Wisconsin and the Uniform Child Custody Jurisdiction Act: In Whose Hand Solomon's Sword

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COMMENTS

WISCONSIN AND THE UNIFORM CHILD CUSTODY JURISDICTION ACT: IN WhOSE HAND SOLOMON'S SWORD

And the king said, bring me a sword. And they brought a sword before the king. And the king said, Divide the living child in two, and give half to one and half to the other.¹

With the adoption of the Uniform Child Custody Jurisdiction Act² (the Act), the Wisconsin Legislature has taken a major step toward eliminating much of the uncertainty and confusion which have traditionally surrounded child custody proceedings. Judicial decisions in this area require the wisdom of Solomon, even without the presence of the complex jurisdictional issues which frequently arise in custody disputes. One commentator has noted that the "judge agonizes more about making the right decision in a contested custody issue than about any other decision he renders."³ The Act serves to ease the burden of the judge by permitting the courts to apply local law for the purpose of determining the best interests of the child, and setting forth a useful framework for resolving jurisdictional questions.

The recurrence of complex jurisdictional issues in child custody suits can be attributed to many factors. Among these are the failure of the United States Supreme Court⁴ to render a definitive decision regarding the relationship between the full faith and credit clause⁵ and child custody decrees; no fault

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¹ 1 Kings 3:24, 3:25.
³ B. BOTSTEIN, TRIAL JUDGE 273 (1952).
⁵ Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may
divorce, which often forces parents to vent their anger and frustration in custody battles;\(^6\) and the increasing mobility of our society.\(^7\) Commentators and courts recognized that the concepts of jurisdiction and comity did not provide an adequate basis for handling the complexities of child custody litigation and that an alternative approach was needed.\(^8\)

In seeking such a solution a uniform law appeared to be the most viable alternative.\(^9\) The Uniform Child Custody Act resulted. Acceptance of the Act has been slow, but ten of the eleven states that have adopted the Act have done so in the past four years.\(^10\) Although the effectiveness of the Act does not depend on reciprocal adoption by other jurisdictions, the “full benefits will not be reaped until a large number of states have enacted it.”\(^11\) The Act, although not immune from criticism,\(^12\) has been described as “an authoritative statement of the rules currently to be preferred.”\(^13\)

\(^6\) Bodenheimer, The Rights of Children and the Crisis in Custody Litigation: Modification of Custody in and out of State, 46 Colo. L. Rev. 495, 496 (1975) [hereinafter cited as Bodenheimer, Modification].
\(^7\) V. Packard, A Nation of Strangers (1972).
\(^9\) Bodenheimer, supra note 4, at 1217.
\(^11\) UCCJA Prefatory Note, supra note 2, at 102.
\(^12\) Hudak cites five major problems in the Act: (1) it is impracticable and naive, (2) it lacks explicit standards for judges to follow, (3) its highly subjective “priority in time” and “inconvenient forum” rules could encourage “seize and run” tactics, (4) it involves expensive record-keeping, and (5) it is not being enacted into law quickly enough by the states. Hudak, Seize, Run and Sue: The Ignominy of Interstate Child Custody Litigation in American Courts, 39 Mo. L. Rev. 521, 547 (1974) [hereinafter cited as Hudak].
\(^13\) In re Giblin, 304 Minn. 510, ———, 232 N.W.2d 214, 221-22 (1975). Although the
822.01  Purposes of act; construction of provisions

(1)  The general purposes of this act are to:

(a)  Avoid jurisdictional competition and conflict with courts of other states in matters of child custody which have in the past resulted in the shifting of children from state to state with harmful effects on their well-being;

(b)  Promote cooperation with the courts of other states to the end that a custody decree is rendered in that state which can best decide the case in the interest of the child;

(c)  Assure that litigation concerning the custody of a child takes place ordinarily in the state with which the child and family have the closest connection and where significant evidence concerning the child’s care, protection, training, and personal relationships is most readily available, and that courts of this state decline the exercise of jurisdiction when the child and family have a closer connection with another state;

(d)  Discourage continuing controversies over child custody in the interest of greater stability of home environment and of secure family relationships for the child;

(e)  Deter abductions and other unilateral removals of children undertaken to obtain custody awards;

(f)  Avoid relitigation of custody decisions of other states in this state insofar as feasible;

(g)  Facilitate the enforcement of custody decrees of other states;

(h)  Promote and expand the exchange of information and other forms of mutual assistance between the courts of this state and those of other states concerned with the same child; and

(i)  Make uniform the law of those states which enact it.

(2)  This act shall be construed to promote the general purposes stated in this section.

Bridgette Bodenheimer, Reporter for the drafting committee, stated that it was the committee’s intent that “[e]very section . . . be applied in the light of its basic purpose, as expressed in section 1.”14 The purposes here listed are reinforced and restated throughout the Act. Section 822.01 serves

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as a touchstone for resolving any interpretative questions which may arise under the Act.

822.02 Definitions

As used in this act:

(1) "Contestant" means a person, including a parent, who claims a right to custody or visitation rights with respect to a child.

(2) "Custody determination" means a court decision and court orders and instructions providing for the custody of a child, including visitation rights; it does not include a decision relating to child support or any other monetary obligation of any person.

(3) "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.

(4) "Decree" or "custody decree" means a custody determination contained in a judicial decree or order made in a custody proceeding, and includes an initial decree and a modification decree.

(5) "Home state" means the state in which the child immediately preceding the time involved lived with the child's parents, a parent, or a person acting as parent, for at least 6 consecutive months, and in the case of a child less than 6 months old the state in which the child lived from birth with any of the persons mentioned. Periods of temporary absence of any of the named persons are counted as part of the 6-month or other period.

(6) "Initial decree" means the first custody decree concerning a particular child.

(7) "Modification decree" means a custody decree which modifies or replaces a prior decree, whether made by the court which rendered the prior decree or by another court.

(8) "Person acting as parent" means a person, other than a parent, who has physical custody of a child and who has either been awarded custody by a court or claims a right to custody.

(9) "Physical custody" means actual possession and control of a child.

(10) "State" means any state, territory, or possession of the United States, the commonwealth of Puerto Rico, and the District of Columbia.

This section makes no significant departure from present Wisconsin law. In defining "custody proceedings" the Commis-
The legislature endorsed this interpretation by stating that "[a]ll proceedings relating to the custody of children shall comply with the requirements of Ch. 822" in various sections of the children's code, divorce actions and support of dependents. Thus, the provisions of the Act apply to all proceedings at which a child custody issue may be determined.

The writ of habeas corpus has been recognized by both statute and case law as a permissible procedure for instituting a custody determination. In Anderson v. Anderson the Wisconsin Supreme Court approved this practice, permitting a full determination of custody issues in a habeas corpus proceeding. In contrast, in criminal cases the writ may only be used to determine the legality of the detention.

822.03 Jurisdiction

(1) A court of this state which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if:

(a) This state is the home state of the child at the time of commencement of the proceeding, or had been the child's home state within 6 months before commencement of the proceeding and the child is absent from this state because of the child's removal or retention by a person claiming custody or for other reasons, and a parent or person acting as parent continues to live in this state; or

(b) It is in the best interest of the child that a court of this state assume jurisdiction because the child and the child's parents, or the child and at least one contestant, have a significant connection with this state, and there is available in this state substantial evidence concerning the child's pres-

15. UCCJA, § 2, comment at 105-06; see also Hudak, supra note 12, at 542-43.
19. However, in an Oregon child abuse case the court noted in response to the defendant mother's contention that the UCCJA pleading requirements applied to all such custody hearings, whether interstate or not, that "[t]here is good reason to question this contention." In support of its questioning the court quoted sections of the UCCJA Prefatory Note indicating that the purpose of the Act was to prevent the interstate scuttling of children. In re Tiller, 542 P.2d 934, 936 (1975).
21. Zillmer v. Zillmer, 8 Wis. 2d 657, 100 N.W.2d 564, modified, 101 N.W.2d 703 (1960); State ex rel. Hannon v. Eisler, 270 Wis. 469, 71 N.W. 2d 376 (1955); Bellmore v. McLeod, 189 Wis. 431, 207 N.W. 699 (1926).
22. 36 Wis. 2d 455, 153 N.W.2d 627 (1967).
ent or future care, protection, training, and personal relationships; or

(c) The child is physically present in this state, and the child has been abandoned or it is necessary in an emergency to protect the child because the child has been subjected to or threatened with mistreatment or abuse or is otherwise neglected or dependent; or

(d) It appears that no other state would have jurisdiction under prerequisites substantially in accordance with par. (a), (b) or (c), or another state has declined to exercise jurisdiction on the ground that this state is the more appropriate forum to determine the custody of the child, and it is in the best interest of the child that this court assume jurisdiction.

(2) Except under sub. (1)(c) and (d), physical presence in this state of the child, or of the child and one of the contestants, is not alone sufficient to confer jurisdiction on a court of this state to make a child custody determination.

(3) Physical presence of the child, while desirable, is not a prerequisite for jurisdiction to determine custody.

The failure of the United States Supreme Court to rule that custody decrees are binding in all circumstances has resulted in conflicting state jurisdictional rules.

