BALANCING INTERESTS AND SETTING PRIORITIES: COMPARING NEW RULES IN EUROPEAN AND AMERICAN CHILD LAW

Martha Hayes Sampson, University College Chester, UK

Introduction

The past twenty-five years have seen significant improvements in child law worldwide. Domestic legislation as well as international and regional instruments have increased protection for the welfare of children as well as having clarified the rights and obligations of those who have responsibility for their care.

This paper is concerned in the main with a significant piece of recent legislation of the European Community, but will also discuss comparable legislation in the United States with the objective to illustrate the direction that governments are taking in modifying an area of law that has in the past been sacredly guarded in national law.

The process of legislating in the two jurisdictions will be very briefly described to lend clarity to the manner in which differences in a system’s legal structure may account for some of the differences in the resulting legislation.

The paper will conclude by drawing comparisons and critiquing the implications of the changes, together with comment on what may be, or perhaps should be, yet to come.

Comparing the law-making procedures in the EU and the US

Legislating in the European Union

EC Article 249 provides that a regulation has general application, is binding in its entirety and is directly applicable in all Member States. A regulation is generally adopted by the Council of the European Union, but may be the result of a ‘co-decision’ procedure between the Council and the Parliament. It is a legislative act and ‘direct applicability’ means that a regulation is taken to have been incorporated into the national legal system of each of the Member States automatically, and comes into force in accordance with Art. 254. Direct applicability also means that neither

* BS, BA, JD (George Mason University School of Law); Senior Lecturer, Department of Law, University College Chester, UK.

2 Id., Art 254, para 2: “Regulations of the Council and of the Commission, as well as directives of those institutions which are addressed to all Member States, shall be published in the Official Journal
national authorities nor any national legal or administrative measure can prevent its application.\(^3\) The European Union is a supranational body, and although it seems to be moving in that direction, it is not yet a federal system; it is in a “process of creating an ever closer union among the peoples of Europe.”\(^4\)

**Law-making in the United States**

On the other hand, the legal system of the United States *is* a federal system.\(^5\) Although some powers are overlapping between the federal government and the sovereign states, many powers are clearly delineated. Among those is the regulation of domestic relations, the area of law encompassing marriage and family relationships. Although the federal government may regulate relationships between and among the states,\(^6\) it is the state legislatures that pass on issues of such personal status matters as who may marry and when, the grounds for divorce, and the procedures for service of process and judicial matters within the state,\(^7\) much in the same way as the Member States of the European Union have reserved such matters to themselves.

Virginia’s contention in *Loving v Virginia*\(^8\) that regulation of marriage was a state responsibility under the Tenth Amendment was conceded by United States Supreme Court Chief Justice Warren, saying that ‘marriage is a social relation subject to the States’ police power.’ However, this does not mean that “its powers to regulate marriage are unlimited notwithstanding the commands of the Fourteenth Amendment.”\(^9\)

The United States legal system also incorporates a series of Uniform Laws which are written by committees of legal experts and scholars, but are not enacted as federal laws per se. A uniform law must be adopted by each state’s legislature in order to become law. One such example is the Uniform Child Custody Jurisdiction and Enforcement Act 1997\(^10\) to be discussed below.

\(^3\) See Case 230/78 Eridania v Ministry of Agriculture [1979] ECR 2749 at 2772(35). Some provisions in a regulation may require implementing measures in the Member State, but the regulation itself is not to be transformed into national law through the national procedures.


\(^6\) See for example the Parental Kidnapping Prevention Act (28 U.S.C. §1738A) which mandates Full Faith and Credit to Child Custody Determinations throughout the states, the District of Columbia, Puerto Rico and the territories and possessions.

\(^7\) Supra, n. 5, amend X.

\(^8\) *Loving v Virginia*, 388 US 1 (1967),


\(^10\) Although its predecessor, the UCCJA was adopted in all 50 states, the District of Columbia, Puerto Rico and the territories, the UCCJE has been adopted so far in 42 states, the District of Columbia and the U.S. Virgin Islands, and has recently been introduced in four more states. See the website of the Uniform Law Commissioners at [http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-uccjea.asp](http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-uccjea.asp).
International and Regional Treaties

Obviously in addition to the above, are international conventions, such as the Hague Conventions. International conventions are generally enacted into each European Union Member State’s law of its own volition, whereas the sovereign states of the United States have no treaty-making power.\textsuperscript{11} However, after the amendments in the Amsterdam Treaty, some conventions, once negotiated at the Community level, will require mandatory ratification by each Member State.

This broad spectrum of law-making procedures provides our legal systems with an ever-increasingly important and efficient means of ‘righting wrongs’, but more importantly for the topic under discussion, for facilitating the stability and continuance of the family.

