. This remedies the absence of federal law by effectively mandating full faith and credit for sister-state custody orders, as a matter of state law.
- g. **Registration.** Provides procedures to register other state's custody determinations.
- h. **Rules for multi-jurisdictional litigation** – assistance to be rendered by one court to another court (obtaining testimony or documents, holding hearings, etc.)
- i. **Extends policies to international area**, even if UCCJA not adopted in the other country.

4. Problems with the UCCJA

- a. **Dual Standard.** The biggest problem was that the UCCJA provided two seemingly equal bases for exercising subject-matter jurisdiction: "home state" and "significant connections." While "home state" was an objective standard, under which only one state could qualify, "significant connections" was far more subjective. Both mom's and dad's states could usually make reasonable findings of significant connections, *and* the Act's call for interstate communication and conferencing was neither well defined nor uniformly followed.
- b. **Lack of Complete Uniformity.** As each state adopted the UCCJA, key provisions were enacted with variations in language. Some of these differences could alter outcomes. The lack of consistent language tended to defeat the goal of a uniform standard and consistent, predictable enforcement in all states.
- c. **Conflicting Interpretations.** Appellate decisions attempting to resolve the dual-standard dilemma were predictably mixed, both between states and within the same state. Results were largely fact-driven – yielding low predictability and high risk.
- d. **Enforcement.** The UCCJA's provisions for enforcement of custody and visitation orders were sketchy at best. After providing generally for registration of out-of-state custody orders, enforcement had to be the same as for any other in-state custody order.
- e. **Result:** There was still wide room for forum shopping. Interstate abductions persisted. Enforcement methods remained non-uniform and largely undefined.

B. Parental Kidnaping Prevention Act of 1980¹ (PKPA): 28 U.S.C. 1738A

- 1. **Principal purpose** was much the same as that of the UCCJA, but this was a federal act by which Congress attempted to put the weight of full faith and credit behind the principles of the UCCJA. (Effective date: 12-28-80)
- 2. **Two Major Differences Between PKPA and UCCJA:**
 - a. **Absolute Priority for "Home State."** Where the UCCJA did not give priority to the objective Home State jurisdictional standard over the more subjective "significant connections" standard,

¹ Picky note: the Act spells "Kidnaping" with just one "p." [Click here](#) for the full text of this Act, as amended in 1998 by the Visitation Rights Enforcement Act (PL 105-374).

the PKPA does. It mandates that where there is a “home state,” only that state may exercise initial jurisdiction. The “significant connection” standard for jurisdiction can only be used if the child has no “home state.”

- b. Exclusive, Continuing Jurisdiction To Modify.** Under the PKPA, once a state has exercised custody jurisdiction, it retains continuing and exclusive jurisdiction to modify its orders until every party to the dispute – including the child – has left that state. The UCCJA had attempted to accomplish that same end, but its language was weaker.
- 3. Preempts Inconsistent State Law.** To the extent that the PKPA conflicts with the UCCJA or other state law, the PKPA preempts that state law.¹
- 4. Interplay with UCCJA.** Beyond mandating priority to Home State as a jurisdictional basis, most of the other differences are minor. Only occasionally will those differences confuse the adjudication or settlement of a custody dispute. Under the PKPA, there must first be a determination of whether the state has jurisdiction *under its own law*—i.e., the UCCJA (or, now, the UCCJEA) as enacted in that state. If it can assert jurisdiction on that basis, then the court must determine if it can exercise jurisdiction under the PKPA’s standards. If not, the petition must be denied for lack of subject matter jurisdiction.
- 5. Misleading Title.** Despite the Act’s title, its main purpose is limited neither to criminal matters relating to kidnapping nor to cases involving parental abductions. Rather, its provisions clearly reveal Congress’s intent that the Act be applied in all interstate custody disputes, whether or not an abduction has occurred or is even threatened.
- 6. No Individual Right of Action in Federal Court.** In situations where two states had each taken jurisdiction, rendered conflicting decisions, and had declined—even on appeal—to cede jurisdiction to the other state, some parent/litigants tried to have the federal courts break the impasse, arguing that the PKPA implicitly created a right of federal action, at least to enjoin one of the states from proceeding. No luck ! The U.S. Supreme Court rejected all attempts.

 - a. In *Lehman v. Lycoming County Children’s Servs. Agcy.*, 458 U.S. 502 (1982), the Supreme Court held that the federal habeas corpus statutes did not confer federal jurisdiction to review state court orders terminating parental rights.
 - b. In *Thompson v. Thompson*, 484 U.S. 174 (1988), the Supreme Court, facing competing custody decrees from California (original decree) and Louisiana, *affirmed* the dismissal of Mom’s federal action to enjoin enforcement of the Louisiana court orders, holding that the PKPA did not provide an implied cause of action in federal court to enforce state compliance with the Act. The Supreme Court simply refused to permit federal courts to enter the domestic arena, even on a pure question of jurisdiction.
- 7. 1998 Amendment To Include Grandparent Visitation.** As original enacted, the PKPA described the parties to a custody proceeding within its scope as “contestants,” a term borrowed directly from the original UCCJA, to mean “a person, including a parent, who claims a right of custody or visitation rights....” It also defined a “custody determination” as clearly including “custody or visitation orders.” However, because some courts had interpreted the PKPA as not including visitation orders *for grandparents*, Congress amended the PKPA in 1998 to specify “parent or grandparent” in its definition of “contestant,” and to make separate provisions throughout the act for “custody determinations” and for “visitation determinations.”

¹ *Justis v. Justis* (Ohio, 1998) 81 Ohio St.3d 312, 691 N.E.2d 264; *State ex rel. Seaton v. Holmes* (Ohio, 2003) 100 Ohio St.3d 265; *Hamilton v. Hamilton* (Me., 2009) 976 A.2d 924 [PKPA preempts the UCCJEA if they are in conflict]; *Murphy v. Woerner* (AK, 1988) 748 P.2d 749, 750.

III. Uniform Child Custody Jurisdiction and Enforcement Act

A. Promulgated in 1997 by the National Conference of Commissioners on Uniform State Laws [“NCCUSL”] and approved by the American Bar Association.¹ Effective April 11, 2005, it was adopted in Ohio as *2005 Ohio Act sub S.B. 185.*, which repeals the UCCJA (R.C. 3109.21 to .37).² It has now been adopted by 49 states plus D.C. , Guam and U. S. Virgin Islands, but not Puerto Rico.³ A bill proposing its enactment is even pending in the sole remaining holdout state ([Massachusetts](#)).

B. Principal Purposes

1. Reconcile UCCJA’s principles with the PKPA’s (especially “Home State” Priority).
2. Establish clear bases under which only one court can properly take jurisdiction to render an initial custody or placement order.
3. Protect the resulting custody order from modification in other states by allowing modification only in the original issuing state *unless* that state has lost all connections to the parents and child OR unless it cedes jurisdiction under principles of *forum non conviens*.
4. Avoid jurisdictional competition with courts of other states in child custody matters, and foster cooperation between those courts.
5. Deter interstate abductions of children by parents.
6. Avoid relitigation in one state of another state’s custody determinations; discouraging the use of the interstate system for continuing controversies over child custody.
7. Facilitate enforcement of one state’s custody orders in other states.
8. **Note:** When the NCCUSL promulgated the UCCJEA in 1997, it intentionally omitted from the model act’s actual text any explicit recitation of the act’s purposes, and described those purposes *only* in its comments and explanatory literature. Ohio’s enactment follows the Model Act in this regard and includes no express statement of general purposes.

C. General Jurisdictional Scheme – Initial Jurisdiction vs. Jurisdiction to Modify

1. Jurisdiction To Make an *Initial* Determination – “Home State” Priority (3127.15)

- a. **Early Preference Becomes Firm Priority.** The drafters of the UCCJA thought that the child’s home state was the best state in which to find evidence needed to make a custody decision, but they also assumed that once a court took jurisdiction on any other acceptable basis, it should be able to proceed with the case without delaying to find out if another state might have “home state” status. By contract, the drafters of the federal PKPA regarded the child’s home state as having such a superior basis for exercising jurisdiction to make an initial determination, that it should *always* have priority. Thus, the PKPA always accords the home state the first opportunity to assume jurisdiction. Deferring to the PKPA’s logic *and* its preemption, the UCCJEA abandoned the UCCJA’s position and adopted that of the PKPA.

¹ For the full text of the model act, including the Commissioners’ comments, see [here](#).

² For the full text of the UCCJEA, as enacted by the 2005 Act (SB185), see [here](#).

³ For a table of states that have adopted the UCCJEA, with statutory citations and effective dates, see [here](#).

