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International Conflicts In Child Custody: United States v. Saudi Arabia

I. INTRODUCTION

The problem of child custody confronts many divorcing couples with children. When the parents' nationalities differ, the wishes of one to return to his or her own country exacerbates the problem. One parent then faces the probability of never or only rarely seeing the child again. This type of situation increases the importance of an actual custody decree, spelling out the rights and obligations of each parent. Even when the custody laws of the two countries are similar, each parent usually anticipates a more favorable decree from his or her own country. But when the laws of the two countries vary widely, the custody decision may openly discriminate against one parent.

This Comment compares the widely divergent systems of child custody law of the United States and Saudi Arabia. The discussion focuses only on the major issues involved, including findings on the criteria used for custody in both countries and the recognition of foreign custody judgments by the United States. The findings are then applied to a specific set of facts.¹ Finally, this Comment presents a proposal for dealing with this type of case.²

II. ISLAMIC LAW OF SAUDI ARABIA

The *shari'a*, the divine law of Islam, stems from several sources: the word of God in the *Quran*, the law given to Islam by the Prophet Muhammad, known as the *sunna*, and the law formed by the consensus of scholars in the community, known as the *ijma'*.³ "The word *shari'a* literally means 'the path to follow' and it is the name given to

1. See *infra* notes 173-78 and accompanying text.

2. Although collateral issues such as the validity of an Islamic *talaq* divorce in the United States and international child abduction are touched upon, they are not explored in depth. Nor are child support or visitation rights discussed.

The analysis is written from the point of view of a United States woman who has returned from Saudi Arabia with her child, because the conflict would most likely not arise if a United States man were involved. Given the built-in bias of the traditional Islamic legal system, men receive deferential treatment. This Comment does not intend to suggest that women are inherently better caretakers than men; any of the arguments herein stated are equally applicable to men who have been discriminated against in another country's application of child custody law.

3. Yamani, *The Eternal Shari'a*, 12 N.Y.U. J. INT'L L. & POL. 206-07 (1979).

the all-embracing legal system that regulates the lives of Muslims everywhere."⁴ As a traditional Islamic country, Saudi Arabia construes the *shari'a* narrowly, obligating every Muslim to follow the binding authority of the *shari'a*.⁵ The *shari'a* does not simply govern religious thought and devotions, it applies to all things in everyday life as the foundation of life for all Muslims.⁶

The four historical Sunni schools of Islamic judicial thought still remain as the main vehicles for contemporary interpretation of Islamic law.⁷ These schools are the Shafi'i, Hanafi, Hanbali and Maliki.⁸ Although the schools resemble one another in their use of analogy and community consensus as methods of interpretation, they differ as to how much discretion a judge has in using personal interpretation.⁹ The Hanbali school, the most conservative of the four, governs Saudi Arabia.¹⁰ The King's declarations and those of his appointed ministers supplement the Hanbali school's pronouncements.¹¹ The Hanbali school's view that public interest plays a large part in the interpretation of the *shari'a* distinguishes it from the other Sunni schools.¹² The Hanbali jurist searches for the particular public interest involved in the case, balancing that interest against the welfare of the individual in the community in this life and in the next.¹³

The *shari'a* court system in Saudi Arabia consists of two lower courts and two Courts of Appeal.¹⁴ The Supreme Judicial Council oversees those courts and also oversees the Ministry of Justice.¹⁵ Additional semi-judicial courts enforce the regulations set out by the King and his ministers.¹⁶ The morals or religious police, enforce

4. *Id.*

5. *Id.* at 206.

6. Asherman, *Doing Business in Saudi Arabia: The Contemporary Application of Islamic Law*, 16 INT'L LAW. 321, 322-25 (1978).

7. Glauber, *Religious Law in Changing Societies: Interpreting Islamic and Jewish Law*, 12 N.Y.U. J. INT'L L. & POL. 201 (1979).

8. *Id.*

9. *Id.*

10. Comment, *Islamic Law and Modern Government: Saudi Arabia Supplements the Shari'a to Regulate Development*, COLUM. J. TRANSNAT'L L. 413, 421-22 (1979).

11. 2 A. PEASLEE, CONSTITUTIONS OF NATIONS 1090 (rev. 3d ed. 1966).

12. Yamani, *supra* note 3, at 208.

13. *Id.* This appears to be similar to the way in which a United States judge balances common law interests, but the United States judge would not consider the after-life. In fact, the First Amendment prohibits it.

14. Comment, *supra* note 10, at 440.

15. *Id.* at 441.

16. Asherman, *supra* note 6, at 328. As these regulations are given by man and not God, they are not considered law, but only lesser proclamations. Comment, *supra* note 10, at 438.

those laws relating to religious devotions, such as matters of custom and dress for women.¹⁷ Due to these overlapping systems, and because of the oral tradition of Saudi Arabian law, black-letter law practically eludes determination.¹⁸ A court in a foreign country could encounter great difficulty applying Saudi law in many contexts. But because Saudi Arabian family law has escaped modern reform,¹⁹ a foreign court could readily ascertain what law to apply in a family law context.

A. Islamic Family Law

Saudi Arabia adheres to the classical Islamic family law,²⁰ which, compared to other areas of law, has remained unaffected by modern Western legal codes.²¹ Although some Islamic countries have attempted to reform the general area of family law,²² the laws regarding child custody remain essentially unchanged. Unlike the United States, an Islamic divorce does not contain a child custody determination.

Saudi Arabia recognizes three kinds of divorce. *Talaq* divorce, the first and most traditional kind, consists of a repudiation of the wife by her husband when he says "I divorce thee" three times.²³ He may pronounce one *talaq* and then wait three months to pronounce the other two, or he may pronounce one *talaq* each month for three months before the divorce becomes final.²⁴ In this way, the husband has a chance to reconsider before he actually divorces his wife.²⁵ Another form of *talaq* divorce occurs when the husband says all three *talaqs* at the same time, thus ending the marriage immediately.²⁶

17. R. NYROP, AREA HANDBOOK FOR SAUDI ARABIA 125 (3d ed. 1977).

18. Asherman, *supra* note 6, at 322-25.

19. "[T]here are a number of countries in which there has been no effort to reform or codify traditional law as it applies to women and the family. . . . Saudi Arabia . . . [is] among the nations which up to 1972 had not reformed or codified any aspect of personal or family law." White, *Legal Reform as an Indicator of Women's Status in Muslim Nations*, in WOMEN IN THE MUSLIM WORLD 54 (L. Beck & N. Keddie eds. 1978).

20. T. MAHMOOD, FAMILY LAW REFORM IN THE MUSLIM WORLD 3 (1972).

21. J. ESPOSITO, WOMEN IN MUSLIM FAMILY LAW x (1982); Gottheil, *Introductory Note*, in A. SHUKRI, MUHAMMEDAN LAW OF MARRIAGE AND DIVORCE (1966).

22. See generally J. ESPOSITO, *supra* note 21; White, *supra* note 19, at 54-61.

23. A. SHUKRI, *supra* note 21, at 94.

24. Coulson & Hinchcliffe, *Women and Law Reform in Contemporary Islam*, in WOMEN IN THE MUSLIM WORLD, *supra* note 19, at 42-43.

25. *Id.* at 43.

26. *Id.*

Most Muslims frown upon this type of *talaq*, but accept it as legal.²⁷ In fact, Muslim men use this form more than any other.²⁸ It not only irrevocably dissolves the marriage, it also makes remarriage between the parties illegal until the woman has married another man, consummated that marriage, and divorced again.²⁹

With the second kind of divorce, the *kuhl* divorce, the parties mutually agree to divorce.³⁰ With the third and most modern kind of divorce, one party obtains a divorce by judicial decree.³¹ Although either party can obtain a judicial divorce, usually the wife seeks one because, unlike traditional divorce, women are given the power to unilaterally divorce their husbands.³² This judicial form gives the wives a power they formerly did not have under the *talaq* form.³³ Yet a woman would be unlikely to seek a judicial divorce without the support and encouragement of the men on her side of the family,³⁴ which is not always given.³⁵ None of these types of divorce contains a separate child custody decree. Neither does the type of divorce affect what custody laws the Islamic system applies.

