

## LEGAL FACT SHEET

### INTERSTATE RULES REGARDING NON-AGENCY (NON FOSTER CARE) CUSTODY OF CHILDREN\*

States are bound by federal law to respect the child custody determinations of other states.<sup>1</sup> For example, if a parent, grandparent or other non-parental caregivers has been given legal custody or guardianship of a child in one state and travels from that state to another, or if they send children to stay or visit with family members in another state, those other states are bound to observe those custody decisions equally in their own states as well.

Beyond this “full faith and credit” to the laws of other states, each state may establish its own laws regarding the custody of children. Child custody is considered a state matter and is not usually regulated by federal law. To provide common rules across state lines, all but four<sup>2</sup> states have adopted a Uniform Law,<sup>3</sup> the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). In New York, this law is codified under Article 5A of the Domestic Relations Law.<sup>4</sup> This law describes how states are required to recognize and enforce, according to their terms and without modification, custody decrees made by courts in other states.

The UCCJEA, enacted in New York with minor modifications as Domestic Relations Law Article 5-A (sections 75 thru 78-a), superseded and replaced the former Uniform Child Custody Jurisdiction Act (UCCJA)<sup>5</sup>.

These laws were enacted over the last thirty years to replace what a committee of experts had described in 1968 as a “confused legal situation” that had allowed “self-help and the rule of ‘seize-and-run’” to prevail. Historically, child custody jurisdiction had been indeterminate. Since custody decisions are never final, the issue could be re-litigated before any court and in any state that might obtain long-arm personal jurisdiction. Full faith and credit was unavailable and comity was rarely granted<sup>6</sup>. Since jurisdiction could be predicated upon mere physical presence, interstate child snatching had become rampant.<sup>7</sup>

In addition, UCCJA was drafted in response to the growing public concern that thousands of children were being “shifted from state to state and from one family to another every year while their divorcing parents or other persons battled over their custody . . .” in various state courts. The drafters were troubled by the lasting psychological trauma of children devastated by custody battles between their hostile and scattered family members: “a child who has never been given the chance to develop a sense of belonging and whose personal attachments when beginning to form are cruelly disrupted, may well be crippled for life, to his own lasting detriment and the detriment of society.” However, the drafters also felt the need to balance children's stability with the need for certainty in custody decisions.

<sup>1</sup> 28 U.S.C. 1738A, Full faith and credit given to child custody determinations: “(a) The appropriate authorities of every State shall enforce according to its terms, and shall not modify except as provided in subsections (f), (g), and (h) of this section, any custody determination or visitation determination made consistently with the provisions of this section by a court of another State.”

<sup>2</sup> Missouri, Vermont, New Hampshire, Massachusetts have not enacted UCCJEA. The UCCJA was enacted in all fifty states, the District of Columbia and Puerto Rico, in the early ‘80s.

<sup>3</sup> Uniform Laws are promulgated and advanced by an intergovernmental judicial commission, the Uniform Law Commission, or the National Conference of Commissioners on Uniform State Laws (NCCUSL), and are enacted by each state legislature. The need for Uniform Acts results in large part from the inherent nature of the American federal system. The United States Congress lacks authority under the U.S. Constitution to directly legislate in many areas, because all powers not explicitly granted to the federal government are reserved to state governments under the Tenth Amendment. At the same time, there is a desire to have laws across the states that are as similar as practicable. The widespread enactment of uniform state laws have reduced the preemption of state law by federal legislation. To date approximately 93 Uniform Laws have been drafted by NCCUSL, with approval from the American Bar Association (ABA), and enacted by various state legislatures.

