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Domestic Relations - An Interpretation of the Parental Kidnapping Prevention Act of 1980: State ex rel. Valles v. Brown

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DOMESTIC RELATIONS—AN INTERPRETATION OF THE PARENTAL KIDNAPPING PREVENTION ACT OF 1980: *State ex rel. Valles v. Brown*.

INTRODUCTION

The New Mexico Supreme Court became the first state supreme court¹ in the United States to interpret the Parental Kidnapping Prevention Act of 1980² when it decided *State ex rel. Valles v. Brown*.³ The PKPA is a federal statute⁴ designed to discourage child snatching⁵—the abduction of a child from one parent by the other parent in disregard of adjudicated custody and visitation rights. Under the supremacy clause of the United States Constitution,⁶ state courts must apply the PKPA.

This Note will examine the *Valles*⁷ decision, currently the leading case applying the PKPA. Because the application of the PKPA in *Valles* overruled more than sixty-five years of New Mexico case law regarding the modification of foreign child custody decrees,⁸ this Note will also outline changes in the law which are relevant to New Mexico domestic relations attorneys. Although the full ramifications of the application of the PKPA in New Mexico are currently unknown, the Note will close with an assessment of the influence of the PKPA in future New Mexico child custody decisions, and, more broadly, in the promotion of familial stability for New Mexico's children.

1. For the purpose of this Note, the term "supreme court" refers to highest state courts only.

2. 28 U.S.C. § 1738A (Supp. IV 1980) [hereinafter cited as PKPA].

3. ___ N.M. ___, 639 P.2d 1181 (1981) [hereinafter cited as *Valles*]. For further discussion of this case, see Kelsey & Siegel, *Domestic Relations*, ante at 379.

Nationally, five cases have relied on the PKPA to determine whether a state court can modify a foreign child custody decree. Three of these cases, including *Valles*, are from New Mexico. The cases are: *Pierce v. Pierce*, ___ Mont. ___, 640 P.2d 899 (1982); *E. E. B. v. D. A.*, 89 N.J. 595, 446 A.2d 871 (1982); *Belosky v. Belosky*, 97 N.M. 365, 640 P.2d 471 (1982); *Tufares v. Wright*, 98 N.M. 8, 644 P.2d 522 (1982).

4. Senator Wallop of Wyoming introduced the PKPA into Congress. See generally *Parental Kidnapping Prevention Act of 1979: Joint Hearing on S. 105 Before the Subcomm. on Criminal Justice of the Comm. on the Judiciary and the Subcomm. on Child and Human Resources*, 96th Cong., 2d Sess. 11-12 (1980) (prepared statement of Sen. Wallop) [hereinafter cited as *1980 Joint Hearing*].

5. Parental Kidnapping Prevention Act of 1980, Pub. L. No. 96-611, § 7(c), 94 Stat. 3568-73 (1980), enumerates the general purposes of the PKPA. See 28 U.S.C. § 1738A (Supp. IV 1980).

6. U.S. Const. art. VI reads in pertinent part: "This Constitution . . . shall be the supreme Law of the Land."

7. ___ N.M. at ___, 639 P.2d at 1181 (1981).

8. *Id.*

SCOPE OF PROBLEM

Due to the mobility of the population and the prevalence of divorce and familial disintegration in the United States, child snatching has reached alarming national proportions. It is estimated that parents abduct in excess of 25,000 children yearly,⁹ with resulting mental anguish on the part of both parents and children. Frequently, one parent and then the other repeatedly kidnap affected children.¹⁰

The snatched child experiences environmental instability with unpredictable changes in the neighborhood, school, and custodial parent. Renowned psychologists and psychiatrists of various theoretical orientations, such as Erik Erikson,¹¹ Karen Horney,¹² and Abraham Maslow,¹³ stress the importance of security and continuity during infancy and childhood as prerequisites for successful development into adulthood. As a result of having basic psychological needs thwarted, there may be a risk of permanent psychological damage to snatched children.¹⁴

New Mexico, formerly reputed to be a haven for child snatchers,¹⁵ was one of the last states in the nation to adopt the Uniform Child Custody Jurisdiction Act.¹⁶ The UCCJA represents an effort on the state level to alleviate parental kidnapping.¹⁷ The federal PKPA went into effect in New Mexico¹⁸ prior to the New Mexico state statute which encompasses the UCCJA.¹⁹

Courts can deter parental kidnapping, which results in emotional harm to untold numbers of children,²⁰ by granting full faith and credit²¹ to the

9. 1980 Joint Hearings, *supra* note 4, at 1.

