

Merritt McKeon  
Family Law - Prof. Stone

May 12, 1994

THE HAGUE CONVENTION, THE UCCJA, THE PKPA AND THE INTERNATIONAL PARENTAL KIDNAPPING CRIME ACT OF 1993: TOWARDS THE FEDERALIZATION OF FAMILY LAW?

This paper will compare the Hague Convention on the Civil Aspects of International Child Abduction (the Convention); the Uniform Child Custody Jurisdiction Act (the UCCJA); the Parental Kidnapping Prevention Act (the PKPA), and the International Parental Kidnapping Crime Act of 1993, 18 U.S.C. Sec 1204, (the IPKCA93) in order to illustrate the growing trend towards the federalization of family law. This trend was discussed in detail in a lecture given at Cardozo Law School on April 4, 1993, by Robert D. Arenstein, who is the Legislative Chair for the American Academy of Matrimonial Lawyers. Mr. Arenstein discussed all of these laws as well as the legislative agenda planned by the Academy, which will be detailed at the end of this paper.

The Convention's treatment of pre-custody decree abduction cases is distinguishable from Federal domestic law in the United States, specifically the UCCJA and the PKPA, both of which provide for enforcement of custody decrees. The UCCJA and PKPA permit the enforcement of a custody decree obtained by a parent in the home state after the child has been removed from that state by the other parent. In the absence of a custody decree from the home state, the enforcement provisions of those laws are inoperative. In contrast to the UCCJA and the PKPA, a proceeding under the Hague Convention is not contingent on the existence of a custody decree. Instead, the Convention provides for the prompt return of the child to his or her country of habitual residence so that the custody dispute can be heard in an appropriate forum. Mr. Arenstein, one of two attorneys recommended as experts on the Convention by the U.S. Department of State, calls the habitual residence a term of art, undefined by the Convention. The Convention is not a custody law; it is, rather, a treaty granting jurisdiction over Child Custody Subject Matter Jurisdiction (CCSMJ) to the appropriate Contracting State.

The Convention's first stated objective is to secure the prompt return of children who are wrongfully removed from or retained in any Contracting State. Article 1(a). The second stated objective is to ensure that rights of custody and of access under the law of one Contracting State are effectively exercised in other Contracting States (Article 1(b)). The removal or retention must be wrongful within the meaning of Article 3, according to the Article 5(a), to trigger the return procedures established by the Convention. Article 3 provides that the removal or retention of a child is to be considered wrongful where:

(a) it is in breach of custody rights attributed to a person, an institution or another body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and (b) at the time of the removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The exercise of custody rights under the Convention, then, unlike the UCCJA and the PKPA, does not depend on a custody decree obtained prior to wrongful removal of the child from the child's State of habitual residence. Expanding the notion of parenting, the

U.S. Department of State, in its Legal Analysis of the Hague Convention on the Civil Aspects of International Child Abduction<sup>1</sup> notes that "there may be situations in which a person other than a biological parent has actually been exercising custody of the child and is therefore eligible to seek the child's return pursuant to the Convention. An example would be a grandparent who has had physical custody of a child following the death of the parent with whom the child had been residing. If the child is subsequently removed from the custody of the grandparent by the surviving parent, the aggrieved grandparent could invoke the Convention to secure the child's return. In another situation, the child may be in the care of foster parents. If custody rights exercised by the foster parents are breached, for instance, by abduction of the child by its biological parent, the foster parents could invoke the Convention to secure the child's return." FN 01 The Convention considers the removal of a child by one of the joint custodians without the consent of the other to be wrongful. This "wrongfulness" is not due to the breach of a particular law, but from the notion that the removal has disregarded the rights of the other parent, and has interfered with the normal exercise of those rights.

Article 3(a) ensures the application of the Convention to pre-custody decree abductions, since it protects the rights of a parent who was exercising custody of the child jointly with the abductor at the time of the abduction, before the issuance of a custody decree.

