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Family Law - Federal Courts Have Jurisdiction to Enforce Provisions of Parental Kidnapping Prevention Act

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Parental kidnapping or "child snatching" is an increasingly common phenomenon in the United States today.¹ Current unofficial estimates suggest that as more and more marriages and families are dissolving,² between 50,000 to 100,000 children are being kidnapped by one or the other of their parents each year.³

Until the recent enactment of the Parental Kidnapping Prevention Act (PKPA) in 1980,⁴ the legal system, in the area of domestic relations law, actually encouraged parents to engage in child abduction.⁵ In par-

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² See Agopian & Anderson, Legislative Reforms to Reduce Parental Child Abductions, 6 J. Juv. L. 1, 2 n.4 (1982) (citing Child Snatching on Increase Across U.S., L.A. Times, May 25, 1980, West Side Ed. at 1, col. 1)). See generally S. Abrahms, CHILDREN IN THE CROSSFIRE: THE TRAGEDY OF PARENTAL KIDNAPPING (1983); M. Agopian, PARENTAL CHILD STEALING (1981). Parental stealing or kidnapping occurs when one parent abducts or detains a child from the other parent in violation of a custody decree. Parental Kidnapping Prevention Act of 1979: Addendum to Joint Hearing on S.105 Before the Subcomm. on the Judiciary and the Subcomm. on Child and Human Development of the Senate Comm. on Labor and Human Resources, 96th Cong., 2d Sess. 62 (1980) (paper by Michael Agopian, Instructor of Sociology, West Los Angeles College) [hereinafter cited as Addendum to Joint Hearing]. Although the literature on parental abduction of children frequently refers to this conduct as "kidnapping," strictly speaking, a parent who seizes his or her child in violation of a custody decree is not guilty of "kidnapping" under the criminal laws as defined by most states. See generally S. Abrahms, supra; M. Agopian, supra.

³ Friedman & Taus, Kidnapping Your Child, TRIAL, Oct. 1984, at 46-48. See also Addendum to Joint Hearing, supra note 1, at 63.


⁵ See Lansing & Sherman, The Legal Response to Child Snatching, 7 J. Juv. L. 16, 16 (1983). See also Friedman & Taus, supra note 3, at 47-48 (discussing strat-
ticular, faced with state court jurisdictional rules which permitted one state to modify custody decrees of sister states or even make de novo custody determinations, a parent not awarded custody in the child's home state was encouraged to kidnap his or her child and flee to a new jurisdiction in hopes of either gaining custody or having the original custody decree modified under the laws of the new jurisdiction.

Seeking to alleviate problems such as child snatching caused by the often inconsistent and conflicting practices of state courts in custody disputes, the National Conference of Commissioners on Uniform State Laws promulgated the Uniform Child Custody Jurisdiction Act (UCCJA) in 1968. However, because the UCCJA had to be adopted by a particu-

ey of noncustodial parent for gaining custody in second jurisdiction after having kidnapped his or her child). See generally Agopian & Anderson, supra note 1.

6. See Lansing & Sherman, supra note 5, at 16. Generally, in early domestic relations law, a state had jurisdiction in child custody cases if the child was domiciled in the state, i.e., "the state was the child's . . . 'true, fixed, permanent home.'" Id. (citing 1 BEALE, CONFLICT OF LAWS § 9.5 (1935) (citation omitted)). Throughout the years alternate bases for initial jurisdiction came to be readily accepted by the states. Id. In addition to assuming jurisdiction based on domicile, state courts assumed jurisdiction when an abducted child was physically present in a state or when the state had jurisdiction over both parents. Id. Therefore, "two courts could legally have jurisdiction over the same case as a child could be domiciled in one state yet be physically present in another." Id. (citing Sampsell v. Superior Court, 32 Cal. 2d 763, 197 P.2d 739 (1948)).

7. See, e.g., Bergen v. Bergen, 439 F.2d 1008 (3d Cir. 1971). A court may readily assume jurisdiction over a custody dispute already ruled upon by another court for a number of reasons. First, a court may not trust or agree with a prior court's custody determination. Agopian & Anderson, supra note 1, at 5. Second, a court may want to examine for itself custodial circumstances to determine the "best interests" of the child. See Lansing & Sherman, supra note 5, at 17. For a discussion of the "best interests" standard, see generally Note, Child Custody: Determining the Best Interests of the Child, 7 J. Juv. L. 135 (1983). Third, courts may tend to favor the parent who is a resident and is present with the child, even if the child was abducted. See Agopian & Anderson, supra note 1, at 5-7. Competition between courts may cause a judge to disregard the judgment of a court in a sister state and encourage forum shopping on behalf of the parent not awarded custody in the original jurisdiction. See id. Although some courts are unwilling to extend jurisdiction to a parent who is a wrongdoer, most courts are not reluctant, rationalizing that a child's "best interests" should not suffer because of the wrongdoing of the parent. See Lansing & Sherman, supra note 5, at 17.

8. UNIF. CHILD CUSTODY JURISDICTION ACT, §§ 1-27, 9 U.L.A. 116, 114 prefatory note (1968) [hereinafter cited as UCCJA]. Under the UCCJA, a court may exercise jurisdiction over a child custody action if: (1) it is situated in the same state as the child's home; (2) the child and at least one parent have a significant connection with the state and substantial evidence of the child's care exists there; (3) the child has been abandoned or has been exposed to or threatened with neglect, abuse or mistreatment in the forum state; or (4) no other state satisfies the UCCJA jurisdictional requirements or a state satisfying the prerequisites declines to exercise jurisdiction because the forum state is a more appropriate forum to decide the custody issue and the child's best interests require that the forum state exercise jurisdiction. Id. at §§ 3, 8, 13-15, 9 U.L.A. at 122-23, 142, 151-58. See Wand, A Call for the Repudiation of the Domestic Relations Exception to Federal Jurisdiction, 30 Vill. L. Rev. 307, 360, 388-91 (1985) (discussing judicially created problem of child-snatching and effectiveness of two statutory at-

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lar state in order to be enforceable in that state, and because not all states chose to adopt the UCCJA, jurisdictional problems in custody disputes still remained.

