NATURE OF THE CASE

Appellant Janet Miller-Jenkins appeals the decision of the Frederick County Circuit Court ("Virginia Court") to exercise jurisdiction over this child custody case and its refusal to enforce a prior Vermont custody order regarding the same custody and visitation matters, all in violation of both the Parental Kidnapping Prevention Act ("PKPA"), 28 U.S.C.A. § 1738A, and Virginia's Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"), Va. Code Ann. § 20-146.1 *et seq.* A custody proceeding, initiated by Appellee Lisa Miller-Jenkins on November 24, 2003, was already underway in the Rutland County Family Court in Vermont ("Vermont Court") when, seven months later, Appellee—unhappy with developments in the custody case she started in Vermont—filed a second custody action in the Virginia Court, asking that Court to undertake a simultaneous redetermination of the custody matters already being decided by the Vermont Court.

Both the PKPA and Virginia's UCCJEA preclude the Virginia Court, or any court other than the Vermont Court, from exercising jurisdiction over this matter. Under both statutes, the Vermont Court has exclusive and continuing jurisdiction. Both statutes bar any court, including the Virginia Court, from modifying the Vermont Court's orders. The PKPA further requires that the Virginia Court enforce the custody orders of the Vermont Court.

Accordingly, Appellant asks this Court: to hold that the Frederick County Circuit Court's exercise of jurisdiction was improper and its modification of the Vermont Court's order error; to vacate the Virginia Court's orders; and to remand with instructions that the Virginia Court is to enforce according to their terms, the custody orders and decrees of the Vermont Court.

MATERIAL PROCEEDINGS IN THE TRIAL COURT

On November 24, 2003, Appellee Lisa Miller-Jenkins petitioned the Rutland County Family Court of Vermont ("Vermont Court") to dissolve her civil union with Appellant Janet Miller-Jenkins, require Janet to pay Lisa child support, and determine custody or visitation of their minor daughter, IMJ.[1] On June 17, 2004, the Vermont Court issued a temporary custody order awarding Lisa custody, and granting Janet substantial unsupervised visitation to occur in both Virginia and Vermont.

On July 1, 2004, Lisa filed a "Petition to Establish Parentage and for Declaratory Relief," in the Frederick County Circuit Court of Virginia ("Virginia Court"). In her Petition, Lisa asked for an order declaring her to be IMJ's sole parent, and a declaration that she alone has legal and physical custody of IMJ, and that Janet has no rights of any kind to IMJ. On July 19, 2004, the Vermont Court issued an order, affirming that its jurisdiction was continuing and that its June 17 Temporary Order was to be followed.

On July 29, 2004, Janet demurred to Lisa's Petition, arguing that both the PKPA and Virginia's UCCJEA preclude the Virginia Court from exercising jurisdiction over this matter and instead require the Virginia Court to enforce the order of the Vermont Court. In support of her demurrer, Janet submitted a certified copy of the Vermont Court proceedings to the Virginia Court. That record is included in the Joint Appendix at 63-325.

On August 18, 2004, over Janet's objection, the Virginia Court modified the Vermont Court's June 17, 2004 Temporary Custody and Visitation Order by staying all visitation except supervised visitation in the Commonwealth of Virginia, in direct contradiction of the Vermont Court's June 17 Order.

[1] The parties are referred to by their first names for ease of identification and their minor child only by initials.

On August 24, 2004, the Virginia Court held a hearing on the issue of whether it could exercise jurisdiction. Ruling from the bench, the Virginia Court held that it had jurisdiction, and certified for interlocutory appeal the question of whether its exercise of jurisdiction was proper. On September 17, 2004, Janet timely noticed her appeal of that order. *See* Ct. App. Rec. No. 2192-04-4. On January 6, 2005, this Court dismissed that appeal as procedurally improper because the trial court's exercise of jurisdiction was not a final order, and was not subject to certification for interlocutory appeal.

During this period Lisa refused to allow Janet any contact whatsoever with IMJ. Accordingly, on September 2, 2004, the Vermont Court held Lisa in contempt, finding that Lisa had willfully refused to comply with the June 17 Order solely because she "does not like it." *See* VT Ct. Order of 9/2/04 at 4-5, JA 462-63. Despite this contempt ruling, Lisa continues to ignore the Vermont Court's orders and continues to refuse Janet visitation with IMJ.

On October 15, 2004, the Virginia Court—continuing to ignore the Vermont Court's orders—granted Lisa's petition in its entirety, ruling that Lisa has sole legal rights to IMJ and Janet has no "claims of parentage or visitation rights over [IMJ]." On November 9, 2004, Janet timely noticed her appeal of the Virginia Court's October 15, 2004 order (Rec. No. 2654-04-4).

On November 17, 2004, the Vermont Court held that Janet is IMJ's legal parent and that she has all the rights and responsibilities of a parent. The Vermont Court also took issue with the Virginia Court's erroneous exercise of jurisdiction, holding that "this court already had jurisdiction over the parentage issue and continues to have jurisdiction over this matter. The exercise of jurisdiction by the Virginia Court is not in accordance with the Uniform Child Custody Jurisdiction Act, see 15 V.S.A. §§ 1031 et seq., Va. Code Ann. §§ 20-146.1 et seq., and the federal Parental Kidnapping Prevention Act (PKPA), 28 U.S.C.A. § 1738A(f)." *See* VT Ct. Order of 11/17/04 at 13 n.6, attached as Exhibit A to Appellant's Response to Show Cause Order,

filed contemporaneously with this brief.[2]

On December 21, 2004, the Vermont Court denied Lisa's Request for entry of Judgment Based on the Virginia Court Order, holding that "During the course of these pending proceedings, the plaintiff, Lisa Miller-Jenkins, filed an action in a court in the Commonwealth of Virginia, seeking that court to extinguish any parental rights of the defendant, Janet Miller-Jenkins. The Virginia court has since issued an order declaring that Lisa is the sole and only possible parent to the minor child and that Janet has no parent rights or rights to custody or visitation. That declaration is in direct contradiction to this court's determinations under Vermont law. Lisa now asks this court to give full faith and credit to the Virginia judgment under the United States Constitution. For the reasons set forth below, **this court concludes that because the Virginia court improperly exercised jurisdiction in this case while the matter was pending in Vermont and subject to Vermont's continuing jurisdiction, the Virginia court's judgment is <u>not</u> entitled to full faith and credit.**" VT Ct. Order of 12/21/04 at 1 (underscoring in original, bold added), attached as Exhibit B to Appellant's Response to Show Cause Order, filed contemporaneously with this brief.[3]

[2] Because the Vermont Court's November 17, 2004 Order was entered after the certified Vermont record was submitted to the Virginia Court by Appellant, it is not included in the Joint Appendix.

[3] Because the Vermont Court's December 21, 2004 Order was entered after the certified Vermont record was submitted to the Virginia Court by Appellant, it is not included in the Joint Appendix.

QUESTIONS PRESENTED

1. Did the Virginia Court err in holding that the PKPA permitted it to exercise jurisdiction in this child-custody matter, where a prior custody proceeding was already underway in another a court of another jurisdiction, and that court had already issued a custody order?

2. Did the Virginia Court err in holding that the UCCJEA permitted it to exercise jurisdiction in this child-custody matter, where a prior custody proceeding was already underway in a court of another jurisdiction, where that court was exercising jurisdiction in substantial conformity with the UCCJEA, and where that court had already issued a custody order, the child had lived in the other jurisdiction until shortly before the action commenced and appellant still lived there?

3. Did the Virginia Court err in refusing to enforce the June 17, 2004 custody order of the Vermont Court, which has exclusive and continuing jurisdiction of these matters, in violation of the federal PKPA?[4]

[4] Appellant expressly preserved each of these questions for appeal during the August 18, 2004 and August 24, 2004 hearings in this matter before Frederick County Circuit Court Judge John R. Prosser. *See* VA Ct. Order of 8/18/04 at 3, JA 50 (objecting to the Court's stay of visitation); Hearing Tr. of 8/24/04 at 28:1-8 (Judge Prosser states "So I am ruling that this Court does have jurisdiction. Mr. Price will have exceptions noted . . . ."), 29:14 – 30:14, 35:20 – 36:6, JA 427-29, 434-35. Appellant also fully set forth her position that both the PKPA and Virginia's UCCJEA preclude the exercise of jurisdiction by the Virginia Court in Respondent's Memorandum of Points and Authorities in Support of Demurrer. JA 329-381.

