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VAWA, PKPA and the UCCJEA: In search of nationwide enforcement of custody components of protection orders.

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The purpose of this article is to familiarize the family law practitioner with potential nonenforceability of custody provisions of some domestic violence protection orders. For example, a Family Abuse Prevention Act (FAPA) restraining order issued pursuant to ORS 107.700, or a similar order issued in another state, often contains a provision to ensure the safety of the party requesting the order, and a provision regarding custody and parenting time of minor children of the petitioner.

As discussed below, provisions relating to the personal safety of the petitioner have been granted the potential of nationwide enforcement through the Violence Against Women Act (VAWA). The status of the custody provision within the protection order, however, is murky. To ensure enforcement of the custody provisions in a foreign jurisdiction, a careful practitioner should request language in the restraining order necessary to meet the requirements of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) and the federal Parental Kidnapping Prevention Act (PKPA). By including language of compliance with both the UCCJEA and the PKPA, the entire protection order can benefit from full faith and credit provisions, and as a result the petitioner receives enforcement of both the personal safety and the custody orders in a subsequent jurisdiction.

This article will address the questions of when a protection order is entitled to enforcement by a non-issuing state, and when a custody provision is within a protection order entitled to enforcement by a non-issuing state.

Is the protection order entitled to enforcement by a non-issuing state?

President Clinton signed VAWA into law in 1994. One of the most important aspects of this significant legislation was the full faith and credit provision establishing nationwide enforcement of civil and criminal protection orders. States, Indian tribes and U.S. territories are now directed to honor "valid" protection orders issued in other jurisdictions, and to treat those orders as if they were their own. VAWA, 18 USC s. 2265. In order for a protection order to be valid under VAWA, and

therefore entitled to full faith and credit, the issuing court must have had *subject matter jurisdiction* over the case or controversy, and *personal jurisdiction* over the parties. In addition, the issuing court must have given the defendant *reasonable notice and an opportunity to be heard before* entering the order. However, in the case of *ex-parte orders*, notice and opportunity to be heard must be given in the time required by state law, and within a reasonable time *after* the order is issued, sufficient to protect the defendant's due process rights.

As a result of VAWA, if the issuing court had appropriate jurisdiction over the subject matter and the parties, and notice and opportunity to be heard was afforded respondent (either prior to entry of the order or after entry of an *ex parte* order), the protection provisions are entitled to enforcement in any other jurisdiction.

In Oregon, the registration of foreign judgments and orders is regulated by the Uniform Enforcement of Foreign Judgments Act (UEFJA) found in ORS Chapter 24. Under the UEFJA, a *foreign judgment* is "any judgment, decree or order of a court of the United States or of any other court which is entitled to full faith and credit in this state." ORS 24.105. A foreign restraining order can be registered pursuant to ORS 24.190. However, except as otherwise provided, *immediately* upon arrival in Oregon of a party protected by a foreign restraining order, the order is enforceable as an Oregon order without the necessity of filing or registration in an Oregon court, and continues to be enforceable without any further action. ORS 24.190(2)(a). Similar to the limitations on full faith and credit under the VAWA statute, a restraining order will not be enforceable as an Oregon order if entered by a court without subject matter jurisdiction or jurisdiction over the person restrained, or entered without reasonable notice and opportunity for the party restrained to be heard *under the laws of the issuing jurisdiction*. ORS 24.190(2)(b)(A).

Is the custody provision within the protection order entitled to enforcement in a non-issuing state?

The full faith and credit provision of VAWA applies to "... any injunction or other order, issued for the purpose of preventing violent or threatening acts or harassment against, or contact or communication with or physical proximity to another person, including temporary and final protection orders issued by civil and criminal courts (other than support or child custody orders)" VAWA 18 USC s 2266, emphasis added. As a result of the highlighted exception, the status of a custody order embedded within a protection order remains a subject of debate in legal and scholarly circles. Until there is a clear answer, one way for the practitioner to ensure foreign enforceability of the custody order, is to utilize those provisions of the UCCJEA and the PKPA that govern full faith and credit of custody determinations. The practitioner should look to the PKPA and UCCJEA, rather than VAWA, as the final authorities on interstate enforcement of custody orders within a protection order.