10. See Tufares v. Wright, 98 N.M. at 9, 644 P.2d at 523.

11. E. Erikson, *Childhood and Society* 247 (1950).

12. K. Horney, *The Neurotic Personality of Our Time* (1937).

13. A. Maslow, *Motivation and Personality* 199-234 (1954).

14. 1980 Joint Hearings, *supra* note 4, at 116.

15. See S. Katz, *Child Snatching: A Legal Response to the Abduction of Children* 63 (1981).

16. Unif. Child Custody Jurisdiction Act, 9 U.L.A. 111 (1968) [hereinafter cited as the UCCJA]. The American Bar Association recommended approval of the UCCJA in 1968. *Id.* The effective date of the UCCJA in New Mexico was July 1, 1981. 1981 N.M. Laws ch. 119, § 26. For a discussion of the UCCJA, see Foster & Freed, *Child Snatching and Custodial Fights: The Case for the Uniform Child Custody Jurisdiction Act*, 28 *Hastings L.J.* 1011 (1977). Currently, only Massachusetts, Texas, the District of Columbia, and Puerto Rico have failed to adopt the UCCJA. The National Conference of Commissioners on Uniform Laws provided this information in a telephone conversation on November 12, 1982.

17. The UCCJA protects one state's custody determination from modification by courts of another state.

18. In *Valles*, the court held that the effective date of the PKPA was the enactment date, December 28, 1980. ___ N.M. at ___, 639 P.2d at 1183.

19. N.M. Stat. Ann. §§ 40-10-1 to -24 (Cum. Supp. 1982).

20. ___ N.M. at ___, 639 P.2d at 1184.

21. The full faith and credit clause, contained in U.S. Const. art. IV, § 1, provides in part: "Full Faith and Credit shall be given in each state to the public Acts, Records, and judicial Proceedings of every other State." In *Barker v. Barker*, 94 N.M. 162, 608 P.2d 138 (1980), the New Mexico Supreme Court adopted the following interpretation of the full faith and credit clause:

child custody decrees of other jurisdictions as required by the PKPA.²² In *Valles* and subsequent cases concerning the modification of foreign child custody decrees,²³ New Mexico courts have followed the federal mandate and have used the PKPA to deter parental kidnapping. Conversely, in most other jurisdictions where the UCCJA was in force prior to the enactment of the PKPA,²⁴ the PKPA is used merely as a supplement to the UCCJA.²⁵ While the PKPA merely provides jurisdictional guidelines regarding the modification of foreign child custody decrees, the UCCJA is more comprehensive. The UCCJA deals not only with jurisdiction but also with procedural due process, forum non conveniens, res judicata, and other procedural concerns.²⁶

STATEMENT OF THE CASE

Valles is actually two cases, *Valles v. Brown* and *Miller v. Love*,²⁷ which the New Mexico Supreme Court consolidated because both cases required application of the PKPA in the context of New Mexico law. In *Valles v. Brown*, the New Mexico Supreme Court granted Mrs. Valles' request for an alternative writ of prohibition²⁸ after a New Mexico trial court held that it could modify a Washington child custody decree.²⁹ In *Miller v. Love*, the New Mexico Supreme Court responded affirmatively to Mrs. Miller's petition for an alternative writ of prohibition after a New Mexico trial court granted full faith and credit to an Arizona child custody decree.³⁰

The full faith and credit clause, which has been described as a nationally unifying force, prescribes a rule by which courts, federal and state, are to be guided when a question arises in the progress of a pending suit as to the faith and credit to be given by the court to the public acts, records, and judicial proceedings of a state other than that in which the court is sitting.

94 N.M. at 164-65, 608 P.2d at 140-41.

22. The best interests of the child standard, as described in *In re Hogue*, 41 N.M. 438, 70 P.2d 764 (1937), controls the modification of foreign child custody decrees in New Mexico. *Mylius v. Cargill*, 19 N.M. 278, 142 P. 918 (1914).

23. *Tufares v. Wright*, 98 N.M. 8, 644 P.2d 522 (1982); *Belosky v. Belosky*, 97 N.M. 365, 640 P.2d 471 (1982).

24. Research indicates that prior to the enactment of the PKPA, forty-two states had adopted the UCCJA.

25. See, e.g., *St. Clair v. Faulkner*, 305 N.W.2d 441, 442 (Iowa 1981); *In re Custody of Ross*, 291 Or. 263, ___, 630 P.2d 353, 362 (1981). In a conflict between the PKPA and the UCCJA, the PKPA must prevail because of the supremacy clause. U.S. Const. art. VI.

