

The UCCJEA, the PKPA, and Preemption: Why the Jurisdictional Provisions of the UCCJEA Cannot Be Waived

by
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The Uniform Child Custody Jurisdiction and Enforcement Act (“UCCJEA”), drafted by its commissioners in 1997, has been adopted by every state, except Massachusetts. The goals of the UCCJEA are set forth in the official comments to the Act. These goals include: (1) avoiding jurisdictional competition and conflict with courts of other states in matters of child custody; (2) promoting cooperation with the courts of other states; (3) discouraging the use of the interstate system for continuing controversies over child custody; (4) deterring abductions of children; (5) avoiding relitigation of custody decisions of multiple states; and (6) facilitating the enforcement of custody decrees of other states.¹

Toward these ends, the UCCJEA intends to be the “exclusive jurisdictional basis for making a child custody determination” by each state that has adopted it.² What the term “exclusive jurisdictional basis” encompasses has been a topic of great controversy and is the focus of this article. Appellate courts in some states have concluded that the UCCJEA is a subject matter jurisdiction scheme.³ Under this approach, the failure to adhere to

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¹ See UNIF. CHILD CUSTODY JURISDICTION & ENF’T ACT (“UCCJEA”) § 101, comment, 9 U.L.A. 657 (1999).

² UCCJEA § 201(b).

³ “Subject matter jurisdiction” is used throughout this article to mean a court’s jurisdiction over a particular case that cannot be waived, forfeited, or consented to. Although the concept of orders that are void from the outset and always subject to collateral attack is universal throughout the United States, different states have different terms of art to describe the concept. Most states treat subject matter jurisdiction as a binary concept: “Either subject-matter jurisdiction exists or it does not exist.” *Jefferson Cty. Comm’n v. Edwards*, 32 So.

the jurisdictional provisions of the UCCJEA results in a void order. Void orders are not subject to recognition or enforcement under any circumstances, including under the circumstances of waiver, forfeiture, consent, or estoppel. Notably, the official comment to section 201 of the UCCJEA confirms that it was the intent of the drafters of the UCCJEA to make it a subject matter jurisdiction scheme.⁴ Many states have found this comment to be compelling, if not dispositive.⁵

Regardless, appellate courts in other states have taken a different approach to this important question of subject matter ju-

3d 572, 591 (Ala. 2009). In California, however, it is a tertiary concept. In California, there can be 1) no subject matter jurisdiction at all; 2) subject matter jurisdiction that is *non-fundamental*, which is waivable, forfeitable, etc.; and 3) *fundamental* subject matter jurisdiction, which is *not* waivable, forfeitable, etc.

⁴ “It should also be noted that since jurisdiction to make a child custody determination is subject matter jurisdiction, an agreement of the parties to confer jurisdiction on a court that would not otherwise have jurisdiction under this Act is ineffective.” Official Comment to Model UCCJEA, § 201.

⁵ See *Officer v. Blankenship*, 555 S.W.3d 449, 458 (Ky. Ct. App. 2018) (“The fundamental purpose of the UCCJEA is to avoid jurisdictional competition and conflicts between states in child custody matters. If that objective is to be achieved, the UCCJEA must be interpreted similarly among the various states. The Comments to the Uniform Act itself, make clear that jurisdiction under the Act means subject matter jurisdiction, and that any agreement by the parties with respect to jurisdiction is ‘ineffective.’”); *Friedman v. Eighth Jud. Dist. Ct.*, 264 P.3d 1161, 1167 (Nev. 2011) (“Instead, it accepted Kevyn’s argument that the parties’ agreement to a Nevada forum for future child custody disputes removed her family from the UCCJEA. But this position is unsustainable. NRS 125A.305(2) states that NRS 125A.305(1) ‘is the exclusive jurisdictional basis for making a child custody determination by a court of this State.’ Since the UCCJEA deems this to involve ‘subject matter jurisdiction, an agreement of the parties to confer jurisdiction on a court that would not otherwise have jurisdiction under this Act is ineffective.’”); *Harshberger v. Harshberger*, 724 N.W.2d 148, 153-54 (N.D. 2006) (“Subject matter jurisdiction cannot be conferred by agreement, consent, or waiver, and issues involving subject matter jurisdiction can be raised by the court at any time . . . Uniform Child Custody Jurisdiction and Enforcement Act § 201, Comment, 9 Uniform Laws Annotated 673 (Part IA 1999) (‘since jurisdiction to make a child custody determination is subject matter jurisdiction, an agreement of the parties to confer jurisdiction on a court that would not otherwise have jurisdiction under this Act is ineffective.’”)); *In re Custody of A.C.*, 200 P.3d 689, 693 n.8 (Wash. 2009) (“We also note that to permit waiver of the jurisdictional provisions of the UCCJEA would undermine the goals of avoiding conflicting proceedings. Cf. UCCJEA § 201 cmt., 9 pt. 1A U.L.A. at 673 (an agreement to confer jurisdiction under the UCCJEA statute is not effective).”)

