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Child Custody and Support: Frequently Asked Questions

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Summary

Under the U.S. Constitution, Congress has little direct authority to legislate in the field of domestic relations. Generally, state policy guides these decisions. Despite the lack of direct authority to legislate domestic relations issues, Congress continues to enact federal laws that indirectly affect family law questions concerning child custody and support. This report answers questions frequently asked regarding the interplay between federal and state laws governing these areas.

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Child Custody

If parents separate and one parent moves out-of-state with children before divorce proceedings begin, where will child custody issues be decided?

A court handling an interstate child custody dispute must consider whether it has jurisdiction to decide the custody case. Three laws provide the answer as to whether a particular court has jurisdiction: the Parental Kidnapping Prevention Act [PKPA],¹ the Uniform Child Jurisdiction and Enforcement Act [UCJEA]² and the Uniform Child Custody Jurisdiction Act [UCCJA],³ which has been enacted in some form in all fifty states and the District of Columbia.⁴

The PKPA gives priority to the child's home state (the state where the child lived with at least one parent for six months before the custody petition was filed).⁵ If one parent moves with the child to live in a new state, the original state continues to be the home state for an additional six months after the move. The child need not be physically present in the original state for the child custody proceeding to be initiated there by the parent who remained behind.

Can a custody order be modified?

Yes. In all states, custody orders can be modified by a court to further the best interests of the child.⁶ Usually, the parent requesting the modification must convince a judge that a substantial change in circumstances affecting the child's welfare has occurred since the original custody order was entered.⁷

If one parent takes a child to another state and tries to modify custody there, which state will decide the case?

Under the PKPA, the court that issued the initial custody decree has "continuing jurisdiction" over custody matters, provided that the first state meets three preconditions: (1) it entered its initial custody order in accordance with the Parental Kidnapping Prevention Act; (2) the child or

¹ 28 U.S.C. §1738A.

² 9 U.L.A. 649 (1999 & Supp. 2001). The UCCJA and UCCJEA are only effective to the extent that states adopt them. The UCCJEA has been adopted in some form in 27 states with pending legislation in nine other states.

³ 9 U.L.A. pt. 1, 262-63 (1999 & Supp. 2001).

⁴ For background information on the relationship between federal and state law, see CRS Report RL31201, *Family Law: Congress's Authority to Legislate on Domestic Relations Questions*, by Alison M. Smith.

⁵ It must be noted that the PKPA does not confer jurisdiction on the federal courts. This act merely delineates which jurisdiction may modify child support and custody orders. As such, the PKPA is inapplicable to intrastate disputes and only relevant in interstate disputes when the jurisdictions have conflicting laws. The jurisdictional guidelines set forth in the PKPA supersede any conflicting state law. As such, parents are bound by state court decisions regarding custody, visitation and support.

⁶ Numerous factors converge and influence this standard, including the home environment, stability of the parents, the time a parent and child spend together, the quality of the relationship between parent and child, sexual conduct and criminal background of the parents, as well as other factors the court deems appropriate.

⁷ See, e.g., *Ward v. Ward*, 611 N.E.2d 167 (Ind. App. 1993); *Blotske v. Leidholm*, 487 N.W.2d 607 (N.D. 1992). But see *McMillen v. McMillen*, 602 A.2d 845 (Pa. 1992).

one parent continues to live in the state; and (3) the state's own law allows continuing jurisdiction.⁸

If these conditions are met, a parent living in another state who wants to modify the initial custody arrangement must file the modification petition in the first state. The UCCJA provides that dismissal is mandatory where the noncustodial parent violates an existing custody order by refusing to return the child to the custodial parent at the end of the child's period of visitation and then asks the out-of-state court to modify custody.⁹

Neither the PKPA, UCJEA nor the UCCJA totally precludes the second state from ever modifying the initial custody order. The PKPA permits the second state to modify the initial custody provision if: (1) the second state has jurisdiction to make a child custody determination and (2) the first state no longer has jurisdiction or has declined to exercise jurisdiction.¹⁰

What recourse does a left-behind parent have in an interstate custody dispute?

The remedies available under the UCJEA and UCCJA are unavailing if the left-behind parent is unable to find the abducting parent and the child. For this reason, the PKPA makes the federal Parent Locator Service available to assist local police in locating the abductor. The PKPA also provides that any state that treats parental kidnapping as a felony may enlist the F.B.I.'s assistance under the federal Fugitive Felon Act in locating the abducting parent, provided he or she has left the state.¹¹

Is it a crime for a parent to kidnap a child?

