

SILENT PARTNER

CUSTODY ENFORCEMENT – DOMESTIC (IN THE U.S.)

INTRODUCTION: *SILENT PARTNER* is a lawyer-to-lawyer resource for military legal assistance attorneys. It is an attempt to explain basic concepts about the law of domestic relations. It is, of course, very general in nature since no handout can answer every specific question. Comments, corrections and suggestions regarding this pamphlet should be sent to the address at the end of the last page.

The most important part of custody enforcement is the existence of a court decree for custody, and “decree” includes a separation agreement that is incorporated into a divorce decree. If the client has one, she (or he) can get the courts to issue an enforcement order. Even though such orders may not obtain the immediate return of the child, they are a start. The client without an initial custody decree has a long way to go to get that child back; the law presumes equal custody rights for mom and dad. With a custody decree, on the other hand, mom (or dad) has the power to ask the court for a hearing on contempt, on suspension of future visitation rights, and so on.

[NOTE: The materials below are adapted from the TJAGSA outline on custody.]

CUSTODY ENFORCEMENT UNDER THE UCCJA AND THE PKPA

I. UNIFORM CHILD CUSTODY JURISDICTION ACT

A. Introduction.

1. History.
 - a. Promulgated by the National Conference of Commissioners on Uniform State Laws (NCCUSL) in 1968. All 50 states have adopted the UCCJA, although some have modified the uniform language in places.
 - b. Uniform Child Custody Jurisdiction and Enforcement Act--new uniform act adopted by the NCCUSL in 1997. Pending passage in 10 states.
2. Purposes.
 - a. Avoid jurisdictional conflicts and promote cooperation between courts and the states.
 - b. Assure that child custody litigation takes place in a state where the child and family have the closest contacts.
 - c. Deter abductions, discourage continuing controversies, avoid re-litigation of prior custody disputes, and provide a stable home environment for the child.
3. Applicability.
 - a. UCCJA jurisdiction applies to all custody determinations.
 - b. Jurisdiction may exist over dissolution of the marriage but not exist over custody. (See Stevens v. Stevens, 682 N.E. 2d 1309 (Ct of App Ind 1997)).

B. Key Definitions.

1. **Custody determination:** a court decision and court orders or instructions providing for the custody of a child, including visitation rights, but not including support or other monetary obligations.
2. **Home state:** the state where the child or children lived with the parents, one parent, or a person acting as a parent for at least six months immediately

preceding the date on which the action is commenced, or if the child is less than six months old, the state where the child has lived from time of birth.

C. Jurisdictional Provisions.

1. Home State Provision:

- a. A court may exercise jurisdiction over a custody proceeding if it has subject matter jurisdiction under state law and if it is the "home state" at the time the proceeding is commenced, or
- b. Had been the home within 6 months preceding the commencement of the action, and the child is absent because of "removal or retention by a person claiming custody or for other reasons," and a parent or person acting as parent continues to live in the state.
- c. But note Sams v. Boston, 384 S.E.2d 151 (W. Va. 1989) (a state does not attain "home state" status if the child was taken there as a result of parental kidnaping; instead, the state from where the child was kidnaped remains the home state).
- d. Temporary absence from the state. A temporary absence from the state does not remove the "home state" status for jurisdiction purposes. The UCCJA does not define "temporary absence".
 - (1) Split in jurisdictions. Some courts hold that only absences of less than 6 months are temporary. Others hold that absences over 6 months can be temporary depending on the intent behind the absence. (See Zelaya v. Frost, 681 N.E. 2d 1030 (Ct of App Ill 1997)).