A foreordained set of laws, which Muslims follow as much by religious custom as by legal enforcement, determines custody. Rigidity characterizes the traditional Islamic law relating to child custody.³⁶ Every Sunni school agrees that a divorced or widowed mother has custody of her children for a limited period of time.³⁷ The time period differs from school to school. In Saudi Arabia, Hanbali law dictates that a divorced mother has the right to custody of her son until he reaches seven years of age.³⁸ The father takes custody of the

27. *Id.*

28. *Id.*

29. *Id.*

30. See generally A. SHUKRI, *supra* note 21.

31. *Id.*

32. *Id.*

33. *Id.*

34. Fernea & Bezirgan, *Introduction*, in MIDDLE EASTERN MUSLIM WOMEN SPEAK xxiv (1977).

35. *Id.*

In Marrakech in 1972, for example, the family of a deserted wife was unwilling to take legal steps against the missing husband because he was a first cousin, and such public proceedings as a law case were seen as bad for the reputation of the entire family. This (the reputation of the group) was a more important consideration than the plight of a single member of the group, in this case the deserted wife.

Id.

36. Coulson & Hinchcliffe, *supra* note 24, at 44.

37. *Id.* at 44-45.

38. J. ESPOSITO, *supra* note 21, at 37; see also M. KHAN BAHADUR, II TAGORE LAW

boy at age seven based upon the traditional Islamic ideal that a boy no longer needs the assistance of women after that age.³⁹ By that age he should be able to dress himself, feed himself and know basic hygiene.⁴⁰ The father then takes charge to ensure the boy's proper religious upbringing. The divorced mother also has custody of her daughter until she reaches nine years of age or puberty, whichever comes first.⁴¹ The father obtains physical custody of his daughter at age nine or upon puberty because she has then reached the age of carnal desire.⁴² Traditionally, her father can better supervise her at that age than her mother.⁴³ When the child reaches the predetermined age, the father or his nearest male relative takes physical custody.⁴⁴

Even while the mother has physical custody of the child, Islamic law considers the father the child's legal guardian.⁴⁵ He has responsibility for the child's education and maintenance.⁴⁶ He can also contract the child's marriage without the mother's consent.⁴⁷ The mother can also lose custody simply by marrying a man not related to the child within a proscribed degree or if she becomes physically or morally unfit.⁴⁸ Saudi Arabia steadfastly adheres to these traditional laws.⁴⁹

LECTURES 1891-92, MAHOMEDAN LAW RELATING TO MARRIAGE, DOWER, DIVORCE, LEGITIMACY, AND GUARDIANSHIP OF MINORS, ACCORDING TO THE SOONEES §§ 1551, 1542 (1898) [hereinafter TAGORE LECTURES].

39. TAGORE LECTURES, *supra* note 38, § 1551.

40. *Id.*

41. *Id.*; see also J. ESPOSITO, *supra* note 21, at 37.

42. TAGORE LECTURES, *supra* note 38, § 1551.

43. *Id.*

44. *Id.*; see also J. ESPOSITO, *supra* note 21, at 37.

45. *Id.*

46. *Id.*

47. Coulson & Hinchcliffe, *supra* note 24, at 45.

48. *Id.*

49. J. ESPOSITO, *supra* note 21, at 56. In 1919, Egypt changed the ages at which a mother must relinquish custody of her children to nine for boys and eleven for girls. The rationale remained the same. In 1979, Egypt raised the ages again so that a boy would be relinquished at ten and a girl at twelve. The most important change, however, was that the judge was given the discretion to consider the best interests of the children. Using these criteria, the mother could conceivably be allowed to retain custody until her daughter married and until her son reached fifteen, the age of manhood. *Id.* at 62.

Today, throughout the greater part of the Muslim world, these traditional rules regarding custody of children have been relaxed. The principle underlying the recent reforms has been that the welfare of the child is paramount. . . . Sudanese law allows the court a similar discretion [similar to the discretion given the Egyptian court] up to the age of puberty in the case of boys and until marriage in the case of girls. The law in Syria, Tunisia, Iraq, Iran, and South Yemen now expressly provides that the

If one spouse renounces Islam or follows a non-Muslim faith, then the law regarding custody weighs heavily in favor of the Islamic spouse. If a spouse renounces Islam, the law still considers the minor children as Muslim.⁵⁰ If a danger exists that the child will become a non-Muslim, the Muslim spouse will retain custody despite the child's age.⁵¹ Islamic law presumes that it serves the child's best interests to bring up the child in a healthy religious atmosphere.⁵² Since Islam is considered to be the "best" religion, the Muslim spouse should have custody.⁵³

The *shari'a* also states that if the child does not reside in a Muslim country at age seven, he or she may choose which religion to follow.⁵⁴ The perceived danger of the child becoming non-Muslim thus appears very real if the non-Muslim spouse removes the child from Saudi Arabia to a non-Muslim country. The choice of religion is the child's right, even though his father controls his religious education.⁵⁵ As long as the child has an understanding of the consequences of his act, he decides as a personal matter of conscience.⁵⁶ Even more important, however, a child automatically abandons allegiance to the Islamic faith if he is unable to state the tenets of Islam upon reaching the age of majority.⁵⁷ Saudi Arabia bases its government largely on the premise that it will uphold the Islamic faith.⁵⁸ It therefore has a high public interest in maintaining laws by which a Muslim spouse takes physical custody of children at a young age.

interests of the child are of prime importance, and custody may be granted to either parent at the court's discretion. In India and Pakistan the same results have been achieved by means of judicial decisions. The principle that emerges from the case law is that the welfare of the child is paramount, and although there is a presumption that the welfare of the child is best served by applying the strict rules of the traditional law, the presumption is rebuttable.

Coulson & Hinchcliffe, *supra* note 24, at 45.

50. K. AHMED, *THE MUSLIM LAW OF DIVORCE* 810, 811 (1972).

51. *Id.* at 528, 812.

52. *Id.*

53. *Id.*

54. *Id.* at 810; see III TAGORE LECTURES, *supra* note 38, § 2805.

55. K. AHMED, *supra* note 50, at 810.

56. *Id.* at 810-11.

57. III TAGORE LECTURES, *supra* note 38, § 2806.

58. Comment, *supra* note 10, at 423-24. "The investiture of the King is a form of contract between the ruler and the people [sic]. The King promises to govern in accordance with the *shari'a* and Islamic tradition. If he were to violate this oath, he could legally be deposed." *Id.* at 429 (footnotes omitted).

B. Bias in the Islamic Legal System

The traditional Islamic legal system contains an inherent bias against women. Before the pronouncement of the *Quran*, the customary and tribal laws of the Middle East exhibited this bias.⁵⁹ While some contradictions between customary law and the *Quran* existed,⁶⁰ the two systems shared a basic premise, man's superiority over woman.⁶¹ Islam's individuality arises in how it dictates women's status by its religious law, especially the *Quran*.⁶² As a result, the Islamic system enshrines the inferior status of women at the heart of the religion.⁶³ Therefore, innovators find more difficulty in changing women's status than if it were defined only by custom.⁶⁴

This bias appears in the everyday restrictions placed upon women. Islamic law does not allow women to travel alone,⁶⁵ leave the house unveiled,⁶⁶ work with men,⁶⁷ or even occupy the same room as a male non-relative.⁶⁸ The *Quran* mandates the obedience of women to men, legitimizes a man's marrying up to four wives at the same time,⁶⁹ and dictates that a man inherit twice what a woman does.⁷⁰ Under the *Quran*, women have male guardians, have less reason than men, and the testimony of two women equals that of one man.⁷¹ But

59. Fernea & Bezirgan, *supra* note 34, at xviii - xx; Beck & Keddie, *Introduction*, in *WOMEN IN THE MUSLIM WORLD*, *supra* note 19, at 25.

60. Fernea & Bezirgan, *supra* note 34, at xix. For example, "[t]he Koran's acceptance of human sexuality as a good to be enjoyed by both men and women, on earth and in paradise, is opposed by a male [customary] view that female sexual drives are dangerous and in need of curbing." *Id.*

61. *Id.*

62. Beck & Keddie, *Introduction*, in *WOMEN IN THE MUSLIM WORLD*, *supra* note 19, at 25.

63. *Id.*

64. *Id.*

65. D. PIPES, *IN THE PATH OF GOD: ISLAM AND POLITICAL POWER* 24 (1983).

66. Fernea & Bezirgan, *supra* note 34, at xxv.

67. D. PIPES, *supra* note 65, at 24.

68. La Jolla Light, Sept. 27, 1984, at B1, col. 2.

69. Beck & Keddie, *Introduction*, in *WOMEN IN THE MUSLIM WORLD*, *supra* note 19, at 25.

70. *Id.*; see also QUR'AN sura (chapter) iv, verse 11 (A. Yusuf Ali trans. 1946).

71. QUR'AN sura ii, verse 282 (A. Yusuf Ali trans. 1946); Beck & Keddie, *Introduction*, in *WOMEN IN THE MUSLIM WORLD*, *supra* note 19, at 25-26.