risdiction. The appellate courts in these states have concluded that when the jurisdictional provisions of the UCCJEA are not followed, the result is not a *void* order, but a *voidable* order. Unlike void orders, voidable orders can be waived, forfeited, consented to, etc.⁶

An example will help demonstrate the difference between a void order and a voidable order. Under Section 202 of the Model UCCJEA, a court cannot continue to exercise continuing, exclusive jurisdiction once a child and all the parties move out of a state to reside elsewhere. If State A follows the first approach, an order made pursuant to a modification filed after all the parties have moved out of State A is void because the order was not made consistent with the jurisdictional provisions of the UCCJEA. Since the order is void, it is not entitled to any intra-state or interstate recognition. Accordingly, if a state court made an order under these conditions, either party can come to court at any time and set that order aside. Even until it is set aside, the order does not have any legal force or effect.⁷

If State A, however, follows the second approach, the result may be different. Under this second approach, State A would be required to conclude that, even if State A no longer has jurisdiction under Section 202, a resulting order would be valid and enforceable if the jurisdictional defect was consented to, waived, or forfeited.

⁶ “There is distinction between a judgment that is ‘void’ and one that is ‘voidable.’ . . . A void judgment is so defective that it is deemed never to have had legal force and effect. In contrast, a voidable judgment is a judgment that has been entered based upon some error in procedure that allows a party to have the judgment vacated, but the judgment has legal force and effect unless and until it is vacated A voidable judgment can be challenged by motion for rehearing or appeal and may be subject to collateral attack under specific circumstances, but it cannot be challenged at any time as void A trial court’s lack of subject-matter jurisdiction makes its judgment void. *N.W.T. v. L.H.D.*” *Sterling Factors v. U.S. Bank*, 968 So. 2d 658, 665 (Fla. Dist. Ct. App. 2007). In contrast to a void order, a voidable order is “valid until set aside, and parties may be precluded from setting it aside by such things as waiver, estoppel, or the passage of time.” *In re Andres G.*, 75 Cal. Rptr. 2d 285, 288. (Cal. Ct. App. 1998).

⁷ See *Sterling Factors*, 968 So. 2d at 665.

A small, but growing group of states have decided to follow this second approach.⁸ A May 2020 concurring opinion from Texas Supreme Court Justice Debra Lehrman, agreeing that UCCJEA jurisdiction is waivable, concluded that allowing UCCJEA jurisdiction to be waivable is “consistent with the modern trend . . . away from classifying statutes as jurisdictional in the true subject-matter sense in the absence of clear legislative intent to that effect.”⁹ In the same opinion, the court’s majority observed that the jurisdictional nature of the UCCJEA was not a settled question.¹⁰ An August 2020 published opinion from an intermediate appellate court in California, also following this trend, noted that it did not believe that the “model UCCJEA was even intended to regulate the [subject matter] jurisdiction of the courts of states that adopted it.”¹¹ It noted further, that appellate courts in Washington D.C., Illinois, Indiana, and Missouri had followed this approach.¹²

This article submits the second approach is fundamentally flawed because it fails to consider the implications of federal preemption arising out of the Parental Kidnapping Protection Act (“PKPA”).¹³ The result of this preemption is that, first, custody

⁸ See *Officer v. Blankenship*, 555 S.W.3d 449, 455 (Ky. Ct. App. 2018) (“Even though a case for classifying jurisdiction under the UCCJEA as particular case jurisdiction can be made, it is not the approach the majority of states, including our own, have taken.”).

⁹ *In the Interest of D.S.*, 602 S.W.3d 504, 521 (Tex. 2020) (Lehrmann, J., concurring).

¹⁰ See *id.* at 517-18.

