

UNIFORM CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT

A Primer for the Practitioner

All fifty states had by 1997 enacted individual versions of the Uniform Child Custody and Jurisdiction Act. Nevertheless, significant difficulties in practice continued. In the effort to minimize conflicts in the exercise of subject matter jurisdiction, particularly for the purposes of making a child custody determination. The Parental Kidnapping Prevention Act (PKPA) 28 USC 1738A had been enacted in 1980 providing a federal component to Interstate Child Custody Practice. The PKPA established a “home state” priority in the exercise of subject matter jurisdiction to make an initial child custody determination. Additionally, the full faith and credit provisions of the Violence Against Women Act enacted in 1994 and the Hague Convention on the Civil Aspects of International Child Abduction which was ratified by the United States in 1986 and incorporated in federal legislation as the International Child Abduction Remedies Act in 1998 created a complex matrix into which family law practitioners were unwittingly thrust in the increasingly common fact pattern of interstate child custody disputes.

The preliminary comments which accompanied the draft of the revision of the Uniform Child Custody Jurisdiction Act sets forth a succinct review of the weaknesses of the prior Act. The inconsistencies between the State versions of the UCCJA and the Parental Kidnapping Prevention Act coupled with the cumulative effect of thirty years of adversarial litigation had produced a body of law which defied the ability of any practitioner to reasonably anticipate what could be expected to happen in the case of a jurisdictional contest. The National Conference of Commissioners on Uniform State Laws went so far as to say, “...the goals of the UCCJA were rendered unattainable in

many cases.” Additionally, the Uniform Interstate Family Support Act, which addressed the interstate enforcement of child support and maintenance obligations, provided the final motivation which empowered a drafting committee to address a revision of the UCCJA. The Act’s text was completed by the Uniform Law Commissioners in 1997 and has now been adopted in twenty-six states with an additional ten states considering pending litigation. An updated review of the status of the Uniform Child Custody Jurisdiction and Enforcement Act, as well as a review of the Uniform text can be found on the web site of the National Conference of Commissioners on Uniform State Laws, http://www.nccusl.org/nccusl/uniformact_factsheets/uniformacts-fs-uccjea.asp.

A review of the case law from a practitioner’s standpoint is attached to these materials. Research identified a little over fifty cases in which the Uniform Child Custody Jurisdiction and Enforcement Act has been either addressed or cited by 18 states. Many of the decisions represent merely an acknowledgment of the applicability of the Uniform Child Custody Jurisdiction and Enforcement Act or the recognition that the proceeding at issue does not fall under the protection of the UCCJEA. Yet, in some cases the decisions demonstrate the substantive differences between the UCCJA and UCCJEA. The focus of these comments will be to briefly identify, from a practitioner’s perspective, the major differences between the UCCJEA and its predecessor UCCJA. The second is to address what new tools are available to private practitioners in the prosecution and resolution of interstate and international child custody disputes while identifying potential pitfalls associated with interstate and international child custody litigation implicated by the Act. Finally, the materials provide a brief review of current case law generated on the Uniform Child Custody Jurisdiction and Enforcement Act.

Part I: What's new about the UCCJEA?

The UCCJEA expands the definition of which types of proceedings are to be subjected to the prerequisites of the new Act.

Unlike the UCCJA the UCCJEA does not apply to adoption cases. [§102(4) Definitions)¹.

Alternatively tribal court proceedings, which had been left in an ambiguous position because of the absence of language in both the UCCJA and the PKPA have now been addressed by provisions which may permissively be enacted at the election of the individual state. Those provisions indicate that state courts will be required to treat tribes as if they were states and tribal court custody proceedings as if they were sister state court proceedings and to enforce tribal court custody orders. §104(b) and (c)

An area of surprising increase in litigation is the area of dependency and neglect proceedings which are now specifically included in the UCCJEA. While child custody practitioners in matrimonial cases may have a tendency to gloss over dependency proceedings as unrelated to the typical divorce case, there is an increasing number of cases in which, because of allegations of domestic violence or of sexual assault, dependency and neglect proceedings may be initiated. When that is the case, the interrelationship between the UCCJEA and the Interstate Compact on the Placement of Children creates potential conflict of law regarding the substantive and jurisdictional prerequisites of each Act, which may be very different.