#### Wrongful Removal or Retention

The abducting parent is obligated, under the Convention, to return an child to the person entitled to custody only if the removal or the retention is wrongful within the meaning of the Convention. To be considered wrongful, there must be a breach of "custody rights". The removal or retention must be in breach of "custody rights," defined in Article 5(a) as "rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence."The International Parental Kidnapping Crime Act of 1993 (the "IPKCA93") echoes the language of the Convention in making the actions of a person who "removes a child from the United States or retains a child (who has been in the United States) outside the United States with intent to obstruct the lawful exercise of parental rights" a Federal felony punishable by up to three years in prison as well as fines. According to a letter written by Mary C. Spearing, Chief of the General Litigation and Legal Advice Section of the U.S. Department of Justice Criminal Division, continuing retention of a child after the date of enactment (December 3, 1993) could be considered a felony distinct from the crime of wrongful removal. FN 02

The IPKCA93 provides three affirmative defenses; (1) acting within the provisions of a valid court order; (2) fleeing an incidence or pattern of domestic violence; and (3) inability to return child as a result of circumstances beyond defendant's control, where the other parent was notified within 24 hours.

The IPKCA93 was created in large part for those parents whose children were abducted to non-contracting States. Where the Convention's civil remedies can be applied, they are recommended as the option of choice for the left-behind parent. The IPKCA93 goes much further than the Convention, the UCCJA or the PKPA in recognizing visitation as a "parental right", the violation of which will result in severe penalties. The Convention, by contrast, recognizes a left-behind parent's right to exercise what it calls "access" -- in the words of Adair Dyer, the head of the Hague

Council on Children, "access implies something rather broader than visitation and I felt that that was desirable. In other words, access may include: telephone access, mail access, fax access, and perhaps in the future, video conference access." FN 03 The violation of the right of access will not trigger the return of an abducted or wrongfully retained child, but the State which has joined the Convention must do all that it can to ensure that the other parent can exercise the right of access.

#### Domestic Violence and the Safe Harbor Defense

The IPKCA93 provides an affirmative defense to criminal charges, if the accused is fleeing domestic violence. The defense would presumably be raised after extradition and before trial. The child would probably be in the custody of the left-behind parent who may be a spouse or child abuser, and the burden of proof would be on the runaway parent. But even this shred of protection for those parents fleeing violence is far greater than anything provided under either the Convention or the UCCJA and the PKPA. It is unfortunate that such a defense can only be raised after the criminal justice system has the fleeing parent and child in its hands, the parent presumably in its custody, the child in the custody of the alleged abuser. But the Convention itself is silent on the issue of domestic violence. It vaguely addresses the issues of human rights in the following manner:

It is possible that under a very liberal reading of article 20, the child may not be returned when its return "would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms". Even if its literal meaning is much like the terminology used in international texts on protection of human rights, this particular rule is not directed at developments which have occurred on the international level, but is concerned only with the principles accepted by the law of the requested State, either through general international law and treaty law, or through internal legislation. The ability to refuse to return a child on the basis of this article would be created only after a showing that the fundamental principles of the requested State with regard to the subject-matter of the Convention do not permit it. It would not be enough to show that the return would be incompatible with these principles. Case law of different countries shows that the application by ordinary judges of the laws on human rights and fundamental freedoms is undertaken with a great care, and domestic violence towards spouses and children arguably might be impossible to prove outside of the place of habitual residence.

Acceptance of Article 20 by the 32 Contracting States was fraught with difficulty. As A.E. Anton, Chairman of the Commission on the Hague Conference on Private International Law described the process, "(i)ts acceptance may in part have been due to the fact that it states a rule which many States would have been bound to apply in any event, for example, by reason of the terms of their constitutions. The reference in this provision to 'the fundamental principles of the requested State' make it clear that the reference is not one to international conventions or declarations concerned with the protection of human rights and fundamental freedoms which have been ratified or accepted by Contracting States. It is rather to the fundamental provisions of the law of the requested State in such matters . . . If the United Kingdom decides to ratify Hague Convention, it will, of course, be for the implementing legislation or the courts to specify what provisions of United kingdom law come within the scope of Article 20. The Article, however, is merely permissive and it is to be hoped that States will exercise restraint

in availing themselves of it." FN 04 The United States has never added or clarified through legislation any sort of domestic violence or "Safe Harbor" reading of Article 20.