26. See *supra* note 19, and *infra* notes 95-97.

27. ___ N.M. at ___, 639 P.2d at 1182.

28. *Id.* Writs of prohibition are extraordinary writs, granted only in limited circumstances, which may be "invoked to prevent an inferior court from acting either without jurisdiction or in excess of jurisdiction." *General Atomic Co. v. Felter*, 90 N.M. 120, 122, 560 P.2d 541, 543, *rev'd on other grounds*, 434 U.S. 12 (1977).

29. ___ N.M. at ___, 639 P.2d at 1182.

30. *Id.*

Valles v. Brown

When Karen and Carl Valles were divorced in Washington state in 1979, the court granted Karen Valles custody of the child of the marriage, Shawna Valles. Carl Valles was granted visitation rights.³¹

Later in 1979, Mr. Valles moved from Washington to New Mexico. Mrs. Valles and the child continued to reside in Washington until August of 1979. Although maintaining her domicile in Washington, Mrs. Valles departed for New York in order to attend school. Shawna went to New York with her mother but often returned to Washington to visit her maternal grandparents.³²

In January of 1981, Mr. Valles learned that Shawna was staying with her grandparents in Washington. He obtained Mrs. Valles' permission to take the child to New Mexico for a visit. Shortly after arriving in New Mexico with Shawna, Mr. Valles petitioned the New Mexico district court to modify the Washington decree, alleging a substantial change in circumstances.³³

The Washington decree contained a provision which allowed for the modification of the decree if Mrs. Valles could no longer care for Shawna. Relying on this provision, the New Mexico court granted temporary custody of Shawna to Mr. Valles. The court further denied Mrs. Valles' motion asking the court to grant full faith and credit to the Washington child custody decree.³⁴ Subsequently, the New Mexico Supreme Court granted an alternative writ of prohibition³⁵ and prevented the district court from taking any further action in the case.

Upon review, Mrs. Valles' arguments persuaded the New Mexico Supreme Court that the PKPA prevented New Mexico courts from modifying the Washington child custody decree³⁶ because the Washington court continued to exercise valid jurisdiction in the case.³⁷ Mr. Valles argued unsuccessfully that the New Mexico courts had no duty to give full faith and credit to the Washington child custody decree because Washington no longer had jurisdiction or, alternatively, because the Washington decree provided for custody modification.³⁸ Mrs. Valles regained legal custody of Shawna.

31. *Id.*

32. *Id.* at ___, 639 P.2d at 1183.

33. *Id.*

34. *Id.*

35. *Id.* at ___, 639 P.2d at 1182.

36. Brief in Chief of Petitioner, Karen Valles, at 17-18 (on file at the University of New Mexico Law School library).

37. *Id.* at 16.

38. Answer Brief of Respondent, the Honorable John E. Brown at 7 (on file at the University of New Mexico Law School library).

Miller v. Love

Although wed in Arizona in 1974, Deborah and Ron Miller soon moved to New Mexico where two children were born of the marriage. The family resided in New Mexico until November 1, 1980, when Mrs. Miller left her husband and took the children to Arizona.³⁹ On Christmas Day 1980, Mr. Miller brought the children back to New Mexico without his wife's consent. Each parent subsequently filed for divorce and requested custody of the children—Mr. Miller in New Mexico and Mrs. Miller in Arizona. Mrs. Miller was not served with process. Although Mr. Miller was served, he failed to respond. The Arizona court granted Mrs. Miller a divorce, awarded custody to her, and ordered the immediate return of the Miller children to Arizona.⁴⁰ Mrs. Miller's counsel contested the jurisdiction of the New Mexico trial court by entering a special appearance in New Mexico district court.⁴¹

The New Mexico district court granted full faith and credit to the Arizona decree and consequently awarded custody of the children to Mrs. Miller. The New Mexico Supreme Court granted Mr. Miller's petition for an alternative writ of prohibition thereby preventing the trial court from taking any further action in the case.⁴²

The New Mexico Supreme Court agreed with Mr. Miller's argument that the Arizona custody decree was jurisdictionally defective and, therefore, not entitled to full faith and credit by the New Mexico court.⁴³ Consequently, the court reversed and remanded the *Miller* case for a determination of whether the New Mexico trial court had valid jurisdiction. If jurisdiction could be established, the supreme court instructed the trial court to address the merits of the case.

DISCUSSION

In *Valles*, the court weighed competing interests regarding the modification of foreign child custody decrees.⁴⁴ New Mexico courts have traditionally attempted to promote the best interests of the child in custody disputes by providing for flexibility in the modification of child custody decrees following a substantial change in circumstances.⁴⁵ In *Valles*, the court first balanced this traditional interest against the benefit to the child of the increased stability in custody arrangements between divorced par-

39. ___ N.M. at ___, 639 P.2d at 1182.