2. Significant Connection:

- a. Jurisdiction may be exercised if the court has subject matter jurisdiction and it is in the best interests of the child because the child and his parents, or the child and at least one contestant, have a significant connection with the state, and
- b. There is available in the state substantial evidence regarding the child's present or future care, protection, training, and personal relationships.
- c. What is a "significant connection"? Consider In re B.B.R., 566 A.2d 1032 (D.C.1989), where the prospective adoptive parents removed the child from California 2 days after his birth. The birth mother immediately changed her mind and sought the child's return. On these facts, does California have a "significant connection" with the child?
- d. The decision states: "[After removal,] the child...remained significantly connected with California since it was there that his mother and the [adoptive parents] signed a contractual agreement, governed by California law, establishing the terms of his removal to and continued presence in [Washington D.C., the adoptive parents' home]. The rights of the [adoptive parents] to bring him to the District initially and to continue to hold him here, if legitimate at all, were founded in that agreement. The child remained yet further connected to California by virtue of the presence there of a sibling ([the mother's] older child). We conclude that even assuming no one of these ties...would by itself suffice, taken as a whole they constitute a 'significant connection.' (Even if these ties were deemed insufficient, we think a court could legitimately take into account the circumstances under which further ties to the state were thwarted by wrongful acts of a contesting party. Had the [adoptive parents] returned the child to [the mother] upon her initial request, the ties with California would have been overwhelming)."

3. Emergency Provision:

- a. Jurisdiction may be exercised, assuming the court has subject matter jurisdiction, if the child is physically present in the state, and it has been abandoned, or
 - b. Emergency action is necessary to protect the child from actual or threatened mistreatment, abuse, or neglect.
4. Best Interests:
 - a. A fourth basis for the exercise of jurisdiction exists if it would be in the child's best interests and no other state has jurisdiction under any of the first three grounds, or
 - b. Another state has declined jurisdiction on the ground that custody would more appropriately be determined in the state proposing to exercise jurisdiction.
 5. Physical presence of the child.
 - a. The child's physical presence in the state is not by itself a sufficient basis to exercise jurisdiction.
 - b. On the other hand, while the child's physical presence in the state may be desirable, it is not a prerequisite for jurisdiction in a custody proceeding unless the court is using the "emergency" provision.

D. Resolving Jurisdictional Conflicts.

1. It is possible for two states to be able to claim jurisdiction under these provisions.
2. Simultaneous Proceedings:
 - a. A court shall not exercise jurisdiction if a custody proceeding is already proceeding in another state (unless that state stays its proceeding to allow jurisdiction in the state in question). UCCJA Sec. 6.
 - b. Courts are directed to actively explore the issue of parallel proceedings and are encouraged to communicate with other courts hearing related cases.
 - c. If a court discovers that another proceeding had already begun before the instant case commenced, it shall stay the proceedings and communicate with the other to discuss which court is most appropriate.
3. A court may decline to exercise jurisdiction it otherwise has under the Act if it finds that it is an inconvenient forum and another state is a more appropriate forum. UCCJA Sec. 7.
 - a. The court can act sua sponte.
 - b. The court is encouraged to contact the other court in appropriate cases.
 - c. The court may dismiss or stay the custody proceeding and continue with a divorce or dissolution action.
4. A court may decline jurisdiction in an initial decree action if it finds that the petitioner has wrongfully removed the child from another state or has engaged in similar reprehensible conduct. UCCJA Sec. 8(a).

E. Modifying Initial Decrees.

1. In a custody modification action, a court
 - a. Shall decline jurisdiction, unless required to proceed in the interests of the child, if the petitioner, without consent of the party entitled to custody, has improperly removed the child or retained custody after visitation.
 - b. May decline jurisdiction if the petitioner has violated any other provision of a custody decree. UCCJA Sec. 8.
2. A court shall not modify an initial decree issued by a court of another state unless:
 - a. The court has jurisdiction under this Act, and

- b. The court that rendered the initial decree either no longer has jurisdiction under the Act or has declined to modify the decree. UCCJA Sec. 14.
- c. Moore v. Miller, 675 N.E.2d 755 (Ct. of App. Ind. 1997). Moore, an Air Force member, and Miller were divorced in Guam in 1990. Custody of the kids went to Miller and they moved to Arizona and then Iowa. In 1994, Miller left the kids with Moore's parents in Iowa and went to Nevada. Iowa modified Guam's custody order based on abandonment and awarded custody to Moore. Moore returned with the kids to Arizona. In 1995, while the kids visited her in Indiana, Miller filed for modification under emergency provision and Indiana awarded custody to Miller. Indiana's Court of Appeals ruled that Indiana did not have jurisdiction to modify the Iowa custody order, reversed the trial court and returned the children to Moore.
- 3. In a modification proceeding involving a decree issued by another state, the court shall give due consideration to the transcript of the previous proceeding.