Accordingly, in 1980 Congress passed the Parental Kidnapping Prevention Act (PKPA) in a direct attempt to remedy jurisdictional conflicts and competition between states in the determination of child custody actions. The Act attempts to prevent jurisdictional conflicts by requiring all states to respect the custody decrees of a sister state. In particular, the PKPA establishes strict criteria for the modification of custody decrees by a court of another state. It provides:

A court of a State may modify a determination of the custody of the same child made by a court of another State, if

1. it has jurisdiction to make such a child custody determination; and
2. the court of the other State no longer has jurisdiction, or it has declined to exercise such jurisdiction to modify such determination.

Because the federal courts have traditionally abstained from in-
volvement in child custody disputes\textsuperscript{13} by invoking the "domestic relations"\textsuperscript{14} and "full faith and credit"\textsuperscript{15} exceptions to federal jurisdiction, the responsibility of interpreting the provisions of the PKPA has generally fallen to state rather than federal courts.\textsuperscript{16} However, in \textit{Flood v. Braaten},\textsuperscript{17} the Third Circuit challenged this traditional stance, holding that, based upon Congress' intent, federal courts may exercise jurisdiction to enforce compliance with the provisions of the PKPA.\textsuperscript{18}

The \textit{Flood} case arose following Betty Braaten Flood's divorce from Gerald Braaten in July, 1977.\textsuperscript{19} The original divorce decree, issued in

\begin{thebibliography}{99}
\bibitem{14}See 13B C. \textsc{Wright}, A. \textsc{Miller} & E. \textsc{Cooper}, \textsc{Federal Practice and Procedure} \textsection 3609 (1984). The domestic relations exception to federal jurisdiction is not premised upon any statutory language, but instead stems from Supreme Court dicta. \textit{See} Solomon v. Solomon, 516 F.2d 1018, 1021-22 (3d Cir. 1975). In one of the earliest decisions commenting on the domestic relations exception, the Supreme Court stated: "We disclaim altogether any jurisdiction in the courts of the United States upon the subject of divorce or for the allowance of alimony . . . ." \textit{Barber v. Barber}, 62 U.S. 582, 584 (1859). \textit{See also In re Burrus}, 136 U.S. 586, 593-94 (1890) ("whole subject of the domestic relation of husband and wife, parent and child," properly rests with states). The domestic relations exception has also been applied in the area of child custody. \textit{See}, e.g., Magaziner v. Montemuro, 468 F.2d 782 (3d Cir. 1972) (civil rights action brought by children regarding adjudication of their own custody rights); Hernstadt v. Hernstadt, 373 F.2d 316 (2d Cir. 1967) (declaratory judgment action brought by father to construe custody and visitation rights); Albanese v. Richter, 161 F.2d 688 (3d Cir.) (suit by illegitimate child against putative father for support payments), \textit{cert. denied}, 332 U.S. 782 (1947).

The Supreme Court, however, has recently moved away from total abstention in domestic relations issues. \textit{See infra} text accompanying notes 59-66. For an in-depth discussion of the domestic relations exception, see generally \textit{Wand}, \textit{supra} note 8. \textit{See also infra} notes 42-43 and accompanying text.

\bibitem{15}See, e.g., \textit{Ford v. Ford}, 371 U.S. 187, 193-94 (1962); Kovacs v. Brewer, 356 U.S. 604, 607 (1958). The Constitution's full faith and credit clause requires that a judgment that is final and therefore res judicata in the courts of one state must ordinarily be given full faith and credit by all other courts in the United States. \textit{U.S. Const. art. IV, \textsection 1, cl. 1}; \textit{28 U.S.C. \textsection 1738} (1982). However, federal courts have specifically declined to grant full faith and credit to child custody decrees because custody decisions are always subject to modification and thus lackfinality. For a discussion of the modifiability of custody decrees, see \textit{infra} note 44. The federal courts' refusal to apply full faith and credit to prior custody decrees has traditionally been viewed as creating a bar to federal jurisdiction over custody disputes. \textit{See}, e.g., \textit{Flood}, 727 F.2d at 309 n.19. For a further discussion of the full faith and credit exception, see \textit{infra} note 44.


\bibitem{17}727 F.2d 303 (3d Cir. 1984).

\bibitem{18}\textit{Id.} at 305-07. For a discussion of the court's holding, see \textit{infra} notes 57-58 and accompanying text.

\bibitem{19}727 F.2d at 305.

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North Dakota, awarded custody of Flood and Braaten's children to Flood.\textsuperscript{20} However, two years later the parties amended the decree to permit Flood to leave North Dakota with the children and to give Braaten the right to custody of the children during the summer months of each year.\textsuperscript{21} Shortly after this modification, Flood and the children moved out of state.\textsuperscript{22} When they returned to North Dakota for a visit with relatives during the 1979 Thanksgiving holiday, a lengthy and complicated custody battle involving both the New Jersey and North Dakota courts commenced.\textsuperscript{23}

On December 4, 1979, Braaten obtained an ex parte order from a North Dakota court awarding him custody of the children.\textsuperscript{24} Although Flood had the order rescinded soon thereafter,\textsuperscript{25} Braaten obtained another order from a North Dakota court, on August 6, 1980, mandating that custody of the four children be transferred to him.\textsuperscript{26} Four days later, Braaten seized two of the children, Joel and Shawna, in New Jersey and took them to North Dakota.\textsuperscript{27} Flood responded by first filing a complaint with the New Jersey Superior Court seeking custody of all four children and then filing a motion with the North Dakota court requesting that its custody decree be modified to return custody of the children to her.\textsuperscript{28} The same day she filed the motion with the North Dakota court, Flood seized Joel from Braaten and returned to New Jersey.\textsuperscript{29} Finally, after eleven more months of legal battling between the parties, the New Jersey Superior Court ruled that it had jurisdiction to modify

\textsuperscript{20} Id. The parties had four minor children: Jim, Jason, Joel, and Shawna. Id.

\textsuperscript{21} Id. Both parties agreed to amend the custody arrangement on August 24, 1979. Id.

\textsuperscript{22} Id. Flood and the children first moved to New York where they resided temporarily before ultimately moving to New Jersey. Id.

\textsuperscript{23} By the time the battle finally reached the federal courts, three years had passed. See id. at 305-06.

\textsuperscript{24} Id.