STATEMENT OF FACTS

From February 1998 to July 2002 Janet and Lisa lived in Virginia in an openly lesbian relationship. During this period they resided primarily at Appellant's home at 313 West Virginia Avenue, Hamilton, Virginia. J. Miller-Jenkins Aff. ¶ 1, JA 354.[5]

On December 19, 2000, while still residing in Virginia, Lisa and Janet traveled to Vermont, entered into a civil union, and returned to Virginia. *Id.* ¶ 2, JA 354; *see also* Complaint for Civil Union Dissolution (hereinafter "Compl. for Dissolution") at VT Rec. 31, JA 97.[6] After returning to Virginia, they decided to have a child through artificial insemination using sperm obtained from a sperm bank. J. Miller-Jenkins Aff. ¶ 3, JA 354. The couple selected a donor with physical characteristics similar to Janet so that their child would physically resemble them both. *Id.* Lisa conceived and carried the couple's daughter. *Id.* ¶ 4, JA 354. On April 16, 2002, the couple's daughter, IMJ, was born in Hamilton, Virginia. *Id.* Janet was present in the delivery room and cut IMJ's umbilical cord. *Id.*

In July 2002, concerned that Virginia was not a welcoming place for a gay family, Lisa and Janet decided to relocate permanently with IMJ to Fair Haven, Vermont. *Id.* ¶ 6, JA 354. A little over a year later, in the fall of 2003, Lisa and Janet decided to separate. *Id.* ¶ 7, JA 354. Janet urged Lisa to remain in Vermont, but Lisa insisted on taking IMJ and returning to Virginia, which she did in September 2003. *Id.*

On November 24, 2003, Lisa initiated a proceeding in Vermont to dissolve her and Janet's civil union by filing a Complaint for Civil Union Dissolution in the Rutland Family Court of Vermont ("Vermont Court"). Compl. for Dissolution at VT Rec. 31-34, JA 97-100. In her

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[5] Citations are made to the document by title and page, paragraph and/or line number, e.g., Hearing Tr. of 8/24/04 at 20:14 (page: line number), and to the page numbers(s) of the document as it is numbered in the Joint Appendix, e.g., JA 444-45.

[6] Citations to documents that are part of the certified Vermont Court Record (which is numbered VT Rec. 0001 – 0262), which was submitted to the Virginia Circuit Court by Appellant, is in the form VT Rec. __page #__, JA __page #__.

complaint, Lisa listed IMJ as a biological or adoptive child of the civil union. *Id.* at 31, JA 97; *see also* VT Ct. Order of 11/17/04 at 1. She requested that the court dissolve the civil union, award her legal and physical rights and responsibilities for IMJ, award Janet suitable parent/child contact, and require Janet to pay child support. Compl. for Dissolution at VT Rec. 32, JA 98; VT Ct. Order of 11/17/04 at 1.

On June 17, 2004, the Vermont Court issued a Temporary Custody Order allocating parental rights and responsibilities between Janet and Lisa. VT Ct. Order of 6/17/04 at VT Rec. 14-16, JA 80-82. Pursuant to that order Janet was to have "parent-child" contact and visitation with IMJ in June and July in Virginia and in August and thereafter in Vermont. *Id.* Lisa refused to comply with the Vermont Court's custody and visitation Order and did not allow Janet visitation, communication, or contact with IMJ. VT Ct. Order of 9/2/04 at 4, JA 462.

On July 1, 2004—the same day that Virginia's "Marriage Affirmation Act,"[7] became law—Lisa asked Virginia's Frederick County Circuit Court ("Virginia Court") to help her end-run the decision she sought from the Vermont Court, by redetermining custody and visitation, and denying Janet any and all rights on the basis of the newly enacted Marriage Affirmation Act. In Count I of her Petition, Lisa asked the Virginia Court to make a determination of parentage pursuant to Va. Code Ann. § 20-49.1, Virginia's paternity statute. Petition at 1, JA 1-3. In Count II, she asked the Virginia Court to make a custody and visitation determination by "[a]djudicating Petitioner, Lisa Miller-Jenkins, to be the sole parent of and to have sole parental rights over [IMJ]" and by "[a]djudicating any parental rights claimed by Respondent, Janet Miller-Jenkins, to be nugatory, void, illegal and/or unenforceable." Petition at 2, JA 2. On July 1, 2004, and presently, IMJ and Lisa reside in Frederick County, Virginia, while Janet continues to reside in Rutland County, Vermont. J. Miller-Jenkins Aff. ¶¶ 10, 11, JA 355.

[7] Va. Code Ann. § 20-45.3.

After learning of Lisa's filing in the Virginia Court, on July 19, 2004, the Vermont Court issued an order, affirming that "[t]his Vermont Court has and will continue to have jurisdiction over this case including all parent-child contact issues. . . . The Temporary Order for parent-child contact [is] to be followed." VT Ct. Order of 7/19/04 at VT Rec. 9, JA 75.

On July 29, 2004, Janet demurred to Lisa's Petition in the Virginia Court, arguing that both the PKPA and Virginia's UCCJEA preclude the Virginia Court from exercising jurisdiction over this matter and instead require the Virginia Court to enforce the order of the Vermont Court. In support of her demurrer, Janet submitted a certified copy of the Vermont Court proceedings, as of August 18, 2004, to the Virginia Court. *See* JA 63-325.

On August 18, 2004, the Virginia Court requested that the parties brief the issue of whether the Virginia Court could properly exercise jurisdiction. VA Ct. Order of 8/18/04 at 1-2, JA 48-49. Over the objection of Janet, the Court also modified[8] the Vermont Court's June 17 Temporary Custody and Visitation Order. The Court stayed all visitation except supervised visitation in the Commonwealth of Virginia, in direct contradiction of the Vermont Court's June 17 Order, which grants Janet unsupervised visitation in both Virginia and Vermont. *See* VA Ct. Order of 8/18/04 at 1-2, JA 48-49; VT Ct. Order of 6/17/04 at VT Rec. 14-16, JA 80-82.

On August 24, 2004, the Virginia Court held a hearing on the issue of jurisdiction. Ruling from the bench, the Virginia Court disregarded the Vermont Court's orders and proceedings, as well as federal law requiring the Virginia Court to enforce the Vermont Court's orders. The Virginia Court did not even mention the PKPA during its ruling from the bench, and its 2-page September 9, 2004 order (memorializing its August 24 ruling) does not even attempt to reconcile jurisdiction in Virginia with the plain language of the PKPA. *See* Hearing Tr. of 8/24/04 at 23-28, JA 422-27; VA Ct. Order of 9/9/04 at 1-3, JA 444-46. The Virginia Court also

[8] The Vermont Court recognized and took exception to this impermissible modification of its order, finding that "Unfortunately, and without contacting this Court before it did so, the Virginia court modified the Vermont order to preclude parent-child contact between the child and Janet outside Virginia." VT Ct. Order of 9/2/04 ¶ 21, JA 461.

disregarded the plain meaning of Virginia's UCCJEA, holding that it could exercise jurisdiction despite the pendency of the Vermont proceedings. *See* Hearing Tr. of 8/24/04 at 24-25, JA 423-24; VA Ct. Order of 9/9/04 at 2, JA 445. On September 17, 2004, Janet timely noticed her appeal of the Virginia Court's September 9, 2004 Order exercising jurisdiction and refusing to enforce the Vermont Court's June 17, 2004 Order. Appellant's Notice of Appeal at 1, JA 470-73.

Throughout this period Lisa refused to allow Janet any contact whatsoever with IMJ. VT Ct. Order of 9/2/04 at 4, JA 462. Accordingly, on September 2, 2004, the Vermont Court found Lisa in contempt, holding that "[h]ere, Lisa has willfully refused to comply with this court's order regarding visitation since mid-June, solely because she does not like it. . . . Lisa's contemptuous conduct goes beyond that, however. Lisa initiated this dissolution action in Vermont and asked for a temporary order regarding parental rights and responsibilities. Then, when she received a temporary order she did not like, she not only refused to comply with it, but she actually initiated a separate action in a Virginia court, asking that court to disregard the fact that she had already initiated an action involving the same issues (i.e. the parental status of Lisa and Janet and their relative rights and responsibilities) in Vermont." VT Ct. Order of 9/2/04 at 4-5, JA 462-63. Despite this contempt ruling, Lisa continues to ignore the Vermont Court's orders and has continued to refuse to allow Janet to have visitation with IMJ.

On October 15, 2004, the Virginia Court, again disregarding the Vermont Court's orders, granted Lisa's petition in its entirety, ruling that Lisa "solely has the legal rights, privileges, duties and obligations as a parent hereby established for the health, safety, and welfare of the minor child, [IMJ]. Neither [Janet] nor any other person has any claims of parentage or visitation rights over [IMJ]." VA Ct. Order of 10/15/04 at 1-2, JA 468-69. On November 9, 2004, Janet timely noticed her appeal of the Virginia Court's October 15, 2004 order, and moved to consolidate her appeals.