40. *Id.*

41. *Id.* The court held that a special appearance must be limited to only challenging the jurisdiction of the court. Because Mrs. Miller also requested enforcement of the Arizona child custody decree, the court held that she had entered a general appearance. *Id.* at ___, 639 P.2d at 1185.

42. *Id.* at ___, 639 P.2d at 1182.

43. Petitioner's Brief in Chief at 13 (on file at the University of New Mexico Law School library).

44. ___ N.M. at ___, 639 P.2d at 1182.

45. See *Albright v. Albright*, 45 N.M. 302, 115 P.2d 59 (1941).

ents which would result from national uniformity in the enforcement of child custody decrees.⁴⁶ Second, the New Mexico Supreme Court weighed the value of traditional state autonomy in domestic relations⁴⁷ against the federal statutory requirements in the PKPA which promote the extension of full faith and credit to all valid child custody decrees. Generally, according to the PKPA, the original forum will have the option to modify the child custody decrees which it has issued.⁴⁸

The court found that not only were the interests of the affected children best served by the discouragement of child snatching through the adoption of a uniform national standard of child custody decree modification,⁴⁹ but also that the state law must defer to pre-empting federal law.⁵⁰ As a result, New Mexico will apply the uniform federal jurisdictional standards as mandated in the PKPA⁵¹ when asked to modify foreign child custody decrees.

The New Mexico Court's Application of the PKPA

The New Mexico Supreme Court applied the PKPA⁵² two-part jurisdictional test to determine when a New Mexico court may modify a foreign child custody decree. Two alternatives compose the first part of the PKPA test. Either the foreign forum which issued the contested custody decree no longer has jurisdiction under its own law⁵³ and under the

46. Parental Kidnapping Prevention Act of 1980, Pub. L. No. 96-611, § 7(b), 94 Stat. 3568-73 (1980), outlines the purposes of the federal Parental Kidnapping Prevention Act.

47. H. Clark, *The Law of Domestic Relations in the United States* 572 (1968).

48. 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.

28 U.S.C. § 1738A(d) (Supp. IV 1980).

49. ___ N.M. at ___, 639 P.2d at 1184.

50. *Id.*

51. *Id.*

52. The court stated:

According to the PKPA, a New Mexico court may *only* modify a child custody decree issued in another state when:

1. New Mexico has jurisdiction under its own law, 28 U.S.C.A. Section 1738A(c)(1) (Spec. Pamp. 1981), and under the PKPA, 28 U.S.C.A. Sections 1738A(c)(2)(A) through 1738A(c)(2)(E) (Spec. Pamp. 1981); 28 U.S.C.A. Section 1738A(f)(1) (Spec. Pamp. 1981) *and*

2. The state which issued the child custody decrees no longer has jurisdiction under the PKPA and its own law, 28 U.S.C.A. Section 1738A(c) (Spec. Pamp. 1981), *or* has declined to exercise jurisdiction to modify the decree. 28 U.S.C.A. Section 1738A(f)(2) (Spec. Pamp. 1981).

___ N.M. at ___, 639 P.2d at 1184 (emphasis by the court). The order of the test in the text is reversed because the court generally analyzes the second part of the test first.

53. 28 U.S.C. § 1738A(c)(1) (Supp. IV 1980), states: "(c) A child custody determination made by a court of a State is consistent with the provisions of this section only if—(1) such court has jurisdiction under the law of such State." A state cannot issue a legitimate child custody decree absent jurisdiction under its own law.

PKPA⁵⁴ or it has declined to exercise its jurisdiction to modify the decree.⁵⁵ If the jurisdiction of the foreign forum was defective at adjudication, a New Mexico court does not have to grant full faith and credit to that child custody decree.⁵⁶

Second, New Mexico must have jurisdiction under its own law⁵⁷ and under the PKPA.⁵⁸ In order to comply with the jurisdictional requirements of the PKPA, New Mexico must fulfill at least one of the following five conditions: (1) New Mexico must be the child's home state;⁵⁹ (2) the child has a substantial connection with the state of New Mexico such as being domiciled there; (3) the child has been abandoned or abused in New Mexico; (4) no state other than New Mexico had legally adequate jurisdiction at the time that the New Mexico court exercised jurisdiction; or (5) the New Mexico court was exercising a continuing jurisdiction from a prior proceeding when it entered the decree in question.⁶⁰