One of the most significant changes in the text of the UCCJEA is the complete revision of UCCJA §23 which sets forth for state courts the treatment to be given to

¹ For the purposes of this Article I will refer to the Uniform Act designations and citations understanding that each state's individual citations will be unique.

foreign jurisdictions for the purposes of the application of the act. The UCCJEA addresses the international context both in the exercise of jurisdiction for the purposes of an initial child custody determination, and the recognition and enforcement of custody determinations made by foreign courts. §105(b)(c).

The organization of the Act provides guidance for both initial child custody determinations and modification proceedings. However, the new UCCJEA makes very clear the rules of engagement, particularly prohibitions against the exercise of jurisdiction if a sister court has exclusive continuing jurisdiction.

The UCCJEA tightens and enhances the jurisdictional analysis for both initial child custody determinations and modification issues. Clearly, the most important change made by the UCCJEA in addressing initial child custody determinations is establishing once and for all the priority given to “home state” jurisdiction so that both the UCCJEA and the PKPA are in conformity.

Under the UCCJEA, a state can exercise “significant connection jurisdiction” in an initial determination only if the “home state” declines jurisdiction in its favor or makes the determination of inconvenient forum or parental misconduct as a basis to decline jurisdiction. Under the UCCJEA, for practitioners, perhaps as important as the priority given to home state jurisdiction is the removal of “emergency jurisdiction” from the possible options in initial child custody determinations. This speaks to the substantive distinction which the drafters wished to impress in the minds of practitioners and judges, that addressing emergencies that impact on child custody is significantly different from engaging in a substantive analysis of who is the better custodian and where the evidence

and witnesses are likely to be located. Therefore, a new separate section of the Act, covering all aspects of emergency jurisdiction has been added to the UCCJEA. (§204).

The UCCJEA provides for the declination of one state in favor of another on inconvenient forum or misconduct grounds, and identifies a third basis of “more appropriate forum. Additionally, the UCCJEA makes it clear that if no other state would have jurisdiction under the preceding sections, a court may fill this vacuum and issue an initial child custody order. However, interestingly enough, the previous UCCJA language which spoke to child’s “best interest” has been deleted. It is clear that in determining jurisdiction the court should not be determining the merits of the case.

Under modification jurisdiction, the most significant contribution of the UCCJEA is the strengthening of the concept of “continuing exclusive jurisdiction”. The UCCJEA rejects the earlier interpretation of some State Courts espousing concurrent modification jurisdiction (i.e. that more than one state can exercise modification jurisdiction over anyone child at a time). Succinctly put, “exclusive continuing jurisdiction” continues in a court that has made a qualifying child custody determination until neither the child, nor either of the parties, remains in the state. Or that neither the child, parent and child, nor the child and a person acting as a parent, have significant connection with the state and substantial evidence regarding the child is no longer available there. The UCCJEA’s language is, in a subtle way, different than that PKPA. The mere presence of one of the contestants does not provide for the continuing exercise of exclusive jurisdiction if that presence does not carry with it some involvement or contact with the subject child. Nevertheless, only the state that entered the original child custody determination can decide if it should continue to exercise exclusive jurisdiction. A sister state cannot

decide, for example, based on a shift of the child's home state or allegations with respect to the strength of the relationship between the non-custodial parent and the child that the decree state is now deprived of continuing exclusive jurisdiction. The furthest it can go is to make a factual determination that all parties have left the original decree state.

Another of the substantive changes in the UCCJEA that directly affects practitioners and judges are the provisions for judicial communication and cooperation. The general overview of the Act specifies that a court should communicate with the court of another state about any proceeding arising under the Act. That authority to communicate includes communications with foreign courts and tribal courts. However, it is important to note that §204, §206 and §307 require communication, but do not specify either the means or the process for communication. Although subsection 110(b) provides that courts should allow parties to participate in judicial communication, it does not mandate their participation. However, the act makes it clear that if the parties are not provided the opportunity to participate in the communication, they must have an opportunity to present facts and legal arguments before a judicial determination is made. Under the precise terms of the Act oral argument is not required, although, substantive state laws may provide independent authority for the right to oral argument. The court is required to make a record of the judicial communications and to inform the parties of those communications. The Act does not specify how that record is to be made.