<sup>4</sup> McKinney’s Domestic Relations Law §§76 *et seq.*

<sup>5</sup> Unif. Child Custody Jurisdiction Act (1968), 9 U.L.A. Part I pp. 115-331 (1988) [hereinafter UCCJA]

<sup>6</sup> *People of State of N.Y. Ex Rel. Halvey v. Halvey*, 330 U.S. 610, 614-15 (1947)

<sup>7</sup> ...leading Justice Jackson to cryptically remark that the rule of “seize and run” rendered child possession nine-tenths of the law (*May v. Anderson*, 345 U.S. 528, 542 (1953), Jackson, J., dissenting). The New York courts were caught in the web of jurisdictional anarchy, tempered only occasionally by invoking the principle of *forum non-conveniens* (see, for example, *Bachman v. Mejias*, 1 N.Y.2d 575, 154 N.Y.S.2d 903, 136 N.E.2d 866 (1956) where the Court of Appeals declined to grant full faith and credit or comity to a Puerto Rican decree).

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As their titles suggest, UCCJA and UCCJEA are similar. However, the UCCJEA incorporates several new innovative provisions. Unlike its predecessor, it is also fully compatible with the Federal Parental Kidnapping Prevention Act (PKPA), aligns child custody jurisdiction mechanisms with the Uniform Interstate Family Support Act (UIFSA) enforcing child support orders across state lines<sup>8</sup>, covers international custody disputes<sup>9</sup>, and provides greatly enhanced enforcement mechanisms<sup>10</sup>.

### What Court Has Jurisdiction?

The court that first accepted jurisdiction in the home state where the child resided before transfer retains exclusive, continuing jurisdiction over the placement and financial responsibility for the child's care, right on up until they either reach adulthood at age 18, the court decides that the child retains no significant relationship with the state at all, or decides that none of the parents or persons acting as parents any longer live in the home state<sup>11</sup>. In addition, if the courts decide that the jurisdiction in the home state court is an inconvenient one for a number of special reasons, under the UCCJEA that jurisdiction can be transferred by mutual agreement between the first court and the court in the new state.<sup>12</sup>

### Who May Petition: A Person Acting as a Parent

The federal law governing full faith and credit for child custody proceedings depends on one critical definition, that of "person acting as a parent"<sup>13</sup>. This is important for our purposes involving grandparents and other non-parent custodians. According to New York Domestic Relations Law section 75-a(13):

"Person acting as a parent" means a person, other than a parent, who:<sup>14</sup>

- has physical custody of the child or has had physical custody for a period of six consecutive months, including any temporary absence, within one year immediately before the commencement of a child custody proceeding; and
- has been awarded legal custody by a court or claims a right to legal custody under the law of this state."

Hence a person who has been awarded custody by a court, but does not presently have actual custody and has not had actual custody for the requisite six months, does not fit the definition (for example, a person who has legal custody but has voluntarily relinquished actual custody).

On the other hand, an individual who possesses actual (de facto) custody on the critical date (even without the benefit of a court order) is deemed to be "a person acting as a parent."

<sup>8</sup> In New York, UIFSA is enacted in McKinney's Family Court Act, Art. 5B, §§580-101 thru 580-905. In federal law, it is supported by the Full Faith and Credit for Child Support Orders Act (FFCCSOA), 28 U.S.C.A. §1738B: "(a) The appropriate authorities of each State--(1) shall enforce according to its terms a child support order made consistently with this section by a court of another State; and (2) shall not seek or make a modification of such an order..."

<sup>9</sup> McKinney's Domestic Relations Act §77-a, "Enforcement Under Hague Convention". "...a court of this state may enforce an order for the return of the child made under the Hague Convention on the Civil Aspects of International Child Abduction as if it were a child custody determination." This situation becomes confused however by "country of habitual residence" definition, when the parents move back and forth between two countries. *Gitter v. Gitter*, 396 F.3d 124 (2d Cir. 2005).

<sup>10</sup> One key provision: even if did not have principal jurisdiction to modify another state's child custody determination, under the new law, a New York court may under McKinney's Domestic Relations Act §77-c issue a temporary order in New York enforcing: a) a visitation schedule made by a court of another state; or b) the visitation provisions of a child custody determination of another state that does not provide for a specific visitation schedule, valid while the interested party has time to get an order from the home state. The child custody order from the home state must be registered in the new state (§77-d), entitled parties must be noticed (§75-g). See also, McKinney's Domestic Relations Law §§77 to 77-p.

