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Due Process Rights of Absent Parents in Interstate Custody Conflicts: A Commentary on *In re Marriage of Hudson*

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Adjudications of custody necessarily involve the resolution of conflicts between parental rights and the best interests of children. In interstate custody battles, the parents' rights include the due process right to notice and the opportunity to be heard. In an era of increasing concern for parental rights, and for the rights of nonresident defendants generally, the danger exists that protection for the absent parent's rights may be extended at the expense of the children's welfare. The Uniform Child Custody Jurisdiction Act (UCCJA)¹ was designed primarily for the protection of children in interstate custody cases. The Act assures that a competent forum will always be available to decide child custody and that other states will enforce the decision, but the UCCJA does not require in personam jurisdiction over an absent parent or minimum contacts between the absent parent and the forum.² Recent United States Supreme Court cases dealing with the due process rights of nonresident defendants³ raise anew the question whether the UCCJA has struck the proper balance between the rights of parents and the welfare of their children. It is not an easy question, especially when considered in light of the confusion created by an earlier Supreme Court case, *May v. Anderson*.⁴

The Supreme Court has held that divorce jurisdiction is divisible.⁵ Jurisdiction over the marital status, often designated as jurisdiction

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¹9 U.L.A. 111 (1968). The Indiana version of the Act is IND. CODE §§ 31-1-11.6-1 to -24 (1982). Where appropriate, UCCJA sections will be cited to the Indiana version of the Act which contains no major deviations from the text.

²IND. CODE §§ 31-1-11.6-12, -13 commissioners' notes (1982).

³*Kulko v. Superior Court*, 436 U.S. 84 (1978); *Shaffer v. Heitner*, 433 U.S. 186 (1977).

⁴345 U.S. 528 (1953).

⁵*Estin v. Estin*, 334 U.S. 541 (1948).

in rem,⁶ may be acquired by substituted service, but in personam jurisdiction over the defendant spouse is required before an alimony order will be enforceable in other states.⁷ A plurality of the Court applied the in personam requirement to custody in *May v. Anderson*,⁸ holding that an ex parte custody decree could not be enforced against the absent parent. Although the opinion in *May* is less than crystal clear, its "only logical construction" is that due process requires in personam jurisdiction over the absent parent.⁹ This interpretation is consistent with the plurality's citation to a 1928 Indiana case holding that a custody decree rendered without personal jurisdiction over the absent parent was "void."¹⁰

When *May* was decided in 1953, it was generally true that in personam jurisdiction could be acquired only by personal service of summons within the state.¹¹ The Wisconsin state court in *May* had personally served the defendant wife with summons in Ohio, but this service did not give the Wisconsin court in personam jurisdiction over her, because there was no applicable long arm statute. The expansion of long arm jurisdiction after 1953 softened the impact of *May* on custody jurisdiction, and it was during this period that the UCCJA was drafted. In the UCCJA, the drafters virtually ignored the due process implications of *May* and treated custody jurisdiction as purely in rem. They provided notice and an opportunity to be heard for the absent parent,¹² but did not require in personam jurisdiction. The

⁶*E.g.*, *In re Marriage of Rinderknecht*, 174 Ind. App. 382, 367 N.E.2d 1128 (1977). The United States Supreme Court has eschewed reliance on the designation of divorce jurisdiction as in rem. *See Williams v. North Carolina*, 317 U.S. 287, 297 (1942) ("[I]t does not aid in the solution of the problem presented by this case to label these proceedings as proceedings *in rem*.").

⁷*Estin v. Estin*, 334 U.S. 541 (1948). Many years earlier, the Indiana Supreme Court in *Beard v. Beard*, 21 Ind. 321 (1863), held that an ex parte Indiana judgment for alimony could not be enforced against a nonresident. Although *Beard* was decided before the fourteenth amendment was adopted, the decision's reasoning parallels modern due process analysis, holding that the judgment, based on notice by publication, "was not obtained by due course of law." *Id.* at 328.

⁸345 U.S. 528 (1953).

⁹Clark, *The Supreme Court Faces the Family*, 5 FAM. ADVOCATE 20, 22 (Summer 1982). *See also Hazard, May v. Anderson: Preamble to Family Law Chaos*, 45 VA. L. REV. 379, 384 (1959).

¹⁰*May v. Anderson*, 345 U.S. 528, 535 n.8 (1953) (citing *Weber v. Redding*, 200 Ind. 448, 455, 163 N.E. 269, 271 (1928)). The *Weber* decision indicates that Indiana was committed to protection of the absent parent's rights long before *May* was decided by the United States Supreme Court.

¹¹*See, e.g.*, Act of Sept. 19, 1881, ch. 38, § 56, 1881 Ind. Acts 240 (repealed 1969). Today the Indiana Code permits acquisition of in personam jurisdiction under the long arm statute. IND. R. TR. P. 4.4.

¹²UNIF. CHILD CUSTODY JURISDICTION ACT §§ 5, 12 & commissioners' notes (1968). These provisions are discussed in detail *infra* notes 127-30, and accompanying text.

drafters treated *May* as a full faith and credit case rather than a due process case, stating that *May* permits but does not require interstate recognition of ex parte custody decrees.¹³

The due process implications of *May* assumed new importance, however, when the Supreme Court warned in 1977 that the reach of long arm statutes had due process limits. In *Shaffer v. Heitner*,¹⁴ the United States Supreme Court stated that the due process clause of the fourteenth amendment¹⁵ requires minimum contacts for all assertions of state court jurisdiction over nonresident defendants, whether jurisdiction is labeled in rem or in personam.¹⁶ A footnote in *Shaffer* recognizes an exception for "particularized rules governing adjudications of status."¹⁷ There is little doubt that this status exception will support the continued validity of ex parte divorces,¹⁸ but different considerations apply to child custody.

Shaffer's broad holding was confirmed in *Kulko v. Superior Court*,¹⁹ when the Court applied the minimum contacts test to a child support action brought in California against a father who was a resident of New York. Because the father had only the most ephemeral contacts with California, the Court held that California could not assert in personam jurisdiction over him.²⁰ *Shaffer*, and especially *Kulko*, erected a due process barrier to further expansion of long arm jurisdiction, closing the escape hatch that such jurisdiction had afforded against the due process implications of *May*.²¹ The Court's expressed concern for the due process rights of nonresident defendants makes it increas-

¹³See *id.* § 12 commissioners' notes ("[*May*] relates to interstate recognition rather than in-state validity of custody decrees."). This distinction is discussed in detail, *infra* notes 131-37 and accompanying text.

¹⁴443 U.S. 186 (1977). Although *Shaffer* involved quasi in rem jurisdiction, its due process holding was far broader in scope, as subsequent decisions confirmed. See, e.g., *Kulko v. Superior Court*, 436 U.S. 84, 91-96 (1978).

¹⁵U.S. CONST. amend. XIV, § 1.

¹⁶The jurisdictional test applied in *Shaffer* was the minimum contacts test of *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (A party must "have certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'").

¹⁷433 U.S. at 208 n.30.

¹⁸The Court has long recognized such decrees as effective to terminate the marital status of the nonresident spouse despite the absence of contacts between the nonresident spouse and the forum. *E.g.*, *Williams v. North Carolina*, 317 U.S. 287 (1942). *But see* Comment, *The Divisible Divorce Doctrine Reexamined in Light of Shaffer v. Heitner*, 51 *MISS. L.J.* 801 (1981).

¹⁹436 U.S. 84 (1978).

²⁰*Id.* at 101.

²¹Bodenheimer & Neeley-Kvarme, *Jurisdiction Over Child Custody and Adoption After Shaffer and Kulko*, 12 *U.C. DAVIS L. REV.* 229, 237 (1979) ("If we had hopes that jurisdiction could be extended further and further by long-arm legislation, *Kulko* has dashed these hopes.").

ingly unlikely that the Court will adopt the UCCJA interpretation of *May*.²² If personal jurisdiction over the absent parent is required in custody cases, as the plurality in *May* indicates, there is little doubt that minimum contacts also will be required. Indeed, *Shaffer* and *Kulko* seem to require minimum contacts even if personal jurisdiction is not required.

This potential conflict between the UCCJA and the due process cases from *May* through *Kulko* reached the Indiana Court of Appeals in *In re Marriage of Hudson*.²³ The UCCJA gave the trial court jurisdiction over the custody issue, but the nonresident father claimed that the court had violated his due process rights when it awarded custody to the mother without having in personam jurisdiction over him and without minimum contacts between him and the Indiana forum. The court of appeals avoided the minimum contacts issue by holding that in personam jurisdiction was not required and that custody jurisdiction under the UCCJA came within the "status exception" of *Shaffer*.²⁴

The *Hudson* opinion is grounded firmly on interpretations of the UCCJA by its drafter, Brigitte M. Bodenheimer, as reflected in the official comments to the Act.²⁵ The result is certainly defensible; it makes the trial court's custody award binding on a father who had removed two of his children to Spain. The holding, however, is not limited to cases involving child snatching;²⁶ it would deny a minimum contacts defense to *any* absent parent, regardless of his conduct and regardless of the reasons for his absence. The father in *Hudson* had been sent to Spain under military orders, and if no child snatching had been involved, he would have presented a most appealing case for protection of his due process right to a hearing on custody.²⁷ If that kind of case comes before the United States Supreme Court, it is unlikely that the Court will dismiss so casually the complex due process issues raised.²⁸

The *Hudson* court's resolution of the conflict between the UCCJA's child-centered jurisdictional provisions and the due process rationale

²²*Cf.* Coombs, *Interstate Child Custody: Jurisdiction, Recognition, and Enforcement*, 66 MINN. L. REV. 711, 741-44 (1982).

²³434 N.E.2d 107 (Ind. Ct. App. 1982), *cert. denied*, 51 U.S.L.W. 3611 (U.S. Feb. 22, 1983) (No. 82-793).

²⁴*Id.* at 117. The status exception is contained in a footnote to *Shaffer*. See *supra* note 17 and accompanying text.

²⁵434 N.E.2d at 118. See UNIF. CHILD CUSTODY JURISDICTION ACT §§ 12, 13 commissioners' notes (1968). Other courts have reached similar results. *E.g.*, *In re Marriage of Leonard*, 122 Cal. App. 3d 443, 175 Cal. Rptr. 903 (1981).

²⁶There are indications in *May* that it was not intended to apply in child-snatching cases. See *infra* note 82 and accompanying text.

²⁷The United States Supreme Court has held that there is a due process right to a custody hearing. *Stanley v. Illinois*, 405 U.S. 645 (1972).

²⁸A petition for certiorari in *Hudson* was denied by the United States Supreme Court. 51 U.S.L.W. 3611 (U.S. Feb. 22, 1983) (No. 82-793).

of *May* and *Kulko* is much too easy. *Hudson* makes one wonder whether a better balance might be struck among the interests of the child, the state, and the parents. Only the United States Supreme Court can supply the ultimate authoritative answer, but it is useful to examine the alternatives available to the Court. First, a more detailed examination of the problem is necessary, and a reexamination of the nature of custody jurisdiction provides a useful starting point.

I. THE BEST INTERESTS OF THE RES

[O]rdinarily procedural protection may be afforded to a liberty interest of one person without derogating from the substantive liberty of another. Here, however, such a tension is virtually unavoidable.²⁹

In *Hudson*, the Indiana Court of Appeals, following the UCCJA, characterized custody jurisdiction as in rem, and a custody decision as an adjudication of status.³⁰ In order to bring custody jurisdiction within the status exception of *Shaffer*, the court treated custody as comparable to marital status, which is the basis for in rem jurisdiction in divorce.³¹ There is substantial authority for treating custody as a status proceeding,³² but significant differences between divorce and custody make the fit an uneasy one.

A custody determination does not permanently alter the legal relationship of parent and child as divorce alters the marital relationship.³³ Custody involves a temporary allocation between the parents of rights and duties toward the child, which leaves the essential elements of

²⁹*Smith v. Organization of Foster Families*, 431 U.S. 816, 846 (1977). This statement referred to the conflict between the rights of foster parents and natural parents, but is equally appropriate in reference to the competing rights of children and those claiming their custody.

³⁰434 N.E.2d at 118-19.

³¹For a discussion of in rem jurisdiction in divorce, see Garfield, *The Transitory Divorce Action: Jurisdiction in the No-Fault Era*, 58 TEX. L. REV. 501 (1980).

³²*E.g.*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 69-79 (1969). See Bodenheimer & Neeley-Kvarme, *supra* note 21, at 240; Hazard, *supra* note 9, at 387 & n.30; Comment, *Jurisdiction Over the Nonresident Parent in a Suit Affecting the Parent-Child Relationship*, 34 BAYLOR L. REV. 107, 112 & n.39 (1982).

³³In support of the UCCJA characterization of custody as a status proceeding, Bodenheimer and Neeley-Kvarme quote Professor Reese, who defines status as a "relationship between two persons, which is not temporary in its nature, is not terminable at the mere will of either and with which the State is concerned." Bodenheimer & Neeley-Kvarme, *supra* note 21, at 240 (quoting Reese, *Marriage in American Conflict of Laws*, 26 INT'L & COMP. L.Q. 952, 953 (1977) (emphasis added)). Custody, being always subject to modification by the courts, is temporary in nature and does not permanently alter the relationship of parent and child in the same way marital status is altered by divorce, or the parent-child relationship is altered by termination.

the parent-child relationship unaltered.³⁴ The custodial parent is given the lion's share of responsibility for making decisions concerning the child's care and education. However, the allocation of rights and duties between the parents is always subject to reconsideration and revision when circumstances change. Meanwhile, the noncustodial parent retains substantial residual rights.³⁵

A custody action is primarily a dispute over possessory rights to the child, which makes it more analogous to the alimony-property aspects of divorce than to the adjudication of marital status. Parents fight for possession of the child in much the same way as they would fight over possession of property, casting the child in the role of the *res*. Here the usefulness of the analogy ends, however, for a child is a living, breathing *res* with rights of its own that are at least equal and probably superior to the rights of the parents. In custody cases, "courts are no longer concerned primarily with the proprietary claims of the contestants for the '*res*' before the court, but with the welfare of the '*res*' itself."³⁶ In determining whether custody jurisdiction will fit into the analytical framework developed in connection with disputes over property, care must be taken to protect the interests of the *res* while doing the least possible damage to the analytical framework, particularly the constitutional framework protecting the due process rights of litigants. It would be surprising if this were an easy task.