The UCCJEA, as an enforcement tool, mandates the recognition and enforcement of child custody determinations wherever they are made, when they are made in "substantial conformity" with the Act or made under factual circumstances which meet the jurisdictional standards of the UCCJEA. The primary way in which the UCCJEA

changes the law of enforcement is in the comprehensive provision of procedures available to enforce custody and visitation on an interstate basis. The UCCJEA creates a registration process, provides for the interstate enforcement of visitation rights, provides for expedited enforcement of custody determinations (*turbo habeas*), provides for a warrant to take physical custody of a child and, if necessary, the public enforcement by law enforcement and prosecutorial staff, particularly in circumstances of recovery of an abducted child or international child custody disputes.

Part II: **What are the New Tools?**

While the substantive provisions and purpose of the UCCJEA in streamlining interstate and international child custody jurisdictional practice is laudatory, the practical effect on family litigation is dependent on procedures that provide individual litigants identifiable results. As such, it is in the details or “tools” that the UCCJEA provides most of the changes in practice and opportunities for family litigators.

A. Continuing Exclusive Jurisdiction:

UCCJEA §201(b) makes it clear that §201(a), (that is, the four-pronged outline of jurisdictional prerequisites), is the exclusive jurisdictional basis for making a child custody determination. Personal jurisdiction over a party or a child is neither necessary nor sufficient to make a child custody determination. You must have subject matter jurisdiction under the Act. Under the new Act, a child need not be physically present in the state for the state to exercise jurisdiction, nor does a child’s absence from the state defeat extended jurisdiction if a parent, or a person acting as a parent, continues to live in the state.

Continuing exclusive jurisdiction carries with it the greatest promise toward continuity and enforcement of child custody decrees. In the context of modification nothing can be more important, given the frequency with which parties relocate. Home states of children shift away from non-custodial parents who may have negotiated primary residential custody merely as a formality, believing that their involvement in the life of their child would be intense and daily. Very often, these cases result in protracted and difficult removal applications in which a tortured decision may be reached. A judge may then condition the move on precise access arrangements, the allocation of access expenses and the provision of telephone or computer contacts for the non-custodial parent

Without continuing exclusive jurisdiction as set forth by the Act, there is no way to insure that the removal of the children does not mean that enforcement of such provisions are illusory. By making it clear that only the decree state may determine whether it continues its significant connection to this family or has lost continuing exclusive jurisdiction, it insures that at the least, the court that made the decision to let the custodial parent move is the one that will make a determination as to whether or not the custodial parent should be permitted to modify those conditions.

For the attorney who is defending the removing parent, and arguing that the circumstances have so significantly changed as to require a review of those access conditions, that attorney can certainly move to ask the original decree court to decline jurisdiction in favor of the children's new home state or based on the inconvenience of the forum.

As a family litigator, the most important analysis here is to determine exactly what question the court is being asked. If, for example, the custodial parent is arguing

that certain behaviors of the visiting parent are at issue, or that the conditions or circumstances of home life of the children while visiting the non-custodial parent are in some way at issue, it is clear that the substantial evidence and witnesses should necessarily be where that non-custodial parent resides.

In the alternative if the argument being framed is that the children have in some way changed, or that their needs have changed, to make the prior access schedule unworkable or untenable, then arguably, the evidence with respect to the children, their peer groups or other personal issues involving their emotional support are more likely to be located in the new home state. As you are drafting and framing the modification issues, those considerations should be foremost in your mind.

B. Emergencies/Temporary Orders:

Tools that are the most helpful are those which deal with the identifiable “emergency” argument. Under the UCCJEA the term “emergency” has taken on new and precise meaning. When a child is abandoned; when a child is in need of protection because that child is threatened with mistreatment or abuse, such can be considered an “emergency”. New to the UCCJEA is the acknowledgment that if such emergency affects a sibling, the emergency can be considered applicable to the subject child as well. This is particularly helpful in circumstances in which siblings may have different parents. Neglect is no longer included in the definition of “emergency” under UCCJEA.