The New European Regulation

Background

Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, came into force on August 1, 2004 (transitional measures) and formally applied from March 1, 2005 in 24 of the 25 European Member States.\textsuperscript{12} Because the former regulation 1347/2000 was, for historical reasons, referred to as ‘Brussels II’, the new regulation is often referred to as ‘revised Brussels II’, ‘new Brussels II’, ‘Brussels II bis’ (from a French proposal\textsuperscript{13}), or in some literature simply ‘B2r’.\textsuperscript{14}

The purpose of the revised Brussels II is “to bring together in a single document the provisions on divorce and on parental responsibility.”\textsuperscript{15} Further, it “gives priority to the child’s right to maintain normal relations with both parents” and “represents a major step forward in the fight against abductions of children.”\textsuperscript{16} The Regulation consequentially augments the creation of a European judicial area, and promotes the free movement of European citizens, as well as furthering the goals memorialized in Article 24 of the Charter of Fundamental Rights.\textsuperscript{17}

\textsuperscript{11} Supra, n. 5, art I, cl 10.
\textsuperscript{12} Denmark, in accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and the Treaty establishing the European Community, is not participating in the adoption of the Regulation and is therefore not bound by it nor subject to its application.” Preamble (31) of the Regulation. See also ‘Protocol on certain provisions relating to Denmark’ annexed to the EC Treaty as amended by the Treaty on European Union (Maastricht).
\textsuperscript{13} ‘bis’ roughly means ‘again’ or ‘twice’.
\textsuperscript{14} See for example Duncan Ranton, Brussels II Revised, 2005 Fam LJ 35(196).
\textsuperscript{15} See \url{http://www.europa.eu.int/scadplus/leg/en/lvb/l33194.htm}.
\textsuperscript{16} Id.
\textsuperscript{17} Charter of Fundamental Rights of the European Union (OJ 2000/C 364/01), Art 24, states as follows: The Rights of the Child 1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity. 2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration. 3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.
The Scope of Revised Brussels II on Children

While the sections of Brussels II concerning matrimonial matters remained largely unchanged, there were significant changes with regard to the law’s content on the protection of children and the extent of parental responsibility. Brussels II contained some unfortunate limitations in regard to decisions concerning children. First of all, it covered only children of both spouses, but not step-children, or children for whom only one of the parties may have had parental responsibility. Secondly, it was concerned with measures to protect those children only on the dissolution of a marriage, and not as an independent action.

Much of the language of Brussels II revised tracks the language of the 1996 Hague Convention on the Protection of Children which applies in Australia, Monaco, Morocco, and Ecuador in addition to several EU Member States. The states parties of the Hague Convention on Private International Law were in the process of negotiating the Convention at the same time that the European partners were drafting and negotiating Brussels II. Even at the time when Brussels II came into force in 2000, the groundwork was already being laid to consolidate it with a regulation granting protection of the same kind agreed under the 1996 Hague Convention. In fact, all Member States will also be required to have ratified the Convention on the Protection of Children by the autumn of this year.

The new Regulation applies to all matters regarding “the attribution, exercise, delegation, restriction or termination of parental responsibility.” Decisions on these matters are self-initiating, independent of any matrimonial proceeding as required under the previous regulation. Art.1 (2) identifies the following matters as the subject of the revised portions of the Regulation:

- rights of custody and rights of access;
- guardianship, curatorship and similar institutions;
- the designation and functions of any person or body having charge of the child’s person or property, representing or assisting the child;
- the placement of the child in a foster family or in institutional care;
- measures for the protection of the child relating to the administration, conservation or disposal of the child’s property.

The regulation does not apply to actions to establish or contest parenthood, or decisions involved in adoption; names of the child, emancipation, or matters of trusts and succession; and it does not apply to any measure taken as a result of a child’s criminal offences. Also excluded from the ambit of the Regulation are maintenance

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19 Articles 61(c) and 65 EC. See also an interesting working paper on the subject by Helena Raulus at http://www.abdn.ac.uk/~law217/paper1.htm.
21 Id., Art 1(3).
obligations which are the subject of another regulation. However, as can be observed from the above bulleted list, the Regulation applies not only to matters of private law, but also to public law, such as arranging for foster care for the child.

**Defining Parental Responsibility**

The term ‘parental responsibility’ is more broadly defined than in the previous Regulation by Art.2(7):

> all rights and duties relating to the person or the property of a child which are given to a natural or legal person by judgment, by operation of law or by an agreement having legal effect.

This definition includes right of a public authority, and agreements between parties, perhaps even those such as the ‘Settlement Agreements’ common in the United States, which include agreement on the custody and support of the children of the marriage often as a required element, and other types of parental responsibility agreements.

The term parental responsibility includes rights of custody, including the right to determine the child’s place of residence; and rights of access, which includes the right to take a child to a place other than his or her habitual residence for a set period of time.