\textsuperscript{25} Id. Flood had the ex parte order rescinded December 10, 1979, and immediately returned to New York with the four children. Id. Within the next few weeks, Flood and the four children moved to New Jersey. Id.

\textsuperscript{26} Id. A North Dakota district court ordered Flood to show cause why custody of the children should not be awarded to Braaten. Id. The show cause order was first issued on January 15, 1980, but because it was not timely served, a new order was issued by the court on February 28, 1980. Id. at 305 n.5. Custody of the four children was transferred to Braaten over the objection of Flood's lawyer who had made a limited appearance. Id. at 305.

\textsuperscript{27} Id. New Jersey criminal charges based on this abduction were filed against both Braaten and his new wife, Karen, however the charges were later dismissed. Id. at 305 n.7.

\textsuperscript{28} Id. at 305.

\textsuperscript{29} Id. Flood attempted to abduct both Joel and Shawna. Although she was successful in removing Joel from North Dakota, her attempt to regain Shawna failed. Id.
the custody decree and resolve the dispute under the UCCJA. \[\text{30}\]

Braaten's attempt to have the North Dakota custody decree enforced was denied by several New Jersey courts. \[\text{31}\]

On March 15, 1982, the Superior Court of New Jersey awarded custody of the children to Flood. \[\text{32}\]

By the fall of 1982, Flood and Braaten's custody battle was at an impasse, with the courts of New Jersey and North Dakota each refusing to enforce the custody decree of the other court. \[\text{33}\]

In an attempt to end the deadlock, Flood filed a complaint with the United States District Court for the District of New Jersey, requesting a stay of all further state judicial proceedings, and a federal court order enforcing the New Jersey custody decree. \[\text{34}\]

The district court, \textit{sua sponte}, summarily dismissed the complaint for failure to state a basis of jurisdiction. \[\text{35}\]

Flood appealed the district court's dismissal to the Third Circuit. \[\text{36}\]

Writing for a unanimous court, \[\text{37}\] Judge Adams faced the issue of whether the PKPA affords federal question jurisdiction for the enforcement of its provisions. \[\text{38}\]

The court began its analysis by considering

\[\text{30. Id. at 305 n.8 (citing N.J. STAT. ANN. §§ 2A:34-28 (West Supp. 1981)). For a discussion of the UCCJA, see supra note 8.}\]

\[\text{31. 727 F.2d at 305-06. Braaten's attempt to have the North Dakota custody decree enforced was denied when the New Jersey Superior Court ruled that New Jersey was the proper forum to resolve the custody dispute. Id. at 305. The New Jersey opinion presented four reasons why the court should exercise jurisdiction over the custody decree for the Braaten children: (1) the children had lived in New Jersey just three days short of the required six months to make it a "homestate"; (2) North Dakota had not been the children's "homestate" within the past six months; (3) the North Dakota court had awarded custody to Braaten without any consideration of the pending New Jersey action; and (4) consideration of the custody decree by a New Jersey court would serve the "best interests" of the children. Id. at 306 n.9. Braaten was denied leave to appeal the superior court ruling by both the Appellate Division and the Supreme Court of New Jersey. Id. at 306.}\]

\[\text{32. Id. After Flood was awarded custody of the children by the New Jersey Superior Court, she traveled to North Dakota in a second unsuccessful attempt to abduct Shawna, the single child still remaining with Braaten. Id.}\]

\[\text{33. Id. Each state asserted jurisdiction over the matter and awarded custody to the parent residing in the forum state. Id.}\]

\[\text{34. Id. The complaint that was filed on November 29, 1982, alleged that federal jurisdiction existed under 28 U.S.C. § 1738A, "the provision codifying the PKPA's rules for state court adjudication of custody cases." Id. For a discussion of the PKPA, see supra note 11.}\]

\[\text{35. 727 F.2d at 306. District Judge Ackerman dismissed the complaint without prejudice the same day it was filed. Id.}\]

\[\text{36. Id.}\]

\[\text{37. The case was heard by Circuit Judges Adams and Higginbotham and District Judge Teitelbaum of the United States District Court for the Western District of Pennsylvania, sitting by designation. See id. at 304.}\]

\[\text{38. Id. at 306-07. The court, emphasizing the narrowness of the question presented for review, stated:}\]

\[\text{The issue before us is not whether federal courts can enter child custody decrees or even whether federal courts should be generally available for interstate enforcement of custody decrees. Rather, we understand the question on this appeal to be considerably more nar-}\]
whether the doctrines which traditionally had precluded federal court jurisdiction over child custody matters—the domestic relations exception\(^39\) and the full faith and credit exception\(^40\)—also foreclosed a federal court from exercising its power to enforce compliance with the PKPA.\(^41\)

Rejecting the applicability of the domestic relations exception, the Third Circuit reviewed prior federal court decisions that had invoked the exception to disclaim federal jurisdiction over actions for divorce, child custody and other domestic relations matters.\(^42\) The court distinguished these prior cases on the grounds that the parties in those cases had based their claim of access to the federal courts on diversity jurisdiction, whereas Flood’s complaint, was based on federal question jurisdiction.\(^43\)

Similarly, the court found that the longstanding practice of denying full faith and credit to custody decrees did not preclude federal jurisdiction for the enforcement of the PKPA.\(^44\) Noting the differences between the general language and directive of the full faith and credit clause and

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\(^{39}\) Id. at 306-08. For a discussion of the domestic relations exception, see supra note 14, infra note 42 and accompanying text.

\(^{40}\) 727 F.2d at 306-08. For a discussion of the full faith and credit exception, see supra note 15, infra note 44 and accompanying text.

\(^{41}\) 727 F.2d at 306.

\(^{42}\) Id. at 307. The Third Circuit acknowledged that federal courts have traditionally declined to assert diversity jurisdiction over “domestic relations” actions. Id. (citing Barber v. Barber, 62 U.S. 582, 584 (1859) (no jurisdiction in federal courts in divorce or alimony actions); Solomon v. Solomon, 516 F.2d 1018, 1021-26 (3d Cir. 1975) (no federal jurisdiction in divorce, support action); Magaziner v. Montemuro, 468 F.2d 782, 787 (3d Cir. 1972) (no federal jurisdiction in domestic relations case involving child custody)).