- b. **Effect of Home State Priority.** If there is a “home state,” all other states must defer to it before accepting jurisdiction of an initial custody dispute.¹ Another state may take Temporary Emergency Jurisdiction, but only long enough to secure the safety of the endangered child or parent, after which jurisdiction to continue must be deferred in favor of the child’s home state (or, if none, to another state with another [better] ground for jurisdiction).²
- c. **Alternate Bases.** If the child has no home state and the ‘look-back’ exception does not apply, then the UCCJEA provides three other bases for exercising jurisdiction. In order of their descending priority, they are:
- (1) **Significant Connections.** The **first** alternative basis confers jurisdiction if the child *and* at least one parent have a “significant connection with [the] state other than mere physical presence” **and** “substantial evidence” is available in the state concerning the child’s care, protection, training and personal relationships.
 - (2) **Deferral To This State.** The **second** (having a lower priority) alternative basis, confers jurisdiction if *all* other states with jurisdiction either as the child’s home state or under the significant connections/substantial evidence standard have decided that this state is a more appropriate forum and have deferred to this state on that basis.
 - (3) **Default or “Vacuum” Basis.** The **last** alternative (with lowest priority), is sometimes referred to as the “default” or “vacuum” jurisdiction rule. It confers jurisdiction on this state if no other state could exercise jurisdiction based on any of the other rules. Thus, if no state has any better basis for asserting jurisdiction, then this state can fill that vacuum, so that the parents will have a forum somewhere in which their custody dispute can be decided.
- d. **Simultaneous Proceedings.** (3127.20) If one parent files an initial custody proceeding in one state and the other parent files a competing initial proceeding in another state, the Act has two kinds of rules to resolve that conflict. The first level of conflict resolution is inherent in the hierarchical bases for jurisdiction themselves. Thus, for example, if one case has been filed in the child’s home state and the other is in a state that can assert jurisdiction only under the significant connections/substantial evidence standard (a lower priority), then the state with the lower priority claim to jurisdiction must yield to the state with the higher priority, no matter which was filed first. If there is no basis for home state jurisdiction and each state’s claim to jurisdiction is based on the *same* standard [i.e., significant connections/ substantial evidence **or** vacuum jurisdiction], then the first case commenced prevails.³

2. Jurisdiction To Modify Custody Orders – Exclusive Continuing Jurisdiction (3127.16 –.17)

- a. **UCCJA vs. PKPA Conflict.** Though the UCCJA allowed jurisdiction to shift to another state if the initial ground for asserting jurisdiction ceased to exist, the PKPA took a different approach: the original state would retain exclusive, continuing jurisdiction unless (1) the child **and both parents** had left the state **or** (2) the state lost its continuing jurisdiction *under its own law*. The Model UCCJEA adopts the PKPA’s either/or approach, but with a little twist. The first basis on which a state will lose its continuing jurisdiction is the departure of the child **and both**

¹ The home state rule is actually two rules. The first covers the case in which the child has lived in this state with at least one parent for the six months immediately preceding the commencement of the custody proceeding. The second, which is generally referred to as the “extended home state provision,” is a limited ‘look back’ rule that covers cases in which this state was the child’s home state within the six months immediately before the commencement of the custody proceeding, *but* (1) the child is absent from this state when the case is actually commenced, **and** (2) at least one parent “continues to live” in this state when the case is commenced.

² This highly restricted basis for temporary, emergency jurisdiction is discussed below in section III, D.

³ An action’s date of “commencement” is the date the first pleading is filed. The Act itself is silent as to what happens if the first pleading is filed but not actually served.

parents **and** all persons acting as a parent from the state – a bright-line determination that can be made by any court in any state. Rather than let the states develop their own alternative grounds for ending continuing jurisdiction, however, the UCCJEA creates a *uniform* second standard: a determination *by a court in the original state* that the child and at least one of the parents no longer have “a significant connection with this state **and** that substantial evidence is no longer available in this state concerning the child’s care, protection, training and personal relationships.” This two-prong standard is intentionally hard to satisfy, particularly if the child returns to the state for summers or Christmas visitation. Under the Model UCCJEA, therefore, even if the child moves from the state that made the initial order and acquires a new “home state,” the first state retains exclusive, continuing jurisdiction to modify its orders so long as at least one of the parents still lives there, or until the connections between the child and that state have become so attenuated that a court of that state finds that the connections are no longer “significant.”

- b. Home State Is Irrelevant.** Once an initial custody determination has been made, the identity of the child’s home state becomes jurisdictionally irrelevant. Why? It’s because the jurisdiction of the court that made the initial custody order continues *even if the child and one parent move to another state* and even if that new state becomes the child’s home state. That new home state remains irrelevant until the child and **both** parents have left the first state. With nobody left in the original state at that point, it makes no sense to force everyone to return just to litigate a modification – particularly since the most important evidence is surely going to be located where the child or at least one of the parents now lives. In modification cases, therefore, the child’s move to a new home state is utterly irrelevant *unless* everyone has left the original state, and practicality compels selection of a new forum. Only then will the child’s “home state” again become relevant and controlling.
- c. Power to Decide If Original State Retains Jurisdiction.** Under the UCCJEA, any court may make the bright-line “determin[ation] that the child, the child’s parents, and all persons acting as parents do not presently reside in the [original] state.” [3127.16 & .17] For the alternative jurisdictional basis, however, the Model Act provides that only a court in the original state may determine whether the significant connections/substantial evidence standard for continuing jurisdiction is still met. Thus, unless the child and *both* parents have left the original state, no other state can assume jurisdiction unless the original state “determines [that] it no longer has exclusive, continuing jurisdiction ... or that a court of [some other] state would be a more convenient forum....” [3127.17]
- d. Ohio’s Variation On The Modification Standard.** The above explanation holds true for every state that has adopted the UCCJEA, except for Ohio and Virginia. These two states have eliminated the ‘either/or’ standard for keeping or losing exclusive, continuing jurisdiction, opting instead for one simple, bright-line rule. Thus, under §3127.16, if the initial order was made by an Ohio court, Ohio retains exclusive, continuing jurisdiction to modify that order until the child and *both* parents no longer reside in Ohio. So long as even one parent (or a person acting as a parent) still lives in Ohio, Ohio’s exclusive jurisdiction continues, even if the child has not set foot in the state for even a brief visit for many years. If the initial order was made outside of Ohio or Virginia and if at least one parent still lives in that state, §3127.17 recognizes that all those other states have adopted the Model UCCJEA’s ‘either/or’ standard for continuing jurisdiction, and it effectively forbids Ohio courts from modifying the order unless a court in that original state “determines [that] it no longer has exclusive, continuing jurisdiction...or that a court of this state would be a more convenient forum....”

D. Temporary Emergency Jurisdiction – Highly Restricted Exception (3127.18)

- 1. Underlying Basis.** There are situations that will be generally recognized as emergencies. Typical examples involve children who are abandoned or subjected to physical abuse in a state other than their home state. In such cases, the need for a local court to step in quickly to protect the child with temporary orders will and should take priority over the duties of each state to recognize and enforce but not to modify another state’s custody orders. From the beginning, there has been a tension between the practical need to recognize and legitimate true emergency

interventions and the goal of establishing bright-line rules under which one state will have priority over all others in making custody decisions concerning the child. The means for balancing those tensions has evolved considerably over the years.

2. **Under Old Law.** Under the UCCJA, ‘emergency jurisdiction’ was on an equal footing with all other bases for jurisdiction. Even after the PKPA mandated home state priority, it was not clear that emergency jurisdiction was necessarily temporary or restricted. It was only clear that the criteria for taking “emergency” jurisdiction should be such that cases justifying a finding of “emergency” would be rare. Over time, however, “emergencies” became a tail that could wag the dog.
3. **UCCJEA Creates Highly Restricted Exception.** The UCCJEA’s addition of the word “temporary” to the emergency ground for jurisdiction is far from cosmetic. It is emblematic of the significant restrictions and time limits imposed – all reinforcing “home state” priority.
 - a. **What Constitutes An “Emergency?”** A state may assume temporary emergency jurisdiction only if the child is (1) physically present in that state **and** (2) (a) has been abandoned, or (b) it is necessary in an emergency to protect the child because he/she or the child’s sibling or parent “is subjected to or threatened with mistreatment or abuse.” The addition of siblings and parents reflects the developing awareness of domestic violence, its effects on the family, and the special procedures that may apply if it is alleged. Note, however, that “neglect” has been removed from the definition of “emergency.” [3127.18(A)]
 - b. **If No Prior Custody Orders Exist.** If there is no prior custody order to be enforced *and* no proceeding has been commenced in a state with a non-temporary ground for jurisdiction, any temporary emergency order will remain in effect until an order is obtained from the child’s home state or a state having another proper basis for jurisdiction. However, if no such proceeding is commenced in a state with proper jurisdiction, then the temporary order becomes a final order, *but only if* the order itself so provides *and only if* the state issuing the order becomes the child’s home state. [3127.18(B)]
 - c. **If A Prior Order Does Exist.** If a prior custody order entitled to enforcement exists or if a proceeding has been commenced in a state with a non-temporary basis for exercising jurisdiction, the temporary emergency order may be made, but it **must** specify a period that is adequate to allow the petitioner to obtain an order from that other state. Before specifying that period, the issuing court **must** confer with the other court in order to resolve the emergency and to determine an appropriate sunset date for the temporary orders. Meanwhile, the temporary emergency order will remain in effect only until another order is obtained in the other state or until the period stated in the temporary emergency order expires. This type of temporary order can never become permanent. [3127.18(C), (D)]

E. Bases For Declining Jurisdiction

1. **Inconvenient Forum.** (3127.21) Even if a court has jurisdiction to decide a custody case – be it an initial determination or a modification – it may decline jurisdiction in favor of another state’s court, based on principles of *forum non conveniens*. It may, but need not consult with the other state’s court before deciding if it will decline to hear the case. Section 3127.21(B) spells out a list of eight factors that **must** be considered, among others, before jurisdiction is ceded on this ground.¹ Though some states have held that an actual evidentiary hearing must be held before deciding an inconvenient forum motion, Ohio’s courts insist only that the parties be permitted to “submit information” and to fully brief and argue the issues before any decision is made.² The section also makes it clear that “a court of this state may decline to exercise its jurisdiction ... if a

¹ The very first of these eight factors is whether domestic violence has occurred and may continue and which state can best protect the parties and the child. This factor may involve VAWA considerations (see *infra* at IV, D), particularly if the abuse victim’s move to the other state was in an effort to escape from that domestic violence.

