

NOTES

IN THE BEST INTERESTS OF THE CHILD? THE MISAPPLICATION OF THE UCCJA AND THE PKPA TO INTERSTATE ADOPTION CUSTODY DISPUTES

INTRODUCTION

In adoption placement the stability and security of the adopted child are of paramount importance.¹ In interstate adoption, however, the best interests of the adopted child may not be addressed because there are onerous jurisdictional hurdles to clear prior to such a determination.² The best interests of the child, a fundamental underpinning of jurisdictional statutes, should be central to the inquiry, especially if a prolonged custody contest arises between a biological parent and the adoptive, custodial parents. This note focuses on the jurisdictional issues arising in interstate adoption and how these issues might better be resolved in the child's best interest.

The Uniform Child Custody Jurisdiction Act ("UCCJA")³ and the Parental Kidnapping Prevention Act ("PKPA")⁴ furnish criteria for state courts to determine jurisdiction in custody disputes. Both acts seek to deter divorced or estranged parents from kidnapping and removing their children to a state with custody laws more favorable to their position.⁵ Thus, both acts encourage the reduction of forum-shopping in custody disputes.⁶ Additionally, both acts allow a court to take jurisdiction to modify existing custody decrees if the initial court either loses or declines to take jurisdiction. The drafters of both the UCCJA and the PKPA based the statutes on policy goals relating to familial custody disputes. However, courts seeking to determine jurisdiction in interstate adoption custody disputes find the statutes difficult to apply.

1. UNIF. CHILD CUSTODY JURISDICTION ACT, § 1, 9 U.L.A. 123, 123-24 (1982) (Purposes of Act).

2. See *infra* notes 17-25 and accompanying text.

3. 9 U.L.A. at 144-45.

4. Congressional Findings and Declarations of Purposes for the Parental Kidnapping Prevention Act of 1980, Pub. L. No. 96-611, 94 Stat. 3569 (codified as amended at 28 U.S.C. § 1738A (Supp. 1988)) [hereinafter PKPA Findings].

5. See *infra* notes 20-25 and accompanying text.

6. PKPA Findings, Pub. L. No. 96-611, § 7(c)(6); 9 U.L.A. at 116.

The UCCJA and the PKPA clearly apply to the typical custody dispute resulting from a divorce. Because familial custody determinations are never fully settled until the child is no longer subject to parental guardianship, striking a balance between the stability of children and certainty of dispute resolution was of utmost concern to the drafters of the UCCJA and the PKPA.⁷ Additionally, increasing parental kidnappings and the resulting shift of children from one state to another by family members in search of favorable forums precipitated the development of a nationwide cooperative system to determine initial and continuing jurisdiction over custody decrees.⁸

These concerns, however, are not so clearly applicable to interstate adoption custody disputes. Adoption, which falls under the jurisdictional dictates of the UCCJA and the PKPA,⁹ presents issues apart from the typical family custody battle. The adoption process generally makes a single, permanent award of custody to the adoptive parents. Yet, if a biological parent seeks to regain custody before the adoption is final, custody of the child may be returned to him or her.¹⁰ Neither award is subject to modification due to changing circumstances, unlike traditional custody awards.¹¹ Factors determining jurisdiction under the UCCJA and the PKPA, such as the home state of the child,¹² or significant connections with a state,¹³ are not particularly applicable to the interstate adoption proceeding. Additionally, the threat of parental kidnapping is not a fundamental policy concern

7. See *infra* note 144 and accompanying text. Parties to a custody award made as a result of a divorce may request that the award be modified. For example, in Michigan, the court will modify a custody award if there is change in circumstances in the child's current living situation "until the child reaches 18 years of age." Child Custody Act of 1970, 25 MICH. COMP. LAWS § 25.312(7)(c) (1986).

8. See *infra* notes 18-25 and accompanying text.

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

10. See *infra* note 109 and accompanying text.

11. See *supra* note 7.

12. See *infra* notes 28-30 and 61-62 and accompanying text.

13. See *infra* notes 31-37 and accompanying text.

in the adoption custody context. Most importantly, state courts manipulate the UCCJA and the PKPA to achieve results consistent with their policies of enforcing either parents' rights or the child's best interests.

The different approaches of the state courts require interstate adoption proceedings to focus on the sometimes opposing jurisdictional principles that reflect the real choice the courts are making: whether to enforce the rights of the biological parents absolutely or to consider the best interests of the adoptive child. Consequently, the UCCJA and the PKPA should include a separate provision for interstate adoption custody disputes that allows courts to strike a fair balance between the rights and interests of the biological parents and the best interests of the child.

Section I discusses the need for promulgation and implementation of both the UCCJA and the PKPA, as well as the historical and constitutional development of the parental rights doctrine and the best interests of the child doctrine.¹⁴ Section II details two recent interstate adoption cases with strikingly similar facts in which the courts applied the jurisdictional provisions of the UCCJA and the PKPA with opposite results.¹⁵ Section III analyzes these two cases to illustrate how the courts' continuing struggle with jurisdictional issues in interstate adoption custody disputes demonstrates the need for separate provisions under the UCCJA and the PKPA.¹⁶ Finally, section IV details a proposal for change in the current UCCJA and the PKPA based on the actual policies employed by courts in making their jurisdictional decisions.¹⁷

I. BACKGROUND

A. *The Uniform Child Custody Jurisdiction Act*

The Uniform Child Custody Jurisdiction Act,¹⁸ a model act

14. See *infra* part I.C and accompanying text.

15. See *infra* part II and accompanying text.

16. See *infra* part III and accompanying text.

17. See *infra* part IV and accompanying text.

18. For discussion regarding the need for, promulgation of, and implementation of the UCCJA see Christopher L. Blakesley, *Child Custody—Jurisdiction and Procedure*, 35 EMORY L.J. 291 (1986); Lucy S. McGough & Anne R. Hughes, *Chartered Territory: The Louisiana Experience with the Uniform Child Custody Jurisdiction Act*, 44 LA. L. REV. 19,

promulgated by the National Conference of Commissioners on Uniform State Laws in 1968,¹⁹ was drafted in response to the growing public concern that thousands of children were being "shifted from state to state and from one family to another every year while their [divorcing] parents or other persons battled over their custody . . ." in various state courts.²⁰ The drafters were troubled by the lasting psychological trauma of children devastated by custody battles between their hostile and scattered family members: "[a] child who has never been given the chance to develop a sense of belonging and whose personal attachments when beginning to form are cruelly disrupted, may well be crippled for life, to his own lasting detriment and the detriment of society."²¹ However, the drafters also felt the need to balance children's stability with the need for certainty in custody decisions.²² The drafters wanted the implementation of the UCCJA by all fifty states²³ to bring order to the chaos of interstate custody disputes, because it requires courts to take jurisdiction *only* in the child's home state or where there are strong contacts with the child and his family.²⁴ In addition, the UCCJA requires recognition and enforcement of out-of-state custody decrees in most instances, limiting a subsequent court's jurisdiction to modify an initial decree and thus denying "child snatchers" access to courts they perceive as favorable.²⁵

By 1983, all fifty states, the District of Columbia, and the Virgin Islands had enacted the UCCJA with slight variations among the jurisdictions.²⁶ Iowa, Michigan, New Jersey, and

24-34 (1983).

19. 9 U.L.A. at 116.

20. *Id.*

21. *Id.*

22. Anne B. Goldstein, *The Tragedy of the Interstate Child: A Critical Reexamination of the Uniform Child Custody Jurisdiction Act and the Parental Kidnapping Prevention Act*, 25 U.C. DAVIS L. REV. 845, 946 (1992) (claiming in absence of states' ability to sacrifice flexibility for certainty in interstate custody decrees, UCCJA and PKPA should be repealed entirely).

23. See *infra* note 26 and accompanying text.

24. 9 U.L.A. at 118 (comment) (emphasis added).

25. *Id.*

26. 9 U.L.A. at 115-16; Mark H. Kruger, *Jurisdiction Under the Uniform Child Custody Jurisdiction Act*, 44 J. MO. B. 467, 470 (1988).

Ohio, the states deciding the cases analyzed by this note, all promulgated slight variations of the Act by 1979.²⁷

The UCCJA permits a state court to take jurisdiction in a number of ways. Primarily, a court has jurisdiction over a custody case if the child's home is in that state or, secondarily, if the child has significant connections with that state.²⁸ If neither home state nor significant connection jurisdiction exists, the court may take jurisdiction either in an emergency or if no other state has jurisdiction.²⁹ The UCCJA defines home state as:

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

27. 9 U.L.A. at 115. Michigan enacted a slightly modified version of the act in 1975. MICH. COMP. LAWS §§ 600.651-600.73 (1986). Iowa and Ohio followed in 1977, and New Jersey passed its version in 1979. IOWA CODE ANN. §§ 598A.1-598A.25 (West 1981); OHIO REV. CODE ANN. §§ 3109.21-3109.37 (Anderson Supp. 1993); N.J. STAT. ANN. §§ 2A:34-28 to 2A:34-52 (West 1987). Each state's version substantially conforms with the model UCCJA. *Id.*

28. 9 U.L.A. at 144 (comment).

29. *Id.* at 143. Relevant portions of Section 3 (Jurisdiction) of the UCCJA read as follows:

(a) A court of this State which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if: (1) this State (i) is the *home state* of the child at the time of commencement of the proceeding, or (ii) had been the child's home state within 6 months before commencement of the proceeding and the child is absent from this State because of his removal or retention by a person claiming his custody or for other reasons, and a parent or person acting as parent continues to live in this State; or (2) 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 child's present or future care, protection, training, and personal relationships; or (3) the child is physically present in this State and (i) the child has been abandoned or (ii) it is necessary in an *emergency* to protect the child because he has been subjected to or threatened with mistreatment or abuse or is otherwise neglected [or dependent]; or (4)(i) it appears that *no other state would have jurisdiction* under prerequisites substantially in accordance with paragraphs (1), (2) or (3), or another state has declined to exercise jurisdiction on the ground that this State is the more appropriate forum to determine the custody of the child, and (ii) it is in the *best interest of the child* that this court assume jurisdiction.