\(^{43}\) 727 F.2d at 308. Although the Third Circuit neither attempted to define the scope of the “amorphous” term, “domestic relations,” nor questioned the general viability of the domestic relations exception, it concluded that “the domestic relations exception per se applies only to actions in diversity . . . . We find no cases declining federal jurisdiction on the basis of the domestic relations exception when a litigant has otherwise made out a well-pleaded and substantial complaint alleging federal subject matter jurisdiction.” Id. at 307. The court recognized that while the broad language in some cases suggested that the domestic relations exception also applies to federal question cases, this language is “simply reflective of the fact that until recently neither the Constitution nor laws of the United States were seen as affecting the family unit.” Id. at 307 n.17 (citing In re Burrus, 136 U.S. 586, 594 (1890); Solomon v. Solomon, 516 F.2d 1018, 1024 (3d Cir. 1975); Hernstadt v. Hernstadt, 373 F.2d 316, 317 (2d Cir. 1967)).

\(^{44}\) Id. at 308-09. Courts of one state generally must give full faith and credit to the final judgments of another state and their failure to do so may be challenged in a claim for enforcement of such judgments in federal court under...
The specific requirements of the PKPA, the court pointed out that the federal courts’ reluctance to apply full faith and credit principles to custody decrees, rooted in the fear that the court would become embroiled in the underlying dispute, was inapposite. The Third Circuit reasoned that a court need not become enmeshed in the underlying custody dispute in order to decide a lawsuit based on the PKPA since, under that statute, a court’s task is merely to decide which state court properly asserted jurisdiction, not which parent should be awarded custody.

The full faith and credit clause. See id. However, as the Third Circuit stated in Flood:

Even though the Supreme Court has reserved the question whether full faith and credit principles apply at all to custody decrees, the modifiability of custody decrees makes it unlikely that a litigant could properly allege a federal claim for outright enforcement of a custody decree under the Full Faith and Credit Clause or statute.

Id. (citations omitted). It is the special character of custody decrees that prevents the true application of full faith and credit principles. See id. (citing Ford v. Ford, 371 U.S. 187, 194 (1962) (courts of South Carolina are not precluded from modifying custody decrees of another state by full faith and credit clause); May v. Anderson, 345 U.S. 528 (1953) (Ohio court need not give full faith and credit to Wisconsin custody order); Eicke v. Eicke, 399 So. 2d 1231 (La. App.) (Louisiana court refused to give full faith and credit to Texas custody decree) cert. denied, 406 So. 2d 607 (La. 1981), cert. dismissed, 459 U.S. 1139 (1983)). The Third Circuit explained that because custody decrees can be modified rather easily by the rendering state itself if changed circumstances demonstrate that a modification would be in the “best interests” of the child, full faith and credit principles may permit modification in some other forum state as well. See 727 F.2d at 309 (citing New York ex rel. Halvey v. Halvey, 330 U.S. 610 (1947) (court in one state can modify custody decrees made in another state)).

Therefore, the Third Circuit concluded that because a federal court asked to apply full faith and credit to one court’s custody decree “would ineluctably be drawn into readjudicating the underlying custody dispute,” such suits could rarely state a valid federal claim. Id. at 308-09.

45. 727 F.2d at 309-10. In comparing full faith and credit provisions with PKPA requirements, the Third Circuit emphasized that, unlike the full faith and credit principles which allow state courts to apply their own standards in determining when they can assert jurisdiction to modify a custody decree, the PKPA provides specific rules for determining the one state forum that can take jurisdiction. Id. The court also noted that the PKPA, unlike the full faith and credit clause, forbids a state court from exercising jurisdiction in any custody proceeding commenced during the pendency of a proceeding in another state court, where the state court is exercising jurisdiction in accordance with the provisions of the Act. Id. at 310 (citing 28 U.S.C. § 1738A(g) (1982)).

46. 727 F.2d at 309. The Third Circuit was not concerned that a federal court enforcing state compliance with the PKPA “would ineluctably be drawn into readjudicating the underlying dispute,” as would a court considering whether “changed circumstances” have occurred to warrant modification of the custody decree. Id.

47. Id. at 310. The PKPA requires only a preliminary inquiry into the facts to determine which state court appropriately has jurisdiction under the statute. See id. Because the PKPA permits only one state at a time to assert jurisdiction (unlike full faith and credit principles) the court concluded that “a federal court could in certain cases enforce a decree without becoming enmeshed in the underlying custody dispute.” Id. But see Wand, supra note 8, at 391-92 n.454.
After concluding that the traditional bars to federal jurisdiction in child custody cases were inapplicable to a suit under the PKPA, the court addressed the issue of whether Congress intended to afford federal court jurisdiction to enforce the PKPA. Finding no guidance in the language of the statute, the court examined its legislative history. Upon analyzing various committee reports, statements, and other testimony, the Third Circuit concluded that whereas Congress intended to leave the rendering and even initial enforcement of custody determinations themselves in the hands of the state courts, Congress also intended to permit PKPA enforcement actions to be brought in federal court. In reaching this conclusion the court focused on the fact that Congress had sought to enact a uniform set of rules governing custody jurisdiction that would be binding on all state courts in order to eliminate the incentive to “snatch” children generated by inconsistent state laws governing custody jurisdiction.

48. See supra notes 39-47 and accompanying text.
49. 727 F.2d at 310.
50. Id. at 310-11. The court observed that the language of the PKPA neither provides for nor prohibits federal court jurisdiction. Id. at 310.
51. Id.
52. Id. at 310-11 (citing Parental Kidnapping Prevention Act of 1979: Joint Hearing on S. 105 Before the Subcomm. on Criminal Justice of the Senate Judiciary Comm. and the Subcomm. on Child and Human Development of the Senate Labor and Resources Comm., 96th Cong., 2d Sess. 20 (1980) [hereinafter cited as Joint Hearing] (testimony of Congressman Duncan) (“we hold Federal interference to the minimum”); id. at 71 (testimony of A. Miller, President, Children’s Rights, Inc., and supporter of bill) (“We do not want the Federal Government settling custody disputes.”)).