"And what about women?" I asked. "Ah," he said with a smile, "women are quite another matter. You see, women too have 'aquel' [reason], but in their case it can't develop as much as in men. It's just in their nature. Women have very great sexual desires and that's why a man is always necessary to control them, to keep them from creating all sorts of disorder, to keep them from leading men astray. Why else do we call women *hbel shitan* (the Rope of Satan)? That is why women must be cloaked when in public, live in houses with small windows placed so that others cannot see in,

not all of the restrictions on women directly issue from the *Quran*.

The hallmark of early Muslim jurisprudence, or at least the jurisprudence of the Sunni majority, was the principle that the status quo remained valid unless and until it was expressly superseded by the dictates of Islam. Hence the standards and the criteria of pre-Islamic customary law were carried over into Islam and exercised a dominant influence in the development of the Islamic legal system.⁷²

Thus, customs still exist involving man's superiority over woman that the *Quran* does not directly embody, but may still be upheld in court.⁷³

In Saudi Arabia, the traditional attitudes towards women as outlined above still prevail.⁷⁴ In addition to the above restrictions, since men and women cannot stay in the same room together, girls are educated in separate schools after the age of six.⁷⁵ Girls must wear the veil after they reach eleven or twelve.⁷⁶ At the university level, female students watch lectures on closed circuit television to maintain complete segregation from male students and male professors.⁷⁷ They must use a telephone in their classroom to ask the professor any questions.⁷⁸ One day a week the library bars male students so the female students may use it.⁷⁹ Moving to the world outside the class room, women are not allowed to drive cars.⁸⁰ Thus, Saudi life abounds with restrictions on women which would be considered prejudicial in most Western countries.

The bias of concern here is the Saudi Arabian law's presumption that the father can best care for a child of either sex after a predetermined age.⁸¹ A Saudi court will not do a balancing test to determine

and married off before they can give their fathers any trouble. It's like the saying goes: 'A woman by herself is like a Turkish bath without water,' because she is always hot and without a man she has no way to slake the fire."

Rosen, *The Negotiation of Reality: Male-Female Relations in Sefrou, Morocco*, in *WOMEN IN THE MUSLIM WORLD*, *supra* note 19, at 568.

72. Coulson & Hinchcliffe, *supra* note 24, at 38.

73. Beck & Keddie, *Introduction*, in *WOMEN IN THE MUSLIM WORLD*, *supra* note 19, at 26.

74. Nath, *Education and Employment among Kuwaiti Women*, in *WOMEN IN THE MUSLIM WORLD*, *supra* note 19, at 177.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. II TAGORE LECTURES, *supra* note 38, § 1551.

the relative merits of the parents. If a woman approached a court to obtain permanent custody, the court would still award custody to the Islamic man.⁸² If the father has died, or has some moral or physical disability, his nearest male relative will receive custody.⁸³ Therefore, Islamic law's bias against a woman's right to have permanent custody predetermines the result of any custody proceeding in Saudi Arabia.

III. CHILD CUSTODY LAW IN THE UNITED STATES

State court jurisdiction over child custody suits has a long established tradition.⁸⁴ The federal courts have refused to take jurisdiction over custody cases because courts at the state court level could best handle domestic matters.⁸⁵ As in many areas of law, this refusal resulted in significant variations in custody laws among various states.⁸⁶ These variations caused severe problems in enforcing one state's custody decree in another state. Because a custody decree can change, most states did not consider it a final judgement.⁸⁷ Therefore, a custody decree did not deserve full faith and credit under article IV § 1 of the United States Constitution,⁸⁸ and another state could fashion a new custody decree using its own criteria. However, in the last two decades the Uniform Child Custody Jurisdiction Act (UCCJA)⁸⁹ has reformed jurisdiction and modification requirements.

In addition to changes in jurisdictional law, a shift in emphasis has occurred regarding the criteria determining child custody from a sex-based presumption of fitness to a "best interests" analysis. The criteria used to determine the best interests of the child vary from state to state. Most states have at least some statutory guidelines where the legislature has specified which criteria are paramount in the "best interests" analysis.⁹⁰ Other state statutes only indicate that the

82. See *supra* notes 36-49 and accompanying text.

83. J. ESPOSITO, *supra* note 21, at 37.

84. A. HARALAMBIE, *HANDLING CHILD CUSTODY CASES* § 9.01 (Family Law Series 1983).

85. *Schleiffer v. Meyers*, 644 F.2d 656 (7th Cir.), *cert. denied*, 454 U.S. 82 (1981).

86. A. HARALAMBIE, *supra* note 84, § 9.01.

87. *Id.*

88. *Id.* Full faith and credit does not apply to custody orders "since they must always remain non-final if custody allocation is going to be based on the current best interest of a child." R. CROUCH, *INTERSTATE CUSTODY LITIGATION: A GUIDE TO USE AND COURT INTERPRETATION OF THE UNIFORM CHILD CUSTODY JURISDICTION ACT* xi (1981).

89. 9 U.L.A. 111-70 (1979).

90. For a general survey of specific state statutes dealing with the UCCJA and the best interests analysis, see 2 *CHILD CUSTODY AND VISITATION LAW AND PRACTICE* 10A-1 to 10A-14 (1986).

"best interests" of the child controls custody, allowing the individual judge to decide what specific factors to use.⁹¹ In that instance, the judge looks to the case law of his state to determine the applicable factors.

A. *The Uniform Child Custody Jurisdiction Act*

The National Conference of Commissioners on Uniform State Laws developed the Uniform Child Custody Jurisdiction Act (UCCJA) in 1968.⁹² The UCCJA attempts to eliminate forum-shopping for custody disputes and encourages cooperation between different state courts.⁹³ It established specific guidelines for a state court's jurisdiction over a custody dispute,⁹⁴ and for enforcement of another state's custody decree.⁹⁵ The UCCJA also delineates which criteria a state court, other than the court of original jurisdiction, must meet in order to assume jurisdiction and to modify the original court's custody decree.⁹⁶ The UCCJA contains a section that specifically refers to international application.⁹⁷

All fifty states and the District of Columbia have adopted the UCCJA,⁹⁸ although some states have made omissions, modifications or additions.⁹⁹ Because the UCCJA now applies in all states, it would apply to any action brought in the United States for an initial custody decree or for the enforcement or modification of a foreign country's decree.

[A] court will first determine from the parties' representations and from communication with other states' judges whether it has jurisdiction, and then will determine on the basis of the same evidence, or more if necessary, whether it is appropriate to exercise that jurisdiction. Then and only then will [the court] address the merits of the custody claim.¹⁰⁰

91. *Id.*

92. P. HOFF, CHILD CUSTODY PROJECT, INTERSTATE AND INTERNATIONAL CHILD CUSTODY DISPUTES 1 (1981).

93. *Id.*; Marcus, *Recognition, Enforcement and Modification Under UCCJA and PKPA: Comity and Full Faith and Credit*, in 2 CHILD CUSTODY AND VISITATION LAW AND PRACTICE § 5.02 (1986).

94. UNIF. CHILD CUSTODY JURISDICTION ACT § 3, 9 U.L.A. 122 (1979).

95. *Id.* § 15, 9 U.L.A. 158 (1979).

96. *Id.* § 14, 9 U.L.A. 153 (1979).

97. *Id.* § 23, 9 U.L.A. 167 (1979).

98. Marcus, *supra* note 93, § 5.02.

99. A. HARALAMBIE, *supra* note 84, § 9.01.

100. R. CROUCH, *supra* note 88, at xiv. For a good guide to practicing under the UCCJA, see *id.* This book contains the text of the UCCJA, the Parental Kidnapping Prevention Act

The UCCJA creates a certainty about what law another state will apply and also allows a court to draw upon a body of interpretive case law from other states regarding jurisdiction.¹⁰¹

1. Section 3 (jurisdiction)

Section 3¹⁰² of the UCCJA sets out the jurisdictional requirements that the parties in a child custody case must meet which entitle a particular state court to exercise jurisdiction. This section covers jurisdiction over both initial decrees and modifications. The UCCJA acts in conjunction with the jurisdictional requirements of the federal

and the Hague Convention on the Civil Aspects of International Child Abduction. This source also has the text of the Strasbourg Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration of Custody of Children. Although this latter Convention cannot be used directly, as the United States is not and cannot be a signatory, it could be helpful when the Hague Convention is ratified if both Conventions are used in conjunction. The United States cannot sign the Strasbourg Convention as membership in the Council of Europe, limited to European Countries, is required. The Strasbourg Convention could be used to retrieve children from countries who are members of the Council of Europe but are not signatories of the Hague Convention when the child has been taken through a country that is a signatory of both conventions. *Id.* at 97.

101. *Id.* at 1.

