



Summer 1987

Domestic Relations - An Interpretation of the Parental Kidnapping Prevention Act and the New Mexico Child Custody Jurisdiction Act: State Ex Rel. Dept. of Human Servs. v. Avinger

Margaret Phelan Armijo

Recommended Citation

Margaret P. Armijo, *Domestic Relations - An Interpretation of the Parental Kidnapping Prevention Act and the New Mexico Child Custody Jurisdiction Act: State Ex Rel. Dept. of Human Servs. v. Avinger*, 17 N.M. L. Rev. 409 (1987).

Available at: <https://digitalrepository.unm.edu/nmlr/vol17/iss2/11>

DOMESTIC RELATIONS—An Interpretation of the Parental Kidnapping Prevention Act and the New Mexico Child Custody Jurisdiction Act; *State ex rel. Dept. of Human Servs. v. Avinger*

I. INTRODUCTION

Congress adopted the Parental Kidnapping Prevention Act (PKPA) in 1980,¹ and the New Mexico Legislature adopted the Uniform Child Custody Jurisdiction Act (UCCJA) as the New Mexico Child Custody Jurisdiction Act (NMCCJA) in 1981.² The PKPA and the UCCJA were both intended to deter non-custodial parents from taking children from the custodial parent and re-litigating custody in another forum.³

In *State ex rel. Department of Human Servs. v. Avinger*, the New Mexico Supreme Court considered the application of the federal PKPA and the NMCCJA to a child neglect and dependency proceeding⁴. The court held that the PKPA did not preempt the NMCCJA in child neglect and dependency actions.⁵ The court also held that the NMCCJA precluded the New Mexico Children's Court from modifying the custody decree of another state in a neglect and dependency proceeding unless the court which rendered the decree did not have jurisdiction or had declined to assume jurisdiction to modify the decree.⁶ The issues raised in *Avinger* were questions of first impression in New Mexico.⁷

Although the court in *Avinger* clarified the application of the NMCCJA to child custody and neglect proceedings, the 1986 New Mexico Legislature changed the precedential value of the case.⁸ The New Mexico Legislature acted during the 1986 session to delete child neglect and dependency proceedings from the definition of "custody proceeding" in the NMCCJA. These words were central to the *Avinger* court's interpretation of the NMCCJA.⁹ Thus, neglect and dependency proceedings are

1. 28 U.S.C. § 1738A (1982).

2. N.M. STAT. ANN. § 40-10-1 to -24 (Repl. Pamp. 1986).

3. Parental Kidnapping Prevention Act of 1980, Pub. L. No. 96-611, § 7, 94 Stat. 3568-73 (1980); Uniform Child Custody Jurisdiction Act § 1, 9 U.L.A. 111, 116 (1968).

4. 104 N.M. 255, 720 P.2d 290 (1986), *aff'g*, 104 N.M. 355, 721 P.2d 781 (Ct. App. 1985).

5. *Id.* at 257, 720 P.2d at 292.

6. *Id.* at 259, 720 P.2d at 294.

7. *Id.* at 256, 720 P.2d at 291.

8. Laws 1986, Chap. 93. The statute previously read " '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." N.M. STAT. ANN. § 40-10-3(C) (Repl. Pamp. 1986).

9. Laws 1986, Chap. 93.

no longer specifically included in the NMCCJA.¹⁰ Since the court in *Avinger* held that a similar failure to include neglect and dependency proceedings in the PKPA means that the PKPA does not apply to such proceedings,¹¹ it is likely that the NMCCJA no longer applies to child neglect and dependency proceedings either.

This Note will examine the history of the PKPA and the UCCJA in New Mexico and consider the decision in *Avinger* and its implications for New Mexico practitioners. The Note will then consider the legislative revision of the New Mexico CCJA and its effects and implications in light of the holding in *Avinger*.

II. STATEMENT OF THE CASE

Respondent *Avinger* is the mother of the children who are the subject of this action.¹² A Texas court awarded custody of the children to Kathy *Avinger* in a divorce decree.¹³ Relatives brought the children to New Mexico,¹⁴ apparently without the knowledge or consent of their mother.¹⁵ The New Mexico Human Services Department (HSD) obtained temporary custody of the children through an *ex parte* order based on allegations that the children were neglected and in need of protection.¹⁶ HSD then filed a neglect petition against *Avinger* in children's court.¹⁷ After a temporary custody hearing, the children's court continued custody in HSD.¹⁸ The court then held an adjudicatory hearing,¹⁹ determined it had jurisdiction under Section 32-1-9²⁰ of the Children's Code,²¹ found the children were abandoned and neglected, and gave custody of the children to HSD for no longer than six months.²²

Avinger appealed to the New Mexico Court of Appeals, claiming the

10. N.M. STAT. ANN. § 40-10-3(C) (Repl. Pamph. 1986).

11. *Avinger*, 104 N.M. at 257, 720 P.2d at 292.