¹¹ *In re J.W.*, 53 Cal. App. 5th 347, 362 (2020), *but see* *A.M. v. Superior Court*, D078117, 13-14 (Cal. Ct. App. Apr. 20, 2021) (“The public policy considerations at issue in *J.W.* that formed the basis for its decision to prioritize the dependency scheme over the UCCJEA are not present” because “[t]he potential disruption of the fundamental jurisdiction of the dependency court, whose statutory role is protection of a minor whose well-being is in jeopardy, is far different from the termination of the family court’s jurisdiction in this case.”)

¹² *In re J.W.*, 53 Cal. App. 5th at 364-65.

¹³ A distinction should be made between 1) appellate courts that have concluded that the UCCJEA is not intended to be a subject matter jurisdictional scheme; and 2) appellate courts that have concluded that this question is irrelevant because their state constitutions preempt such a result. For instance, in *Hightower v. Myers*, 304 S.W.3d 727 (Mo. 2010), the Supreme Court of Missouri concluded that, regardless of the intent of the UCCJEA, subject matter jurisdiction is conferred in *every civil case* pursuant to the Missouri Constitution. Other states, such as California, look to the legislative intent behind a

and visitation orders that are allowed to stand despite their jurisdictional defects are, at best, only entitled to recognition or enforcement within the territorial borders of a state that makes such an order and, second, a state that issues an order inconsistent with the jurisdictional provisions of the PKPA/UCCJEA must disregard its own orders when that order conflicts with an order made in accordance with the PKPA/UCCJEA. Specifically, this result follows because the PKPA only requires states to recognize custody and visitation orders that are made consistently with the jurisdictional provisions of the PKPA and because the jurisdictional provisions of the PKPA and UCCJEA are consistent with each other. In other words, an order not made consistently with the jurisdictional provisions of the UCCJEA is necessarily not made consistently with the jurisdictional provisions of the PKPA.¹⁴ This dramatically undermines all of the stated goals of the UCCJEA set forth in the introduction to this article.

Part I of this article includes brief histories of the enactments of the Uniform Child Custody Jurisdiction Act (“UCCJA”), the PKPA, and the UCCJEA, inasmuch as they are relevant to the question of subject matter jurisdiction. Part I will demonstrate the importance of the uniformity of the law. Specifically, Part I will establish that the avoidance of conflicting decisions and competing jurisdiction was a primary thrust behind the adoption of the UCCJA in 1967, the PKPA in 1980, the UCCJEA in 1997.

Part II discusses why determining that UCCJEA jurisdiction is waivable is inapposite to the UCCJEA’s primary goal of avoid-

particular statute in determining whether a statute is a subject matter jurisdictional statute. This is a particularly important distinction because California looks to intent at the statutory level, not the constitutional level, to determine whether subject matter is fundamental. “There is ‘no simple, mechanical test’ for determining whether a specific requirement is jurisdictional . . . or not, but ‘[t]he question is ultimately one of legislative intent.’” *In re J.W.*, 53 Cal. App. 5th at 357. To avoid the problems described below by permitting the UCCJEA to be waived, the states that confer subject matter jurisdiction at the constitutional level would be required to amend their state constitutions.

¹⁴ Since it is not clear whether the PKPA applies to custody and determinations outside of the family law context (e.g., adoption, juvenile dependency), the arguments made in this article only apply, with certainty, to cases within the family law context.

ing conflicting decisions and competing jurisdiction. The PKPA only compels the interstate enforcement of another state's custody or visitation orders when that state makes those orders in compliance with the jurisdictional provisions of the PKPA. The result of this is profound. Not only does this mean that every time a state ignores the jurisdictional defects in a custody and visitation order, such an order is not entitled to recognition in any other state, but it also means any state that issues such an order must disregard its own order whenever it is confronted with a conflicting out-of-state order that is made consistently with the jurisdictional provisions of the PKPA/UCCJEA.

Part III demonstrates the ubiquity of the problem noted in Part II and why this problem cannot be ignored: the UCCJEA only allows one state at a time to exercise jurisdiction over a child. Accordingly, the consideration of waiver is only relevant when a court also concludes that a state incorrectly exercised jurisdiction. If there is a state that incorrectly exercised jurisdiction, there is always a different state that can correctly exercise jurisdiction. That state can ignore the other state's orders and issue conflicting orders *each and every time* the first state issues an order inconsistent with the jurisdictional provisions of the PKPA/UCCJEA.