**Revised Jurisdictional Rules**

Fundamental changes have been made by the new Regulation to the rules on jurisdiction over matters of parental responsibility. Generally speaking first of all, parental responsibility actions may now be brought, as mentioned above, independently of matrimonial proceedings. Additionally, the scope of the new Regulation includes not only the children of the marriage as in Brussels II, but also step-children and children born outside the marriage. Brussels II revised also applies whether or not the parents were ever married. These aspects of the Regulation allow for a broadening of the protection of children as well as the protection of the rights of those with parental responsibility.

“The approach is child-centred and attributes jurisdiction first and foremost to the state of the habitual residence of the child.” Generally, the Member State with

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23 Id., Art 2(9).
24 Id., Art 2(10).
25See Preamble to Council Regulation (EC) No 2201/2003 (5): *In order to ensure equality for all children, this Regulation covers all decisions on parental responsibility, including measures for the protection of the child, independently of any link with a matrimonial proceeding*. See also, Art 1(1)(b).
jurisdiction is the one in which a child is habitually resident\textsuperscript{27} at the time the court is seised.\textsuperscript{28} However, there are certain exceptions to the general rule.

\textit{i) a lawful move}

If the child moves lawfully from one Member State to another and acquires a new habitual residence, the original court’s jurisdiction continues for three months to facilitate the modification of orders on access rights, if the holder of those access rights remains in the original Member State. This provision does not apply if the person holding access rights accepts the new court’s jurisdiction.\textsuperscript{29}

\textit{ii) jurisdiction over the whole matter}

The court of a Member State exercising jurisdiction over a matrimonial matter under Article 3 also has jurisdiction over a matter of parental responsibility relating to it if at least one of the parties to the proceedings has parental responsibility regarding the child and the court’s jurisdiction has been expressly or otherwise unequivocally accepted by the parties; and it is in the ‘superior interests’ of the child.\textsuperscript{30}

\textit{iii) substantial connection}

A court may also have jurisdiction where there is a ‘substantial connection’ with the Member State, such as by nationality, or if one of the holders of parental responsibility habitually resides there.\textsuperscript{31}

\textit{iv) no habitual residence}

In cases where a child’s habitual residence cannot be established and the question of jurisdiction cannot be resolved under the general rule, the Member State in which the child is physically present will have jurisdiction.\textsuperscript{32} This section would provide, for example, for the protection of refugee children in the jurisdiction.

\textit{Transfer and lis alibi pendens}

In order to prevent concurrent proceedings in separate Member States the strict, non-discretionary \textit{lis alibi pendens} rule has been enshrined in Article 19(2) of the Regulation. When proceedings on parental responsibility relating to the same child and the same cause of action are brought before courts of different Member States, the court second seised must on its own motion stay its proceedings until the jurisdiction of the court first seised has been established. As soon as it has been, the second court \textit{must decline jurisdiction}.

\textsuperscript{27} Habitual residence is not defined in the Regulation; its definition is left to the law of the Member State hearing the case. This will be one of the most interesting aspects to observe as the case law on the Regulation develops.

\textsuperscript{28} Supra, n.20, Art 8(1).

\textsuperscript{29} Id., Art 8(2).

\textsuperscript{30} Id., Art 12(1). This is the so-called ‘Prorogation provision’.

\textsuperscript{31} Id., Art 12(3).

\textsuperscript{32} Id., Art 13(1).
However, Article 15 may provide some flexibility to courts in these circumstances. Article 15 provides for and encourages judicial cooperation, either directly or through the central authorities. This cooperation will facilitate the provision in the Article for transfer of a matter, if it is considered by the court having jurisdiction that a court in another Member State would be better placed to hear the case or any part of it, as long as the transfer would be in the best interests of the child, and at least one of the parties accept the action. Beaton states,

\[\text{It is hoped that adequate training and support will be given to judges in those legal systems that are unfamiliar with this solution to the problem of parallel actions to enable them to work it properly.}\]

Common law practitioners and scholars are accustomed to the rule of *forum non conveniens*, a discretionary rule, giving the judge the right to dismiss a case before him if a more suitable venue is available, given the convenience of the parties and the interests of justice.

### Recognition and Enforcement of Orders

Central to the goals of Brussels II revised is refinement of the procedure for recognition and enforcement of parental responsibility decisions between Member States. In order to obtain recognition in another Member State, a party need only apply, and the court in the requested Member State must declare “without delay” whether or not the decision is enforceable.

The circumstances under which recognition may be declined are extremely narrow. Specifically, the court may refuse if the decision is manifestly contrary to the public policy of the Member State requested; if it were made without the child’s being given an opportunity to be heard; if the decision were a default decision without fair notice to the party not attending; if a person claims that the judgment infringes his parental responsibility and he had no opportunity to be heard by the issuing court, or if the decision cannot be reconciled with a later judgment given in the Member State requested, or in certain circumstances one rendered in another Member State or even a non-Member State.