12. *Id.* at 256, 720 P.2d at 291.

13. *Id.*

14. *Id.* at 259, 720 P.2d at 294.

15. Appellant's Brief-in-Chief at 2, Dept. of Human Servs. v. *Avinger*, 104 N.M. 355, 721 P.2d 781.

16. *Avinger*, 104 N.M. at 256, 720 P.2d at 291. *Ex parte* orders are allowed under SCRA 1986, Rule 10-301(A), which states: "At the time a petition is filed or any time thereafter, the children's or district court may issue an *ex parte* custody order upon a sworn written statement of facts showing probable cause exists to believe that the child is abused or neglected and that custody under the criteria set forth in Rule 10-303 of these rules is necessary."

17. *Avinger*, 104 N.M. at 256, 720 P.2d at 291.

18. *Id.*

19. *Id.*

20. N.M. STAT. ANN. § 32-1-9(A) (Repl. Pamph. 1986): "The court has exclusive original jurisdiction of all proceedings under the Children's Code in which . . . a child is alleged to be . . . (3) a neglected child; or (4) an abused child."

21. *Avinger*, 104 N.M. 355, 357, 721 P.2d 781, 783.

22. *Id.*

children's court did not have jurisdiction to modify a Texas custody decree under the NMCCJA.²³ HSD argued that the provisions of the NMCCJA that relate to custody decrees did not apply to neglect and dependency proceedings.²⁴ Neither Avinger nor HSD raised the issue of the application of the PKPA to child neglect and dependency proceedings in the court of appeals.²⁵

The court of appeals vacated the adjudicatory order of the children's court which gave custody of the children to HSD for no more than six months.²⁶ (The authority of the children's court to enter the temporary custody orders was never an issue.)²⁷ The court of appeals held that both the PKPA and the NMCCJA applied to the proceeding.²⁸ The limitations in the NMCCJA on the authority of the children's court to modify another state's custody decree applied even when the court was exercising its jurisdiction under the emergency provisions at Section 40-10-4(A)(3),²⁹ which gives the court jurisdiction in child neglect and abuse cases.³⁰ Under the PKPA and the NMCCJA, the children's court lacked jurisdiction to modify the Texas custody decree.³¹ The Texas decree was consistent with the PKPA, and there was nothing in the record to indicate either that Texas no longer had jurisdiction or had declined to exercise jurisdiction.³²

The Human Services Department instituted an original proceeding to obtain certiorari review of the court of appeals decision.³³ HSD did not seek review of the portion of the court of appeals decision which held that the NMCCJA was applicable to neglect and dependency proceed-

23. Appellant's Brief-in-Chief at 7, *Avinger*, 104 N.M. 355, 721 P.2d 781. Avinger also appealed the case on three other grounds: incorrect application of the rule of law on neglect and abandonment, error in admitting evidence of her prior conviction of a misdemeanor, and admission of the testimony of a witness present at the trial even though the witness exclusion rule had been invoked. *Id.* The court of appeals did not address these issues, because the jurisdictional issue was dispositive.

24. Appellee's Answer Brief at 7, *Avinger*, 104 N.M. 355, 721 P.2d 781. DHS also argued that the trial court had not erred in the other issues presented by Avinger as grounds for appeal. *Id.*

25. Respondent-Appellant's Supplemental Brief in Response to Appellee's Application for Writ of Certiorari at 3, *Avinger*, 104 N.M. 355, 721 P.2d 781.

26. *Id.* at 362, 721 P.2d at 788.

27. *Id.* at 361, 721 P.2d at 787.

28. *Id.*

29. N.M. STAT. ANN. § 40-10-4(A)(3) (Repl. Pamp. 1986):

A district court of New Mexico which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial decree or modification decree under the following circumstances if: . . . (3) the child is physically present in New Mexico and: (a) the child has been abandoned; or (b) 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.