I. A Brief History of the UCCJA, the PKPA, and the UCCJEA

A. The UCCJA

The UCCJA is the predecessor to the UCCJEA. It was drafted in 1967. Eventually, it was adopted by all fifty states and the District of Columbia. Its stated purpose is very similar to the UCCJEA. It included the avoidance of "jurisdictional competition and conflict with courts of other states in matters of child custody," the promotion of "cooperation with the courts of other states," to "avoid re-litigation of custody decisions other states," and to "make uniform the law of those states which [enacted] it."¹⁵ The Act attempted to create bright line rules for when a

¹⁵ UNIF. CHILD CUSTODY JURISDICTION ACT ("UCCJA") § 1, 9 U.L.A. 123 (1999).

particular state should exercise jurisdiction over a child.¹⁶ Prior to the enactment of the UCCJA, no uniform act had attempted to tackle these problems.

B. *The PKPA*

The UCCJA's stated purposes, and the execution of those purposes by the states which enacted the UCCJA, turned out to be very different things. In 1980, the federal government enacted the PKPA, which consists of a single, brief, but enormously impactful statute, 28 U.S.C. § 1738A. The PKPA was enacted specifically "to address the interstate custody jurisdictional problems that continued to exist after the adoption of the UCCJA."¹⁷ It intends to achieve this purpose by mandating "that state authorities give full faith and credit to other states' custody determinations, so long as those determinations were made in conformity with the provisions of the PKPA."¹⁸ As set forth in the following section, many problems remained or were left unaddressed altogether. This would eventually lead to the creation of the UCCJEA.

C. *The UCCJEA*

Although the jurisdictional provisions of the PKPA and the UCCJEA were similar, there were still significant differences.¹⁹ For instance, while the PKPA directly addressed the concept of continuing, exclusive jurisdiction once a state makes an initial order, the UCCJA did not directly address this. These differences were exacerbated by inconsistent interpretation of the UCCJA and led to a loss of uniformity among the various states.²⁰ As one commenter put it, the relationship between the UCCJA and the PKPA became "technical enough to delight a medieval property lawyer."²¹

Making the jurisdictional provisions of the UCCJEA consistent with the jurisdictional provisions of the PKPA was the only solution to these problems. This is exactly what the UCCJEA

¹⁶ See UCCJA § 3.

¹⁷ UCCJEA prefatory note.

¹⁸ *Id.*

¹⁹ See *id.*

²⁰ See *id.*

²¹ HOMER H. CLARK, DOMESTIC RELATIONS § 12.5 at 494 (2d ed. 1988)

accomplishes. The Official Comment to section 303 of the Model UCCJEA states:

Enforcement of custody determinations of issuing States is also required by federal law in the PKPA, 28 U.S.C. § 1738A(a). The changes made [to the jurisdictional provisions] of [the UCCJEA] now make a state's duty to enforce and not modify a child custody determination of another state consistent with the enforcement and non-modification provisions of the PKPA.²²

As one state legislature put it, “[a]dopting the revised UCCJEA would simply remove the confusion created by the inconsistent provisions of state law [in the UCCJA] and reduce the likelihood of inharmonious decisions.”²³

In other words, the UCCJEA's jurisdictional provisions in sections 201, 202, 203 and 204 of the model UCCJEA are intended to be consistent with the analogous provisions of the PKPA, 28 U.S.C. sections 1738A(c)-(h).

The UCCJEA's focus on consistency between the PKPA and the UCCJEA, how this relates to enforcement, and how this relates to the jurisdictional provisions is not limited to the comment in section 303. Frequent examples of this focus can be observed throughout the model act and its comments. Notably, virtually every time the jurisdictional provisions of the UCCJEA are mentioned in a section of the UCCJEA, the comment to that section contains a discussion about the importance of the consistency of the UCCJEA and the PKPA along with a reminder that the PKPA requires each state to only enforce orders that are made consistently with the provisions of the PKPA.

Sections 206, 303, and 310 exemplify this connection. Section 206 of the Model UCCJEA states:

(a) . . . **[A] court of this State may not exercise its jurisdiction under this [article] if, at the time of the commencement of the proceeding, a proceeding concerning the custody of the child has been commenced in a court of another State having jurisdiction substantially in conformity with this [Act],** unless the proceeding has been terminated or is stayed by the court of the other State because a court of this State is a more convenient forum under Section 207.²⁴

²² UCCJEA § 303 comment.

²³ California Bill Analysis, S.B. 668 Sen., Apr. 6, 1999, http://leginfo.ca.gov/pub/99-00/bill/sen/sb_0651-0700/sb_668_cfa_19990407_142002_sen_comm.html.