On November 17, 2004, the Vermont Court, ruling on Lisa's "Motion to Withdraw Waiver to Challenge Presumption of Parentage," held that Janet is IMJ's legal parent and that she

has all the rights and responsibilities of a parent. The Vermont Court also took issue with the Virginia Court's duplicative exercise of jurisdiction, holding that "this court already had jurisdiction over the parentage issue and continues to have jurisdiction over this matter. The exercise of jurisdiction by the Virginia Court is not in accordance with the Uniform Child Custody Jurisdiction Act, see 15 V.S.A. §§ 1031 et seq., Va. Code Ann. §§ 20-146.1 et seq., and the federal Parental Kidnapping Prevention Act (PKPA), 28 U.S.C. § 1738A(f)." *See* VT Ct. Order of 11/17/04 at 13 n.6.

SUMMARY OF ARGUMENT

The Virginia Court's exercise of jurisdiction and modification of the Vermont Court's order are improper, and are expressly barred by the clear and plain terms of both the Parental Kidnapping Prevention Act ("PKPA"), 28 U.S.C.A. § 1738A, and Virginia's Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"), Va. Code Ann. § 20-146.1 *et seq.* The PKPA provides that "[a] court of a State shall not exercise jurisdiction in any proceeding for a custody or visitation determination commenced during the pendency of a proceeding in a court of another State where such court of that other State is exercising jurisdiction consistently with the provisions of this section to make a custody or visitation determination." 28 U.S.C.A. § 1738A(g) (emphasis added). It is undisputed that a custody or visitation proceeding was already pending in the Vermont Court and that the Vermont Court was exercising jurisdiction consistent with the provisions of the PKPA. It is also well established that the PKPA preempts any conflicting state law that might otherwise permit the exercise of jurisdiction. Accordingly, it was error for the Virginia Court to exercise jurisdiction as the Vermont Court has continuing and exclusive jurisdiction as a matter of law.

The PKPA also expressly provides that: "[t]he appropriate authorities of every State shall enforce according to its terms and shall not modify except as provided in subsection (f) of this section, any child custody determination made consistently with the provisions of this section by

a court of another State." 28 U.S.C.A. § 1738A(a) (emphasis added). Nevertheless, the Virginia Court modified of the Vermont Court's June 17, 2004 Order, and refuses to enforce that order "according to its terms" in plain violation of the express language of the PKPA.

Entirely independent of the PKPA, Virginia's own Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"), Va. Code Ann. § 20-146.1 *et seq*., likewise precludes the exercise of jurisdiction in this matter by the Virginia Court. Pursuant to the UCCJEA, once a court of any state with jurisdiction to hear the case makes a child custody determination, that court has "exclusive, continuing jurisdiction" over the matter as long as "any person acting as a parent" continues to live in that state. Va. Code Ann. § 20-146.13(A). In the case of simultaneous proceedings, the UCCJEA also provides that: "a court of this Commonwealth may not exercise its jurisdiction under this article if, at the time of the commencement of the proceeding, a proceeding concerning the custody of the child has been previously commenced in a court of another state having jurisdiction substantially in conformity with this act . . . ." Va. Code Ann. § 20-146.17(A).

Here, the undisputed evidence before the Virginia Court established both that the Vermont Court had made a custody determination, and that a proceeding concerning the custody of IMJ had been underway for months in the Vermont Court which had jurisdiction substantially in conformity with Virginia's UCCJEA. Accordingly, the Virginia Court's exercise of jurisdiction was also a violation of the UCCJEA.

For these reasons, Appellant asks this Court to hold that the Frederick County Circuit Court's exercise of jurisdiction was improper, to vacate all of its orders in this matter, and to remand with instructions that it enforce the custody orders and decrees of the Vermont Court.

ARGUMENT

This case presents the exact situation that the PKPA and UCCJEA were designed to address. A person seeking custody files an action in one state. She does not get the result she wants. Then, she files a custody action in a second state, where the law is more favorable to her claim. Both Congress and the Virginia legislature have found this gamesmanship harmful to children and unacceptable, and prohibit the second state from exercising jurisdiction, irrespective of any other public policy concerns.

I. THE FEDERAL PKPA PRECLUDES THE EXERCISE OF JURISDICTION BY THE VIRGINIA COURT.

The Federal PKPA controls this case and vests jurisdiction to determine custody matters exclusively with Vermont. Tellingly absent from the Virginia Court's September 9, 2004 order asserting jurisdiction in this matter is any explanation for circumventing the plain language of the PKPA. Nor did the Virginia Court bother to mention, never mind discuss, the PKPA during its August 24, 2004 ruling from the bench, despite extensive oral and written arguments as to its controlling authority.

The PKPA was passed to address situations exactly like this. Congress passed the PKPA because it found that "there is a large and growing number of cases annually involving disputes between persons claiming rights of custody and visitation of children under the laws, and in the courts, of different States . . ." and "the laws and practices by which the courts of those jurisdictions determine their jurisdiction to decide such disputes, and the effect to be given the decisions of such disputes by the courts of other jurisdictions, are often inconsistent and conflicting."[9]

Congress passed the PKPA expressly to "avoid jurisdictional competition and conflict between State courts in matters of child custody and visitation which have in the past resulted in the shifting of children from State to State with harmful effects on their well being; and [to] deter

[9] Pub. L. 106-386, Div. B, Title III, § 1303(a) to (c), Oct. 28, 2000, 114 Stat. 1512, reprinted in

interstate abductions and other unilateral removals of children undertaken to obtain custody and visitation awards."[10] *See also In re Clausen*, 442 Mich. 648, 669, 502 N.W.2d 649, 657 (1993) (holding "[t]he congressionally declared purpose of the PKPA is to deal with inconsistent and conflicting laws and practices by which courts determine their jurisdiction to decide disputes between persons claiming rights of custody"). In exercising jurisdiction in this matter, the Virginia Court improperly ignored the PKPA and the paramount protections it provides for both parents and their children.

A. The Virginia Court Improperly Exercised Jurisdiction in this Custody Matter in Violation of the PKPA.

The PKPA provides that "[a] court of a State shall not exercise jurisdiction in any proceeding for a custody or visitation determination commenced during the pendency of a proceeding in a court of another State where such court of that other State is exercising jurisdiction consistently with the provisions of this section to make a custody or visitation determination." 28 U.S.C.A. § 1738A(g) (emphasis added).

Accordingly, here, the Virginia Court could not exercise jurisdiction in this matter if it did so (1) for purposes of making a "custody or visitation determination"; and (2) a custody or visitation proceeding was already pending in another state; and (3) that state was exercising jurisdiction consistent with the provisions of the PKPA. As set forth below, each of these criteria was met and it was therefore error for the Virginia Court to exercise jurisdiction and to refuse to enforce the Vermont Court's previously existing order.

1. The Virginia Court Exercised Jurisdiction to Make a "Custody or Visitation Determination."

Lisa's "Petition to Establish Parentage and for Declaratory Relief," asked the Virginia Court to determine custody, visitation, and parentage. Count I of the Petition asked the Virginia Court to make a determination of parentage pursuant to Va. Code Ann. § 20-49.1,

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28 U.S.C.A. § 1738A, Historical and Statutory Notes at (a)(1)-(2).

[10] *Id.* at (c)(5)-(6).

Virginia's paternity statute. Petition at 2, JA 2. Count II of the Petition asked for declaratory relief in the form of the adjudication of the parental rights, including custody and visitation rights, of both Janet and Lisa. *Id*. at 3, JA 3. These requests are individually and collectively a "proceeding for custody or visitation determination" as defined by the PKPA.

The PKPA defines custody and visitation proceedings broadly so as to include any and all proceedings that result in a custody or visitation determination. Specifically, a "custody determination" is "a judgment, decree, or other order of a court providing for the custody of a child, and includes permanent and temporary orders, and initial orders and modifications." 28 U.S.C.A. § 1738A (b)(3). "Visitation determination" is defined as "a judgment, decree, or other order of a court providing for the visitation of a child and includes permanent and temporary orders and initial orders and modifications." *Id.* at (b)(9).

Virginia's paternity statute itself makes clear that a paternity proceeding can "include provisions for the custody and guardianship of the child, visitation privileges with the child, or any other matter in the best interest of the child." Va. Code Ann. § 20-49.8. Even where a petitioner seeks only a determination of parentage and does not expressly seek adjudication of parental rights, the request for a determination of paternity alone is a "proceeding for custody" under the both the PKPA and the UCCJEA. *See Guernsey v. Guernsey*, 794 So.2d 1108, 1110 (Ala. Civ. App. 1998) (holding that a paternity suit by itself is a "custody proceeding" under both the PKPA and the UCCJA); *Paternity of M.R.*, 778 N.E.2d 861, 864 (Ind. Ct. App. 2002) (holding that paternity suit alone is a "custody proceeding" under the UCCJA).