While a court can exercise “emergency jurisdiction”, even when there is a simultaneous proceeding in another state, conditions for such an exercise are limited. First, judicial communication is mandatory, and a precise time period for the duration of the temporary order must be determined and set forth in the Order.

Second, §205 makes it clear that even in the event of an emergency, notice and opportunity to be heard must be done before a child custody determination capable of recognition can be made. In order for an emergency custody determination to be enforceable on an interstate basis, it must be made in compliance with the notice provisions of these acts.

Please do not confuse the concept of notice and service. Notice (that is, actual notice) as well as subsequent opportunity to be heard, are the minimum prerequisites in an order for a child custody determination to be enforceable.

It is important when drafting pleadings that contain prayers for relief that go beyond child custody and perhaps to issue of emergent child support, domestic violence or complaints for divorce, that one keeps in mind that the notice requirements and the service requirements of separate actions will be very different. An international matter may require strict compliance with international treaties if a money judgment or maintenance obligation will be sought. Your entire process will be meaningless if such treaties are ignored. If your primary concern is custody, stick to it. A separate application in order to protect the custodial interest is by far the cleanest way to address multiple service and notice requirements.

In the event that a temporary emergency order is the first proceeding which has been filed, and no other proceeding has been commenced in any other court asking for a child custody determination, the UCCJEA provides that the temporary emergency order becomes a final determination when that state becomes the child's home state for six (6) months.

It is important to recall that for that temporary order to be considered “final”, it must have been done with notice and opportunity to be heard. (Although the UCCJEA §108 makes it clear that notice by publication is permissible if other means are not effective in producing actual notice.)

C. Declining Jurisdiction:

There are two reasons why a court can decline jurisdiction. The first is for inconvenient forum; the other is the unjustifiable conduct of the party seeking the exercise of jurisdiction.

The new provisions of the UCCJEA provide that the court may sua sponte address the issue of inconvenient forum. Inconvenient forum can be addressed upon motion of either party or can be addressed on formal request of a sister state court. The UCCJEA also permits the parties to submit information in support of an inconvenient forum motion and once done, requires the court to consider all of the relevant statutory factors as well as additional relevant factors, including the newly added consideration of domestic violence. Section 207(b) provides that the court is to determine, in reviewing an inconvenient forum application, whether domestic violence has already occurred or would be likely to occur in the future and, in that event, which state could “best protect” the parties and the child.

With this provision, it is clear that in allegations of domestic violence, if those allegations are contested, it is critical to address the issues immediately and seek a dismissal of any domestic violence temporary restraining order unless the issue of forum is to be conceded.

If a court declines to exercise jurisdiction on inconvenient forum grounds the UCCJEA makes it clear that it must retain jurisdiction to transfer the case. The order is not a dismissal or declaration that the State lacks jurisdiction. It is a stay of its exercise of jurisdiction which is conditioned on a proceeding being commenced promptly in the other, more convenient state (or alternate appropriate forum, for example, in another foreign jurisdiction). Therefore, if you are dealing with an international matter, it is important, then, to set forth precisely what will be jurisdictionally required and identifying the time frames for filing an application and prosecuting a child custody determination. If for example you were defending a forum application and you wanted to maintain a child custody action in what is arguably an “inconvenient forum”, you might want to demonstrate that the process to accomplish a child custody determination in the alternate forum, would be excessive or involve other serious deficiencies in time, cost or process.

The UCCJEA removed the provisions associated with the award of attorneys’ fees and expenses for a filing made in a clearly inconvenient forum. The only language associated with attorneys’ fees and expenses are now included under the Act’s “unjustifiable conduct” provisions.

The UCCJEA takes away the language of ‘unclean hands’ in favor of describing the declination, “because a person seeking to invoke [jurisdiction] has engaged in unjustifiable conduct”. (*UCCJEA* §208). The court does not define “unjustifiable conduct” and further sets forth three exceptions from consideration of such conduct. (1) Where there has been acquiescence; (2) where there has been deference to the court on inconvenient forum grounds or (3) where no other court would have jurisdiction. In

those three circumstances, even in the face of “unjustifiable” parental conduct, the court should maintain jurisdiction. In the event that unjustifiable conduct can be demonstrated, the court is “required” to assess necessary and reasonable expenses against the party who sought to evoke the jurisdiction.