² See, e.g., *Kemp v. Kemp* (Ohio App., 2011), 2011 Ohio 177 [statutory mandate was satisfied by the parties’ written briefs, attached exhibits, oral argument, and the otherwise thoroughly presented motion].

child custody determination is incidental to an action for divorce ... while still retaining jurisdiction over the divorce or other proceeding.”

2. **Unjustifiable Conduct.** (3127.22). If this state has become the child’s home state or has otherwise acquired jurisdiction only because the petitioner has “engaged in unjustifiable conduct” (such as abducting the child and hiding in the state for at least six months), this state’s courts *must* decline to exercise jurisdiction unless (a) all parents have acquiesced to its exercise of jurisdiction, or (b) Ohio would have had jurisdiction anyway *and* it is the more appropriate forum under the inconvenient forum analysis of §3127.21, or (c) no other court would have any basis for asserting either initial or modification jurisdiction. While the Model UCCJEA intentionally leaves “unjustifiable conduct” undefined, so as to include many sorts of “unclean hands” behaviors, Ohio’s Act adds a tightly-worded definition of “unjustifiable conduct” to foreclose any such expansive reading of the section.¹ If the court dismisses or stays a proceeding on this basis, it *must* also assess fees and costs (broadly defined) against the offending parent,² unless that parent “establishes that the assessment would be clearly inappropriate.”
3. **Who Decides?** Only the court with jurisdiction to hear and determine the case may decide if it is appropriate to decline to exercise that jurisdiction in favor of another state’s court.

F. Cooperation and Consultation Between Courts (3127.09 – .11)

The old UCCJA strongly urged courts in potentially competing jurisdictions to consult and cooperate with each other before deciding to take jurisdiction. Experience proved that the UCCJA’s urging was too often disregarded. The UCCJEA, therefore, employs stronger and more specific procedures to ensure that the pre-decision inter-court conversations actually occur.

1. **Authorized Cooperation.** Sections 3127.10 to .11 import most of the UCCJA’s provisions that permit Ohio courts to request another state’s court to hold evidentiary hearings, issue subpoenas, order custody evaluations, forward certified transcripts of hearing records and other evidence, or even to order a parent or other physical custodian to appear in person, with or without the child. Conversely, they also empower our courts to act on such requests made by courts in other states. The Act permits orders for out-of-state depositions, and for obtaining testimony or evidence from another state by telephone, video-conference, fax, e-mail or other technologies, and it provides that documentary evidence transmitted from another state to a court in this state by means of such technology “may not be excluded from evidence on an objection based on the means of transmission.”
2. **Inter-Court Communication.** Section 3127.09 sets out the rules governing communication between courts. Those rules require that, except for non-substantive conversations about non-substantive matters like scheduling, calendars, or court records, a record *must* be made and the parties must either be allowed to participate in the conversation or be promptly informed of the communication, granted access to the record *and* be permitted to present evidence and argument *before* any decision is made on the subject of jurisdiction.³
3. **Required Consultation.** The UCCJEA *requires* consultation between courts in at least three specific situations:
 - a. **Temporary Emergencies.** (3127.18[D]) Whenever an Ohio court that is exercising jurisdiction because of a temporary emergency learns that a proceeding either exists or has been com-

¹ Thus, subsection 3127.21(D) defines “unjustifiable conduct” as “conduct by a parent or that parent’s surrogate that attempts to create jurisdiction in [Ohio] by removing the child from the child’s home state, secreting the child, retaining the child, or restraining or otherwise preventing the child from returning to the child’s home state in order to prevent the other parent from commencing a child custody proceeding in the child’s home state.”

² However, fees and costs may *not* be assessed against the state or any county or municipal agency.

³ Given the need for a record, an important preliminary, ‘non-substantive’ matter that both judges will want their respective clerks to work out in advance will be whose reporter will be responsible for making the record and how that record will be made available to the other court and to the parties. They may also want to work out whether (and how) to provide each other with copies of pleadings and motion papers filed in each other’s court.

menced in another state that has non-emergency jurisdiction **or** when an Ohio court with non-emergency jurisdiction learns of a temporary emergency proceeding in another state, the Ohio court “*shall immediately communicate with [the other court]...*” in an attempt to resolve the emergency, protect the safety of the child and the parties, and to jointly determine an appropriate duration for the temporary order.

b. Simultaneous Proceedings. (3127.20[B]) Before any custody hearing, the Ohio court must examine the disclosure statements filed pursuant to §3127.23 and other court documents, and if it learns that a custody proceeding has been commenced in another state that has proper jurisdiction under the UCCJEA, it “*shall stay its proceeding and communicate with the court of the other state.*” Then, unless the other (first-in time) state decides that this state is a more appropriate forum, the Ohio court must dismiss the proceeding that was filed here.¹

c. Simultaneous Proceedings for Enforcement and Modification. (3127.37) If an enforcement proceeding is pending in Ohio, and the Ohio court learns that a proceeding to *modify* the underlying order or judgment is pending in another state with proper modification jurisdiction, the Ohio court is required to “*immediately communicate with the modifying court.*” Ordinarily the enforcement action will continue, since the underlying orders have not yet been modified. However, the Ohio court is specifically empowered to decide, based on its communication, whether it will stay, dismiss, or permit the enforcement action to continue.

4. Communication Strongly Suggested for Inconvenient Forum Decisions. (3127.21) Though the Act does not *require* a court with proper jurisdiction to communicate with a court in another state before it decides to cede jurisdiction to that court as a “more appropriate” forum, such a consultation is surely implied. Among the various factors that must be considered in making the decision are “(7) The ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence” and “(8) The familiarity of the court of each state with the facts and issues in the pending litigation.” Realistic assessment of those two factors will be difficult or impossible unless there has been some sort of discussion between the two courts.

G. Variations From Model Uniform Act

The language of the UCCJEA, as enacted by the Ohio Legislature, is *nearly* identical to that of the [Model Act](#). However, there are some differences.

1. “Modification.” Under the Model Act, there are two distinct bases under which a state can lose its exclusive, continuing jurisdiction. The first basis is the departure of both parents **and** the child **and** all persons acting as a parent from the state – a determination which can be made by any court in any state. The second is a determination that may be made only by the court that rendered the initial order(s) that the child and at least one parent no longer have a significant connection with the state **and** that substantial evidence of the child’s care, training (etc.) no longer exists in the state. As described above at section III.C.2.d., Ohio’s enactment entirely omits this second basis. Thus, an Ohio court’s exclusive, continuing jurisdiction can be lost only when a court in Ohio or elsewhere finds that both parents, *and* the child, *and* all persons acting as a parent no longer reside in the state of Ohio. (3127.16)

2. Declining Jurisdiction Because of “Unjustifiable Conduct.” As described in detail in section III, E 2, *supra*, the Model Act makes no attempt to define the sort of “unjustifiable conduct” that will preclude a court from exercising jurisdiction. It thereby admits the possibility that a petitioner’s atypical but genuinely reprehensible conduct can be deemed “unjustifiable” within the meaning of this section. The Ohio Legislature attempted to foreclose such a potentially expansive reading

¹ This section does not require communication whenever a custody proceeding has been commenced in another state. Rather, it is required only when the other case has been commenced “in a court of another state *having jurisdiction substantially in accordance with this chapter.*” For example, in an “initial jurisdiction” case where Ohio is the child’s home state and the other state’s basis for exercising jurisdiction is the child’s significant connections with that state and the existence there of substantial evidence about the child’s care, the other state would **not** have jurisdiction “substantially in accordance with this chapter.” In such a case, communication, though allowed, would *not* be required.

of the section by adding a tightly-worded, unique-to-Ohio definition of “unjustifiable conduct” as section 3127.22(D).¹

3. **Parenting Time.** The Model Act provides for Legal Custody, Physical Custody, and Visitation, but makes no reference to “parenting time.” Ohio’s Act makes it clear that a proceeding seeking an allocation of parenting time is also “child custody proceeding,” within the meaning of R.C. 1327.01(B)(4).
4. **Abandonment.** The Model Act defines “Abandoned” merely as “left without provision for reasonable and necessary care or supervision. Ohio’s enactment changes that definition to the following: “ ... the parents of a child have failed to visit or maintain contact with the child for more than ninety days, regardless of whether the parents resume contact with the child after that ninety-day period.” [3127.01(B)(1)]
5. **The “UCCJEA.”** Unlike the Model Act, which has no comparable provision, R.C. 3127.01(A) specifically defines the “uniform child custody jurisdiction and enforcement act” as meaning “... the act addressing interstate recognition and enforcement of child custody orders adopted in 1997 by the national conference of commissioners on uniform state laws or any law substantially similar to the act adopted by another state.”
6. **Stylistic Changes.** The Model Act’s stylistic approach to lists of requirements most often employs the formula, “ ... may [do such and such] only if:” Ohio’s enactment changes that stylistic convention by employing a formula that provides either “may [do such and such] only if one of the following applies:” or “... if either of the following applies:....” These variances from the Model Act are stylistic only. It seems clear that no substantive distinction was intended by this change in language. There are other minor stylistic variances between the Model Act and Ohio’s version of that act (e.g., using “preceding” instead of “before.”), but none of these seem to have been made for any purpose other than to make the language more consistent with the stylistic conventions of other Ohio statutes.