In many states, parental kidnapping (also known as interference with parental custody) is a felony, depending upon the circumstances.¹² In others, it is a felony if the child is taken from the state.¹³ However, in most states, there can be no kidnapping unless there is an existing custody order that the parent has intentionally violated.

Because many parental kidnappings take place before a final custody decree is entered, a few states have extended criminal sanctions to kidnappings that occur before the final custody decree.¹⁴ Several states also permit the court to assess expenses incurred in returning the child against any person convicted of violating the state's criminal custodial interference law.¹⁵

⁸ 28 U.S.C. §1738A(c).

⁹ UCCJA §8(b).

¹⁰ 28 U.S.C. §1738(h).

¹¹ 18 U.S.C. §1073.

¹² See e.g., Mo. Stat. §565.153 (classifying parental kidnapping as a class D felony); Conn. Gen. Stat §53a-97 (classifying custodial interference as a class D felony if the child or person is removed from the state).

¹³ See e.g., Mo. Stat. 565.150 (classifying interference with custody as a class D felony if a person is taken from the state).

¹⁴ See, e.g., Tex. Penal Code Ann. §25.03(a)(2).

¹⁵ Minn. Stat. Ann. §609.26, subd. 4; Ind. Code §35-42-3-4(e). See *Vanness v. State*, 605 N.E.2d 777 (Ind. App. 1992).

Parents, although they are subject to the PKPA, remain exempt from criminal sanctions under the general federal kidnapping statute.¹⁶ International parental kidnapping is a federal crime, punishable by a fine and/or imprisonment for up to three years.¹⁷

What recourse does a parent have if the other parent abducts the children and takes them to another country?

Once the child has been located, a possible solution to the abduction may be provided by the Hague Convention on the Civil Aspects of International Child Abduction.¹⁸ The Convention is in force in approximately 40 countries, including the United States,¹⁹ Mexico, Canada, and most of Europe. The countries that have signed the Hague Convention have agreed that a child who is habitually a resident in one country and who is removed to or retained in another country in breach of the left-behind parent's custody rights must be promptly returned to the country of the child's habitual residence.²⁰ However, the Convention is inapplicable if the child has been abducted to a country that has not signed the Convention or the child is sixteen or older.

Although there need not be a custody decree to invoke the Convention, the left-behind parent must be able to prove that he or she is exercising a "right of custody"²¹ at the time of abduction and that he or she had not given permission for the child to be removed or to be retained in the foreign country beyond a specified, agreed-upon time. In the absence of a formal custody order, custodial rights are determined by state law.

It is important to remember that a Hague Convention proceeding is not a custody case. At a hearing under the Hague Convention, the judge's job is to determine only where the custody hearing should take place, not who is entitled to custody of the child.²² The goal of the Hague Convention is the child's swift return to his or her original country where the custody dispute can then be resolved, if necessary, in that country's courts.

Child Support

Who is obliged to pay child support?

Parents are obliged to pay child support whether or not they were ever married. Parents also have an obligation to support all of their children, not just the children who reside with them. Thus,

¹⁶ 18 U.S.C. §1201(a).

¹⁷ 18 U.S.C. §1204.

¹⁸ For additional information on this topic, see CRS Report RS21261, *International Parental Child Abductions*, by Alison M. Smith.

¹⁹ Congress passed the International Child Abduction Remedies Act in 1988 to implement the Convention. See 42 U.S.C. 11601 et seq.

²⁰ The term *habitual residence* is left undefined by the Hague Convention. Courts have struggled to define it. See *Friedrich v. Friedrich*, 983 F.2d 1396 (6th Cir. 1993); *Levesque v. Levesque*, 816 F. Supp. 662 (D. Kan. 1993).

²¹ The Convention defines right of custody as including "rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence." See Hague Convention, art. 5(a), 19 I.L.M. 1501 (1980). A left-behind parent who lacks physical custody of the child may nonetheless have a custody right if there is an outstanding custody order requiring that parent to consent to a relocation of the child. But see *Viragh v. Foldes*, 612 N.E.2d 241 (Mass. 1993)(visitation is not a right of custody).

²² *Tahan v. Duquette*, 259 N.J. Super. 328, 613 A.2d 486 (1992).

although the noncustodial parent is married to someone else or supporting other children, he or she has a continuing obligation to support the children of a previous marriage or relationship.²³

Can child support be withheld from an obligated parent's paycheck?