The court also found support for this conclusion in the fact that a House Committee had rejected an alternative proposal by Congressman Hamilton Fish that would have overruled the domestic relations exception to diversity jurisdiction insofar as it applies to child custody decrees. 727 F.2d at 310 (citing Parental Kidnapping Prevention Act of 1979: Hearings Before the Subcomm. on Crime of the House Comm. on the Judiciary, 96th Cong., 2d Sess. 7 (1980)). Noting that Congressman Fish’s proposal would have permitted parents to enforce custody decrees in the federal courts without regard to the usual requirement of a $10,000 amount-in-controversy in diversity cases, the court interpreted the rejection of this proposal to mean that “Congress wished to prevent the federal district courts from becoming a forum of first resort when an out-of-state parent disregards a custody decree.” Id. at 311.

53. 727 F.2d at 310-11. The Third Circuit explained that the inconsistency of state laws governing jurisdiction over custody disputes had led parents to believe that they might secure custody by snatching their children and fleeing to a different state. Id. at 311. For a discussion of the inconsistency of state jurisdictional law, see supra note 6 and accompanying text.

The court noted that the Uniform Child Custody Jurisdiction Act (UCCJA) was drafted in 1968 particularly because of the “chaos” generated by inconsistent state laws. 727 F.2d at 311. The court further indicated, however, that by the time of the congressional hearings on the PKPA, the interstate custody problem had little improved from the situation existing when the UCCJA was proposed over a decade earlier. Id. The Third Circuit quoted the National Conference of Commissioners on Uniform Laws to describe that situation: [T]he courts of the various states have acted in isolation and at times in competition with each other; often with disastrous consequences. A
sional sponsors of [the PKPA] believed that the need for nationwide uniformity in the rules of custody jurisdiction justified exercising federal power to compel interstate cooperation," 54 the Third Circuit found that to deny a federal court jurisdiction for the enforcement of the PKPA would thwart the congressional policy underlying the PKPA and render its provisions virtually meaningless. 55 Writing for the court, Judge Adams stated: "[W]e cannot believe that Congress intended to render [the PKPA] virtually nugatory by so restricting the availability of a federal court of one state may have awarded custody to the mother while another state decreed simultaneously that the child must go to the father . . . . In situations like this the litigants do not know which court to obey. They may face punishment for contempt of court and perhaps criminal charges for child stealing in one state when complying with the decree of the other. Also a custody decree made in one state one year is often overturned in another jurisdiction the next year or some years later and the child is handed over to another family, to be repeated as long as the feud continues . . . . To remedy this intolerable state of affairs where self-help and the rule of "seize-and-run" prevail rather than the orderly processes of the law, uniform legislation has been urged in recent years to bring about a fair measure of interstate stability in custody awards . . . . The Act is designed to bring some semblance of order into the existing chaos.

Id. (quoting UCCJA, 9 U.L.A. 116, 113-14 prefatory note (1979)).

54. 727 F.2d at 311 (citing Parental Kidnapping Prevention Act of 1979: Hearing on S. 105 Before the Child and Human Development Subcomm. of the Senate Labor and Human Resources Comm., 96th Cong., 1st Sess. 167 (1979)) [hereinafter cited as Hearing]. The Third Circuit quoted one of the bill's sponsors, Senator Wallop:

Because the UCCJA is a reciprocal act and may be freely adopted or rejected by the states, its effectiveness in interstate custody cases depends upon its adoption throughout the country . . . . The price of waiting for this eventuality is too high in terms for Congress not to take initiative in finding a solution to the interstate child-snatching problem.

Id. (citing Hearing, supra, at 15 (statement of Senator Malcolm Wallop)). The Third Circuit also quoted Senator Cranston:

Although legal custody issues relating to divorce and child-custody matters have traditionally been within the domain of the States and not the Federal Government, it is within the province of the Federal Government to resolve problems that are interstate in origin and which the States, acting independently, seem unable to resolve . . . .

Id. at 311 n.25 (quoting Joint Hearing, supra note 52, at 4 (statement of Senator Alan Cranston, co-sponsor)). At the same hearing, Congressman Duncan stated: "Though I would prefer to have this question addressed at the State level, it has not been . . . . [W]e [the federal government] can handle this problem here." Joint Hearing, supra note 52, at 20 (testimony of Congressman Duncan).

55. 727 F.2d at 312. Before reaching this conclusion, the court acknowledged that direct appeal to the United States Supreme Court from a state supreme court which allegedly had violated the PKPA is, in theory, an available option to the litigant denied a federal forum at a lower level. Id. However, the court quickly dismissed the feasibility of this option, indicating that the Supreme Court's crowded docket effectively prevented it from ensuring compliance, on a case-by-case basis, with the PKPA. Id.
forum that state compliance with the legislation would become optional." The court thus held that Flood's complaint sufficiently alleged a violation of federal statutory rights under the PKPA and that it could not be dismissed for lack of jurisdiction.

Notwithstanding the refusal of several circuit courts to involve themselves in child custody disputes even when federal constitutional questions are at stake, recent Supreme Court analyses support the Third Circuit's conclusion that the domestic relations bar to federal court jurisdiction applies solely to child custody cases arising in diversity and not to federal question cases. For example, in *Palmore v. Sidoti*, the Court granted certiorari to review the judgment of a state court that had divested a natural mother of custody of her infant child because of

56. 727 F.2d at 312.

57. Id. at 312-13. The Third Circuit noted that Flood had "alleged that North Dakota and New Jersey courts have concurrently issued conflicting custody decrees." Id. She also alleged "that she and her children [were] suffering irreparable harm from the lack of consistent custody decrees." Id. at 313. Given these allegations, the court concluded that the complaint described a violation of Flood's rights protected by federal law, the PKPA. Id. Those rights included "the right to have one state at a time determine her children's [sic] custody and the right to have other states enforce the determination unless modification is permitted by federal law." Id. (emphasis added).

58. Id. at 312. The court, enunciating the standard promulgated in *Bell v. Hood*, concluded that Flood's complaint could not be dismissed because it was not "wholly insubstantial and frivolous [or] so patently without merit as to justify . . . dismissal for want of jurisdiction." Id. (quoting *Bell v. Hood*, 327 U.S. 678 (1946)).