In much the same way, the provision for recognition and enforcement of access, or contact, orders has been simplified. Any access order must be recognised in the

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33 *Id.*, Art 15(6).
34 Peter Beaton, Edinburgh, leader of the UK Delegation during the negotiations on the new Brussels II.
36 *Supra*, n.20, Art 21(1) states: A judgment given in a Member State shall be recognised in the other Member States without any special procedure being required.
37 *Id.*, Art 31(1).
38 *Id.*, Art 23(a).
39 *Id.*, Art 23(b).
40 *Id.*, Art 23(c).
41 *Id.*, Art 23(d).
42 *Id.*, Art 23(e).
43 *Id.*, Art 23(f).
requested Member State provided it is accompanied by the proper certificate (provided as Annex III to the Regulation) confirming that all procedural safeguards have been observed.\footnote{Id., Art 41.}

“The policy aim here is to remove what is known in the legal systems of mainland Europe as ‘exequatur’. This expression connotes an intermediate measure whereby a bare decree of a court is given enforceable quality, not just internationally but domestically. It is a stated aim of European ministers that there should be removal of exequatur in certain classes of case. The drive here is to create a situation in which an order of a court in any member state should be enforceable directly in all the other member states, \textit{as if it were an internal order of that member state} [emphasis added]. This expresses the aim of creating a common judicial area in the EU or (… as the French put it) une espace judiciaire Européene.”\footnote{Supra, n.35.}

\textit{Application in Cases of Parental Child Abduction: the connection with the 1980 Hague Convention}

Art.2(11) of the new Regulation tracks the language used in the Hague Child Abduction Convention\footnote{Hague Convention on the Civil Aspects of International Child Abduction 1980 available at \texttt{http://www.hcch.net/index\_en.php?act=conventions.text&cid=24}.} in defining the concept of wrongful removal or retention of a child,\footnote{Supra, n.20, Art.2(11).} although the language is sharpened for applications within the European Union.\footnote{Removal or retention is wrongful where: \textbf{Regulation Art.2(11)(a)}: it is in breach of rights of custody acquired by judgment or by operation of law or by an agreement having legal effect under the law of the Member State where the child was habitually resident immediately before the removal or retention; and \textbf{(b) provided that, at the time of removal or retention, the rights of custody were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention. Custody shall be considered to be exercised jointly when, pursuant to a judgment or by operation of law, one holder of parental responsibility cannot decide on the child’s place of residence without the consent of another holder of parental responsibility. [The latter point, although it does not appear in the language of the Convention, has been decided in case law.] \textbf{Child Abduction Convention Art.3}: a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and \textbf{b) at the time of removal or retention} those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention. The rights of custody mentioned in sub-paragraph \textit{a}) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.} After much discussion, the Convention remains the legal basis for return of abducted children as it applies between Member States, but some refinements have been inserted. Some of these changes will supplement the workings of the Convention, but some will take precedence over the Convention’s provisions,\footnote{Art.60(e).} again, within 24 of the Member States of the European Union.
i) Article 13 defences

(a) voice of the child

One consideration added to the return mechanism is the requirement that a child has had the opportunity to be heard before return is ordered. The obligation has been placed upon the Member States to hear, in some way, the child’s views before a decision is made on his or her return to the state of habitual residence. This provision makes mandatory within the European Community what was available as a possible defense under the Child Abduction Convention. Under the Regulation, the burden is on the court to ensure that the child’s views are heard, unless he is too immature, but under the Convention the child must first raise an objection to return, and if he is mature enough, he will be heard.

The judicial or administrative authority may … refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

However, the views of the child were heard in only a very limited number of cases under the 1980 Convention, because it was only when the specific 13(2) defence was alleged by the abducting party that the provision ‘kicked in’. McEleavy views this part of the Regulation negatively. He argues, “The compromise …was a very unsatisfactory settlement which is likely to cause years of confusion and may prove to be a retrograde step in this very sensitive and public area of law.” Further he says that “the changes, in particular Article 11, …fundamentally alter…the 1980 regime.” Are the courts in European Member States about to circumvent the purpose behind their treaty obligation by in essence raising the Article 13(2) defence sua sponte?

(b) grave risk

Another area of conflict on the subject of the Article 13 defences to return is the Art.13(b) defence of grave risk. According to the Practice Guide:

2.2. The Court shall always order the return of the child if he or she can be protected in the Member State of origin. Article 11(4). The Regulation reinforces the principle that the court shall order the immediate return of the child by restricting the exceptions of Article 13(b) of the 1980 Hague Convention to a strict minimum. The principle is that the child shall always be returned if he can be protected in the Member State of origin [emphasis added].