102. Section 3 of the U.C.C.J.A. reads:

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

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

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

(3) the child is physically present in this State and (i) the child has been abandoned or (ii) it is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse or is otherwise neglected [or dependent]; or

(4) (i) it appears that no other state would have jurisdiction under prerequisites substantially in accordance with paragraphs (1), (2), or (3), or another state has declined to exercise jurisdiction on the ground that this State is the more appropriate forum to determine the custody of the child, and (ii) it is in the best interest of the child that this court assume jurisdiction.

(b) Except under paragraphs (3) and (4) of subsection (a), physical presence in this State of the child, or of the child and one of the contestants, is not alone sufficient to confer jurisdiction on a court of this State to make a child custody determination.

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

UNIF. CHILD CUSTODY JURISDICTION ACT § 3, 9 U.L.A. 122-23 (1979).

Parental Kidnapping Prevention Act (PKPA), which provides a federal mandate for interstate enforcement of custody decrees.¹⁰³ The UCCJA lists four bases for jurisdiction in preferential order: *home state, significant connection, emergency* and *no other state has jurisdiction*.¹⁰⁴

The most preferred basis for jurisdiction occurs when the state in which the court sits qualifies as the child's home state.¹⁰⁵ The UCCJA defines the state as (1) the state where the child resides at the beginning of the custody proceedings,¹⁰⁶ or (2) as the state where one parent resides if the child lived in that state within six months before the proceeding.¹⁰⁷ The parent within the state does not necessarily initiate the custody proceeding, the parent may live outside the state which qualifies as the home state. If the child has not reached the age of six months, the home state is where the child has lived since birth with any person attempting to gain or retain custody in the suit.¹⁰⁸

Second in preference, a court maintains jurisdiction over the suit when the child and at least one parent have a "significant connection" with the state. The significant connection test requires a showing that "substantial evidence" exists in that state regarding the child's care, relationships, training and protection.¹⁰⁹ This language would appear to lend itself to a very broad interpretation, allowing more than one state to exercise jurisdiction. However, the Commissioners' Comment to Section 1 specifically dictates an interpretation of Section 3 in

103. Pub. L. No. 96-611, 94 Stat. 3566 (1980). The PKPA:

embodies the same purposes as the UCCJA, and § 8 had the effect of requiring all states, whether or not they have enacted the UCCJA, to enforce and refuse to modify decrees and custody orders of other states which were rendered in conformity with the federal requirements The [PKPA] states a clear preference for home state jurisdiction by making enforcement of foreign custody orders mandatory only when rendered by a court with home state jurisdiction.

A. HARALAMBIE, *supra* note 84, §§ 9.02-9.03 (footnotes omitted). The PKPA is the first instance in which Congress has assumed a role in the interstate conflict in recognizing out-of-state child custody decrees. But the history of the legislation indicates that Congress intended that child custody disputes remain in the state courts. P. HOFF, *supra* note 92, at 3. This Comment deals only with the possibility of a foreign custody decree or of an initial United States decree. Since the PKPA governs enforcement of custody decrees only between states of the United States, it would not affect either of these two areas, except in the enforcement of an initial decree in another state.

104. UNIF. CHILD CUSTODY JURISDICTION ACT § 3, 9 U.L.A. 122 (1979) (emphasis added).

105. *Id.*

106. *Id.* § 3(a)(1)(i), 9 U.L.A. 122 (1979).

107. *Id.* § 3(a)(1)(ii), 9 U.L.A. 122 (1979).

108. *Id.* § 2(5), 9 U.L.A. 119 (1979).

109. *Id.* § 3(a)(2)(i) - (ii), 9 U.L.A. 122 (1979).

light of the purposes of the whole UCCJA.¹¹⁰ The Commissioners' Comment to Section 6 states that Sections 6 and 7 further limit the scope of Section 3 by providing that a court will not exercise jurisdiction if it knows of another custody proceeding in another state,¹¹¹ or if the UCCJA defines the state as an inconvenient forum.¹¹² Therefore, the UCCJA works to limit Section 3 while still allowing a state to exercise jurisdiction if it is truly an appropriate forum.

The court may still have jurisdiction even in situations where the state cannot exercise jurisdiction under either of the above subsections. The court has jurisdiction in an emergency situation, including those in which the child has been abandoned,¹¹³ or threatened with abuse¹¹⁴ while present in the state. The state may also be entitled to jurisdiction if no other state has jurisdiction under the preceding subsections. If another state's court declares this state as the appropriate forum,¹¹⁵ and "if it is in the best interest of the child that this court assume jurisdiction,"¹¹⁶ then no other state has jurisdiction.

Section 3(b) states that the mere physical presence of the child and/or one or more of the parents does not in itself suffice to establish jurisdiction.¹¹⁷ On the other hand, the court can exercise jurisdiction even without the child's presence in the state if the other requirements of the preceding subsections are met.¹¹⁸

Neither Section 3, nor any other section of the UCCJA, contains any language referring to personal jurisdiction over the parties to the custody dispute. The provisions of the UCCJA only concern subject matter jurisdiction.¹¹⁹ Since it is only the state's relationship to the child which determines jurisdiction, personal jurisdiction over any party to the suit is not one of the prerequisites.¹²⁰ Therefore, it appears that a court could have jurisdiction over a party simply because of his or her connection to the child.¹²¹

110. *Id.* at Commissioners' Comment to § 1, 9 U.L.A. 117 (1979).

111. *Id.* § 6(c) & Commissioners' Comment, 9 U.L.A. 134-35 (1979).

112. *Id.* § 7, 9 U.L.A. 137 (1979).

113. *Id.* § 3(a)(3)(i), 9 U.L.A. 122 (1979).

114. *Id.* § 3(a)(3)(ii), 9 U.L.A. 122 (1979).

115. *Id.* § 3(a)(4)(i), 9 U.L.A. 122 (1979).

116. *Id.* § 3(a)(4)(ii), 9 U.L.A. 122 (1979).

117. *Id.* § 3(b) - (c), 9 U.L.A. 122-23 (1979).

118. *Id.*

119. Marcus, *supra* note 93, § 5.02(1).

120. *Id.*

121. See A. HARALAMBIE, *supra* note 84, § 3.02.

2. Section 15 (filing and enforcement of custody decree of another state)

Section 15¹²² recognizes continuing jurisdiction. This section provides that a second state shall enforce the custody decree of the first state when either parent files the first state's decree with the second state.¹²³ The UCCJA explicitly provides for the enforcement of the decree because of the United States Supreme Court's reluctance to extend application of the Full Faith and Credit Clause¹²⁴ of the United States Constitution to child custody decrees.¹²⁵ The Commissioners' Comment to this Section also makes it clear that "[t]he authority to enforce an out-of-state decree does not include the power to modify it."¹²⁶ Otherwise Section 15 would defeat one of the main purposes of the UCCJA, which is to stop the modification of custody decrees when a state has little true connection to the case. Section 23 extends Section 15 to the enforcement of foreign country custody decrees. When combined with the requirements of Section 14 regarding the modification of a decree, enforcement of a foreign country decree is possible because Section 14 allows modification only where the original court no longer has jurisdiction.¹²⁷

3. Section 14 (modification of custody decree of another state)

Section 14¹²⁸ of the UCCJA attempts to severely limit the situa-

122. Section 15 of the U.C.C.J.A. reads:

(a) A certified copy of a custody decree of another state may be filed in the office of the clerk of any [District Court, Family Court] of this State. The clerk shall treat the decree in the same manner as a custody decree of the [District Court, Family Court] of this State. A custody decree so filed has the same effect and shall be enforced in like manner as a custody decree rendered by a court of this State.

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

UNIF. CHILD CUSTODY JURISDICTION ACT § 15, 9 U.L.A. 158 (1979) (brackets in original).

123. *Id.* § 15 & Commissioners' Comment, 9 U.L.A. 158-59 (1979).

124. U.S. CONST. art. IV, § 1.

125. Marcus, *supra* note 93, § 5.01(2).

126. UNIF. CHILD CUSTODY JURISDICTION ACT at Commissioners' Comment to § 15, 9 U.L.A. 158 (1979).

127. *Id.* at Commissioners' Comment to § 14, 9 U.L.A. 154-55 (1979).

128. Section 14 of the U.C.C.J.A. reads:

(a) If a court of another state has made a custody decree, a court of this State shall not modify that decree unless (1) it appears to the court of this State that the court which rendered the decree does not now have jurisdiction under jurisdictional prerequisites substantially in accordance with this Act or has declined to assume jurisdiction to modify the decree and (2) the court of this State has jurisdiction.