54. 28 U.S.C. § 1738A(c)(2) (Supp. IV 1980), states that in order to fulfill the PKPA jurisdictional requirements it is necessary that:

(2) one of the following conditions is met:

(A) such State (i) is the home State of the child on the date of the commencement of the proceeding, or (ii) had been the child's home State within six months before the date of the commencement of the proceeding and the child is absent from such State because his removal or retention by a contestant or for other reasons, and a contestant continues to live in such State;

(B)(i) it appears that no other State would have jurisdiction under subparagraph (A), and (ii) it is in the best interests 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;

(C) the child is physically present in such 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;

(D)(i) it appears that no other State would have jurisdiction under subparagraph (A), (B), (C), or (E), or another State has declined 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 interests of the child that such court assume jurisdiction; or

(E) the court has continuing jurisdiction pursuant to subsection (d) of this section.

The child custody decree of a forum is not entitled to full faith and credit absent jurisdiction under the PKPA.

55. 28 U.S.C. § 1738A(f)(2) (Supp. IV 1980), states: "(f) A court of a State may modify a determination of the custody of the same child made by the court of another State. if . . . (2) the court of the other State no longer has jurisdiction, or it has declined to exercise such jurisdiction to modify such determination."

56. ___ N.M. at ___, 639 P.2d at 1185.

57. N.M. Stat. Ann. § 40-10-4 (Cum. Supp. 1982).

58. See *supra* note 54.

59. The PKPA states: "'home state' means the State in which immediately preceding the time involved, the child lived with his parents, a parent, or a person acting as parent, for at least six consecutive months. . . ." 28 U.S.C. § 1738A(b)(4) (Supp. IV 1980).

60. See *supra* note 54.

Application of the PKPA in Valles

In *Valles*, the court applied the two-part test from the PKPA to the facts of *Valles v. Brown* and *Miller v. Love*. In *Valles v. Brown* the court focused on the first part of the PKPA analysis, finding that the Washington court had initial and continuing jurisdiction both under its own law and the PKPA.⁶¹ The facts of the *Valles v. Brown* case⁶² fulfilled the PKPA jurisdictional requirements. Specifically, the fact that Shawna had spent most of her life in Washington persuaded the court to find that Washington was Shawna's "home" state.⁶³ Additionally, the court stated that either Mrs. Valles or Shawna had significant connections with Washington other than mere physical presence. Substantial evidence concerning Shawna's care, protection, training, and personal relationships was present in Washington. Finally, Shawna was domiciled in Washington.⁶⁴ Because the Washington court was willing to hear the *Valles v. Brown* case,⁶⁵ Washington state fulfilled all the necessary jurisdictional requirements. New Mexico therefore lacked subject matter jurisdiction.

In *Miller*, the court considered whether the Miller children's relationship with the state of Arizona satisfied any of the five requisite jurisdictional standards under the PKPA.⁶⁶ The court found that Arizona was not the "home" state of the Miller children. The Miller children lacked significant connections with the state of Arizona. Also, no substantial evidence concerning the Miller children's welfare was present in Arizona. Finally, the court found that Arizona was neither the only forum with jurisdiction nor the most appropriate forum.⁶⁷ In addition, the court found that Arizona lacked jurisdiction under the PKPA's modified version of *parens patriae*⁶⁸ whereby a state can exercise emergency jurisdiction. The Miller children were neither physically present in Arizona nor threatened with abuse or abandonment.⁶⁹ Because Arizona lacked original jurisdiction under the PKPA, the New Mexico court did not have to give full faith and credit to the Arizona child custody decree.⁷⁰ If New Mexico had valid jurisdiction, the trial court was free to make a child custody determination.⁷¹ The supreme court therefore instructed the New Mexico district court to apply the PKPA test to the facts of the *Miller* case.⁷²

61. ___ N.M. at ___, 639 P.2d at 1185.

62. *Id.* at ___, 639 P.2d at 1186.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* at ___, 639 P.2d at 1184-85.

67. *Id.*

68. The state as *parens patriae* provides for the safety, health, morals, and general welfare of immature children. *Ettinger v. Ettinger*, 72 N.M. 300, 383 P.2d 261 (1963).

69. ___ N.M. at ___, 639 P.2d at 1185.

70. *Id.*

71. *Id.*

72. *Id.*

Subsequent Cases Applying the PKPA Test

Two recent cases, *Belosky v. Belosky*⁷³ and *Tufares v. Wright*,⁷⁴ dealt with the same issue—the modification of a foreign child custody decree by New Mexico courts. In both cases, the supreme court reiterated the PKPA analysis as applied in *Valles*.