The UCCJA and the Convention might allow for some protection for the child, in the following sample "Safe Harbor" pleading. In the first instance, the request is usually made that the court in Forum Two take "Emergency Jurisdiction" pursuant to 9 ULA 3(a)(3) and issue orders under this section preventing the enforcement of the order from Forum One. In the case of the Convention, the parent in Forum Two usually alleges that one of the exceptions to the immediate return of the child will be found under Article 13, generally Article 13(b). The purpose of this sample pleading is to set up conditions whereby the child is returned to a "Safe Harbor" in Forum One such that none of the harmful conditions that have been alleged to exist in Forum One can, in any way, cause physical or emotional harm to the child. The following Hypothetical illustrates the use of the "Safe Harbor" technique: Enforcement of a valid order from Forum One is sought in Forum Two. The parent in Forum Two alleges that the parent in Forum One sexually molests the child. The court in Forum One then temporarily grants custody of the child to a third party, eg, grand parents, uncle, aunt, etc., or orders that the child be placed in a foster home in Forum One pending further order of the court. The court also makes orders prohibiting any contact of any kind between the child and the parent in Forum One. When the above orders are in place, the possible danger to the child no longer exists and Forum Two will have no legal basis for not returning the child to Forum One, eg, the "Emergency" conditions alleged in Forum One no longer exist. FN 05

Though William Hilton, who with Robert Arenstein is America's "expert on the Hague", valiantly put together these arguments for a sample pleading, there is no assurance that such pleadings have actually resulted in any protective actions for children, for the Convention does not address these questions, leaving it to the Contracting States to decide whether the child needs protection and, if so, how to best provide it. There seems to be no provision for battered spouses.

Custody rights under the Convention are determined by law of child's habitual residence. In addition to including the right to determine the child's residence (Article 5(a)), the term "custody rights" covers a collection of rights which take on more specific meaning by reference to the law of the country in which the child was habitually resident immediately before the removal or retention. Article 3(a).

The Convention does not list all possible sources from which custody rights may derive, but it does identify three sources. According to the final paragraph of Article 3, custody rights may arise: (1) by operation of law; (2) by reason of a judicial or administrative decision; or (3) by reason of an agreement having legal effect under the law of that State.

#### Custody Rights Arising by Operation of Law

Custody rights which arise by operation of law in the State of habitual residence are protected; they need not be conferred by court order to fall within the scope of the Convention, Article 3. A person whose child is abducted prior to the entry of a custody order is not required to obtain a custody order in the State of the child's habitual residence in order to invoke the Convention's return provisions.

In the United States, there is a presumption that both parents have equal rights of custody of their children prior to the issuance of a court order allocating rights between them. If one parent interferes with the other's equal rights by unilaterally removing or retaining the child abroad without consent of the other parent, such interference could constitute wrongful conduct within the meaning of the Convention. A parent left in the United States after a pre-decree abduction could seek return of a child from a Contracting State abroad pursuant to the Convention. In cases involving children wrongfully brought to or retained in the United States from a Contracting State abroad prior to the entry of a decree, in the absence of an agreement between the parties the question of wrongfulness would be resolved by looking to the law of the child's country of habitual residence.

Even though a custody decree is not needed to invoke the Convention, there are two situations in which the left-behind parent may benefit by securing a custody order, assuming the courts can hear swiftly a petition for custody. First, to the extent that an award of custody to the left-behind parent (or other person) is based in part upon an express finding by the court that the child's removal or retention was wrongful within the meaning of Article 3, the applicant can answer a request by the judicial authority applying the Convention, pursuant to Article 15, for a court determination of wrongfulness. This may speed disposition of a return petition under the Convention. Second, a person outside the United States who obtains a custody decree from a foreign court subsequent to the child's abduction, after notice and opportunity to be heard have been accorded to the absconding parent, may be able to invoke either the Convention or the UCCJA, or both, to secure the child's return from the United States. The UCCJA may be preferable inasmuch as its enforcement provisions are not subject to the exceptions contained in the Convention.