A useful illustration of both the similarities and the differences between the law's treatment of children and property may be found in proceedings to terminate parental rights. Such proceedings, unlike custody actions, do permanently alter the parent-child relationship, and therefore fit much more easily into the "status" mold than custody does. Nevertheless, termination proceedings are also analogous in some respects to property actions. For example, the chief ground for ter-

³⁴Rights of inheritance between parent and child, for example, are completely unaffected, and the parent's duty to support the child is affected only to the extent that the court may reduce the noncustodial parent's obligation to a finite sum. Duties of care, education, and nurture toward the child are only temporarily altered. *See* Annot., 9 A.L.R.2d 434, 440 (1950).

Although custody disputes sometimes do involve custodians other than parents, this Article is concerned with parental rights, and therefore is limited to the most common form of custody dispute, that between two parents.

³⁵*See infra* note 41 and accompanying text. Parents contending for custody are apt to perceive it as an all-or-nothing proposition, and it may work out that way in practice, especially if the noncustodial parent's opportunities for participation in raising the child are limited, but this possibility is a function of how the parents interact rather than an essential attribute of their legal relations toward the child. *But see* Hazard, *supra* note 9, at 388-89.

³⁶*May v. Anderson*, 345 U.S. 528, 541 (1953) (Jackson, J., dissenting). *See also* Bodenheimer & Neeley-Kvarme, *supra* note 21, at 233 ("The child is not technically a party, but the interests of the child are the major issue.").

mination of parental rights is abandonment,³⁷ and the same ground exists for termination of interests in property. The difference is that the *period* of abandonment is much shorter for children than for property, reflecting the greater need of children for care and cultivation. Herein lies the principal difference between an owner's rights in property and a parent's rights in his children. A parent's relationship to his child encompasses not only rights but duties, including duties of support, education, and nurture. Indeed, a parent's duties and responsibilities toward his child weigh more heavily than his rights in the child, though it is otherwise with property. As a result, a parent retains his right to custody of the child only so long as he fulfills his duties and responsibilities toward the child. Parental rights are important and constitutionally protected,³⁸ but they are also exceedingly fragile.

While the family remains intact, both parents have equal claim to custody of their children.³⁹ When the family breaks apart, however, a court must decide how the parents' rights and duties are to be apportioned. Equal partition of a child is seldom possible.⁴⁰ The traditional disposition of custody to one parent, with visitation rights to the other, is an unequal division of parental rights and responsibilities. The custodial parent retains the bulk of rights and responsibilities, and the noncustodial parent retains residual rights and duties.⁴¹ Under modern divorce statutes, the duties of support usually are equitably apportioned between the parents.⁴² The court determines which parent

³⁷Bodenheimer & Neeley-Kvarme, *supra* note 21, at 241.

³⁸The Supreme Court has recognized a substantive due process right of parents in their children. *See, e.g.,* Caban v. Mohammed, 441 U.S. 380 (1979); Bell, *Termination of Parental Rights: Recent Judicial and Legislative Trends*, 30 EMORY L.J. 1065, 1084 (1981) ("The Court has firmly established that a parent has a constitutionally protected liberty interest in retaining custody of his or her child."). *See also* Santosky v. Kramer, 102 S. Ct. 1388 (1982) (due process requires that before a parent's rights may be completely severed, the state must support its allegations by "clear and convincing evidence").

³⁹It was not always this way. Early common law gave the father absolute right to custody, while more recently the mother has received a preference. *See infra* note 70.

⁴⁰Joint custody would be analogous to both joint owners *retaining* their interest in the "property," rather than dividing it, or selling it and dividing the proceeds. As a form of *property* disposition, joint ownership is seldom workable because it retains the divorced spouses in what is essentially a partnership situation. The same kind of problem often exists with joint custody. *See, e.g.,* Dodd v. Dodd, 93 Misc. 2d 641, 403 N.Y.S.2d 401 (Sup. Ct. 1978). The traditional custody disposition "seems to be the only workable model for the great majority of ordinary mortals." Bodenheimer, *Equal Rights Visitation and the Right to Move*, 1 FAM. ADVOCATE, Summer 1978, at 19, 19.

⁴¹Residual rights include the right to visitation and the right to regain full custody should future changes occur. *E.g.,* IND. CODE § 31-1-11.5-24(a) (1982); *In re* Guardianship of Phillips, 383 N.E.2d 1056, 1059 (Ind. Ct. App. 1979).

⁴²Today's statutes no longer place the primary duty of support on the father. *E.g.,* IND. CODE § 31-1-11.5-12 (1982). It is doubtful that a statute placing the duty of

receives custody based upon the best interests of the child.⁴³ Again it is concern for the welfare of the res that distinguishes rights in children from rights in property. The divorcing parents' custody rights essentially amount to a right to a hearing on custody.

In *May v. Anderson*,⁴⁴ the Supreme Court seemed to treat the parents' rights as totally analogous to rights in property. The much criticized plurality opinion extended protection to parents' rights without adequately examining the nature of those rights⁴⁵ and without considering the children's interests. These deficiencies, combined with the peculiar procedural context in which *May* arose, created a confusion which has persisted to the present day.

II. DUE PROCESS—FROM DIVISIBLE DIVORCE TO, MINIMUM CONTACTS

A. *May v. Anderson*

If *May v. Anderson*⁴⁶ was indeed a due process case, it simply extended the concept of divisible divorce from alimony to custody. However, the extension was not nearly as easy as the plurality opinion suggests. The Supreme Court established the concept of divisible divorce in *Estin v. Estin*,⁴⁷ by recognizing separate bases for jurisdiction over marital status and over alimony in interstate divorce cases.⁴⁸ The Court held in *Estin* that a Nevada court's jurisdiction over the marital status, based on the husband's domicile in Nevada, entitled the court's ex parte divorce decree to full faith and credit in other states,⁴⁹ but that the court needed in personam jurisdiction over the wife before it could affect her right to alimony under a preexisting New York separate maintenance decree.⁵⁰

support solely on the father would be constitutional under *Orr v. Orr*, 440 U.S. 268 (1979) (invalidating a state statute allowing alimony awards only to divorced wives). Even under earlier law, de facto apportionment of support duties occurred in the many cases in which the support payments were not adequate to meet the child's total needs, as well as the cases in which support could not be collected.

⁴³*E.g.*, IND. CODE § 31-1-11.5-21 (1982).

⁴⁴345 U.S. 528, 533-34 (1953).

⁴⁵Later Supreme Court cases have been concerned primarily with parents' rights to a hearing on custody, *e.g.*, *Stanley v. Illinois*, 405 U.S. 645 (1972), and thus more accurately reflect the transient nature of parental rights.

⁴⁶345 U.S. 528 (1953) (plurality opinion).

⁴⁷334 U.S. 541 (1948).

⁴⁸*Id.* at 549. The wife in *Estin* had been granted separate maintenance by a New York court. Later, the husband moved to Nevada and obtained an ex parte divorce. The Nevada decree did not mention alimony, and the husband claimed that he no longer had to make payments under the New York decree.

⁴⁹*Id.* at 543-44 (citing *Williams v. North Carolina*, 317 U.S. 287 (1942)).

⁵⁰334 U.S. at 548-49. Despite its emphasis on in personam jurisdiction, Justice

When the *May* plurality extended the requirement of in personam jurisdiction to custody, because it concerns "[r]ights far more precious . . . than property rights,"⁵¹ the Court failed to note that the jurisdictional bases for custody never had been the same as for alimony. The plurality merely cited the first Restatement of Conflicts, which listed the child's domicile as the sole basis for custody jurisdiction.⁵² If the Restatement had been accurate, then custody jurisdiction based on domicile would have been more akin to divorce jurisdiction than to alimony, but domicile never was the exclusive basis for custody jurisdiction. Historically, equity courts have asserted the power to act for the protection of children within their territorial jurisdiction, regardless of the child's domicile.⁵³ At the time *May* was decided, state courts also recognized custody jurisdiction based upon personal jurisdiction over both parents. Thus, three distinct bases of custody jurisdiction existed,⁵⁴ reflecting the complex and conflicting interests involved.

No single jurisdictional basis can or should qualify as the exclusive basis for custody jurisdiction. The child's domicile is often merely a legal fiction, and there will always be cases in which personal jurisdiction over both parents cannot be obtained. Using the presence of the child as the sole basis for custody jurisdiction would only encourage child snatching by parents.⁵⁵ Custody jurisdiction has elements in common with both divorce and alimony jurisdiction. Above all, custody jurisdiction requires flexibility. A forum must always be available to determine or modify custody when the child's needs require it. The

Douglas' opinion for the Court did not explicitly rest on the due process clause. The immediate question before the Court concerned full faith and credit rather than due process. A later case, *Vanderbilt v. Vanderbilt*, 354 U.S. 416 (1957), was more explicit in its due process rationale. See, e.g., *Hudson v. Hudson*, 52 Cal. 2d 735, 740, 344 P.2d 295, 297 (1959) (Traynor, J.); *Garfield*, *supra* note 31, at 511.

⁵¹345 U.S. at 533.

⁵²*Id.* at 534 n.7 (citing RESTATEMENT (FIRST) OF CONFLICT OF LAWS §§ 32, 146 illustrations 1, 2 (1934)) (defining the domicile of a child whose parents have separated as that of the parent with whom it lives). Thus, the child's domicile also would be, by definition, the domicile of at least one of the parents, making custody jurisdiction coextensive with divorce jurisdiction.

Justice Jackson's dissent also accepted the *Restatement's* characterization of domicile as the sole basis for custody jurisdiction. 345 U.S. at 538-39.

⁵³Such jurisdiction existed in England as early as the seventeenth century and was recognized from the earliest times in the United States. H. CLARK, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* § 17.1, at 572 (1968). See also *Finlay v. Finlay*, 240 N.Y. 429, 148 N.E. 624 (1925) (Cardozo, J.).

⁵⁴*Sampsell v. Superior Court*, 32 Cal. 2d 763, 197 P.2d 739 (1948) (Traynor, J.). These bases of jurisdiction have now been supplanted in most states by the UCCJA. See *infra* notes 114-20 and accompanying text.

⁵⁵It was primarily the problem of child snatching which led to the promulgation and adoption of the UCCJA. See *infra* notes 112-13 and accompanying text.

child's helplessness places a heavy responsibility on the state to provide a forum for settling custody disputes regardless of jurisdictional niceties.⁵⁶

The need for flexibility in custody jurisdiction is reflected in the way the full faith and credit clause⁵⁷ has been applied. Ex parte divorces rendered by the state of a spouse's domicile are entitled to full faith and credit,⁵⁸ but the lack of finality that characterizes custody decrees⁵⁹ has enabled the Court to avoid the full faith and credit question in cases arising both before and after *May*. For example, in a case prior to *May*, *New York ex rel. Halvey v. Halvey*,⁶⁰ New York modified an ex parte Florida custody order and granted visitation rights to the father.⁶¹ The United States Supreme Court affirmed, holding that the Florida decree, which was subject to modification in Florida, was entitled to no greater effect in New York than it had in Florida.⁶² New York had "at least as much leeway to disregard the judgment, to qualify it, or to depart from it" as Florida did.⁶³ By using Florida standards to modify the decree, New York gave the Florida decree all the full faith and credit to which it was entitled.⁶⁴ It was therefore unnecessary for the Court to decide "whether in absence of personal service the Florida decree of custody had any binding effect on the husband."⁶⁵ Because of the procedural context in which

⁵⁶See *Sampsel v. Superior Court*, 32 Cal. 2d 763, 777, 197 P.2d 739, 749 (1948) ("Unfortunately, cases will arise where one or two elements [of jurisdiction] are lacking, and some court must have jurisdiction in the interest of the child to make proper provision for its custody."). The UCCJA retains multiple bases for jurisdiction, although they are not the ones that prevailed when *May* was decided. See *infra* notes 114-20 and accompanying text.

⁵⁷U.S. CONST. art. IV, § 1.

⁵⁸*Williams v. North Carolina*, 317 U.S. 287 (1942). The Court has been inconsistent at times in allowing full faith and credit for divorce decrees. However, this inconsistency is beyond the scope of this Article. See *Garfield*, *supra* note 31.

⁵⁹In this respect, custody decrees more closely resemble orders for alimony and child support, which are entitled to full faith and credit only with respect to accrued arrears no longer subject to modification. *Sistare v. Sistare*, 218 U.S. 1 (1910).

⁶⁰330 U.S. 610 (1947).

⁶¹The New York court also required the mother to post a \$5,000 surety bond to guarantee that the child would be made available for visitation with the father. *Id.* at 612.

⁶²330 U.S. at 615-16.

⁶³*Id.* at 615.

⁶⁴Full faith and credit, then as now, meant giving a judgment the same effect as it had in the state where it was rendered. The original federal statute implementing the full faith and credit clause, U.S. CONST. art. IV, § 1, required that state court judgments "have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the state from whence the said records are or shall be taken." Act of May 26, 1790, ch. 11, 1 Stat. 122 (current version at 28 U.S.C. § 1738 (1976)). Subsequent amendments to this statute have not altered the substance of the congressional definition of full faith and credit.