Here, Lisa unequivocally asked for and received <u>both</u> a determination of parentage and adjudication of parental rights. The Virginia Court stayed—and thus modified—the Vermont Court's Order—before even confirming its jurisdiction, and then determined that Janet had neither visitation nor other parental rights. VA Ct. Order of 10/15/04 at 2, JA 469. The Virginia action was therefore a "proceeding for custody or visitation determination" under the PKPA.

2. The Vermont Court Was Already Exercising Jurisdiction to Make a Custody and Visitation Determination when the Virginia Action Was Filed.

The Vermont Court was making a "custody or visitation determination"—at Lisa's request—at the time the Virginia Court decided to ignore the Vermont Court's orders and to exercise jurisdiction.

On November 24, 2003, over seven months before the filing in Virginia, Lisa initiated aproceeding to dissolve her civil union by filing a Complaint for Civil Union Dissolution in the Vermont Court. In her complaint, Lisa expressly listed IMJ as a biological or adoptive child of the civil union, and requested that the Vermont Court require Janet to pay Lisa child support and determine the parental status of Lisa and Janet and their relative rights and responsibilities regarding IMJ. *See* Compl. for Dissolution at VT Rec. 31-32, JA 97-98. *See also* VT Ct. Order of 9/2/04 at 4-5, JA 462-63.

The Vermont Court in fact made a "custody or visitation determination" on June 17, 2004, when it issued its "Temporary Order Re: Parental Rights & Responsibilities,"[11] which expressly states that Lisa is "awarded temporary legal and physical responsibility for the minor child of the parties," and that Janet will have temporary "parent-child contact" as delineated, including "visitation" in "both Virginia and Vermont." VT Ct. Order of 6/17/04 at VT Rec. 14-16, JA 80-82. By its plain terms, the Vermont Court's Order is an "order of a court providing for the custody of a child," as well as an "order of a court providing for the visitation of a child," as "custody determination" and "visitation determination" are defined by the PKPA. *See* 28 U.S.C.A. § 1738A (b)(3), (9).

[11] Vermont domestic relations law substitutes the phrase "parental rights and responsibilities" for "child custody;" therefore, the Vermont court's "Temporary Order Re: Parental Rights & Responsibilities" equates to a temporary custody order. *See, e.g., Myott v. Myott*, 149 Vt. 573, 575, 547 A.2d 1336, 1338 (1988) (Vermont statute governing parental rights and responsibilities orders, Vt. Stat. Ann. tit. 15 § 665, specifies how courts are to decide custody matters). "Parental rights and responsibilities" means "the rights and responsibilities related to a child's physical living arrangements, parent child contact, education, medical and dental care, religion, travel and any other matter involving a child's welfare and upbringing." Vt. Stat. Ann. tit. 15, § 664(1).

During the proceedings below, Lisa argued that the Vermont Court Order cannot be an order providing for the custody or visitation of a child, because the Vermont Order is premised on a civil union. This argument simply does not survive the plain meaning of the PKPA. The PKPA, by design, does not require that the underlying custody action emanate from a divorce proceeding or a dispute between two legal parents. In fact, it does not specify that parents (biological or otherwise) need be involved at all. The specific language of the PKPA defines "contestant" in terms of a person claiming a right to custody.[12] Given the congressionally stated purpose of the PKPA, and Congress's express recognition of the fact that laws differ from state to state regarding custody and visitation, it is not surprising that Congress did not choose to include such a restriction, but sought to be expansive to discourage forum-shopping harmful to children.

3. The Vermont Court is Exercising Jurisdiction Consistent with the PKPA.

The third criterion of the PKPA, i.e., whether the Vermont Court was exercising jurisdiction consistent with the provisions of the PKPA, is also satisfied. The PKPA provides:

> **(c)** A child custody or visitation determination made by a court of a State is consistent with the provisions of this section only if--
>
> **(1)** such court has jurisdiction under the law of such State; and
>
> **(2)** one of the following conditions is met:
>
> > **(A)** such State (i) is the home State of the child on the date of the commencement of the proceeding, or (ii) had been the child's home State within six months before the date of the commencement of the proceeding and the child is absent from such State because of his removal or retention by a contestant or for other reasons, and a contestant continues to live in such State;
> >
> > . . .
> >
> > **(E)** the court has continuing jurisdiction pursuant to subsection (d) of this section.

[12] *See infra*, note 14.

> **(d)** The jurisdiction of a court of a State which has made a child custody or visitation determination consistently with the provisions of this section continues as long as the requirement of subsection (c)(1) of this section continues to be met and such State remains the residence of the child or of any contestant.

Id. at (c), (d).

There are several independent bases for supporting Vermont's superior jurisdiction under the PKPA. The uncontested evidence established that the Vermont Court has jurisdiction pursuant to both sections (c) and (d) of the PKPA.

Section (c)(1) is satisfied as it is undisputed that the Vermont Court has jurisdiction under Vermont law. Indeed, the Vermont Court itself issued a July 19, 2004 Order stating "This Vermont Court has and will continue to have jurisdiction over this case including all parent-child contact issues." VT Ct. Order of 7/19/04 VT at VT Rec. 9, JA 75. *See also* Vt. Stat. Ann. tit. 15, § 1201 *et. seq.*

Section (c)(2) is also satisfied in two separate ways. The unchallenged evidence established that the Vermont Court is exercising jurisdiction consistent with the PKPA pursuant to both sections (c)(2)(A)(ii) and (c)(2)(E). Section (c)(2)(A)(ii) is satisfied because: (1) Vermont was IMJ's "home state"[13] within six months before November 24, 2003, the date of the commencement of the Vermont proceeding; (2) IMJ is absent from Vermont because she was removed by Lisa; and (3) Janet continues to live in Vermont.[14] *See* J. Miller-Jenkins Aff. ¶¶ 6-11,

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[13] "Home State" is defined under the PKPA, as it is under the UCCJEA, as "the State in which, immediately preceding the time involved, the child lived with his parents, a parent, or a person acting as a parent, for at least six consecutive months . . . ." 28 U.S.C.A. § 1738A(b)(4). Here, there is no dispute that IMJ resided in Vermont from June 2002 – September 2003, a period of more than 14 months immediately preceding Lisa's initiation of custody determination proceedings in the Vermont Court on November 24, 2003. *See* J. Miller-Jenkins Aff. ¶¶ 6-7, JA 354.

[14] Respondent is clearly a "contestant" for purposes of the PKPA as that term is defined as "a person, including a parent or grandparent, who claims a right to custody or visitation of a child." 28 U.S.C.A. § 1738A(b)(2). When determining whether someone is claiming a "right to custody," the forum state looks at whether the person has a claim under the laws of the first state exercising jurisdiction—here Vermont——not the forum state. *See Matter of C.A.D.*, 839 P.2d 165, 173-74 (Okla. 1992) (examining whether person acting as a parent had colorable claim to custody under Texas law); *Rogers v. Platt*, 199 Cal.App.3d 1204, 1212-13, 245 Cal. Rptr. 532,

JA 354-55. *See also* VT Ct. Order of 9/2/04 at 1-3, JA 459-61.

Section (c)(2)(E) is also satisfied because the Vermont Court has continuing jurisdiction under the PKPA. The Vermont Court has made a child custody or visitation determination in accordance with Vermont law, *see* VT Ct. Order of 6/17/04 at VT. Rec. 14-16, JA 80-82, and Janet continues to reside in Vermont. *See* J. Miller-Jenkins Aff. ¶ 11, JA 355; s*ee also* VT Ct. Order of 9/2/04 ¶ 24, JA 461.

Independently, Section (d) of the PKPA is also satisfied for precisely the same reasons. Having made a made a child custody or visitation determination on June 17, 2004, the jurisdiction of the Vermont Court continues because the requirements of section (c)(1) continue to be met and Vermont remains Janet's state of residence. *See* J. Miller-Jenkins Aff. ¶ 11, JA 355. *See also* VT Ct. Order of 9/2/04 ¶ 24, JA 461. Accordingly, it is evident that the Virginia Court's exercise of jurisdiction was improper because (1) it exercised jurisdiction for purposes of making a "custody or visitation determination"; (2) a custody or visitation proceeding was already pending in the Vermont Court; and (3) the Vermont Court was exercising jurisdiction consistent with the provisions of the PKPA.

B. PKPA Analysis Does Not Require or Permit Consideration of the Underlying Merits of the Custody or Visitation Determination.

The Virginia Court did not address the PKPA during the hearing on jurisdiction, and its two-page order offers no explanation as to how the Court could exercise jurisdiction despite the plain prohibition of the PKPA.