(b) If a court of this State is authorized under subsection (a) and section 8 to

tions where one state can modify another state's custody decree. A custody decree can be modified by another state only if the state that issued the decree no longer has jurisdiction under Section 3 or if that court has declined jurisdiction to modify its own decree.¹²⁹ The second state's court must still have jurisdiction in its own right under Section 3 before it can modify the decree.¹³⁰

Section 14(b) then refers to Section 8, which instructs the court that it "shall not" modify another court's decree if the person seeking modification violated the original decree.¹³¹ This section aims specifically at the problem of parental kidnapping. It states that if the person seeking the modification stole the child from his or her appointed custodian, the court may not exercise jurisdiction.¹³² Coupling these provisions with the preference for continuing jurisdiction¹³³ and for home state jurisdiction,¹³⁴ the second court would have great difficulty modifying the decree absent a true change in circumstances.

Finally, Section 14 provides that the modifying court must take into account the record and findings of the first court.¹³⁵ This informs the modifying court of all the circumstances as fully as possible before making a decision.¹³⁶ Therefore, any findings of another state or international court could be considered.

4. Section 23 (international application)

Section 23¹³⁷ specifically applies the UCCJA to international as well as interstate custody disputes. It not only extends the general

modify a custody decree of another state it shall give due consideration to the transcript of the record and other documents of all previous proceedings submitted to it in accordance with section 22.

Id. § 14, 9 U.L.A. 153 (1979).

129. *Id.* § 14(a)(1), 9 U.L.A. 153-54 (1979).

130. *Id.* § 14(a)(2), 9 U.L.A. 154 (1979).

131. *Id.* § 8(b), 9 U.L.A. 154 (1979).

132. *Id.*

133. *Id.* § 14(a), 9 U.L.A. 153 (1979).

134. *Id.* § 3, 9 U.L.A. 122 (1979).

135. *Id.* § 14(b), 9 U.L.A. 154 (1979).

136. *Id.* at Commissioners' Comment to § 14, 9 U.L.A. 155 (1979). However, the weight to be accorded to the records is still a matter of local law.

137. Section 23 of the U.C.C.J.A. reads:

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

Id. § 23, 9 U.L.A. 167 (1979).

policies of the UCCJA,¹³⁸ but also applies the recognition and enforcement provisions to international custody decrees where a court-like institution has rendered a child custody decision.¹³⁹ As the only prerequisite, the section directs that all the parties have notice and the opportunity to be heard.¹⁴⁰ The foreign country does not have to comply with the jurisdictional requirements of Section 3 to qualify under the UCCJA. It need only establish jurisdiction under its own law.¹⁴¹ However, if the foreign country does have jurisdiction under Section 3, a court in the United States may have to decline jurisdiction under the principles stated in Section 14.¹⁴² United States courts have declined to modify decrees of foreign countries on that basis.¹⁴³

The Commissioners' Comment seems to dispose of any impression that the procedural or substantive custody law of the foreign country must correspond to American law in any respect other than the specified notice and hearing requirements.¹⁴⁴ Thus, very few limits may exist for giving effect to a foreign country's decree, even when that country has very different ideas of jurisdiction and radically different custody laws.¹⁴⁵ Most of the cases currently reported deal with countries that have an English common-law heritage and where the custody standard is the best interest of the child.¹⁴⁶ But the number of cases coming from countries with different ideologies will likely grow as the contact between those countries and the United States increases.¹⁴⁷

Interpreting Section 23 in this way, an apparent conflict occurs with Section 14 which allows continuing jurisdiction only for decrees from those courts that took jurisdiction "under jurisdictional prerequisites substantially in accordance with this Act."¹⁴⁸ The Comment to Section 14 does not include a definition of its similarity require-

138. *Id.* Most important in this regard is the policy against inter-jurisdictional disputes and multiple litigation of the same dispute. *Id.* at Commissioners' Comment to § 23, 9 U.L.A. 167-68 (1979).

139. *Id.* § 23, 9 U.L.A. 167 (1979).

140. *Id.*

141. *Id.* at Commissioners' Comment to § 23, 9 U.L.A. 168 (1979); *cf.* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 10, 92, 98, 109(2) (Proposed Official Draft 1967).

142. A. HARALAMBIE, *supra* note 84, § 9.20.

143. *Id.*

144. R. CROUCH, *supra* note 88, at 40.

145. *Id.*

146. *Id.*

147. *Id.*

148. UNIF. CHILD CUSTODY JURISDICTION ACT § 14, 9 U.L.A. 153 (1979).

ment.¹⁴⁹ In the Comment to Section 23, the Commissioners state that they defer to the jurisdictional premises of other countries in accordance with the general principles of international conflicts of laws.¹⁵⁰ But the Commissioners do not state whether this section should be interpreted with Section 14 or as a preemption of Section 14's requirements in the international arena. Therefore, it is difficult to ascertain exactly what criteria the court will use in making this determination.¹⁵¹

B. Criteria Used for Determining Child Custody

Traditionally, at common law, the father had absolute power over his offspring.¹⁵² Gradually this gave way to the notion that the mother should have custody of her children during their "tender years," commonly seven and under.¹⁵³ This "tender years" doctrine prevailed in early twentieth century United States law.¹⁵⁴ Most state courts now rule out the sex of the parent as the determinative factor.¹⁵⁵ Instead of leaning towards a gender-based presumption, the courts now analyze each family's situation individually.¹⁵⁶ Today, almost every state court determines custody based upon the "best interests" of the child.¹⁵⁷

The "best interests" analysis takes into account the family's entire situation,¹⁵⁸ and therefore the trial court has a great deal of discretion in deciding which factors to examine in a custody case. The way a court determines the detriments or best interests of a specific child is highly individualized.¹⁵⁹ Proponents of judicial discretion believe that this individualized standard allows judges to express chang-

149. R. CROUCH, *supra* note 88, at 40.

150. *Id.*

151. See *Fernandez v. Rodriguez*, 411 N.Y.S.2d 134, 97 Misc. 2d 353 (Monroe Cty. Sup. Ct. 1978). "In *Fernandez v. Rodriguez* . . . the court said that it did not have to honor a Puerto Rican decree because Puerto Rico did not have jurisdictional statutes substantially similar to the UCCJA. . . . Insufficient notice by the Puerto Rican Court was an additional reason for refusal of comity." R. CROUCH, *supra* note 88, at 46.

152. A. HARALAMBIE, *supra* note 84, § 1.02 (e.g., Roman and English law).

153. *Id.* § 1.03.

154. *Id.* § 1.05.

155. *Id.* § 3.05.

156. *Id.* § 1.05.

157. *Id.* § 1.01.

158. *Id.* § 1.06.

159. Pearson & Luchesi Ring, *Judicial Decision-Making in Contested Custody Cases*, 21 J. FAM. L. 703, 703-04 (1982-83).

ing values within the society.¹⁶⁰ Others contend that this flexibility necessarily involves a moral judgment by the judge, based upon his or her own values and biases.¹⁶¹ Whatever the view, a best interests analysis usually focuses on the needs of the child rather than the rights of the parents.¹⁶²

A court considers a wide variety of individual factors in a best interests analysis. Depending on the family's situation, one or more factors may weigh more heavily in the particular analysis. Some of these factors include the relationship between the parent, child and siblings; the stability of the environment; the time a parent has available to spend with the child; abuse and neglect; religious training; a move out of the state or out of the country; and the parents' and child's wishes.¹⁶³ The court carefully analyzes any factor that touches upon a parent's constitutional rights, such as freedom of religion.¹⁶⁴ If religion were the controlling factor in a decision, the decision would violate the parent's First Amendment rights.¹⁶⁵

Courts are also steadily becoming more sensitive to the child's emotional needs as well as to the traditionally recognized physical needs.¹⁶⁶ As a result, courts have increased the emphasis on the psychological parent-child relationship as opposed to the biological relationship.¹⁶⁷ Continuity of environment and of the primary caretaker can dominate a suit where one parent has had temporary custody.¹⁶⁸ Courts have granted custody to a parent when a child has adjusted to living with that parent and feels secure.¹⁶⁹ Even if this factor does not appear in the final decision, the judge may have considered the disruption of the child's life potentially caused by awarding permanent custody to the parent who did not have temporary custody.¹⁷⁰ Courts have also expressed a preference for the primary caretaker, regardless of gender.¹⁷¹

160. *Id.* at 704.

161. *Id.*

162. A. HARALAMBIE, *supra* note 84, § 1.06.

163. See Atkinson, *Criteria for Deciding Child Custody in the Trial and Appellate Courts*, 18 FAM. L.Q. 1 (1984).

164. *Id.*; see also A. HARALAMBIE, *supra* note 84, § 1.07.