²⁴ UCCJEA § 206 (emphasis added).

The official comment to section 206 states:

The problem of simultaneous proceedings is no longer a significant issue. . . . If there is a State of exclusive, continuing jurisdiction, there cannot be another State with concurrent jurisdiction and, therefore, no simultaneous proceedings. . . [a]lthough the enforcement State is required by the PKPA to enforce according to its terms a custody determination made consistently with the PKPA, that duty is subject to the decree being modified by a State with the power to do so under the PKPA.²⁵

Section 206 and its comment make clear that simultaneous proceedings are no longer a problem, not only because of the text of UCCJEA, but because of the clarity and consistency of the UCCJEA and the PKPA. Section 303 of the Model UCCJEA states:

A court of this state shall recognize and enforce a child custody determination of a court of another state **if the latter court exercised jurisdiction in substantial conformity with this part or the determination was made under factual circumstances meeting the jurisdictional standards of this part and the determination has not been modified in accordance with this part.**²⁶

As noted above, the official comment to Section 303 reads as follows:

Enforcement of custody determinations of issuing States is also required by federal law in the PKPA, 28 U.S.C. § 1738A(a). The changes made in Article 2 of this Act now make a State's duty to enforce and not modify a child custody determination of another State consistent with the enforcement and nonmodification provisions of the PKPA.²⁷

Section 303 and its comment require a state to recognize and enforce child custody determinations of other states only when, essentially, the other state followed the UCCJEA as well as the PKPA, as the jurisdictional provisions in the two acts are consistent.

Section 310 of the Model UCCJEA states:

(a) Unless the court issues a temporary emergency order pursuant to Section 3424, **upon a finding that a petitioner is entitled to immediate physical custody of the child, the court shall order that the petitioner may take immediate physical custody of the child unless the respondent establishes either of the following:**

²⁵ UCCJEA § 206 comment.

²⁶ UCCJEA § 303(a) (emphasis added).

²⁷ UCCJEA § 303 comment (emphasis added).

(1) That the child custody determination has not been registered and confirmed under Section 3445 and one of the following is true:

(A) The issuing court did not have jurisdiction under Chapter 2 (commencing with Section 3421). . .²⁸

The comment to Model UCCJEA section 310 states the following:

Federal law requires the court to enforce the custody determination if the issuing state's decree was rendered in compliance with the PKPA. 28 U.S.C. § 1738A(a). This Act requires enforcement of custody determinations that are made in conformity with Article 2's jurisdictional rules.²⁹

This is, again, another important reference to the consistency of the jurisdictional provisions of the UCCJEA and the PKPA, this time in the context of the right to immediate physical custody of a child.

It is a defense to enforcement that another jurisdiction has issued a custody determination that is required to be enforced under Article 2.³⁰

This portion of the comment makes clear that whenever an order is made inconsistently with the jurisdictional provisions of the UCCJEA, a state may (and, in certain situations explained in Part II below, must) refuse to enforce that order if another state has made a conflicting order with jurisdiction under the UCCJEA.

An example is when one court has based its original custody determination on the UCCJA § 3(a)(2) (significant connections) and another jurisdiction has rendered an original custody determination based on the UCCJA § 3(a)(1) (home State). **When this occurs, Article 2 of this Act, as well as the PKPA, mandate that the home state determination be enforced in all other States, including the State that rendered the significant connections determination.**³¹

This portion of the comment makes clear that whenever an order is made consistently with the jurisdictional provisions of the UCCJEA/PKPA, that order must be enforced in every state, including the very state that made a determination that was in-

²⁸ UCCJEA § 310 (emphasis added).

²⁹ UCCJEA § 310 comment (emphasis added).

³⁰ *Id.* (emphasis added).

³¹ *Id.* (emphasis added).

consistent with the jurisdictional provisions of the UCCJEA/PKPA.

1. *Section 106's Effect on Intrastate and Interstate Enforcement.*

Although not mentioning the PKPA, section 106 of the Model UCCJEA and its predecessor, section 12 of the Model UCCJA, aptly explain how the concepts of subject matter jurisdiction and interstate enforcement are intended to harmonize with each other.

A child-custody determination made by a court of this State that had jurisdiction under this [Act] binds all persons who have been served in accordance with the laws of this State or notified in accordance with Section 108 or who have submitted to the jurisdiction of the court, and who have been given an opportunity to be heard. As to those persons, the determination is conclusive as to all decided issues of law and fact except to the extent the determination is modified.³²

This section explains under what conditions a child custody is enforceable against those who have participated in the proceedings.