The Virginia Court made it clear that it was examining the issue of whether it had jurisdiction based on substantive public policy considerations of Virginia law. This is flatly precluded by the PKPA, which makes its own policies (which are mirrored in the Virginia UCCJEA) superior. 28 U.S.C.A. § 1738A(a),(g); *Clausen*, 442 Mich. at 676, 502 N.W.2d at 661 ("After passage of the PKPA, we are not free to refuse to enforce the Iowa judgment as being

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537-38 (1988) (same; examining issue under District of Columbia law); *In re B.R.F.*, 669 S.W.2d

contrary to public policy."). Explaining its ruling, the Virginia Court observed that:

> [I]t does seem to me that Virginia's laws are not similar or substantially in conformity with Vermont's laws nor are Vermont's with Virginia. That 20-45.3 clearly states, at least if not the outright law, the public policy in Virginia, that civil unions are void in all respects. So if I am applying that on top of the UCCJEA, it would seem to me that one could make the argument that actually as far as Virginia is concerned, nothing has taken place in Vermont and certainly nothing has taken place in Vermont that would deprive this Court of the legal authority to make a judgment as to the fact that Lisa Miller-Jenkins is the mother, biological mother, of this child and that is what you have asked me to do.

Hearing Tr. of 8/24/04 at 27:10-23, JA 426.

This reasoning is erroneous regarding both the PKPA and the UCCJEA.[15] The Virginia Court's instinct to compare the states' policies and hold one aspect of Virginia law and policy supreme invites the mischief condemned in the PKPA and conflicts with federal law. The PKPA neither invites nor permits a court to look behind the original state court's custody or visitation order, or to the merits or substance of that order, in determining whether the second court can properly exercise jurisdiction. Rather, in precise language, Congress spelled out that all the second court may do is determine whether there is a "custody or visitation proceeding" already pending in another court. Finding such, the second state court's analysis proceeds no further. Strong feelings that the underlying custody determination is wrong, not in agreement with the policy of the second state, or that the determination would turn out differently if made in the second state are immaterial.

The Supreme Court of Michigan explained this critical aspect of the PKPA in *In re Clausen*, 442 Mich. 648, 669, 502 N.W.2d 649, 657 (1993). There, the court rejected the argument that it was permissible for one state court, considering the exercise of jurisdiction under the PKPA, to consider the merits of another state court's decision. *Id.* at 670, 502 N.W.2d at 658. The Supreme Court of Michigan held that to do so would "permit the forum state's view of the

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240, 245-46 (Mo. Ct. App. 1984) (same; examining issue under New Jersey law).

merits of the case to govern the assumption of jurisdiction . . . ." *Id.* The court observed that this would defeat the very purpose of the PKPA, as the "[t]he congressionally declared purpose of the PKPA is to deal with inconsistent and conflicting laws and practices by which courts determine their jurisdiction to decide disputes between persons claiming rights of custody." *Id.* at 669, 502 N.W.2d at 657. Accordingly, the court concluded that without regard to the underlying merits of a decision, the PKPA establishes that "'[i]n language that is subject to little or no misinterpretation the jurisdiction of the initial court continues to the exclusion of all others as long as the court has jurisdiction under the law of that state and the state remains the residence of the child or any contestant.'" *Id.* at 671, 502 N.W.2d at 658 (emphasis added) (internal citation omitted).

Other courts have likewise recognized that Congress's intent in passing the PKPA was to eliminate the incentive for a parent to uproot her child from one jurisdiction and custodian and flee to another state where the underlying substantive law might benefit her. In *Perez v. Tanner*, 332 Ark. 356, 367, 965 S.W.2d 90, 94-95 (1998), the Arkansas Supreme Court held that the trial court erred in assuming jurisdiction in a custody dispute. There, as here, a claimant ignored orders of the first court and was held in contempt by the first state. *Id*., at 361, 965 S.W.2d at 91. There as here, the second state wrongly applied its own substantive law and "refused to extend full faith and credit to the Mississippi orders because it found that [the other party] was a 'stranger' to the children under" its own law. *Id.* 362, 965 S.W.2d at 92. The *Perez* court flatly rejected the notion that Arkansas should apply its own law. *Id.* at 368, 965 S.W.2d at 95 ("The Arkansas court was obligated to determine whether the foreign court had jurisdiction, as well as testing the validity and effect of the foreign court's order, under the law of the foreign state, not Arkansas law."); *see also Bergman v. Zempel*, 807 N.E.2d 146, 154 (Ind. Ct. App. 2004). By preventing the second state from exercising jurisdiction in such cases, Congress sought to end the temptation to forum shop, a temptation to which Lisa has plainly—and detrimentally for IMJ—

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[15] *See* discussion regarding UCCJEA *infra* at III.

surrendered. *Perez*, 332 Ark. At 368, 965 S.W.2d at 95. As the Court of Appeals of Indiana observed in *Bergman*, "Congress passed the PKPA in 1980 to 'make the enforcement of a sister state's custody decision a federal obligation" and to "reduce state-by-state deviations in the interpretation and application of the UCCJA." *Bergman*, 807 N.E.2d. at 154 n.8.

Here, the only analysis the Virginia Court should have undertaken was whether a custody or visitation proceeding was already pending in the Vermont Court; and whether the Vermont Court was exercising jurisdiction consistent with the provisions of the PKPA. That analysis invariably results in a determination that jurisdiction should not and could not be exercised by the Virginia Court.

C. The PKPA Preempts Any Conflicting Virginia Law that Would Permit the Exercise of Jurisdiction in the Virginia Court.

In addition to prohibiting a court from revisiting the merits of another state's custody determination or proceeding when determining whether to exercise jurisdiction, the PKPA preempts any state law that might otherwise permit the exercise of jurisdiction. Thus it was error to invoke a Virginia law to bypass the PKPA and attempt to wrest jurisdiction from Vermont.

The Virginia Court hinged its exercise of jurisdiction on the existence of Virginia's so-called "Marriage Affirmation Act," Va. Code Ann. § 20-45.3.[16] Section 20-45.3 provides:

> A civil union, partnership, contract or other arrangement between persons of the same sex purporting to bestow the privileges or obligations of marriage is prohibited. Any such civil union, partnership, contract or other arrangement entered into by persons of the same sex in another State or jurisdiction shall be void in all respects in Virginia and any contractual rights

[16] As set forth herein at I.C. and III.C.2, Virginia's Marriage Affirmation Act is not relevant to jurisdictional analysis under either the PKPA or Virginia's UCCJEA. Moreover, as set forth herein at in I.C., even if the Marriage Affirmation Act could somehow be interpreted as having some bearing on the Virginia Court's jurisdictional analysis, it is nevertheless preempted by the PKPA. However, assuming *arguendo*, that the Marriage Affirmation still may be understood as having any bearing whatsoever on these proceedings, the Marriage Affirmation Act cannot be applied here because it is, on its face, unconstitutional. It violates both the Virginia Constitution and United States Constitution by abridging the right of Contract. Should this Court reach a holding that applies the Marriage Affirmation Act to these proceedings, Appellant requests the opportunity to brief the issue of the Marriage Act's constitutionality and to advise the Attorney General of this matter, as required.

created thereby shall be void and unenforceable.

Va. Code Ann. § 20-45.3.

The Virginia Court offers no explanation as to how, in the face of the PKPA as well as the Commonwealth's own parallel UCCJEA, section 20-45.3 permits an exercise of jurisdiction in this case. Nor is it apparent from the plain language of section 20-45.3 how it has any bearing whatsoever on the order, decree, or judgment of another state. Indeed, such an interpretation and application of section 20-45.3 would necessarily raise constitutional questions, as the Virginia Supreme Court has repeatedly held that the courts of the Commonwealth are bound by the full faith and credit clause of the United States Constitution to give effect to the judgments, orders, and decrees of other states, even when those judgments, orders, and decrees are abhorrent to the public policy of the Commonwealth. *See, e.g., Coghill v. Boardwalk Regency Corp.*, 240 Va. 230, 233-35, 396 S.E.2d 838, 839-40 (1990). Accordingly, any interpretation of section 20-45.3 to nullify the Vermont Court's order would represent an unconstitutional application of the statute.