F. Registering out-of-state Decrees.

- 1. Court clerks are required to maintain a registry of out-of-state custody decrees they receive, together with other communications received concerning the decrees and subsequent proceedings.
- 2. Certified copies of out-of-state decrees may be filed with the local court clerk. Once filed, the decree shall be treated and enforced in like manner with decrees issued by the local court, including assessment of costs against a violating party.

G. Notice Requirements.

- 1. Reasonable notice and opportunity to be heard must be given to any parent or person with physical custody of the child or children.
- 2. Notice to persons outside the state.
 - a. Personal service in accordance with the law of the forum state.
 - b. Any method permissible by law of the place where service is made (for courts of general jurisdiction) is recognized.
 - c. Notice by any form of "return receipt required" mail is sufficient.
 - d. Notice must be served at least 10 (20) days before any hearing on the merits.
 - e. Example: Copeland v. Copeland, 314 S.E.2d 297 (N.C. Ct. App. 1984) (Ex parte order obtained by mother in Mass. without notice to N.C. father held not entitled to full faith and credit in N.C.).

H. "Teeth" in the UCCJA.

- 1. Binding force, res judicata and recognition of out-of-state decrees.
 - a. A custody decree by a court with jurisdiction binds all parties served in the state, served in accordance with the notice provisions of the UCCJA, or who have submitted to the court's jurisdiction, or who had an opportunity to be heard.
 - b. Courts of one state are required to recognize and enforce decree of another state rendered under the UCCJA or a substantially similar act.
 - c. Example: Lofts v. Superior Court of Arizona, 682 P.2d 412 (Ariz. 1984) (Arizona Supreme Court found that Arizona courts were bound by res judicata on a prior jurisdictional determination by a Washington State court).
- 2. If the court finds that it is an inconvenient forum, it can require the party bringing the action to pay all costs, including travel expenses of the child, opposing parties, and other witnesses, and to pay attorneys fees.

3. Same provision for all costs and attorneys fees where party has wrongfully taken child or engaged in other reprehensible conduct.
4. Appearance of the child and other parties.
 - a. The court may order any person within the state to appear, and if that person has physical custody of the child, to appear with the child.
 - b. If a party outside the state desires to appear, the court may require the party requesting the hearing to pay any costs.
 - c. A court in one state may request a court in another state to order a party in the 2d state to appear before the requesting state court, and if the party has custody of the child, to appear with the child.
 - d. A court may request a court of another state to hold evidentiary hearings or to have social services studies made.

I. International Application.

1. UCCJA Sec. 23. The UCCJA applies internationally if:
 - a. There was reasonable notice, and
 - b. The international jurisdiction has laws substantially similar to the Act, and
 - c. An opportunity to be heard was given to all affected persons.
 - d. Examples:
 - (1) Middleton v. Middleton, 314 S.E. 2d 362 (Va. 1984) (Virginia Supreme Court applied UCCJA to two international custody disputes, finding that England was a "state" within the meaning of the UCCJA and that its jurisdictional rules were substantially similar to the UCCJA).
 - (2) Klont v. Klont, 342 N.W. 2d 549 (Mich. App. 1984) (Michigan trial court should have deferred to a pending custody proceeding in West Germany).
 - (3) Dorrity v. Dorrity, 695 So.2d 411 (Dist. Ct. of App. Florida 1997), rehearing denied June 10, 1997. Charles Dorrity, an Army member, married a German national and they had a child. Prior to ETS, they moved to Florida. After 6 weeks, Charles put his wife on a plane back to Germany and filed for custody in Florida based on emergency. His wife filed in Germany and Germany issued a custody order. Florida issued a custody order in favor of Charles. The appellate court ruled that Germany was the state of jurisdiction and Florida's order was without jurisdiction.
 - e. Note the effect of DOD Dir. 5525.9 and AR 608-99.
 - f. Consider use of the Hague Convention.