⁶⁵330 U.S. at 615.

May arose, the Court did have to answer that question, and the answer was "no."

The question in *May* was whether the state of Ohio "must give full faith and credit to a Wisconsin decree awarding custody of the children to their father when that decree [was] obtained by the father in an *ex parte* divorce action in a Wisconsin court which had no personal jurisdiction over the mother."⁶⁶ The father had brought a habeas corpus action in Ohio to enforce the Wisconsin custody decree after the mother refused to return the children to him following visitation in Ohio. In Ohio, habeas corpus was a legal, rather than an equitable remedy; therefore, a court did not have the power either to determine or to modify custody. The Ohio court could decide only the "immediate right to possession of the children."⁶⁷ The father could prevail only by showing that he had a right to custody superior to the mother's, that is, by establishing the interstate validity of the Wisconsin custody order. Thus the issue of interstate recognition of custody decrees came to the court "[s]eparated . . . from that of the future interests of the children."⁶⁸ The *May* opinion has been severely criticized for this separation of the jurisdictional and substantive issues,⁶⁹ but it was not the plurality that effected the separation. It was the law of Ohio.

Because of the limited nature of the Ohio habeas corpus action, neither the Ohio courts nor the Supreme Court could consider the merits of the custody issue. They could decide only whether the father was entitled to summary enforcement of the *ex parte* Wisconsin order. When the *May* plurality opinion is assessed in light of the procedural context in which the case arose, and when account also is taken of the evanescent nature of parental rights, its impact is considerably softened. Viewed in this light, the *May* decision does not hold that the mother retained full custody rights to her children, or that her rights were somehow superior to the father's, although that may well have been the plurality's unstated assumption.⁷⁰ The effect of *May*

⁶⁶345 U.S. at 528-29.

⁶⁷*Id.* at 532.

⁶⁸*Id.* at 533.

⁶⁹*E.g.*, H. CLARK, *supra* note 53, at 324 n.36; Bodenheimer & Neeley-Kvarme, *supra* note 21, at 249 & n.118; Hazard, *supra* note 9, at 388 n.33.

⁷⁰*Cf.* Foster & Freed, *Child Snatching and Custodial Fights: The Case for the Uniform Child Custody Jurisdiction Act*, 28 HASTINGS L.J. 1011, 1022 (1977) (suggesting that *May* would have been decided differently had the absent parent been the father rather than the mother). At the time *May* was decided, most states recognized the tender years presumption, the strongest version of which would grant custody of young children to the mother unless she were proven unfit. If the plurality assumed this to be the applicable rule, then the mother, in effect, would have a substantive right to custody (the right "far more precious than property rights") which could not be taken away without a hearing proving unfitness. The father, however, would have only the right

is merely to hold that the parents' rights were equal. The father's action failed because he was unable to prove that he had a right to custody superior to the mother's right. Because the marriage had been validly dissolved, *neither* parent had full custody rights. The parents had only the right to have a court apportion their parental rights and duties between them; each parent had a right to a *hearing* on custody.⁷¹ Although a hearing had been held, only the father's point of view had been presented because Wisconsin lacked personal jurisdiction over the mother. Therefore, the Supreme Court held in *May* that enforcement of the *ex parte* custody decree would violate the mother's due process rights.⁷² This holding left the divorced parents in status quo, both equally entitled to custody, until a hearing could be held on the merits with both parents before the court.⁷³

Unfortunately, none of the several opinions in *May* dealt adequately with the nature of the parents' rights, nor with the immediate consequences of the decision.⁷⁴ Justice Frankfurter concurred on the

to a hearing at which he could attempt to prove the mother's unfitness. The mother would thus have a *prima facie* right to custody superior to the father's right to a hearing.

The tender years presumption has been repealed by statute in Indiana. IND. CODE § 31-1-11.5-21(a) (1982). Even in those states where it persists, it usually is a weak presumption of fact, which would not have the effect of granting either parent a substantive quasi-property right to custody. *But see* *Gordon v. Gordon*, 577 P.2d 1271 (Okla. 1978). Even this watered-down version may be unconstitutional under the Supreme Court's recent sex discrimination decisions. *E.g.*, *Orr v. Orr*, 440 U.S. 268 (1979) (holding that alimony only to wives violates equal protection clause). It is thus abundantly clear that under modern custody law, neither parent has anything more than a right to a *hearing* on custody. The interpretation of *May* in the text is based on this assumption.

⁷¹*See supra* notes 40-45 and accompanying text. In later parental rights cases, the issue has been defined more clearly in terms of the parent's right to a hearing on custody. *See, e.g.*, *Stanley v. Illinois*, 405 U.S. 645 (1972) (unwed father's right to a hearing on custody). Viewing *May* as a right-to-hearing case makes it more consistent with *Stanley* and requires rejection of Professor Clark's suggestion that *Stanley* may have overruled *May* sub silentio. *See* H. CLARK, DOMESTIC RELATIONS CASES AND PROBLEMS 1037 n.5 (3d ed. 1980). *See also* Coombs, *Interstate Child Custody: Jurisdiction, Recognition and Enforcement*, 66 MINN. L. REV. 711, 742 n.178 (1982); Sherman, *Child Custody Jurisdiction and the Parental Kidnapping Prevention Act—A Due Process Dilemma?*, 17 TULSA L.J. 713, 719-21 (1982).

⁷²345 U.S. at 533-34 (plurality opinion).

⁷³The Ohio hearing would not be a modification hearing, in which the burden would be on the mother to prove a substantial change in circumstances, but would be an original custody hearing in which the court would determine custody based on the best interests of the children. *See infra* notes 205-06 and accompanying text. Modern long arm statutes would make it more likely that the father could have secured such a hearing in Wisconsin.

⁷⁴Justice Jackson's dissent projected an impasse: "The Wisconsin courts cannot bind the mother, and the Ohio courts cannot bind the father." 345 U.S. at 539 (Jackson, J., dissenting). In fact, the father could have sought a hearing on the merits in Ohio, in a proceeding other than habeas corpus. There would be no problem obtaining personal jurisdiction over the mother and both parties would be bound.

assumption that *May* was a full faith and credit case rather than a due process case. In his view, *May* held only that the full faith and credit clause did not *require* Ohio to recognize the ex parte Wisconsin custody decree, but that Ohio could recognize the Wisconsin decree without violating the mother's due process rights.⁷⁵ This "interpretation" of the plurality opinion is impossible to reconcile with the plurality's reference to the necessity for personal jurisdiction over the mother before she could be deprived of "[r]ights far more precious . . . than property rights."⁷⁶

Justice Jackson dissented from the plurality opinion precisely because he thought it *was* a due process opinion and therefore prohibited Ohio from recognizing the Wisconsin custody decree.⁷⁷ The only valid reason for denying full faith and credit to the decree would be the violation of the mother's due process rights. The dissent dismissed Justice Frankfurter's concurrence as "reduc[ing] the law of custody to a rule of seize-and-run."⁷⁸ Justice Jackson would have treated the

⁷⁵345 U.S. at 535-36. Justice Frankfurter came very close to saying that full faith and credit has no application at all in custody cases. "[T]he child's welfare in a custody case has such a claim upon the State that its responsibility is obviously not to be foreclosed by a prior adjudication reflecting another State's discharge of its responsibility at another time." *Id.* at 536. He was even more explicit in denying full faith and credit to custody decrees in *Kovacs v. Brewer*, 356 U.S. 604, 611-16 (1958) (Frankfurter, J., dissenting). It is ironic that the UCCJA, whose goal is to strengthen interstate recognition of custody decrees, should have adopted Justice Frankfurter's interpretation of *May*. See UNIF. CHILD CUSTODY JURISDICTION ACT §§ 12, 13 commissioners' notes (1968).

⁷⁶345 U.S. at 533-34 (plurality opinion). The plurality's reliance on the due process rationale of *Estin* seems clear in this passage:

In *Estin v. Estin* . . . we held Nevada powerless to cut off . . . a spouse's right to financial support under the prior decree of another state. In the instant case, we recognize that a mother's right to custody of her children is a personal right entitled to at least as much protection as her right to alimony.

. . . We find it unnecessary to determine the children's legal domicile [for purposes of establishing custody jurisdiction in Wisconsin] because, even if it be with their father, that does not give Wisconsin . . . the *personal jurisdiction that it must have in order to deprive their mother of her personal right to their immediate possession.*

Id. at 533-34 (emphasis added) (citations and footnotes omitted). See also Sherman, *supra* note 71, at 716 ("Justice Frankfurter's explanation is plainly at odds with the opinion in which he joined.")

⁷⁷345 U.S. at 536-37 (Jackson, J., dissenting). Justice Reed joined Justice Jackson's dissent and Justice Minton filed a separate dissent, arguing that the Ohio court properly accorded the decree full faith and credit. *Id.* at 542-43 (Minton, J., dissenting). Justice Clark did not participate, leaving the Court without a clear majority.

⁷⁸*Id.* at 542 (Jackson, J., dissenting). See also Ratner, *Child Custody in a Federal System*, 62 MICH. L. REV. 795, 811 (1964) ("the Frankfurter position invites removal of the child by a leave-taking parent").

custody decree much the same as a divorce decree, granting it summary enforcement simply because it was rendered by the state of the children's domicile,⁷⁹ "until [the Wisconsin court] or some other court with equal or better claims to jurisdiction shall modify it."⁸⁰ This position accords full faith and credit to the Wisconsin decree only because the Ohio habeas corpus procedure did not permit its modification. In most other cases, the dissent would allow virtually unlimited modification of custody decrees; it thus affords little more finality or stability to such decrees than the other opinions do, leaving the law substantially as it was in *Halvey*.⁸¹

In *May*, as in *Halvey*, the Court failed to consider the effect its full faith and credit rulings would have on interstate custody disputes. The plurality noted that the facts in *May* did not involve a parent who had left the jurisdiction to avoid process, or who had "unlawfully or surreptitiously" taken the children from the other parent.⁸² These decisions, however, unquestionably encouraged parents to do both.⁸³ The parent who took the children from the state of marital residence, surreptitiously or not, could avoid the home state's determination of custody and relitigate custody in another jurisdiction, where the absconding parent might well expect to enjoy a home court advantage.

The fact is, however, that the Supreme Court had no good alternatives in *May*. Given the all-or-nothing nature of the Ohio habeas corpus proceeding, the Court had only two choices: it could either require that all states give full faith and credit to all ex parte custody decrees, or that no state need give full faith and credit to such decrees. It probably chose the better alternative. Automatic enforcement of ex parte decrees would have introduced an element of rigidity into an area where flexibility always has been considered necessary to protect the interests of children. The child's interests usually are best served by having both parents present at the custody hearing. A decision mandating full faith and credit for all ex parte decrees would make it less likely that such bilateral hearings would occur.

The Court's dilemma in *May* suggests that the complex problems of interstate custody jurisdiction simply are not susceptible to solu-

⁷⁹"If ever domicile of the children plus that of one spouse is sufficient to support a custody decree binding all interested parties, it should be in this case." 345 U.S. at 538 (Jackson, J., dissenting).

⁸⁰*Id.* at 542.

⁸¹See *supra* notes 60-65 and accompanying text.

⁸²345 U.S. at 534 n.8. This statement suggests that the *May* holding would not apply at all in a child-snatching case.

⁸³"*May* encourages a potential custody defendant to flee or never to enter a jurisdiction in which he fears an adverse custody decision." Comment, *The Jurisdiction of Texas Courts in Interstate Child Custody Disputes: A Functional Approach*, 54 TEX. L. REV. 1008, 1014 (1976).

tion by constitutional fiat. Only legislation could redefine the bases of custody jurisdiction and prescribe their effects, and ultimately the UCCJA⁸⁴ and the Parental Kidnapping Prevention Act⁸⁵ did perform this function. These statutes developed child-centered bases of jurisdiction which may conflict with the Supreme Court's recent due process/minimum contacts decisions.

B. *Kulko v. Superior Court*

The *May* plurality's requirement of in personam jurisdiction over the absent parent took on renewed significance when the Supreme Court restricted the expansion of long arm jurisdiction in *Shaffer v. Heitner*⁸⁶ and *Kulko v. Superior Court*.⁸⁷ In *Kulko*, the Court concluded that the state courts had "failed to heed our admonition that the 'flexible standard of *International Shoe*' does not 'herald[d] the eventual demise of all restrictions on the personal jurisdiction of state courts.'" ⁸⁸ *Kulko* is particularly significant because it involved in personam jurisdiction in a domestic relations setting, although jurisdiction over child support rather than custody was at issue.

The parents in *Kulko* were domiciled in New York throughout a thirteen-year marriage. When they separated, the wife moved to California and later remarried. The separation agreement, negotiated and signed in New York, gave the father custody of the two children during the school year and gave the mother custody during vacation periods.⁸⁹ The father agreed to pay support for the children while they were with the mother. A Haitian divorce decree, obtained by the mother, incorporated the terms of the agreement. Fifteen months later,⁹⁰ the daughter, with her father's consent, began living with the mother in California during the school year and with the father during vacations. The son joined his sister two years later, without the father's prior consent.

The mother sued the father in a California state court, seeking a modification of the Haitian divorce decree to award her full custody of the children and to increase child support.⁹¹ Personal jurisdiction

⁸⁴UNIF. CHILD CUSTODY JURISDICTION ACT §§ 1-28 (1968).

⁸⁵28 U.S.C. § 1738A (Supp. V 1981).

⁸⁶433 U.S. 186 (1977). See *supra* notes 14-18 and accompanying text.