More to the point, however, is that the Virginia Court has offered no rationale whatsoever as to how section 20-45.3 permits the exercise of jurisdiction in light of the PKPA's preemptive power. Indeed, it is firmly established that the PKPA preempts any conflicting state law that would, expressly or by its operation, confer jurisdiction where the PKPA precludes such jurisdiction.[17] The PKPA even preempts a state's UCCJA/EA provisions when that state's

[17] *See, e.g., Meade v. Meade*, 812 F.2d 1473, 1476 (4th Cir. 1987), *overruled on other grounds, Thompson v. Thompson*, 484 U.S. 174, 108 S. Ct. 513 (1988); *Martinez v. Reed*, 623 F. Supp. 1050, 1054 (E.D.La.1985), *aff'd without opinion by* 783 F.2d 1061 (5th Cir.1986); *Esser v. Roach*, 829 F. Supp. 171, 176 (E.D.Va.1993); *Ex parte Blanton*, 463 So.2d 162, 164 (Ala.1985); *Rogers v. Rogers*, 907 P.2d 469, 471 (Alaska 1995); *Atkins v. Atkins*, 308 Ark. 1, 823 S.W.2d 816, 819 (1992); *In re Marriage of Pedowitz*, 179 Cal.App.3d 992, 999, 225 Cal.Rptr. 186, 189 (1986); *Matter of B.B.R.*, 566 A.2d 1032, 1036 n. 10 (D.C.App.1989); *Yurgel v. Yurgel*, 572 So.2d 1327, 1329 (Fla.1990); *In re Marriage of Leyda*, 398 N.W.2d 815, 819 (Iowa 1987); *Wachter v. Wachter*, 439 So.2d 1260, 1265 (La.App.1983); *Guardianship of Gabriel W.*, 666 A.2d 505, 508 (Me.1995); *Delk v. Gonzalez*, 421 Mass. 525, 531, 658 N.E.2d 681, 684 (1995); *In re Clausen*, 442 Mich. 648, 502 N.W.2d 649, 657 n. 23 (1993); *Glanzner v. State, DSS*, 835 S.W.2d 386, 392 (Mo. Ct. App.1992); *Ganz v. Rust*, 299 N.J. Super. 324, 334 n. 5, 690 A.2d

UCCJA/EA provisions conflicts with the PKPA. *See Bergman v. Zempel*, 807 N.E.2d 146, 153-54 (Ind. Ct. App. 2004); *Barclay v. Eckert*, 743 A.2d 1259, 1262 (Me. 2000); *Henry v. Keppel*, 326 Or. 166, 172, 951 P.2d 135, 138 (1997); *Griffin v. Dist. Ct. of the 5th Dist.*, 831 P.2d 233, 237 n.6 (Wyo. 1992).

Accordingly, even if section 20-45.3 otherwise permitted the exercise of jurisdiction by the Virginia Court, section 20-45.3 would be preempted by the PKPA, and it therefore provides no basis for the Virginia Court's exercise of jurisdiction in this matter. Accordingly, the Virginia Court's decision to exercise jurisdiction should be reversed and all subsequent orders entered by the Virginia Court should be vacated.

II. THE PKPA REQUIRES THE VIRGINIA COURT TO ENFORCE THE VERMONT COURT'S ORDERS.

In addition to barring the exercise of jurisdiction by a second court where a custody or visitation proceeding is already pending in another court, the PKPA expressly provides that: "[t]he appropriate authorities of every State shall enforce according to its terms and shall not modify except as provided in subsection (f) of this section, any child custody determination made consistently with the provisions of this section by a court of another State." 28 U.S.C.A. § 1738A(a) (emphasis added). Applying these provisions, the Indiana Court of Appeals explained that "Congress passed the PKPA in 1980 to 'make the enforcement of a sister state's custody decision a federal obligation' and to 'reduce state-by-state deviations in the interpretation and

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1113, 1118 n. 5 (1997); *Tufares v. Wright*, 98 N.M. 8, 644 P.2d 522, 524 (1982); *Leslie L. F. v. Constance F.*, 110 Misc.2d 86, 441 N.Y.S.2d 911, 913 (Fam.Ct.1981); *Dahlen v. Dahlen*, 393 N.W.2d 765, 767 (N.D.1986); *Holm v. Smilowitz*, 83 Ohio App.3d 757, 767, 615 N.E.2d 1047, 1053-54 (1992); *In the Matter of Henry*, 326 Or. 166, 172, 951 P.2d 135, 138 (1997); *Barndt v. Barndt*, 397 Pa. Super. 321, 322, 580 A.2d 320, 326 (1990); *Marks v. Marks*, 281 S.C. 316, 315 S.E.2d 158, 160 (1984); *Brown v. Brown*, 847 S.W.2d 496, 499 (Tenn.1993); *In Interest of S.A.V.*, 837 S.W.2d 80, 87-88 (Tex.1992); *State in Interest of D.S.K.*, 792 P.2d 118, 128 (Utah App.1990); *State v. Carver*, 113 Wash.2d 591, 607, 781 P.2d 1308, 1316, 789 P.2d 306 (1990); *Arbogast v. Arbogast*, 174 W.Va. 498, 502, 327 S.E.2d 675, 679 (1984); *Michalik v. Michalik*, 172 Wis.2d 640, 649, 494 N.W.2d 391, 394 (1993); *State ex rel. Griffin v. District Court*, 831 P.2d 233, 237 n. 6 (Wyo.1992).

application of the UCCJA.'" *Bergman v. Zempel*, 807 N.E.2d 146, 154 n.8 (Ind. Ct. App. 2004) (internal citation omitted).

The *Bergman* court further recognized that "'[t]he PKPA imposes on states a federal duty, under enumerated standards derived from the UCCJA, to give full faith and credit to the custody decrees of other states.'" *Id.* Similarly, applying the same provisions, the Oregon Supreme Court held that "[t]he PKPA requires states to enforce a child custody determination entered by a court of a sister state, if that determination was 'made consistently with provisions of' the act." *Henry v. Keppel*, 326 Or. 166, 172, 951 P.2d 135, 138 (1997); *accord Wilson v. Gouse*, 263 Ga. 887, 889, 441 S.E.2d 57, 60 (1994) ("In essence, the PKPA imposes on states a federal duty, under standards derived from the UCCJA, to give full faith and credit to a custody decree of a sister state") (citing *Thompson*, 484 U.S. at 181).

As previously noted, on August 18, 2004, the Virginia Court modified the Vermont Court's June 17, 2004 Temporary Custody and Visitation Order. The Virginia Court stayed all visitation except supervised visitation in the Commonwealth of Virginia, in direct contradiction of the Vermont Court's June 17 Order, which grants Janet unsupervised visitation in both Virginia and Vermont. *See* VA Ct. Order of 8/18/04 at 1-2, JA 48-49; VT Ct. Order of 6/17/04 at VT Rec. 14-16, JA 80-82. The Vermont Court recognized and took exception to this impermissible modification of its order, finding that "Unfortunately, and without contacting this Court before it did so, the Virginia court modified the Vermont order to preclude parent-child contact between the child and Janet outside Virginia." VT Ct. Order of 9/2/04 ¶ 21, JA 461.

Like its exercise of jurisdiction, the Virginia Court's modification of the Vermont Court's June 17, 2004 Order and continuing refusal to enforce that order "according to its terms" is a flagrant violation of the express terms of the PKPA. The evidence before the Virginia Court, which was unchallenged, clearly established that the Vermont Court had jurisdiction and that its determination was made consistently with provisions of the PKPA. Accordingly, in addition to reversing the Virginia Court's decision to exercise jurisdiction and vacating its orders, this Court

should remand this matter with instructions for the Virginia Court to enforce the orders and decrees of the Vermont Court in this matter.

III. VIRGINIA'S UCCJEA PRECLUDES THE EXERCISE OF JURISDICTION BY THE VIRGINIA COURT.

"[T]he Virginia UCCJA was enacted . . . to avoid relitigating foreign custody decisions in this state so far as possible . . . ."

– *Middleton v. Middleton*, 227 Va. 82, 93 (1984).

Entirely independent of the PKPA, Virginia's own Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"), Va. Code Ann. § 20-146.1 *et seq*., also precludes the exercise of jurisdiction by the Virginia Court. The UCCJEA was enacted precisely for the same reasons as the PKPA and was intended to avoid the same potential pitfalls presented by two states entertaining concurrent custody and visitation proceedings. *See* Va. Code Ann. § 20-146.38(A); *see also Middleton v. Middleton*, 227 Va. 82, 93, 314 S.E.2d 362, 368 (1984) (enumerating the purposes underlying the UCCJA, predecessor to the UCCJEA, and overruling a trial court's custody order under the UCCJA because England had a closer connection with the children and the father had "snatched" the children by keeping them in violation of a visitation agreement to obtain a tactical advantage). To this end, the Virginia legislature has mandated that courts construe the UCCJEA to promote several enumerated purposes, including to:

> (1) avoid jurisdictional competition and conflict with courts of other states in matters of child custody that have in the past resulted in the shifting of children from state to state with harmful effects on their well-being;
>
> ***
>
> (4) discourage continuing controversies over child custody in the interest of greater stability of home environment and of secure family relationships for the child;
>
> (5) deter abductions and other unilateral removals of children undertaken to obtain child custody awards; and
>
> (6) avoid relitigation of custody decisions of other states in this Commonwealth insofar as feasible.