The first Restatement of Conflicts of Laws treated custody as a status. The location of the status and hence the law to be applied, was determined by the domicile of the father. This classification provided a simple standard for determining the proper forum for resolving custody disputes. However, there were two major exceptions to this general rule. If the child was physically present within the forum, the state could exercise jurisdiction to protect the child. The second exception allowed a court to take jurisdiction if both custodial adults resided in the forum. In 1934, when the first Restatement appeared, the lesser mobility of the American population and the undeveloped state of the child’s best interest test made the applica-


24. The law of the state of the father’s domicile at the birth of a legitimate child determines the right of custody of the child, which continues until changed in accordance with the rules stated in §§ 145 to 151.

Restatement of Conflict of Laws § 144 (1934).


26. The best interest of the child doctrine is derived from a Pennsylvania Supreme Court case, Commonwealth v. Addicks, 5 Binn. 520 (1813), and a Kansas decision,
tion of the original Restatement rule a mechanical procedure in most cases. However, with the development of the child’s best interest doctrine and the increase in the mobility of the populace, this rigid rule was soon criticized. For example, Professor Stansbury called the Restatement rule “a pure abstraction put forward to make hard facts fit an a priori theory of jurisdiction.”

The Stansbury article provided the rationale for Sampsell v. Superior Court, which sounded the death knell for the first Restatement rule. The Sampsells were both California residents. The wife absconded to Nevada with the child, obtained a Nevada divorce and was granted custody of the child without notice to her husband. At the same time, the husband instituted an action in California seeking both a divorce and a custody determination. The wife, who had since remarried and moved to Utah, appeared in the California action and answered, pleading the Nevada divorce decree. The California trial court dismissed the husband’s action based on a lack of jurisdiction over the mother and child. In reversing the lower court, Justice Traynor determined that more than one state could obtain and exercise jurisdiction in a child custody proceeding.

Prior to Sampsell, the courts considered the three major bases of jurisdiction—status, the physical presence of the child within the state and the presence of the two custodial adults, to be mutually exclusive in their operation. But Justice Traynor used these bases as alternatives in a concurrent jurisdiction approach. In turn, his analysis in Sampsell served as the basis of the concurrent jurisdiction approach of the Second Restatement which the Wisconsin Supreme Court approved in Greef

29. 32 Cal. 2d 763, 197 P.2d 739 (1948).
30. Id. at ———, 197 P.2d at 750.
31. Id. at ———, 197 P.2d at 748-50.
32. The revised Restatement rule provides that:
A state has power to exercise judicial jurisdiction to determine the custody, or
to appoint a guardian of the person of a child or adult
(a) who is domiciled in the state, or
v. Greef.\(^{33}\)

The usefulness of the Second Restatement rule was not its expansion of the number of available forums, but rather its limiting effect on the exercise of jurisdiction to avoid conflicting custody decrees. The existence of another forum able to render a decree should persuade courts to exercise a higher degree of discretion in asserting jurisdiction. Even before approval of the concurrent jurisdiction rules in *Greef*, the Wisconsin Supreme Court declined to become involved in a custody jurisdiction dispute, although it admitted that either of two states could exercise jurisdiction.\(^{34}\) Other states have not been so farsighted\(^{35}\) and this has given rise to criticism of the concurrent jurisdiction theory. One writer has described it as an abandonment of any recognizable jurisdictional test.\(^{36}\)

To remedy the conflicting situation, Professor Ratner developed the “established home” theory.\(^{37}\) Other major approaches\(^{38}\) to the jurisdiction problem had one major weak-
ness—the encouragement of self-help tactics. In seeking to find a workable basis for jurisdiction in child custody proceedings, Ratner relied on psychological studies which showed that most children were integrated into American communities after six months residence. Under this approach the jurisdiction in which the child last resided for six months was considered the child's established home. After this time the child was said to have had the opportunity to establish enough contacts within the community to permit a court in that jurisdiction to make an informed decision concerning the child's best interest. Ratner concluded that jurisdiction should not be predicated on domicile or residence, but rather, on the court's ability to make a proper decision.

The largest number of forum decisions will be based on the Act's major jurisdictional basis—home state, as defined in section 822.05 (5). This provision is a variation of Ratner's established home doctrine. The selection of the home state as a proper forum provides a simple standard which is "defined and certain." Jurisdiction of the home state continues for a period of six months if the child is removed from its confines or leaves for any reason. This provision applies to children who have been abducted by a parent and also to those away at a boarding school. Because of the extension of home state jurisdiction, a parent need not follow an abducting parent and child, as proceedings can still be initiated in the home state. Consistent with this, subsection 3 provides that the child's presence in the forum is not necessary to assure the court of jurisdiction.

There are a number of situations where subsection (1)(a)
will not apply, and thus require the implementation of (1)(b). One such situation occurs when there is no state where the child has lived for six months. Also, when the child has not yet established a home state, and the parent in the previously established home state has moved from that state, subsection (1)(b) must also be applied. These two examples pose no philosophical problems when applying the "significant contacts" test of (1)(b). The lack of a home state will always require a jurisdictional determination in the best interest of the child.

When using (1)(b) as a basis for exercising jurisdiction, close reading and interpretation is necessary in view of the Commission's caveat that "perhaps more than any other provision of the Act [(1)(b)] requires that it be interpreted in the spirit of the legislative purposes enumerated in Section 1."12

At present, there has been more judicial interpretation of (1)(b) than of any other section of the Act. In Brooks v. Brooks,13 a noncustodial father sought enforcement in Oregon of a Montana ex parte order which transferred custody rights from the mother to him. The Oregon Court of Appeals ruled that there was no basis for the assertion of jurisdiction by Montana. In discussing the significant contacts test, the court noted that,

while both parties and the children had substantial previous contacts with Montana, these contacts had terminated, except for intermittent family contacts. The Montana court, therefore, was not, and is not, in the best position now to determine the present best interests of the children and the fitness of the parents, both of whom had left Montana. It is significant that the Montana court made no findings as to (a) the present circumstances of the children or (b) the fitness of either parent.4

The case of Turley v. Griffin45 was decided under a Kentucky child custody statute with a jurisdictional scheme similar to that of the Act.46 In her divorce action, the mother was

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42. UCCJA, supra note 2, at § 3 comment.
43. 20 Or. App. 43, 530 P.2d 547 (1975).
44. Id. at —, 530 P.2d at 551.
45. 508 S.W.2d 764 (1974).
46. 403.260. Custody—Jurisdiction, commencement of proceedings.
(1) A court of this state competent to decide child custody matters has
awarded custody of their daughter and then moved out of the state. The father, seeking a modification of the decree in Kentucky, asserted that both parents and the child had substantial contacts with the state. Affirming the circuit court’s denial of jurisdiction, the court of appeals relied on the comments to the Uniform Child Custody Jurisdiction Act for the proposition

jurisdiction to make a child custody determination by initial or modification decree if:

(a) This state:
1. Is the home state of the child at the time of commencement of the proceeding; or
2. Had been the child’s home state within 6 months before commencement of the proceeding and the child is absent from this state because of his removal or retention by a person claiming his custody or for other reason, and a parent or person acting as parent continues to live in this state; or

(b) It is in the best interest of the child that a court of this state assume jurisdiction because:
1. The child and his parents, or the child and at least one contestant, have a significant connection with this state; and
2. There is available in this state substantial evidence concerning the child’s present future care, protection, training, and person relationships; or

(c) The child is physically present in this state; and
1. Has been abandoned; or
2. It is necessary in an emergency to protect him because he has been subjected to or threatened with mistreatment or abuse or is neglected or dependent; or

(d) 1. No other state has jurisdiction under prerequisites substantially in accordance with paragraphs (a), (b) or (c) of subsection (1), or another state has declined to exercise jurisdiction on the ground that this state is the more appropriate forum to determine custody of the child; and
2. It is in his best interest that the court assume jurisdiction.

(2) Except under paragraphs (c) and (d) of subsection (1), physical presence in this state of the child, or of the child and one of the contestants, is not alone sufficient to confer jurisdiction on the court of this state to make a child custody determination.

(3) Physical presence of the child, while desirable, is not a prerequisite for jurisdiction to determine his custody.

(4) A child custody proceeding is commenced in the circuit court:
(a) By a parent, by filing a petition:
1. For dissolution or legal separation; or
2. For custody of the child in the county in which he is permanently resident or found; or

(b) By a person other than a parent, by filing a petition for custody of the child in the county in which he is permanently resident or found, but only if he is not in the physical custody of one of his parents.

(5) Notice of a child custody proceeding shall be given to the child’s parent, guardian, and custodian, who may appear, be heard, and file a responsive pleading. The court, upon a showing of good cause, may permit intervention of other interested parties.

that the "purpose is to limit jurisdiction. The alternative juris-
diction should serve the best interests of the child, not the
convenience of the parent." To counter the contention that
there were sufficient contacts between the forum and the ab-
sent mother and child, the court stated that "[t]here must be
a maximum rather than a minimum contact with the state."\(^4\)

A result contrary to the intent of the Act was reached in the
Colorado case of Nelson v. District Court.\(^4\) Both mother and
father were Colorado residents who had been divorced in Okla-
homa. Custody of their child was given to a guardian in Mon-
tana who then took the child to Colorado. The mother ab-
ducted the child and refused to release him. A writ of habeas
corpus was brought by the guardian, and the mother sought
relief in Colorado under the "strong contacts" provision of the
Act. The Colorado Supreme Court found that the state trial
court could exercise jurisdiction. It relied on four factors for the
conclusion that Colorado's basis for jurisdicton outweighed
that of the child's home state of Montana: (1) both parents
lived in Colorado; (2) all parties sought remedies through the
Colorado courts; (3) sufficient evidence was available in Colo-
rado as both the maternal and paternal grandparents lived in
Colorado; and (4) it was in the child's best interest. Three of
the seven judges, in dissent, charged that the majority emas-
culated the section. The dissent correctly pointed out that both
the parent and the child are required to have significant con-
tact with the jurisdiction.\(^5\) When confronted with a claim for
jurisdiction under (1)(b), the court should examine the situa-
tion carefully to insure a result in harmony with the purposes
of the Act. If there is a viable alternative jurisdiction, the com-
peting claims should be decided under the rules in sections
822.06 and 822.07.\(^5\)

The parens patriae power of the state is codified in para-
graph (1)(c). The exercise of jurisdiction in this manner is re-
served for "extraordinary circumstances."\(^6\) The section is con-
sistent with present Wisconsin law as set forth in Zillmer v.