⁸⁷436 U.S. 84 (1978).

⁸⁸*Id.* at 101 (quoting *Hanson v. Denckla*, 357 U.S. 235, 251 (1958)). For the standard referred to in the quotation, see *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

⁸⁹The children were to spend "Christmas, Easter, and summer vacations with their mother." 436 U.S. at 87.

⁹⁰The parties signed the agreement in September 1972 and complied with it as written until December 1973. *Id.*

⁹¹To effect modification of the foreign decree, the mother "sought to establish the Haitian decree as a California judgment." *Id.* at 88. This procedure, allowing modifica-

over the father was based on California's long arm statute which permitted jurisdiction to be exercised over nonresidents "on any basis not inconsistent with the Constitution of this state or of the United States,"⁹² making the California courts' jurisdiction coextensive with due process. The California courts rejected the father's due process attack, reasoning that the father had "caused an effect" in California when he consented to his daughter's living there.⁹³ The United States Supreme Court disagreed and, carrying out the promise of *Shaffer v. Heitner*,⁹⁴ held that *all* assertions of state court jurisdiction over nonresidents would henceforth be subject to the minimum contacts test of *International Shoe Co. v. Washington*.⁹⁵

In the Court's view, the fatal flaw in the California courts' reasoning was their failure to require some purposeful act by the defendant.⁹⁶ "A father who agrees, in the interests of family harmony and his children's preferences, to allow them to spend more time in California than was required under a separation agreement can hardly be said to have 'purposefully availed himself' of the 'benefits and protections' of California's laws."⁹⁷ The *causing an effect* rationale could properly be applied to wrongful activity causing injury within the state, or to commercial activity affecting state residents, but not to actions arising from defendant's "personal, domestic relations."⁹⁸ This statement has led many commentators to conclude that the Court is requiring a higher standard of minimum contacts for domestic relations

tion of foreign decrees based on comity, was established in *Worthley v. Worthley*, 44 Cal. 2d 465, 283 P.2d 19 (1955) (Traynor, J.). It has been widely followed in other states. *E.g.*, *Kniffen v. Courtney*, 148 Ind. App. 358, 266 N.E.2d 72 (1971).

⁹²436 U.S. at 89 n.3 (quoting CAL. CIV. PROC. CODE § 410.10 (West 1973)).

⁹³436 U.S. at 88-89. The California Supreme Court held that the exercise of personal jurisdiction over the father was "reasonable" here because he had "purposely availed himself of the benefits and protections of the laws of California" by sending his daughter to live there. *Id.* at 89 (quoting *Kulko v. Superior Court*, 19 Cal. 3d 514, 521-22, 564 P.2d 353, 356, 358 (1977)).

⁹⁴433 U.S. at 212.

⁹⁵326 U.S. 310 (1945). *Shaffer* involved quasi in rem rather than in personam jurisdiction.

⁹⁶436 U.S. 84, 94 (1977) (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)) ("[I]t is essential in each case that there be *some act* by which the defendant *purposefully* avails [him]self of the privilege of conducting activities within the forum State.") (emphasis added).

⁹⁷436 U.S. at 94 (citing *Shaffer v. Heitner*, 433 U.S. 186, 216 (1977)). The Court also rejected California's argument that the father derived financial benefit from his daughter's longer presence in California, noting that the wife could have sought increased support at any time after the daughter first moved to California. "Any ultimate financial advantage to appellant thus results not from the child's presence in California, but from appellee's failure earlier to seek an increase in payments under the separation agreement." 436 U.S. at 95.

⁹⁸*Id.* at 96-97.

cases than for ordinary commercial transactions.⁹⁹ This conclusion, if correct, would have disastrous consequences in conjunction with a requirement of personal jurisdiction in custody disputes.¹⁰⁰ Unless it can be shown that a different standard, rather than a higher one, is all that is required in domestic cases, any reaffirmation of the due process implications of *May* may well prove fatal to the UCCJA.

Fortunately, the *Kulko* opinion raised some points which are helpful in distinguishing custody from support cases. The Supreme Court referred to the "unquestionably important" interest of the state "in protecting the welfare of its minor residents and in promoting to the fullest extent possible a healthy and supportive family environment in which the children of the State are to be raised."¹⁰¹ In rejecting this state interest as sufficient justification for imposing in personam jurisdiction on the nonresident father, the Court noted that California had not indicated any "particularized interest" in trying child support cases, by "enacting a special jurisdictional statute."¹⁰² In the area of custody, the UCCJA would seem to qualify as a "special jurisdictional statute." The Court in *Kulko* also pointed out that the Revised Uniform Reciprocal Enforcement of Support Act (RURESA), which provides procedures for interstate enforcement of support,¹⁰³ already served California's interest in aiding collection of child support. Thus, the mother would not be left without a remedy if California could not obtain personal jurisdiction over the father.¹⁰⁴ This reasoning would not necessarily be applicable in custody jurisdiction cases, where no alternative remedies comparable to RURESA exist.¹⁰⁵

⁹⁹See, e.g., H. CLARK, *supra* note 71, at 861 n.4; Bodenheimer & Neeley-Kvarme, *supra* note 21, at 231, 237-38.

¹⁰⁰See *infra* notes 181-97 and accompanying text.

¹⁰¹436 U.S. at 98.

¹⁰²*Id.*

¹⁰³RURESA, 9A U.L.A. 643 (1982).

¹⁰⁴436 U.S. at 98-100 & n.15. One may be tempted to quarrel with the Court's assumptions concerning the efficacy of the RURESA remedy. See, e.g., Fox *The Uniform Reciprocal Enforcement of Support Act*, 4 FAM. L. REP. (BNA) 4017, 4021 (1978) ("erratic prosecution of RURESA petitions"). But any criticism of RURESA falling short of demonstrating its total ineffectiveness would not seem sufficient to refute the Court's position. *But see* Coombs, *supra* note 22, at 759-62.

¹⁰⁵There are provisions in the UCCJA designed to minimize the disadvantages to the absent parent of out-of-state litigation, including provisions for travel expenses, out-of-state hearings, and depositions. See IND. CODE §§ 31-1-11.6-8, -11, -15, -18 to -20 (1982). See also Bodenheimer, *The Uniform Child Custody Jurisdiction Act: A Legislative Remedy for Children Caught in the Conflict of Laws*, 22 VAND. L. REV. 1207, 1234-35 (1969). These provisions are not as extensive, however, as the two-state proceedings set up under RURESA. See IND. CODE §§ 31-2-1-1 to -39 (1982). In any case, these provisions appear in the UCCJA itself, rather than in an alternative remedy, so the *Kulko* reasoning would not apply to a custody action brought under the UCCJA.

Because almost all states have adopted the UCCJA,¹⁰⁶ and its standards have been substantially incorporated into the federal Parental Kidnapping Prevention Act,¹⁰⁷ the UCCJA now represents a nearly universal standard for determining custody jurisdiction. If personal jurisdiction is required in custody cases, inevitably instances will arise in which the state qualifying for custody jurisdiction under the UCCJA cannot acquire personal jurisdiction over the nonresident parent. In such cases, the custody action will have to be brought in the state where the parent can be served, but that state may not qualify for custody jurisdiction under the UCCJA standards.¹⁰⁸ To allow that state to assume jurisdiction would nullify the intent of the UCCJA provisions requiring custody hearings to be conducted in the state with the closest connection to the *child*.¹⁰⁹ Requiring personal jurisdiction in all cases would sacrifice the interests of the child to the convenience of the parents, a result no one would favor. The *Hudson* court sought to avoid this dilemma by ignoring *May* and sidestepping *Kulko*. Before evaluating this resolution of the problem, a closer examination of the UCCJA jurisdictional standards is appropriate.

III. CUSTODY JURISDICTION UNDER THE UCCJA

May can be justly criticized for deciding an issue vital to the welfare of children without adequate discussion of either the underlying policy considerations or the consequences. It may be that these questions were not adequately brought to the Court's attention.¹¹⁰ It would be impossible today, however, for the Court to ignore the policy considerations which led to the adoption of the UCCJA.

The purposes of the UCCJA are spelled out in some detail in the Act itself, as well as in the prefatory notes.¹¹¹ The drafter of the Act, the late Brigitte M. Bodenheimer, summarized the conditions that prompted adoption of the UCCJA:

It will be recalled that for a long time child snatching prior to or after a custody decree was quasi-accepted behavior,

¹⁰⁶As of late 1982, 48 states had adopted the UCCJA. 8 FAM. L. REP. (BNA) 2623 (1982).

¹⁰⁷28 U.S.C. § 1738A (Supp. V 1981). The differences between the federal standards and those of the UCCJA are beyond the scope of this Article. See R. CROUCH, INTERSTATE CUSTODY LITIGATION: A GUIDE TO USE AND COURT INTERPRETATION OF THE UNIFORM CHILD CUSTODY JURISDICTION ACT 91 (1981); Coombs, *supra* note 22, at 850-54; Foster, *Child Custody Jurisdiction: UCCJA and PKPA*, 27 N.Y.L. SCH. L. REV. 297, 299-312 (1981).

¹⁰⁸See *infra* notes 114-20 and accompanying text. Jurisdiction usually attaches in the state where the child has lived for the past six months or where the child has a significant connection. Neither condition might be met in the state where personal jurisdiction is obtainable over the parent.

¹⁰⁹See *infra* notes 111-21 and accompanying text.

¹¹⁰Hazard, *supra* note 9, at 382.

¹¹¹See UNIF. CHILD CUSTODY JURISDICTION ACT (1968).

somewhere in a no man's land of the law. Legal rules played into the hands of persons engaged in such practices. Child custody could be awarded or modified in any state where the child was physically present, whether or not another state's custody decree had been violated or proceedings were pending or ready to be commenced in the child's home state. Existing custody determinations could be reopened elsewhere and relitigated on the merits, and the child's "best interests" were often assessed differently by a judge in the new state. This state of the law not only encouraged kidnapping and the retention of children after out-of-state visits; it also led to jurisdictional competition between several states, keeping the lives of many children in constant turmoil.¹¹²

The UCCJA was adopted to "remedy this intolerable state of affairs" and to "bring about a fair measure of interstate stability in custody awards."¹¹³

¹¹²Bodenheimer, *Interstate Custody: Initial Jurisdiction and Continuing Jurisdiction under the UCCJA*, 14 FAM. L.Q. 203, 203-04 (1981). This article was the last of many that Bodenheimer wrote on the UCCJA.

The Act's own detailed statement of purpose, IND. CODE § 31-1-11.6-1(a) (1982), is as follows:

Sec. 1. Purposes and Construction of Law. (a) The general purposes of this law are to:

- (1) 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;
- (2) 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;
- (3) assure that litigation concerning the custody of a child take place ordinarily in the state with which the child and his family have the closest connection and where significant evidence concerning his care, protection, training, and personal relationships is most readily available, and that the courts of this state decline the exercise of jurisdiction when the child and his family have a closer connection with another state;
- (4) discourage continuing controversies over child custody in the interest of greater stability of home environment and of secure family relationships for the child;
- (5) deter abductions and other unilateral removals of children undertaken to obtain custody awards;
- (6) avoid re-litigation of custody decisions of other states in this state insofar as feasible;
- (7) facilitate the enforcement of custody decrees of other states; and
- (8) 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.

¹¹³UNIF. CHILD CUSTODY JURISDICTION ACT prefatory note (1968). For an excellent discussion of psychological and other types of injury suffered by abducted children,

To accomplish its purposes, the UCCJA rejects all three of the prior bases of jurisdiction over custody: (1) the child's domicile, (2) the physical presence of the child, and (3) personal jurisdiction over both contestants.¹¹⁴ It adopts, as the primary basis for jurisdiction, the child's "home state," defined as the state where the child has actually lived with a parent or custodian for at least six months.¹¹⁵ "Home state" is more than a euphemism for "domicile"; it identifies the state where the child actually lives, rather than the state assigned as the child's home because it is the residence of the parents.¹¹⁶ To discourage child snatching, home state jurisdiction continues for six months after the child's removal from the state, as long as a parent or custodian remains in the home state.¹¹⁷ The alternate basis for jurisdiction is the "significant connection" of the child, and at least one contestant, with a state having available "substantial evidence concerning the child's present or future care, protection, training, and personal relationships."¹¹⁸ In addition, the Act includes a provision for emergency jurisdiction when the child has been abandoned, abused, or neglected.¹¹⁹ A state also can take jurisdiction when no other state is able or willing to exercise jurisdiction.¹²⁰

Although the UCCJA attempts to limit jurisdiction to one state, which usually will be the "home state," the UCCJA also recognizes that a forum for adjudication of custody must always be available. Because of this need, the Act retains some flexibility in the jurisdictional standards, though considerably less than under prior law. It is possible that more than one state can qualify for jurisdiction under UCCJA section 3.¹²¹ In such situations, the Act accords priority of jurisdiction to the state where proceedings were first initiated,¹²² but the UCCJA also contemplates that the court with time priority may

see Note, *The Parental Kidnapping Prevention Act—Analysis and Impact on Uniform Child Custody Jurisdiction*, 27 N.Y.L. SCH. L. REV. 553, 555-57 (1981).

¹¹⁴See *Sampsel v. Superior Court*, 32 Cal. 2d 763, 197 P.2d 739 (1948).

¹¹⁵IND. CODE §§ 31-1-11.6-2(5), -3(a)(1) (1982). Again, it should be noted that where appropriate UCCJA sections will be cited to the Indiana version of the Act, which contains no major deviations from the text.

¹¹⁶A child's domicile is a legal fiction which may or may not be the state where the child actually lives.