The UCCJEA (ORS 109.701-834) provides that if all jurisdictional requirements are met, any initial child custody determinations bind all parties with notice of the custody action. This specifically **includes** child custody provisions in orders of protection. UCCJEA §102(4), 205 cmt. Notice and opportunity to be heard must be given **before** a child custody determination is made under the UCCJEA §102(4), 205(a). A child custody order is entitled to interstate enforcement and nonmodification under the UCCJEA only if there has been notice and an opportunity to be heard. UCCJEA §102(4), 205 cmt. Notice, in a way that is reasonably likely to give actual notice, can be given to any person outside the state under either the issuing state or the other state's notice laws. UCCJEA §108(a).

The drafters of the UCCJEA noted that a temporary *ex parte* custody order may be enforceable, against due process objections for a short period of time, if issued as a temporary restraining order to protect a child from harm. UCCJEA §102(4), 205 cmt. This does not resolve the situation where an adult victim of domestic violence seeks an *ex parte* protection order, valid under VAWA, that contains a custody provision.

Of further importance regarding enforceability of foreign custody orders is the PKPA, enacted by Congress in 1980. 28 U.S.C. s 1738A (1994). This legislation forced every state to give full faith and credit to any custody decree, no matter which state rendered the decision, provided it met due process and the PKPA jurisdictional requirements. To ensure due process, the PKPA requires that "... **before** a child custody or visitation determination is made, reasonable notice and opportunity to be heard shall be given to the contestants . . ." 28 USC s 1738A(e).

It has been suggested that one way to resolve the problem of enforceability of custody provisions within protection orders, is for the PKPA to be amended to allow for a "domestic violence exception according full faith and credit to ex-parte temporary custody provisions within protection orders, where there will be notice and a reasonable opportunity to be heard." Uniform Child-Custody Jurisdiction and Enforcement Act: Affording Enhanced Protection for Victims of Domestic Violence and Their Children, 50 *Juvenile and Family Court Journal* 55 (1999). This language would then bring the PKPA and VAWA into agreement on enforceability of orders, when notice and opportunity to be heard will be given after the order is entered *ex parte*.

Oregon case law has addressed the role of the PKPA in state jurisdictional questions. In *re Hayes*, 160 Or.App. 24 (1999), the Court of Appeals clarified that the PKPA does not control state court subject matter jurisdiction of custody matters. Rather, the PKPA controls "only whether one state must enforce or may modify another state's custody decree." *Id* at 37. Furthermore, "the PKPA does not determine whether Oregon's courts have jurisdiction to enter a custody decree. That issue is controlled only by Oregon law." *Id* at 37, 38.

Under the UCCJEA and the PKPA, if a hearing is held on a restraining order petition, and the respondent is given notice and an opportunity to be heard prior to entry of the custody provision of the order, and if all other jurisdictional requirements are met, that custody provision would be entitled to full faith and credit along with the protection provisions.

To further ensure that custody provisions within protection orders will benefit from full faith and credit protections, the following language should be included within a protective order:

A. The defendant was given reasonable notice and opportunity to be heard sufficient to protect the defendant's right to due process before this order was issued; or if the order was issued ex-parte, the court ordered that the defendant be given reasonable notice and opportunity to be heard within the time required by law of this jurisdiction, and in any event within a reasonable time after the order was issued, sufficient to protect the defendant's due process rights;

B. The order was issued in accordance with the requirements of the UCCJA or the UCCJEA of this state/territory and consistent with the strictures of the federal PKPA.

As mentioned above, a foreign protection order should be registered in accordance with the UEFJA, ORS 24.105-24.175. When a foreign judgment contains a custody order, a separate registration under the UCCJEA is necessary, at least to comply with notice requirements. ORS 24.115 has a five-day notice provision, while ORS 109.787 has a 21-day provision. A foreign protection order that contains a custody order should therefore be registered under both the UEFJA and the UCCJEA. Proper registration and recognition is essential for successful enforcement of a foreign judgment. See *Dagan and Dagan*, 103 Or App 453, 456 (1990).