Va. Code Ann. § 20-146.38(A)-(B).

This case epitomizes *exactly* what the UCCJEA was enacted to prevent: courts in Vermont and Virginia are simultaneously asserting jurisdiction—in actions filed by Lisa in both states—and have issued conflicting custody orders; Lisa filed her second action when the first state ruled against her and the law in the second state looked more inviting; the two states have issued conflicting custody orders, which the parties are simultaneously attempting to enforce; and, meanwhile, IMJ is being kept from Janet and must endure prolonged delay, turmoil and confusion while this dispute is litigated and relitigated in two competing jurisdictions. These sorry circumstances are meant to be avoided, and should now be resolved, by *proper* application of the UCCJEA.

A. The UCCJEA Governs This Action and Limits Jurisdiction to Vermont.

The UCCJEA defines a "Child custody proceeding" to mean:

> a proceeding in which legal custody, physical custody, or visitation with respect to a child is an issue. The term includes a proceeding for divorce, separation, neglect, abuse, dependency, guardianship, paternity, termination of parental rights, and protection from domestic violence, in which the issue may appear. The term does not include a proceeding involving juvenile delinquency, contractual emancipation, or enforcement under Article 3 (§ 20-146.22 et seq.) of this chapter.

Va. Code Ann. § 20-146.1 (emphasis added). This definition subjects all "proceedings that affect access to [a] child" to the UCCJEA. *Uniform Child Custody Jurisdiction and Enforcement Act (ULA)*, § 102, cmt. (1997). On the face of Lisa's Petition to the Virginia Court, it is clear that each of Lisa's requests—for a determination of parentage or an adjudication of parental rights—falls within the scope of "child custody proceedings" governed by the UCCJEA, and triggered application of that statute. Indeed, the Virginia Court's Final Order of Parentage explicitly addressed the issue of custody and visitation by awarding Lisa "*the legal rights, privileges, duties and obligations* as a parent hereby established for the health, safety, and welfare of the minor child, [IMJ]" and holding that "[n]either [Janet] nor any other person has any claims of parentage

or *visitation rights* over [IMJ]." VA Ct. Order of 11/1/04 at 2, JA 469 (emphasis added).

Under the plain language of Virginia's UCCJEA, once a court with jurisdiction to hear the case makes a child custody determination,[18] that court has "exclusive, continuing jurisdiction" over the matter as long as "any person acting as a parent" continues to live in that state. Va. Code Ann. § 20-146.13 (A). In fact, even before entry of a custody order, and regardless of the parental status of the parties involved, the UCCJEA greatly restricts Virginia's ability to entertain a custody action that was not first filed. The UCCJEA provides:

> [A] court of this Commonwealth may not exercise its jurisdiction under this article if, at the time of the commencement of the proceeding, a proceeding concerning the custody of the child has been previously commenced in a court of another state having jurisdiction substantially in conformity with this act, unless the proceeding has been terminated or is stayed by the court of the other state because a court of this Commonwealth is a more convenient forum . . . .

Va. Code Ann. § 20-146.17(A); *see also D'Agnese v. D'Agnese*, 22 Va. App. 147, 154-55, 468 S.E.2d 140, 144 (1996) (noting that Virginia law establishes a general jurisdictional principle of "first in time" for custody proceedings).

Pursuant to the plain language of the UCCJEA, it was error for the Virginia Court to exercise jurisdiction in this matter because: (1) the Vermont Court had issued a child custody determination and one of the involved parents remains in Vermont; and alternatively, (2) the Vermont Court was already exercising jurisdiction substantially in conformity with the UCCJEA and it had neither terminated nor stayed the proceedings before it.

As with the PKPA, the genesis of the underlying custody proceeding is not germane to this Court's determination of jurisdiction under the UCCJEA. Whether the underlying proceeding was a divorce, a domestic violence proceeding, or a civil union dissolution, what is germane is whether the proceeding in Vermont is "a proceeding in which legal custody, physical

[18] The UCCJEA does not distinguish between temporary or permanent custody orders, but rather includes in the definition of "child custody determination" any "permanent, temporary, initial or modification order." Va. Code Ann. § 20-146.1.

custody, or visitation with respect to a child is an issue." Va. Code Ann. § 20-146.1.

B. The Vermont Court Was Already Exercising Jurisdiction to Make a Custody and Visitation Determination.

The unrefuted evidence before the Virginia Court clearly established that "a proceeding concerning the custody of the child" had been previously commenced in Vermont. As noted, the UCCJEA defines "child custody proceeding" broadly to mean "a proceeding in which legal custody, physical custody, or visitation with respect to a child is an issue." Va. Code Ann. § 20-146.1. This definition subjects all "proceedings that affect access to [a] child" to the UCCJEA. *Uniform Child Custody Jurisdiction and Enforcement Act (ULA)*, § 102, cmt. (1997).

Here, the Vermont Court's Order, termed "Temporary Order Re: Parental Rights & Responsibilities," [19] expressly states that Lisa is "awarded temporary legal and physical responsibility for the minor child of the parties,"[20] and that Janet, "on a temporary basis," shall have "parent-child contact"[21] as delineated, including "visitation" in both Virginia and Vermont.

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[19] As previously noted, the Vermont domestic relations law substitutes the phrase "parental rights and responsibilities" for "child custody;" therefore, the Vermont court's "Temporary Order Re: Parental Rights & Responsibilities" equates to a temporary custody order. *See, e.g., Myott v. Myott*, 149 Vt. 573, 575, 547 A.2d 1336, 1338 (1988)(Vermont statute governing parental rights and responsibilities orders, Vt. Stat. Ann. tit. 15 § 665 specifies how courts are to decide custody matters). "Parental rights and responsibilities" means "the rights and responsibilities related to a child's physical living arrangements, parent child contact, education, medical and dental care, religion, travel and any other matter involving a child's welfare and upbringing." Vt. Stat. Ann. tit. 15, § 664(1).

[20] Under Vermont domestic relations law, "legal responsibility" means "the rights and responsibilities to determine and control various matters affecting a child's welfare and upbringing, other than routine daily care and control of the child. These matters include but are not limited to education, medical and dental care, religion and travel arrangements. Legal responsibility may be held solely or may be divided or shared." Vt. Stat. Ann. tit. 15, § 664(1)(A). "Physical responsibility" means "the rights and responsibilities to provide routine daily care and control of the child subject to the right of the other parent to have contact with the child. Physical responsibility may be held solely or may be divided or shared." Vt. Stat. Ann. tit. 15, § 664(1)(B).

[21] Under Vermont domestic relations law, "parent child contact" means "the right of a parent who does not have physical responsibility to have visitation with the child." Vt. Stat. Ann. tit. 15, § 664(2).

VT Ct. Order of 6/17/04 at VT Rec. 14-15, JA 80-81. By its plain terms the Vermont Court's Order unequivocally demonstrates that the Vermont proceeding is "a proceeding in which legal custody, physical custody, or visitation with respect to a child is an issue." Va. Code Ann. 20-146.1. Indeed, it is unfathomable as to how the proceeding could be understood to be anything else.

C. The Vermont Court Is Exercising Jurisdiction Substantially in Conformity with the UCCJEA.

1. Vermont was IMJ's Home State and Janet Continues to Reside in Vermont.

Under Virginia's UCCJEA, a Virginia court can exercise jurisdiction for purposes of making an initial child custody determination if the "Commonwealth is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding and the child is absent from this Commonwealth but a parent or person acting as a parent continues to live in this Commonwealth." Va. Code Ann. § 20-146.12(A)(1). Accordingly, the Vermont Court's exercise of jurisdiction is in "substantial conformity" with Virginia's UCCJEA if Vermont was IMJ's home state within six months before the commencement of the proceeding on November 24, 2003, and IMJ is absent from Vermont, but a parent or person acting as a parent continues to reside in Vermont.

It is plain that the Vermont Court's exercise of jurisdiction comports with Virginia's UCCJEA. Vermont was the home state[22] of IMJ within six months before the commencement of the proceeding on November 24, 2003. *See* J. Miller-Jenkins Aff. ¶¶ 6-7, JA 354. There is no dispute that IMJ resided in Vermont from June 2002 – September 2003, a period of more than 14 months immediately preceding Lisa's initiation of a custody determination proceeding in the

[22] "Home State" is defined under the UCCJEA, as it is under the PKPA, as "the State in which a child lived with a parent or person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding." Va. Code Ann. § 20-146.1.

Vermont Court on November 24, 2003. *Id.* It is likewise undisputed that, though IMJ is now in Virginia, Janet, who is a person "acting as parent" continues to reside in Vermont. *Id.* at ¶ 11, JA 355. *See also* VT Ct. Order of 9/2/04 at ¶ 24, JA 461. Accordingly, the Vermont Court's exercise of jurisdiction to make a parentage, custody, and visitation determination substantially comports with Virginia's UCCJEA, and thereby precludes the exercise of jurisdiction by the Virginia Court.