Id. (emphasis added).

old the state in which the child lived from birth with any of the persons mentioned.³⁰

If the home state criteria cannot be satisfied, the court then determines whether the forum has significant connections with the child and at least one of the custody contestants.³¹ This provision was primarily intended for the family that moves frequently, thus preventing its child from residing in one place for at least six months.³² The significant connection provision, combined with the provision that presence of the child in the state is insufficient to confer jurisdiction,³³ discourages unilateral removal of children to other states in order to seek custody in a "preferable" forum.³⁴ Although phrased in general terms in order to be flexible, the significant connection paragraph is designed to *limit* jurisdiction.³⁵ Jurisdiction is to be conferred if it is in the *child's* interest, not merely in the interest of, or for the convenience of, the parties in dispute.³⁶ The forum serves the best interests of the child when it has optimum access to relevant information about the child and her family.³⁷

If neither home state nor significant connection jurisdiction exists, courts may take "emergency" jurisdiction. Emergency jurisdiction is reserved exclusively for "extraordinary circumstances."³⁸ One example of extraordinary circumstances is child neglect coupled with abandonment. Only under emergency jurisdiction is the child's mere presence in the state sufficient to confer jurisdiction.³⁹

Traditionally, problems arise in interstate custody disputes when more than one court has jurisdiction. Concurrent

30. 9 U.L.A. at 133.

31. 9 U.L.A. at 144 (comment).

32. *Id.* This paragraph also provides for the parent from the home state to follow the custodial parent to her current state of residence and file for custody there. *Id.*

33. *Id.* Section 3 (Jurisdiction) of the UCCJA reads in part: "(b) Except under paragraphs (3) and (4) of subsection (a), physical presence in this State of the child, or of the child and one of the contestants, is not alone sufficient to confer jurisdiction on a court of this State to make a child custody determination." 9 U.L.A. at 144.

34. *Id.* at 145 (comment).

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.* See generally Application of Lang, 193 N.Y.S.2d 763 (App. Div. 1959) (representing the type of extraordinary circumstances contemplated by the UCCJA).

39. 9 U.L.A. at 145.

jurisdiction is controlled by section six of the UCCJA.⁴⁰ If jurisdiction is being exercised by another court acting in substantial conformity with the UCCJA, a second court may not exercise jurisdiction.⁴¹ If no other court is exercising jurisdiction and more than one court has proper initial jurisdiction, priority in time determines which court will proceed with the action.⁴² Therefore, courts must actively seek information regarding custody proceedings concerning the same child in other states.⁴³

In formulating the UCCJA, the drafters recognized that once a court has made an initial decree, the parties may wish to modify its terms due to changed circumstances. Section fourteen controls modification of an initial decree by a different state.⁴⁴ Courts that render a custody decree generally retain continuing jurisdiction to modify it.⁴⁵ Due to the strong policy of stability in custody arrangements and the stance against forum shopping, a state must decline jurisdiction if the state issuing the initial decree appears to have continuing jurisdiction.⁴⁶ Modification jurisdiction shifts to another state only when the parties have either moved out of the initial state, their contact with the initial state has become slight,⁴⁷ or if the state issuing the initial decree declines to take jurisdiction to modify. Upon fulfilling one of these conditions, another state with jurisdiction under section three may proceed with the case.⁴⁸

The unanimous promulgation of the UCCJA by the states did not solve the problem of enforcement or modification of existing decrees.⁴⁹ Courts continued inconsistently to take jurisdiction to enter or modify custody orders, leading to excessive relitigation of cases.⁵⁰ Congress recognized that "the failure of the courts . . . to give full faith and credit to the judicial proceedings of the other jurisdictions . . . [caused] harm to the welfare of children and

40. *Id.* at 219-20.

41. *Id.*

42. *Id.* at 220.

43. *Id.*

44. *Id.* at 292.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* at 293. This is not so, however, if the prior court dismissed the petition on its merits. *Id.*

49. *Clausen*, 502 N.W.2d at 655.

50. PKPA Findings, Pub. L. No. 96-611, § 7(a)(3).

their parents and other custodians."⁵¹ Therefore, Congress enacted the Parental Kidnapping Prevention Act to induce the states to give effect to custody decrees made by other states.⁵²

B. *The Parental Kidnapping Prevention Act*

The Parental Kidnapping Prevention Act mandates that full faith and credit be given to custody determinations rendered by another state made in conformity with the PKPA.⁵³ The PKPA was enacted to give order to the inconsistent, conflicting laws and practices by which state courts determined their jurisdiction in custody disputes.⁵⁴ Inconsistent decisions were prevalent due to an increasing number of custody cases being determined by state courts, each with particular laws governing its jurisdiction.⁵⁵ These varying jurisdictional and substantive state laws gave incentive to

parties involved in such disputes to frequently resort to the seizure, restraint, concealment, and interstate transportation of children, the disregard of court orders, excessive relitigation of cases, obtaining of conflicting orders by the courts of various jurisdictions, and interstate travel and communication that is so expensive and time consuming as to disrupt their occupations and commercial activities⁵⁶

The PKPA was thus promulgated to establish a national system to locate parents who moved children from one jurisdiction to another and concealed them, in connection with custody disputes, to establish national standards under which courts could determine their jurisdiction to decide such disputes, and to determine the effect to be given to custody orders from other jurisdictions.⁵⁷ This system promotes the cooperation and

51. *Id.* § 7(a)(4).

52. Full Faith and Credit Given to Child Custody Determinations, 28 U.S.C. § 1738A (1988) [hereinafter PKPA].

53. *Id.*; 28 U.S.C. § 1738A(a) (1988). The PKPA became effective July 1, 1981. *Id.*

54. PKPA Findings, Pub. L. No. 96-611, § 7(a)(1)-(4). See also *Rees v. Reyes*, 602 A.2d 1137, 1140 (D.C. App. 1992).

55. PKPA Findings, Pub. L. No. 96-611, § 7(a)(1)-(3).

56. *Id.* § 7(a)(3).

57. *Id.* § 7(b). See generally *Voninski v. Voninski*, 661 S.W.2d 872 (Tenn. App. 1982).

exchange of information between state courts, while facilitating custody determinations made in the state best situated to decide the case in the child's best interest. Additionally, the PKPA discourages continuing interstate controversies over child custody in the interest of greater stability of home environments and of established family relationships for the child⁵⁸ and deters interstate abductions and other unilateral removals of children.⁵⁹

The PKPA allows a state to take jurisdiction over a custody case if:

- (1) the state is the child's home state; (2) there is no home state and the child and at least one contestant have significant connections with the state; (3) the child is physically present in the state and has been abandoned, abused, or neglected; (4) no state has jurisdiction pursuant to the PKPA; (5) a state has declined jurisdiction because it is in the child's best interest that this state decide the child custody issue; or (6) the state has continuing jurisdiction under the PKPA.⁶⁰

The PKPA requires the taking of jurisdiction under the "home state" provision unless its prerequisites are not met and preempts the UCCJA to the extent that it does not prefer the home state provision.⁶¹

To further the taking of jurisdiction consistent with the best interests of the child involved, the PKPA explicitly adopted the concept of "continuing jurisdiction" championed by family law authority Professor Bodenheimer.⁶² Once a state court makes an

58. PKPA Findings, Pub. L. No. 96-611, § 7(c)(4).

59. *Id.* § 7(c)(6). See *Sams v. Boston*, 384 S.E.2d 151, 156 (W. Va. 1989); *Rees*, 602 A.2d at 1140.

60. Juliet A. Cox, Note, *Judicial Wandering Through a Legislative Maze: Application of the Uniform Child Custody Jurisdiction Act and the Parental Kidnapping Prevention Act to Child Custody Determinations*, 58 MO. L. REV. 427, 439-40. See also Cox, *supra* at 432-44, for an extensive discussion of the history of the UCCJA and the PKPA; Mark L. v. Jennifer S., 506 N.Y.S.2d 1020, 1023 (N.Y. Fam. Ct. 1986).

61. 28 U.S.C. § 1738A(c). See also *O'Daniel v. Walker*, 686 S.W.2d 805, 807 (Ark. Ct. App. 1985); *Mancusi v. Mancusi*, 519 N.Y.S.2d 476, 478 (N.Y. Fam. Ct. 1987); *Garrett v. Garrett*, 732 S.W.2d 127, 128 (Ark. 1987).

62. 9 U.L.A. at 292. See also Brigitte M. Bodenheimer, *Progress Under the Uniform Child Custody Jurisdiction Act and Remaining Problems: Punitive Decrees, Joint Custody and Excessive Modifications*, 65 CAL. L. REV. 978, 984-87 (1977) (Professor Bodenheimer was a member of the National Conference of Commissioners which drafted the UCCJA.);

initial custody decree that is consistent with the PKPA's dictates, its orders are entitled to full faith and credit—provided that the decree court continues to have jurisdiction under its own laws and remains the residence of either the child or any contestant.⁶³ Like the UCCJA, the PKPA permits courts to modify the custody orders of other states under two conditions: (1) if the other state no longer has jurisdiction; and (2) if the decree court has declined to exercise its jurisdiction.⁶⁴

The continuity provided by limiting jurisdiction to modify custody decrees was viewed as furthering the best interests of the child, the person at the center of the custody dispute.⁶⁵ By limiting modification jurisdiction, the drafters expected that the court making the initial custody decree would likely make ensuing custody decisions. This court, having access to all previous information regarding the care and custody of the child, would be equipped to make the most informed custody decision possible. Limiting modification jurisdiction was viewed as a deterrent to forum shopping as well, because other jurisdictions would not be able to take jurisdiction under the PKPA.⁶⁶ This would lead to greater stability in the child's custody placement following a family breakdown, which the drafters perceived to be in the child's best interests.⁶⁷ In the interstate adoption context, however, the modification provision of the PKPA has been problematic in application because courts differ as to whether adoption custody awards are modifiable. Inconsistent jurisdictional decisions in this context have led to unstable child custodial arrangements. Consequently, the child's best interests are not being served.