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50 Supra, n.20, Art 11(2) When applying Articles 12 and 13 of the 1980 Hague Convention, it shall be ensured that the child is given the opportunity to be heard during the proceedings ....
51 Id., Art 11(2) includes the qualifying clause, “…unless this appears inappropriate having regard to his or her age or degree of maturity.”
52 Supra, n. 46, Art.13(2).
Article 13(b) of the 1980 Hague Convention stipulates that the court is not obliged to order the return if it would expose the child to a grave risk of physical or psychological harm or subject him to an intolerable situation. The Regulation goes a giant step further by extending the obligation to order the return of the child to cases where a return could expose the child to such harm, but it is nevertheless established that the authorities in the Member State of origin have made adequate arrangements to secure the protection of the child after the return. According to the Guide it is not enough just to establish that procedures exist but it must be shown that ‘the authorities in the Member State of origin have taken concrete measures to protect the child in question’.

Lowe points out, however, that “what is not clear, is who has the burden of proof. If Art. 13(b) is established, is it for the applicant to show adequate means of protection are in place or is it to be presumed unless proved otherwise?”\(^{55}\) One would have to hope that the burden is on the Member State of origin to show that such protective provisions have already been put in place. But again, has Europe undermined the balance agreed by Convention signatories by making a non-return order within the European Community very, very difficult? Of course, theoretically, the States of Europe are expected to offer minimum levels of protection in agreed areas to all European citizens, so philosophically this aspect of the Regulation furthers that goal by requiring Member States to demand such minimums of all sister States.

\section*{ii) applicant’s right to be heard}

Additionally, a court cannot refuse to return a child under these circumstances unless the person who requested the return of the child has also had an opportunity to be heard.\(^{56}\)

\section*{iii) expeditious decision-making}

Furthermore, unless exceptional circumstances exist, the court’s decision must be issued within six weeks.\(^{57}\)

\section*{iv) lack of finality of non-return decisions}

Another serious modification in the Regulation is the capacity of the Member State of origin to ‘trump’ a non-return order of another Member State. The court in the Member State of origin is given the last word.\(^{58}\) According to the new Regulation, the court in the Member State of habitual residence of the child retains jurisdiction until the child acquires a new habitual residence and various conditions set out in Article 10 have been met. Each person with rights of custody must acquiesce in the removal or retention; the child must reside in the new State for at least a year with the full knowledge of anyone with custody rights, and the child must be settled in his new

\footnotesize\(^{55}\) Nigel Lowe, Negotiating the Revised Brussels II Regulation, IFLJ 2004(205).

\footnotesize\(^{56}\) Supra, n.20, Art 11(5).

\footnotesize\(^{57}\) Id., Art 11(3) para. 2.

\footnotesize\(^{58}\) Id., Art 11(8): Notwithstanding a judgment of non-return pursuant to Article 13 of the 1980 Hague Convention, any subsequent judgment which requires the return of the child issued by a court having jurisdiction under this Regulation shall be enforceable in accordance with Section 4 of Chapter III below in order to secure the return of the child.
environment; and there must be no ongoing or open request for return during that time.

(Parallel) Developments in American Family Law

During the same period of time, on the other side of the Atlantic, similar changes have been occurring to the law on parental responsibility in the United States.

Background

American law on the subject of parental responsibility has also been in the process of change. One such development, the Uniform Child Custody Jurisdiction and Enforcement Act, is in the midst of a long process of adoption by the various states and territories.59

As the Uniform Law Commissioners60 recognized decades ago, great numbers of American children of separated parents were being subjected to highly disruptive moves, interfering with the personal attachments, stability and sense of belonging critical to a child’s development. The Commissioners further recognized that the lack of statutory protection of state jurisdictional competence and the lack of a decision by the highest federal court that the full faith and credit clause enshrined in the 14th Amendment to the Constitution applied to child custody decrees had created a chaotic circumstance where states were routinely amending and modifying the custody decrees of other states, and no reliability existed in the field of child custody law. No framework or guidelines existed at the federal level to sort out whether a custody decree rendered in one state was entitled to recognition and enforcement in another; nor as to when one state could alter a custody decree of a sister state.

In drafting the Act, the National Conference of Commissioners drew heavily on the work of leading authors and other authorities in the field, and included consultations with the American Bar Association in formulating its framework.