59. See, e.g., *Bergstrom v. Bergstrom*, 623 F.2d 517 (8th Cir. 1980) (court denied jurisdiction where minor's right to remain in United States was in question because of custody dispute); *Huynh Thi Anh v. Levi*, 586 F.2d 625 (6th Cir. 1978) (court denied jurisdiction in habeas corpus action brought by natural relatives of four Vietnamese children contesting evacuation and custody of children under "Operation Babylift"). It is submitted that the Third Circuit in *Flood* inaccurately stated that there were no cases "declining federal jurisdiction on the basis of the domestic relations exception . . . [and a] complaint alleging federal subject matter jurisdiction." 727 F.2d at 307.

For cases where federal courts have accepted jurisdiction over domestic relations controversies involving federal questions, see *Nguyen Da Yen v. Kissenger*, 528 F.2d 1194 (9th Cir. 1975) (babylifted Vietnamese children brought class action against Immigration and Naturalization Service asserting that their fifth amendment rights were violated by their continued involuntary detention in United States in custody of people other than their parents); *Abdul-Rahman Omar Adra v. Clift*, 195 F. Supp. 857 (D. Md. 1961) (alien, a Lebanese citizen, sought custody of his daughter from his ex-wife and her American husband). See also *Wasserman v. Wasserman*, 671 F.2d 832 (4th Cir.) (federal court granted jurisdiction over tort actions for child snatching), cert. denied, 459 U.S. 1014 (1982); *Lloyd v. Loeffler*, 599 F. Supp. 998 (E.D. Wis.) (same), aff'd, 694 F.2d 489 (7th Cir. 1982); *Kajtazi v. Kajtazi*, 488 F. Supp. 15 (E.D.N.Y. 1978) (same).

60. The district and circuit courts are not consistent in their holdings as to whether the domestic relations bar precludes federal jurisdiction in federal question cases. See supra note 59.

her remarriage to a person of a different race. While recognizing that "[t]he judgment of a state court determining or reviewing a child custody decision is not ordinarily a candidate for review by this Court," Chief Justice Burger, writing for a unanimous court, agreed to hear the case because of the important federal concerns raised by the petitioner's claim. In granting certiorari, the Court did not even mention the domestic relations exception. Moreover, Palmore is not the first federal question case involving domestic relations issues in which the Supreme Court has exercised jurisdiction. Thus, given the Supreme Court's sub silentio determinations that the domestic relations exception is no bar to the exercise of federal jurisdiction where a substantial federal question has been raised, it seems likely that the court would uphold the grant of jurisdiction in a case such as Flood where interpretation of a federal statute is at issue.

The Third Circuit's conclusion that the full faith and credit clause does not preclude federal court jurisdiction over custody cases under the PKPA is also sound. As Judge Adams noted, federal courts' reluctance to assume jurisdiction to enforce custody decrees under the authority of this constitutional provision stems from a fear of involvement in the merits of the underlying custody dispute, which inquiry has traditionally been reserved for the state courts. This concern, however, should not deter federal courts from hearing cases brought under the PKPA because the Act, as compared with the full faith and credit clause, permits a federal court to enforce a decree without becoming enmeshed in the underlying custody battle.

62. Id. at 1880.
63. Id. at 1881.
64. Id. For Justice Burger's statement on the reviewability of state court custody determinations by the Supreme Court, see supra text accompanying note 63.
65. See 104 S. Ct. at 1881.
67. For a discussion of the federal courts' reluctance to assume jurisdiction in custody cases under the authority of the full faith and credit clause, see supra note 44 and accompanying text. See also Wand, supra note 8, at 348-55.
68. For a discussion comparing the provisions of the PKPA with the full faith and credit clause, see supra note 45.
69. See 727 F.2d at 310. Under the rules of the PKPA, if two states concurrently render custody decrees, one state has asserted jurisdiction in violation of federal law. See id. (quoting 28 U.S.C. § 1738A(a)-(g) (1982)). According to the Third Circuit, "[i]dentifying that errant state under [the PKPA] requires only preliminary inquiry into jurisdictional facts." Id.
Notwithstanding the basic soundness of the Flood court’s analysis, the opinion is not beyond criticism. The Third Circuit gave little weight to the legislative analysis contained in Bennett v. Bennett,70 in which the District of Columbia Circuit, albeit in dicta, reached a conclusion directly contrary to the Flood holding.71 Although Bennett was brought in diversity rather than under the PKPA,72 Judge Bazelon, writing for the majority, nevertheless addressed the issue of whether the PKPA contemplates federal court interpretation and enforcement of its provisions.73 After reviewing the legislative history of the PKPA and focusing upon the traditional federal court deference to the “peculiar province, experience, and competence of the state courts” in domestic relations matters, he concluded that Congress did not intend a federal court role.74

In Flood, the Third Circuit failed squarely to address the District of Columbia Circuit’s determination that the legislative history of the PKPA does not reflect a congressional intent that jurisdiction to enforce compliance with the PKPA be exercised by federal courts. Instead, the Third Circuit distinguished Bennett solely on the grounds that Bennett, unlike Flood, involved a plaintiff that did not allege a federal issue under the court’s federal question jurisdiction, but rather asserted a claim in diversity.75 The Third Circuit’s failure adequately to address the legislative analysis contained in Bennett is significant because it increases the

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70. 682 F.2d 1039 (D.C. Cir. 1982).
71. See 727 F.2d at 312 n.27.
72. 682 F.2d at 1043-44. In Bennett, a father suing under diversity jurisdiction sought two kinds of relief: damages for his ex-spouse’s allegedly tortious violation of a custody decree and injunctive relief from future tortious interference in the custody decree. Id. at 1040. The court allowed the damages claim to proceed, but denied jurisdiction over the claim for injunctive relief. Id. at 1042, 1044. The father asserted no claims under the PKPA. See id.
73. Id. at 1043.
74. Id. Judge Bazelon stated: “We note that conspicuously absent from this comprehensive enactment is any provision creating or recognizing a direct role for the federal courts in determining child custody. Indeed, the legislative history of the Act makes clear that Congress deliberately and emphatically omitted such a role.” Id. In reaching this conclusion the Bennett Court relied on testimony by Congressman Duncan and A. Miller, President of Children’s Rights, Inc., at the legislative hearings on the PKPA. Id. at 1043 n.6. See Joint Hearing, supra note 52, at 20 (testimony of Congressman Duncan); id. at 71 (testimony of A. Miller). The court in Flood and the court in Bennett cited the same testimony and reached a different conclusion. The Third Circuit should have addressed why its interpretation of such testimony, in support of its conclusion that the federal courts have jurisdiction under the PKPA, was the correct one.
75. 727 F.2d at 312 n.27. The Flood court noted:

Bennett concluded that [the PKPA] did not legislatively alter the domestic relations exception to diversity jurisdiction so as to permit a federal court to issue the injunction requested by the plaintiff in that case. We do not believe that such a reading of [the PKPA’s] legislative history can be applied to a suit predicated on federal question jurisdiction which seeks to enforce compliance with [the PKPA] itself.