The official comment to Section 106 reads as follows: “No substantive changes have been made to this section which was Section 12 of the UCCJA.”³³ In other words, the intent of Section 106 of the UCCJEA is no different than the intent of Section 12 of the UCCJA.

The official comment to Section 12 of the Model UCCJA reads as follows:

This section deals with the intra-state validity of custody decrees which provides the basis for their interstate recognition and enforcement. The two prerequisites are (1) jurisdiction under section 3 of this Act and (2) strict compliance with due process mandates of notice and opportunity to be heard. . . .³⁴

Section 3 of the UCCJA determines when the court has subject matter jurisdiction to act.³⁵

Accordingly, not only is an order made outside the bounds of the jurisdictional provisions of the UCCJEA not entitled to

³² UCCJEA § 106.

³³ UCCJEA § 106 comment.

³⁴ Model UCCJA § 12.

³⁵ *See* UCCJA § 3.

enforcement in other states, it is not even entitled to enforcement in the very state that made it. This conclusion is consistent with the interpretation made by the Supreme Court of Washington.

Finally, the Nagels contend that Cork waived any jurisdictional arguments. The Nagels cite RCW 26.27.061, which states, “A child custody determination made by a court of this state *that had jurisdiction under this chapter* binds all persons . . . who have submitted to the jurisdiction of the court.” Because the superior court did not have jurisdiction to modify Montana’s custody determination under chapter 26.27 RCW, this provision does not apply.³⁶

Here, the Washington Supreme Court confirms that having subject matter jurisdiction under the UCCJEA is a necessary pre-condition to a binding order enforceable in any of the fifty states.

Based on the foregoing provisions and their comments, one must not only conclude that the jurisdictional provisions of the PKPA and the UCCJEA are not only consistent, but that this consistency was intended to be the critical foundation of the UCCJEA.

II. How Federal Preemption Informs the Interpretation of the PKPA/UCCJEA

The reason why the PKPA compels the conclusion that UCCJEA jurisdiction is non-waivable comes down to one simple, but important concept: federal preemption.

Article VI, cl. 2, of the Constitution provides that the laws of the United States “shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.” Consistent with that command, we have long recognized that state laws that conflict with federal law are “without effect.”³⁷

Since the PKPA is a federal law, it supersedes any individual state’s statutory or constitutional law to the contrary.³⁸ Further, recall the California legislature’s comment that “all states are already required to comply with the requirements of PKPA. . . the federal government has preempted the field in the interstate

³⁶ *In re Custody of A.C.*, 200 P.3d 689, 693 (Wa. 2009) (emphasis in original).

³⁷ *Altria Group, Inc. v. Good*, 555 U.S. 70, 76 (2008).

³⁸ *See id.*

child custody disputes with PKPA and thus the federal requirements control when there is a conflict with state law.”³⁹

The following hypothetical demonstrates the problem that preemption creates for states that allow waiver of the jurisdictional provisions of the PKPA/UCCJEA. It involves Indiana, a state that has concluded that the jurisdictional provisions of the PKPA/UCCJEA *can* be waived, and West Virginia, a state that has concluded that the jurisdictional provisions of the PKPA/UCCJEA *cannot* be waived.

Assume that a child and her parents reside in Indiana. Further assume that Indiana has exercised initial home state jurisdiction in conformity with its version of Model UCCJEA section 201. In other words, the child and her parents have all resided in Indiana for the six months immediately preceding the filing of a first pleading in an action that seeks orders on custody and visitation. Under Indiana’s version of section 202, Indiana maintains continuing and exclusive jurisdiction until it

determines that neither the child, nor the child and one parent, nor the child and a person acting as a parent have a significant connection with [Indiana] and that substantial evidence is no longer available in this [Indiana] concerning the child’s care, protection, training, and personal relationships; or (2) a court of Indiana or a court of another State determines that the child, the child’s parents, and any person acting as a parent do not presently reside in [Indiana].⁴⁰

Further assume that both parents and the child move to the state of West Virginia and, after the move, the mother files a modification motion in Indiana. According to the UCCJEA, an Indiana court would not have jurisdiction under either the UCCJEA or the PKPA to modify the determination because both parents and the child have left the state to move elsewhere.⁴¹ Assume though that the parties consented to Indiana hearing the modification motion and the court accepted the stipulation of the parties to hear the motion. The Indiana court hears the modification motion and awards full custody to the father. The mother appeals and the Indiana appeals court affirms be-

³⁹ California Bill Analysis, *supra* note 23.