If the court is determined to decline jurisdiction by reason of unjustifiable conduct, yet award necessary expenses, that it either retains jurisdiction for the purposes of enforcing those expenses or, in the alternative, that the court conditions the transfer of jurisdiction on the acceptance, recognition and enforcement of the attorneys’ fees and reasonable expenses portion of the order by the court to which the matter is sent.

D. Discovery Tools:

The UCCJEA consolidates and simplifies under terms loosely described as “interstate judicial cooperation” provisions for interstate discovery.

The UCCJEA permits the taking of testimony in a sister state when either a party, the child or the witnesses are located there. Section 111 permits taking of such testimony, but it should be noted that it does not distinguish between the taking of testimony for the purposes of discovery and the purposes of preserving testimony for trial. Therefore, if it is your intention to depose an out-of-state witness or party, and to use that deposition for discovery purposes, you must make it clear on the record that this is a discovery deposition since the adversary could move to have, under §111, discovery considered testimony for the purposes of the Act.

The court can permit an individual to be deposed, or to testify by telephone, audio/visual means or electronic means before either an alternative court that it designates or at another location. This is strengthened by §112 which authorizes courts

to seek assistance from, or give assistance to, a court of another state. Therefore, in a circumstance, for example, where a Notice for Deposition, or subpoena were issued to an out-of-state witness and subsequently ignored, judicial assistance could be sought by way of application or sua sponte by the court. The trial court would request the court in the deponent's jurisdiction to issue an administrative subpoena under its signator, in order to produce the individual in their court, either to conduct an evidentiary proceeding in that jurisdiction or, in the alternative, to produce the party for the purposes of telephonic testimony to be offered to the court. This provision covers the production of evidence, custody evaluations or the collection of records by subpoena duces tecum.

E. Enforcement of Orders:

The tools for enforcing custody orders interstate have been vastly improved. The first is the formal registration process in which presumptions of a procedure which preserves enforceability of orders, which have been rendered by sister states, is set forth simply enough to be done without the assistance of counsel.

The request for registration is sent to the court with certified copies of the custody order and any information required by the individual state process. The order is filed as a foreign judgment and notice is then served on any parent or person acting as parent, who has been awarded custody or rights of access. Those parties have twenty (20) days from the service of such an application to lodge a request for a hearing to contest the registration. If no request is made, the order is confirmed as a matter of law.

Even if a hearing is requested, there are only three defenses available: (1) the lack of jurisdiction on the part of the issuing court; (2) the lack of notice and opportunity to be heard in the child custody proceeding that resulted in the order or (3) the child custody

determination for which recognition is sought has been vacated, stayed or subsequently modified.

Once the registration proceeding is confirmed, either by operation of law or by hearing, further contest is precluded. If there is an enforcement hearing subsequent to it, the only defense available is that the registered order has since been vacated, stayed or modified since the registration process. §205(f), §308(d)

The process is precisely the same in circumstances in which there is an international child custody determination, although §105(c) of the Uniform Act requires an additional level of inquiry. A court in the United States need not enforce a custody determination from another country if it is demonstrated that the child custody law of that country violates fundamental principles of human rights.

The next enforcement mechanism is designed to deal with rights of access. §304(a)(1). This allows a court to issue a temporary order enforcing a visitation schedule by the court of another state. It should be noted, that in enforcing rights of access, any permanent changes made in such an order can only be made by the court which has competent jurisdiction to do so. The enforcing state can issue temporary orders to affect the exercise of access as contemplated by the original decree. Section 304(b) embodies the remedy of providing for specific terms in enforcing a visitation order, which contemplates, for example, changing the decreed schedule to ensure that the spirit of the order is fulfilled.

Turbo habeas, a term coined by The Honorable David Peeples, refers to a speedy enforcement mechanism for the prompt recovery of children wrongfully removed or retained outside of the decree state. The new procedure provides for an enforcement

hearing, normally the next judicial day after service, which will result in an order authorizing the petitioner to take the immediate physical custody of the child, unless the respondent establishes one of a very few defenses available in the statute.