#### Custody Rights Arising by Reason of Judicial or Administrative Decision

Custody rights arising from judicial or administrative decisions are recognized in the Convention. Custody determinations in the United States are made by State courts, but in some Contracting States, notably the Scandinavian countries, administrative bodies are empowered to decide matters relating to child custody, including the allocation of custody and visitation rights. This was the reason behind the reference to "administrative decisions" in Article 3.

The language used in this part of the Convention can be misleading. Even when custody rights are conferred by court decree, the Convention does not require recognition and enforcement of that decree. The Convention seeks only to restore the factual custody arrangements that existed prior to the wrongful removal or retention, which in many cases will be the same as those specified by court order.

#### Custody Rights Arising by Reason of Agreement Having Legal Effect

Parents who have private agreements concerning a child's custody have some recourse under the Convention if those custody rights are breached, Article 3. The only limitation is that the agreement have legal effect under the law of the child's habitual residence.

With respect to language contained in an earlier draft of the Convention (i.e., that the agreement "have the force of law"),

the U.S. delegation comments give expanded meaning to the expression "an agreement having legal effect". In the U.S. view, the provision should be interpreted expansively to cover more than just agreements which have been embodied in a custody judgment. FN 06

#### Invoking the Convention

To invoke the Convention, the holder of custody rights must allege that he or she actually exercised those rights at the time of the breach or would have exercised them but for the breach. Article 3(b). Under Article 5, custody rights are defined to include the right to determine the child's place of residence. Thus, if a child is abducted from the physical custody of the person in whose care the child has been entrusted by the custodial parent who was "actually exercising" custody, it is the parent who placed the child who may make application under the Convention for the child's return.

The applicant need only provide some preliminary evidence that he or she actually exercised custody of the child, for instance, took physical care of the child. In the purview of the Convention, it is presumed that the person who has custody actually exercised it. Article 13 places on the alleged abductor the burden of proving the non-exercise of custody rights by the applicant as an exception to the return obligation.

When a legal custodian's custody rights have been breached by the wrongful removal or retention of the child by another, he or she can seek return of the child pursuant to the Convention. This right of return is the heart of the Convention. The Convention establishes two means by which the child may be returned. One is through direct application by the aggrieved person to a court in the Contracting State to which the child has been taken or in which the child is being kept. Articles 12, 29. The other is through application to the Central Authority to be established by every Contracting State. Article 8. These remedies are not mutually exclusive; the custodian may invoke either or both of them. Moreover, the parent may also pursue remedies outside the Convention. Articles 18, 29 and 34.

#### Remedies Outside the Convention: UCCJA, PKPA, IPKCA93

A parent seeking return of a child from the United States could petition for return under the Convention, or for enforcement of a foreign court order pursuant to the UCCJA. A French mother whose child has been wrongfully removed to Alaska could petition courts in Alaska either for return of the child under the Hague Convention or for recognition and enforcement of her French custody decree pursuant to the UCCJA. If she prevailed in either situation, the Alaskan court could order the child returned to her in France. The mother in this hypothetical may find the UCCJA remedy the speediest method because rather than invoking the Convention for the child's return, the UCCJA is not subject to the exceptions set forth in the Convention.

In the U. S., a left-behind parent or other claimant can petition for custody after the child has been removed from the forum. This right of action is conferred by the UCCJA. The result of such proceeding is a custody determination allocating custody and visitation rights, or joint custody rights, between the parties. A custody determination on the merits that makes no reference to the Hague Convention may not by itself satisfy an Article 15 request by a foreign court for a determination as to the wrongfulness of the conduct within the meaning of Article 3. To ensure compliance with a

possible Article 15 request the parent in the United States would be wise to ask for a finding as to the wrongfulness of the alleged removal or retention within the meaning of Article 3, in addition to seeking custody.

A court may get notice of a wrongful removal or retention in some manner other than the filing of a petition for return, for instance by communication from a Central Authority, from the aggrieved party (either directly or through counsel), or from a court in a Contracting State which has stayed or dismissed return proceedings upon removal of the child from that State.