30. *Avinger*, 104 N.M. at 359, 721 P.2d at 785.

31. *Id.* at 361, 721 P.2d at 787.

32. *Id.*

33. *Avinger*, 104 N.M. at 255, 720 P.2d at 290.

ings.³⁴ HSD asked the supreme court to consider only two questions: 1) whether the PKPA applied to child neglect and dependency proceedings, and 2) whether the court of appeals erred in applying the jurisdiction limitations in the NMCCJA at Section 40-10-15(A)³⁵ to extinguish the court's emergency jurisdiction established at Section 40-10-4(A)(3).³⁶ HSD argued that the PKPA did not apply to child neglect and dependency proceedings, because the plain language of the statute did not include such proceedings, and the legislative history of the PKPA showed that the statute was not intended to apply to child neglect and dependency proceedings.³⁷

As for the application of the jurisdictional limits to emergency proceedings, HSD argued that this might endanger children who needed the protection of the state, because Rule 60³⁸ of the New Mexico Children's Court required that an adjudicatory hearing be held within sixty days of the entry of a temporary order in a child neglect and dependency proceeding.³⁹ The effect of applying the jurisdictional limits of the NMCCJA to child neglect and dependency proceedings would be to impose a sixty day limitation on the exercise of the children's court's emergency jurisdiction.⁴⁰ HSD claimed that this did not give them adequate time to resolve cases concerning child abuse and neglect.⁴¹ HSD also argued that this decision made an arbitrary distinction between *ex parte* custody orders (temporary custody orders) and orders given at the adjudicatory stage of a proceeding.⁴² HSD noted that provisions for abused and neglected children recognize the existence of a continuing emergency situation, so that

34. Application for Writ of Certiorari at 2-3, *id.* at 255, 720 P.2d 290 (1986).

35. N.M. STAT. ANN. § 40-10-15(A) (Repl. Pamp. 1986):

If a court of another state has made a custody decree, a district court of New Mexico shall not modify that decree unless: (1) it appears that the court which rendered the decree does not now have jurisdiction under jurisdictional prerequisites substantially in accordance with the Child Custody Jurisdiction Act [40-10-1 to 40-10-24 NMSA 1978] or has declined to assume jurisdiction to modify the decree; and (2) the district court of New Mexico has jurisdiction.

36. Application for Writ of Certiorari at 2, *Avinger*, 104 N.M. at 255, 720 P.2d 290.

37. *Id.* at 5.

38. SCRA 1978, Rule 60(a), (now at SCRA 1986, Rule 10-308):

If the alleged abused or neglected child is in the custody of the department, the adjudicatory hearing shall be commenced within sixty days after whichever of the following events occurs latest:

- (1) the date of the petition is served on the respondent;
- (2) if a mistrial is declared or a new trial is ordered by the trial court, the date such order is filed; or
- (3) in the event of an appeal, the date the mandate or order is filed in the district court disposing of the appeal.

39. Application for Writ of Certiorari at 7, *Avinger*, 104 N.M. 255, 720 P.2d 290.

40. *Id.*

41. *Id.*

42. *Id.* at 8.

all adjudication concerning such children should be considered urgent.⁴³

Avinger argued that the PKPA did apply to neglect and dependency proceedings whenever the issue was modification of the custody decree of another state entitled to full faith and credit.⁴⁴ She also argued that child neglect and dependency proceedings were within the intent of the PKPA, which was to prevent forum shopping in custody cases.⁴⁵ As to the issue of whether the NMCCJA applied to proceedings brought under the court's emergency jurisdiction, Avinger claimed that the children's court was preparing to adjudicate the case on its merits, so it was proper to apply the NMCCJA.⁴⁶

The New Mexico Supreme Court granted certiorari,⁴⁷ affirmed the decision of the court of appeals, and vacated the adjudicatory order of the children's court with directions to comply with the NMCCJA.⁴⁸ The supreme court held that the PKPA did not apply to the proceeding.⁴⁹ The NMCCJA, however, did apply to limit the authority of the children's court to enter the adjudicatory order.⁵⁰ Avinger filed a motion for rehearing in the supreme court.⁵¹ The motion was denied.⁵²

III. DISCUSSION AND ANALYSIS

A. *History of the PKPA and the UCCJA in New Mexico*

Prior to the promulgation of the PKPA and the UCCJA, child snatching was "quasi-accepted behavior" encouraged by the legal rules.⁵³ Jurisdiction was based on the physical presence of the child in the state; and custody decrees, which were not final, could be re-litigated endlessly.⁵⁴ Parents who lost custody in one forum could take advantage of the situation by kidnapping their children and taking them to a new forum,

43. *Id.* at 9.