H. Orders From Foreign Countries (3127.04; 3127.32)

The UCCJEA is not a *reciprocal* law. Its principles must be applied even if the other state has not adopted any version of the act. Thus, it applies even to custody decrees from foreign countries. The act expressly mandates that our courts “shall treat a foreign country as if it were a state for the purpose of applying [the jurisdictional rules and general provision of the act].” (3127.04 [A]) And to dispel any ambiguity, it mandates that unless a foreign country’s custody law violates fundamental principles of human rights, “a child custody determination made in a foreign country under factual circumstances in substantial conformity with the jurisdictional standards of [this act] shall be recognized and enforced under [the act’s enforcement provisions].” (3127.04[B]) It even goes beyond the standard range of custody orders by expressly authorizing our state courts to enforce an order to return a child made under the *Hague Convention on the Civil Aspects of International Child Abduction* [see, *infra* at section IV, B.] “as if it were a child custody determination.” (3127.32)

I. Enforcement (3127.31– 3127.47)²

1. **Duty To Enforce Other States’ Orders.** (3127.33) Sections 3127.31 through .47 are devoted generally to “enforcement.” Indeed, the Model Act sets these sections out as a separate “Articles” (some states call the grouping a “subchapters.”) These sections provide unambiguously that Ohio’s courts must recognize and enforce custody and placement orders issued in any other state, so long as that state (a) was possessed of subject matter jurisdiction (as defined in the act) and (b) was properly exercising that jurisdiction under the standards of the UCCJEA, and (c) provided that the order has not since been modified by a court that had proper jurisdiction to do so. Section 3127.33(B) authorizes Ohio courts to employ “any remedy available under other law of this state,” and clarifies that any specific remedies provided in sections 3127.31 through .47 are “cumulative and do not affect the availability of other [enforcement] remedies....”

¹ The actual text of that definition is set out above, at Fn. 1 of Section III E(2).

² For detailed treatment of enforcement, see this author’s 2-part article in *Wis. J. Fam. Law* (Apr. & Jul, 2007), which can also be found by visiting the UCCJEA Resources [Articles & Presentations] page at www.uccjea.net .

2. Specific Remedies. The UCCJEA also creates a suite of interstate enforcement tools and procedures that go far beyond those found in the old UCCJA. These include:

a. Registration. (3127.35) The UCCJA provided generally for registration of other states' child custody determinations, but the UCCJEA spells out the procedure for accomplishing such registration in meticulous detail. The procedure is closely analogous to that of UIFSA (R.C. 3115.39). A party who seeks to establish another state's order in Ohio needs only to send the Clerk of the juvenile court a letter requesting registration *and* two copies (including one certified copy) of the order, together with a "statement under penalty of perjury" that the order has not, to the best of his/her knowledge and belief, been modified. *plus* the appropriate filing fee or deposit set by court rule. The letter must provide the names and addresses of the applicant and of any parent designated as the residential parent and legal custodian or to have parenting time or any person acting as a parent who has been awarded custody or visitation under the order. The clerk must then file the order as a foreign judgment (together with "any accompanying documents and information, regardless of their form"), and send out a detailed notice of the registration to all persons named in the letter requesting registration. The other parent(s) then has 30 days¹ to request a hearing to contest the validity of the registration. Section 3127.35 also spells out the procedure for the very limited hearing to be held if an objection is filed. If the hearing is not timely requested, the registration is confirmed as a matter of law and subsequent challenge is precluded. Once registered, the order is enforceable (this does *not* mean "modifiable"), just as any in-state custody or placement order would be enforceable.²

b. Expedited Enforcement, Even Without Registration. (3127.38 – 3127.41)

1) Procedure If No Emergency—Hearing Next Day. The Act creates an expedited remedy that is strongly reminiscent of *habeas corpus*.³ Upon receiving a verified petition (from a parent, prosecutor, or other), the court must order the party with the child to submit to an immediate hearing (on the "next judicial day" unless that is "impossible") for enforcement. The order may require the child to be produced at the hearing and may also "make any order necessary to ensure the safety of the parties and the child." If, at the hearing, the respondent is unable to show that the issuing court lacked jurisdiction, that the order has been properly modified, vacated or stayed, or that the respondent was never given proper notice before the order was issued, the court **must** grant petitioner immediate physical custody of the child **plus** payment of costs, attorneys fees and expenses, **may** grant additional relief (e.g., a request for the assistance of law enforcement), and **must** schedule a further hearing to consider if such additional relief is appropriate.

2. Procedure In Emergency—Warrant To Pick Up Child Before Hearing. (3127.41) If the child "is imminently likely to suffer serious physical harm or be removed from [Ohio]," then the expedited enforcement petition described above may be accompanied by a "verified application" for a warrant to take immediate physical custody of the child. If such an application is filed, the court may then, "upon the testimony of the petitioner or another witness",⁴ issue the warrant. The warrant must (a) recite the facts on which the conclusion of immediate serious physical harm or removal is based, (b) direct the police or sheriff to pick

¹ Though the Model Act calls for 20 days, the Ohio Act provides a more generous 30 day time period.

² For a collection of forms from Wisconsin and other states that can be adapted for Ohio use in registering and enforcing out-of-state custody orders, see the "UCCJEA Resources" section of www.uccjea.net.

³ Unlike *habeas corpus*, however, the "expedited enforcement" remedy does *not* include any requirement that the petitioner demonstrate the lack of an adequate remedy in the ordinary course of law. Indeed, in reversing an order granting a writ of *habeas corpus* to enforce another state's custody order, the Court of Appeals recently held that the enforcement mechanisms of the UCCJEA "without question ... constitute an adequate remedy at law." **In re M.T.** (OhioApp, 2008) 178 OhioApp.3d 546, 899 N.E.2d 162.

⁴ This requirement of "testimony" would seem to indicate that a quick *ex parte* hearing and not just affidavits must precede the order. It should be noted that the "testimony" is to be **either** from the petitioner **or** from another witness. Either way, the testimony at the *ex parte* hearing contemplated by the statute is to come from only *one* witness.

up the child immediately, and (c) provide for the child's placement pending the hearing. If necessary, the warrant may authorize the officers to enter private property to get the child. On a showing of exigent circumstances, the court may even authorize the officers to "make a forcible entry at any hour." The respondent is to be served with the warrant immediately *after* the child is picked up.

3. Costs, Fees, and Expenses. (3127.42) The act requires an award of reasonable attorney fees, costs and expenses (broadly defined to include investigation fees, communication costs, witness fees, travel expenses, and child care during the course of the proceedings), to the prevailing party, unless the proposed payer "establishes that the award would be clearly inappropriate."

4. No Stay Pending Appeal. (3127.44) Although an expedited appeal can be taken from any final order enforcing another state's custody or visitation decree, the enforcing court "may not stay an order enforcing [that decree] pending appeal."¹

c. Temporary Placement or Visitation. (3127.34) Even if an Ohio court lacks jurisdiction to *modify* another state's custody or visitation order, it may make its own order enforcing a physical placement or visitation schedule made by the court of another state. Moreover, even if the other state's order does *not* contain a specific parenting time or visitation schedule, the Ohio court may issue its own *temporary* implementing order imposing a specific schedule. In this latter case, the temporary implementing order must specify an expiration date, determined by how long the court "considers adequate to allow the petitioner to obtain an order from a court having [proper] jurisdiction...."

d. Expanded Role for Prosecutor. (3127.45) Whether the case arises under the UCCJEA or under the Hague Convention (*see*, § IV, B, *infra*), the act grants the prosecutor standing and a right to initiate any enforcement proceeding authorized by the UCCJEA "or any other available civil proceeding" to locate a child, obtain the return of a child, or to enforce a custody, visitation or parenting time order [implicitly, of this or any other state] so long as (1) a custody, visitation or parenting time order "exists," **or** (2) a court so requests in any pending custody proceeding, **or** (3) he/she reasonably believes that a crime has been committed, **or** (4) he/she reasonably believes that the child has been wrongfully removed or retained in violation of the Hague Convention. Moreover, unless the respondent prevails, §3127.47 even authorizes the assessment against the respondent of "all direct expenses and costs incurred by the prosecutor ... and law enforcement officers...."

J. Required Disclosures – UCCJEA Informational Affidavit.² (3127.23)

In all child custody proceedings (but not in enforcement proceedings), each party, in his or her first pleading (or attached to it), must disclose, under oath, the child's present address *and* every place known where the child has lived for past 5 years, *and* the names and present address of every person with whom that child has lived during those 5 years.³ The affidavit must also disclose if he/she (a) has ever participated (as a party or even as a witness) in any other custody proceeding concerning the child in any court, (b) knows of any proceeding (past or current) that could affect the current case, or (c) knows of anyone who either has physical custody of the child or claims a right to custody. If any other such proceedings or persons are known, full particulars must be provided. It is important to note that the UCCJEA has expanded the definition of "proceedings that could affect the current case" to include domestic violence, TPR, and adoption cases. Despite the mandatory language of the section, the act spells out no remedy for failing to provide the information. Sadly,

¹ The no-stay prohibition applies specifically to the "enforcing court" (*i.e.*, usually the Juvenile Court). It does not preclude the Court of Appeals from issuing a stay of enforcement or other extraordinary relief pending appeal.

² Ohio has official, statewide ("Affidavit 3") and local forms for use in complying with this disclosure requirement. Most can be accessed through Supreme Court's and local courts' individual web sites.