Clearly, foreign enforcement of custody components of protective orders requires practitioners to remain vigilant to the intricacies and interplay of VAWA, the PKPA and the UCCJEA. By utilizing the full faith and credit protections available, a protective order can be structured to contain custody provisions that will themselves be afforded full faith and credit. However, if a custody order is entered that does not comply with UCCJEA and PKPA provisions, it is possible the petitioner may find herself with a custody order not enforceable in another state, or subject to attack by respondent in subsequent proceedings.

● **Scenario # 1**

Juliet and Romeo live in Minnesota. They have no children. Juliet flees to Oregon and receives, *ex parte*, an order of protection.

Continued on page 3 - VAWA

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The purpose of this Newsletter is to provide information on current developments in the law. Attorneys using information in this publication for dealing with legal matters should also research original sources and other authorities. The opinions and recommendations expressed are the author's own and do not necessarily reflect the views of the Family Law Section or the Oregon State Bar.

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Publication Deadlines

The following deadlines apply if a member wants an announcement or letter included in the newsletter.

<u>Deadline</u>	<u>Issue</u>
January 1, 2005	February 2005
March 1, 2005	April 2005

Annual Conference
October 20, 21 and 22, 2005

Result #1

Juliet's protection order will be entitled to national enforcement if it complies with VAWA requirements of notice and opportunity for Romeo to be heard after the order is granted.

● **Scenario #2**

Maria and Tony live in Minnesota. They have one child. Maria flees to Oregon and receives, ex parte, an order of protection including a determination that she be granted custody of the minor child.

Result #2

The personal safety orders, if they comply with VAWA, will be entitled to nationwide enforcement. However, with no language indicating Tony was given UCCJEA and PKPA notice and opportunity to be heard prior to the order being entered, it is possible he will be able to defeat interjurisdictional enforcement of the custody provision.

● **Scenario #3**

Maria has now been in Oregon for six months. No custody order had been entered prior to her requesting the order of protection, and Tony has not sought a custody determination in a court that would have jurisdiction.

Result #3

The custody order becomes a final order because Oregon has become the "home state" (ORS 109.741[1][a] and 109.704[7]) of the child.

● **Scenario #4**

Pheobe and Joey lived together in Minnesota. They have one child. Pheobe flees with child to Oregon and seeks, ex parte, an order of protection and custody order. An order of protection with a custody determination is entered in Pheobe's favor. The custody order includes language stating notice requirements have been met under UCCJEA and PKPA. Joey received notice and opportunity to respond prior to the order being entered.

Result #4

Pheobe has a protective order AND a custody order entitled to nationwide enforcement under the full faith and credit provisions of VAWA and PKPA.

● **Scenario #5**

Joan and Bill live in New York. They have one child. Joan receives a protection order against Bill in New York in compliance with VAWA. Joan then flees to Oregon and requests that the court exercise temporary emergency jurisdiction and enter a custody order in her favor.

Result #5

In deciding whether or not to exercise emergency jurisdiction, the court may not relitigate the issues of abuse determined at the protective order hearing in New York. A finding that a child is present in Oregon, and that a parent is subject to or threatened with mistreatment or abuse, will allow the court to immediately grant a custody order in Joan's favor.

There are a number of situations, however, where the answers are far from clear and the outcomes much more unpredictable. For example:

● **Scenario #6**

George and Laura are the unmarried parents of a child and live in separate households in Oregon. George removes the child, harms the mother and goes to Clark County, Washington. Laura obtains an Oregon protective order with a custody component. The FAPA form includes UCCJEA and PKPA notice language within the protective order, and George does not get notice prior to entry of the order. Can Laura recover custody of the child under ORS 107.732 by enforcing the FAPA in Clark County with the aid of the Clarke County Sheriff?

Possible Result #6

Because the FAPA complies with Oregon law and VAWA, the protection order is valid, but because no notice was given under the PKPA regarding the custody award, it is not enforceable in Clark County, Washington. This example illuminates the need seen by many to bring VAWA and PKPA into conformance on ex parte order enforceability.