⁴⁰ UCCJEA § 202(a)(1),(2).

⁴¹ *See id.*

cause, under Indiana law, the parties consented to the jurisdiction and that waives the jurisdictional defect.⁴²

The mother then decides to file a modification motion in West Virginia. Consistent with the Supreme Court of West Virginia's interpretation of the PKPA and the UCCJEA, the West Virginia court notes that it cannot enforce the modification order because it was not made in accordance with the provisions of the PKPA.⁴³ It decides, instead, to modify the prior order and gives the mother full custody.

Already, there is a massive problem. The goals of the UCCJEA to avoid conflicting orders and competing jurisdiction, to discourage the use of the interstate system for continuing controversies over child custody, to avoid relitigating custody decisions of other states, and to facilitate the enforcement of custody decrees of other states, has been dramatically undermined. In this hypothetical, two states have simply interpreted the UCCJEA differently. It is not uncommon for two states to interpret parts of the same uniform law differently. As long as a federal question is not involved, both states can be right.

However, in this instance, both states are not right. Only West Virginia is right because only West Virginia made orders consistent with the jurisdictional provisions of the PKPA/UCCJEA. Only West Virginia's orders are entitled to recognition in other states, including Indiana.

Under the PKPA, the "jurisdiction of a court of a State which has made a child custody or visitation determination consistently with the provisions of this section continues as long as

⁴² "The jurisdictional limitations imposed by the [predecessor act to the UCCJEA] are not equivalent to declarations of subject matter jurisdiction, but rather are refinements of the ancillary capacity of a trial court to exercise authority over a particular case. This exercise of authority is waivable." *Williams v. Williams*, 555 N.E.2d 142, 145 (Ind. 1990).

⁴³ "Pursuant to the Parental Kidnaping Prevention Act [hereinafter "P.K.P.A."], 28 U.S.C.A. § 1738A (2000), we are not required to recognize and enforce custody determinations of sister states that lack jurisdiction under the U.C.C.J.E.A. . . Accordingly, although foreign states' custody decrees should be enforced and recognized by West Virginia courts if they accord with the statutory jurisdictional provisions of the U.C.C.J.E.A. and the P.K.P.A., in child custody matters such as this, where a foreign court lacks jurisdiction under the U.C.C.J.E.A., the full faith and credit doctrine will not be applied." *Rosen v. Rosen*, 222 W. Va. 402, 407-8 (2008).

. . . such State remains the residence of the child or of any contestant.”⁴⁴ Similarly, section 202 of the UCCJEA provides that a state court that has rendered “a child-custody determination consistent with Section 201 or 203 has exclusive, continuing jurisdiction over the determination until: . . . a court of this State or a court of another State determines that the child, the child’s parents, and any person acting as a parent do not presently reside in this State.”⁴⁵ These jurisdictional provisions are, unsurprisingly, consistent. Put another way, precisely because the jurisdictional provisions of the PKPA and the UCCJEA are consistent, when the PKPA commands all states to “enforce according to its terms . . . any custody determination or visitation determination made consistently with the provisions of [the PKPA] by a court of another state,” this is the equivalent of commanding all states to “enforce according to its terms . . . any custody determination or visitation determination made consistently with” the UCCJEA.⁴⁶

Because of preemption, under federal law, only the order made by West Virginia is entitled to full faith and credit in all other states, including Indiana. Next assume that the mother then registers her West Virginia order for enforcement in Indiana and, simultaneously, the father registers his Indiana order in West Virginia for enforcement. Under the PKPA, Indiana is required to enforce all custody and visitation orders made by West Virginia made in accordance with the PKPA.⁴⁷ When the mother attempts to enforce the West Virginia order in Indiana, because of federal preemption, Indiana must disregard its inferior order that was not made consistent with jurisdictional provisions of the PKPA/UCCJEA and must enforce the West Virginia order, just as Indiana must disregard its own statutes to the extent they conflict with federal law.

West Virginia, however, is not compelled by any federal law to enforce the second order from Indiana. The PKPA only requires West Virginia to enforce orders that are made consistently with the provisions of the PKPA/UCCJEA. The Indiana order, however, came after the child and the parties all left the state. In allowing the jurisdictional provisions of the PKPA/UCCJEA to

⁴⁴ 28 U.S.C. § 1738A(d).