¹¹⁷IND. CODE § 31-1-11.6-3(a)(1) (1982). There is also a "clean hands" provision under which a court can decline jurisdiction if the child has been "wrongfully taken" from another state. *Id.* § 31-1-11.6-8.

¹¹⁸*Id.* § 31-1-11.6-3(a)(2).

¹¹⁹*Id.* § 31-1-11.6-3(a)(3).

¹²⁰*Id.* § 31-1-11.6-3(a)(4).

¹²¹UNIF. CHILD CUSTODY JURISDICTION ACT § 3. Typically, when the child has recently acquired a new home state, the state of its former residence still will have "significant connection" with the child and a custodian, and "substantial evidence" concerning the child will be present in that state.

¹²²IND. CODE § 31-1-11.6-6 (1982).

decline jurisdiction in favor of a more convenient forum.¹²³ To achieve this result, the Act encourages, and sometimes requires, courts to "communicate" with each other in order to determine which court is the more appropriate forum.¹²⁴ Once a court that meets the jurisdictional requirements of the Act has reached a decision, all other states are required to recognize and enforce the decree.¹²⁵ No other state can modify the decree while the original court retains jurisdiction.¹²⁶

The jurisdictional standards of the UCCJA are focused on the child; the child's home state or the state having a significant connection with the child usually assumes jurisdiction. The absent parent is entitled to "reasonable notice and opportunity to be heard."¹²⁷ If the parent lives outside the state, notice can be given by personal service, by mail, or "as directed by the court."¹²⁸ The determination

¹²³*Id.* § 31-1-11.6-7.

¹²⁴*Id.* §§ 31-1-11.6-6(c), -7(d). Direct communication between courts is a novel concept which originated with the UCCJA, although patterned to some extent on RURESA. See IND. CODE §§ 31-2-1-1 to -39 (1982).

¹²⁵*Id.* § 31-1-11.6-13.

¹²⁶*Id.* § 31-1-11.6-14(a).

¹²⁷*Id.* § 31-1-11.6-4. Section 4 provides:

Sec. 4. Notice and Opportunity to be Heard. Before making a decree under this chapter, 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 section 5 of this chapter.

¹²⁸*Id.* § 31-1-11.6-5. Section 5 provides:

(a) 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:

- (1) by personal delivery outside this state in the manner prescribed for service of process within this state;
- (2) 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;
- (3) by any form of mail addressed to the person to be served and requesting a receipt; or
- (4) as directed by the court.

(b) Notice under this section shall be served, mailed, or delivered, at least twenty (20) days before any hearing in this state.

(c) 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.

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

An optional provision authorizing service by publication was omitted from the Indiana version of the UCCJA.

of a court meeting the jurisdictional standards of the Act will bind a parent so notified, if he has been given an opportunity to be heard.¹²⁹ The Act does not claim, however, that giving the required notice and opportunity to be heard results in personal jurisdiction over the absent parent. In fact, any such intent is expressly disclaimed in the official comments to the Act: "There is no requirement for technical personal jurisdiction, on the traditional theory that custody determinations, as distinguished from support actions . . . are proceedings in rem or proceedings affecting status."¹³⁰

The conflict between the UCCJA and the *May* plurality opinion is evident. The Act relies on "a common interpretation" of *May*, that "a state is permitted to recognize a custody decree of another state regardless of lack of personal jurisdiction, as long as due process requirements of notice and opportunity to be heard have been met."¹³¹ This interpretation, based upon the Frankfurter concurrence in *May*¹³² and adopted by the *Restatement (Second) of Conflicts*,¹³³ treats personal jurisdiction as irrelevant and *May* as a full faith and credit case rather than a due process case.¹³⁴ It is not surprising that the UCCJA adopted this view, considering the uncertainty of the law at the time the Act was drafted. Because the Supreme Court had withheld the protection of full faith and credit from custody decrees,¹³⁵ the UCCJA sought stability instead through interstate comity and cooperation.¹³⁶ States

¹²⁹*Id.* § 31-1-11.6-12. Section 12 provides:

A custody decree rendered by a court of this state which had jurisdiction under section 3 of this chapter binds all parties who have been served in this state or notified in accordance with section 5 of this chapter or who have submitted to the jurisdiction of the court, and who have been given an opportunity to be heard. As to 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 chapter.

¹³⁰UNIF. CHILD CUSTODY JURISDICTION ACT § 12 commissioners' note. *See also id.* § 13 commissioners' note.

¹³¹*Id.* § 13 commissioners' note.

¹³²345 U.S. at 535.

¹³³RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 79 & comment.

¹³⁴"The section [12] is not at variance with *May v. Anderson* . . . which relates to interstate recognition rather than in-state validity of custody decrees." UNIF. CHILD CUSTODY JURISDICTION ACT § 12 commissioners' note.

¹³⁵*E.g.*, *May v. Anderson*, 345 U.S. 528 (1953) (plurality opinion).

¹³⁶The prefatory note to the UCCJA points out that "the United States Supreme Court has never settled the question whether the full faith and credit clause of the Constitution applies to custody decrees . . ." UNIF. CHILD CUSTODY JURISDICTION ACT, prefatory note, 9 U.L.A. at 112. This uncertainty led to "a tendency to over-emphasize the need for fluidity and modifiability of custody decrees at the expense of the equal (if not greater) need, from the standpoint of the child, for stability of custody decisions once made." *Id.* at 113.

adopting the Act commit themselves to recognize and to enforce custody decrees from all other states, provided only that the court issuing the decree meets the jurisdictional standards of the Act.¹³⁷ Interstate enforcement of decrees is secured through comity, rather than full faith and credit. Viewed as a full faith and credit case, *May* was not an obstacle to achievement of the UCCJA's goals.

Congress recently brought the full faith and credit clause back into the picture, however, by passing the Parental Kidnapping Prevention Act of 1980.¹³⁸ The federal act declares that custody decrees meeting standards that parallel the UCCJA jurisdictional standards are entitled to full faith and credit in all states.¹³⁹ If a case arose today with facts identical to *May*, the federal statute would require Ohio to give full faith and credit to the Wisconsin decree. It now seems somewhat ironic that the UCCJA was based on the Frankfurter concurrence in *May*, which took the position that full faith and credit had little or no application to custody cases.¹⁴⁰

It is significant that the UCCJA's choice of Frankfurter's interpretation of *May* occurred several years before the Supreme Court decided *Shaffer and Kulko*, and during a period of unparalleled expansion of interstate jurisdiction.¹⁴¹ At the time the UCCJA was

¹³⁷IND. CODE § 31-1-11.6-14 (1982). Section 14 applies whenever a state custody court meets the jurisdictional standards of the Act, even though the state has not adopted the UCCJA. State *ex rel. Marcrum v. Marion County Superior Court*, 403 N.E.2d 806 (Ind. 1980).

¹³⁸28 U.S.C. § 1738A (Supp. V 1981).

¹³⁹*Id.* The full faith and credit clause, U.S. CONST. art. IV, § 1, gives Congress the power to prescribe the "effect" of state judicial proceedings: "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 by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." *Id.* (emphasis added). See generally Whitten, *The Constitutional Limitations on State-Court Jurisdiction: A Historical-Interpretative Reexamination of the Full Faith and Credit and Due Process Clauses* (pt. 1), 14 CREIGHTON L. REV. 499, 505 n.26, 604-05 (1981); Comment, *The Uniform Child Custody Jurisdiction Act and the Parental Kidnapping Prevention Act: Dual Response to Interstate Child Custody Problems*, 39 WASH. & LEE L. REV. 149, 159-60 (1982).

Professor Coombs asserts that what the federal statute requires is enforcement rather than full faith and credit despite the statute's title: "Full faith and credit given to child custody determinations." See Coombs, *supra* note 22, at 714, 834-42, 849. Even if it is true that the faith and credit given is less than "full" it is still far greater than has ever been given to custody decrees.

¹⁴⁰345 U.S. at 535-36. See *Kovacs v. Brewer*, 356 U.S. 604, 613 (1958) (Frankfurter, J., dissenting); Ratner, *Procedural Due Process and Jurisdiction to Adjudicate: (a) Effective-Litigation Values vs. the Territorial Imperative (b) The Uniform Child Custody Jurisdiction Act*, 75 NW. U.L. REV. 363, 383 (1980).

¹⁴¹Note, *Long-Arm Jurisdiction and Products Liability: Beyond World-Wide Volkswagen*, 11 MEM. ST. U.L. REV. 351, 353 & n.16 (1981) ("The expansion of state judicial jurisdiction continued virtually unchecked between 1945 and 1977.").

drafted, the "minimum contacts" test was used largely in cases involving in personam jurisdiction over corporate defendants.¹⁴² Therefore, it is not surprising that the drafters of the UCCJA felt they could safely sidestep the due process implications of the *May* plurality opinion by applying the in rem label to custody jurisdiction. Now the Court is moving in the direction of greater procedural protection both for nonresident defendants¹⁴³ and for parental rights,¹⁴⁴ and the UCCJA appears to be swimming against the tide when it rejects a due process rationale for *May*. For the Court now to hold that due process affords no protection to the rights of absent parents would be incongruous. Even if the Court accepted the UCCJA's designation of custody jurisdiction as in rem, that, in itself, would not suffice to immunize custody jurisdiction from the minimum contacts test under *Shaffer*.¹⁴⁵

On the other hand, it is equally unlikely that the Court can or will ignore the well-documented history of child snatching and of competition between state courts which led to adoption of the UCCJA and the Parental Kidnapping Prevention Act. The need for jurisdictional and full faith and credit standards in custody cases is too clear to permit the Court easily to overturn those statutes. Also, the UCCJA does provide notice and an opportunity to be heard for the absent parent. UCCJA section 12 states that a custody decree "binds all parties who have been served in this state or notified in accordance with section 5 of this chapter or who have submitted to the jurisdiction of the court, and who have been given an opportunity to be heard."¹⁴⁶ As the comments to section 12 state, "[t]he two prerequisites are (1) jurisdiction under section 3 of this Act and (2) strict compliance with due process mandates of notice and opportunity to be heard."¹⁴⁷ The remaining question then is whether there can be "strict compliance" with the absent parent's due process right to a hearing

¹⁴²*E.g.*, *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957); *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). See Hazard, *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241, 272-73.

¹⁴³Minimum contacts now are required in all kinds of suits, in rem as well as in personam, and against all defendants, individual as well as corporate. See *Kulko v. Superior Court*, 436 U.S. 84, 91-96 (1978); *Shaffer v. Heitner*, 433 U.S. 186 (1977).

¹⁴⁴For example, the Court has held that an unwed father has a due process right to a hearing before he can be deprived of the custody of his children. *Stanley v. Illinois*, 405 U.S. 645 (1972). In addition, no parent, wed or unwed, can have his parental rights terminated without proof by at least a clear and convincing evidence standard. *Santosky v. Kramer*, 102 S. Ct. 1388 (1982).

¹⁴⁵*Shaffer v. Heitner*, 433 U.S. 186 (1977) (requiring that assertions of in rem jurisdiction be evaluated according to the minimum contacts standards set forth in decisions regarding in personam actions).

¹⁴⁶IND. CODE § 31-1-11.6-12 (1982) (emphasis added).

¹⁴⁷UCCJA § 12 commissioners' note (emphasis added).

without an examination of minimum contacts between that parent and the forum. The answer given by the Supreme Court will not necessarily be the one given by the UCCJA and followed by the Indiana Court of Appeals in *In re Marriage of Hudson*.¹⁴⁸

IV. *In re Marriage of Hudson*

The parties in *Hudson* were married in Bloomington, Indiana in 1975 and lived there for a year and a half until the husband was transferred to Iceland. The couple's two children were born in Iceland. In addition, the husband adopted the wife's daughter from a previous marriage. The husband was transferred to the state of Washington in 1978, and the parties lived there until the wife returned to her parents' home in Indiana in July 1979. She went back to Washington a month later, but returned to Indiana with the children in December 1979. The wife filed for divorce in Indiana on March 12, 1980, notifying the husband by mail. On the same day, the husband "apparently forcibly removed" the two younger children from the mother's custody and took them with him to Spain, where he was then stationed with the Navy.¹⁴⁹

The Indiana trial court entered a decree dissolving the marriage, dividing the marital property, and awarding custody of the three children to the wife. The court of appeals upheld the dissolution and the custody award but reversed the division of property.¹⁵⁰ The appellate court held that the trial court had jurisdiction over the divorce because of the plaintiff wife's domicile in Indiana.¹⁵¹ The trial court also had jurisdiction to award custody based on the significant connection and substantial evidence standard of UCCJA section 3(a)(2).¹⁵² However, the appellate court held that the court did not have jurisdiction over the marital property because the court lacked in personam jurisdiction over the absent husband.¹⁵³

The court of appeals held that Indiana Trial Rule 4.4(A)(7)

¹⁴⁸434 N.E.2d 107 (Ind. Ct. App. 1982).

¹⁴⁹434 N.E.2d 107, 110 (Ind. Ct. App. 1982).

¹⁵⁰*Id.* at 110.

¹⁵¹In determining that the wife had been domiciled in Indiana for the six months required by IND. CODE § 31-1-11.5-6 (1982), the trial court found that the wife's four-month stay in Washington *after* her original return to Indiana had been only temporary; the wife, therefore, had established residence in Indiana in July 1979, eight months before filing her petition. The court of appeals held that this finding was supported by sufficient evidence. 434 N.E.2d at 112.

¹⁵²434 N.E.2d at 115-17. Although Indiana's version of the UCCJA is titled the Uniform Child Custody Jurisdiction Law (UCCJL), this discussion refers to the UCCJA because the court of appeals relied on the Uniform Act and the commissioners' notes in reaching its decision. Furthermore, section 3 of the UCCJL is identical to the UCCJA. *Id.* at 114-15 nn.6-7.