2. Janet is a Person "Acting as a Parent."

The Virginia Court, while agreeing that Vermont had been IMJ's home state at the relevant time, and that Janet continued to reside in Vermont, nevertheless concluded that the Vermont Court was not exercising jurisdiction in substantial conformity with Virginia's UCCJEA because Janet was not a person "acting as a parent." Hearing Tr. of 8/24/04 at 23-25, JA 422-24; VA Ct. Order of 9/9/04 ¶ 3, JA 453. According to the Virginia Court, Janet could not be a person "acting as a parent" under the UCCJEA because she could not, under Virginia law, claim any parental rights to IMJ. *Id.* Specifically, the Virginia Court asserts that Janet cannot qualify as a "person acting as a parent" because her claim to legal custody of IMJ stems from her civil union, which Virginia does not recognize pursuant to the Marriage Affirmation Act, Va. Code Ann. § 20-45.3.[23] The Virginia Court's interpretation of the UCCJEA is in error.

First, Janet is a legal parent to IMJ under Vermont law regardless of the Virginia court's view of Virginia law. Lisa recognized as much in her petition initiating the Vermont proceedings. IMJ was born into the Miller-Jenkins family after their civil union was solemnized. By Vermont statute, therefore, IMJ is a child of both Janet and Lisa, *see* 15 V.S.A. § 2-401; 15 V.S.A. § 1204(b), and Janet is a parent before the Vermont Court. She remains a parent there for all purposes, as she should also be viewed in this state.

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[23] Va. Code § 20-45.3 is not only irrelevant to this analysis, but is unconstitutional under both the United States and Virginia Constitutions. *See supra* I.C and note 16.

Further, Janet *acts* as IMJ's parent. The UCCJEA defines a "person acting as a parent" to mean:

> [A] person, other than a parent, who has
>
> (i) physical custody of the child or has had physical custody for a period of six consecutive months, including any temporary absence, within one year immediately before the commencement of a child custody proceeding and
>
> (ii) been awarded legal custody by a court or claims a right to legal custody under the laws of this Commonwealth.

Va. Code Ann. § 20-146.1.

Janet qualifies as a "person acting as a parent" under both sections (i) and (ii). Turning to section (i), the undisputed record before the Virginia Court is that Janet had physical custody of IMJ—defined under the UCCJEA as "the physical care and supervision of a child"—which she shared with Lisa for more than 16 months, from April 2002 – September 2003, immediately preceding Lisa's initiation of custody determination proceedings in the Vermont Court on November 24, 2003. [24] *See* J. Miller-Jenkins Aff. ¶¶ 6-7, JA 354.

Janet also satisfies section (ii) of the definition of a person "acting as a parent" because she was awarded legal custody in the June 17, 2004 Order. *See* VT. Ct. Order of 6/17/04 at VT Rec. 14-15, JA 80-81.

Even if this order had not been entered, Janet also qualifies as a "person acting as a parent" under section (ii) because she claims a right to legal custody of IMJ under the laws of *Vermont*. The Virginia Court incorrectly read the UCCJEA to mean that Janet must claim a right of legal custody of IMJ under the laws of *Virginia*. *See* Unif. Child Custody Jurisdiction & Enforcement Act § 102 cmt. (1997). The Comment of the National Conference of Commissioners of Uniform State Laws to the definition of "person acting as a parent," which Virginia adopted verbatim, explains:

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[24] Va. Code Ann. § 20-146.1.

> [A] person acting as a parent must either have legal custody or claim a right to legal custody under the law of this [Commonwealth]. The reference to the law of this [Commonwealth] means that a court determines the issue of whether someone is a "person acting as a parent" under its own law. This reaffirms the traditional view that a court in a child custody case applies its own substantive law.

Id. (emphasis added). The Vermont Court was exercising jurisdiction substantially in conformity with Virginia's UCCJEA, because Janet asserted a cognizable claim to legal custody of IMJ under Vermont law. *See* Vt. Stat. Ann. tit. 15, § 1204(d), (f). Thus, whether Janet possesses a viable claim to legal custody in Virginia is immaterial to whether the Vermont court properly exercised jurisdiction.[25] Moreover, the Virginia Court's interpretation contradicts Virginia law, which requires courts to construe the UCCJEA to "avoid jurisdictional competition and conflict with courts of other states in matters of child custody," and "deter abductions and other unilateral removals of children undertaken to obtain child custody awards." Va. Code Ann. § 20-146.38(A)-(B).

The Virginia Court, therefore, lacked authority to exercise jurisdiction for purposes of making either a parentage determination or an adjudication of parental rights. The Vermont Court is exercising "jurisdiction substantially in conformity" with the UCCJEA. Va. Code Ann. § 20-146.17. That proceeding is ongoing, it has not been terminated or stayed, and it cannot be legally ignored.

D. The Vermont Court Has Continuing and Exclusive Jurisdiction.

As with the PKPA, the UCCJEA also forecloses the Virginia Court from modifying the Vermont Court's June 17, 2004 Order because the Vermont Court enjoys exclusive, continuing

[25] As it happens, however, the record before the Virginia Court provides ample evidence to establish that Janet could assert a claim to legal custody under Virginia law. Specifically, as one of IMJ's two primary caregivers from her birth until September 2003 when she was physically taken from Janet by Lisa, Janet is a "person with a legitimate interest" who may seek custody and vistitation of IMJ. *See Va. Code Ann.* § 20-124.2(B); 124.1; *c.f. Thrift v. Baldwin*, 23 Va. App. 18, 20, 473 S.E.2d 715, 716 (1996) (holding that "party with a legitimate interest" means "not only a party possessed of legal rights with respect to the child, but also any party having a cognizable and reasonable interest in maintaining a close relationship with the child" under Va.

jurisdiction over this case. Once a court has exercised jurisdiction over a child custody proceeding in substantial conformity with the UCCJEA, and has made a child custody determination, that court enjoys "exclusive, continuing jurisdiction" over that determination as long as any person acting as a parent continues to reside in the state. Va. Code Ann. § 20-146.3.

Accordingly, it was error for the Virginia Court to modify the Vermont Court's June 17, 2004 Temporary Custody and Visitation Order. The Virginia Court stayed all visitation except supervised visitation in the Commonwealth of Virginia, in direct contradiction of the Vermont Court's June 17 Order, which grants Janet unsupervised visitation in both Virginia and Vermont. *See* VA Ct. Order of 8/18/04 at 1-2, JA 48-49; VT Ct. Order of 6/17/04 at VT Rec. 14-16, JA 80-82. Like its exercise of jurisdiction, the Virginia Court's modification of the Vermont Court's June 17, 2004 Order is a violation of the express terms of the UCCJEA.

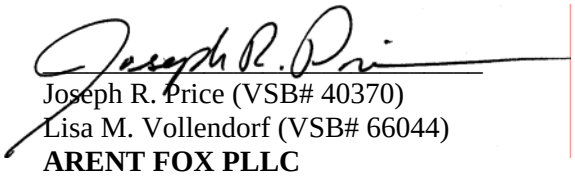
CONCLUSION

As set forth herein, the PKPA and Virginia's UCCJEA preclude the Virginia Court from exercising jurisdiction over this matter. Under both statutes, the Vermont Court has exclusive and continuing jurisdiction over these custody matters. Moreover, the PKPA and UCCJEA bar the Virginia Court from modifying the Vermont Court's orders. The PKPA further requires that the Virginia Court enforce the custody orders of the Vermont Court.

For the foregoing reasons, Appellant asks this Court to: (1) hold that the Frederick County Circuit Court's exercise of jurisdiction was improper and its modification of the Vermont Court's order error; (2) to vacate the Virginia Court's orders; and (3) to remand with instructions that the Virginia Court is to enforce according to their terms, the custody orders and decrees of the Vermont Court.

Code Ann. § 16.1-241(A), which governs custody proceedings brought in district courts).

Respectfully submitted,



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CERTIFICATE PURSUANT TO RULE 5A:20(h)

(1) The under signed counsel hereby certifies that in compliance with Rule 5A:19(e), on this 25th day of January, 2005 three copies of the foregoing brief and the appendix were sent to each counsel of record by United States mail, postage pre-paid and addressed as follows:

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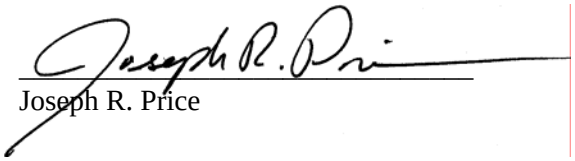

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