44. Respondent-Appellant's Supplemental Brief in Response to Appellee's Application for Writ of Certiorari at 3, *Avinger*, 104 N.M. 255, 720 P.2d 290.

45. *Id.* at 5.

46. *Id.* at 11.

47. *Avinger*, 104 N.M. at 256, 720 P.2d at 291.

48. *Id.* at 260, 720 P.2d at 295.

49. *Id.* at 257, 720 P.2d at 292.

50. *Id.* at 259, 720 P.2d at 294.

51. Brief in Support of Respondent's Motion for Rehearing Concerning the Court's Opinion of Certiorari at 1-2, *Avinger*, 104 N.M. 255, 720 P.2d 290. The rehearing was requested, because the Supreme Court of Arizona had just issued a decision which held that the PKPA did apply to child neglect and dependency proceedings, *In the Matter of the Appeal in Pima County Juvenile Action*, 712 P.2d 431, 432 (Ariz. 1986).

52. *Avinger*, 104 N.M. at 255, 720 P.2d at 290.

53. Bodenheimer, *Interstate Custody: Initial Jurisdiction and Continuing Jurisdiction under the UCCJA*, 14 FAM. L.Q. 203 (1981).

54. *Id.*

where custody could be re-litigated.⁵⁵ Thus, the lives of many children were in constant turmoil.⁵⁶ The PKPA and the UCCJA were attempts to deal with this by changing the laws that rewarded child snatching.

The UCCJA changed the law in three ways.⁵⁷ First, the uniform act explicitly eliminated jurisdiction based on the physical presence of the child.⁵⁸ Second, the act prohibited modification of other states' custody decrees.⁵⁹ Third, the UCCJA required enforcement of other states' custody decrees.⁶⁰

Like the UCCJA, the PKPA did away with jurisdiction based on the physical presence of the child, required that states grant full faith and credit to out-of-state custody decrees, and limited the ability of the states to modify custody decrees of other states.⁶¹ In addition, the PKPA made the Fugitive Felon Act applicable to parental kidnappers,⁶² and established a federal parent locator service.⁶³

The adoption of the PKPA and the UCCJA overruled a long line of New Mexico child custody cases.⁶⁴ Prior to the adoption of the PKPA, New Mexico courts modified other states' custody decrees if a party could show substantially changed circumstances and that the modification would serve the best interests of the child.⁶⁵ Now the courts must follow the more stringent standards of the PKPA and the NMCCJA.⁶⁶ These statutes promote the policy of familial stability above all other concerns, including state autonomy, precedent, and the interests of particular children.

Since the PKPA and the NMCCJA were intended to prevent parental kidnapping, it was not clear how they affected child neglect and de-

55. *Id.*

56. *Id.* at 203-204. It was estimated that, prior to the adoption of the PKPA, parents abducted between 25,000 and 100,000 children every year, *Parental Kidnapping Prevention Act: Joint Hearings on S.105 Before the Subcomm. on Criminal Justice of the Senate Comm. on the Judiciary and the Subcomm. on Child and Human Development of the Senate's Comm. on Labor and Human Resources*, 96th Cong., 2d Sess. 1 (1980).

57. Bodenheimer, *supra* note 53, at 204.

58. UCCJA § 3(b). Adopted in New Mexico at N.M. STAT. ANN. § 40-10-4(B) (Repl. Pamp. 1986).

59. UCCJA § 14. Adopted in New Mexico at N.M. STAT. ANN. § 40-10-15(A) (Repl. Pamp. 1986).

60. UCCJA §§ 13, 15. Adopted in New Mexico at N.M. STAT. ANN. §§ 40-10-14 and 40-10-16 (Repl. Pamp. 1986).

61. 28 U.S.C. § 1738A (1982). There are, however, technical distinctions in these provisions between the two acts. See generally, Foster, *Child Custody Jurisdiction: UCCJA and PKPA*, 27 N.Y.L. SCH. L. REV. 297, 299 (1981), for an explanation of the differences.

62. 18 U.S.C. § 1073 (1982).

63. 42 U.S.C. § 651 (1982).