¹⁵³434 N.E.2d at 112-14.

authorizes jurisdiction over a nonresident spouse who has lived "in the marital relationship within the state" only if the other spouse has maintained continuous residence within the state.¹⁵⁴ Under this interpretation, service upon the husband by mail in Spain did not give the Indiana court personal jurisdiction over him.¹⁵⁵ Thus, the court of appeals settled the question of in personam jurisdiction over the husband adversely to the wife before reaching the custody jurisdiction issue.

The husband argued that due process required in personam jurisdiction over him before the court could determine custody and that no such jurisdiction existed because he had no minimum contacts with Indiana. The appellate court held that in personam jurisdiction is not required under the UCCJA, which treats custody jurisdiction as in rem; the court avoided the minimum contacts issue entirely by relying on the status exception in *Shaffer v. Heitner*.¹⁵⁶

Initially, the court determined that Indiana had in rem jurisdiction over custody under UCCJA section 3(a)(2), because the state had

¹⁵⁴IND. R. TR. P. 4.4(A)(7) provides for jurisdiction over nonresidents based on "living in the marital relationship within the state notwithstanding subsequent departure from the state, as to all obligations for alimony, custody, child support, or property settlement, if the other party to the marital relationship continues to reside in the state." (emphasis added). The appellate court's requirement of continuous residence by the remaining spouse seems fair enough on the facts of *Hudson*, where the couple had lived in Indiana for only one and a half years and had left the state nearly four years before the wife filed her dissolution action. This requirement may make considerably less sense in cases where the period of Indiana residence is much longer and the period of absence is much shorter but still sufficient to break the continuity of the remaining spouse's residence. The holding of *Hudson* makes no allowance for such factual variations.

Note also that Trial Rule 4.4(A)(7) applies to personal jurisdiction for purposes of child custody, as well as for alimony, child support, and property settlement.

¹⁵⁵Because no claim to personal jurisdiction over the husband could be established based on Trial Rule 4.4(A)(7), there was no occasion for further discussion of possible minimum contacts between the husband and Indiana. Only if a basis for long arm jurisdiction existed under the rule would it become necessary to subject the claimed jurisdiction to the further due process test of minimum contacts. See F. JAMES & G. HAZARD, CIVIL PROCEDURE § 12.14, at 632-33 (2d ed. 1977); Comment, *Constitutional Limitations on State Longarm Jurisdiction*, 49 U. CHI. L. REV. 156, 157 n.14 (1982).

The court's language implies that qualifying for jurisdiction under Trial Rule 4.4(A)(7) would automatically satisfy the minimum contacts test. "Generally . . . this minimum contact requirement may be met under Ind. Rules of Procedure, Trial Rule 4.4(A)(7)." 434 N.E.2d at 112. One can imagine a case, however, in which the spouse's absence from the state had been so prolonged that a genuine question concerning minimum contacts might arise. In such a case, due process might require rejection of in personam jurisdiction even though the technical requirements of Trial Rule 4.4(A)(7) had been met.

The court of appeals also held that the husband had not waived the issue of personal jurisdiction by addressing the merits, and that he was not estopped by his statement that he would "abide by" the trial court's custody decision. 434 N.E.2d at 113.

¹⁵⁶434 N.E.2d at 117 (citing *Shaffer v. Heitner*, 433 U.S. 186 (1977)).

a "significant connection" with the children and with one contestant, the mother, and "substantial evidence" was available concerning the children's *future* care.¹⁵⁷ Because of the children's recent move to Indiana, no state could qualify as the children's home state under section 3(a)(1).¹⁵⁸ Section 3(a)(2) bases jurisdiction on contacts of the child and *one* parent with the state; the other parent's contacts with the state are irrelevant under the UCCJA. Under *Shaffer*, however, *any* assertion of state court jurisdiction is subject to the minimum contacts test of *International Shoe*.¹⁵⁹ Treating custody jurisdiction as in rem solved only the problems posed by the *May* plurality's requirement of in personam jurisdiction: the issue of minimum contacts

¹⁵⁷434 N.E.2d at 116 (citing IND. CODE § 31-1-11.6-3(a)(2) (1982)). Under this code section a state has custody jurisdiction if:

(2) it is in the best interest of the child that a court of this state assume jurisdiction because (A) the child and his parents, or the child and at least one (1) contestant, have a significant connection with this state, and (B) there is available in this state substantial evidence concerning the child's present or future care, protection, training, and personal relationships.

IND. CODE. § 31-1-11.6-3(a)(2) (1982).

¹⁵⁸A state has jurisdiction under section 3(a)(1) if:

(1) this state (A) is the home state of the child at the time of commencement of the proceedings, or (B) had been the child's home state within six (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 reasons, and a parent or person acting as parent continues to live in this state.

IND. CODE § 31-1-11.6-3(a)(1) (1982).

"Home state" is defined by section 2(5):

(5) "home state" means the state in which the child, immediately preceding the time involved, lived with his parents, a parent, or a person acting as parent, for at least six (6) consecutive months, and in the case of a child less than six (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 six (6) month or other period.

Id. § 31-1-11.6-2(5).

Although a home state retains its status as such for six months after the child's removal, it does so only if a parent or custodian continues to live in the state. Because neither parent remained in Washington when the wife filed her petition three months after bringing the children to Indiana, Washington could not claim home state status, although it might have qualified under the significant connection/substantial evidence test of section 3(a)(2). No one had filed suit in Washington, so it was unnecessary to decide which state would have the better jurisdictional claim. Had such a dispute over jurisdiction arisen, it would have been determined by communication between the Washington and Indiana courts under Indiana Code sections 31-1-11.6-6, -7. However, in *Hudson* it was necessary only to decide, as the court did, that Indiana *did* have jurisdiction.

¹⁵⁹433 U.S. 186, 212 (1977) (citing *International Shoe Co. v. Washington*, 326 U.S. 310 (1945)).

remained. The court of appeals had to rely on the "status exception" of *Shaffer* in order to dispose of the need for minimum contacts altogether.¹⁶⁰

The status exception is found in a footnote to *Shaffer*: "We do not suggest that jurisdictional doctrines other than those discussed in text, such as the particularized rules governing adjudications of status, are inconsistent with the standard of fairness."¹⁶¹ The footnote follows a statement in the text that many types of in rem jurisdiction "would not be affected" by *Shaffer's* requirement that all assertions of state court jurisdiction "must satisfy" the minimum contacts test.¹⁶² It is not clear whether the Court meant that the basis for the claim of in rem jurisdiction in such cases usually would satisfy the minimum contacts test, or that minimum contacts would not be required at all. The Indiana court assumed that the second interpretation was correct, but the context of the textual statement strongly suggests that the first meaning was intended.¹⁶³ The only example of a status adjudication given in *Shaffer* is divorce. A quotation from *Pennoyer v. Neff*¹⁶⁴ refers to divorce jurisdiction as the prime example of adjudications affecting status,¹⁶⁵ and the only authority cited in the footnote, an article by Justice Traynor, discusses the significant differences between divorce jurisdiction and custody jurisdiction.¹⁶⁶ *Shaffer* thus provides scant authority for lumping divorce and custody together under the status label.

A comparison between the rights of the absent parties in divorce and custody cases is critical to the due process issue of minimum contacts. Justice Traynor points out that in divorce cases the absent spouse frequently can claim "no more than a marriage in name."¹⁶⁷ In such cases,

a court could reason that even a defendant who had no contacts whatever with the forum state would not be gravely af-

¹⁶⁰434 N.E.2d at 117.

¹⁶¹433 U.S. at 208 n.30.

¹⁶²*Id.* at 208.

¹⁶³*See Shaffer*, 433 U.S. at 207-08, in which the Court points out that the "presence of property in a State may bear on the existence of jurisdiction by providing contacts among the forum State, the defendant, and the litigation." *Id.* at 207.. *See Coombs*, *supra* note 22, at 741-44.

¹⁶⁴95 U.S. 714 (1878).

¹⁶⁵433 U.S. at 201. "Mr. Justice Field's opinion [in *Pennoyer*] carefully noted that cases involving the personal status of the plaintiff, *such as divorce actions*, could be adjudicated in the plaintiff's home State even though the defendant could not be served within that State." *Id.* (emphasis added). The reference to "home state" here is, of course, to plaintiff's domicile, not to the UCCJA concept.

¹⁶⁶Traynor, *Is This Conflict Really Necessary?*, 37 TEX. L. REV. 657, 660-61 (1959). The significance of the Court's citation of the Traynor article is discussed in *Coombs*, *supra* note 22, at 743 n.182.

¹⁶⁷Traynor, *supra* note 166, at 661.

fectured by a decree enabling the plaintiff to remarry, since there would be no way of compelling the plaintiff to cohabit with defendant and no effective way of preventing the plaintiff from cohabiting with anyone else. . . . In any event, a defendant's purposeless interest in barricading the plaintiff's avenue to freedom is overwhelmingly outweighed by the plaintiff's purposeful interest in securing freedom. Finally, the dubious interest of defendant's state in perpetuating a broken marriage in limbo is overwhelmingly outweighed by the forum state's major interest in the orderly resolution of a plaintiff domiciliary's marital status.¹⁶⁸

It cannot be said that an absent *parent's* interests in a custody adjudication are "purposeless" or "dubious," or that the parent "would not be gravely affected" by a custody determination made in his absence, especially if no weight is given to the *reasons* for the absence. Justice Traynor recognized that the interests of the state and of the parties are far greater in actions involving children. Contacts between the parties and the state "take on larger and perhaps paramount importance, since *the consequences of any action either declaring or terminating the relationship are so momentous to the parties.* In conjunction with fair play, *these considerations would normally preclude jurisdiction over a nonresident defendant having no contact with the forum state.*"¹⁶⁹

Nothing in the Traynor article supports including custody jurisdiction within the status exception. Indeed, Justice Traynor's statements are entirely compatible with the *May* plurality's reference to "rights far more precious than property rights." Hence it is doubtful that the Court intended either to overrule *May* in a footnote or to dispense with any requirement of minimum contacts in custody cases. Even a plurality opinion is rarely overruled by a footnote, especially when the authority cited in the footnote tends to support the plurality.

The court of appeals in *Hudson* held that compliance with the notice provisions of the UCCJA was sufficient to satisfy "traditional notions of fair play and substantial justice";¹⁷⁰ however, the minimum contacts test is concerned less with notice than with the opportunity to be heard. Notice alone does not satisfy due process if it does no more than inform a defendant of a hearing taking place in a distant

¹⁶⁸*Id.* See also Garfield, *supra* note 31, at 510 & n.57 (1980) ("It seems unlikely . . . that the right to remain married to an unwilling spouse rises to the dignity of a due process right."). The same could not be said of a parent's rights in his children.

¹⁶⁹Traynor, *supra* note 166, at 661 (emphasis added). Justice Traynor concedes that if a parent's whereabouts are unknown, or the parent "has failed to discharge his parental obligations," the state, on giving "the best notice reasonably possible, should be free to promote the interest of the child by permitting his adoption." *Id.* at 662. However, no such concession is made concerning *custody*. See *infra* note 187.

¹⁷⁰434 N.E.2d at 119.

forum in which he has no realistic chance of appearing. Consequently, the core requirement of the due process clause is usually stated as *notice and an opportunity to be heard*.¹⁷¹ The forum non convenience provisions of the UCCJA provide some protection for the defendant's right to a hearing,¹⁷² but they are of little use in cases such as *Hudson* where no more convenient forum is available. UCCJA section 7 contemplates that a court will decline jurisdiction only when a court in another state can provide "a more appropriate forum."¹⁷³ In *Hudson*, the only alternative forums were Spain, where the husband and two of the children were living, and Washington, where none of the parties lived. Therefore, Indiana was the least inconvenient forum.

If the result in *Hudson* satisfies "traditional notions of fair play and substantial justice," it is only because of the presence of child snatching by the father. The status exception rationale of *Hudson* would mandate the same result even without the child snatching, even perhaps if the *mother* had been guilty of child snatching.¹⁷⁴ Binding a father by a custody determination in favor of a child-snatching mother, made at a hearing he was physically unable to attend in a state with which he had no contacts, would not comport with due process. Such a father should have at least the opportunity of raising a minimum contacts defense to the court's assertion of custody jurisdiction. Due process requires that the *Hudson* rationale be reconsidered.

Upholding the rationale of *Hudson* would require the Supreme Court not only to overrule the plurality opinion in *May*, but also to immunize custody jurisdiction from any minimum contacts inquiry, through the status exception or otherwise. Both actions would be necessary, and it is not clear that the Supreme Court is prepared to do either. Other alternatives need to be examined.

V. DUE PROCESS WITHOUT MINIMUM CONTACTS?

The UCCJA initially assumed that the absent parent could have due process protection without requiring in personam jurisdiction. The

¹⁷¹*E.g.*, *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). In *Boddie v. Connecticut*, 401 U.S. 371 (1971), the Court was concerned *only* with the opportunity to be heard because the plaintiffs were complaining that filing fees and service costs beyond their financial means denied them the opportunity to be heard.

¹⁷²See IND. CODE § 31-1-11.6-7 (1982). Other UCCJA provisions minimize the disadvantages of out-of-state litigation. See *supra* note 105.

¹⁷³IND. CODE § 31-1-11.6-7(a), (c), (d), (e), (h) (1982).

¹⁷⁴The clean hands provision, *id.* § 31-1-11.6-8, would allow the Indiana court to decline jurisdiction if the mother were guilty of child snatching, but section 8 is discretionary. If the court did take jurisdiction in spite of the mother's conduct, the resulting decree would be binding on the father. On facts similar to *Hudson's*, the father might find some relief in the Soldiers and Sailors' Civil Relief Act, but this would not apply to all absent parents. See 50 U.S.C. app. § 520 (1976).