\(^{47}\) 508 S.W.2d at 766.
\(^{48}\) Id.
\(^{50}\) Id. at ___, 527 P.2d at 814.
\(^{51}\) Bodenheimer, supra note 4, at 1226-27, 1230-31.
\(^{52}\) UCCJA, supra note 3, at § 3 comment. See also Bodenheimer, supra note 4, at
1229-30.
In *Zillmer*, the mother was hospitalized in Kansas for mental illness and the children were brought to the home of her husband's parents in Wisconsin. After being declared competent, she filed a divorce action against her husband, also a Kansas resident. The divorce was granted, and the Kansas court, aware of the children's presence in Wisconsin, awarded custody to the mother. The children's grandparents, allegedly fearing for the children's safety, refused to surrender them in the face of a writ of habeas corpus filed in Wisconsin by the mother. The Wisconsin Supreme Court affirmed the trial court finding that the Kansas divorce was res judicata and ordered the grandparents to return the children to their mother. However, on motion for rehearing, the judgment was modified permitting the children to remain with their grandparents for sixty days to allow the father time to seek a modification of the Kansas divorce decree. The emphasis placed on the safety of the children was the key factor in the supreme court's modification on rehearing. It was noted by the court that,

> further reflection has not altered our conclusion that the question of custody ought to be decided in Kansas court, and counsel has not attempted to show that the law of Kansas would prevent further consideration there. Because of the concern for the welfare of the children engendered by the opinion of the medical witness, however, we have concluded that it will be an appropriate exercise of the power of the Wisconsin court to permit the children to remain in the temporary custody of the grandparents pending institution and disposition of an application to the Kansas court for modification of its judgment insofar as it relates to custody.\(^6\)

Another attempt to use the parens patriae power to modify an out-of-state decree was defeated by the Colorado Supreme Court.\(^5\) A Colorado resident brought his son to Colorado and asked the trial court to invoke its emergency jurisdiction under \(1)(c)\) and modify a Kansas decree which awarded custody to the mother. Colorado's Supreme Court affirmed the trial court's refusal to exercise jurisdiction, holding that the Act allows a court to enter a temporary order to protect the child but does not permit modification of foreign custody decrees.\(^4\)

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53. 8 Wis. 2d 657, 100 N.W.2d 564, modified, 101 N.W.2d 703 (1960).
54. Id. at 662a-662b, 101 N.W.2d at 704. See also Ratner, supra note 8, at 833.
56. Id. at ____, 537 P.2d at 1096.
The parens patriae power of a court was also considered by the California Supreme Court in *Ferreira v. Ferreira.*\(^{57}\) There, the court held that "'[t]he greatest discretion given the trial court in custody matters cannot embrace the power to order children into asserted peril without inquiry into the reality of the danger.'"\(^{58}\) Although decided prior to California's adoption of the Act, the *Ferreira* court, relying on the Traynor-Second Restatement rule, reached a result consistent with the principles of the Uniform Act.\(^{59}\)

Paragraph (1)(d) operates only as a saving clause for situations which do not fall within any other section, or in the case where another jurisdiction declines to exercise its power in the belief that the courts of another state could make a more informed decision. The commission considered this section "subsidiary in nature."\(^{60}\)

Section (2) is specifically directed toward attempted legitimization by a non-custodial parent in another forum. Parental kidnapping is often assisted by the willingness of foreign jurisdictions to modify child custody decrees. Mere physical presence of the child and a custodian is not alone sufficient to justify the assertion of jurisdiction by a foreign court; to do so would run counter to the "'basic notion of the Act.'"\(^{61}\) This section should be used in conjunction with section 822.08 (1),\(^{62}\) which authorizes the court to refuse a grant of jurisdiction where the petitioner has control of the child in violation of a custody decree of another state. Effective use of this section will prevent utilization of what was formerly the best possible argument in a custody case—possession of the child.\(^{63}\)

Subsection (3) is a companion to the final clauses in subsections (1)(a) and (2). The six month extension of the home state jurisdiction for a child away from an established home is reinforced by subsection (3). This provision is consistent with the Act's deemphasis of the importance of the physical presence of the child.\(^{64}\) The child's accessibility to the court is not as criti-
The jurisdictional scheme of the Act is structured to minimize the advantage gained by taking the child to another state.  

822.04 Notice and opportunity to be heard

Before making a decree under this act, reasonable notice and opportunity to be heard shall be given to the contestants, any parent whose parental rights have not been previously terminated, and any person who has physical custody of the child. If any of these persons is outside this state, notice and opportunity to be heard shall be given pursuant to s. 822.05.

This section is consistent with prior Wisconsin law regarding the requirement of notice in child custody cases. In Jones v. Jones, the Wisconsin Supreme Court ruled that “where there is jurisdiction, due process is satisfied if there is reasonable notice of the proceedings.” The Act adopts the notice requirements of Wisconsin Rules of Civil Procedure for parties to the action who are within the state. The intrastate notice requirement of this section is not expected to produce any major problems. The more complex situations involving persons outside Wisconsin are covered under section 822.05.

822.05 Notice to persons outside this state; submission to jurisdiction

(1) Notice required for the exercise of jurisdiction over a person outside this state shall be given in a manner reasonably calculated to give actual notice, and may be:

(a) By personal delivery outside this state in the manner prescribed for service of process within this state;
(b) In the manner prescribed by the law of the place in which the service is made for service of process in that place in an action in any of its courts of general jurisdiction.
(c) By any form of mail addressed to the person to be served and requesting a receipt; or
(d) As directed by the court, including publication, if other means of notification are ineffective.

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613-14 (1958), where the dissenting Justice Frankfurter maintained that the presence of the child within the jurisdiction should be an absolute prerequisite to a custody determination.

65. Ratner, Reply, supra note 39, at 185.
66. 54 Wis. 2d 41, 194 N.W.2d 627 (1972).
67. Id. at 45, 194 N.W.2d at 630.
69. UCCJA, supra note 3, at § 4 comment.
(2) Notice under this section shall be served, mailed, delivered or last published at least 10 days before any hearing in this state.

(3) Proof of service outside this state may be made by affidavit of the individual who made the service, or in the manner prescribed by the law of this state, the order pursuant to which the service is made, or the law of the place in which the service is made. If service is made by mail, proof may be a receipt signed by the addressee or other evidence of delivery to the addressee.

(4) Notice is not required if a person submits to the jurisdiction of the court.

Personal service is the most desirable of the authorized methods as it is the type most likely to give actual notice.\(^{70}\) The validity of a decree rendered by the court depends, in large measure, on the adequacy of the notice served on the parties. The power of a court to issue orders which bind the parties will be discussed in more detail below.\(^{71}\)

The main objective of paragraph (1)(b) is to provide compatibility with the laws of foreign jurisdictions. Other jurisdictions should be "less likely to object to a manner of service prescribed in their own law\(^{72}\) than to an unfamiliar procedure of a foreign state.

Use of return receipt mail, a practice known to most Wisconsin lawyers, fulfills the requirements for (1)(c). This practice had previously been approved by the Wisconsin Supreme Court in \textit{Block v. Block}.\(^{73}\) There, the father had given an address for himself in Buffalo, New York. After unsuccessful attempts at personal service, a notice and an order to show cause why visitation should not be terminated was mailed to the Buffalo address. After the father failed to appear, the court terminated his visitation rights. In affirming the trial court's decision, the supreme court held that service by mail was sufficient notice to obtain jurisdiction.

The provision for notice by publication is not found in the text of the Uniform Act. The commissioners felt that it was of


\(^{71}\) See text accompanying notes 122-24, infra.

\(^{72}\) UNIFORM INTERSTATE AND INTERNATIONAL PROCEDURE ACT, § 2.01; Comment, 13 UNIFORM LAWS ANN. 99 (1975) [hereinafter cited as UNIF. PROC. ACT].

\(^{73}\) 15 Wis. 2d 291, 112 N.W.2d 923 (1961).
doubtful constitutionality if used in lieu of other means.\footnote{74} The phrase indicating that notice by publication is permissible should be interpreted as allowing it to be "used in addition to the other modes of service."\footnote{75} If service by publication is chosen, consideration should be given to publishing in the jurisdiction where the person maintains a residence, as well as in the forum state.

Subsection (3) provides for proof of service and is used in conjunction with subsection (1)(b) to show compliance with the rules governing service in a foreign jurisdiction. Service by certified mail is evidenced by the receipt. The affidavit of service merely provides another form of proving compliance with the Act's notice requirements.