Henry H. Foster, *Child Custody Jurisdiction: UCCJA and PKPA*, 27 N.Y.L. SCH. L. REV. 297, 303 n.33 (1981) (Professor Foster asserted that Bodenheimer was influential in persuading Congress to enact the concurrent jurisdiction concept into federal law.).

63. 28 U.S.C. § 1738A(d). The PKPA provides:

The jurisdiction of a court of a State which has made a child custody determination consistently with the provisions of this section continues as long as the requirement of subsection (c)(1) of this section continues to be met and such State remains the residence of the child or of any contestant.

Id. § 1738A(d). Subsection (c)(1) simply requires that the state have jurisdiction "under the law of such State"; that is, under its own laws. *Id.* § 1738(c)(1).

64. *Id.* § 1738A(f)(2).

65. PKPA Findings, Pub. L. No. 96-611, § 7(c)(3)-(5).

66. *Id.*

67. Bodenheimer, *supra* note 62, at 984-87.

C. *The Best Interests of The Child*

Making custody determinations in the best interest of the child is an explicit goal of both the UCCJA and the PKPA.⁶⁸ Implementation of the best interests standard has developed concurrently with the advancement of the rights of children. Recognition of children as individuals having rights is a relatively recent legal advancement.⁶⁹ Until the twentieth century, children were considered to be little more than the property of their parents.⁷⁰ The onset of the Industrial Revolution in the beginning of the nineteenth century, however, decreased emphasis on the agrarian family unit.⁷¹ The role of the parent became less of a property owner and more of a guardian or care-giver; thus the child became less important to the welfare of the family and more a recipient of care and support.⁷² With this increasing emphasis on a nurturing family unit came judicial concern over "what is best for the child" in the context of custody decisions.⁷³ Although the initial presumption favored the father as the proper custodian, the focus of custody disputes between fathers and mothers slowly moved to an analysis of the child's best interests.⁷⁴ A best interests analysis included such factors as: the desires of the child's parents; the child's preferences; the child's needs, including those related to special mental or physical conditions; the child's age and sex; and each parent's relative fitness to care for the child.⁷⁵

During the twentieth century, courts began to recognize limited constitutional rights of children.⁷⁶ This recognition is

68. See *supra* notes 36-37 & 58-60 and accompanying text.

69. James G. O'Keefe, *The Need to Consider Children's Rights in Biological Parent v. Third Party Custody Disputes*, 67 CHI. KENT L. REV. 1077, 1082 (1991).

70. *Id.* at 1082. See, e.g., *Campbell v. Wright*, 62 P. 613, 614 (Cal. 1900) (father's right to custody of his child is a right of property); *Kennedy v. Meara*, 56 S.E. 243, 247 (Ga. 1906) (parent has property right in child and is thus entitled to due process of law before any deprivation).

71. O'Keefe, *supra* note 69, at 1083.

72. *Id.* at 1084.

73. *Id.*

74. *Id.*

75. 24 AM. JUR. 2D *Divorce and Separation* § 974 (1983).

76. See generally *In re Gault*, 387 U.S. 1 (1967) (holding juvenile faced with delinquency proceeding has due process rights to notice, counsel, as well as the privilege against self-incrimination); *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969) (holding high school students have First Amendment right to freedom

significant because courts started to treat children as individuals with interests as important as those of the adults who fought for their custody. However, jurisdictions are split on their position on the best interests of the child doctrine. One best interests jurisdiction is illustrated in *Painter v. Bannister*.⁷⁷ In *Painter*, the Supreme Court of Iowa awarded custody of a boy to his grandparents, who had been his custodians and caregivers for two years following his mother's death.⁷⁸ The boy's father filed a habeas corpus action to regain custody from the grandparents. The Iowa court awarded custody to the grandparents because it would be in the boy's best interest to remain in the stable atmosphere they provided.⁷⁹ The court did not find the father unfit; rather they placed a stronger emphasis on the boy's attachment to the grandfather, who was his "father figure," than on his relationship to his biological father. Thus, the court deemphasized the father's parental rights and emphasized the best interests of the child at the heart of the dispute.⁸⁰

The best interests of the child doctrine should and can be balanced with the parental rights doctrine. Proponents of the best interests position would allow some weight in the balance to be accorded the biological tie between parent and child; however, the balance would be struck in favor of what is best for the child, not simply what is in the parent's interest.⁸¹ Both the UCCJA and the PKPA reflect the drafters' intent that the best interests of the child be of primary importance in determining which court is qualified to take jurisdiction. Although there is a well-established doctrine of parental rights in this country,⁸² many sociologists and legal scholars find that the rights and interests of a child should be the ultimate deciding factor in a custody decision.⁸³

of expression).

77. *Painter v. Bannister*, 140 N.W.2d 152 (Iowa 1966), cert. denied, 385 U.S. 949 (1966).

78. *Id.* at 153, 158.

79. *Id.* at 158.

80. *Id.*

81. HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES*, vol. 2, § 19.6 (2d ed. 1988).

82. See *infra* notes 84-90 and accompanying text.

83. CLARK, *supra* note 81, § 19.6; O'Keefe, *supra* note 69, at 1082.

D. Parental Rights

Seemingly opposite to the best interests doctrine is the parental rights doctrine.⁸⁴ This doctrine interprets the Constitution of the United States as granting a substantive liberty interest in the natural parent-child relationship and prohibiting any intrusions into this relationship, absent established substantive and procedural due process protections.⁸⁵ Third parties are unable to invoke a state action to deprive a child of care, custody, control, and companionship absent a finding of parental unfitness.⁸⁶ "The liberty interest in family privacy has its source, and its contours are ordinarily to be sought . . . in intrinsic human rights, as they have been understood in 'this Nation's history and tradition.'"⁸⁷ The Supreme Court has stated that the natural parent has a "constitutionally recognized liberty interest that derives from blood relationship . . . and basic human right . . ."⁸⁸ However, some courts have long distinguished the right to a relationship with one's child from the right to title of property.⁸⁹ The prevailing view of those who subscribe to the parental rights doctrine is that while a child may have a constitutionally protected interest in family life, the interest is not independent of the parents' interests absent a showing of parental unfitness.⁹⁰

84. For an in-depth discussion of the parental rights doctrine, and the trend toward a best interest standard, see O'Keefe, *supra* note 69. See also Janet L. Richards, *The Natural Parent Preference Versus Third Parties: Expanding the Definition of Parent*, 16 NOVA L. REV. 733, 736-42 (1992).

85. See, e.g., *In re D.A.McW.*, 460 So. 2d 368, 370 (Fla. 1984) (quoting *State ex. rel. Sparks v. Reeves*, 97 So.2d 18, 20 (Fla. 1957)) (natural parent's right to custody is "a rule older than the common law itself"); *In re Willis*, 207 S.E.2d 129, 136 (W.Va. 1973) ("no rule is more firmly established than that the right of a natural parent to the custody of his or her infant child is paramount to that of any other person") (citations omitted); *Roche v. Roche*, 152 P.2d 999, 1000 (Cal. 1944) ("One of the natural rights incident to parenthood, a right supported by law and sound public policy, is the right to the care and custody of a minor child . . .").

86. See *Santosky v. Kramer*, 455 U.S. 745, 753-54 (1982); *Smith v. OFFER*, 431 U.S. 816, 847-48 (1977); *Stanley v. Illinois*, 405 U.S. 645, 658 (1972).

87. *Smith*, 431 U.S. at 845 (quoting *Moore v. East Cleveland*, 431 U.S. 494, 503 (1932)).

88. *Id.* at 846.

89. *Chapsky v. Wood*, 26 Kan. 650 (1881).

90. *Santosky*, 455 U.S. at 769-70 (taking the position that in a termination of parental rights, the Due Process Clause demands that the finding of neglect on which the termination is based must be proved by "clear and convincing evidence").

Although the parental rights doctrine has a long history in American jurisprudence, society has changed its view of children. As concerns grow over the psychological well-being of children subject to custody battles, the parental rights doctrine should and is becoming less rigid. Striking a balance between the right of the child to the best possible care and the right of the parent to a relationship with her child is more consistent with current sociological and psychological theory.

II. INSTANT DECISIONS

Two recent cases highlight courts' conflicting choices in taking jurisdiction in interstate custody disputes involving adoption: *E.E.B. v. D.A.*⁹¹ and *In re Clausen*.⁹² In both cases, the courts were faced with determining appropriate modification jurisdiction in custody disputes between the potential adoptive parents and the biological parents who resided in a different state. Despite similar facts the courts reached opposite results. This split demonstrates courts' inability to fit the particular facts of an interstate adoption custody dispute within the parameters of the UCCJA and the PKPA with any consistency.