64. Note, *Domestic Relations—An Interpretation of the Parental Kidnapping Prevention Act of 1980: State ex rel. Valles v. Brown*, 13 N.M.L. REV. 527, 536 (1983).

65. *Id.*

66. Some New Mexico cases applying the PKPA are *State ex rel. Valles v. Brown*, 97 N.M. 327, 639 P.2d 1181 (1981), *Belosky v. Belosky*, 97 N.M. 365, 640 P.2d 471 (1982), and *Tufares v. Wright*, 98 N.M. 8, 644 P.2d 522 (1982).

pendency proceedings. The PKPA defined "custody determination" as "a judgment, decree, or other order of a court providing for the custody or visitation of a child, and includes permanent and temporary orders and initial orders and modifications."⁶⁷ Since the PKPA neither specifically included nor excluded child neglect and dependency proceedings in its definition of "custody determination," it was unclear whether the PKPA applied.⁶⁸ In contrast, the NMCCJA included child neglect and dependency proceedings in its definition of "custody proceeding."⁶⁹ However, it was unclear whether the prohibition in Section 40-10-15(A)⁷⁰ against modifying another state's custody decrees applied even when the court was exercising jurisdiction under Section 40-10-4(A)(3),⁷¹ which gave the court jurisdiction to make child custody determinations in cases of child abandonment or abuse. The supreme court clarified the law in this area by deciding these questions in *Avinger*.⁷²

B. The Decision in *Avinger*

The supreme court in *Avinger* used statutory interpretation to address the issues of whether the PKPA and the NMCCJA applied to child neglect and dependency proceedings.⁷³ The first issue the court considered was the application of the PKPA.⁷⁴ The court noted that the express language of the PKPA⁷⁵ does not specifically include such proceedings.⁷⁶ Since the UCCJA specifically included child neglect and dependency proceedings in its definition of custody decrees, and the PKPA was partially based on the UCCJA, the omission of the phrase from the PKPA showed an intent not to apply the PKPA to such proceedings.⁷⁷ The court also cited to the history of the PKPA, which stressed the prevention of child snatching and never mentioned child neglect and dependency proceedings.⁷⁸ The *Avinger* court held that the PKPA does not apply to such proceedings,

67. 28 U.S.C. § 1738A(b)(3) (1982).

68. *Avinger*, 104 N.M. at 257, 720 P.2d at 292.

69. N.M. STAT. ANN. § 40-10-3(c) (Repl. Pamp. 1986). This definition was amended in 1986, and "child neglect and dependency proceedings" was deleted, Laws 1986, Chap. 93. See *infra* notes 103-11 and accompanying text.

70. See *supra* note 35 for specific statutory language.

71. See *supra* note 29 for specific statutory language.

72. *Avinger*, 104 N.M. 255, 720 P.2d 290.

73. *Id.* at 257, 720 P.2d at 292.

74. *Id.* at 256, 720 P.2d at 291.

75. The definition of "custody determination" in the PKPA is "a judgment, decree, or other order of a court providing for the custody or visitation of a child, and includes permanent and temporary orders, and initial orders and modifications," 28 U.S.C. § 1738A (1982).

76. *Avinger*, 104 N.M. at 257, 720 P.2d at 292.

77. *Id.*

78. *Id.* But see Justice Walter's dissent, 104 N.M. at 261-63, 720 P.2d at 296-98 (Walters, J., dissenting) (discussing whether the failure of Congress to include "child neglect and dependency proceedings" in the PKPA showed an intent to exclude such proceedings from the PKPA).

because of the express language of the statute and the legislative history.⁷⁹

The second issue was whether the NMCCJA applied to child neglect and dependency proceedings.⁸⁰ The court held that the act applied, because the NMCCJA definition of "custody proceeding" specifically included "child neglect and dependency proceedings."⁸¹ The court then considered whether the NMCCJA precluded the children's courts from modifying another state's custody decree through such a proceeding.⁸² HSD claimed the limitation in Section 40-10-15(A)⁸³ on modifying out-of-state decrees did not apply to proceedings initiated under Section 32-1-9(A),⁸⁴ which gave the children's court exclusive jurisdiction over proceedings in which a child was alleged to be neglected.⁸⁵ The court, however, rejected this argument.⁸⁶ The court reasoned that Section 40-10-15(A)⁸⁷ precludes New Mexico courts from modifying other states' custody decrees unless the original court does not have jurisdiction or has declined to assume jurisdiction.⁸⁸