\section*{Simultaneous proceedings in other states}

(1) A court of this state shall not exercise its jurisdiction under this act if at the time of filing the petition a proceeding concerning the custody of the child was pending in a court of another state exercising jurisdiction substantially in conformity with this act, unless the proceeding is stayed by the court of the other state because this state is a more appropriate forum or for other reasons.

(2) Before hearing the petition in a custody proceeding the court shall examine the pleadings and other information supplied by the parties under s. 822.09 and shall consult the child custody registry established under s. 822.16 concerning the pendency of proceedings with respect to the child in other states. If the court has reason to believe that proceedings may be pending in another state it shall direct an inquiry to the state court administrator or other appropriate official of the other state.

(3) If the court is informed during the course of the proceeding that a proceeding concerning the custody of the child was pending in another state before the court assumed jurisdiction it shall stay the proceeding and communicate with the court in which the other proceeding is pending to the end that the issue may be litigated in the more appropriate forum and that information be exchanged in accordance with ss. 822.19 to 822.22. If a court of this state has made a custody decree before being informed of a pending proceeding in a court of another state it shall immediately inform that court.

\footnote{74} UCCJA, supra note 3, at § 5 comment. \footnote{75} Id. (Emphasis in original).
of the fact. If the court is informed that a proceeding was commenced in another state after it assumed jurisdiction it shall likewise inform the other court to the end that the issues may be litigated in the more appropriate forum.

It is possible, under sections 822.03 and 822.14, that more than one state may be able to properly exercise jurisdiction. In a situation where this is possible, priority in time will, in most cases, determine which court should proceed with the action. This offers no conflict with present Wisconsin law.\(^7^6\) The Wisconsin Supreme Court has stated that the question is one of policy, rather than power to exercise jurisdiction.\(^7^7\) The Wisconsin case of \textit{Brazy v. Brazy}\(^7^8\) is one of many which illustrate the need for interstate cooperation and the avoidance of jurisdictional conflict. In \textit{Brazy}, the parents obtained a divorce in Wisconsin. The mother was awarded custody and relocated in California with the child. The father, who had remarried, traveled to California to visit his child. Upon his arrival, he was served with an order for support and a motion for custody determination. After obtaining a lawyer in the California proceeding, the father brought a motion in Wisconsin for a change in custody. The Wisconsin court issued an order to show cause why modification of the custody should not be made and also to enjoin the California proceeding. The mother's Wisconsin attorney made a special appearance and claimed (1) the Wisconsin court did not have jurisdiction over the child, (2) it lacked personal jurisdiction over the mother, and (3) the father had submitted himself to jurisdiction in California. The court in California then enjoined the father from proceeding in Wisconsin, increased the amount of support and curtailed his visitation rights. Meanwhile, back in Wisconsin, the court found the mother in contempt for proceeding in the California action. Included in its contempt determination was a finding that the Wisconsin court had retained jurisdiction. On appeal the Wisconsin Supreme Court made two determinations. The first was that both states had jurisdiction. Wisconsin retained it under the continuing jurisdiction provision of section 247.25.\(^7^9\) Cali-

\(^7^6\) \textit{Brazy v. Brazy}, 5 Wis. 2d 352, 92 N.W.2d 738 (1958), \textit{rehearing denied} 93 N.W.2d 856 (1959).


\(^7^8\) 5 Wis. 2d 352, 92 N.W.2d 738 (1958), \textit{rehearing denied} 93 N.W.2d 856 (1958).

\(^7^9\) \textit{Revision of Judgment}. The Court may from time to time afterwards, on the petition of either of the parties and upon notice to the family court...
fornia's jurisdiction was based on personal service on the father and the child's residence within the state. In making its second determination the court, in essence, adopted section 822.06(1) by ruling that the Wisconsin court's exercise of jurisdiction was improper, since a court "should not exercise jurisdiction over subject matter which another court of competent jurisdiction has commenced to exercise." 80

The term "simultaneous proceedings" was interpreted by the Colorado Supreme Court in *Wheeler v. District Court.* 81 In *Wheeler,* the father was granted custody when the parents were divorced in Illinois. He obtained court permission and moved to Colorado. Shortly thereafter, one child was voluntarily returned to the mother. Several months later the Illinois Court, in an ex parte proceeding, modified the decree and ordered the other children returned to the mother. She then filed an action in the Colorado court to enforce the Illinois order. The father cross-petitioned to affirm his custody rights. The trial court interpreted the Illinois order as a simultaneous proceeding and found it to be a bar to any action by the Colorado courts. Although the court dismissed the father's action, it noted that the situation was a classic example of the type of conduct the Act was designed to prevent. The Colorado Supreme Court reversed the trial court, holding that the section,

concerns simultaneous proceedings in other states. It provides that a state where the children may be (such as Colorado) nevertheless has no jurisdiction, when a proceeding concerning custody of the children is pending in another state at the time of filing the petition.

In our view, section [822.06] does not apply. There was no proceeding pending in Illinois. Once a custody decree has been rendered in one state, jurisdiction is determined by other sections under the Act. 82

[^81]: 5 Wis. 2d at 361, 92 N.W.2d at 742-43.
Subsections (2) and (3) should be considered as procedural steps designed to fulfill the objectives of section 822.06(1) and further the purposes of the Act as stated in section 822.01. At the time of filing, the court should be informed if there is a pending action in another forum. If there is another action in progress, the court must determine whether that action was commenced under similar jurisdictional provisions.\textsuperscript{83} However, the policy against simultaneous proceedings is "so strong that it might, in a particular situation, be appropriate to defer to the other court under the circumstances."\textsuperscript{84}

The rule of first in time, first in right is modified by the last sentence in (3). If the court which first assumes jurisdiction determines that another court, in which later proceedings were commenced, is a more appropriate forum, the court of original jurisdiction should stay its proceedings. The same caveat regarding the exercise of alternative jurisdiction under section 822.03(b)\textsuperscript{85} applies to this provision as well. If a court does defer, it should direct as much information as it had to the foreign forum to assist that tribunal in making an informed decision.

As with several other sections of the Act, section 822.06 cannot be applied in a vacuum. Determination of inconvenient forum will play a large role in the court's discretionary exercise of jurisdiction.

822.07 Inconvenient forum

(1) A court which has jurisdiction under this act to make an initial or modification decree may decline to exercise its jurisdiction any time before making a decree if it finds that it is an inconvenient forum to make a custody determination under the circumstances of the case and that a court of another state is a more appropriate forum.

(2) A finding of inconvenient forum may be made upon the court's own motion or upon motion of a party or a guardian ad litem or other representative of the child.

(3) In determining if it is an inconvenient forum, the court shall consider if it is in the interest of the child that another state assume jurisdiction. For this purpose it may take into account the following factors, among others:

\textsuperscript{83} Wis. Stat. § 822.06(1) (1975).
\textsuperscript{84} UCCJA, supra note 3, at § 6 comment.
\textsuperscript{85} See text accompanying notes 43-50, supra.
(a) If another state is or recently was the child’s home state;
(b) If another state has a closer connection with the child and family or with the child and one or more of the contestants;
(c) If substantial evidence concerning the child’s present or future care, protection, training, and personal relationships is more readily available in another state;
(d) If the parties have agreed on another forum which is no less appropriate; and
(e) If the exercise of jurisdiction by a court of this state would contravene any of the purposes stated in s. 822.01.

(4) Before determining whether to decline or retain jurisdiction the court may communicate with a court of another state and exchange information pertinent to the assumption of jurisdiction by either court with a view to assuring that jurisdiction will be exercised by the more appropriate court and that a forum will be available to the parties.

(5) If the court finds that it is an inconvenient forum and that a court of another state is a more appropriate forum, it may dismiss the proceedings, or it may stay the proceedings upon condition that a custody proceeding be promptly commenced in another named state or upon any other conditions which may be just and proper, including the condition that a moving party stipulate consent and submission to the jurisdiction of the other forum.

(6) The court may decline to exercise its jurisdiction under this act if a custody determination is incidental to an action for divorce or another proceeding while retaining jurisdiction over the divorce or other proceeding.

(7) If it appears to the court that it is clearly an inappropriate forum it may require the party who commenced the proceedings to pay, in addition to the costs of the proceedings in this state, necessary travel and other expenses, including attorneys’ fees, incurred by other parties or their witnesses. Payment is to be made to the clerk of the court for remittance to the proper party.

(8) Upon dismissal or stay of proceedings under this section the court shall inform the court found to be the more appropriate forum of this fact, or if the court which would have jurisdiction in the other state is not certainly known, shall transmit the information to the court administrator or other appropriate official for forwarding to the appropriate court.

(9) Any communication received from another state informing this state of a finding of inconvenient forum because
a court of this state is the more appropriate forum shall be filed in the custody registry of the appropriate court. Upon assuming jurisdiction the court of this state shall inform the original court of this fact.

This section, used in conjunction with section 822.06, requires the exercise of judicial restraint when a case presents dual bases for jurisdiction under section 822.03.\textsuperscript{88} “Inconvenient forum,” as used in this section should be equated with the term “inappropriate forum.” The underlying policy, as with section 822.06, is that the court with the most information is in the best position to determine the custody of the child.\textsuperscript{87}

A finding of a more appropriate forum can result from the presence of the factors listed in subsection (3). The court need not find all of the considerations there listed to justify a determination of inconvenient forum. Noticeably absent from this list of considerations are factors which are usually considered determinative of such a finding. In a child custody case, hardship or convenience of the parties is of secondary importance to the best interests of the child.\textsuperscript{88} The court may stay or dismiss the action sua sponte when faced with an inconvenient forum situation.