165. Atkinson, *supra* note 163.

166. A. HARALAMBIE, *supra* note 84, § 1.06.

167. Pearson & Luchesi Ring, *supra* note 159, at 703.

168. A. HARALAMBIE, *supra* note 84, § 3.15.

169. *In re Tuttle*, 62 Or. App. 281, 660 P.2d 196 (1983).

170. Pearson & Luchesi Ring, *supra* note 159, at 720.

171. A. HARALAMBIE, *supra* note 84, § 3.08.

The totality of the child's situation always determines the child's best interests.¹⁷² Factors such as religion, education and medical care may cause the most bitter disputes since the custodial parent has the right to control these aspects of the child's upbringing absent a modification by the court.¹⁷³ Therefore, these controversial areas can be crucial, if not controlling, in the presentation to the court. The following hypothetical child custody suit suggests how a court might approach the difficult analysis involved when comparing Saudi Arabia's custody law to that of the United States.

IV. DETERMINATION OF CUSTODY INVOLVING A CHILD OF A FOREIGN PARENT

A. *Hypothetical Suit (Based on a Real Life Situation)*

At the age of twenty-two, "Lindy", a young woman from Oregon, married a Saudi Arabian prince and moved with him to his country.¹⁷⁴ When she arrived, she found that she had to comply with the traditional Islamic customs regarding women.¹⁷⁵ While there, she and the prince had a son.¹⁷⁶ Lindy decided that she had to leave Saudi Arabia because of the very confining customs.¹⁷⁷ Finally, the prince helped her return to Oregon and divorced her.¹⁷⁸ He let her take their son with her.¹⁷⁹ No court in Saudi Arabia or in the United States determined the permanent custody of the child. Consequently, questions arise as to whether the prince can regain custody by ob-

172. *Id.* § 3.06.

173. *Id.* § 3.22.

174. La Jolla Light, *supra* note 68, at col. 1. "The prince had been sent to London to be educated and was visiting friends in Oregon when he met the young American. . . . [He] royally courted [Lindy] for a year while she was a college student in Oregon." *Id.* at cols. 2-3.

175. Although Arabian men may adopt Western customs while in the West, they return to the Muslim way of life when they return to their own country. *Id.* at col. 3.

176. In September 1984, Lindy's son was four years old. *Id.* at col. 4.

177. The prince would come and go at will, but Lindy could leave her home only with a male chaperone. Whenever a male visited, Lindy and all the women of the household had to cover their faces and retreat to a back room. While she had many beautiful jewels and clothes, she had no place to wear them except to visit other women in their homes. When the prince left for weeks at a time, Lindy would ask where he had been. He always answered, "It is not your place to ask." The home had grills on all the windows, and armed guards at the harem gate.

Once, Lindy attempted to reach the United States Embassy by climbing over the harem wall. But the morality police caught her and returned her to the prince's home. *Id.* at cols. 1-6.

178. *Id.* at col. 4.

179. *Id.*

taining a judgment from either country, and whether he could enforce a Saudi Arabian judgment in the United States.

B. Decree in a United States Court

If the foreign parent seeks a child custody decree in a United States court, the court should commence a three-step evaluation. First, the court should establish that it has subject matter jurisdiction under the UCCJA. Secondly, the court should decide whether to use the law of the foreign nation or of the state in which the parties bring suit. Finally, the court should apply pertinent criteria under the chosen law.

1. Jurisdiction under the UCCJA

Although the United States Constitution allows a foreign national to sue a United States citizen in federal court,¹⁸⁰ federal courts have held that state court is the proper forum for domestic relations cases.¹⁸¹ Therefore, a state court qualified under the UCCJA has jurisdiction even if the custody case involves a foreign national.

Under the UCCJA, the Oregon state court would have jurisdiction over this model suit as Oregon is the child's home state.¹⁸² Lindy and her son have lived in Oregon since her divorce,¹⁸³ thereby satisfying the jurisdictional requirement that the child must have lived in the state where the court sits for six consecutive months before the proceeding.¹⁸⁴ As this model suit requires an initial decree, Sections 14 and 15 of the UCCJA concerning modification do not apply. Since a foreign country decree is not involved, Section 23 covering international application of the UCCJA does not apply either. As long as the court determines that the out-of-country party has adequate notice and an opportunity to be heard,¹⁸⁵ the Oregon state court has proper jurisdiction.

2. Choice of law

After determining that a conflict exists between the laws of the two countries involved in the suit, the hearing court must decide

180. U.S. CONST. art. III, § 2.

181. 644 F.2d at 663.

182. U.C.C.J.A. § 3(a)(1).

183. La Jolla Light, *supra* note 68.

184. U.C.C.J.A. § 3.

185. *Id.* § 4.

which jurisdiction's law to apply. As a state court properly hears child custody matters, that state's choice of law principles shall apply.¹⁸⁶ If no state statute directs the choice of law, the court may look at several factors to decide.¹⁸⁷ These factors may call for a result in an international conflicts case that differs from an interstate conflict.¹⁸⁸

One factor is the ease in determining and applying the foreign law.¹⁸⁹ Courts may avoid applying Islamic law in American courts because of the difficulty in applying law based upon such a different philosophy.¹⁹⁰ A survey of contract and tort cases found that where the plaintiff sought recovery and adjudication based on Islamic law, simply pleading the Islamic law caused difficulty.¹⁹¹ An American judge will most likely apply the familiar American law because of his uncertainty of the tenets and balancing principles inherent in Islamic law.¹⁹²

Conversely, a judge could readily ascertain Islamic child custody law. The mother is entitled to custody during the child's tender years, and the father automatically gains custody after that.¹⁹³ This right exists even without a court decree.¹⁹⁴ Islamic law, however, adjudicates custody based upon the sex of the parent, not on evidence concerning the best interests of the child presented in an unbiased hearing. The applicable Islamic law therefore differs substantively from American law and entitles the state court to adjudicate the custody issue independently.¹⁹⁵

Usually, a United States court will give effect to Islamic custody law only where it serves the child's best interests by the standards of

186. *Huynh Thi Ahn v. Levi*, 586 F.2d 625, 630 (6th Cir. 1978); RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 6, 78, 289 (1971).

187. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2) (1971). The factors include:

(a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied.

Id.

188. *Id.* § 10.

189. *Id.* § 6(2)(g).

190. *See Forte, Islamic Law in American Courts*, 7 SUFFOLK TRANSNAT'L L.J. 1 (1983).

191. *Id.* at 31.

192. *Id.* at 32-33.

193. A. EHRENZWEIG & E. JAYME, 2 PRIVATE INTERNATIONAL LAW § 326-2 (1973).

194. *Id.*

195. *Id.* § 331-4.

the forum.¹⁹⁶ For example, the court in *Abdul-Rahma Omar Adra v. Clift*¹⁹⁷ applied American law to a child custody suit although all of the major parties retained citizenship from Islamic countries.¹⁹⁸ There, a Lebanese father sued his Iraqi ex-wife for custody of Najwa, their daughter.¹⁹⁹ Both parents followed the Islamic faith.²⁰⁰ They knew that Lebanese Islamic law governed custody of Najwa because of her birth in Lebanon.²⁰¹ That law entitled the father to custody when Najwa turned nine.²⁰² The mother brought Najwa to the United States after the age of nine against the wishes of Najwa's father.²⁰³ The father repeatedly tried to regain custody of Najwa after she turned nine without success.²⁰⁴ Finally, he obtained a custody decree from the Religious Court of Beirut, Lebanon, for Najwa's return.²⁰⁵ As Najwa and her mother lived in the United States, where her mother had married a United States citizen,²⁰⁶ the father brought suit there.

The father filed suit in federal court, based upon 28 U.S.C. § 1350 which mandated federal court jurisdiction over an alien's action in tort.²⁰⁷ The suit did not attempt to enforce the Lebanese judgment, but to gain a United States judgment to the same effect. The court held that the mother had unlawfully retained custody of Najwa and was liable under the statute.²⁰⁸ But the father did not ask for money damages as his remedy. Instead, he asked for the return of Najwa.²⁰⁹ Thus, the court was forced to make a custody determination even though the suit was couched in terms of a tort. Although the judge could have simply stated that an award of custody was not an appropriate remedy under the statute, he instead proceeded to analyze the case as though it were a custody dispute.

The court recognized that Lebanese law entitled the father to

196. *Id.* § 326-2.

197. 195 F. Supp. 857 (D. Md. 1961).

198. *Id.* at 866.

199. *Id.* at 857.

200. *Id.* at 859.

201. *Id.*

202. *Id.* at 860.

203. *Id.* at 861-62.

204. *Id.* at 862.

205. *Id.*

206. *Id.* at 861.

207. *Id.* at 859.

208. *Id.* at 863.