In *Belosky*, an Ohio court had awarded Mrs. Belosky custody of her children. She violated the decree by removing the children to New Mexico. She then petitioned the New Mexico court for a modification of the Ohio decree. The mother specifically sought to strike the condition which prohibited her from removing the children from Ohio.⁷⁵ The children's father filed a motion to dismiss the petition for modification because of lack of jurisdiction and to enforce an Ohio decree granting him emergency temporary custody. The trial court denied Mr. Belosky's motion.⁷⁶

Reversing the New Mexico trial court, the New Mexico Supreme Court stated: "We follow the analysis of *Valles v. Brown, supra* in applying the PKPA to this case."⁷⁷ Under the first part of the PKPA test the Ohio court continued to have jurisdiction under its own law.⁷⁸ Furthermore, Ohio fulfilled the jurisdictional requirements of the PKPA because the children had lived in Ohio for at least six months preceding the Ohio court's child custody decree.⁷⁹ The New Mexico trial court therefore lacked jurisdiction in the case.⁸⁰ The mother's suit would be proper only in Ohio.

Similarly, in *Tufares*, the New Mexico Supreme Court refused to approve a New Mexico trial court order which modified a Utah district court judgment granting child custody to the father.⁸¹ The court held that by the terms of the PKPA, the New Mexico trial court lacked subject matter jurisdiction.⁸² Although New Mexico had jurisdiction under its own law to make a custody determination, New Mexico courts could not modify the Utah decree because the first part of the PKPA test was not met: Utah continued to have jurisdiction under its own law. Furthermore, Utah satisfied the PKPA's jurisdictional requirements.⁸³ In the court's analysis, "Utah has met the 'home state' requirements within six months of June 28, 1980, the date of the commencement of the New Mexico

73. 97 N.M. 365, 640 P.2d 471 (1982).

74. 98 N.M. 8, 644 P.2d 522 (1982).

75. 97 N.M. at 366, 640 P.2d at 472.

76. *Id.*

77. *Id.*

78. *Id.* Ohio had jurisdiction both as the childrens' "home state" and state of "significant connection" pursuant to Ohio law. Ohio Rev. Code Ann. § 3109.22(A)(1) (2) (Page Repl. Vol. 1980).

79. 97 N.M. at 367, 640 P.2d at 473.

80. *Id.*

81. 98 N.M. at 9, 644 P.2d at 523.

82. *Id.*

83. *Id.* at 11, 644 P.2d at 525.

proceedings."⁸⁴ The New Mexico court therefore could not modify the Utah decree.

To date, the New Mexico Supreme Court has clearly stated its intent to abide scrupulously by the jurisdictional guidelines of the PKPA. In order to reach a correct resolution, a court must simply and mechanically apply the PKPA test to the facts of any given child custody case involving the modification of a foreign decree.

The New Mexico Supreme Court Overrules Traditional New Mexico Rules Governing the Modification of Foreign Child Custody Decrees

The New Mexico Supreme Court's application of the PKPA in *Valles* overruled longstanding New Mexico case law regarding the modification of foreign child custody decrees. Assuming continuing jurisdiction under the PKPA, the court which renders the initial child custody decree will exercise virtually exclusive modification jurisdiction.⁸⁵

The traditional New Mexico rules regarding the modification of foreign child custody decrees are now defunct. Prior to *Valles*, New Mexico courts had modified foreign custody decrees if there was a showing of substantially changed circumstances which indicated that a change of custody from one parent to another would best serve the welfare of the child.⁸⁶ All child custody judgments were provisional and temporary in nature and generally were not *res judicata*, either in the same court or in a court of a foreign jurisdiction, except as to the facts before the court at the time of the judgment.⁸⁷ Previously, the New Mexico Supreme Court held that a modification of a foreign child custody decree in New Mexico did not mean that full faith and credit had not been given to the earlier judgment and decree of the sister state.⁸⁸ New Mexico courts have applied various components of these principles in a long line of cases concerning the modification of foreign child custody decrees.⁸⁹

The *Valles* court's application of the PKPA approach to full faith and credit contrasts sharply with previous New Mexico decisions. The new rule is clearly more stringent. Increasingly, New Mexico courts will respond to requests for modification of foreign decrees by finding that New Mexico lacks subject matter jurisdiction.⁹⁰

84. *Id.*

85. 28 U.S.C. § 1738A(c)(2)(E) (Supp. IV 1980). The exception to this general rule is § 1738A(f)(2). See *supra* note 55 for the text of that section.

86. See *Albright v. Albright*, 45 N.M. 302, 303, 115 P.2d 59, 60 (1941).

87. *Mylius v. Cargill*, 19 N.M. 278, 283, 142 P. 918, 920 (1919).