An inconvenient forum determination was made in \textit{Gatchell v. Rice}.\textsuperscript{89} There a father sought to enforce a modification of a Nebraska custody decree in Oregon. The mother cross-petitioned for custody based on the alleged unfitness of the father. In dismissing the mother’s claim, the court held that since the “basic issue was the fitness of the father, who lived in Nebraska, . . . further proceedings regarding custody should take place in Nebraska where the [necessary] witnesses . . . could easily be brought to court.”\textsuperscript{90}

Wisconsin practitioners should be familiar with the operation of subsection (5) which is similar in effect to section 801.63 of the Wisconsin Statutes.\textsuperscript{91} In an inconvenient forum situation, the court has discretionary power to either dismiss or stay

\begin{footnotes}
\footnote{86. \textit{Id.}}
\footnote{87. See Ratner, \textit{supra} note 8, at 815-16.}
\footnote{88. \textit{UCCJA}, \textit{supra} note 2, at § 7 comment.}
\footnote{89. 16 Or. App. 222, 517 P.2d 1198 (1974).}
\footnote{90. \textit{Id.} at ----, 517 P.2d at 1199.}
\footnote{91. See \textit{UCCJA}, \textit{supra} note 2, at § 7 comment.}
\end{footnotes}
the proceedings. One of the innovative features of section 801.63 is that it requires the moving party to waive any statute of limitation defenses and submit to personal jurisdiction in the foreign forum as a prerequisite to obtaining a stay of proceedings. In child custody cases, the statute of limitations is usually not a critical factor and personal jurisdiction is often not of issue. However, the grant of power to the court to enforce such an action is another indication of the desire to have the most appropriate forum make the decision.

The determination of custody may, in the court’s discretion, be severed from a related proceeding. This may be necessary, for example, in a default divorce where one spouse and the children are not within the jurisdiction. The discretionary severance provision should eliminate the problems which arise when a Wisconsin court issues a child custody order, only to find that no other forum will enforce the decree because a non-resident failed to appear.\(^2\)

Subsection (7) is also drawn from a previously existing section of the Wisconsin Statutes.\(^3\) If the forum chosen is clearly inappropriate, subsection (7) authorizes the court to order the party who commenced the action to pay the actual, not merely the statutory, costs of the action. This provision, like section 814.49, is designed to “deter the assertion of frivolous jurisdiction claims and permit the trial courts to do substantial justice by taking into account such factors as the good faith of the plaintiff’s jurisdictional claim.”\(^4\)

The remaining subsections, (8) and (9), relate to the need for communication regarding custody matters. Efficient use of these provisions in conjunction with section 822.06(3) should produce the useful interchange of information envisioned by the drafters.

**822.08 Jurisdiction declined by reason of conduct**

1. If the petitioner for an initial decree has wrongfully taken the child from another state or has engaged in similar reprehensible conduct the court may decline to exercise jurisdiction if this is just and proper under the circumstances.

2. Unless required in the interest of the child, the court

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shall not exercise its jurisdiction to modify a custody decree of another state if the petitioner, without consent of the person entitled to custody, has improperly removed the child from the physical custody of the person entitled to custody or has improperly retained the child after a visit or other temporary relinquishment of physical custody. If the petitioner has violated any other provision of a custody decree of another state the court may decline to exercise its jurisdiction if this is just and proper under the circumstances.

(3) In appropriate cases a court dismissing a petition under this section may charge the petitioner with necessary travel and other expenses, including attorneys' fees, incurred by other parties or their witnesses.

Under this section, Wisconsin courts are allowed to deny a tactical advantage to a parent who wrongfully abducts a child.\textsuperscript{95} The incorporation of the equitable “clean hands” doctrine into this section is designed to provide a sanction against a parent who seeks a more favorable judgment in another forum.\textsuperscript{96} Subsection (1) governs situations arising before an initial decree is entered, while subsection (2) controls proceedings after that time.

Both parents are considered to have equal custody rights until a court intervenes through the issuance of a custody decree. Thus, until such a decree is issued, there can be no violation of the other's parental rights.\textsuperscript{97} However, there can be a wrongful taking within the meaning of the Act when a parent's conduct is considered shocking to the conscience of the court. When a parent has acted in such a reprehensible manner, the "parent should not find the courts . . . waiting with open arms to give judicial sanction to such actions."\textsuperscript{98}

Once the court has determined that it has jurisdiction under section 822.14,\textsuperscript{99} subsection (2) of 822.08 may come into play.\textsuperscript{100} A distinction is made between the improper removal or

\textsuperscript{95} Fain, \textit{The Interstate Child Custody Problem Revisited}, 16 Family Law Newsletter 1 (1976).

\textsuperscript{96} Bodenheimer, \textit{supra} note 4, at 1219. \textit{See also} Ehrenzweig, \textit{supra} note 53, at 358-60.

\textsuperscript{97} UCCJA, \textit{supra} note 2, at § 8 comment.

\textsuperscript{98} Settle v. Settle, 25 Or. App. 579, 550 P.2d 445, 447 (1976). In this case the mother had cross-petitioned for custody in the suit brought by her husband to enforce the former state's decree rendered in her absence. The Oregon Court of Appeals reversed the trial court's granting of her petition.

\textsuperscript{99} \textit{See} text accompanying notes 142-67, \textit{n.fra}.

\textsuperscript{100} UCCJA, \textit{supra} note 2, at § 8 comment.
detention of a child and a violation of any other provision of a custody decree. In the former case, the statute directs that "the court shall not exercise its jurisdiction. Detention or removal of a child is improper when done without special justification such as illness or similar emergency." Where the parent violates other provisions of a decree, the court has discretionary power to decline to exercise its jurisdiction.

Parental misconduct is only one factor to be considered in the court's decision to exercise jurisdiction. This section must be read in the light of the child's best interest limitation. Certainly, it would be most "improper to punish the innocent child for parental misconduct." Recognizing that self-help is an "irresponsible and barbaric remedy," some commentators have advocated stiff penalties for parental misconduct. However, the Act places only financial sanctions on such conduct, similar to those applied under section 822.07(7).

822.09 Information under oath to be submitted to the court

(1) Every party in a custody proceeding in the first pleading or in an affidavit attached to that pleading shall give information under oath as to the child's present address, the places where the child has lived within the last 5 years, and the names and present addresses of the persons with whom the child has lived during that period. In this pleading or affidavit every party shall further declare under oath whether:

(a) The party has participated as a party, witness, or in any other capacity in any other litigation concerning the custody of the same child in this or any other state;

(b) The party has information of any custody proceeding concerning the child pending in a court of this or any other state; and

(c) The party knows of any person not a party to the proceedings who has physical custody of the child or claims

101. Id.
to have custody or visitation rights with respect to the child.

(2) If the declaration as to any of the above items is in the affirmative the declarant shall give additional information under oath as required by the court. The court may examine the parties under oath as to details of the information furnished and as to other matters pertinent to the court's jurisdiction and the disposition of the case.

(3) Each party has a continuing duty to inform the court of any custody proceeding concerning the child in this or any other state of which the party obtained information during this proceeding.

The court's decision to exercise its discretionary jurisdiction under sections 822.06, 822.07 or 822.08 will be based on information required under section 822.09. From the facts presented, the court will decide whether additional parties must be joined or if other jurisdictions must be notified. Courts must take an active role in determining whether there are any interstate considerations included in a child custody hearing. The information requirement is intended to present the judge with the most accurate picture of the situation possible. The residential history of the previous five years assists the court in making its jurisdictional decision, while the litigation history enables the court to determine whether it should decline to exercise its jurisdiction on grounds of simultaneous proceeding, inconvenient forum or reprehensible conduct.

The initial pleadings will often indicate that the dispute is interstate in nature, as in the case where the plaintiff seeks enforcement or modification of an out-of-state decree. Where there are interstate aspects to the action, a greater amount of information is required so that the court may be advised of the existence and location of other relevant evidence. Without this additional information requirement, a court might be forced to make a finding based solely on a "petitioner's own story and his own witnesses."

822.10 Additional parties

If the court learns from information furnished by the par-
ties pursuant to s. 822.09 or from other sources that a person not a party to the custody proceeding has physical custody of the child or claims to have custody or visitation rights with respect to the child, it shall order that person to be joined as a party and to be duly notified of the pendency of the proceeding and of the person's joinder as a party. If the person joined as a party is outside this state the person shall be served with process or otherwise notified in accordance with s. 822.05.

Since the Act does not specifically define "additional parties," this section should be construed broadly to provide liberal joinder of all parties interested in the action.\textsuperscript{113} In the best interests of the child, "additional parties" should include not only relatives and custodial adults, but also any social service agency closely involved with the child's home environment. Any party who has or may have an interest in the custody proceeding should be considered an additional party. This section provides that information regarding additional parties may be obtained from both formal and "informal" sources.\textsuperscript{114} Attempts to secure such information are aided by the interjurisdictional cooperation provisions of sections 822.20 through 822.22.\textsuperscript{115}

\section*{822.11 Appearance of parties and the child}

(1) The court may order any party to the proceeding who is in this state to appear personally before the court. If that party has physical custody of the child the court may order that the party appear personally with the child.