³ Unlike the Model Act, which has no exemptions from the requirement that all parties include this disclosure in their first pleading, Ohio's enactment specifically exempts public children services agencies from this requirement whenever they are "acting pursuant to a complaint or an action on a complaint filed under [R.C. 3151.27]."

the Ohio enactment is even more toothless than the Model Act, since the Ohio Legislature elected to omit the Model Act's subsection that authorized the court to stay a proceeding "until the information is furnished."

K. Non-Disclosure of Contact Information in Sensitive Cases. (3127.23[5])

Whenever the act requires the disclosure of a party's or child's present location or contact information, *section 3127.23(D)* expressly permits sealing and non-disclosure of that information whenever the health, safety or liberty of the child or a party would be jeopardized by disclosure of the information. To obtain this protection against disclosure, the party seeking the protection must file either an affidavit or a sworn pleading setting forth the threat and seeking that relief.¹

L. Language Defined

1. **"Home State"** (3127.01[7]) This keystone of jurisdiction for initial determinations is defined as the state in which the child has lived with at least one parent for "at least 6 consecutive months immediately preceding the commencement of a child custody proceeding." If the child is under the age of 6 months, then the "home state" is where the child has lived since birth with at least one parent.² Periods of "temporary absence" from the state are included in counting the time. Although not separately defined, such absences would certainly include out-of-state vacations and the like. If the child had, however, been sent to live with grandparents in another state for 4 months, that absence might not be considered "temporary" enough to avoid restarting the 6-month clock upon the child's return. The same definition was used in the PKPA and the old UCCJA. Thus, cases deciding home state issues under those acts should still be viable authority.
2. **"Child Custody Determination"** (3127.01[3]) This is the term of art which the UCCJEA uses to refer to any judgment, decree, or other order of a court providing for legal custody, physical custody, visitation, or parenting time of a child. It includes permanent, temporary, initial, and modification orders, but it does not include orders relating to child support or other monetary obligations. Essentially the same definition was used in the PKPA and the UCCJA.
3. **"Child Custody Proceeding"** (3127.01[4]; 3127.02) This term refers broadly to any proceeding in which child custody, visitation, or parenting time is at issue. It can include proceedings for separation, divorce, neglect, abuse, dependency, guardianship, paternity, termination of parental rights and protection from domestic violence. It does *not* include proceedings involving juvenile delinquency, contractual emancipation, adoption, authorization of emergency medical care for a child, or enforcement of child custody determinations. Essentially the same definition was used in the PKPA and the UCCJA.
4. **"Person Acting As A Parent"** (3127.01[12]) Throughout this summary of the law, the term "parent" is used loosely, since most interstate custody and placement disputes will involve a child's parents. The UCCJEA, however, applies to more than parents. In most of its provisions, it will specify, in the interests of full coverage, "parent or a person acting as a parent." This latter term is defined as any person (living or legal – such as a corporation, trust, agency, public corporation, or association) other than a parent who (a) has had physical custody of the child for at least 6 consecutive months out of the one year preceding the commencement of the custody proceeding **and** (b) either has been awarded legal custody by any court or claims a right to legal custody

¹ The official "Affidavit 3" referred immediately above has a checkbox allegation to request this protection. These forms are available in most Court Clerk's offices, and in the "UCCJEA Resources" section of www.uccjea.net.

² See, e.g., *In re Kalbes [Hatch v. Hatch]* (Wis.App., 2007) 302 Wis.2d. 215, 733 N.W.2d 648 [two-week-old baby born in Wisconsin has a "home state" in Wisconsin], and *Arkansas Dept. Of Human Services v. Cox* (Ark., 2002), 82 S.W.3d 806 [Arkansas was "home state" of a 10-day old child born in that state and who had never (until then) lived in any other state]. *But see, In re E.T.* (Kan.App., 2006) 137 P.3d 1035 [Premature child of Kansas parents, who was born in Missouri and spent first 3 months in a Missouri hospital, after which it was placed in a MO foster home, and then – after another hospitalization – with a relative in Kansas, was held to have no "home state," because the child had never lived "with a parent or person acting as a parent" in either state before the termination petition was filed.]

under Ohio law.¹

5. **“Petitioner” and “Respondent”** (3127.31[A] and [B]) Confusion often results when the “respondent” or “defendant” in another state’s case seeks to enforce a provision of that case’s custody order in this state. To avoid linguistic contortions in constructing statutory language to fit all enforcement cases, the UCCJEA provides that any party who seeks either the enforcement of a child custody determination or of an order for the return of a child under the Hague Convention is to be called a “*petitioner*.” Likewise, anyone against whom such an enforcement proceeding is brought is to be called a “*respondent*.”

M. Important Conceptual Points

1. Jurisdiction To Decide Custody/Visitation Is Subject Matter – Not Personal – Jurisdiction

- a. **Personal Jurisdiction Is Irrelevant.** The existence of personal (*in personam*) jurisdiction over the parties has no effect. A court may have personal jurisdiction over the parties without having child custody subject matter jurisdiction. Conversely, a court may have child custody subject matter jurisdiction without having personal jurisdiction over one of the parties. If the court has child custody subject matter jurisdiction, it may properly entertain and decide the case even if it has not acquired personal jurisdiction over one of the parties – so long as that party has been given notice and an opportunity to be heard.² However, even if the court has personal jurisdiction over both parties, it may *not* decide the case if it does not have subject matter jurisdiction.³
- b. **Custody Jurisdiction Problem Cannot Be Waived or Stipulated Away.** The lack of subject matter jurisdiction cannot be cured by stipulation. Unlike personal jurisdiction, the lack of which can be cured either by consent or by stipulation, a lack of subject matter jurisdiction cannot be cured by consent, waiver, stipulation, or agreement.⁴ Under the UCCJEA and the PKPA, if the child and at least one parent have not lived in the forum state for at least six months before the initial case was commenced, it cannot be the child’s “home state.” If another state rendered a prior custody/visitation decree and one of the parents still lives in that state, no Ohio court can modify that decree, even if the child moved to Ohio years ago and both parties affirmatively ask this state’s court to do so.

2. **Best Interests of the Child Are Irrelevant To Custody Jurisdiction.** Best Interests have to do with the merits of a case – not with subject matter jurisdiction. If a court does not have child custody subject matter jurisdiction, it may not consider a child’s best interests or any other substantive issue in the case. Thus, counsel should never be allowed to argue that it would be against the child’s best interests not to find that the court has subject matter jurisdiction. A finding that the court has jurisdiction to consider issues of child custody, visitation or parenting time must always precede

¹ There is considerable appellate law concerning who may qualify as a “person acting as a parent” under the UCCJEA. Many of those decisions are ably collected and analyzed in the recent opinion of *Shirado v. Foote* (N.D., 2010) 2010 ND 136, 785 N.W.2d 235. One of the issues that has been considered by at least six state appellate courts is whether a non-parent custodian with *de facto* decision making power may qualify as a “person acting as a parent” if his or her “claim” to custody has not been affirmatively asserted “in the context of a custody proceeding.” Pennsylvania, Washington and Wisconsin answer no, while Delaware, and Tennessee answer yes. Texas has one appellate court decision answering yes and one answering no. Ohio’s courts have not yet considered the issue.

² See, e.g., *Schroeder v. Virgil-Escalera-Perez*, 76 Ohio Misc.2d 25, 664 N.E.2d 627.

³ *In re M.T.* (OhioApp, 2008) 178 OhioApp.3d 546, 899 N.E.2d 162.

⁴ See, e.g., *Rosen v. Celebreeze* (Ohio, 2008), 117 Ohio St.3d 241, 883 N.E.2d 420; and *United States v. Hazlewood*, 526 F.3d 862 (5th Cir., 2008). The only situation in which a stipulation or consent can permit a court to proceed with a case is found in the Act’s “unjustifiable conduct” provisions at section 3127.22(A)(1). As explained above (see III, E, 2), §3127.22 addresses cases in which a court would have jurisdiction to determine a case but must decline to exercise that jurisdiction because the party seeking relief has engaged in some misconduct that wrongly manufactured the court’s basis for jurisdiction. However, if all parties, including the innocent party, “acquiesce” in the court’s exercise of jurisdiction, the court may determine the case, despite the unjustifiable conduct.

consideration of the merits of a custody case.¹

- 3. Do Not Confuse “Jurisdiction” with “Jurisdiction.”** One of the problems facing any lawyer or judge involved in custody jurisdiction matters is that “jurisdiction” has multiple meanings. It is important to distinguish between these very different meanings. The Common Pleas court in Ohio has “jurisdiction” to handle certain kinds of cases— felony trials but not traffic tickets; professional malpractice but not small claims cases. The domestic relations court has “jurisdiction” to handle custody in divorce cases, but not for unmarried parents or even for married parents who are not seeking a divorce. And only probate court has “jurisdiction” to handle guardianships or adoptions. Likewise a court generally *acquires* personal “jurisdiction” over a party when that party is personally served with process in this state. *NONE* of these is the same as “jurisdiction” over the subject matter of a child custody or visitation dispute. And none of these other “jurisdiction” questions can be reached, considered or even addressed if the court does not have child custody subject matter “jurisdiction.” Under the UCCJEA, the criteria for determining if this state has “custody jurisdiction” are spelled out in R.C. §3127.15 for initial decrees and in §§3127.16 and 3127.17 for modification cases.