II. THE PARENTAL KIDNAPING PREVENTION ACT OF 1980.

- A. Impetus for the PKPA.
 1. Congressional dissatisfaction over increasing numbers of parental kidnappings, inconsistent and conflicting court orders, excessive relitigation.
 2. Lack of criminal enforcement mechanism in UCCJA.
 3. Desire to track down runaway parents.
- B. Jurisdictional Aspects of PKPA.
 1. Full faith and credit must be given to valid sister state child custody determinations.
 2. Such determinations are valid as long as the rendering state had jurisdiction pursuant to one of the jurisdictional bases found in the PKPA.
 - a. "Home state" on the date of commencement of the proceeding; or had been the home state within 6 months of the commencement,

- and child has been removed by a contestant, and a contestant continues to reside in the state.
- b. If no state qualifies as a home state, jurisdiction can be exercised if the child and at least one contestant have a significant connection with the state other than mere physical presence; and there is available in the state substantial evidence concerning the child's present and future care, protection, training, and personal relationships.
 - c. The child is physically present in the state and is abandoned or an emergency situation exists.
 - d. If no state has jurisdiction on the preceding grounds, or all states with potential jurisdiction have declined to exercise it, and the exercise of jurisdiction is in the best interests of the child.
- C. Supremacy Clause: PKPA controls in a conflict with UCCJA provisions. Otherwise, read the two acts together..
- D. A court in one state is entitled to modify a custody award by a court of another state if:
1. It has jurisdiction, and
 2. The court in the other state no longer has jurisdiction or has declined to exercise jurisdiction to make a modification.
 - a. The statute provides that the state with original jurisdiction continues as long as the child or one parent remains in the state.
 - (1) Rohlfs v. Rohlfs, 666 So.2d 568 (Dist. Ct. of App. Florida 1996). Marine couple fighting over custody of child. Florida continues with jurisdiction due the mother's residence despite her absence from Florida due to military assignment.
 - (2) Lemley v. Miller, 932 S.W.2d 284 (Ct. of App. Of Texas 1996). An 11-month absence from the state while accompanying a military spouse stationed in Germany was a "temporary" absence and Texas is still home state.
 - b. There is some authority questioning the constitutionality and wisdom of this rule.
 - (1) Robinson v. Robinson, 511 N.Y.S. 2d 172 (3d Dept. 1987) (New York court that issued the original order declined to exercise continuing jurisdiction, even though the noncustodial parent still lived there, where the custodial parent and child had resided in Florida since 1979).
 - (2) Hemingway v. Robertson, 778 S.W.2d 199 (Tex. Ct. App. 1989) (under Texas version of the UCCJA, state courts do not retain jurisdiction over custody after the custodial parent and child establish a "home state" elsewhere, but they do retain jurisdiction over visitation as long as the noncustodial parent remains in Texas).
 - 3. A court cannot exercise jurisdiction if there is already another custody action pending in another state and that state is exercising jurisdiction consistent with the PKPA. See, e.g., In re B.B.R., 566 A.2d 1032 (D.C. 1989).
- E. Federal Parent Locator Service (PLS) Established by PKPA.
1. States may use PLS and may charge a fee for it.
 2. Only authorized persons are entitled to use PLS.
- F. PKPA's Enforcement Mechanism: The Unlawful Flight Warrant.
1. Parental kidnaping is an act for which a warrant for unlawful flight to avoid prosecution may be issued under 18 U.S.C. ' 1073 if:
 - a. There is evidence that the child was taken across interstate or international borders, and

- b. The state from which the child was taken has a statute which makes such taking a felony.