If the Convention is to deter abductions, the alleged abductor must not be given special treatment by courts in his or her country of origin, which, in the absence of the Convention, might be prone to favor "home forum" litigants. Claims made by the person resisting the child's return should be considered in light of evidence presented by the applicant concerning the child's contacts with and ties to his or her country of habitual residence. In considering the passage of time, which may have made the child form ties to the new country, the court will consider the reason for the time. If the alleged wrongdoer concealed the child from the custodian, requiring a long search for the child and delaying the return proceeding by the applicant, the respondent should not be permitted to benefit from such conduct.

Again echoing the Convention, the IPKCA93's Stated legislative purpose is to deter such parental kidnappings. It may provide some aid to parents and children when the abduction takes place not between Contracting States, but between non-contracting States and American residents. The IPKCA93 does not distinguish between citizens or illegal residents, but only specifies that the child must have been in the United States at some point before the abduction occurred.

#### Jurisdiction under the Various Treaties and Laws

As discussed above, the Convention is treaty which decides the proper jurisdiction for adjudicating custody claims. In the words of Robert Arenstein, it is simply the "law of the land". Since the United States has entered into the treaty, it must comply with it. Curiously, Arenstein recommends that a Federal court might be a better forum for a foreign petitioner in the U.S., since State judges might not be enthusiastic about handing over an "American" child to a Spanish or French parent to take back "home". Indeed, in the International Child Abduction Remedies Act, 42 U.S.C. 11601 et. seq., the Hague Convention became law and section 4(a) of the act specifies that Hague actions can be brought in State and Federal courts.

Personal (In Personam) Jurisdiction over the parties and Child Custody Subject Matter Jurisdiction (CCSMJ) , are independent issues. A court may have Personal (In Personam) Jurisdiction over the parties without having CCSMJ. In re Marriage of Ben-Yehoshua (Cal.App. 5 Dist. 1979) 91 Cal.App.3d 259, 263-264 [154 Cal.Rptr. 80, 82-83]. Under Article IV, Sec. 1 of the United States Constitution, each State must give full faith and credit to the public acts, records and judicial proceedings of every other State. The codification of this constitutional mandate in 28 U.S.C. Sec. 1738, and its precondition that there be finality of judgment, however, left the full faith and credit clause inapplicable to child custody orders. These orders are modifiable in any State when the best interest of the child require. Custody orders lack the necessary finality for protection under the full faith and credit

clause, of only due to the fact that children grow and their needs change. *Kovacs v. Brewer*, 356 U.S. 604 [78 S.Ct. 963, 2 L.Ed.2d 1008] (1958). Of course, procedural defects may preclude enforcement under the full faith and credit clause of even arguably "final" custody orders. *Ford v. Ford*, 371 U.S. 187 [83 S.Ct. 273, 9 L.Ed.2d 240] (1962); *May v. Anderson*, 345 U.S. 528 [97 L.Ed. 1221, 73 S.Ct. 840] (1953). This lack of recognition and enforcement of decrees of sister States resulted in the constant uprooting and movement of children from State to State in their parents' efforts to obtain or enforce conflicting custody orders.

The purpose of the UCCJA was to provide stability to the home environment and to family relationships by discouraging continuing controversy over child custody and visitation; to avoid jurisdiction disputes; to deter abductions; to avoid relitigation; to promote comity; and to assure that litigation concerning child custody takes place ordinarily in the State in which the child and his family have the closest connection. *Kumar v Superior Court of Santa Clara Cty.* (1982) 32 Cal.3d 689 [186 Cal.Rptr. 772; 652 P.2d 1003].

The "home State" means the State in which the child immediately preceding the time involved lived with his parents, a parent, or a person acting as a parent, for at least six consecutive months, and in the case of a child less than six months old the State in which the child lived from birth with any of the persons mentioned. Periods of temporary absence of any of the named persons are counted as part of the six-month or other period. "Home State" is the State of actual physical presence of the child and not the State of legal residence or domicile of the child. *May v Anderson* (1953) 345 U.S. 528 [73 S.Ct. 840, 97 L.Ed. 1221]; 390 So.2d 787, 790; *Bergstrom v Bergstrom* (N.D. 1978) 271 N.W.2d 540, 546.