Id.
likelihood that federal courts will interpret the PKPA inconsistently. For example, in *Siler v. Storey,* a case decided after *Flood,* the district court for the Northern District of Texas would not explicitly conclude that the plaintiff could bring an action under the PKPA in federal court. However, the jurisdictional issue in *Siler* might have been decided differently had the Third Circuit provided a more in-depth analysis to support its own view and to distinguish *Bennett.*

A related weakness of the *Flood* decision is evident in the Third Circuit's failure to reconcile fully its acknowledgement that the legislative history of the PKPA "demonstrates that Congress intended custody determinations to remain in the hands of the state courts," with its determination that "in limited circumstances of non-compliance with [the PKPA], federal district court intervention is permissible." In attempting to justify its conclusion that the legislative history of the PKPA supports such federal intervention, the court was unable to point to any language directly expressing an intent to provide for federal judicial review for the enforcement of the Act. The Third Circuit instead relied solely on statements in the Act's legislative history reflecting a grave concern over the need to enact an effective, uniform national scheme of custody jurisdiction to rectify the problem of child snatching. The

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77. Id. at 987. The court stated: "The jurisdiction of this court [plaintiff] apparently seeks . . . is founded on [the PKPA]. That statute, however, nowhere creates a federal judicial remedy for child custody matters." *Id.* (citations omitted).
78. See *id.* The *Siler* court, after reviewing the *Flood* decision, stated: Even if it be assumed, contrary to . . . *Bennett v. Bennett* above, that [the PKPA] creates a federal judicial remedy for child custody matters, the federal courts are not given exclusive jurisdiction to grant such a remedy. This court is unwilling to assume, as [plaintiff] would have it do, that the courts of Texas will not protect her federal rights. *Id.* (citation omitted) (emphasis added).
79. 727 F.2d at 310.
80. Id. at 312.
81. See *Addendum to Joint Hearings,* supra note 1, at 104 (letter from Patricia M. Wald, Assistant Attorney General, Department of Justice, to Congressman Peter Rodino, Chairman, House Committee on the Judiciary). Ms. Wald stated: "Nor does the legislation establish a federal substantive law—it would give the district courts jurisdiction to enforce the custody orders of State Courts and the law which will be applied is purely state law—and, accordingly, federal question jurisdiction likewise may not lie." *Id.* (emphasis in original).
82. See 727 F.2d at 311 nn.24-26. See also *Hearing,* supra note 54; *Joint Hearing,* supra note 52, at 15 (statement of Senator Malcolm Wallop, sponsor of the PKPA); *id.* at 4 (statement of Senator Alan Cranston, co-sponsor of the PKPA); *id.* at 20 (statement of Congressman Duncan). Senator Wallop stated: "While the traditional role of State law must be preserved in intrastate cases, we at the Federal level have a compelling responsibility to take the necessary and appropriate steps to assist states in resolving the complicated interstate and international cases which they have been unable to adequately address themselves." *Joint Hearing,* supra note 52, at 15 (statement of Senator Malcolm Wallop). At the same hearing, Professor Russell Coombs of Rutgers-Camden Law School stated:
limited nature of the Third Circuit's analysis, again, increases the chances that other federal and state courts may refuse to adopt its conclusion.

Although the Third Circuit's legislative and legal analysis may be criticized as above, the court nevertheless reached the proper result in concluding that Congress intended to permit the enforcement of the PKPA in federal court.\textsuperscript{83} It is contended that Congress' failure expressly to provide for federal court enforcement of the PKPA was the result of an oversight, rather than an intended omission.\textsuperscript{84} Considering the magnitude of the parental kidnapping problem\textsuperscript{85} and the terrible track record the state courts have had in dealing with the problem, even under the UCCJA,\textsuperscript{86} it is unlikely that Congress would have intentionally created a scheme of federal standards to remedy the kidnapping problem without mandating some federal enforcement of those standards. Nonetheless, Congress' failure to provide an explicit right of enforcement under the statute does not preclude the existence of such a right.\textsuperscript{87} The availability of a federal enforcement mechanism is important because federal courts, not themselves involved in the merits of custody determinations, are less likely to apply the PKPA in a biased fashion.\textsuperscript{88}

"Enactment of this federal legislation is necessary . . . to ensure that the fundamental, central provisions establishing the basic criteria of jurisdiction and the duty of interstate enforcement are uniform among all the States." \textit{Id.} at 143 (statement of Professor Russell Coombs).

83. Several courts have subsequently followed the holding in Flood. \textit{See} Heartfield v. Heartfield, 749 F.2d 1138, 1141 (5th Cir. 1985) ("[w]e agree with the Braaten court" that Congress could not have intentionally rendered the PKPA meaningless by so restricting the availability of a federal forum); McDougald v. Jenson, 596 F. Supp. 680, 685 (N.D. Fla. 1984) (citing Flood as authority for court's ability to assert jurisdiction under the PKPA).

84. Although the PKPA requires that a state must give deference to another state's custody decree, no explicit provision exists for situations (such as the one present in Flood) in which a state flatly refuses to follow the PKPA, and asserts jurisdiction to modify another state's custody decree, giving no deference whatsoever. \textit{See} Wand, \textit{supra} note 8, at 389-90. Clearly, Congress gave little consideration to the idea that the states would fail to comply with the provisions of the PKPA. Several statements, like that of Professor Coombs, are evidence that non-compliance was not thought to be a problem. Professor Coombs utilized phrases such as "few cases [of non-compliance]" in his discussions. He stated that "in the few cases where prevention and deterrence fail and child snatching does occur, the parent locator service should be capable of locating most of the parents that hide." \textit{Joint Hearing, supra} note 52, at 136 (statement of Professor Russell Coombs) (emphasis added).