G. Experience under PKPA.

1. FBI/DOJ.

- a. Initial reluctance to handle PKPA cases. After passage, DOJ determined that it would issue unlawful flight warrants only if:
 - (1) There was probable cause to believe that a violation of the unlawful flight statute had occurred, and
 - (2) The state law enforcement agency requesting the warrant was committed to extraditing and prosecuting the defendant, and
 - (3) There was independent credible evidence that the child was in physical danger or in a condition of abuse or neglect, and
 - (4) Local U.S. attorneys were required to get DOJ Criminal Division authorization before such warrants could be issued.
- b. Congressional pressure forced change.
 - (1) Now local U.S. attorneys make warrant decision; DOJ okay not required.
 - (2) Only limitation now is that U.S. attorneys should not issue such warrants where there is reason to believe that the state will not extradite and prosecute once the FBI has apprehended the fugitive.

H. Judicial Enforcement.

- 1. Does PKPA create a federal cause of action to resolve which of two conflicting orders is entitled to full faith and credit? No. Thompson v. Thompson, 484 U.S. 174 (1988). (PKPA does not create a cause of action that may be pursued in federal courts to resolve a dispute between two competing custody orders, and neither does it supersede the family law exception to diversity jurisdiction).
- 2. PKPA is not a defense to extradition proceedings based on self-help enforcement of a custody order entitled to full faith and credit, in violation of a different custody order that was not issued in compliance with PKPA. California v. Superior Court, 482 U.S. 400 (1987).

III. LITIGATION UNDER THE UCCJA AND PKPA.

A. Defenses to jurisdiction.

- 1. Another court qualifies as a home state.
 - a. Presumably, a court would want to avoid a "moot" decision.
 - b. PKPA does not "invalidate" state orders--it only says they are not entitled to full faith and credit.
- 2. An action is already pending in another state.
- 3. The court is an inconvenient forum.
- 4. Misconduct by the plaintiff.
- 5. Another state has continuing jurisdiction.

B. Procedural matters.

- 1. Service of notice on the other party is essential. UCCJA ' 5; 28 U.S.C. ' 1738A(e).
- 2. Affidavits/pleadings. UCCJA ' 9.
 - a. Past litigation.
 - b. Pending proceedings.
 - c. Who has possession?
 - d. Child's present address.
 - e. Child's residences for past 5 years.
 - f. Names and addresses of those with whom the child lived.

- g. Adversarial matters?
- 3. Interstate testimony.
- 4. Ordering social studies.
- 5. Initial brief for the court.

IV. MILITARY SPECIFIC REQUIREMENTS REGARDING CHILD CUSTODY.

- A. Army Regulation 608-99.
 - 1. The Army has promulgated a policy on child custody and parental kidnaping. Commanders must assist in cases where soldiers have wrongfully taken or retained custody of a child. Para. 1-4e(10); AR 608-99.
 - a. Inform the victim parent of soldier's port-call, future duty assignment, and/or child's general whereabouts.
 - b. May, after consultation with SJA, reveal soldier's home address.
 - 2. Abduction of a child: to be a violation. .
 - a. there must be a preexisting court order establishing custody rights in another individual, and
 - b. the soldier must know of its existence and act in disregard of its provisions. Para. 2-5a, 2-5b; see 112 Mil. L. Rev. at 56-57.
 - c. Exception: illegitimate children. Para. 2-5b.
 - 3. Withholding, detaining, or concealing a child: to be a violation
 - a. a court order must have been issued giving the complaining party custody, and
 - b. the soldier continues to withhold, detain, or conceal the child after learning of the order. See 112 Mil. L. Rev. at 56-57.
 - 4. Regulation applies to wrongful abduction, withholding, etc. of children-relatives of the soldier.
 - a. Natural and adopted children.
 - b. and wards. . .
 - c. and siblings. . .
 - d. and stepchildren. . .
 - e. who are unmarried and under 14 years old.
 - 5. The regulation does not specifically address situations where the soldier's spouse has abducted or withheld a child.
- B. Joint custody decrees. See 112 Mil. L. Rev. at 57.
 - 1. Violation still possible if the order gives each parent the exclusive right to custody or possession or visitation for specified periods.
 - 2. Violation also possible by wrongfully detaining or concealing the child to the prejudice of the other parent's legal rights.
 - 3. Army policy. 112 Mil. L. Rev. at 58.
 - a. Assist in returning the child to the lawful custodian.
 - b. But do not over-react, especially in cases where there has been a long delay in requesting the child's return or where there genuinely appears to be problems in the home the child is to be returned to.
 - c. Take no punitive action when faced with conflicting court orders.
- C. Sanctions for violations. Para. 1-7.
 - 1. The full range of administrative sanctions are available.
 - 2. The abduction and withholding/detaining/ concealing provisions are punitive.
 - 3. Prosecution under the Assimilative Crimes Act is also possible.
 - 4. But a soldier can avoid punishment under the regulation by voluntarily returning the child to the lawful custodian within 96 hours of receiving a demand for the child's return. Para. 2-5d(2).