A. *E.E.B. v. D.A.*

In *E.E.B.*, twenty-one year old Doris Angle gave birth to a baby girl on October 13, 1978, in Ohio.⁹³ One month prior to the birth Angle contacted the Ohio welfare department about placing the child for adoption.⁹⁴ Three days after the child was born both Angle and the child's father signed a "Permanent Surrender of Child" form, surrendering her to the Holmes County Welfare Department.⁹⁵ Six days after her birth, the child was delivered to the adoptive parents, Edwin and Jane Bowen.⁹⁶ A week after signing the surrender, Angle went to the Department and asked

91. *E.E.B. v. D.A.*, 446 A.2d 871 (N.J. 1982), cert. denied sub nom. *Angle v. Bowen*, 459 U.S. 1210 (1983).

92. *In re Clausen*, 502 N.W.2d 649 (Mich. 1993).

93. *E.E.B.*, 446 A.2d at 873.

94. *Id.*

95. *Id.*

96. The Bowens were Ohio residents at this time. *Id.* at 874.

for her child back, thus orally revoking her surrender.⁹⁷ The Department did not inform the Ohio Juvenile Court of the revocation, and the court approved Angle's surrender the next day. Two months later, in December 1978, Angle instituted a habeas corpus proceeding to regain custody of her child.⁹⁸ The Ohio Juvenile Court denied the writ and reapproved the surrender.⁹⁹ Four months later the appeals court denied Angle's appeal.

During Angle's appeal to the Supreme Court of Ohio, the Bowens moved to New Jersey.¹⁰⁰ The Ohio Supreme Court reversed the Court of Appeals and held that Angle revoked her consent before the Juvenile Court approved the surrender to the Department.¹⁰¹ The court found the revocation dissolved the offer to surrender¹⁰² and the Department's continued retention of the child was illegal, giving rise to an action in habeas corpus.¹⁰³ The Bowens, rather than surrendering the child they had raised for two years, filed for custody in the Superior Court of New Jersey in September 1980.¹⁰⁴ The New Jersey court

97. *E.E.B.*, 446 A.2d at 873. In *Angle v. Children's Serv. Div., Holmes County Welfare Dept.*, the Supreme Court of Ohio cited the Ohio Adoption Statute R.C. 2151.011, which provided in part:

'Permanent custody' means a legal status created by the court which vests in the county department of welfare which has assumed the administration of child welfare, county welfare board, or certified organization, all parental rights, duties, and obligations, including the right to consent to adoption, and divests the natural parents . . . of any and all parental rights, privileges, and obligations. . . .

The court further explained:

unless and until a proposed agreement . . . has been reached consistent with R.C. 5153.16(B), and the proposed agreement is not only revocable by the parent prior to consent of the Juvenile Court, but this revocation operates to dissolve the offer to surrender and the public agency's continued retention of the child and refusal to return it to the natural parent is illegal and gives rise to an action in habeas corpus.

Angle v. Children's Serv. Div., Holmes County Welfare Dept., 407 N.E.2d 524, 526-27 (Ohio 1980).

98. *E.E.B.*, 446 A.2d at 873. The natural father did not join in the Ohio proceeding. *Id.*

99. *Id.* The Court of Appeals affirmed in June of 1979. *Id.*

100. *Id.* at 874. Mr. Bowen was a clergyman, who received an appointment to a position in Wayne, New Jersey. *Id.* The Bowens informed the Department of their moving, and maintained contact with the Department throughout the proceedings. *Id.*

101. *Id.*

102. *Id.*

103. *Angle*, 407 N.E.2d at 526-27.

104. *E.E.B.*, 446 A.2d at 874.

found it had jurisdiction to order a best interests hearing.¹⁰⁵ In an unpublished opinion, the Appellate Division sustained the finding of jurisdiction of the New Jersey courts.¹⁰⁶ Leave to appeal the decision was denied by the New Jersey Supreme Court; however, the case was remanded for an expedited best interests hearing.¹⁰⁷

Although the court remanded on the basis "of a profound respect for the ties that normally bind natural parents and child," it also recognized the "psychological bonding between adoptive parents and child may become stronger than natural ties."¹⁰⁸ Neither the biological mother nor her attorney appeared at the best interests hearing, and the superior court determined that the child's best interests were served by remaining with her adoptive parents.¹⁰⁹ The natural mother appealed contending that the Full Faith and Credit Clause, the PKPA, and the UCCJA precluded the New Jersey court from considering the best interests of the child.¹¹⁰ The New Jersey Supreme Court held the Full Faith and Credit Clause did not apply to all custody determinations and the PKPA applied to disputes between all persons who seek custody of a child. Having found the PKPA applied to the case at bar, the court determined the Ohio courts had in place a procedure to modify custody decrees using a hearing based on the best interests of the child.¹¹¹ The New Jersey Supreme Court found that under the PKPA it could modify the Ohio writ, because the Ohio court declined to exercise jurisdiction to provide a best interests hearing.¹¹²

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* (citations omitted).

109. *Id.*

110. *Id.*

111. *Id.* at 877.

112. *Id.* The Supreme Court of New Jersey found it irrelevant whether the Ohio courts decided not to hold a best interests hearing (possibly since the adoptive parents had moved out of state), or whether the Supreme Court of Ohio failed to order a best interests hearing since it assumed the Juvenile Court would hold such a hearing. *Id.* However, the New Jersey court then went on to presume that the Ohio court declined to exercise jurisdiction. *Id.*

Next, the New Jersey court held that the UCCJA applied to the modification of the writ of habeas corpus.¹¹³ The court concluded that the "UCCJA does not contemplate blind obedience to home state jurisdiction. The state to decide a child custody dispute is not necessarily the home state, but the one best positioned to make the decision based on the *best interest of the child*."¹¹⁴ The court found that the PKPA preempted the UCCJA to the extent that the PKPA granted jurisdiction based on significant contacts only if no state qualified as home state, and that the PKPA permits a home state to defer jurisdiction to another state on the ground that the other is a more appropriate forum.¹¹⁵

The court considered both the purpose of the statute—defining and stabilizing the right to custody in the best interest of the child—and its literal wording.¹¹⁶ The court admonished the chancery court for failing to communicate with the Ohio court, but pointed out that the UCCJA did not require communication with a sister state regarding modification of an initial custody decree and the PKPA had only been in effect since December 1980.¹¹⁷ Thus, the New Jersey Supreme Court ruled that the child should remain with her adoptive parents.¹¹⁸

In balancing parental rights and the child's best interests, the court conferred greater weight to the child's interest in staying in the only home she had ever known than to the parental rights of Doris Angle, her biological mother. The opposite result, however, was struck by the Michigan Supreme Court in *In re Clausen*, where the court accorded more weight to the parental rights of the child's biological father and declined to take jurisdiction to modify the existing custody decree.¹¹⁹

113. *Id.* at 877. The Court found that "[w]hile the UCCJA focuses on custody disputes between family members, its operative provisions are broad enough to include a dispute between a natural parent and adoptive parents." *Id.* at 878.

114. *Id.* at 879 (emphasis added).

115. *Id.*

116. *Id.* at 880. The court did find that New Jersey was the home state with the most significant contacts, as the child and his adoptive parents had resided in New Jersey for almost a year before the filing of this action. *Id.*

117. *Id.*

118. *Id.* at 875, 880. The child was three and a half years old by the time the Supreme Court made its decision.

119. See *infra* part II.B and accompanying text.

B. In Re Clausen

The custody dispute in *In re Clausen*¹²⁰ took place over Cara Clausen's baby girl, born in Iowa on February 8, 1991.¹²¹ On February 10, Clausen signed a release-of-custody form relinquishing her parental rights to her child.¹²² She named Scott Seefeldt as the baby's father and he relinquished his parental rights four days later.¹²³ On February 25, Jan and Roberta DeBoer, the baby's adoptive parents, filed a petition for adoption in the juvenile court in Iowa.¹²⁴ A hearing was held during which both Clausen and Seefeldt's parental rights were terminated, and the DeBoers were granted custody of the baby girl. The DeBoers returned to Michigan with the child they named Jessica; she remained with them for the next three years.¹²⁵

Less than a month after Jessica went to Michigan with the DeBoers, Clausen filed a request in the Iowa Juvenile Court to revoke her release of custody.¹²⁶ She also filed an affidavit that stated she lied regarding the child's father and named Daniel Schmidt as the true biological father.¹²⁷ Her request to revoke her release was denied.¹²⁸ On March 27, Schmidt filed a petition to intervene in the DeBoers' adoption proceeding.¹²⁹ The Iowa District Court ordered blood tests to ascertain paternity, but the DeBoers resisted such testing.¹³⁰ Ultimately, the test results were procured in September 1991, showing an extremely

120. *Clausen*, 502 N.W.2d at 649.

121. *In re Clausen*, 501 N.W.2d 193, 194 (Mich. Ct. App. 1993) (the Court of Appeals of Michigan referred to the child as "BGC" for the remainder of its opinion).

122. *Id.* Iowa Adoption Law requires a 72-hour waiting period for a parent to relinquish custody of her child. IOWA CODE ANN. § 600A.4(2)(d) (West 1981).

123. *Clausen*, 501 N.W.2d at 194.

124. *Id.* The adoption placement was private; such adoptions were and are not legal in the state of Michigan. *Id.* Therefore, the DeBoers had to file for adoption in the Iowa courts.

125. *Id.* The DeBoers named "BGC" Jessica; the Schmidts re-named her Anna. *Id.* This note refers to her as Jessica.

126. *Id.*

127. Cara Clausen and Daniel Schmidt were married in April 1992. Edward Walsh, *Two Parents Too Many for a Little Girl: Michigan Supreme Court Hears Emotional Adoption Case*, WASH. POST, June 4, 1993, at C1.

128. *Clausen*, 501 N.W.2d at 194.