N. Court’s Independent Duty To Make A Jurisdictional Inquiry.

R.C. §3127.20(B) and (C) require the court, *before* hearing a custody proceeding, to examine the court documents and the information supplied pursuant to §3127.23, to determine at least whether any other custody proceeding was pending in any other state when the case was filed in Ohio. Thus, a failure by either party to object to the court’s exercise of jurisdiction does not excuse the court from examining the pleadings to learn if they disclose a sufficient factual basis for asserting custody jurisdiction or whether there is an obligation to communicate with another court in which a previously-filed custody proceeding may be pending with respect to the same child or children.

O. Practical Considerations

- 1. Read Both Laws.** Always read the other state’s version of the UCCJA or UCCJEA, and note similarities and differences from Ohio’s *and* from the Model Act.² Be sure you understand the effect of those differences/ similarities.
- 2. Read The Commission’s Comments.** Then read the [commissioners’ comments to the model act’s provisions](#),³ recognizing that those comments have the same status as legislative history. That is, they are persuasive authority and controlling (on questions of interpretation and intent) until a contrary decision is rendered by a court in this or the other state.
- 3. Pleading Forms.** The “UCCJEA Resources” section of www.uccjea.net has ten forms (created by this author) for use in enforcement cases *plus* model jurisdictional findings that should be included in any order or judgment that might ever need to be enforced outside of the state. Though they were created for Wisconsin lawyers and judges, they should be readily adaptable for use in Ohio. If an Ohio form is not readily available for other situations, consider finding one either on the Resources pages of www.uccjea.net or directly at another state’s judicial web site and then modifying it to match Ohio’s format and statute numbers. The most likely sources for this legally permissible plagiarism are California, Michigan, Washington, Alaska, and Oregon, in that order.

¹ Guardian ad litem appointments raise this issue. Because a GAL is appointed to “protect the best interests of the child...” [R.C. §2151.281(1); *see also* §3109.04], and a child’s best interests cannot be considered if subject matter jurisdiction is lacking, the court probably lacks the power to appoint a GAL unless it first finds that it has custody jurisdiction. *See, Porter v. Johnson* (Tex App., 1986) 712 SW2d 598 [*Aff’g* non-appointment of GAL where the court lacked UCCJA jurisdiction].

² A quick way to access any other state’s version of the UCCJEA is via the interactive adoptions table at www.uccjea.net/resources/UCCJEA-Adoption-Table.shtml .

³ <http://tiny.cc/uccjea-97>

4. Sub-Specialists—Especially for Abductions and Emergency Cases. There is a very small group of family law practitioners who sub-specialize in interstate and international custody cases and an even smaller number who limit their practices to interstate and/or international custody jurisdiction cases. These lawyers can be an invaluable source of help in any interstate or international case. However, whenever a case involves an international or interstate abduction, or has a potential for temporary emergency jurisdiction, one should seriously consider calling on such a sub-specialist – either as a consultant, as co-counsel, or to take full charge of the jurisdictional motions. These cases especially require a sense of urgency, speed and sophisticated handling. Their likelihood of success decreases dramatically for every day that passes without an effective prosecution being commenced and aggressively pursued. These sub-specialists have the expertise, sophistication and experience to obtain optimal results with a minimum of research and “learning time.” Some sub-specialists, like this author, will happily restrict their engagement to handling just the jurisdictional motions and agree either to take no part in the litigation of any substantive issues or to act just as consultants on those issues.

5. Parents in U.S. Armed Forces. The U.S. Defense Department issued [DoD Directive 5525.9](#) on December 27, 1988. Although it expressly provides no independent remedy for individuals, it does provide a procedure for enforcing custody decrees in U.S. military stations overseas (and possibly in the U.S.), both for civilian and military personnel who are wrongfully withholding a child from the other parent. Most service branches have since adopted their own implementing regulations. (See, e.g., [Army Reg. 608-99](#) [2003].)

6. Argument Aids: Banners, Headlines, or Argument Themes ¹

This is *NOT*
a custody proceeding!
It’s a jurisdictional **motion**.

Best Interests Are
NOT At Issue.

Jurisdiction Before you have Jurisdiction

IV. Other Related Laws and Treaties

A. Indian Child Welfare Act (ICWA – 25 U.S.C. 1901-1963)

1. Adoption; Purpose; Application. Adopted by Congress in 1978, ICWA applies to child custody proceedings in state courts involving “Indian” children—children of Native American ancestry who are either members of an Indian Tribe or Native Alaskan Village or eligible for such membership by reason of their parent’s membership. The act was passed to counter the tendency of state courts to remove large numbers of Indian children from their homes and to place them in non-Indian homes (some states were removing as many as 25-35% of all Indian children from their homes, and over 85% of these removed children were being placed in non-Indian homes). In passing the act, Congress intended to protect the integrity of Indian tribes and ensure their future, recognizing (in effect) that no nation or culture can flourish if its youngest members are removed. Because the act was specifically designed to address the real threat posed by these removals, it applies in four specific contexts: 1) foster care placements, 2) Terminations of Parental Rights (including even “voluntary” TPRs), 3) Preadoption placements, and 4) Adoption Placements.

¹ These three posters or banners and their wording are not original to this author. They were suggested by the late William Hilton, who was a long-time sub-specialist in international and interstate custody jurisdiction cases, and one of the foremost American authorities on the Hague Convention. Before it was taken down following his death, Hilton’s website (www.hiltonhouse.com) was a treasure trove of forms, sample pleadings, briefs, memoranda and other information about the Hague Convention and both the UCCJA and the UCCJEA.

- 2. Jurisdictional and Placement Mandates.** If ICWA applies, it accords exclusive jurisdiction to tribal courts for children who live on a reservation. For off-reservation children, state courts may exercise jurisdiction, but the tribe must be given notice of the proceedings, and it is accorded an absolute right to intervene in the cases. Even the UCCJEA (3127.03) clearly provides that it does not apply in any case where ICWA applies. Moreover, substantial legal hurdles make it very difficult to order placement of the child with anyone other than the child's extended family or another member of the child's tribe.
- 3. Not Applicable in Typical Divorce Cases.** ICWA is aimed at situations in which children of Indian parents are threatened with removal from their parents *by a state or public agency*. As such, it does not apply in typical domestic relations or juvenile court custody disputes between a child's parents.¹ However, if a custody/visitation dispute involves one Native-American and one non-Native-American parent, some of ICWA's policies may arguably apply as "factors" to consider in determining custody. This is particularly so if the non-Indian parent wants to raise the child as an "American," in derogation of the child's Indian heritage, or is attempting to minimize the child's contact with the child's tribal community or extended family.

B. The Hague Convention on the Civil Aspects of International Child Abduction²

- 1. Status as Treaty; Effective Date in U.S.** The Hague Convention³ was adopted by the Hague Conference on Private International Law on October 25, 1980. It has the legal status of a "treaty" which became effective in the United States July 1, 1988, concurrent with the enactment of International Child Abduction Remedies Act (Section C, *infra*.) It has been ratified by about 27 countries, including Canada, the U.S., most of Western Europe and the British Commonwealth⁴, Japan, Israel, Turkey and a few other countries. Over 70 other countries (e.g., Mexico) have also signed onto it by "accession" As a treaty, it is effective only between countries that were either original Hague Conference members or that signed onto it by accession. With some qualifications, it is not reciprocally binding unless *both* countries have ratified it or acceded to it.⁵
- 2. Purpose and Overview.** The Hague Convention was designed to secure the prompt return to their place of "habitual residence" of children who are wrongfully removed to or retained in another contracting country. Just as with the UCCJA and PKPA, the contracting nations also hoped that if a truly effective and speedy remedy for international child abduction could become widely available, that remedy would both reduce child abductions and insure respect for the custody and

¹ For the unusual custody case in which a court makes a finding that it is in the best interests of the child for neither parent to be designated the residential parent and legal custodian under R.C. 3109.04(D)(2), it can be reasonably argued that the resulting placement with a relative or certification to the juvenile court may well trigger the operation of ICWA for an Indian child.

² T. I. A. S. No. 11670. For the text of the treaty, see http://hcch.e-vision.nl/index_en.php?act=conventions.text&cid=24.

³ The Hague Conference on Private International Law has adopted dozens of "conventions" spanning a vast spectrum of international civil law areas, from "service abroad of judicial and extrajudicial documents" and "recognition and enforcement of foreign maintenance decrees" to "taking of evidence abroad in civil cases" and "law applicable to trusts and their administration." Some of these have been ratified by the United States, and others have not been. Moreover, a similar "European Convention..." to return abducted children has been ratified by 28 European countries, but not by the United States. There is even a 1996 convention (signed but not ratified by the U.S.) that creates uniform international custody jurisdiction standards. Throughout these materials, the term "*Hague Convention*" is intended to refer only to the 1980 Hague Convention on The Civil Aspects of International Child Abduction.

⁴ There are some notable exceptions like India, which has neither ratified nor acceded to the Convention.