85. For a discussion of the magnitude of the parental kidnapping problem, see \textit{supra} text accompanying note 3. \textit{See also supra} note 2. \textit{See generally} S. Abraham, \textit{supra} note 1; M. Agopian, \textit{supra} note 1.

86. For a discussion of the ineffectiveness of the UCCJA, see \textit{supra} notes 53-54. \textit{See generally} Sampson, \textit{What's Wrong With the UCCJA? Punitive Decrees and Hometown Decisions are Making a Mockery of This Uniform Act, 3 Fam. Advoc., Spring 1981, at 28.

87. \textit{See} 727 F.2d at 312.

88. \textit{See} Wand, \textit{supra} note 8, at 388-91. Even after the enactment of the
Congress' failure to provide explicitly for federal enforcement of the PKPA has had the unfortunate result of leading to a further lack of uniformity in the enforcement of the PKPA. At present, the judicial pronouncements on the issue of whether federal courts have federal question jurisdiction to enforce the provisions of the PKPA have reached contrary results. In the Third and Fifth Circuits, as a result of the courts' holdings in Flood and Heartfield v. Heartfield, a federal forum is now available to those litigants who seek redress from conflicting custody decrees. However, because of the decision in Bennett, a litigant in the District of Columbia Circuit is most likely relegated to nonfederal courts for adjudication of such child custody issues. Clearly such inconsistent results were not contemplated by Congress.

Congress should act expeditiously to enact an explicit grant of federal jurisdiction and thereby clarify this uncertain situation. Such an explicit grant would further uniformity among both federal courts seeking to interpret the PKPA, and among state courts seeking to modify custody decrees in accordance with the PKPA. In enacting such an explicit grant of jurisdiction, Congress should also address the question, noted but not answered in Flood, of whether a plaintiff must exhaust state remedies for the alleged noncompliance with the PKPA prior to invoking federal review. The PKPA legislative history makes it clear that Congress rejected the idea of calling upon federal courts in the first instance to enforce a state court's child custody decree. However, Congress made no clear statement as to whether a plaintiff should be required to raise in state court a claim that a second state was violating PKPA, state courts have continued to exhibit their "propensity for hometown decisions." See id. at 988 (quoting Sampson, supra note 84, at 30). For an example of when state courts have failed to comply with the mandate of the PKPA and have awarded custody to the litigant residing within their borders, see Flood, 727 F.2d at 306 (courts of New Jersey and North Dakota entered inconsistent custody decrees); McDougald v. Jenson, 596 F. Supp. 680, 680 (N.D. Fla. 1984) (courts of Florida and Washington entered inconsistent custody decrees). See also Rush v. Stansbury, 668 S.W.2d 690, 691 (Tex. 1984) (conflicting custody decrees in Texas and Tennessee).


90. See supra note 89.

91. 749 F.2d 1138 (5th Cir. 1985).

92. See id. at 1141; 727 F.2d at 313. A federal forum is also available to litigants in the Northern District of Florida. See McDougald v. Jenson, 596 F. Supp. 680 (N.D. Fla. 1984).

93. 682 F.2d 1039, 1043 (D.C. Cir. 1982).

94. See id. For a discussion of the result in Bennett, see supra notes 72-74 and accompanying text.

95. 727 F.2d at 312 n.28.

96. Id. at 310.
the terms of the PKPA, before bringing that claim to a federal court.97

In enacting a federal enforcement provision, Congress should consider not only the benefit to children but also the various policy considerations underlying and relating to the PKPA. For example, it should consider the negative impact that the lack of a federal enforcement mechanism has on women who generally have fewer resources with which to litigate an interstate custody dispute.98

However, in considering such policy concerns and the need to address the exhaustion issue, Congress should not lose sight of the primary purpose of the PKPA—the promotion of uniform child custody decisions. The failure of Congress to explicitly provide for federal court enforcement of the PKPA was an oversight that should not have occurred and that Congress should presently rectify. If Congress acts swiftly and clearly to establish a federal forum to enforce the provisions

97. Although neither Flood, 727 F.2d at 312 n.28, nor Bennett, 682 F.2d at 1044, address exhaustion, both Heartfield, 749 F.2d at 1138 and McDougald v. Jenson, 596 F. Supp. 680 (N.D. Fla. 1984), do. In Heartfield the court indicated that at a minimum there must be a conflict between the courts of one state and the courts of another state before jurisdiction under the PKPA can lie. 749 F.2d at 1138 (court denied plaintiffs injunctive relief because no conflict yet existed). In McDougald, Judge Vinson stated:

I find no requirement, either expressed or implied, that the parties exhaust any available state remedies through an appeal to the highest available state court when, as here, the custody dispute has already led to clearly conflicting orders entered by the two states, and it is unlikely that appeals in both (or either of the) states would result in a resolution that would be accepted as final in both states.

596 F. Supp. at 680-81 n.2.

98. See Bureau of the Census, U.S. Dep't of Commerce, Money Income of Families and Persons in the United States: 1979 23 (Current Population Reports: Series P-60, No. 129 1981) (median per capita income of divorced women was $4,152; median per capita income of divorced men was $7,886). For a discussion of the extensive litigation that occurred in the interstate custody dispute in Flood, see supra text accompanying notes 19-36.

Although the provisions of the PKPA generally make it more difficult for parents to flee the jurisdiction with their children and thus discourage parental kidnapping, the provisions may have a chilling effect in certain situations where a parent's safety is at stake. Telephone interview with Marla Hollandsworth, Legal Director, House of Ruth, Baltimore, Md. (Oct. 2, 1984). Some provisions within the PKPA exist to protect the safety of children who flee abusive situations. See 28 U.S.C. § 1738A(c)(2)(C)(ii)(1982). Yet there is no provision within the Act to allow a battered woman to flee the original “forum” jurisdiction with her children in order to escape her batterer and protect her safety. Thus, a battered woman is forced to make an impossible choice between her own safety and meeting the requirements of the PKPA. The threat of child snatching is the most prevalent and persuasive threat that batterers use to control their victims. Telephone interview with Joan Kuriansky, Esq., Executive Director, Women Against Abuse, Philadelphia, Pa. (Oct. 1, 1984); Telephone interview with Marla Hollandsworth, supra.
of the PKPA, it will have taken an important step toward remedying the phenomenon of parental kidnapping.

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