In applying the NMCCJA to the *Avinger* facts, the court found that the children's court proceeding involved a modification of another state's custody decree, so the limitations of Section 40-10-15⁸⁹ on modifying the custody decrees of another state applied to this case.⁹⁰ Section 40-10-15 required that in order for a New Mexico court to have jurisdiction to modify another state's custody decree, the original court must not have jurisdiction or must have declined to assume jurisdiction.⁹¹ Section 40-10-4(A)(3)⁹² gave the children's court jurisdiction because the children were physically present in New Mexico and neglected.⁹³ The requirements of Section 40-10-15, however, must still be met before the court can modify the original decree.⁹⁴ Thus, the children's court can modify another state's custody decree only if the other state does not have jurisdiction or has declined to assume jurisdiction, even when the attempted modification occurs in child neglect and dependency proceedings.⁹⁵

79. *Avinger*, 104 N.M. at 257, 720 P.2d at 292.

80. *Id.* at 258, 720 P.2d at 293.

81. *Id.*

82. *Id.*

83. See *supra* note 35 for specific statutory language.

84. See *supra* note 20 for specific statutory language.

85. *Avinger*, 104 N.M. at 258, 720 P.2d at 293.

86. *Id.*

87. See *supra* note 35 for specific statutory language.

88. *Avinger*, 104 N.M. at 258, 720 P.2d at 293.

89. See *infra* notes 91-95 and accompanying text for details of Section 40-10-15.

90. *Avinger*, 104 N.M. at 258, 720 P.2d at 293.

91. N.M. STAT. ANN. § 40-10-15(A) (Repl. Pamph. 1986).

92. See *supra* note 29 and accompanying text.

93. *Avinger*, 104 N.M. at 258, 720 P.2d at 293.

94. *Id.*

95. *Id.* at 259, 720 P.2d at 294.

C. *Implications of the Avinger Decision*

There is an important loophole in the court's holding: the limitation on the children's court's jurisdiction in neglect and dependency proceedings applies only to the adjudicatory hearing which gives HSD custody of the children for six months.⁹⁶ The temporary orders, which the children's court issued before the adjudicatory hearing, were not at issue in this case.⁹⁷ Justice Walters, in dissent, pointed out that this is a tacit recognition of an emergency exception to Section 40-10-15(A).⁹⁸ Thus, the children's court may have temporary authority to modify other state's custody decrees in emergency situations.⁹⁹

The court in *Avinger* clarified the application of the PKPA and the NMCCJA to child neglect and dependency proceedings in New Mexico, emphasizing familial stability over other concerns such as the child's best interest.¹⁰⁰ By applying the NMCCJA to neglect and dependency proceedings and precluding the children's court from modifying the custody decrees of other states even in such proceedings, the court recognized the importance of facilitating enforcement of custody decrees of other states and of making the laws of New Mexico uniform with those of other states.¹⁰¹ Encouraging family stability and uniformity of laws were purposes of the NMCCJA, as well as the orderly resolution of child custody disputes between parents located in different states.¹⁰² However, in upholding these goals, the court made the protection of abandoned and neglected children in New Mexico more difficult. This difficulty was lessened, but not overcome, by the exception for temporary orders in emergency situations. Clearly, there was a trade-off of the protection of neglected and abandoned children for the promotion of uniform laws and the enforcement of out-of-state decrees.

D. *The Legislative Revision of the CCJA*

During the 1986 session, the New Mexico Legislature acted to delete the words "and includes child neglect and dependency proceedings" from the definition of "custody proceeding" in the NMCCJA.¹⁰³ The UCCJA includes child neglect and dependency proceedings under custody pro-

96. *Id.*

97. *Id.*

98. *Avinger*, 104 N.M. at 260-61, 720 P.2d at 295-96 (Walters, J., dissenting).

99. *Id.*

100. *Id.* at 259, 720 P.2d at 294.

101. *Id.*

102. *Id.*

103. Laws 1986, Chap. 93. The statute previously read "'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." N.M. STAT. ANN. § 40-10-3(C) (Repl. Pamp. 1986).

ceedings,¹⁰⁴ and before the deletion, the New Mexico CCJA definition of "custody proceeding" was exactly the same as that in the UCCJA.¹⁰⁵ Thus, neglect and dependency proceedings are no longer specifically included in the NMCCJA.¹⁰⁶ The wording of the NMCCJA is not the same as the wording of the PKPA.¹⁰⁷ Neither statute, however, now explicitly includes child neglect and dependency proceedings within its terms.