129. *Id.*

130. *Id.*

high probability that Schmidt was the father.¹³¹ The DeBoers then filed to terminate his parental rights, claiming that he was an unfit parent because he had abandoned both baby Jessica and two other children born several years earlier.¹³² The district court found that Schmidt was the biological father of "BGC,"¹³³ that the DeBoers failed to establish that his parental rights should be terminated, and that a best interests of the child analysis did not become material until Schmidt's unfitness was established.¹³⁴ Thus, the district court concluded the termination proceeding was void, and the petition to adopt BGC had to be denied.¹³⁵

The Iowa Court of Appeals also reversed the termination of Clausen's parental rights and remanded the case to juvenile

131. *Id.*

132. *Id.* The Iowa Supreme Court found:

Daniel has had a poor performance record as a parent. He fathered two children prior to this child, a son, age fourteen, and a daughter born out of wedlock, now age twelve. The record shows that Daniel has largely failed to support these children financially and has failed to maintain meaningful contact with either of them.

In re B.G.C., 496 N.W.2d 239, 245 (Iowa 1993).

133. Throughout its opinion, the Iowa Supreme Court refers to Jessica as "BGC." Whether this is to protect the child's identity, or whether the court is using the pseudonym to distance itself from the human realities of the case is unknown. *B.G.C.*, 496 N.W.2d at 239 *passim*.

134. *Id.* at 245. The Iowa Supreme Court found as the general rule:

The [S]tate cannot interfere with the rights of natural parents simply to better the moral and temporal welfare of the child as against an unoffending parent, and, as a general rule, the court may not consider whether the adoption will be for the welfare and best interests of the child where the parents have not consented to an adoption or the conditions which obviate the necessity of their consent do not exist. However, where a parent by his conduct forfeits the right to withhold consent, but nevertheless contests the adoption, the welfare of the child is the paramount issue.

Id. (quoting 2 C.J.S. *Adoption of Persons* § 67 (1972)). Iowa case law is in accord with this view; statutory grounds for termination must be established in addition to establishing the child's best interests in order to terminate. See *In re L.H. and J.H.*, 480 N.W.2d 43, 47 (Iowa 1992); *In re B.L.A. and R.D.A.*, 357 N.W.2d 20, 23 (Iowa 1984). The Court agreed with the District Court that under section 600.3(2), parental rights may not be terminated solely on consideration of the child's best interest, but that specific grounds for termination under chapter 600A must also be established. *B.G.C.*, 496 N.W.2d at 245. Daniel's parental rights had not been terminated, and in the Court's view, the adoption proceedings were therefore fatally flawed. *Id.*

135. *Clausen*, 501 N.W.2d at 194.

court.¹³⁶ The DeBoers appealed to the Iowa Supreme Court, which affirmed the findings of the district court in September 1992. The DeBoers were ordered to appear on December 3, 1992, to turn Jessica over to the Schmidts. Once the DeBoers failed to appear, the district court terminated their guardianship of Jessica.¹³⁷

That same day, in the Washtenaw Circuit Court in their home state of Michigan, the DeBoers filed a petition seeking to modify the Iowa order under the UCCJA.¹³⁸ The DeBoers argued Michigan was Jessica's home state, and it would be in her best interests for Michigan to assume jurisdiction. Schmidt filed a motion for summary disposition which was denied by the circuit court.¹³⁹ The circuit court subsequently found it was in Jessica's best interests to remain with the DeBoers. Schmidt appealed, and the court of appeals reversed the circuit court. It found the circuit court did not have jurisdiction under the UCCJA because further proceedings were being held in Iowa regarding the case. Because the Michigan Court of Appeals held the Iowa courts had

136. *Id.* In *B.G.C.*, the Iowa Supreme Court interpreted Iowa Code section 600A.4(2)(d), which states that a release of custody "shall be signed, not less than 72 hours after the birth of the child to be released, by all living parents." *B.G.C.*, 496 N.W.2d at 243 (emphasis deleted). It was undisputed that Clausen's release did not satisfy the seventy-two hour requirement because it was signed only about forty hours after the baby's birth. *Id.* The DeBoers countered that a seventy-two hour waiting period was not required because of the language of the subsection that follows in section 600A.4(3):

Notwithstanding the provisions of subsection 2, an agency or a person making an independent placement may assume custody of a minor child upon the signature of the one living parent who has possession of the minor child if the agency or a person making an independent placement immediately petitions the juvenile court designated in section 600A.5 to be appointed custodian and otherwise petitions, either in the same petition or within a reasonable time in a separate petition, for termination of parental rights under section 600A.5. Upon the custody petition, the juvenile court may appoint a guardian as well as a custodian.

Id. (emphasis deleted). The Court, however, found the release invalid as the "[g]rantee of temporary custody without the formal requirements of subsection 2, however, does not amount to a release of parental rights. Such a release is still required to follow the formal requirements of section 600A.4(2)." *Id.* at 243.

137. *Clausen*, 501 N.W.2d at 195.

138. *Id.* The Washtenaw Circuit Court is in southeast Michigan.

139. *Id.* at 196.

continuing jurisdiction over the case, it expressly declined to retain jurisdiction.¹⁴⁰

The DeBoers then appealed to the Michigan Supreme Court, which affirmed the decision of the court of appeals.¹⁴¹ The supreme court detailed the history of the implementation of the UCCJA, emphasizing its goals of certainty in custody determinations and avoiding jurisdictional competition between states by establishing uniform rules for deciding when states have jurisdiction to make child custody determinations.¹⁴² The court found that adoption proceedings are included in the definition of a custody determination under the UCCJA.¹⁴³ The Michigan Supreme Court stated:

the DeBoers' contention that a Michigan court could modify the Iowa order because Iowa did not act substantially in conformity with the UCCJA by doing a 'best interests of the child' analysis is without merit. The Iowa court dismissed the adoption petition and granted custody of [the child] to Schmidt because he was the biological father of the child and because his parental rights had not been terminated. The Iowa court found that Iowa statutes and case law did not require the type of best interests analysis sought by the DeBoers in Michigan unless statutory grounds for termination had been established.¹⁴⁴

Additionally, the court found:

there is substantial doubt whether the Iowa decision is the kind of "custody order" that is modifiable at all.

140. *Id.* at 196-97. The Court also found that the DeBoers lacked standing to sue for custody in the Michigan courts because the Iowa court had stripped them of their guardianship rights. *Id.* at 197. Under *Bowie v. Arder*, third parties who are not guardians do not possess a substantive right to sue for custody. *Bowie v. Arder*, 490 N.W.2d 568, 580 (Mich. 1992). This standing issue, however, is outside the scope of this note and was a secondary issue in the Michigan Supreme Court's decision.

141. *Clausen*, 502 N.W.2d at 668.

142. *Id.* at 654-56.

143. *Id.* at 656 (citing Mich. Comp. Laws § 27A.652(c) (1986) which states: "Custody proceeding' includes proceedings in which a custody determination is one of several issues, such as an action for divorce or separation, and includes child neglect and dependency proceedings.").

144. *Id.* at 656 (citing *Clausen*, 501 N.W.2d at 193).

When we speak of modifying custody orders, we are ordinarily talking about the typical case of a contest between natural parents. Such orders are at least theoretically perpetually modifiable. Where circumstances change, modification can be made in the child's best interests, because the biological parents have an inherent right to care, custody, and control of the child. That rationale, however, does not apply in a case such as this involving an adoption petition. The decision not to terminate Daniel Schmidt's rights and to dismiss the adoption petition put an end to the proceeding, just as would have been the case had the Iowa courts terminated Schmidt's rights and finalized the adoption. To say that the order in the instant case is modifiable would have the effect of destabilizing finalized adoptions as well as other final orders.¹⁴⁵

The court ordered the DeBoers to return Jessica to the Schmidts. The transfer took place amongst much press on August 3, 1993.¹⁴⁶

Despite the similar facts in *E.E.B.* and *Clausen*, the courts' holdings were unequivocal opposites. In *E.E.B.*, the child remained with her adoptive parents; while in *Clausen*, Jessica was uprooted from the only home that she had ever known and was returned to her biological parents. These divergent holdings illustrate the courts' continuing struggle with the jurisdictional dictates of the UCCJA and the PKPA, and call for separate jurisdictional provisions for custody disputes in an interstate adoption which recognize the underlying policies actually governing courts' decisions.

III. ANALYSIS

The divergent outcomes in *E.E.B.* and *Clausen* illustrate how courts employ opposite approaches in taking modification

145. *Id.* at 657 n.22.

146. *Baby Jessica Appears Happy on TV*, CHI. TRIB., Sept. 13, 1993, at N-13; Michael K. McIntyre, *Mother Says Baby Better Off Adopted*, PLAIN DEALER (Cleveland), Nov. 23, 1993, at 1B; Steve Schmidt, *150 Rally for Kid's Rights In Adoption—Organizers Compelled by Baby Jessica Scene*, SAN DIEGO UNION-TRIB., Oct. 24, 1993, at B-3; Richard Cohen, *Class Action*, WASH. POST, Sept. 12, 1993, at W9.

jurisdiction in interstate adoption custody disputes. These approaches are purported to be based on courts' interpretations of the policy goals underlying both the UCCJA and the PKPA: the best interests of the child versus certainty and finality in custody decisions. However, these policy goals, which led to the promulgation of the UCCJA and the PKPA, were based on concerns over custody disputes among family members and not on concerns raised in interstate adoption disputes. Therefore, the modification provision of the statutes, which was not designed to cover such circumstances, is difficult to apply to interstate adoption disputes, resulting in chaotic and disparate decisions.¹⁴⁷

Ultimately, there is a dichotomy in outcome due to courts' construction of the modification provision based on their belief in either the parental rights doctrine or the best interests doctrine. As a consequence, the jurisdictional decisions in interstate adoption custody disputes are hopelessly inconsistent among the states. A separate statutory provision should be promulgated based on the policy considerations that *actually* underlie courts' determinations in interstate adoption custody disputes: whether a custody award to a biological parent after a failed adoption *can* be modified, and how subscription to the parental rights doctrine or best interests doctrine controls a court's answer to that question.