⁵ Actually, because the convention distinguishes between countries that were original members of the Hague Conference and those that subsequently accede to the Convention, its reciprocal enforceability is a bit more complicated. As between original members (e.g., the U.S., Canada, and much of Western Europe), the Convention becomes mutually binding as soon as the member country formally ratifies it. For all other countries that later accede to the Convention, it becomes reciprocally binding only on those other signatory countries that formally accept the new country's accession. For example, while Pakistan ratified the Convention in 2016, the U.S. only accepted that accession in July, 2020. Thus, the Convention will not be enforceable between Pakistan and the U.S. until October 1, 2020. Many other countries like Bolivia, Philippines and the Russian Federation are still waiting for the U.S. to accept their accessions. For a fuller description of the accession/acceptance process and its implications, see, *Safdar v. Aziz* (Mich.App. 2019) 933 N.W.2d 708.

visitation rights among the participating countries. To that end, *Article 2* of the Convention requires the signatory states to implement the Convention's objectives by "the most expeditious procedures possible." Perhaps even more importantly, the Convention was designed to keep the courts in the abductor's country focused on returning children back to their "habitual residence" as quickly as possible, and then letting the courts in that home country become the forum for deciding any substantive custody or visitation issues. (Arts. 12, 13, 19)

- 3. Threshold Issues; Eligibility for Relief.** The Convention applies only if *all* the following criteria are satisfied:
 - a. Under Age 16.** The child must be under the age of 16 at the time of the *hearing*; and
 - b. Wrongful Removal.** The child must have been *wrongfully* removed from or *wrongfully* retained in a member country; and
 - c. Habitual Residence.** The member country seeking the child's return must have been the child's "*habitual residence*" just before the abduction (or wrongful retention). Although "*habitual residence*" is a somewhat different and less stringent standard than the UCCJEA's concept of "*home state*," both are designed to advance similar purposes—getting the child quickly back to a state or nation with the best and most recent connections to the child and that is best suited to try and decide any custody issues concerning the child; and
 - d. Right of Custody.** The child must have been removed from a person (or agency) that had *and* was exercising a *lawful right of custody* or that would have done so but for the removal. This right of custody includes the right to determine the child's place of residence and other rights regarding care of the child's person, and it can be by court order, an enforceable agreement, or by operation of law (e.g., in Ohio, absent any order, both parents of a marital child, or the mother of a non-marital child, have inherent rights of custody).
- 4. Visitation.** The Convention does not provide for return of a child for visitation or parenting time. It does, however, have special procedures to facilitate and implement existing rights of visitation or parenting time, which it refers to as "*rights of access*," for limited periods of time in places other than the child's habitual residence. (*Art 21*);
- 5. Central Authorities.** The Convention requires each contracting state to designate a "Central Authority" ("C.A.") to carry out the duties imposed by the Convention. States with a federal system or territorial units are free to designate more than one but must designate one of them to which applications may be sent for further transmission. In Canada, for instance, each province has its own designated Central Authority. By contrast, the sole Central Authority in the United States is the U.S. State Department's Office of Children's Issues. Applications for a child's return (obtainable from OCI's website) may be made either to the C.A. where the child is being held or to the C.A. of the child's habitual residence.¹ *Article 8* spells out the information that must be included in an application. Each C.A. is charged with receiving and processing applications, overseeing their progress through administrative and judicial channels, coordinating the case with the other country's C.A., assisting applicants, and making administrative arrangements for the child's safe and secure return.
- 6. Summary Rejection by Central Authority.** If it is clear that an application is not well-founded or that the Convention's requirements are not satisfied, a C.A. may summarily reject an application. In such a case, it must promptly notify either the applicant or the other country's C.A. through which the application was submitted of the rejection *and* of the reasons for that rejection. The applicant may then correct any errors and, if necessary, reapply. If the C.A. has a reason to believe that the child is in another participating state, it must transfer the application to that country's C.A.

¹ For children whose habitual residence is in the United States, the Office of Children's Issues strongly advises that applications be filed with its office, rather than with the C.A. in the country where the child is being held. In that way, OCI says it can better shepherd and oversee the process, and improve the likelihood of quick success. OCI's web site (<https://www.travel.state.gov>) has links to current downloadable application forms, advice packets for attorneys, and current toll-free phone numbers to reach their very competent staff.

- 7. Procedure Once Application Is Accepted.** Once a C.A. accepts an application, it must take all appropriate steps to locate the child, to protect the child once found, and, if possible, to arrange for the child's *voluntary* return. In the United States, ICARA authorizes the C.A. to access information available through the federal Parent Locator Service (established under the Social Security Act—42 U.S.C. 653). It also authorizes federal and state departments, agencies and instrumentalities to search their records for any information that the C.A. might request.
- 8. Court Action If No Voluntary Return.** If a voluntary return is not feasible, the C.A. in the country where the child is held will either initiate judicial proceeding to obtain the child's immediate return or authorize such an action (*i.e.*, let the applicant's attorney file suit). The court may require production or authentication of supporting documents and may request an order from a court of the child's habitual residence that the removal was "wrongful." It may also take judicial notice of the law of that residence country and consider information provided by the C.A. about the child's "social background." In the United States, ICARA grants both state and federal courts concurrent jurisdiction to hear these cases and requires U.S. and state courts to accord full faith and credit to judgments or orders of other courts made under the Convention.
- 9. Limited Exceptions To Mandatory Return.** The Convention forbids a member country's court to refuse to return a child on public policy or analogous grounds. However, the court *may* refuse to return a child if one of four very narrowly defined conditions exists. They are:

 - a. The applicant was not actually exercising custody rights at the time the child was removed, or had consented to or subsequently acquiesced in the removal (*Art 13[a]*);
 - b. The child objects to the return *and* is of sufficient age and maturity to have his/her views taken into account (*Art 13[b]*);
 - c. There is a *grave risk* that return would expose the child to physical or psychological harm, or otherwise place the child in an intolerable situation. (*Art 13[b]*); or
 - d. The return would be shocking to the conscience of the court and would violate "the fundamental principles" of the country where the child has been taken "relating to the protection of human rights and fundamental freedoms." (*Art 20*).
- 10. Time Limits.** If the court proceeding for a child's return is commenced less than one year after the child was removed or wrongfully retained, *and* none of the limited exceptions applies, the court must order the child returned "forthwith." If, however, the proceeding was commenced after at least a year had elapsed, the return is less than automatic, since the court must then also consider whether the child has become settled in the new environment. (*Art 12*)
- 11. Standards of Proof.** Under ICARA, the petitioner must establish by a preponderance of evidence that the child was wrongfully removed or retained, within the meaning of the Convention. The respondent has the burden of establishing the exceptions of *Article 13(b)* [grave risk of harm or child objects) and of *Article 20* [violate fundamental human rights principles] by "clear and convincing evidence." If the respondent tries to prove that any other exception applies, he/she must do so by a "preponderance" standard. If the suit is for "rights of access" (visitation or temporary parenting time), the petitioner must prove his/her right to such access by the same preponderance standard. (42 U.S.C. 11603[e])
- 12. Best Interests Not At Issue.** The Convention is solely remedial. A decision as to a child's return "shall not be taken [as] a determination on the merits of any custody issue." (*Art 19*)
- 13. Non-Exclusive Remedy.** The Convention is a nonexclusive remedy. It does nothing to limit the power of a judicial authority to order return of a child at any time, under other laws and procedures and regardless of the child's age. (*Arts 2, 18, 29, 34, 36 and ICARA*)

- 14. No Provision for Criminal Penalties.** The Convention deals only with the return of the child and makes no provision for criminal penalties or international extradition on criminal charges. Once the child's return has been secured, it makes no provision for the abductor's return to the child's habitual residence. While it does not criminalize any particular conduct, it does not preclude any country from doing so. Indeed, since the Convention operates only if a child is taken "wrongfully," a party's conduct may easily give rise to both civil and criminal consequences in one or more countries.

C. International Child Abduction Remedies Act (ICARA) – 22 USC 9001 et seq. (P.L. 100-300)¹

This act is the federal implementing statute for the Hague Convention. Many of its provisions are discussed above in the treatment of how the Convention itself works. Only three of its provisions will be singled out here for special mention. First, the Act confers concurrent original jurisdiction on federal and state courts to handle cases arising under the Convention. (§9003[a]) Resolving the question of which court to use will depend greatly on the makeup of those individual courts. Second, the Act mandates that both federal and state courts must accord full faith and credit to any judgment or order either denying or directing the return of a child pursuant to the Convention. (§9003[g]) Third, the Act makes it clear that the procedures and remedies spelled out in the Convention and the Act are non-exclusive. That is, the court may also employ any other appropriate remedy or procedure that is otherwise available under any other federal or state law. (§9003[h]) Finally, the *federal regulations* that implement ICARA are found at 22 C.F.R. Part 94.

D. Federal Violence Against Women Act (VAWA) – 18 U.S.C. 2261 – 2265

- 1. Originally enacted in 1994**, and most recently reauthorized on 1/5/2006 as P. L. 109-162.
- 2. Overview.** VAWA is a massive federal attempt to deal with the problem of domestic violence. Most of the huge legislative package provides for ongoing grants to law enforcement and to social service agencies throughout the country. Another part addresses the special needs of foreign women whose immigrant visas were granted because they had married U.S. husbands, and who endure abuse for fear that divorce would result in deportation. For them, special exceptions were created in the immigration and citizenship laws. Two small but important parts criminalize interstate violation of state domestic violence protective orders and mandate interstate registration and enforcement of one state's DV orders in other states. Those two parts can have a bearing on interstate custody matters.²
- 3. Criminal Provisions.** Sections 2261 to 2264 make interstate violation of protective orders or travel in interstate commerce for the purpose of violating a state protective order a federal felony, with provision for restitution orders and penalties of up to life in prison if the victim dies, or up to 20 years for life-threatening injury or permanent disfigurement. For lesser injuries, sentences scale down to a maximum of 5 years.
- 4. Civil – Interstate Registration & Enforcement of DV Orders.** 18 U.S.C. 2265 requires that one state's domestic violence protective orders be granted full faith and credit in all other states and that they be enforced in all other states. The section provides for registration of one state's protective orders in another state. It also provides a procedure under which, even without registration, one state's protective orders can be enforced by the courts and law enforcement officials of another state. The similarity of these provisions to those of the UCCJEA is no coincidence. The UCCJEA's procedures for registration [3127.35] and its procedures for enforcement without registration [3127.38 – 3127.40] were designed to be roughly parallel to the analogous provisions of VAWA [18 USC 2265].