(2) If a party to the proceeding whose presence is desired by the court is outside this state with or without the child the court may order that the notice given under s. 822.05 include a statement directing that party to appear personally with or without the child and declaring that failure to appear may result in a decision adverse to that party.

(3) If a party to the proceeding who is outside this state is directed to appear under sub. (2) or desires to appear personally before the court with or without the child, the court may require another party to pay to the clerk of the court travel and other necessary expenses of the party so appearing

\textsuperscript{113} Id. at 1219.
\textsuperscript{114} UCCJA, supra note 2, at § 10 comment.
\textsuperscript{115} See text accompanying notes 174-79, infra.
and of the child if this is just and proper under the circum-
stances.

The presence of all interested parties is necessary if the
court is to make a well-informed decision. Subsection (1) gives
the court the power to compel any party within the state to
appear and, if necessary, bring the child into court.118 This
provision is similar to the Children's Code provision governing
appearances ordered by the court.117

Subsection (2), when used in conjunction with section
822.05,118 empowers the court to render a binding decree even
if the out-of-state party fails to appear. A similar result can be
reached through the use of section 822.19(2) or 822.20(3).119
While the child's presence is not always essential for the court
to make its determination,120 the child can and should be or-
dered to appear with the out-of-state parent under the provi-
sion of section 822.19(2) whenever necessary.

The "other necessary expenses" provision of subsection (3)
has been construed to allow a court to require a party to pay
the attorney's fees as well as the travel expenses of an out-of-
state party who appears in the action.121 It is reasonable to
allow the court to require a litigant to pay the necessary expen-
ses of a party who comes into the state to appear in the pro-
ceedings. Unfortunately, the Act does not authorize the court
to order payment of expenses other than those incurred for
interstate travel. It is not beyond the imagination that an in-
trastate trip may be more costly and impose a greater hardship
on a potential witness than one which happens to cross a state
line.

822.12 Binding force and res judicata effect of custody
decree

A custody decree rendered by a court of this state which
had jurisdiction under s. 822.03 binds all parties who have
been served in this state or notified in accordance with s.
822.05 or who have submitted to the jurisdiction of the court,
and who have been given an opportunity to be heard. As to

116. UCCJA, supra note 2, § 11 comment.
118. See text accompanying notes 70-72, supra.
119. See text accompanying note 178, infra.
120. See text accompanying notes 76-80, supra. Contra, Currie, Full Faith and
these parties the custody decree is conclusive as to all issues of law and fact decided and as to the custody determination made unless and until that determination is modified pursuant to law, including the provisions of this act.

As pointed out earlier,\textsuperscript{122} whether a decree merits interstate recognition depends on its intrastate validity. The main thrust of this section is to provide that all custody decrees issued by Wisconsin courts are binding on the parties. A major change in Wisconsin law is expected to result from the implementation of this provision.\textsuperscript{123} The policy of this section can be described as one of modified res judicata. The res judicata effect is often not applied with the "same strictness"\textsuperscript{124} to custody decrees as to other judgments.

The nonfinal nature of custody decrees is evidenced by the last sentence of this section. A decree is final until the court chooses to modify it. If the decree is modified, it must be done within the strictures of the Act. This is necessary to ensure that the modification will not run counter to the intent of either the Act or the initial decree.

822.13 Recognition of out-of-state custody decrees

The courts of this state shall recognize and enforce an initial or modification decree of a court of another state which had assumed jurisdiction under statutory provisions substantially in accordance with this act or which was made under factual circumstances meeting the jurisdictional standards of the act, so long as this decree has not been modified in accordance with jurisdictional standards substantially similar to those of this act.

The policy of full faith and credit\textsuperscript{125} has seldom been extended to child custody decisions because of their nonfinal nature. Prior to the Act, a court requested to enforce an out-of-state decree was under no compulsion to do so. The Restate-
ment of Conflicts of Law provided for enforcement of decrees of sister states in most cases. However, the drafters of the Restatement included one extremely large exception. If there was a finding of "change of circumstances" since the issuance of the initial decree, a court could modify that decree if there was a sufficient jurisdictional basis. The willingness of courts to modify foreign decrees influenced parents to stay away from custody proceedings and then attempt to obtain a more favorable result in another jurisdiction.

The problem was further compounded by uncertainty about the applicability of the full faith and credit clause to custody decrees. On four occasions, this issue was presented to the United States Supreme Court. Today, the American courts are still looking for a definite decision on this question.

The case of *May v. Anderson* involved a couple who were originally Wisconsin residents. In an attempt to solve their marital problems, the wife took their child to Ohio. The father, who stayed in Wisconsin, obtained a default divorce and was awarded custody. Although personally served with a summons and complaint, the wife did not participate in the proceeding. When the mother refused to return the child, the father, armed with the Wisconsin decree, sought a writ of habeas corpus in Ohio. The trial court refused to issue the writ. However, on appeal, it was ruled that the Wisconsin decree was entitled to full faith and credit in Ohio and that the father was, therefore, entitled to the relief sought.

In an "inconclusive opinion," the United States Supreme Court found that personal jurisdiction over the mother had not been obtained in the default divorce and, as a result, the Wisconsin court could not cut off her rights in the child. The full

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126. *Restatement of Conflict of Laws* § 147, comment b (1934).
129. 345 U.S. 528 (1953).
132. UCCJA, supra note 2, at § 13 comment. Four judges joined the majority opinion while Justice Franfurter wrote concurring opinion and cast the deciding vote in the 5-3 decision.
faith and credit guaranteed by the Constitution did not entitle the personal judgment to extraterritorial effect if it was rendered without jurisdiction over the person whose rights were affected.\textsuperscript{133} The position taken by Justice Frankfurter in his concurrence has become the accepted interpretation of May.\textsuperscript{134} It was Frankfurter's contention that the full faith and credit clause did not require recognition of the decree but merely permitted Ohio to recognize it as a matter of state law.

In \textit{Ford v. Ford},\textsuperscript{135} the Court reversed another state court ruling on the applicability of the full faith and credit clause. In \textit{Ford}, a Virginia decree based on a stipulation of the parties gave custody to the father. While the child was visiting the mother in South Carolina, she commenced an action seeking to have custody transferred to her. The father appeared and relied on the Virginia decree. Both the trial court and appellate court found, however, that the best interests of the child dictated that the mother be granted custody. On appeal the state supreme court reversed,\textsuperscript{136} holding that the issue was res judicata in Virginia and that the decree was entitled to full faith and credit in South Carolina. In reversing the South Carolina decision, the Supreme Court held that the order of the Virginia court, being subject to modification upon a showing of changed circumstances, was not res judicata and not entitled to full faith and credit. The Court ruled that the full faith and credit clause did not preclude the South Carolina court from determining the best interest of the child and entering an appropriate decree.

The drafters of the Act, cognizant of the lack of deference typically accorded foreign decrees, provided for mandatory recognition of decrees rendered by tribunals under jurisdictional standards similar to those of the Act.\textsuperscript{137} However, under section 822.03, a court may still take appropriate action where necessary to protect the child.

In the Oregon case of \textit{Brooks v. Brooks},\textsuperscript{138} the validity of a

\begin{footnotes}
\item \textsuperscript{133} 345 U.S. at 533.
\item \textsuperscript{134} UCCJA, \textit{supra} note 2, \textsection 13 comment.
\item \textsuperscript{135} 371 U.S. 187 (1962).
\item \textsuperscript{136} 239 S.C. 305, 123 S.E.2d 33 (1961).
\item \textsuperscript{137} \textit{See} text accompanying notes 122-24, \textit{supra}. \textit{See} Bodenheimer, \textit{supra} note 4, at 1218-19; Hudak, \textit{supra} note 12, at 545; and Ratner, \textit{supra} note 8, at 828. \textit{But see} Ehrenzweig, \textit{supra} note 53, at 357-58.
\item \textsuperscript{138} 20 Or. App. 43, 530 P.2d 547 (1975).
\end{footnotes}
modification of a Montana divorce decree was at issue. In the Montana divorce, the mother had been awarded custody. However, when she moved to Oregon without court permission, custody rights were transferred to the father. The father then sought to enforce the punitive modification by writ of habeas corpus in Oregon. The Oregon court recognized the validity of the modification, but then decided that the Montana court lacked sufficient evidence to act, and modified the order again. In affirming the trial court's decision, the Oregon Court of Appeals held that the statute requires enforcement of a custody decree from a sister state only when the decree meets the standards of the Act. Since the Montana court did not comply with the standards set forth in the Act, the modification order lacked a sufficient basis for enforcement in Oregon.

The Act's policy of enforcement without modification preserves the rights of the prevailing party without subjecting the other party to any undue hardship. This approach recognizes the "care and responsibility felt by the original judge who knows that his custody order may determine the entire course of life of the child before him." It also forces a party who is dissatisfied with the outcome of the proceeding to appeal or attempt a modification in the original forum. This prevents the party from seeking a "better" judgment in another jurisdiction and controlling venue of the modification by default.

Prior Wisconsin law is in accord with the policy of this section. In State ex rel. Kern v. Kern, the state supreme court was called on to determine the validity of a foreign court's modification of a Wisconsin custody order. The father had been awarded custody and granted permission to move to Iowa by the Dane County Circuit Court. After numerous attempts at modification, the court granted custody to the wife who then filed a writ of habeas corpus in Iowa. Although the Iowa trial court had been informed of the Wisconsin decision, it elected to make a decision on the merits. Before the proceedings were concluded, the mother spirited the child back to Wisconsin.