88. *Albright v. Albright*, 45 N.M. at 304, 115 P.2d at 60.

89. *E.g.*, *Tuft v. Tuft*, 82 N.M. 461, 483 P.2d 935 (1971); *Terry v. Terry*, 82 N.M. 113, 476 P.2d 772 (1970); *Smith v. South*, 59 N.M. 312, 283 P.2d 1073 (1955).

90. The court found lack of subject matter jurisdiction in *State ex rel. Valles v. Brown, Belosky v. Belosky*, and *Tufares v. Wright*.

The *Valles* ruling also swept away much of the principle of *parens patriae* in the modification of foreign child custody decrees. Under this principle, the physical presence of the child within the territorial jurisdiction of the court is the basis for modifying a foreign child custody decree.⁹¹ In contrast, the physical presence of Shawna Valles in New Mexico did not suffice to confer jurisdiction upon the New Mexico courts.

The supreme court also overruled a related principle. Formerly, in *Worland v. Worland*,⁹² the supreme court held that a New Mexico court had jurisdiction only if: 1) the child was domiciled in New Mexico, or 2) the child was physically present in New Mexico, or 3) the parties disputing custody were personally subject to the jurisdiction of the New Mexico court.⁹³ As a result, a New Mexico parent could escape New Mexico jurisdiction and win child custody in a foreign forum by snatching a child from New Mexico during the pendency of New Mexico proceedings concerning custody. Under the PKPA, New Mexico will continue to exercise jurisdiction.

Future Modification of Foreign Child Custody Decrees—PKPA and UCCJA

The PKPA should discourage child snatchers from seeking a favorable forum in New Mexico to obtain a child custody decree in opposition to a previous foreign decree or from removing a child from New Mexico to avoid the enforcement of an unfavorable New Mexico child custody ruling. The PKPA, however, does not cover all contingencies. *Miller* illustrates a loophole in the protection afforded by the PKPA. The home state from which the child has departed technically continues to exercise jurisdiction over child custody determinations for six months, if a contestant continues to reside in such state. A parent, perceiving the imminent breakdown of the marital relationship, can, prior to litigation and within six months, legitimately seize the child and flee to the state where the family formerly resided. The forum to which the child snatcher fled can adjudicate the child custody issues. As *Miller* demonstrates, the PKPA does nothing to deter child snatching in this limited set of circumstances.

91. See, e.g., *Bassett v. Bassett*, 56 N.M. 739, 250 P.2d 487 (1952). In *Bassett*, a woman of means, supposedly returning to Massachusetts with her children to meet her husband, decided instead to get off the train in Albuquerque and settle down. *Id.* at 742, 250 P.2d at 489. The court stated that:

The rule is well established by the great weight of authority that jurisdiction in child custody cases does not depend upon legal domicile but, where the minor child is actually residing and physically present within the territorial jurisdiction of the court, such court takes and has jurisdiction by virtue of the doctrine of *parens patriae* regardless of the legal domicile of the child.

Id. at 745, 250 P.2d at 491.

92. 89 N.M. 291, 551 P.2d 981 (1976).

93. *Id.* at 293, 551 P.2d at 983.

The application of the PKPA's requirement that the initial forum which awarded child custody has continuing jurisdiction is uncertain. In *Valles v. Brown*, the New Mexico Supreme Court found that the Washington court had continuing jurisdiction despite the facts that neither adult contestant continued to reside⁹⁴ in Washington and that the child was merely a visitor in Washington state. The original forum continued to have the power to exercise jurisdiction despite the physical departure of all contestants.

Compared with the PKPA, the UCCJA is a more comprehensive piece of legislation which fills loopholes left open by the PKPA. In the case of a snatched child who resides in a state which could not yet qualify as a home state, the UCCJA provides for the discretionary refusal of jurisdiction. The forum sought by the fugitive parent may refuse to litigate custody issues because of parental misconduct.⁹⁵ Also, the UCCJA formally provides for consideration of the inconvenient forum issue.⁹⁶ Furthermore, by the terms of the UCCJA, a contestant commencing child custody proceedings in an inappropriate forum can be required to pay court costs, attorneys' fees, and travel expenses of all the parties to the litigation.⁹⁷

Considering the superiority of the UCCJA in scope and in deterrence of child snatching, the PKPA's continued prominence in New Mexico litigation involving the modification of foreign child custody decrees is questionable.⁹⁸ Actually, the PKPA incorporates the basic UCCJA jurisdictional provisions. Realistically, the PKPA is a stopgap measure designed to provide some protection for foreign child custody decrees in the few jurisdictions which have not adopted the UCCJA. If all jurisdictions had adopted the UCCJA and applied the uniform statute evenhandedly, there would have been no need for the PKPA.