209. *Id.*

custody.²¹⁰ However, although no state had yet enacted the UCCJA, the court ruled that the state of the child's residence had a peculiar interest in a child custody dispute.²¹¹ Therefore, while a court should accord Lebanese law consideration in making the final determination, the best interests of the child dominated.²¹² After weighing various factors, the court concluded that it served Najwa's best interests to remain with her mother.²¹³ Although the mother still had liability in tort, the court could not fashion the requested remedy in the face of the best interests of the child. However, in reaching this decision, the judge assumed that United States law was the proper law to apply. He did not go through a choice of law analysis to support his conclusion. It appears that the court used Najwa's mere presence in the United States to apply United States law rather than Islamic law even though Najwa still followed the Islamic faith and retained her Lebanese citizenship.

The application of United States law in this instance shows a possible cultural bias against Islamic law in United States courts. The *Adra* court had ample information from which to ascertain the applicable Islamic law. This availability of information negates the choice of law argument that difficulty in finding and interpreting the foreign law justifies application of United States law. If the judge does have a cultural bias, he or she may not even be aware of it. Prejudice may cause the judge to select certain facts over others for emphasis.²¹⁴ These facts usually uphold any stereotypes the judge may already hold of a certain group, causing unconscious prejudgment.²¹⁵ A cultural bias may therefore involve prejudgment as well as misjudgment.²¹⁶ "[R]esearchers have emphasized the cultural value orientation that judges tend to share. Typically comprised of middle-

210. *Id.* at 860, 866.

211. *Id.* at 866.

212. *Id.*

213. *Id.* at 867.

214. G. SIMPSON & J. YINGER, *RACIAL AND CULTURAL MINORITIES, AN ANALYSIS OF PREJUDICE AND DISCRIMINATION* 21 (5th ed. 1985). In 1928, a "social distance" study was devised by Bogardus. The study attempted to determine how close certain social groups felt to others. He obtained responses from nearly 2,000 United States citizens to forty racial, national, and religious groups. This same study has been given to other groups of United States citizens in 1931, 1933, 1946, 1956, and 1961. Over the years the results have changed very little. White businessmen and schoolteachers classed the groups from most favorable to least favorable, as follows: English, French, German, Spanish, Italian, Jewish, Greek, Mexican, Chinese, Japanese, Negro, Hindu and Turkish. *Id.* at 95.

215. *Id.*

216. *Id.*

age, middle-class males, the judiciary holds a value system that is resistant to social change."²¹⁷ Courts tend to prefer a more traditional environment in custody considerations.²¹⁸ This preference probably means that the traditional environment is a United States environment as opposed to an Islamic one. While all misjudgment does not necessarily constitute a cultural bias,²¹⁹ a child custody suit would seem to demand that a judge carefully scrutinize his or her reasons for applying United States law over Islamic law where no real reason otherwise exists for considering the Islamic parent unsuitable for custody.

In our model suit, the Oregon court has more reason to apply domestic law rather than foreign law than did the *Adra* court. The child here not only resides in the United States, he also has United States citizenship. The court would not likely apply Saudi Arabian law where, as here, it exhibits an inherent bias against one of the parties. While the judge should try to quell any cultural bias he or she may feel towards the Saudi legal system and the status of women, the lack of legal consideration women are accorded in a custody dispute would probably be determinative in the choice of law. Therefore, domestic law should apply to this model suit for an initial decree.

3. Applying Oregon's child custody criteria

In the final stage of the custody analysis, the court applies the forum state's law regarding which factors are considered important in a custody dispute. Oregon determines child custody in terms of the best interests of the child.²²⁰ The factors considered important include the child's emotional ties with family members,²²¹ the parties' attitudes and interest in the child,²²² and the merits of continuing an existing relationship.²²³ One factor should not be relied on to the exclusion of any other,²²⁴ and the tender years doctrine is specifically rejected.²²⁵ These criteria appear very broad, but are limited by other provisions. For example, the court only considers factors such as so-

217. Pearson & Luchesi Ring, *supra* note 159, at 706.

218. Schiller, *Child Custody: Evaluation of Current Criteria*, 26 DEPAUL L. REV. 241, 246 (1977).

219. G. SIMPSON & J. YINGER, *supra* note 214.

220. OR. REV. STAT. § 107.137(1) (1984).

221. *Id.* § 107.137(a).

222. *Id.* § 107.137(b).

223. *Id.* § 107.137(c).

224. *Id.* § 107.137(2).

225. *Id.* § 107.137(3).

cial environment, life style, conduct and marital status when one party can show that the child may suffer emotional or physical damage if custody is granted to the other parent.²²⁶ However, where the lifestyles of the two cultures involved differ so widely, as in our model suit, cultural differences are bound to be considered.

The role played by religion in everyday life and in the legal system constitutes the primary difference between the American and Saudi cultures. The United States Supreme Court has held that the First Amendment protects parents' interests in the religious training of their child.²²⁷ But the establishment clause of the First Amendment also prevents a court from showing a preference for one parent's religion over that of the other parent.²²⁸ This differs greatly from the Saudi idea of religion as the foundation of everyday life.²²⁹ This difference causes a significant dilemma in this type of case, where one parent follows a religion that differs so greatly from the other parent. The parties can compromise only with great difficulty. Where the child suffers no real harm, a court cannot deny a parent custody because of unorthodox religious beliefs or because of an unusual religious lifestyle.²³⁰ However, if the child exhibits a preference for a certain form of religion, the court may consider which parent can best satisfy the child's actual religious needs.²³¹ The child must be old enough to understand the consequences of his or her religious decision and must satisfy the court that the child bases the decision upon his or her own preferences.²³²

The court must also carefully eliminate any xenophobic bias against the Islamic culture in making its decision. Just as race cannot constitutionally be the sole determinative factor for custody,²³³ neither should cultural background. But the court can examine the difference in cultures when, as in this case, that difference would affect the continuity of the child's environment. Granting custody to a foreign parent would not only cause loss of continuity, it would also cause culture shock. Specifically, culture shock would greatly increase if the court were to send the child to an Islamic country. The

226. *Id.* § 107.137(4).

227. *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

228. A. HARALAMBIE, *supra* note 84, § 3.10.

229. Asherman, *supra* note 6, at 322-25.

230. A. HARALAMBIE, *supra* note 84, § 3.10.

231. *Id.*

232. *Id.*

233. Schiller, *supra* note 218, at 247; see *Palmore v. Sidoti*, 466 U.S. 429 (1984).

degree of shock would also depend upon the child's sex. A girl would face many new restrictions in the Islamic culture, while a boy may find some advantages, especially if he comes from a prominent family. Therefore, the court should consider both the cultural differences and the sex of the child in making its determination.

Here, the degree of the child's assimilation into United States culture compared with the degree of culture shock caused by moving him to an Islamic culture would probably determine the suit. As long as both parties exhibited an equal interest in the child and adequate caretaking abilities, the Oregon court would most likely use this potential trauma as the deciding factor. For example, if the United States mother could not care for the child, the Saudi father's princely status might make the case much closer. Furthermore, if the child has lived in the United States for several years, the court most likely will award custody to the mother to preserve the continuity of the child's environment. Therefore, continuity of environment would work towards the child's best interests.

C. *Enforcement of a Foreign Custody Decree*

The question then remains whether a previous foreign custody decree would dictate a different result. The United States Senate has given advice and consent to the Hague Convention on the Civil Aspects of International Child Abduction and the Convention is currently in the House of Representatives awaiting enabling legislation.²³⁴ The Hague Convention sets out an international enforcement system for foreign custody decrees and for the return of kidnapped children to their custodial parent.²³⁵ But since Saudi Ara-

234. Telephone interview with Peter H. Pfund, Assistant Legal Adviser for Private International Law, U.S. Department of State (Jan. 10, 1987).

235. The Convention establishes a system of administrative and legal procedures to bring about the prompt return of children who are wrongfully removed to or retained in a Contracting State. A removal or retention is wrongful within the meaning of the Convention if it violates custody rights that are defined in an agreement or court order, or that arise by operation of law, provided these rights are actually exercised (Article 3), i.e., custody has not in effect been abandoned. The Convention applies to abductions that occur both before and after issuance of custody decrees, as well as abductions by a joint custodian (Article 3). Thus, a custody decree is not a prerequisite to invoking the Convention with a view to securing the child's return. By promptly restoring the *status quo ante*, subject to express requirements and exceptions, the Convention seeks to deny the abductor legal advantage in the country to which the child has been taken, as the courts of that country are under a treaty obligation to return the child without conducting legal proceedings on the merits of the underlying conflicting custody claims.