¹ For the full text of this act, see <https://www.law.cornell.edu/uscode/text/22/chapter-97>.

² The web sites of WomensLaw.org and the [Legal Resource Center on Violence Against Women](http://LegalResourceCenter.org) can be productive starting points for greater insight and detail about VAWA, as well as related laws and issues.

5. **Relationship to Interstate Child Custody Cases.** State domestic violence orders can create a remedy for domestic violence, and, under state law, they can and often do include carefully tailored custody and visitation provisions. However, domestic violence often takes place across state lines. The federal VAWA addresses the need for interstate enforcement of those D.V. orders by providing an independent basis for the granting of full faith and credit to protective orders issued by other states, territories, and Indian Tribes.¹ Though the original enactment expressly carved “child custody” orders out of its definition of “protective order[s],” the 2006 amendments removed that exclusion. Thus, under 18 U.S.C. 2266(5), as amended, a “protective order” that must be accorded full faith and credit by all states now includes any child custody or visitation order that may be contained within a otherwise proper D.V. protective order issued by any state, tribal, or territorial court. This inclusion would seem to eliminate the earlier need for separate UCCJEA registration to make custody provisions in another state’s D.V. protective order enforceable across state lines.
6. **Relationship to Temporary Emergency Cases.** VAWA also plays an important role in determining whether an emergency exists for purposes of the UCCJEA. VAWA requires a court to give full faith and credit to a protective order issued in another state if the order is made in accordance with VAWA. Logically, this full faith and credit treatment will extend to the findings of fact set forth in the order, making them *res judicata*. Thus, when a court is deciding whether a temporary emergency exists under 3127.18, it may not relitigate the existence or the validity of those factual findings, so long as the standards of proof for the two proceedings are comparable.
7. **Interplay with UCCJEA “Inconvenient Forum” Determinations.** As noted at III E 1, above, when a court decides whether another court may be a more appropriate forum for determining a custody case, the first of the eight factors it must consider is “whether domestic violence has occurred and is likely to continue in the future and which state could best protect the parties and the child.” In evaluating this factor, the Commission’s comments offer that “the court should determine whether the parties are located in different States because one party is a victim of domestic violence or child abuse.” In recognition that the inconvenient forum issue may first come to light in non-family law courts, the UCCJEA specifically permits the issue to be raised not just on the motion of a party or the family court’s own motion, but also “upon ... the request of another court.”

E. Federal Fugitive Felon Act (18 U.S.C. 1073)

This act punishes interstate or foreign travel to avoid a felony prosecution with a fine and/or imprisonment for up to 5 years. Thus, if a parent takes a child in violation of a *felony* child-snatching statute and crosses a state line in an effort to avoid prosecution, the parent may be subject to this act. To trigger the act, the state must have issued a felony warrant for the parent or kidnapper. Moreover, the act permits prosecution only upon the written approval of a federal prosecutor. The likelihood of such approval varies considerably from A.G. office to A.G. office and also among individual prosecutors.

F. Missing Children’s Act of 1982 (28 U.S.C.534 [a])

This act requires the FBI (technically the U.S. Attorney General) to keep computer files on unidentified dead bodies in addition to its preexisting missing persons files. It also provides for storing reports of missing children in its computer system *and* for making the information available to local law enforcement agencies. It specifically authorizes the FBI to “provide confirmation as to any entry for such a person to the parent, legal guardian, or next of kin of that person.” It also makes the

¹ The express inclusion of Indian Tribes in VAWA’s mandate that all states, territories *and Indian Tribes* accord full faith and credit to each other’s DV orders differs from the PKPA’s, which includes territories and possessions within its definition of a “state,” but which makes no mention of Indian tribes. This omission has prompted some state courts to conclude that the PKPA neither requires the states to accord full faith and credit to custody orders issued by tribal courts, nor requires tribal courts to accord full faith and credit to custody orders issued by state courts. See, e.g., *Garcia v. Gutierrez* (NM, 2009) 147 N.M. 105, 217 P.3d 591, which concludes that the PKPA does *not* apply to Indian tribes, but only after surveying the split of cases and other authorities on both sides of the issue.

computer files of the National Crime Information Center (NCIC) available to state courts for use in domestic violence and stalking cases. Though the act originally excluded custody orders, it now expressly includes child custody and visitation orders within its definition of “protection orders,” so long as those custody or visitation orders are “issued as part of a protection order, restraining order, or stay away injunction pursuant to State, tribal, territorial, or local law authorizing the issuance of protection orders, restraining orders, or injunctions for the protection of victims of domestic violence, dating violence, sexual assault, or stalking.” [28 USC 534(f)(3)(ii)]

G. National Child Search Assistance Act of 1990 (42 U.S.C. 5779–80)

This act (part of the Crime Control Act of 1990) works in tandem with the Missing Children’s Act by forbidding federal, state and local law enforcement agencies from establishing any waiting period before accepting a missing child report. It also requires that every missing child report immediately be entered into the state’s law enforcement computer system and into the NCIC system, and that it be made available to the state’s Missing Children Information Clearinghouse.¹ The act’s provisions in this regard were strengthened in 2003 by P. L. 108-21 [The Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act], which – among many other provisions – extended the scope of the 1990 act to include abducted children between 18 and 21 and extended the statute of limitations on criminal child abduction to the lifetime of the child.

H. Extradition Treaties Interpretation Act of 1998 (P.L. 105-323) [Eff. 10/30/1998]

Before the mid-1970s, parental abduction was generally not considered to be a criminal offense in most of the United States. Likewise, extradition treaties that became effective through the mid-1970s and which listed “kidnapping” as an extraditable offense were never intended to include parental kidnapping within their scope. For that reason, the U.S. government continued to interpret those treaties as not including parental kidnapping, even after every one of the 50 states had criminalized parental kidnapping. Most of the more recent extradition treaties contain ‘dual criminality’ provisions, under which extradition is authorized if both countries make a listed offense a felony. For those treaties, the U.S. government’s practice had been to interpret them as including parental kidnapping, so long as the other country also considered parental abduction to be a criminal offense. This act rectifies that disparity by expressly authorizing the United States to interpret the term “kidnapping” in any extradition treaty to include parental kidnapping.

I. Child-Snatching Laws

1. Federal: International Parental Kidnapping Crime Act of 1993 (18 U.S.C. 1204)

This act makes it a federal felony to remove a child (under the age of 16) from the United States or to retain a child (who has been in the United States) outside of the United States, with the intention to obstruct the lawful exercise of parental rights. The penalty for violation is a fine and/or up to 3 years in prison. It provides affirmative defenses for flight from an incident or pattern of domestic violence and for retention by a parent with visitation or custody rights who was unable to return the child because of circumstances beyond his/her control so long as the defendant tried to notify the other parent within a day and actually returned the child as soon as possible. It was designed to operate when the Hague Convention and ICARA could not effectively secure the child’s return. The act includes a declaration that it shall not detract from the Hague Convention, and the legislative history includes a “Sense of Congress” declaration that the civil remedies of the Hague Convention and of ICARA should be the preferred form of recourse in cases of international child abduction.

¹ Ohio’s “Clearinghouse” is the Attorney General’s Missing Persons Unit in Columbus. It can be reached at (614) 466-2645 or (800)325-5604, or through the unit’s website, www.mcc.ag.state.oh.us/

2. State: R.C. §2919.23– Interference with Custody

Elements. Division (A)(1) of this act makes it a crime to interfere with the custodial rights of a parent, guardian or custodian of the person of any child under the age of 18.¹ The elements of that crime are:

- a) Enticing, taking, keeping or harboring,
- b) A child under the age of 18,
- c) From the child’s parent, guardian, or custodian of the person,
- d) With knowledge that the actor is without privilege to do so **or** being reckless in that regard

Affirmative Defenses. It is an affirmative defense to a charge of enticing or taking that the actor *reasonably* believed that his/her “conduct was necessary to preserve the child’s health or safety.” As to a charge of enticing or harboring, it is an affirmative defense that the actor “in good faith gave notice to law enforcement or judicial authorities within a reasonable time after the child ... came under the actor’s shelter, protection, or influence.”

Misdemeanor/Felony. The crime is classified in severity based on the following:

- a) **Removal From State – 5th Degree Felony.** If the child is removed from the state **or** if the actor has been previously convicted of the custodial interference, the crime is elevated to the status of a 5th Degree Felony. This elevation to felony status makes it possible to engage the formidable array of federal and interstate remedies that become available to law enforcement and to left-behind parents once a felony warrant has been issued. Extradition and the procedures of the Federal Fugitive Felon Act are but two examples of this array.
- b) **Physical Harm To The Child – 4th Degree Felony.** If the child/victim is physically harmed as a result of the violation the crime becomes a 4th Degree Felony, even if the child has not been removed from the state.
- c) **All Other Circumstances – 1st Degree Misdemeanor.**

¹ The act also criminalizes removing a child from an institution for delinquent, unruly, neglected, abused or dependent children or harboring a child so removed, as well as removing or harboring any person committed by law to a mental institution. Those other acts are, however, punishable as misdemeanors.