139. A punitive modification of child custody decree occurs when the custodial adult, in some manner, acts in contravention of an order of the court, and the court, unable to impose any punishment upon the person, attempts to sanction the custodian by changing custody. See text accompanying note 170, infra.

140. 20 Or. App. at __, 530 P.2d at 551.


142. 17 Wis. 2d 268, 116 N.W.2d 337 (1962).
The Iowa court dismissed the mother's habeas corpus proceeding and ruled that custody be returned to the father. The father then brought a writ of habeas corpus in the Circuit Court for Dane County seeking enforcement of the Iowa ruling. The mother's motion to quash the writ was denied, and the court ordered the child returned to the father. On appeal, the mother contended that Wisconsin should not grant full faith and credit to the Iowa decree as Iowa had failed to accord similar treatment to the Wisconsin order. The court rejected this "two wrongs equal one right" logic and held that the Iowa decision was entitled to receive full faith and credit. In this decision, the Wisconsin Supreme Court adopted a policy which was to appear seven years later in the initial draft of the Act's out-of-state recognition provision:

[When . . . a judgment has been recently entered, as was the case of the Iowa judgment in the instant case, this court, for policy reasons, is inclined to accord such judgment the same effect as though it were binding upon us under the full faith and credit clause. We respect the determination so recently made by the Iowa court on the merits and refrain from ourselves re-examining the merits. We regard this as the better policy in such circumstances.]

822.14 Modification of custody decree of another state

(1) If a court of another state has made a custody decree, a court of this state shall not modify that decree unless it appears to the court of this state that the court which rendered the decree does not now have jurisdiction under jurisdictional prerequisites substantially in accordance with this act or has declined to assume jurisdiction to modify the decree and the court of this state has jurisdiction.

(2) If a court of this state is authorized under sub. (1) and s. 822.08 to modify a custody decree of another state it shall give due consideration to the transcript of the record and other documents of all previous proceedings submitted to it in accordance with s. 822.22.

In the time since the Act was drafted, the emphasis in child custody cases has shifted from limiting jurisdiction to imposing restraints on the modification of decrees. When the Act was drafted, modification of custody decrees was a common prac-

143. Id. at 273, 116 N.W.2d at 340.
144. Bodenheimer, Modification, supra note 6, at 503.
Courts were seldom reluctant to change any custody decree, readily finding that there were "changed circumstances" since the entry of the original order.

Two cases which reached the Supreme Court lent support to this practice. New York ex rel. Halvey v. Halvey ranks as the landmark case on the ability of state courts to modify custody decrees of other jurisdictions. The Halveys were married in New York where they had one child. At the onset of marital difficulties, the wife took the child and moved to Florida without informing her husband. There she began divorce proceedings. Service was effected by publication, but the husband did not appear in the action. On the day before the decree was entered, the father traveled to Florida and took the child back to his home in New York. The mother was awarded permanent custody by the Florida court on the following day. She then brought a writ of habeas corpus in New York, challenging the father's detention of the child. The New York court ruled that custody should remain with the mother, but modified the Florida order to provide for "substantial visitation" by the father. The court also required the mother to post a performance bond to ensure the presence of the child during the father's visits. The Supreme Court affirmed the modification by the New York courts. Since the order could have been modified by a Florida court, the Court decided that the New York court did no more than what any Florida court could do. Justice Douglas, writing for the majority, stated that "the state of the forum has as much leeway to disregard the judgment, to qualify it or, to depart from it as does the state where it was rendered."

In a concurring opinion, Justice Frankfurter emphasized two competing considerations. The first was the "presumptive jurisdiction of the court of a sister state to render judgment for which full faith and credit is asked," and the second, the power of the forum state to make provisions for the child's welfare.

145. See Restatement of Conflict of Laws § 147 (1934); Restatement (Second) of Conflict of Laws § 109 (1971). See also A. Ehrenzweig, A Treatise on the Conflict of Laws 293 (1962); Ehrenzweig, supra note 53, at 352; Hudak, supra note 12, at 536-37.


148. Id. at 615.

149. Id. at 618.

150. Id.
Since the initial jurisdiction of the Florida court was doubtful, Justice Frankfurter concluded that the New York court did not fail in the duty imposed by the full faith and credit clause.

New York also figured prominently in the second Supreme Court case which dealt with modification of out-of-state decrees. In Kovacs v. Brewer, a New York court awarded custody of a child of divorced parents to her paternal grandfather. With the court's permission, the grandfather took the child to North Carolina. Three years later the court modified its order and transferred custody to the mother. On the basis of this modification, the mother filed a writ of habeas corpus in North Carolina. The court found that circumstances had changed since the entry of the New York modification, and the best interests of the child required that she stay with the grandfather. On appeal, the North Carolina Supreme Court upheld the finding of the trial court without specifying any reason, and "went on to declare, seemingly as an alternative ground of decision, that the New York decree was not binding, because the divorce court has no jurisdiction to modify the original custody award after the child had become a resident and domiciliary of North Carolina." Certiorari was granted only on the issue of full faith and credit. Based on the "confused nature" of the state court decision, eight of the nine Justices reserved decision on all questions and remanded the case for clarification. Justice Frankfurter, changing his position from Halvey, stated that there should be no full faith and credit for child custody decrees. It was his opinion that the policy of full faith and credit must be subordinated to the welfare of the child. He argued that requiring North Carolina to justify its decision on the basis of changed circumstances would imply that the decree had some legal significance. The welfare of the child was considered to be sufficient justification for the modification.

These two Supreme Court decisions did not remove any of the confusion surrounding modification of out-of-state custody

152. Id.
154. 356 U.S. at 606.
155. 356 U.S. at 608.
156. 356 U.S. at 609-16.
decrees. A state was not compelled to enforce a decree of another jurisdiction. When a foreign order was enforced, most courts made a point of emphasizing their freedom to modify it if they so desired. Since the subsequent forum possessed jurisdiction to modify, as well as to enforce, custody decrees were ineffective beyond state lines. There was nothing to prevent mobile litigants from engaging in an endless round of custody modification battles.

Ratner's established home concept, codified in section 822.03, provides a workable solution to the problem. The power to modify custody decrees under the Act is restricted, in most instances, to courts of the child's home state. This prevents a dissatisfied parent from initiating proceedings in another jurisdiction, a viable tactic under the Traynor-Restatement rule or under Justice Frankfurter's position in Kovacs. Under section 822.14, a Wisconsin court may not modify an out-of-state custody decree, except under limited circumstances: (1) where the court which rendered the decree no longer has jurisdiction under standards similar to those of the Act, or (2) where the court which rendered the decree has declined to hear the matter. Furthermore, the courts of this state must also have jurisdiction under section 822.03 before considering any modification petition. It is true that the state possesses the parens patriae power, but this may be asserted only where there is a substantial emergency which threatens the welfare of the child.

The Act also discourages punitive modifications directed at parents who violate orders of the court. This additional limitation on a court's modification power is not only a desirable end in itself, but also furthers the overall purposes of the Act. Modifications of child custody decrees should be based on the best interests of the child rather than the offended dignity of the court.

The weight given to transcripts obtained under (2) is a mat-

157. Ratner, supra note 8, at 832.
158. Id. at 815-23.
159. Id. at 813.
160. Porter & Walsh, supra note 103, at 31-32.
ter of local concern, but the opportunity to procure more information should not be disregarded. A request for transcripts under section 822.22 should provide the court with sufficient information to make an informed determination. The trial court will benefit not only from the additional information made available but also from the enlightenment gained through exposure to another judicial evaluation of the controversy.

Wisconsin follows the majority practice of requiring changed circumstances before modifying a custody decree. This rule first appeared in *State ex rel. Hannon v. Eisler*. In *Eisler*, a Wisconsin court modified a custody order from a Winnipeg, Canada court. The Canadian court relied on evidence which indicated that there were large amounts of liquor being consumed in the home of the maternal grandparents where the mother was staying. A Wisconsin trial court was informed that the mother had since remarried and that there was no alcohol problem in her new home. In addition, the mother subsequently was rendered unable to bear any more children. In light of these circumstances, the supreme court allowed the trial court’s modification to stand, but noted that it would not have done so had there not been a “substantial change in circumstances.”

The changed circumstances requirement was explained by the court in *King v. King*, where it was stated that,

> [t]he court, once having fully considered and determined the issue of custody on the circumstances then existing, ought not again consider it until there was such a substantial or material change in circumstances of the parents or of the child as would require or justify in the interest of the child a modification of the previous determination.

Wisconsin’s position on modification of decrees by appeal is unchanged by the Act. In *Brazy v. Brazy*, the state’s high court held that if a party is unhappy about the outcome in a foreign jurisdiction, the remedy is to appeal in that forum.

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162. UCCJA, supra note 2, at § 14 comment.
163. 270 Wis. 469, 71 N.W.2d 376 (1955).
164. Id. at 475, 71 N.W.2d at 380.
165. 25 Wis. 2d 550, 131 N.W.2d 357 (1964).
166. Id. at 554, 131 N.W.2d at 359-60.
167. 5 Wis. 2d 352, 92 N.W.2d 738 (1958), rehearing denied, 93 N.W.2d 856 (1959).
168. 5 Wis. 2d at 360, 92 N.W.2d at 742.
The court has consistently refused to grant relief when it could be obtained through another state's appellate procedure.