Act adopted child-centered bases of jurisdiction and labeled jurisdiction as in rem; but it also provided that the absent parent would be bound only if he had notice and the opportunity to be heard.¹⁷⁵ Once the Supreme Court adopted minimum contacts as the due process test for all types of state court jurisdiction, in rem as well as in personam,¹⁷⁶ minimum contacts became the appropriate test for jurisdiction under the UCCJA. How else would one determine whether a state has met the Act's own due process requirement of notice and opportunity to be heard for the absent parent? The question raised by *Hudson* is whether the absent parent can be afforded due process without minimum contacts among the parent, the forum, and the litigation.¹⁷⁷

It should be clear that *May v. Anderson* is almost irrelevant to this question. It makes little difference whether minimum contacts are required to establish in personam jurisdiction over the absent parent under *May* and *Kulko*, or whether minimum contacts are required to establish in rem jurisdiction over the subject matter of custody under the UCCJA and *Shaffer*. In either event, minimum contacts are required before a binding custody determination can be made.

Designating custody jurisdiction as in rem avoids a minimum contacts inquiry only if one takes the additional step of fitting custody jurisdiction within the *Shaffer* status exception, and then only if the status exception is read as a total exemption from any minimum contacts inquiry.¹⁷⁸ These steps seem to run counter to the Supreme Court's recent concern for the procedural rights of parents,¹⁷⁹ as well as to the Court's generalized concern for the procedural rights of absent defendants.¹⁸⁰ Thus, a real possibility exists that the Supreme Court will reject the *Hudson* reasoning, even though the Court undoubtedly will want to sustain a statute as widely adopted and as well supported by sound policy as the UCCJA. The Court needs a rationale for upholding the UCCJA that is more consistent with its recent due process and parental rights holdings.

If the Court does reject the *Hudson* rationale, any other line of reasoning is likely to result in application of a minimum contacts test to custody cases. The Indiana court assumes in *Hudson* that any such application would be fatal to the UCCJA standards for custody

¹⁷⁵See *supra* notes 127-30 and accompanying text.

¹⁷⁶*Shaffer v. Heitner*, 433 U.S. 186 (1977).

¹⁷⁷See *id.* at 207 (1977).

¹⁷⁸See *supra* notes 160-66 and accompanying text.

¹⁷⁹*E.g.*, *Santosky v. Kramer*, 102 S. Ct. 1388 (1982); *Stanley v. Illinois*, 405 U.S. 645 (1972).

¹⁸⁰*E.g.*, *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Shaffer v. Heitner*, 433 U.S. 186 (1977).

jurisdiction,¹⁸¹ but the Supreme Court has already made it clear that "minimum contacts" does not mean the same thing in all contexts. In *Kulko*, the Court seemed to be applying a more stringent standard to child support cases than it applies in commercial cases.¹⁸² This has led to a fear that a higher standard will apply in all domestic relations cases,¹⁸³ including custody; however, this result does not necessarily follow. The one example the Supreme Court gives of jurisdiction falling within the status exception of *Shaffer* is also in the area of domestic relations—divorce.¹⁸⁴ Thus, domestic relations jurisdiction covers the entire spectrum of standards for minimum contacts, from the most restrictive in child support cases to the least restrictive in divorce. All that remains is to determine where custody jurisdiction best fits within that spectrum.

The Court should decline to fix the minimum contacts standard for custody jurisdiction at either end of the spectrum.¹⁸⁵ The analogy to divorce jurisdiction, necessary to the "status exception" rationale, is seriously flawed. As noted earlier, there are important differences between divorce and custody litigation.¹⁸⁶ The absent parent has a far greater interest in custody than an absent spouse has in maintaining a dead marriage.¹⁸⁷ Therefore, the absent parent needs more protection than the spouse in a divorce action.

¹⁸¹434 N.E.2d at 118. In this assumption, the court follows the lead of the drafter of the UCCJA. See Bodenheimer & Neeley-Kvarme, *supra* note 21, at 237-39, 252. An earlier Bodenheimer article, however, suggested that the child's contacts with the state might be used to satisfy the minimum contacts test. See Bodenheimer, *The Uniform Child Custody Jurisdiction Act: A Legislative Remedy for Children Caught in the Conflict of Laws*, 22 VAND. L. REV. 1207, 1233-34 (1969).

¹⁸²*Kulko v. Superior Court*, 436 U.S. 84 (1978).

¹⁸³*E.g.*, Bodenheimer & Neeley-Kvarme, *supra* note 21, at 237.

¹⁸⁴See *supra* notes 164-66 and accompanying text.

¹⁸⁵See *Pasqualone v. Pasqualone*, 63 Ohio St. 2d 96, 103, 406 N.E.2d 1121, 1127 (1980) ("Although the contacts required to allow a court to make a binding custody order may not need to be as great as those required to order a payment, more contact is required than would be required in a divorce action.").

¹⁸⁶See *supra* notes 32-36 and accompanying text.

¹⁸⁷See *supra* notes 167-69 and accompanying text. The analogy to divorce works better in cases involving termination of parental rights for abandonment, nonsupport, etc. Here the parent has failed in his responsibility toward the child, forfeiting his claim of rights in the child. See Traynor, *supra* note 166, at 661. Here, too, the child's needs are greater. A final determination will open the door to the creation of new parent-child relationships through adoption, so that the child's needs may outweigh the absent parent's rights even though the result (final termination of rights) is more drastic for the parent. "When a parent abuses or neglects a child . . . the interest of the state shifts from protection of the parent's rights to protection of the child." Bell, *supra* note 38, at 1066.

In custody disputes, however, the absent parent has not failed in his responsibilities toward the child; in fact, he is presumably seeking to assume full responsibility for the child. At any rate, failure cannot be presumed from the parent's mere absence

At the other end of the spectrum, the distinction between child custody and child support is equally clear. A child support action is essentially a dispute over money, but in a noncommercial context. As a result, the Court has found it necessary to apply a more restrictive minimum contacts standard than that used in commercial cases.¹⁸⁸ Although the child is the ultimate beneficiary of the support award, the determination of the amount of support due is not nearly so crucial to the child's welfare as the determination of custody. In addition, the nature of support litigation is such that it can be conducted more easily from a distance than custody litigation.¹⁸⁹ The child's interest in the availability of a forum for custody litigation and the state's obligation to provide such a forum are far greater in custody than in support actions. These considerations add weight to the state's claim of jurisdiction; they usually should suffice to uphold jurisdiction despite any lack of direct contacts between the defendant and the state.

With these considerations in mind, it should be no more difficult to uphold custody jurisdiction than it is to uphold jurisdiction over claims to property in a state. The state's obligation to provide a custody forum is surely greater than its obligation to provide a forum for resolving questions of title to property within the state. The Court indicated in *Shaffer* that it foresaw no problems with upholding jurisdiction over property claims, not as an "exception" to minimum contacts, but by using the presence of the property in the state as a relevant and sufficient contact.¹⁹⁰ It is surprising how easily the Court's language in *Shaffer* can be applied to custody, simply by substituting the word "child" for "property":

[T]he presence of [a child] in a State may bear on the existence of jurisdiction by providing contacts among the forum State, the defendant, and the litigation. For example, *when claims to the [child] itself are the source of the underlying controversy between the plaintiff and the defendant, it would be unusual for the State where the [child] is located not to have jurisdiction.* In such cases, the defendant's claim to [a child] located in the state would normally indicate that he expected to

from the state, without considering the reasons for the absence, which would undoubtedly be addressed when the court considers the merits of the case.

¹⁸⁸See *Kulko v. Superior Court*, 436 U.S. at 93-95 (the father's passive consent to his daughter's living in California was insufficient for jurisdiction based on "causing an effect").

¹⁸⁹Aside from the availability of interstate litigation through RURESA, cited in *Kulko*, support litigation is concerned primarily with financial information which can easily be reduced to writing and submitted to the court in the form of affidavits or depositions. In custody litigation, the presence of the contending parties, as well as other witnesses familiar with the parents' relationships with the child, is essential.

¹⁹⁰*Shaffer v. Heitner*, 433 U.S. 186, 207 (1977).

benefit from the State's protection of his interest. The State's strong interest in [protecting children] within its borders and in providing a procedure for peaceful resolution of disputes about the possession of that [child] would also support jurisdiction, as would the likelihood that important records and witnesses will be found in the State.¹⁹¹

This paraphrased statement appears to conflict with *Kulko*, in which the Court held that the mere presence of his child in California, even with the father's consent, was not a sufficient contact with the state to support in personam jurisdiction over the father in a child support action,¹⁹² but the conflict is illusory. The distinction between child support and child custody is recognized by the italicized words, "when claims to the [child] itself are the source of the underlying controversy."¹⁹³ The action in *Kulko* was for money. The claim was not to the child so the Court appropriately could apply, with even greater rigor, the requirement usually applied in commercial cases, "that there be some act by which the defendant purposefully avails [him]self of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."¹⁹⁴ However, this requirement of purposeful activity would be impossible to meet in most custody cases, and it would make little sense to apply it in the custody context. The child's best interests are the focus of custody litigation. Parenthood imposes duties and responsibilities toward the child, regardless of where the child may be found. These duties are surely more weighty than the responsibilities of an owner to his property. If ownership of property within the forum is a sufficient contact for jurisdiction over a controversy between claimants to the property, then having a child present within the forum should also be sufficient in most cases for jurisdiction over custody.

There will be some cases, however, in which the forum state will qualify for jurisdiction under the UCCJA, even though the child is not present in the state.¹⁹⁵ In a case such as *Hudson*, when jurisdic-

¹⁹¹433 U.S. at 207-08 (paraphrase) (emphasis added). In the paraphrase in the text, the state's "strong interest in protecting children within its borders" is substituted for the "strong interest in assuring the marketability of property within its borders." Surely that is a better than even exchange.

Use of the child's presence in the state as a minimum contact is suggested in Note, *Jurisdiction—Uniform Child Custody Jurisdiction Act*, 51 TEMP. L.Q. 139, 148 n.66 (1978). See also Bodenheimer, *supra* note 181, at 1233-34.

¹⁹²*Kulko v. Superior Court*, 436 U.S. 84, 94-95 (1978).

¹⁹³*Shaffer v. Heitner*, 433 U.S. 186, 207 (1977) (paraphrase).

¹⁹⁴*Kulko*, 436 U.S. at 94 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)).

¹⁹⁵For example, IND. CODE § 31-1-11.6-3(a)(1) (1982) continues home state jurisdiction for six months after removal of the children from the state. Section 3(a)(2) does not require the children's presence at all, a point which is underscored by section 3(b).

Section 3(a)(3) requires the child's presence, in addition to other factors, such as the existence of an emergency. *Id.* § 31-1-11.6-3(a)(3).

tion is claimed under UCCJA section 3(a)(2), the minimum contacts relied upon would have to be the child's "significant connection" to the state and the presence in the state of "substantial evidence" concerning the child.¹⁹⁶ In effect, the child's contacts with the state would have to be attributed to the parent. In most cases, this approach would not stretch the concept of minimum contacts too far, considering the great need of the child for a forum with authority to decide custody, the duty of the state to provide such a forum, and the protection afforded the absent parent by the notice requirement and the forum non convenience provisions of the UCCJA.¹⁹⁷ The policy reasons for stretching minimum contacts are even more compelling when the party claiming the due process-minimum contacts defense has engaged in child snatching. In such a situation, the minimum contacts defense should be denied altogether.

To the extent that the minimum contacts test is concerned with considerations of federalism,¹⁹⁸ rather than solely with defendants' rights, the near-universal adoption of the UCCJA by the states provides a sufficient answer to any suggestion that the UCCJA forum state is usurping the power of other states. In effect, the other states have consented to any "usurpation" by adopting the UCCJA.¹⁹⁹ Because nearly all of the states, as well as the Congress,²⁰⁰ now agree that the UCCJA jurisdictional standards provide the best solution to the complex problems raised by custody litigation in a federal system, there is no room for the argument that an assumption of jurisdiction under these standards violates principles of federalism, even by the few states that have not yet adopted the Act. Even the nonadopting states receive benefits from the Act in terms of interstate recognition of their decrees, provided only that those states meet the jurisdictional standards of the Act. Thus, the arguments based on federalism should weigh in favor of UCCJA jurisdiction.

¹⁹⁶*Id.* § 31-1-11.6-3(a)(2).

¹⁹⁷*Id.* § 31-1-11.6-7. "Sensible application" of the minimum contacts test should sustain jurisdiction "in all but extreme cases." Coombs, *supra* note 22, at 763-64. See also Pasqualone v. Pasqualone, 63 Ohio St. 2d 96, 102-03, 406 N.E.2d 1121, 1126 (1980); Comment, *The Due Process Dilemma of the UCCJA*, 6 OHIO N.U.L. REV. 586, 594 (1979).

¹⁹⁸The Court stresses federalism considerations in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293-94 (1980). But see Rheinstein, *The Constitutional Bases of Jurisdiction*, 22 U. CHI. L. REV. 775, 817 (1955) (arguing that due process should be concerned only with the rights of defendants); Whitten, *The Constitutional Limitations on State-Court Jurisdiction: A Historical-Interpretive Reexamination of the Full Faith and Credit and Due Process Clauses (pt. 2)*, 14 CREIGHTON L. REV. 735, 843, 846 (1981).

¹⁹⁹*Cf.* *Elkind v. Byck*, 68 Cal. 2d 453, 439 P.2d 316, 67 Cal. Rptr. 404 (1968) (holding in effect that Georgia, by adopting the Uniform Reciprocal Enforcement of Support Act, consented to the application of the law of the father's residence, California, in determining his child support obligation).