A State can only exercise "Home State" jurisdiction if, at the commencement of the proceeding, the State is the "Home State" of the child or had been the "Home State" of the child within six months before the commencement of the proceeding.

The second basis for child custody jurisdiction under the UCCJA is pursuant to "Most Significant Contacts". Before a State court may assert jurisdiction, it must first find that it is in the best interest of the child that a court of this State assume jurisdiction because (i) the child and his parents, or the child and at least one contestant, have a significant connection with this State; and (ii) there is available in this State substantial evidence concerning the present or future care, protection, training, and personal relationships of the child.

The Commissioners' notes explaining the applicable section of the model UCCJA in pertinent part provide: Paragraph (2), perhaps more than any other provision of the Act, requires that it be interpreted in the spirit of the legislative purposes expressed in section 1. The paragraph was phrased in general terms in order to be flexible enough to cover many fact situations too diverse to lend themselves to exact description. However vague the language, its purpose clearly is to limit jurisdiction rather than to expand it. The first clause of the paragraph is important -- jurisdiction exists only if it is in the child's interest, not merely the interest or convenience of the feuding parties, to determine custody in a particular State. The interest of the child is served when the forum has optimum access to relevant evidence about the child and family. There must be maximum rather than minimum contact with the State.



Paragraph (2) of the comments refers to what has been adopted as the maximum significant contacts test of 9 ULA 2(a)(2). Courts of this State have followed the rationale of the uniform act's comments in construing the "significant contacts" test as a maximum significant contacts test. *Plas v Superior Court* (1984)155 Cal.App. 3d 1008 [202 Cal.Rptr. 490].

Application of Federal Law: 28 U.S.C. 1738A

The UCCJA's legislative intent was to create uniformity in the adjudication of jurisdictional disputes in custody cases. It achieved limited success, due to the variations in the UCCJA as adopted by each of the States, and the variety of interpretation from court to court within those States. Forum shopping, and the flow of child and cases from state to state, continued largely unabated. Federal legislation was enacted in 1980 to bolster the UCCJA, and to create greater uniformity in interpretation and resolution of jurisdictional conflicts involving interstate custody disputes.

The United States Congress enacted the Parental Kidnapping Prevention Act (PKPA) in 1980. The title of the act is rather misleading, since it was not limited to criminal matters relating to kidnapping. Instead, a fundamental purpose of the PKPA was to protect the right of a decree issuing State to exercise exclusive continuing jurisdiction over its child custody orders in certain cases, and to guide custody litigation into the court having continuing jurisdiction by requiring that States give full faith and credit to the custody decrees of States retaining jurisdiction, and preventing the issuance of competing decrees. *Mark L. v Jennifer S.*, 506 N.Y.S.2d 1020, (1986); *Nielson v. Nielson*, 472 So.2d 133 (La.App. 1985).

The PKPA established uniform, national standards to determine jurisdiction in interState custody disputes. *Vonniski v. Vonniski*, 661 S.W.2d 872 (Tn. App. 1982) The intent of the Congress to limit the States in the assumption of jurisdiction is evident from the text of the statute. The PKPA provides for recognition and enforcement of only those decrees made consistent with the provisions of 28 U.S.C. Sec. 1738A. The PKPA has eliminated the opportunity for a State to disregard a foreign decree because of differences in the State's statutory enactment or jurisdictional interpretations of UCCJA provisions. 28 U.S.C. Sec. 1738A(c)(1). The PKPA also grants a priority to "Home State" jurisdiction in initial custody petitions. "Most Significant Connection" jurisdiction can be used as a basis to assume jurisdiction only if there is no "Home State", not as an alternative to the "Home State". 28 U.S.C. Sec. 1738A(c)(2)(A) and (B).

Where there is a "Home State", that State has exclusive jurisdiction and is the only State that can properly exercise CCSMJ and make a custody determination consistent with the PKPA. *Olmo v Olmo* (E.D.N.Y. 1986) 646 F.Supp. 233, 235; *Bolger v Bolger* (Tex.App.1984) 678 S.W.2d 194, 196. Though there are many similarities between the PKPA and the UCCJA provisions, due to the differences described above, there will be cases in which the application of each will create a different result. When the two statutes conflict, the PKPA must prevail over any contrary laws of the States in the area of recognition and modification of a sister State's custody decree. See 28 U.S.C. Sec. 1738A; see also *In re McBride*, 469 So.2d 645 (Ala.Civ.App. 1985); *Olivia H. v. John H.*, 497 N.Y.S.2d 838 [130 Misc.2d 756] (1986). The court cannot make jurisdictional decisions based solely on the State UCCJA, without regard to the PKPA.