147. For example, the home state provision in both the UCCJA and the PKPA was developed to further the best interests of the child, since that jurisdiction would most likely have the most information regarding the care and custody of the child. 9 U.L.A. at 118. However, in order to qualify for the home state provision, the child must have resided in that state for at least six months. 9 U.L.A. at 133; 28 U.S.C. § 1738A(b)(4). The drafters both recognized and sought to reverse the growing trend of parents kidnapping their children and moving them to a more favorable forum to litigate the child's custody. 9 U.L.A. at 118; PKPA Findings, Pub. L. No. 96-611, § 7(a)(3). Thus, these statutes encompass both the best interests policy and the stability and finality of a child's custody situation during the typical family break-up. However, this type of scenario does not address the concerns in an interstate custody dispute, which generally turns on whether the state's substantive law embraces the parental rights doctrine or the best interests of the child doctrine. In a state that embraces the parental rights doctrine, if a biological parent's rights have not been terminated, that parent has the paramount right to custody of the child, absent a showing of unfitness. In a best interests state, the biological parent's right to custody of the child is simply one of the factors weighed in the balance of what is best for the child. Other factors that are important are the time the child has spent in her current environment, whether she looks to her adoptive caretakers as parents, and whether she will be psychologically damaged by a change in custody. See *infra* notes 159-61 and accompanying text.

Because the courts in *E.E.B.* and *Clausen* gave different weight to the children's best interests and the biological parents' rights in their decisions, the outcomes in the factually similar cases were opposite. In *E.E.B.*, the New Jersey court considered parental rights as only one factor in the best interests analysis.¹⁴⁸ The court gave effect to one underlying policy goal of the UCCJA and the PKPA: to make custody decisions that provide primarily for the health and welfare of the child. In *Clausen*, the Michigan court chose not to follow the New Jersey court's rationale; rather, it claimed to choose the policy goal of certainty and stability.¹⁴⁹ However, the biological parents' rights were the determining factor in the Michigan court's jurisdictional decision. Because the statutes were written in response to circumstances surrounding the typical divorce custody dispute, giving the ultimate weight to biological parents' rights in jurisdictional decisions is not one of the policy goals underlying the UCCJA or the PKPA.¹⁵⁰ Also, making decisions based solely on parental rights permits courts to avoid the difficult and often disturbing decision of whether giving custody to the biological parent is best for the child.

Each court implemented its underlying agenda, either parental rights or best interests, to interpret the jurisdictional provisions of the PKPA and the UCCJA. The *E.E.B.* court found it had jurisdiction to hold a best interests hearing even after the Ohio Supreme Court held that the natural mother's surrender was invalid, and that the adoption had failed.¹⁵¹ The court went on to determine that Ohio law permitted a hearing before executing a writ of habeas corpus concerning custody of a child to protect the best interests of a child and that, despite repeated requests by the adoptive parents, the Ohio court did not hold a

148. *E.E.B.*, 446 A.2d at 874.

149. *Clausen*, 502 N.W.2d at 660 n.31. The Michigan Supreme Court stated: We reject the rationale of *E.E.B. v. D.A.*, to the extent that it is cited for the proposition that an order transferring custody pursuant to a judgment determining custody is modifiable per se on a best-interests analysis Such a construction would invite the losing party to resist transfer, in order to have the court issue an enforcement order, which would form the basis for an opportunity to relitigate best interests. Such a result would introduce a degree of instability into this jurisprudence antithetical to the best interests of all parties

Id.

150. See *supra* notes 6-8 and accompanying text.

151. *E.E.B.*, 446 A.2d at 877.

best interests hearing.¹⁵² Since no Ohio court determined the best interests of the child, the *E.E.B.* court found the "clear implication is that the Ohio courts declined to exercise jurisdiction to conduct a best interest hearing . . . under [the PKPA]"¹⁵³ and that it "need not dwell on these speculations" as to why the Ohio Juvenile Court did not hold a best interests hearing.¹⁵⁴ The New Jersey court therefore stretched the meaning of the modification section of the PKPA in order to implement its best interests agenda. After all, these facts do not necessarily show that the Ohio court meant to decline jurisdiction so that the New Jersey forum could make the custody decision.¹⁵⁵ The Ohio court decided that the adoption was flawed; therefore, the child should be returned to her mother.¹⁵⁶ However, the New Jersey court simply assumed that Ohio declined jurisdiction in accordance with the PKPA, and found that New Jersey had modification jurisdiction because it was both the home state and the state with the most significant connections with the child at the time of the filing of the adoptive parents' action.¹⁵⁷ The court supported its position using the policy goals of the drafters of the acts: "[our taking jurisdiction] comports with the congressional intent that child custody decisions be made in the state best able to determine the best interest of the child."¹⁵⁸ The court paid lip service to the goals of the UCCJA and the

152. *Id.* at 877 (citing *In re Cunningham*, 391 N.E.2d 1034, 1038 (Ohio 1979); *In re Hua*, 405 N.E.2d 255, 260-61 (Ohio 1980)).

153. *Id.* The PKPA states:

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.

28 U.S.C. § 1738A(f).

154. *E.E.B.*, 446 A.2d at 877.

155. The PKPA states that a child custody determination is consistent with the provisions of the Act if another state declines to exercise jurisdiction "on the ground that the State whose jurisdiction is in issue is the more appropriate forum to determine the custody of the child, and (ii) it is in the best interest of the child that such court assume jurisdiction." 28 U.S.C. §§ 1738A (c)(2)(D)(i), (ii). There is no indication that the Ohio court was declining jurisdiction on the best interests hearing to allow the "more appropriate forum" of New Jersey to decide the issue.

156. See *supra* notes 104-105 and accompanying text. Traditionally, such a custody decision is not subject to modification.

157. *E.E.B.*, 446 A.2d at 880.

158. *Id.* at 877 (citing PKPA Findings, Pub. L. No. 96-611, § 7).

PKPA acknowledging the acts' attempt to bring certainty in enforcement of custody decrees.¹⁵⁹ However, the court showed that the basis for its decision lay in the best interests doctrine when it stated:

A custody dispute is more than a jurisdictional chess game in which winning depends on compliance with predetermined rules of play. A child is not a pawn. In exercising its discretion within the confines of UCCJA and PKPA, a court should consider not only the literal wording of the statutes but their purpose: to define and stabilize the right to custody *in the best interest of the child*.¹⁶⁰

The dissent in *Clausen*, written by Justice Levin, strongly agreed with the rationale of *E.E.B.*¹⁶¹ He asserted that the well-established standard for the resolution of familial custody disputes, between both biological parents and biological parents and third parties, is the best interests standard. He posed that the same standard should apply when one of the parties is not a biological relative of the child.¹⁶² However, this position does not take into consideration the substantive rights of biological parents under either Iowa or Ohio law. In both states, a parent whose rights have not been terminated has a right to custody of his child, absent a showing of unfitness.

Levin, however, felt that the inquiry should not stop at the decision that the biological parent has a right to custody but with the determination of the best interests of the child. He quoted from a New York Court of Appeals opinion, stating "[t]he day is long past . . . , if it had ever been, when the right of a parent to the custody of his or her child . . . would be enforced inexorably, contrary to the best interest of the child, . . . solely of an absolute right."¹⁶³

To determine the best interests of Jessica, Justice Levin looked to the unanimity among the experts that Jessica would

159. *Id.* at 877-78.

160. *Id.* at 879-80 (emphasis added).

161. *Clausen*, 502 N.W.2d at 668-89 (Levin, J., dissenting).

162. *Id.* at 669, 673 (citing CLARK, *supra* note 81, § 20.1).

163. *Id.* at 669 (quoting *Bennett v. Jeffreys*, 356 N.E.2d 277 (N.Y. 1976)) (emphasis added).

suffer serious traumatic injury as a result of her being removed from the only parents she had ever known.¹⁶⁴ Levin recognized the importance of the parent/child relationship and sought to accommodate both the biological parents' rights and the best interests of children by placing biological parental care high on the scale of factors contributing to the child's well being.¹⁶⁵ Among the other factors he considered in determining the child's best interests were whether the child had been in the non-parents' care for a substantial period of time, and whether the child was strongly attached to the non-parents emotionally or psychologically.¹⁶⁶ Additionally, he asserted that the reason the child had been with the non-parents for a substantial period of time should *not* be a factor in the decision, even if the delay is due to litigation, because the child would have developed emotional attachments to the non-parents regardless of the cause of the delay.¹⁶⁷ Justice Levin could not discount the effects of a custodial change on the psychological health of the child, and thus would hold the best interests of Jessica dictate that she stay with the DeBoers. Justice Levin, like the *E.E.B.* court, showed his accord with the best interests doctrine throughout his opinion:

This court, by ignoring obvious issues concerning the welfare of the child and by focusing exclusively on the concerns of competing adults, as if this were a dispute about the vesting of contingent remainders, reduces the PKPA to a robot of legal formality with results that Congress did not intend.¹⁶⁸

While Justice Levin persuasively detailed why the best interests standard should be used, he failed to recognize that adoption is different from a traditional custody dispute in that once a determination is made, it is generally not modifiable. After all, the use of the best interests standard in this manner assumes that once one state court has terminated a flawed adoption

164. *Id.* In fact, some experts felt she might never fully recover from the psychological injury. *Id.*

165. *Id.* at 670.

166. *Id.* at 670 n.10.

167. *Id.*

168. *Id.*

proceeding and awarded the biological parent custody, jurisdiction can be taken by any other court to modify such a decision.