The legislative amendment of the NMCCJA originated in the New Mexico Senate as Senate Bill 52.¹⁰⁸ The original bill contained an entire section explicitly excluding child neglect and dependency proceedings from the custody limitations of the NMCCJA.¹⁰⁹ The bill originated with child protective services workers before *Avinger* had been decided, but after certiorari had been granted by the New Mexico Supreme Court.¹¹⁰ The final version of the bill, as a deletion of the words "and includes child neglect and dependency proceedings" from the definition of "custody proceeding," was negotiated as a compromise between representatives of the Family Law Section of the Bar and the Human Services Department.¹¹¹

Since the court in *Avinger* interpreted the lack of a specific inclusion of child neglect and dependency proceedings in the PKPA to mean the PKPA did not apply to such proceedings, it is likely the court would reach the same conclusion about the lack of a specific reference in the NMCCJA. Such a conclusion would be supported by the legislature's action in deliberately removing the language which included the proceedings in the NMCCJA.

If *Avinger* were decided today, it is likely that neither the PKPA nor the NMCCJA would apply to limit the action of the children's court. This result gives needed protection to abused and neglected children, by giving the court in the state where they are physically present, authority to help

104. 9 U.L.A. 111, § 2(3) (1968).

105. *Id.*

106. N.M. STAT. ANN. § 40-10-3(C) (Repl. Pamph. 1986).

107. The definition of "custody proceeding" in the NMCCJA "includes proceedings in which a custody determination is one of several issues, such as an action for divorce or separation." N.M. STAT. ANN. § 40-10-3(C) (Repl. Pamph. 1986). The definition of "custody determination" in the PKPA is "a judgment, decree, or other order of a court providing for the custody or visitation of a child, and includes permanent and temporary orders, and initial orders and modifications." 28 U.S.C. § 1738A (1982).

108. Interview with Robert L. Schwartz, General Counsel, New Mexico Human Services Department.

109. *Id.*

110. *Id.* The bill was strongly supported by the Department of Human Services. The Governor's Office introduced the bill, and it was carried by Senator Manny Aragon. The main opponents of the bill were domestic relations lawyers. *Id.*

111. *Id.* The compromise was worked out by a number of attorneys who do both domestic relations and child abuse and neglect work. *Id.*

them. It does not significantly damage the effectiveness of the PKPA and the NMCCJA, however, because this decision applies only in cases where the state can prove abuse and neglect.¹¹²

IV. CONCLUSION

The *Avinger* decision concerned the application of the federal PKPA and the New Mexico CCJA to child neglect and dependency proceedings.¹¹³ The New Mexico Supreme Court held that the PKPA does not apply to neglect and dependency proceedings,¹¹⁴ but the NMCCJA does apply.¹¹⁵ The court interpreted the NMCCJA as precluding the children's court from modifying other states' custody decrees in neglect and dependency proceedings, unless the original court does not have jurisdiction or has declined to assume jurisdiction.¹¹⁶ Thus, the court upheld the goal of the PKPA and the NMCCJA, which was the prevention of parental kidnapping.¹¹⁷ The decision, however, made the protection of neglected and abandoned children more difficult. The legislature's action in taking child neglect and dependency actions out of the NMCCJA¹¹⁸ may, therefore, offer more protection to neglected and abandoned children without weakening the impact of the NMCCJA on parental kidnapping.

MARGARET PHELAN ARMIJO

112. In New Mexico, only the state can bring child neglect and dependency proceedings, N.M. STAT. ANN. §§ 32-1-14 and 32-1-18, so parents cannot use unfounded accusations of child abuse to evade the NMCCJA. *But see* Shapiro, *Family Law*, 17 N.M.L. REV. 291 (1987), for a different view of the implications of this act.

113. *Avinger*, 104 N.M. 255, 720 P.2d 290.

114. *Id.* at 257, 720 P.2d at 292.

115. *Id.* at 258, 720 P.2d at 293.

116. *Id.*

117. Parental Kidnapping Prevention Act of 1980, Pub. L. No. 96-611, § 7, 94 Stat. 3568-73 (1980); N.M. STAT. ANN. § 40-10-2 (Repl. Pam. 1986).

118. Laws 1986, Chap. 93.