822.15 Filing and enforcement of custody decree of another state

(1) A certified copy of a custody decree of another state may be filed in the office of the clerk of any county or circuit court of this state. The clerk shall treat the decree in the same manner as a custody decree of a county or circuit court of this state. A custody decree so filed has the same effect and shall be enforced in like manner as a custody decree rendered by a court of this state.

(2) A person violating a custody decree of another state which makes it necessary to enforce the decree in this state may be required to pay necessary travel and other expenses, including attorneys' fees, incurred by the party entitled to the custody or his or her witnesses.

822.16 Registry of out-of-state custody decrees and proceedings

The clerk of each county and circuit court shall maintain a registry in which he or she shall enter the following:

(1) Certified copies of custody decrees of other states received for filing;

(2) Communications as to the pendency of custody proceedings in other states;

(3) Communications concerning a finding of inconvenient forum by a court of another state; and

(4) Other communications or documents concerning custody proceedings in another state which may affect the jurisdiction of a court of this state or the disposition to be made by it in a custody proceeding.

822.17 Certified copies of custody decree

The clerk of a county or circuit court of this state, at the request of the court of another state or at the request of any person who is affected by or has a legitimate interest in a custody decree, shall certify and forward a copy of the decree to that court or person.

Once the foreign decree has been filed with the clerk of the appropriate court, it applies with the same force as if a court in the state of filing had rendered it. This is true for custody determinations as well as rulings on visitation privileges.

Should any part of the decree become burdensome or impractical after interstate relocation, the custodial adult may petition for modification in the proper forum, which will not necessarily be the new jurisdiction.

Instead of having to resort to a punitive modification which is often an act of judicial frustration, a court having jurisdiction over the custodian may impose an in personam sanction under subsection (2) of 822.15. These penalties provide an operative deterrent to parental misconduct because the effect of the sanction is no different than if the court of the original forum had itself rendered the order. The amount of the sanction is not specifically limited and may include expenses incurred by a party and associated witnesses, as well as attorneys’ fees. The necessity for travel, however, may be lessened by use of the procedures outlined in sections 822.18-.22 regarding the use of testimony taken in another state.

The information listed in section 822.16 is a mere skeleton of that which the clerk of court is required to keep in the registry. The complete file should contain all the necessary information listed in section 822.21. This will not only simplify recordkeeping but also provide efficient transmittal of information requested by another court. The statutory charge to the clerk to comply with an out-of-state request is contained in section 822.17.

822.18 Taking testimony in another state

In addition to other procedural devices available to a party, any party to the proceeding or a guardian ad litem or other representative of the child may adduce testimony of witnesses, including parties and the child, by deposition or otherwise, in another state. The court on its own motion may direct that the testimony of a person be taken in another state and may prescribe the manner in which and the terms upon which the testimony shall be taken.

822.19 Hearings and studies in another state; orders to appear

(1) A court of this state may request the appropriate court of another state to hold a hearing to adduce evidence,

170. Bodenheim, supra note 4, at 1239.
171. See text accompanying notes 93 & 94, 107 & 121, supra.
172. The statute is patterned after the Uniform Reciprocal Enforcement of Support Act. See Wis. Stat. § 52.10(37) (1975).
173. See text accompanying note 179, infra.
to order a party to produce or give evidence under other procedures of that state, or to have social studies made with respect to the custody of a child involved in proceedings pending in the court of this state; and to forward to the court of this state certified copies of the transcript of the record of the hearing, the evidence otherwise adduced, or any social studies prepared in compliance with the request. The cost of the services may be assessed against the parties or, if necessary, ordered paid by the state.

(2) A court of this state may request the appropriate court of another state to order a party to custody proceedings pending in the court of this state to appear in the proceedings, and if that party has physical custody of the child, to appear with the child. The request may state that travel and other necessary expenses of the party and of the child whose appearance is desired will be assessed against another party or will otherwise be paid.

822.20 Assistance to courts of other states

(1) Upon request of the court of another state the courts of this state which are competent to hear custody matters may order a person in this state to appear at a hearing to adduce evidence or to produce or give evidence under other procedures available in this state or may order social studies to be made for use in a custody proceeding in another state. A certified copy of the transcript of the record of the hearing or the evidence otherwise adduced and any social studies prepared shall be forwarded by the clerk of the court to the requesting court.

(2) A person within this state may voluntarily give testimony or a statement in this state for use in a custody proceeding outside this state.

(3) Upon request of the court of another state a competent court of this state may order a person in this state to appear alone or with the child in a custody proceeding in another state. The court may condition compliance with the request upon assurance by the other state that state travel and other necessary expenses will be advanced or reimbursed.

Frequently, participants in interstate child custody cases find that there is relevant evidence which is not available within the forum state. The commissioners drew on ideas from several sources to remedy the situation. Sections 822.18-.20 are treated together because they are drawn primarily from the

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174. UCCJA, supra note 2, at § 18 comment.
Uniform Interstate and International Procedure Act.\textsuperscript{175} The form and availability of discovery devices will differ depending on the identity of the person seeking the information. If the person is a party to the proceeding, guardian ad litem or other representative of the child, then discovery is limited to those devices available in the jurisdiction where the testimony is to be taken.\textsuperscript{176} Should the court order the testimony, it may specify the manner and terms on which it is to be taken. Sections 822.19(1) and 822.20(1) provide for interstate cooperation in the discovery process.

Section 822.20(2) is virtually identical to section 3.02(b) of the Interstate and International Procedure Act. The Commentary of the Commissioners, identical for both statutes, emphasizes that each "reaffirm[s] the basic freedom"\textsuperscript{177} of people to voluntarily give information for use in a custody proceeding anywhere outside of the state.

Sections 822.19(2) and 822.20(3) provide two auxiliary methods for compelling the appearance of a child.\textsuperscript{178} The court may require, as a condition precedent, that a party forward, or at least agree to reimburse the child’s travel expenses. These sections are considerably more effective than the procedural statutes in assuring the appearance of the child when the child’s presence is deemed necessary.

822.21 Preservation of documents for use in other states

In any custody proceeding in this state the court shall preserve the pleadings, orders and decrees, any record that has been made of its hearings, social studies, and other pertinent documents until the child reaches 18 years of age. Upon appropriate request of the court of another state the court shall forward to the other court certified copies of any or all of such documents.

822.22 Request for court records of another state

If a custody decree has been rendered in another state concerning a child involved in a custody proceeding pending in a court of this state, the court of this state upon taking jurisdiction of the case shall request of the court of the other

\textsuperscript{175} Unif. Proc. Act, supra note 72.
\textsuperscript{176} UCCJA, supra note 2, at § 18 comment; Unif. Proc. Act, supra note 72, at 3.02(b) comment. Compare Unif. Proc. Act, supra note 72, at § 3.02, comment with UCCJA, supra note 2, at § 20 comment.
\textsuperscript{177} UCCJA, supra note 2, at § 20 comment.
\textsuperscript{178} See text accompanying notes 64-65, supra.
state a certified copy of the transcript of any court record and other documents mentioned in s. 822.21.

The type of information that should be transferred is not limited by other sections of the Act. This information may include pleadings, affidavits, depositions, previous court orders, transcripts of judicial proceedings, reports of social workers, psychiatric, sociological and psychological studies, school records, and reports of any guardians ad litem. Also included should be any information the court has received from foreign jurisdictions under other sections of the Act.\footnote{179}

The Act's policy of free transferability of information does not imply that any court which obtains such information may properly enter or modify a custody decree. A court is still bound by the jurisdictional provisions of sections 822.03 and 822.14. Courts and commentators agree that not all tribunals stand in an equal position to determine the best interest of the child.\footnote{180}

\section*{822.23 International application}

The general policies of this act extend to the international area. The provisions of this act relating to the recognition and enforcement of custody decrees of other states apply to custody decrees and decrees involving legal institutions similar in nature to custody institutions rendered by appropriate authorities of other nations if reasonable notice and opportunity to be heard were given to all affected persons.

An international dispute should not affect the basic operation of the Act.\footnote{181} The underlying principles and purposes of the Act are still applicable in a case with international aspects. The only express requirement is that the decree was rendered by the appropriate authority after reasonable notice and opportunity to be heard were given to all affected persons. A custody decree entered by a foreign authority is not required to meet the jurisdictional requirements of section 822.03. It is sufficient if the court obtained jurisdiction under its own law.\footnote{182}

\footnote{179. See text accompanying notes 108-12, supra.}
\footnote{182. UCCJA, supra note 2, at § 23 comment.}
822.24  Priority

Upon the request of a party to a custody proceeding which raises a question of existence or exercise of jurisdiction under this act the case shall be given calendar priority and handled expeditiously.

Every child needs the constancy of a known, stable environment. This is especially important for the child who is the focus of a custody proceeding. Affected by the trauma of living on the edge of divorce, the child requires a quick resolution of the conflict. Section 822.24 is limited to priority resolution of jurisdictional questions "because an all encompassing priority would be beyond the scope of [the] Act." If the courts expect to perform in the best interests of the child, hearings and other proceedings should be expedited.

ROBERT S. BERMAN

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185. UCCJA, supra note 2, at § 24 comment.