Justice Levin did not see a modification as a relitigation of a custody decision.¹⁶⁹ According to Levin, the issue in both *E.E.B.* and *Clausen* was "whether a state is obliged by the PKPA or the UCCJA to enforce a custody determination made by another state following a failed adoption where the other state did not, before making its custody determination, consider the best interests of the child."¹⁷⁰ Justice Levin agreed with *E.E.B.* that the PKPA does not require a subsequent state to enforce such a custody decree.¹⁷¹

Based on the Full Faith and Credit Clause,¹⁷² the PKPA was enacted to limit the discretion of forum states to ignore other states' custody decrees, to introduce certainty and stability in the choice of forum, and encourage interstate cooperation in the interest of the child.¹⁷³ Although the PKPA has a limiting function, it does allow a court to modify the custody determination of another state if the court has jurisdiction over the matter and the initial state has either lost jurisdiction or has declined to exercise it.¹⁷⁴ Based on its strong belief in the best interests doctrine, the *E.E.B.* court found it had jurisdiction to modify the Ohio decree because Ohio had declined to hold a best interests hearing.

169. *Id.* at 671.

170. *Id.* at 671 (emphasis added).

171. *Id.* at 672. Levin also cites to a West Virginia case, *Lemley v. Barr*, in which a teen-aged mother and her boyfriend (from Ohio) placed their newly-born baby up for private adoption with Ohio attorneys. *Lemley v. Barr*, 343 S.E.2d 101, 103 (W. Va. 1986). When the mother, Tammy Lemley, changed her mind, the attorneys would not reveal the location of the child or the identity of his adoptive parents. *Id.* After two and one-half years of litigation, the adoptive parents' identity was finally revealed. The adoptive parents had knowingly and intentionally refused to reveal their names and had in the interim filed for adoption in the West Virginia court system. *Id.* The West Virginia Supreme Court ruled that the Ohio court had jurisdiction over the Barrs and, therefore, the West Virginia courts must give full faith and credit to the Ohio court decision. *Id.* at 108. However, the court still remanded the case for a best interests hearing regarding the custody of the five year old child. *Id.* at 109.

172. The Full Faith and Credit Clause provides: "Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." U.S. CONST. art IV, § 1.

173. 28 U.S.C. §§ 1738A(f)(1), (2); *E.E.B.*, 446 A.2d at 875-76.

174. 28 U.S.C. § 1738A(f); *E.E.B.*, 446 A.2d at 877.

On the other hand, the majority's decision in *Clausen* not to take modification jurisdiction over the custody of Jessica clearly showed its strong belief in the parental rights doctrine. The majority found that adoption-related custody orders were not modifiable and, in any event, Iowa was unequivocally the home state of the child. Therefore, Iowa had exclusive and continuing jurisdiction over the matter.¹⁷⁵ This general position was criticized by Professor Homer Clark, as cited in Justice Levin's dissent, who accused courts of using the UCCJA and the PKPA to avoid the tougher burden of deciding the merits of custody cases which would "best serve or least harm the child."¹⁷⁶

After deciding whether the custody decree was modifiable, both courts decided whether they had jurisdiction under the statutes. Although the statutes are different in determining the basis for jurisdiction, the PKPA prefers jurisdiction on the basis of "home state," though "significant connection" is a default provision if the child has no home state.¹⁷⁷ While no preference is explicit in the UCCJA,¹⁷⁸ these differences are not the reason for the opposing outcomes. Rather, it is that each court construes these provisions in light of its own agenda and not in light of the policies underlying the statutes.

In *E.E.B.*, Judge Pollack found New Jersey to be the home state of the child because she had been a New Jersey resident for more than six months, even though she was born in Ohio and the custody dispute started while she still resided in Ohio.¹⁷⁹ Combined with its finding that the Ohio court declined to modify its custody decision, the New Jersey court found that it had jurisdiction over the modification of the decree. The New Jersey court justified its decision by stating "the statutes continue to recognize the crucial importance of considering the best interest of a child in an interstate custody dispute."¹⁸⁰

By contrast, the *Clausen* majority found that Iowa was "unquestionably" the home state of Jessica, without explaining the basis for such a conclusion, even though Jessica had never resided in Iowa (though the custody dispute had been initiated and

175. *Clausen*, 502 N.W.2d at 657. See *supra* note 145 and accompanying text.

176. *Clausen*, 502 N.W.2d at 672 (citing CLARK, *supra* note 81, § 13.5).

177. 28 U.S.C. §§ 1738A(c)(2)(A), (B).

178. 9 U.L.A. at 143.

179. *E.E.B.*, 446 A.2d at 880.

180. *Id.*

litigated in the Iowa courts).¹⁸¹ In his dissent, Justice Levin asserted that the Michigan Supreme Court wrongly decided that Iowa was Jessica's home state.¹⁸² He also determined that Iowa did not have the most significant connections with her.¹⁸³ He pointed to Congress' objective of achieving "secure family relationships for the child" by assuring that a "determination of custody and visitation is rendered in the state which can best decide the case in the interest of the child."¹⁸⁴ Therefore, he asserted that the Michigan court should have found it had jurisdiction to make the best interests determination based on Jessica's home state status in Michigan. Jessica never resided with her biological parents in Iowa; she lived with the DeBoers, the persons "acting as parents," for more than six consecutive months in Michigan, as is required for the home state provision under the PKPA.¹⁸⁵ The DeBoers had custody of Jessica since February 1991; they were awarded custody by a court and qualified as persons acting as parents because they "claim[ed] a right to custody."¹⁸⁶ Under the language of the PKPA, Michigan much more closely met the definition of home state in Jessica's case. However, this finding would conflict with the Michigan court's firm belief in the parental rights doctrine. To give effect to the parental rights doctrine, the Michigan court had to find that it had no jurisdiction to modify the existing decree.

The Michigan court did not decide whether it qualified as the state having jurisdiction under the significant connection provision of the UCCJA because it determined that Iowa was Jessica's home state.¹⁸⁷ However, Jessica and "at least one contestant" had a significant connection, other than "mere physical presence," where there was available "substantial evidence concerning [her] present or future care, protection,

181. *Clausen*, 502 N.W.2d at 658.

182. *Id.* at 673-74.

183. *Id.* at 678.

184. *Id.* at 673 (emphasis deleted) (citing 28 U.S.C. § 1738A(c)(1)).

185. *Id.* (citing 28 U.S.C. § 1738A(b)(6), (7)). The term "person acting as a parent" is defined by the PKPA as meaning: "[A] person, other than a parent, who has physical custody of a child and who has either been awarded custody by a court or claims a right to custody." "Physical custody" is defined as "actual possession and control of a child." 28 U.S.C. § 1738A(b)(6), (7) (provisions for home state jurisdiction).

186. *Clausen*, 502 N.W.2d at 674 n.30 (citing 28 U.S.C. § 1738A(b)(6), (7)).

187. *Id.*

training, and personal relationships.”¹⁸⁸ This evidence could easily be construed as a significant connection. The DeBoers had received an order of custody transferring Jessica to their care and returned home with her to Michigan before it became known that Cara Clausen had committed fraud upon the Iowa court and Daniel Schmidt came forward as Jessica’s putative father.¹⁸⁹ Jessica resided for more than three years with her family in Michigan during the pendency of the proceedings. Therefore, Michigan was the source of information from family, friends, clergy, physicians, and other witnesses regarding Jessica’s physical and mental health. Just as clearly, Iowa did not have a significant connection with Jessica. She resided in an Iowa hospital for less than three weeks of her life and had no connection with the state once her custody was granted to the DeBoers. The majority in *Clausen* did not address this issue, since they determined that Iowa was clearly Jessica’s home state. However closely Michigan qualified as both the home state of Jessica and the state with the most significant connections under the existing provisions of the UCCJA and the PKPA, the Michigan court did not find that it had jurisdiction under these provisions.

This split between the courts in the determination of home state and significant connection reinforces the assertion that the existing statutes, designed for issues raised in familial custody disputes, are not systematically applicable to an interstate adoption. This split also shows the true basis for courts’ decisions when confronted with the jurisdictional issue in an interstate adoption: either the parental rights or the best interests doctrine. Therefore, a separate provision relating to the policies of parental

188. 28 U.S.C. § 1738A(c). This section states:

A child custody determination made by a court of a State is consistent with the provisions of this section *only if* . . . (B)(i) it appears that *no other State would have jurisdiction* under subparagraph (A) [home state jurisdiction], and (ii) it is in the *best interest of the child* that a court of such State assume jurisdiction because (I) the child and his parents, or the child and at least one contestant, have a *significant connection* with such State other than mere physical presence in such State, and (II) there is available in such State *substantial evidence* concerning the *child’s present or future care, protection, training, and personal relationships*

Id. § 1738A(c)(A)(1), (B) (emphasis added).

189. At the time Schmidt came forward to claim paternity, it was not known whether he was Jessica’s biological father. *Clausen*, 502 N.W.2d at 652. See *supra* notes 127-31 and accompanying text.

rights and best interests should be enacted to cover interstate adoption custody disputes.

IV. PROPOSAL

As demonstrated by the illustrating cases, the application of the UCCJA and the PKPA have further muddied the waters of jurisdictional decisions in custody disputes over an interstate adoption. Promulgating statutes that respond to policy concerns related to familial custody battles simply did not lead to legislation applicable to an interstate adoption. Simply put, the custody awards in the two situations are different. A custody award in an adoption *should* be final; otherwise, prospective adoptive parents could never be certain whether they have a permanent new family member. Adoptive parents, unlike foster parents, do not take custody for a period in order for the biological parent to regroup and make a home for the child. Likewise, biological parents whose parental rights have not been terminated should not and cannot be shut out of the proceeding without due process.