Yes. As of January 1, 1994, the Family Support Act of 1988 requires that all new child support orders provide for automatically withholding child support payments from the obligated parent's paycheck, regardless of whether or not support payments are late.²⁴

Federal law permits an exception to immediate withholding if the court finds good cause or if the parents both agree to another arrangement.²⁵ However, a parent who falls at least one month behind in support payments is subject to withholding even in these cases.²⁶

Withholding may be used to collect current support payments as well as arrearages. States have the option, under federal law, to apply withholding to income other than wages and to order withholding from bonuses, commissions, retirement benefits, rental or interest income, or unemployment compensation benefits.²⁷

May a child support order be modified?

Yes. States permit a child support order to be modified upward or downward based on proof of a substantial change in the parents' financial circumstances or the child's needs. In addition, federal law requires that child support orders be reviewed every three years unless neither parent requests a review or, in temporary assistance for needy families [TANF] cases, if the review would not be in the child's best interest.²⁸

However, child support orders may only be modified prospectively. The 1986 Bradley amendment to the federal child support laws effectively bars retroactive modification that would wipe out past-due support obligations.²⁹

Are there criminal penalties for failure to pay child support?

Yes. A parent who willfully refuses to comply with a lawful order of child support, though able to do so, may be held in contempt of court and jailed or fined for a fixed period of time as punishment or for an indefinite period until the child support is paid.³⁰

²³ See generally, Roger J.R. Levesque, *Targeting "Deadbeat" Dads: The Problem With The Direction of Welfare*, 15 *HAMLIN J. PUB. L. & POL'Y* 1, 10-11 (1994)(discussing the financial responsibilities of custodial and noncustodial parents).

²⁴ 42 U.S.C. §666(a)(1) and 666(b) and 45 C.F.R. §303.100.

²⁵ 42 U.S.C. §666(a)(8)(B)(i); 42 U.S.C. §666(b)(3).

²⁶ 42 U.S.C. §666(b)(3)(B).

²⁷ 42 U.S.C. §666(b)(8)(giving states the option of extending withholding to income other than wages); 45 C.F.R. §302.65 (withholding of unemployment compensation). Also, passports may be denied, revoked, or restricted for individuals certified by a state agency as owing more than \$2,500 in past due support. 42 U.S.C. 652(k) and 22 C.F.R §§51.70(a)(8), 51.72(a) and 51.80(a)(2). The Deficit Reduction Act of 2005 (P.L. 109-171) reduced the arrearage amount from \$5,000 to \$2,500.

²⁸ 42 U.S.C. §666(a)(10)(A)(i).

²⁹ 42 U.S.C. §666(a)(9).

³⁰ See e.g. N.Y. Fam. Ct. §454 (listing possible punishments including suspension of driving privileges, imprisonment

for a term not to exceed six months). For further information, see CRS Report R42389, *Child Support Enforcement: Incarceration As the Last Resort Penalty For Nonpayment of Support*, by Carmen Solomon-Fears, Alison M. Smith, and Carla Berry.

As of October 1992, failure to pay child support in the interstate context has become a federal crime.³¹ An out-of-state parent who has willfully failed to pay court-ordered child support for at least one year or who is at least \$5,000 in arrears may be criminally prosecuted by the local United States attorney. For a first offense, the penalties include a fine and/or a prison sentence of up to six months in prison; for a second offense, the punishment is a fine and/or up to two years in jail.

What if the custodial parent does not know where to find the noncustodial parent?

A custodial parent who needs to obtain or enforce a child support order but who cannot find the noncustodial parent may enlist the assistance of a child support enforcement agency run by the state or local government, known as a IV-D agency.³² This assistance is available to all custodial parents, regardless of whether or not they receive public assistance.³³

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³¹ 18 U.S.C. §228.

³² These state and local agencies are known as IV-D agencies in reference to Title IV-D of the Social Security Act, which governs state enforcement of child support for the recipients of public assistance and which requires states to assist custodial parents in locating support obligors and in obtaining and enforcing support orders.

³³ Custodial parents who receive public assistance or Medicaid can get this help for free. Others who want help may be asked to pay an application fee (which may not exceed \$25) as well as a small additional charge if the state needs to use the Federal Parent Locator Service for help in finding the obligor. *See* 45 C.F.R. §302.33 (availability of IV-D services to individuals not receiving public assistance).