D. DOD Guidance

1. Citations.
 - a. National Defense Authorization Act for Fiscal Year 1989, Public Law 100-456, § 721 (1988).
 - b. Department of Defense Directive 5525.9, 32 C.F.R. Part 146
2. Statutory provision.
 - a. [T]he Secretaries of the military departments [shall issue] uniform regulations...to provide for the delivery of members of the Armed Forces to civilian authority when such members have been accused of offenses against civil authority. Such regulations shall specifically provide for the delivery of such members to civilian authority, in appropriate cases, when such members are accused of parental kidnaping and other similar offenses, including criminal contempt arising from such offenses and from child custody matters, and shall specifically address the needs...when members ...assigned overseas are accused of offenses by civilian authorities.
3. Excerpts of DOD Dir. 5525.9.
 - a. Court. Any judicial body in the United States with jurisdiction to impose criminal sanctions on a DOD member, employee, or family member.
 - b. Felony. A criminal offense that is punishable by incarceration for more than 1 year, regardless of the sentence that is imposed for commission of that offense.
 - c. Para. D, Policy. It is DOD policy that: With due regard for mission requirements...the Department of Defense shall cooperate with courts and State and local officials in enforcing court orders relating to DOD members and employees stationed outside the United States, as well as their family members who accompany them, who have been charged with, or convicted of, a felony in a court, have been held in contempt by a court for failure to obey the court's order, or have been ordered to show cause why they should not be held in contempt for failing to obey the court's order.
 - d. Para. F, Procedures: (a) On receipt of a request for assistance from a court, or a Federal, State, or local official concerning a court order . . . , the [DOD Component] shall determine whether the request is based on an order issued by a court of competent jurisdiction. Attempts shall be made to resolve the matter to the satisfaction of the court without the return of . . . the member, employee, or family member (subject). Before action is taken under this section, the subject shall be afforded an opportunity to provide evidence of legal efforts to resist the court order, or otherwise show legitimate cause for noncompliance. If . . . such efforts warrant a delay in taking action, the [DOD Component] may grant a brief delay (not more than 90 days). All delays promptly shall be reported to . . . [the DOD General Counsel].
 - (1) If the request pertains to a felony or to contempt involving [parental kidnaping in violation of a custody decree], and the matter cannot be resolved with the court without the return of the subject to the United States, the [DOD Component] shall promptly take action prescribed in paragraphs (b) through (d) of this section.
 - (2) If the request does not pertain to a felony or [parental kidnaping] . . . , the [DOD Component] shall take action

prescribed in paragraphs (b) through (d)] when deemed appropriate with the facts and circumstances of each particular case.

- (a) If a DOD member is the subject, the member shall be ordered to return expeditiously to an appropriate port of entry at Government expense, contingent on the party requesting return providing transportation, and escort, if desired, of the member from such port of entry to the jurisdiction of the party.
- (b) If a DOD employee is the subject, the employee strongly shall be encouraged to comply with the court order. Failure to respond to the order may be the basis for adverse action against the DOD employee.
- (c) If a family member is the subject, the family member strongly shall be encouraged to comply with the court order.

4. DA implementing guidance -- Compliance of DOD Members, Employees, and Family Members Outside the United States With Court Orders, 32 C.F.R. Part 589. See, Chapter 4, AR 608-99.

[rev. 1/24/08]

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