²⁰⁰See *supra* notes 106, 138-39 and accompanying text.

This is not to say that minimum contacts would exist in every custody case in which UCCJA standards are met. The minimum contacts test would be meaningless if the concept were stretched to the point where *any* contact would suffice. Therefore, it is necessary to consider what would happen if a court were to uphold a minimum contacts defense in a fact situation similar to *Hudson* but without the child-snatching element. Would the court have the power to determine custody in the father's absence? Would its decree be enforceable against the father? A literal reading of *May* would require a negative answer to both questions, but here again it is necessary to consider the special nature of custody proceedings. The forum court is faced with a child in need of a determination of custody, and the court has sufficient contacts with the child under the UCCJA standards to make the determination. The court has a duty to the child to determine custody, and a duty to the absent parent to protect his due process right to a hearing on custody. The court need not choose between two apparently conflicting duties because it can accommodate both.

The court's first and immediate duty is toward the child. Even though the child's interests would be best served by a determination made after a full hearing with both parents present,²⁰¹ when that is impossible, the court must do the best it can with the evidence at hand. The court must determine custody, and in this situation, assuming the mother to be fit, it will have little choice but to award custody to the mother. In rem jurisdiction over custody under the UCCJA should be sufficient to give the court power to issue an ex parte decree in these circumstances.

Although a due process reading of *May* seems to dictate that the father not be bound by the ex parte decree, much has changed since *May* was decided. Both the UCCJA²⁰² and the Parental Kidnapping Prevention Act²⁰³ now require that custody decrees rendered by courts meeting the UCCJA jurisdictional standards be enforced in other states, and that the absent parent be bound, if he had notice and an opportunity to be heard.²⁰⁴ It might be argued that the UCCJA opportunity to be heard requirement itself imports a minimum contacts test, but this would not contribute to solution of the problem. The purposes of the UCCJA and of the full faith and credit and due process clauses can be served by holding that the decree is prima facie entitled to enforcement in all states, even against the father, but that the father remains entitled to an *original* hearing on custody, rather than

²⁰¹See Coombs, *supra* note 22, at 750-51.

²⁰²IND. CODE § 31-1-11.6-13 (1982).

²⁰³28 U.S.C. § 1738A (Supp. V 1981).

²⁰⁴IND. CODE § 31-1-11.6-12 (1982); 28 U.S.C. § 1738A (Supp. V 1981).

a modification hearing.²⁰⁵ At this original hearing, the court would determine custody de novo based on the best interests of the child, and the father would not have the burden of proving changed circumstances.²⁰⁶ Nor would courts in other states be required to defer to the custody jurisdiction of the original forum, as UCCJA section 14 ordinarily would require.²⁰⁷ Any court qualified to decide custody under the UCCJA and able to provide a full-scale hearing with both parties present²⁰⁸ could hear and decide custody de novo.

²⁰⁵See Sampson, *What's Wrong with the UCCJA?*, 3 FAM. ADVOC., Spring 1981, at 28, 30.

In effect, the suggested treatment makes the ex parte decree effective to maintain the status quo only until the absent parent is able to secure the hearing to which he is constitutionally entitled, rather than declaring the ex parte decree void, as would be the case with other kinds of judgments (e.g., a money judgment obtained in violation of the defendant's due process rights). To protect the child, the parent has the burden of seeking redress for the violation of his rights.

²⁰⁶This approach is not to be confused with a similar rule formerly followed in Oregon. In *Williams v. Zacher*, 35 Or. App. 129, 581 P.2d 91 (1978), the Oregon Court of Appeals held that change of circumstances did not have to be shown in an Oregon hearing because the ex parte Colorado decree awarding custody to the mother had been made without notice to the father. The court also relied, however, on the fact that Colorado did not have jurisdiction under the UCCJA at the time its custody order was entered. In *Grubs v. Ross*, 47 Or. App. 631, 614 P.2d 1225 (1980), *rev'd*, 291 Or. 263, 630 P.2d 353 (1981), the same no change of circumstances rule was applied without discussing the prior (Montana) court's jurisdiction, simply on the ground that no prior adversary hearing had been held in the case. 47 Or. App. at 637, 614 P.2d at 1228. This application was much too broad, especially in view of the fact that no adversary hearing had been held because the father had removed the child from Montana before the mother filed her divorce petition. As applied by the Oregon courts, the no change in circumstances rule seriously undermined the central purpose of the UCCJA, to prevent child snatching. *See supra* notes 111-13. Both decisions resulted in awards of custody to child-snatching parents, although the *Williams* court had little choice, because both parents had engaged in child snatching. The Oregon Supreme Court recognized that child snatching "has become a serious societal problem" when it reversed *Grubs*, 291 Or. 263, ___, 630 P.2d 353, 362 (1981).

The rule advocated in this Article would allow the absent parent a de novo hearing on custody only when he has been deprived of due process, as in the *Williams* case, and not in every instance in which no adversary hearing has been held, as in the court of appeals decision in *Grubs*.

The Oregon rule was derived from *Settle v. Settle*, 276 Or. 759, 556 P.2d 962 (1976), in which the Oregon courts granted custody to a child-snatching mother who had left Indiana with the children after the divorce action had been filed and she had been awarded temporary custody by the Indiana court. Indiana clearly had jurisdiction over the subject matter and in personam jurisdiction over the mother. Therefore, its final decree awarding custody to the father was entitled to more respect under UCCJA section 14 than it received in the Oregon proceeding. *Settle* was overruled by the Oregon Supreme Court. *Grubs v. Ross*, 291 Or. 263, 630 P.2d 353 (1981).

²⁰⁷IND. CODE § 31-1-11.6-14 (1982).

²⁰⁸This limitation is necessary in order to prevent a return to pre-UCCJA anarchy. Only a bilateral order, issued after a full hearing by a court with access to all

This approach has the advantage of preserving for the absent parent his essential due process right to a *hearing* on custody, while according prima facie validity to the existing ex parte decree. As applied to the facts of *May*, it would mean that an ex parte custody decree would be enforced in a summary proceeding, even against the absent parent,²⁰⁹ at least until a full hearing could be held. If the absent parent attempted to take the child without legal proceedings, the decree could be used to return the child to the other parent, pending the hearing. Thus, the central purpose of the UCCJA and the federal statute, the prevention of child snatching, could still be effected, while some protection would be afforded to the absent parent's due process rights.

The suggested approach places the respective rights of the parents, the child, and the state in their proper order. It would not devalue the absent parent's rights by treating them as no weightier than the absent spouse's rights in a divorce case. It also would recognize both the great interest of the child in having a forum available to adjudicate custody and the overwhelming responsibility of the state to provide such a forum. In most instances, these interests of the child and the state would outweigh the parent's rights. In those few extreme cases where the absent parent's minimum contacts defense was successful, however, a hearing de novo would at least preserve for him that which due process guarantees: a meaningful opportunity for a hearing.

Holding another original custody hearing would not require the court to ignore the parent's absence from the child or any child snatching. These facts would be relevant to the merits of the custody issue. A parent's long absence may indicate a weakening of the bonds between parent and child, regardless of the reasons for the absence.²¹⁰ A parent's resort to child snatching may reflect his lack of maturity, judgment, and sensitivity to the child's needs. One would expect that the result rarely would be different in an original custody hearing than it would have been in a modification hearing, but due process does not guarantee results: it guarantees only the opportunity for a hearing.

relevant evidence, should be sufficient to override the prima facie validity of the original custody decree. Otherwise we would again be faced with battling parents, armed with conflicting ex parte custody decrees, heralding a resurgence of child snatching.

²⁰⁹This result is achieved, not by overruling or even ignoring *May*, but by the operation of the UCCJA and the federal statute. See R. CROUCH, *supra* note 107, at xi; Comment, *The Due Process Dilemma of the Uniform Child Custody Jurisdiction Act*, 6 OHIO N.U.L. REV. 586, 589 (1979) (arguing that the states in effect "overruled" *May* when they adopted the UCCJA).

²¹⁰*Cf. Unwed Father v. Unwed Mother*, 177 Ind. App. 237, 244, 379 N.E.2d 467, 472 (1978).

If this approach is followed, it makes little difference whether *May* is read as requiring in personam jurisdiction over the absent parent, or whether it is interpreted as a due process case or as a full faith and credit case. The Supreme Court will not need to repudiate the due process implications of *May*.²¹¹ If it so desires, the Court may continue to treat *May* as the first of a growing line of cases dealing with parents' due process rights. The Court may even interpret *May* as requiring in personam jurisdiction in custody cases. If it does, the notice and opportunity to be heard provisions of UCCJA sections 5 and 12 can be read as long arm provisions giving the custody court in personam jurisdiction over the absent parent.²¹² Because these sections require due process notice and an opportunity to be heard, they readily lend themselves to such an interpretation, despite the statements to the contrary in the comments.²¹³ It is the Court's longstanding policy to interpret statutes so as to avoid constitutional problems.²¹⁴ The due process problems raised by rejecting the UCCJA comments' interpretation of *May* could easily be cured by interpreting the UCCJA text as conferring in personam jurisdiction. If this interpretation were applied to the facts of *Hudson*, for example, service by mail on the father in Spain would be treated as giving the Indiana court in personam jurisdiction over the father.²¹⁵ The court then would have to apply a minimum contacts test appropriate to custody cases.

On the other hand, if the Court accepts the UCCJA's characterization of *May* as a full faith and credit case, there would be no need to alter the characterization of custody jurisdiction as in rem. In personam jurisdiction would not be required, but under *Shaffer*, a minimum contacts inquiry would still be necessary. In either event, the court's minimum contacts inquiry should be essentially the same.

²¹¹See *supra* notes 8-22 and accompanying text.

²¹²See *Wilke v. Wilke*, 73 A.D.2d 915, 423 N.Y.S.2d 249 (1980); *Coombs*, *supra* note 22, at 739, 862; *Garfield*, *supra* note 31, at 546. Early drafts of the UCCJA did contain explicit long arm provisions. See Bodenheimer, *The Uniform Child Custody Jurisdiction Act: A Legislative Remedy for Children Caught in the Conflict of Laws*, 22 VAND. L. REV. 1207, 1232-33 (1969).

This approach probably would not work where the optional notice by publication provision of UCCJA section 5 is relied on, but such notice would not be likely to satisfy due process in any case.

²¹³UNIF. CHILD CUSTODY JURISDICTION ACT §§ 12, 13 & commissioners' notes.

²¹⁴*Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

²¹⁵In this event, the existence of in personam jurisdiction would be determined differently for custody than for the other incidents of the marriage. The court's jurisdiction for purposes of property division would still be determined under IND. R. TR. P. 4.4(A)(7), but in personam jurisdiction for custody would be decided under IND. CODE. § 31-1-11.6-3 (1982). The minimum contacts tests applied would also be different for custody and for property.

VI. CONCLUSION

If *May v. Anderson* ever was as great a threat to interstate enforcement of custody decrees as its critics envisioned, it has been effectively neutralized by statute. The UCCJA now requires interstate enforcement of custody decrees by comity, and the federal statute²¹⁶ has reinforced this command with a requirement of full faith and credit. These statutes represent a consensus of both the state and federal legislatures that custody decisions made by courts having adequate contacts with the child must be readily enforceable interstate. Faced with such near-unanimity on a question of social and legal policy, the Supreme Court will have ample incentive to uphold the UCCJA's jurisdictional standards, if they can be reconciled with the Court's due process holdings.

The Supreme Court, in recent years, has expressed great concern both for parental rights and for the rights of nonresident defendants. These concerns coalesce when the nonresident defendant is a parent claiming custody of his child. The Court's due process holdings in *Shaffer* and *Kulko* require minimum contacts whenever state jurisdiction is asserted over a nonresident, whether jurisdiction is labeled in rem or in personam. The Indiana Court of Appeals sought to avoid this requirement in *In re Marriage of Hudson*, by holding that custody jurisdiction comes within the status exception in *Shaffer*. It is doubtful, however, that the Supreme Court will accept such a blanket exemption from minimum contacts inquiry for all adjudications of status.

The need for binding determinations of custody can be reconciled with the due process rights of absent parents if both the similarities and the differences between custody and other kinds of cases are taken into account. A determination of custody by a court competent to make the decision under UCCJA standards should be accorded prima facie validity in other states, provided the absent parent has been given adequate notice of the action. Due process requires, however, that the absent parent be allowed to raise the defense of lack of minimum contacts, either in the original proceeding, as in *Hudson*, or in a subsequent enforcement proceeding. If proper consideration is given to the child's need for a determination of custody and the state's duty to provide a forum competent to make the determination, this defense will rarely be successful.

When the minimum contacts defense is successful, it will lead, in effect, to the conclusion that the absent parent was deprived of his due process opportunity for a hearing on custody; however, the result should not be to invalidate the ex parte custody decree. The

²¹⁶Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A (Supp. V 1981).

denial of the parent's opportunity for hearing can be cured by granting him a hearing. This new hearing would not be a modification hearing, at which the absent parent would have the burden of establishing a change of circumstances, but an original hearing in which the determination of custody would be made de novo, based upon the best interests of the child. The hearing can be held in any state that meets the UCCJA standards and that can obtain participation by both spouses, without the usual deference to the jurisdiction of the original custody court.

This approach would serve not only the interests of the absent parent, but those of the child as well. A full hearing at which both parents are present is necessary to enable a court to determine the best interests of the child. There is no need to devalue the absent parent's rights or undercut the due process holdings of *Shaffer* and *Kulko*, in order to secure automatic enforcement of all ex parte custody decrees. An appropriate minimum contacts test, properly applied, need imperil neither the UCCJA nor the welfare of the child.