However, in a custody dispute among family members, especially parents, all have an equal attachment to the child in question; the child *should* be allowed to change custody from one parent to another should the situation warrant. Of course, the child should not be frequently changing custodial arrangements; it is only when changing circumstances demand a change should the award be modified.

Therefore, the UCCJA and the PKPA should be modified to exclude interstate "stranger" adoption from the general jurisdictional dictates and to include specific provisions determining jurisdiction based on the policies to be furthered. The best interests of the child is and should be the main policy goal of the acts when determining an interstate custody dispute over an adopted child; however, biological parental rights cannot be ignored.

One of two different statutory additions could be made to the jurisdictional laws, which encompass important but unreconcilable policies. One type reflects the belief that parental rights are paramount in a custody determination, but also focuses on certainty in enforcement of custody decrees. The second type focuses on the best interests of the child by having the forum that

is best able to gather relevant information regarding the child's care and custody make the custody determination.

A. Jurisdictional Provision Implementing The Parental Rights Doctrine and Certainty in Enforcement of Custody Decrees

To further the policy of parental rights and certainty in custody placement, a statute might be written as follows:

Jurisdiction over custody disputes regarding an adoption placement shall be taken solely by the court in which the adoption petition is filed. Such court shall have continuing and exclusive jurisdiction to determine custody of the child over which an adoption action is pending. If such a court should find that the adoption process is flawed and awards custody to a biological parent, no other state court shall have jurisdiction to modify such a decree. If the adoption petition is not yet filed, the court in which a custody contestant first files shall take exclusive and continuing jurisdiction over the contest until a permanent custody decision is made.

This type of statute values parental rights while furthering stability and certainty in custody disputes. It allows the out-of-state prospective adoptive parents an opportunity to file for adoption in the jurisdiction of their choice while prohibiting other state courts from attempting to modify a decree that theoretically should not be modifiable.¹⁹⁰

This type of statute also does not interfere with the substantive law of the state. Such interference was of great concern to the majority in *Clausen*, in which the Michigan Supreme Court stated:

The suggestion that in this context the best interests purpose of the PKPA mandates a best interests analysis in Iowa, failing which the Iowa decision is not entitled to full faith and credit, would permit the forum state's view of the merits of the case to govern the assumption of

190. Unless, of course, the adoption is private and the state from which the adoptive parents hail does not permit private adoption. Then the adoptive parents must file in the state in which the child is born.

jurisdiction to modify the foreign decree. It also suggests that Congress intended to impose the substantive best interests rule in all custody determinations on the laws of the fifty states. This interpretation is in direct conflict with the directive of Congress that "[t]he appropriate authorities of every State shall enforce according to its terms, and shall not modify except as provided . . . any child custody determination made consistently with the provisions of this section by a court of another State. . . ." The PKPA is a *procedural and jurisdictional* statute, which *does not impose principles of substantive law* on the states¹⁹¹

Under this model statute, *Clausen* would have been decided the same way. Since the DeBoers filed for adoption in Iowa, Iowa would have exclusive and continuing jurisdiction to determine the custody of Jessica. Michigan would clearly have no ground to take jurisdiction to modify the decree, and Jessica might have been home with the Schmidts as early as December 1991 when the Iowa District Court found that Schmidt was Jessica's biological father who had parental rights to her custody.¹⁹² However, due to the uncertainty in the existing law, Jessica's custody was not changed for almost another year. She had another year to grow more attached to her prospective adoptive parents before her custodial situation was changed, thus causing her even more psychological trauma and damage.

In *E.E.B.*, the outcome would change under the proposed language, and the child would return to her biological mother. The adoption petition was filed in Ohio, and thus the Ohio court should have had continuing jurisdiction over the case. The New Jersey court clearly would not have been able to take modification jurisdiction, despite its opinion of the merits of the case.

Therefore, this type of statute gives predictable, certain results that favor the biological parental rights if their parental rights were not properly terminated. This statute does not, however, directly address the needs of the child, who is undoubtedly the most important and most *innocent* person involved in the dispute. The arbitrarily-defined means by which

191. *Clausen*, 502 N.W.2d at 658 & 658 n.24 (citing 28 U.S.C. § 1738A(a)) (emphasis added).

192. *Id.* at 652-53.

jurisdiction is taken in interstate adoption custody disputes leaves little question about which court controls the case. This statute would require the adoptive couple that files for adoption in an out-of-state forum accept that forum for any ensuing court action involving the adoptive child. This type of certainty would negate the need for extended litigation over the proper jurisdiction; the speedy resolution of custody disputes in this context may in some sense be in the best interest of the child.

B. Jurisdictional Provision Implementing The Best Interests Doctrine

A second policy approach, valuing the best interests of the child in an adoption custody placement, might read:

Jurisdiction over custody disputes regarding an adoption placement shall be taken by the court having greatest access to *substantial* evidence regarding the child's present or future care, protection, training, and personal relationships. In taking jurisdiction, the court shall endeavor to communicate to the extent possible with other courts in which some action pertaining to the custody of the child is or may be pending, to determine if in fact it is the court with the most substantial evidence regarding the child's care, protection, training, and personal relationships. Examples of other courts that a court should communicate with to determine the appropriate forum to take jurisdiction over a custody action are the state in which the child was born or the state in which the adoption petition was filed.

To determine whether taking jurisdiction is in a child's best interests, courts should consider: how long the child has been in his or her current custody arrangement, whether the child has a psychological or emotional attachment to his or her current custodian, whether the child would be traumatized with possible long-term effect if the child's custody were changed, and the importance of the child having a relationship with his or her biological parent.

This type of statute rejects the concept of the home state, which has been interpreted to be where the child was born or

where the adoption was filed. The home state of an adopted newborn is an ambiguous, untenable determination. In the cases examined by this note, the biological parent does not take custody of the child; the adoptive parents remove the child to their home state shortly after its birth, and the custody dispute arises soon after. Therefore, the determination of the home state is virtually a meaningless inquiry, since home state appears to be arbitrarily decided to be the birth state of the child. When considered in the context of the purpose of the UCCJA and the PKPA, to further the best interests of children, this interpretation of home state does not support a court's taking jurisdiction.

Under this statute *Clausen* might have been decided differently. Certainly the Michigan forum could take jurisdiction over the case since it obviously had the most information regarding Jessica's future care and training, and Jessica had strong attachments to the DeBoers and would be traumatized by a change in custody. However, once the Michigan court took jurisdiction, the actual custody decision is unpredictable. The court would then be applying its substantive law to determine what Jessica's best interests were.

In *E.E.B.*, the case would have had the same outcome. The New Jersey court had the greatest access to information regarding the child's care and custody because she had been living in its jurisdiction for two years before the termination of the litigation regarding her custody.¹⁹³ Since the New Jersey court *took* jurisdiction and subsequently upheld the best interests findings, its opinion of the merits was given and the custody outcome would be the same. However, the New Jersey court would be taking jurisdiction based on the clear language of the statute and not based on judicial gloss from the court's own social policies.

This proposed statute, which values the best interests of the child most highly, is much more subjective and thus more open to varying, uncertain results. Past experience has shown that courts do not cooperate to the extent the drafters would like; the solution to this problem is to attempt to remove the subjectivity from the choices the courts can make. However, in removing the subjectivity, and therefore the discretion of courts, a child may suffer irreparable harm by being wrenched from the only family

193. *E.E.B.*, 446 A.2d at 873.

he or she knows during a very critical stage in his or her development.¹⁹⁴

An important criticism of this type of statute is that it imposes substantive law on the states with a federal, procedural statute.¹⁹⁵ As the United States Supreme Court has said, "[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States."¹⁹⁶ "On the rare occasion when state family law has come into conflict with a federal statute, [the Supreme Court] has limited review under the Supremacy Clause to a determination whether Congress has 'positively required by direct enactment' that state law be preempted."¹⁹⁷ The directive of Congress in the PKPA was that "[t]he appropriate authorities of every State shall enforce according to its terms, and shall not modify except as provided . . . , any child custody determination made consistently with the provisions of this section by a court of another State."¹⁹⁸ Therefore, this statute should not be seen as preempting state law, and to the extent that it does not, the state must use its own substantive law in making custody decisions. If a state does issue a decree by applying its substantive law in compliance with the provisions of the PKPA, subsequent states may not modify such a decree. The statute should not be interpreted as imposing any substantive law on the state; rather, it should be interpreted *in light of* the policy of the best interests of the children in the context of the legislative goals underlying the statute. Thus, the statute cannot be construed as imposing a substantive best interests standard to be applied in each interstate adoption custody dispute.

CONCLUSION

The confusion of courts in determining jurisdiction in interstate adoption custody disputes is all too tragically clear when examining the outcomes of cases such as *E.E.B.* and *Clausen*. The current statutory provisions for determining

194. See *supra* note 21 and accompanying text.

195. See *supra* note 191 and accompanying text.

196. *In re Burrus*, 136 U.S. 586, 593-94 (1890).

197. *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979) (quoting *Wetmore v. Markoe*, 196 U.S. 68, 77 (1904)).

198. 28 U.S.C. § 1738A (a).

jurisdiction in adoption custody cases simply do not consistently further either policy goal of certainty or best interests, since courts are relying on their own policies of parental rights versus best interests to make their decisions. Therefore, a jurisdictional provision applying to the narrow context of interstate adoption custody is necessary to avoid opposite results in factually similar cases. The question then becomes one of policy choices: should the statute value parental rights, along with certainty and finality in custody decisions, or should the best interests of the child be the ultimate deciding factor in placement?

The current state of the law seems to dictate the choice to be that of the parental rights—it is straightforward, it is predictable, and it does not in any way conflict with the substantive laws of the states. However, in choosing the certain alternative, policy makers may sacrifice the well being of the child at the heart of the dispute; a choice for which society may well pay a much bigger price than appears on the surface.

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