If there is not a previously registered order (something that should be done in every interstate or international access case), the only defenses available are (1) that the issuing court did not have jurisdiction under the UCCJEA to make the order; (2) no notice was provided in accordance with the standards of the UCCJEA or (3) that the custody order advanced has been vacated, stayed or subsequently modified.

If it is an order that has already been registered, only number (3) above is available. The judge hearing the expedited process application has the mandatory duty of communicating immediately with the court that ordered the original order. The UCCJEA also provides for a warrant to take physical custody of the child in aid of an enforcement application. The provisions of the process to obtain a warrant requires a verified petition and requires that the court take immediate testimony from the petitioner or other witness, either in person or by telephone, in support of the application. The allegation must set forth that there is imminent serious harm in removal from the state in which case the court may issue a warrant directing law enforcement officers to physically take custody of the child. Of course, the client should not expect that the child will then be placed with the other parent. Very often, the child is placed in protective service pending a hearing.

This remedy has been available in many of the states' courts already under their substantive law, but by setting it forth in the jurisdictional context, it insures that state law will track federal law in providing emergency custody remedy.

Part III: Dangers and Pitfalls:

The greatest potential pitfalls for practitioners exists in inadvertence.

First, the technical issues presented by domestic violence allegations has a number of jurisdictional pitfalls associated with it. There is already case law that addresses acquiescence in the context of domestic violence applications in an interstate context under the UCCJA. The new statute formalizes the relationship between domestic violence acquiescence and inconvenient forum. Additionally, it is important to remember that the UCCJEA applies when courts adjudicate custody and visitation issues that arise in the context of protection in a domestic violence proceeding. [UCCJEA §102(4)] There are a number of consequences to be sensitized to.

(1) If notice is not given in accordance with the UCCJEA, custody and visitation portions of a domestic violence protection order would not be entitled to interstate enforcement under the Act. (2) The mandatory judicial communication provisions of the UCCJEA apply in the same way to domestic violence restraining orders as to emergency orders. (3) A temporary restraining order which goes unchallenged for six months becomes a final order for enforcement purposes under the UCCJEA.

Therefore, in both advising a litigant who is seeking protection and advising a litigant who is defending an application, or may be defending an application while in another state, where domestic violence is alleged, one should walk through the particulars of the Act as well as the content of the petition to determine whether or not an application should be filed in the “home state” of the child during the pendency of the domestic violence litigation to protect the jurisdictional and substantive issues.

The next pitfall is that associated with international litigation. Given that international orders are entitled to the same deference as sister state orders would be afforded, at least as an initial proposition, it is important to get certified translations of any order which you feel would be relevant to a determination in the United States. You also need to understand the process involved in obtaining the order, and whether or not the process is one that would comply with the provisions of the UCCJEA. If not, you may want to “cure” the foreign defects in a simultaneous proceeding before seeking enforcement. The issues of substantial conformity as well as the issues associated with enforcement provide a large breadth of lawyering opportunities, but there is no substitute for understanding both the procedural and substantive law of the foreign country and setting out a strategy for either proving up your enforcement case, demonstrating the foreign law and process by expert testimony, and providing an informative affidavit at the time at which you file your initial pleading.

Finally, understanding inconvenient forum has never been more important. Forum and applicable law will now become much more meaningful in the context of an application to decline to exercise jurisdiction and continuing exclusive jurisdiction. Dissolution and parenting agreements which intend continuing jurisdiction to be maintained in the “left-behind state” should set forth not only the standard terms which indicates choice of law of, for example “the law of the State of Oregon should apply”, instead it should set forth the current and anticipated significant contacts and reasoning behind the maintenance of a state as the determining state for all potential modification proceedings.

While such language will not completely foreclose the transfer of modification jurisdiction in the future, it can certainly narrow the scope and potentially protect the “left-behind” parent in the event of a subsequent application.

As the Act and case law makes clear, we are in new territory. While the former version of the UCCJA may have anticipated the issues of interstate and international family law, the UCCJEA clearly takes on the problems of litigating these cases. For the family lawyer it does not do so without some confusion and potential conflict. Nevertheless, it provides a framework in which attorneys should be able to reasonably predict the process their client should take in addressing a jurisdictional pursuit.