<sup>11</sup> McKinney's Domestic Relations Law §76-a

<sup>12</sup> McKinney's Domestic Relations Law §76-f

<sup>13</sup> 28 U.S.C.A. §1738A(b)(6)

<sup>14</sup> These rules have often sown great confusion, see e.g., *Matter of B.B.R.*, 566 A.2d 1032 (1989)

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The definition includes a non-parent relative (such as a grandparent, aunt or sibling) or a nonrelative who claims custody, perhaps based on “extraordinary circumstances”<sup>15</sup>.

One critical aspect of any out-of-state custody decree under both the federal and the uniform acts is the degree to which the rendering court complied with the provisions of the UCCJA and PKPA, particularly the jurisdictional provisions<sup>16</sup>.

It does not apply to children that have reached the age of 18 years old. They can go anywhere they like, of course.

It also has been held by the Supreme Court that a dispute between parents under PKPA may not create an implied private cause of action in federal court for declaratory relief to resolve disputed competing state custody determinations<sup>17</sup>.

Adoption falls under the jurisdictional dictates of both the UCCJA and the PKPA.<sup>18</sup> If a biological parent seeks to regain custody before the adoption is final, custody of the child may be returned to him or her.

Children associated with Indian Tribes also are exempt from this law. The tribal council is treated under many laws as governing another state for purposes of child custody.

The above information is not legal advice. It is not a substitute for consulting an attorney. Up-to-date legal advice and legal information can only be obtained by consulting with an attorney. Any opinions, legal opinions, findings, conclusions or recommendations expressed in this publication or on the NYS Kinship Navigator website or by any person or entity to whom you may be referred are those of the Kinship Navigator, Catholic Family Center and/or the person or entity you are referred to and do not necessarily represent the official views, opinions, legal opinions or policy of the State of New York and/or the New York State Office of Children and Family Services (OCFS). NYS Kinship Navigator is a Catholic Family Center program, funded by the New York State Office of Children and Family Services. Catholic Family Center is the only agency authorized by New York State to provide a statewide information and referral service to kinship caregivers. The information herein is published by the NYS Kinship Navigator.

<sup>15</sup> see *Bennett v. Jeffreys*, 40 N.Y.2d 543 (1976), McKinney’s Domestic Relations Law §72

<sup>16</sup> Thus it was held, in *Williams v Williams*, 110 NC App 406, 430 SE2d 277, 40 ALR5th 881(1993) that an original Indiana custody decree was not entitled to full faith and credit in North Carolina, because the rendering court could not have exercised jurisdiction to determine custody of one child who had never lived outside of North Carolina, or custody of another child without determining that it had subject matter jurisdiction.

<sup>17</sup> *Thompson v. Thompson*, 484 U.S. 174, 108 S.Ct. 513 (1988)

<sup>18</sup> 9 U.L.A. at 133. See *In re Clausen*, 502 N.W.2d 649, 656 (Mich. 1993) (“[a]n adoption proceeding is included in the definition of a custody proceeding under the UCCJA”); *E.E.B. v. D.A.*, 446 A.2d 871, 878 (N.J. 1982), cert. denied sub nom. *Angle v. Bowen*, 459 U.S. 1210 (1983) (The UCCJA is broad enough to include a dispute between natural parents and adoptive parents.); *Bosse v. Superior Court for Santa Clara County*, 152 Cal. Rptr. 665, 668 (Cal. Ct. App. 1979) (In a child custody proceeding, such as adoption, “question of clean hands” should be subordinated to the best interests inquiry.). See also *Brigitte Bodenheimer & Janet Neeley-Kvarme, Jurisdiction over Child Custody and Adoption after Shaffer and Kulko*, 12 U.C. DAVIS L. REV. 229, 232 (1979).