The 1969 Uniform Child Custody Jurisdiction Act did succeed in bringing some order to the chaos that was child custody law at the time. Under the Act custody jurisdiction was limited to the ‘home state’, or the state where both the child and his family had strong contacts;61 provided for the first time for recognition and enforcement of out-of-state custody decrees;62 and restricted modification of other states’ judgments to very limited circumstances.63 The Act also called for communication between judges in the different jurisdictions involved.64 The UCCJA was adopted in all 50 states, the District of Columbia and the Virgin Islands; however,

59 Supra, n. 10.
60 The National Conference of Commissioners on Uniform State Laws (NCCUSL), now 113 years old, provides states with non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of the law. NCCUSL’s work supports the federal system and facilitates the movement of individuals and the business of organizations with rules that are consistent from state to state.” See http://www.nccusl.org/Update/?uniformact_factsheets/uniformacts-fs-uccjea.asp.
61 Uniform Child Custody Jurisdiction Act 1969 §3.
62 Id, §§13 and 15.
63 Id, §14.
64 Id, §§1(a)(2), 6(c), and 7(d).
some states did not adopt the full text. Additionally, the case law interpreting the Act was inconsistent across the states, which undermined the goals of the Act.

In 1980 Congress acted to attempt to address the jurisdictional problems between the states due to these inconsistent interpretations by enacting the Parental Kidnapping Prevention Act. The Act mandates that state authorities give full faith and credit to the custody orders issued in other states, so long as those decisions were made in conformity with the Act. The changes made to the UCCJA provisions were:

- The PKPA gives priority to home state jurisdiction by requiring that full faith and credit cannot be given to a decision from a state that exercised initial jurisdiction as a ‘significant connection’ state if there was a ‘home state’ at the time. (A hierarchy was applied to the four jurisdictional bases.)
- Under the UCCJA the emergency jurisdictional basis was often used by states in very conflicting ways, sometimes trumping each other. The PKPA specifies that emergency jurisdiction is merely temporary until the court in the appropriate state issues a custody determination.
- Conflicting custody decrees often resulted from the lack of clarity in the UCCJA on the subject of continuing jurisdiction. The PKPA authorizes continuing exclusive jurisdiction in the state so long as one parent or the child remains in the jurisdiction.

Recent revisions—the UCCJEA

The mandate of the Law Commissioners in revising the UCCJA was to draft an amendment providing for uniform enforcement of court decisions on visitation. Instead the Commissioners undertook to rewrite the Act to bring it fully into compliance with the PKPA, and other federal statutes as well as to make those changes necessary as a consequence of inconsistent court interpretations. The design of the jurisdictional scheme of the UCCJA was intended to promote the ‘best interests’ of the children who were the subjects of custody disputes by discouraging parental abduction and by providing that, generally, the state with the closest connections to and the most evidence regarding a child should decide that child’s custody. But this ‘best interests’ language was not intended to open up consideration of the merits of the custody dispute, nor was it intended to allow considerations of best interests to override the correct determination of jurisdiction. The UCCJEA has dispensed with the term ‘best interests’ in order to make clear that the discussion of jurisdictional standards is a separate matter from the substantive standards of custody determinations. There are several issues on which significant changes have been made.

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65 28 USC §1738A.
66 In the context of the PKPA, subsection (b)(8) says, “ ‘State’ means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a territory or possession of the United States;”
67 The UCCJA and the PKPA each prescribes four bases of jurisdiction: (1) home state; (2) significant connection, plus evidence regarding the best interests of the child; (3) emergency; and (4) no other state has jurisdiction or has declined it.
i) home state priority

The 1997 Act incorporates the PKPA’s provision which requires full faith and credit only when the custody determination is made by the ‘home state’.\(^{68}\) No other decision is entitled to full faith and credit unless there was no home state. The ‘significant connection’ basis of jurisdiction under the UCCJA was one of the most conflictingly interpreted of all the Act’s provisions, and a custody determination may have been enforced even if it would be denied enforcement under the PKPA. The UCCJEA has prioritized home state jurisdiction in Section 201 to conform to the PKPA. However, a court may decline jurisdiction because of the conduct of the person petitioning the court.\(^{69}\) This is the so-called ‘Clean Hands’ doctrine and applies to those situations where jurisdiction exists, but because of the circumstances created by the unjustified conduct of the person who seeks to invoke it.\(^{70}\)

ii) emergency jurisdiction

The UCCJEA has corrected the significant lack of clarity in the UCCJA regarding the exercise of emergency jurisdiction. Because the language of the UCCJA did not specify that emergency jurisdiction was intended only to protect the child on a temporary basis until the court properly with jurisdiction issued a permanent order, some courts have interpreted the section as another means of taking jurisdiction; others have interpreted it as having no time limit. These differing interpretations resulted in many jurisdictional conflicts, especially over modification of orders.