⁴⁵ UCCJEA § 202(a)(2).

⁴⁶ 28 U.S.C. § 1738A(a).

⁴⁷ *See* 28 U.S.C. § 1738A(a).

be waived, Indiana has also, inadvertently, allowed its custody and visitation orders made inconsistently with the jurisdictional provisions of the UCCJEA to be meaningless outside the boundaries of its state. This is why to “permit waiver of the jurisdictional provisions of the UCCJEA would undermine the goals of avoiding conflicting proceedings.”⁴⁸ This result is contradictory to every stated purpose of the UCCJEA and conclusively demonstrates why permitting waiver is inapposite to the UCCJEA’s purpose of giving “consideration . . . to the need to promote uniformity of the law with respect to its subject matter among States that enact it.”⁴⁹

Importantly, of the cases cited in this article that have held that UCCJEA jurisdiction is waivable, none of them have discussed this result. Further, none except one mentions the PKPA.

III. The Ubiquity of the Problem Caused by Ignoring the Jurisdictional Provisions of the UCCJEA

It is just as important to emphasize not only the severity of the problem noted in Part II, but its ubiquity. One might harken back to the early days of torts in law school and recall the Learned Hand formula. When evaluating the problem noted in Part II, one might not only look at “the gravity of the resulting injury,” but also its “probability.”⁵⁰ The gravity of the problem established in Part II is severe to say the least. It is just as important to note, however, the result in Part II is possible every time in every case where a court concludes that jurisdiction is waived. The consideration of waiver is, of course, only relevant when a court also concludes that a state incorrectly exercised jurisdiction. This is because only one state can correctly exercise jurisdiction under the UCCJEA at a time.⁵¹ If there is a state that

⁴⁸ *In re Custody of A.C.*, 200 P.3d 689, 693 n.8 (Wash. 2009).

⁴⁹ UCCJEA § 401.

⁵⁰ *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947).

⁵¹ “The UCCJEA ensures that only one state has jurisdiction to make ‘child custody determinations.’” *In re Marriage of Fernandez-Abin & Sanchez*, 191 Cal. App. 4th 1015, 1037 (Cal. Ct. App. 2011); *People ex rel. M.C.*, 94 P.3d 1220, 1223 (Colo. App. 2004) (“[T]he UCCJEA also seeks to eliminate the simultaneous exercise of jurisdiction over custody disputes by more than one state.”); *In re Interests of A.A.-F.*, 444 P.3d 938, 948 (Kan. 2019) (“The

incorrectly exercised jurisdiction, that necessarily means that there is always a different state that can correctly exercise jurisdiction. That state can ignore the other state's orders and issue conflicting orders each time. Every time the state that incorrectly exercised jurisdiction is required to enforce that other state's orders and disregard its own conflicting orders. Such cataclysmic results are only avoidable by concluding that the UCCJEA confers fundamental subject matter jurisdiction.

IV. Conclusion

Since 1967, at both the state and federal level, the primary thrust behind any of the laws that have sought to address the unique problem of interstate custody jurisdiction and enforcement has been to avoid conflicting orders and competing jurisdiction. After the enactment of the UCCJA, the PKPA was enacted with the express purpose of strengthening the provisions that avoid conflicting orders and competing jurisdiction and the UCCJEA sought to even further remedy these problems.

Interpreting the UCCJEA as a statute that can be waived, as noted above, is a major step back away from not only this goal, but all of the stated goals of the UCCJEA. Although the states that have found the UCCJEA is waivable were well-intentioned, it appears none of them have foreseen the major problems this interpretation causes as a result of the PKPA and preemption. In the future, both courts and state legislatures would be wise to consider the troubling consequences that result from making the UCCJEA waivable.

UCCJEA's drafters prioritized the jurisdictional grounds to help assure that only one state at a time exercises jurisdiction, thus avoiding conflicting orders."); *Nevares v. Adoptive Couple*, 384 P.3d 213, 217 (Utah 2016) ("[T]he UCCJEA promotes a framework wherein a single state is vested with jurisdiction to make child custody determinations and a uniform set of rules to determine which state is best positioned to adjudicate custody disputes."); *W.H. v. Dep't for Children and Families*, No. 2020-055, 2020 Vt. LEXIS 117, 16-17 (2020) ("Ensuring that one state at a time exercises jurisdiction is a crucial part of the UCCJEA's purpose of avoiding contests between states.").