Under the PKPA, there must be an initial determination of jurisdiction. See 28 U.S.C. Sec. 1738A(c)(1). If there is proper jurisdiction under State law, the State court must then look to jurisdiction prerequisites of 28 U.S.C. Sec 1738A(c)(2)(A) through (E). See *Evans v. Evans*, 670 F.Supp. 774 (E.D. Tenn. 1987). If the court cannot satisfy any one of the PKPA provisions, then the federal statute precludes the State's assumption of jurisdiction, and the petition must be denied for lack of subject matter jurisdiction.

Jurisdiction, then, over issues of child custody and/or visitation, is subject matter jurisdiction. The existence or non-existence of Personal (In Personam) Jurisdiction over the parties has no effect. A court may have Personal (In Personam) Jurisdiction over the parties without having Child Custody Subject Matter Jurisdiction. Conversely, a court may have Child Custody Subject Matter Jurisdiction without having Personal (In Personam) Jurisdiction over one of the parties. The two kinds of jurisdiction are separate, independent and unrelated to one another.

#### Conclusion

In comparing these four laws, we have seen conflict and compliment in the application of statutes to the problem of parental child abduction. Since Hague Convention cases can be heard in Federal court, and since according to the UCCJA and the PKPA, States must follow Federal law in determining whether they can issue or modify a custody decree, it is obvious that there is a trend towards the federalization of family law with regard to custody.

As Robert Arenstein mentioned in his speech to Law Students for Children at Cardozo in April of 1994, the American Academy of Matrimonial Lawyers, of which he is the Legislative Chair, lobbied for passage of the International Parental Kidnapping Crime Act of 1993 as the first leg of a series of measures planned to increase the security of custodial parents in the United States. Plans called for include a national computer registry of all custody decrees, for courts and for airlines. It is very easy to get aboard an international carrier with children, and only Mexico and the airlines serving it require parents traveling without the other parent to show a valid custody order or a valid permission letter before boarding with children. The Academy wants to make it possible to protect children who might otherwise be wrongfully removed. The IPKCA93 is the first move toward that goal.

What will the future hold with regard to the invasion of the privacy of everyone who travels with children? Will the right to a safe harbor be extended to victims of domestic violence who are not children but who flee that violence with the child rather than let the abuser have custody by default? What will happen to State's Rights as Federal statutes dictate what they may and may not do with regard to custody disputes? As Mr. Arenstein has observed, the world is getting smaller and more difficult for parental abductors. It remains to be seen how the efforts to forestall such abductions will affect the rest of the shrinking world.

Merritt is a first year law student at Cardozo Law School. She has founded Law Students for Children and hopes to have a BBS of their own some day. This paper would not have been possible without the generosity of Bill Hilton. Thank you, Bill -- you'll recognize 80% of this paper as yours or some other contributor's work. I appropriate from the best.

- 1 Available from the State Department or from the Hilton BBS Service. WMH Comment: Down load as: ANALHAGUE.ASC
- 2 Letter from Mary Spearing re: Abderezai, March 29, 1994
- 3 Remarks by Adair Dyer on Access (Visitation) for the North American Symposium on International Child Abduction in Washington, D.C., 30 September 1993
- 4 A. E. Anton, Chairman of the Commission on the Hague Conference on Private International Law that drafted the Convention, explained Article 20 in his article, "The Hague Convention on International Child Abduction," 30 I.C.L.Q. 537, 551-2 (July, 1981). WMH Comment: Down load as: ANTON.ART
- 5 William Hilton, Esq., "Safe Harbor Pleading," Hilton BBS WMH Comment: Down load as: SAFEHBR.ORD
- 6 Actes et documents de la Quatorzieme Session, (1980) Volume III.