The UCCJEA contains a separate section entitled ‘Temporary Emergency Jurisdiction’\(^{71}\) which allows a court to take jurisdiction for the protection of a child even though it is located in neither the home state nor a state with significant connection. Because the basis of jurisdiction in custody matters is a subject matter jurisdiction, presence of the child in the state is sufficient if the matter is truly an emergency. Further, the duty of a state to recognize, enforce and not modify a custody decision of a sister state does not take precedence over the necessity to protect the child through a temporary emergency order. The order must be clearly temporary and must specify a suitable time period, allowing for proceedings in the state with jurisdiction over the custody matter to complete its determination.

iii) continuing jurisdiction

The UCCJA failed to clearly state that the decree-granting state retains exclusive continuing jurisdiction to modify a decree. Two problems have arisen from this failure: (1) conflicting custody decrees produced by differing interpretations of the UCCJA’s jurisdictional provisions and (2) no consistent method to determine whether a state had relinquished its jurisdiction.

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\(^{68}\) ‘Home state’ is defined in §102(7) as ‘the State in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child-custody proceeding.’

\(^{69}\) See UCCJEA 1997 §208.

\(^{70}\) One example is the situation in which, before a custody action has begun, one parent removes the child from the home state and establishes a new residence, then files in that new state; the court may, and should, decline jurisdiction. Exceptions exist.

\(^{71}\) Supra, n.69, §204.
Under the UCCJEA, once a court properly exercises jurisdiction in a custody matter, that state is deemed “the issuing state” and retains exclusive jurisdiction to modify the decree and further, to decide that it no longer has jurisdiction. The issuing state may lose substantial connection, but it is the issuing state that must make the determination, unless all parties have moved out of the state before modification proceedings are brought. The language used in this section is designed to parallel the language in the PKPA (as well as language in the UIFSA or Uniform Interstate Family Support Act 1996). This does demonstrate a trend of consistency and cohesion in current law-making pertaining to the family.

The state with exclusive continuing jurisdiction may relinquish that jurisdiction when it makes a determination that another state would be a more convenient forum under the forum non conveniens principle. The modification state is not authorized to determine that the original decree state has lost jurisdiction, except when the original state is no longer the residence of the child, the parents, or any person acting as a parent. A court of the modification state can determine that all parties have moved away from the original state.

v) enforcement mechanisms

Although both the UCCJA and the PKPA directed the enforcement of valid visitation (contact/access) and custody orders, neither act included mechanisms for enforcing those provisions. The UCCJEA provides for two specific methods. Enforcement is dealt with under Article 3 of the Act, and includes enforcement of return orders under the Hague Child Abduction Convention. Therefore, the section applies enforcement remedies to orders issued under the authority of the International Child Abduction Remedies Act (ICARA). The Law Commissioners considered this stipulation necessary because such abductions often occur before a custody order has been entered and in a large number of cases, before proceedings have begun.

The most common and direct method of enforcement is to register the custody determination in another state, whether or not simultaneous enforcement is required. The procedure is simple, and would give the custodial parent (especially if the custody order is a foreign one) immediate feedback on the enforceability of the order before the child is sent into another state for visitation. This procedure is similar to that in Section 2 of Brussels II revised.

The UCCJEA provides a quick remedy along the lines of habeas corpus. The enforcing court may utilize this extraordinary remedy if it is concerned that the parent with physical custody is likely to flee or harm the child; thus, it may issue a warrant to take physical possession of the child. The enforcing court is limited to inquiring into whether the issuing court had jurisdiction and complied with due process in rendering its decree. If so, it may implement enforcement remedies, but may not modify the decree.

72 Supra, n.69, §207.
73 Id., §302.
75 Supra, n.69, §305.
76 Id., §311.
A role is provided for public authorities in the enforcement process as well. The resources of prosecutors and law enforcement officers may be used to help secure compliance with custody determinations. The prosecutor is not authorized however to be involved in the action leading up to the making of the custody determination except when requested by the court under the Hague Convention or when the person holding the child has violated a criminal statute.

**How do the changes and directions compare?**

First of all, the UCCJEA is not a federal statute applying directly to all U.S. states and territories, whereas Brussels II revised is Community law with immediate effect in all Member States except Denmark. The major effect of this status is that each U.S. state chooses whether or not to adopt the Uniform Law, and which parts of it to adopt; consequently there is residual inconsistency, especially in the choice of adopting the enforcement provisions fully, or perhaps in the choice of whether to apply the law to, for example, Native American tribal decisions, or foreign custody decrees since these also fall under the jurisdiction and/or influence of other laws.

The classes of cases that fall under the Regulation as opposed to those under the UCCJEA are similar. The UCCJEA covers all decisions affecting children except adoption and criminal matters, both of which are excluded under the European Regulation as well, but may include the issue of paternity which the Regulation does not. Neither of the laws covers ancillary relief (child support, etc.).

Both laws may be applied to child cases independent of a matrimonial cause, which is also the case under the UCCJA still in effect in a small number of U.S. states. This is not an area of debate in American law. Both the European and American laws do apply to any child who is the subject of any of these proceedings, regardless of the marital status of the parents. Additionally, the regulation covers matters heard by any court or tribunal; the UCCJEA does as well, making specific mention of the possibility of recognition of decisions of Native American tribal courts.