Schultz, *Letter of Submittal*, Hague Convention on the Civil Aspects of International Child Abduction, S. Treaty Doc. No. 99-11 at 3 (Nov. 5, 1985).

bia did not attend the Convention, and shows no signs of adopting it, it does not apply to our model suit.²³⁶ Therefore, the pre-Hague Convention principles of comity for foreign decrees would apply.

The Restatement (Second) of Conflicts of Law states a general policy that United States courts should recognize foreign judgments,²³⁷ although nothing in federal law compels a state to recognize one.²³⁸ However, a treaty between the United States and the foreign nation may compel a state to recognize a foreign judgment.²³⁹ Otherwise, the states can decide for themselves whether to recognize a foreign judgment.²⁴⁰ Additionally, although the full faith and credit clause of the United States Constitution²⁴¹ compels a state to recognize another state's judgment, foreign judgments cannot claim this same recognition.²⁴² Recognition of a foreign judgment is determined exclusively by "comity."²⁴³

"Comity" means that a court in a United States forum is not subject to any higher authority that obliges it to apply foreign law.²⁴⁴

236. "The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights." S. Treaty Doc. No. 99-11, Article 4 at 7 (Nov. 5, 1985) (emphasis added). Although countries other than those in attendance at the Hague Convention can become "Contracting States," it is highly unlikely that Saudi Arabia will ratify the Convention. Saudi Arabia has not signed or ratified other important United Nations Conventions concerning women and children (e.g., The Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of others, the International Convention for the Suppression of the Traffic in Women and Children, the Convention on the Political Rights of Women, and The Convention Concerning Maternity Protection). N. HEVENER, INTERNATIONAL LAW AND THE STATUS OF WOMEN 243-44 (1983).

237. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 98 (1971). "A valid judgment rendered in a foreign nation after a fair trial in a contested proceeding will be recognized in the United States so far as the immediate parties and the underlying cause of action are concerned." *Id.*; see also Swisher, *Foreign Migratory Divorces: A Reappraisal*, 21 J. FAM. L. 9, 15 (1982-83).

238. D. SIEGEL, CONFLICTS IN A NUTSHELL §§ 108-09 (1982).

239. *Id.* Although the United States and Saudi Arabia are parties to a Treaty, it does not concern family law matters. In fact, the Treaty provides that citizens of the United States and Saudi Arabia are subject to the laws of the country where they are presently situated. See *Provisional Agreement Between the United States of America and the Kingdom of Sa'udi Arabia in Regard to Diplomatic and Consular Representation, Juridical Protection, Commerce, and Navigation*, Nov. 7, 1933, 48 Stat. 1826.

240. D. SIEGEL, *supra* note 238, §§ 108-09. In fact, where there is no treaty or act of Congress, a federal court may also have to follow the laws of the state in which it sits as to recognition of foreign judgments under *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 98 comment e (1971).

241. U.S. CONST. art. IV, § 1.

242. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 98 comment b (1971).

243. *Hilton v. Guyot*, 159 U.S. 113, 165 (1985).

244. Swisher, *supra* note 237, at 14 n.14.

The seminal case on the definition of comity and its application is *Hilton v. Guyot*.²⁴⁵ There, the United States Supreme Court defined comity as:

neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other, but it is recognition which one nation allows within its territory to legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience and to the rights of its own citizens or of other persons who are under the protection of its laws.²⁴⁶

The Court then explained that comity will not be extended unless a court is:

satisfied that, where there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court or *in the system of laws under which it was sitting*, or fraud in procuring the judgment, or any other special reason.²⁴⁷

Therefore, the foreign judgment must conform to the United States forum's concepts of due process, fair notice, proper basis for jurisdiction, and fair hearing.²⁴⁸

If the foreign judgment fails in one of these areas, the state can refuse to recognize the foreign judgment as contrary to its public policy²⁴⁹ or as prejudicial to its interests.²⁵⁰ Courts have applied this principle to another area of international family law, that of foreign divorces.²⁵¹ There, the courts have generally defined public policy as the morality and public interests set out in a state's constitution, statutes and judicial opinions.²⁵² Thus, a judicial opinion on whether to extend comity to a foreign divorce would necessarily contain a public policy discussion, including the possibility of prejudice to the parties, to the forum state, or to its citizens.²⁵³ The overriding legal principle

245. 159 U.S. at 165.

246. *Id.* at 163-64.

247. *Id.* at 202-03 (emphasis added).

248. D. SIEGEL, *supra* note 238, § 109.

249. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 117 comment c (1971).

250. 159 U.S. at 165.

251. *See* Swisher, *supra* note 237, at 15.

252. *Id.* at 14 n.18.

253. *Id.* at 14.

in any public policy discussion, however, allows the court to reject recognition of any foreign judgment for a fundamental lack of fairness to one or both parties.²⁵⁴

Applying this principle to our model suit, the court should keep in mind the fundamental bias against women in the Saudi Arabian legal system.²⁵⁵ This bias, particularly in the area of child custody, might well give a court in the United States the basis for independently adjudicating the custody issue. Although the state's laws might state a preference for recognition of foreign judgments,²⁵⁶ a Saudi court could not, by United States standards, accord a woman a fair hearing even if she had proper notice and an opportunity to be heard. The Saudi court would most likely render a conclusionary judgment, based upon well-established Islamic law, that the father should get custody.²⁵⁷

Oregon's public policy is found in the state's adoption of the UCCJA²⁵⁸ with its due process requirements and in the state's explicit rejection of the tender years doctrine.²⁵⁹ The rejection of the tender years doctrine indicates that the state will not determine custody based on sexual bias. Further, Section 109.720(3) of Oregon's UCCJA requires that all parties must have had an opportunity to be heard in the foreign action.²⁶⁰ Therefore, as with an initial custody decree, the Oregon court should not enforce a Saudi Arabian decree and should reexamine the custody issue applying its own criteria.

V. PROPOSAL/CONCLUSION

In summary, the court should go through a two-step process in evaluating an international child custody case. First, the court should determine whether it has jurisdiction under the UCCJA to issue an initial decree or to modify an existing decree. In making this determination, the court can examine where the child and the parents or guardians reside²⁶¹ or where the most information regarding the

254. *Id.*

255. *See supra* notes 42-49 and accompanying text.

256. In conformity with RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 98 (1971).

257. This Comment does not deal with Saudi Arabian jurisdictional law; it only deals with the possible effect an existing Saudi judgment would have in a United States court.

258. OR. REV. STAT. § 109.700-109.930 (1984).

259. *Id.* § 107.137(3).

260. *Id.* § 109.720(3).

261. UNIF. CHILD CUSTODY JURISDICTION ACT §§ 2(5), 3(a)(1)(i) - 3(a)(1)(ii), 9 U.L.A. 119, 122 (1979).

child's care can be found.²⁶² Here, the court could take jurisdiction since it qualifies as the child's home state.

If a decree already exists, the court should determine if that decree was issued under substantially the same laws as those of the court's forum,²⁶³ particularly with regard to notice and hearing requirements.²⁶⁴ If the laws differ substantially, so that all the parties did not get a fair hearing, the court should take jurisdiction and examine the custody suit using the criteria of the applicable law. Here, the Islamic law's inherent bias against women in a custody dispute would justify a United States court's jurisdiction and an independent evaluation of the merits of the case even where there was a previous decree.²⁶⁵

Secondly, the court should determine whether to apply foreign custody law or United States custody law. If a state statute does not dictate the choice of law, the court can apply factors as suggested by the Restatement (Second) of Conflict of Laws, § 6(2).²⁶⁶ In applying these factors, the court should try to exclude any cultural bias from its analysis.²⁶⁷ Where, as in our model suit, the child is a United States citizen and is present in the country, the application of United States law appears certain. The child's substantial contacts with the forum should justify application of the United States law.

Finally, the court should apply either the child custody criteria of its forum, or of the foreign country, depending upon which law the court has decided to apply. In applying United States law, the court should carefully evaluate the differences between the two cultures involved. But the court should use these differences only for analyzing the affect on the continuity of the child's environment²⁶⁸ and how the child would cope with culture shock. The degree to which the child has already assimilated into one culture compared with the degree of culture shock can determine the suit if all other factors are equal. Ideally, the court should award custody to that parent who can best care for the child and to whom the child feels close. In our model

262. *Id.* §§ 3(a)(2)(i) - 3(a)(1)(ii), 9 U.L.A. 122 (1979).

263. *Id.* § 14, 9 U.L.A. 153 (1979).

264. *Id.* § 23, 9 U.L.A. 167 (1979).

265. *See supra* notes 234-59 and accompanying text.

266. *See supra* note 187.

267. *See supra* notes 214-18 and accompanying text.

268. *See supra* note 233 and accompanying text.

suit, the court should award custody to Lindy to preserve continuity in her son's care and his cultural upbringing.

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