On the other hand, the PKPA is a protective device against inconsistency, providing a uniform national standard for the modification of child custody decrees. The PKPA, however, unlike the UCCJA, does not permit two forums to exercise concurrent jurisdiction. Also, in the event of spurious use of the PKPA, there is the opportunity for federal review, an

94. In *Valles v. Brown*, the court equated residence with domicile and found that Washington had jurisdiction.

95. N.M. Stat. Ann. § 40-10-9 (Cum. Supp. 1982).

96. N.M. Stat. Ann. § 40-10-8 (Cum. Supp. 1982).

97. N.M. Stat. Ann. §§ 40-10-8(G) & 40-10-9(C) (Cum. Supp. 1982). The PKPA urges states to force a contestant who has brought child custody proceedings in an inappropriate forum to pay costs and fees.

98. After completion of this Note, the New Mexico Supreme Court, in *Olsen v. Olsen*, 21 N.M. St. B. Bull. 1372 (Sept. 29, 1982), applied the UCCJA to determine whether a New Mexico court could modify a Wyoming child custody decree. The court relied on New Mexico case law interpreting the PKPA to the extent that the PKPA and the UCCJA were consistent.

option which is unavailable as a means of resolving custody disputes involving the UCCJA.

Whether the New Mexico Supreme Court will continue to use the PKPA aggressively is an open question. Most states rely on the UCCJA because it is more comprehensive and ultimately a more useful law in the majority of cases which involve the modification of foreign child custody decrees. The PKPA might be more appropriately used as the primary legal standard in exceptional cases in which the UCCJA is inadequate such as those involving the inconsistent application of the UCCJA or calling for federal review. In any event, the tightening of New Mexico jurisdictional requirements through the application of either the PKPA or the UCCJA should largely remove the legal incentive for abduction of children by their parents.

CONCLUSION

The deterrence of child snatching depends on a uniform national standard for the modification of child custody decrees. Assuming continuing jurisdiction, the authority to modify a child custody decree must be reserved to the court which issued the original decree. Otherwise, multifarious legal standards⁹⁹ will encourage multifarious pronouncements by various courts resulting in inconsistent child custody decrees.

With the *Valles* ruling, the New Mexico Supreme Court has enforced the stringent jurisdictional standards of the PKPA, apparently recognizing that in order to deter child snatching all states must cooperate in honoring the child custody decrees of sister states. The court mechanically applies a two-part test. If New Mexico courts are presented with a request to modify a foreign child custody decree, the courts must first consider whether the foreign forum has jurisdiction under its own law and under the PKPA. If the foreign forum continues to exercise jurisdiction and is willing to hear the case, New Mexico courts lack subject matter jurisdiction and may not modify the decree. New Mexico courts may evaluate whether New Mexico is the proper forum only if the foreign forum which issued the original child custody decree either lacks or has refused to exercise jurisdiction. If either of these two conditions applies, New Mexico courts must discern whether New Mexico has jurisdiction under its own law and under at least one of the five PKPA jurisdictional conditions.

In addition, the enactment of the PKPA erodes traditional state autonomy in the area of domestic relations. Due to the interstate nature of the

99. Legal standards that influence child custody determinations include the best interests of the child, significant connections to the jurisdiction, and *parens patriae*. H. Clark, *Cases and Problems on Domestic Relations* 1025-1103 (3d ed. 1980).

child snatching problem and the pressing need for national uniformity, federal intervention is reasonable.

The enactment of the PKPA has had the effect of limiting the jurisdictional bases of New Mexico courts regarding the modification of foreign child custody decrees. *Valles* overruled the case law which allowed New Mexico courts to modify foreign child custody decrees when the child was physically present in New Mexico and when a substantial change of circumstances had occurred. Although the extent of the ramifications of the application of the PKPA to New Mexico is unclear, New Mexico courts have removed much of the legal incentive for fugitive parents to flee with stolen children either to or from New Mexico, hoping to procure a favorable child custody decree. The UCCJA, a more comprehensive state statute, will likely broaden the scope of effective deterrence of child snatching.

The paramount concern of New Mexico courts in child custody disputes is protecting the best interests of the child. Enforcement of the PKPA by New Mexico courts will promote this positive social value if its application discourages the practice of child snatching. As a result, children who have already suffered disruption of their families might experience enhanced stability, continuity, security, and safety.

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