The certification process for recognition of an access order under Article 41 of Brussels II revised has eliminated the need for hearing on the certification. The validity of a properly certified order cannot be challenged in the enforcing state. Although the procedure is comparable to the registration process provided under Section 305 of the UCCJEA, due process is still required in the enforcing state so that a hearing and opportunity to oppose the enforcement may still be had. This and other provisions, such as that giving the home state increased authority, go a long way toward discouraging abductions, since the friendly forum will all but disappear.

Both jurisdictions, the United States and the European Community, are attempting to tighten the jurisdictional requirements in matters concerning custody of and contact with children, but the style of the two jurisdictions differ. What are the priorities of the systems? Certainly, the new European Regulation appears to have children at the top of the list, in more than just the spirit and words of the statement of purpose. The compulsory prioritizing of children’s welfare above the sovereignty of the Member

77 Id., §§315, 316.
States in deciding for themselves custody matters within their own borders illustrates an attitude of determination on the part of the Community to overcome the internal jurisdictional conflicts of the past. Further, it demonstrates that the harmonization process of private law in Europe is moving ahead with deliberation in some areas.

Both jurisdictions have awarded the greatest weight to the home state; that is, the state of habitual residence. Conflicts over the bases of jurisdiction, both for initial determination and for modification proceedings, was found by both European and American legal communities to be the single most contentious problem faced. Both have applied the same solution to deal with the problem—the setting of an obligatory hierarchy of jurisdictional bases, which are strikingly similar in name and effect. The European rules are less flexible, leaving less to the discretion of judges in the national courts. This however is due in part to the legal system that provides the backdrop for the regulation. As the overwhelming majority of European Member States belong to the civil law tradition, certain rules giving judges discretionary powers such as the discretion to transfer cases to other courts are uncommon.

At first glance, the American UCCJEA does contain much of the same language and spirit as its European counterpart. Although the American law is not designed to cut as wide a swath, many of the same processes of determining jurisdiction are included.

One obvious difference between the two pieces of legislation is the issue of the child’s voice on matters of his or her return after removal or retention. The American law focuses on the parties, or those with parental responsibility for the child as those to whom due process applies. There is little mention, not more than in the Child Abduction Convention, of the opportunity of the child to be heard in such matters. The European regulation requires in the strongest terms that the child have his or her say before any order for return can be concluded. It has been argued that this provision undermines the allowable defences of the Child Abduction Convention to which all Member States of the European Union belong. The argument has been raised that the Community is moving to a federal structure which will eventually mean that it will be the Community, rather than the individual Member States that ratifies international conventions. However, this is unlikely for the near future, given the present overloading of the Court of Justice, and the Court of First Instance. An additional class of case load would not be welcomed without the creation of another specialized court within the present hierarchy. However, as the European Community moves toward a more federal structure, and with the new powers gained under Articles 61 and 65 EC, Member States will lose more and more control over areas previously left solely to their discretion.

Because it has been enacted as a Regulation, Brussels II revised has taken only about 18 months to come fully into effect after completion of the negotiation process. On the other hand, the Uniform Law in the process of adoption in the 50 states, the District of Columbia, Puerto Rico, and the territories, has, after seven years, been enacted in 44 of those jurisdictions, and not in identical form. The remaining jurisdictions continue to follow the UCCJA.

Improved judicial communication and cooperation will continue to promote more balanced decision-making in all jurisdictions. Also, as judges, and in fact, lawyers, academics, and representatives of central authorities continue to meet and exchange views, a continually more uniform approach is likely to be seen in efforts to globalize decisions on the handling of all matters affecting the welfare of children.
What future directions can we expect to see in the two jurisdictions? A draft uniform law on Standards for the Protection of Children from International Abduction will have its first reading this very week in Pittsburgh. Its purpose is to attempt to prevent child abductions resulting from custody disputes and marital proceedings, most of which happen before a decree is entered. Under the provisions of the proposal, judges would be provided with information about abduction risk factors so that they can place appropriate restrictions to prevent abductions either before or after the decree. The prefatory note points out that only two states have enacted such laws. A Texas statute applies to the problem of international child abduction while a California statute applies to both international and domestic abductions.

There is also talk of a Brussels III to unify financial issues of family law in the Community. The movement of judicial and home affairs into the first pillar has created many opportunities for concerted unification in many areas of civil law, and family law is at the top of the agenda. Certainly, the next decade of lawmaking should be fodder for academics, lawyers and judges in both the European Community and the United States.

78 TEX. FAM. CODE § 153.501-§ 153.503.  
79 CAL. FAM. CODE § 3408.