

ALASKA

E.H., Appellant vs. State of Alaska, Department of Health and Social Services 23 P.3d 1186; 2001 Alas. Lexis 68 decided June 8, 2001 Supreme Court of Alaska

Appellant mother challenged an Order of the Superior Court terminating her Parental Rights. She argues the Court erred by denying her application for dismissal on subject matter jurisdiction grounds.

In 1996 DHS received report of abuse of two minor boys. While the investigation is under way the mother leaves Alaska for Edmonton Alberta Canada where the children are found homeless and in need of medical care. Canadian childcare worker arranges Alaskan social worker to fly to Edmonton and retrieve the boys. The Court adjudicated the boys in need of care and under the Interstate Compact for Placement of Children, sent the boys to Oregon to live with their father.

In 1999 the department petitioned for termination of the mother's parental rights. The mother indicates that because the boys had been found in Canada, the jurisdictional requirements of the abuse statute could not have been met. The Court found that in 1996 under the UCCJA, when the original petition was filed by the State, Alaska was the children's Home State.

Under the UCCJEA the Alaskan Court retained exclusive continuing jurisdiction and the placement of the boys in Oregon did not deprive Alaska of jurisdiction since Alaska maintains constructive continuing jurisdiction under the interstate compact.

Practice note: Various States treat the application of the UCCJEA to an individual petition quite differently. In Alaska the application of UCCJEA appears to have been applied mid analysis. Probably to avoid the difficulties associated with the UCCJA language on continuing jurisdiction, and the inapplicability of the PKPA to international jurisdictional issues. For an alternate approach see *Gray v. Gray* under Arkansas cases.

ARKANSAS

Seamans vs. Seamans, 73 Ark. App. 27; 37 S.W. 3d 69; 2001 Ark. App. Lexis 111 decided February 28, 2001 Court of Appeals

The Chancery Court awarded Counsel Fees and Cost under the Arkansas code annotated section 9-19-208 of the UCCJEA, which provides for mandatory fees in the event of a wrongful removal or retention in an interstate case. The removing father appealed and the matter is remanded. The Appellate Court holds that while the Chancery Court had the discretion to award Counsel Fees and Costs, under substantive state law, the provisions of UCCJEA are applicable only to interstate disputes.

Although the parties had originally been divorced in Louisiana, the instant dispute and wrongful retention occurred intrastate.

Gray v. Gray 69 Ark.App.277; 12 S.W. 3d 648; 2000 Ark App. Lexis 148

Appellant father moved to enforce the terms of the Custody Order and alleged mother had wrongfully removed the child from Arkansas to Texas. The Arkansas Courts declined to exercise jurisdiction. The Appellate Court upholds the decision of the Trial Court and indicated that where the UCCJA (which was applicable at the time that the petition was filed) and the PKPA (28 USC 1738) are in conflict, Federal Law (PKPA) supercedes.

The Court found that the PKPA subsection (F) (2) provides the Court discretion in ascertaining and exercising continuing jurisdiction. The Court found that neither the language of the parties custody agreement and order, nor the statute limits the Courts discretion.

But the Court notes parenthetically, without further comment, that the UCCJEA does not apply because the statute had not been enacted when the original petition was filed.

CALIFORNIA

In re: Nada R., 89 Cal App. 4th 1166; 2001 Cal App. Lexis 445108 Cal Rptr 2d 493; 2001 Cal Daily op. service decided May 10. 2001 Court of Appeals California 4th Appellate district division 3.

The California Juvenile Court conducted a dependency hearing and declared two girls dependants and placed them in the custody of respondent mother. The father filed a writ of habeas corpus and also appealed the judgment. Both applications were consolidated for review. The father alleged that the UCCJEA California code section 3400 et. seq. established that California lacked jurisdiction. The father in this case is a Saudi Arabian national the mother and American. After their first daughter was born in California, the parties moved to Saudi Arabia. The second daughter was born in Saudi Arabia. The Court found that the mother had moved back without the children to California, the mother alleged at trial that as a result of domestic abuse. She further alleged that without her knowledge or opportunity to be heard father obtained a divorce and was awarded custody of the children in Saudi Arabia. While the mother alleges that she was never provided notice of the awarded custody of both children from the Al-Khobar Supreme Court, Kingdom of Saudi Arabia she does testify that a year later she remarried in California. For the next four years her contact to her daughters was limited to phone calls and visits which occurred in Dubai UAE a country which borders the Kingdom of Saudi Arabia. In March of 2000 the father took the girls to Orlando Florida for a vacation and invited the mother to join them. During that visit, an argument between the former spouses ensued after one of the daughters apparently "sided " with her mother. It is alleged that the father got extremely angry and began to physically abuse the daughter. The police where called and having observed the fresh injuries on the child arrested the father. The mother returned to California with both daughters and

filed a domestic violence restraining order against the father based on the Orlando incident. The allegations contained in the restraining order were communicated to the Orange County Division of Social Services and as a result the two girls were taken into protective custody and later released to their mothers care. The allegations which were set forth by the children regarding the fathers behavior both in Orlando and in Saudi Arabia described her fathers abuse of alcohol, and alleged sexual assault committed by a third party.

The father appeared and testified that he had never physically assaulted either his ex-wife nor either of his daughters and he proffered a significantly different account of the incident in Orlando. He requested the opportunity to proffer testimony to the Court regarding the provisions of Islamic Matrimonial Law regarding the rights of women in abusive situations, which the Court denied the opportunity to present.

After considering the evidence the Court sustained the allegations of the petitions and declared the children dependants of the Courts. The Court placed both daughters in their mother's care under the Courts supervision and set the matter for a six-month review.

The father argued that the Juvenile Court lacked jurisdiction to conduct a dependency proceeding pursuant to the UCCJEA the Appellate Court disagreed. The Appellate Court acknowledged that the UCCJEA applies to juvenile dependency proceedings as well as child custody disputes in a matrimonial setting and acknowledged that there are different circumstances under which the Courts are vested with jurisdiction to make a child custody determination under the family code. The Court agreed with the fathers contention that the jurisdictional prerequisites to make a child custody determination in a Family Court matter would not have been satisfied. However, the Courts indicated that the jurisdiction which was exercised by the Juvenile Courts was that which was necessitated to address an emergency situation and allegations of threatened or prior mistreatment or abuse. The Court found that the facts clearly support the exercise of temporary emergency jurisdiction and then goes on to agree with the father that the exercise of emergency jurisdiction is and should be short term and limited. However, the court went on to say that since there had been a plenary hearing held in the Juvenile Court, it could find continuing jurisdiction over a minor because of the type of emergency presented and the impossibility of returning the child to her father, i.e. "the ruling suggested an emergency can exist so long as the reason underlying the dependency".

The Appellate Court describes the evidence is clear and convincing that placing the girls with their father will place the children and substantial risk of harm. The father argued next that the Trial Court improperly entered the disposition order because it failed to communicate with the Saudi Arabian Court. The Trial Court noted that Section 3424 of California's UCCJEA requires a court asserting emergency jurisdiction to communicate immediately with the Court where a child custody determination has been made. The mother argued that the juvenile court was not required to communicate with the Saudi Arabian Court in absence of affirmative proof that the Saudi Arabian custody

determination would be enforceable under those provisions of the UCCJEA which set forth enforcement of a foreign custody determination. She contends that the custody decree is unenforceable because there was no notice or opportunity to contest the hearing and therefore there was no obligation of the California Court to communicate with the Saudi Court. The Appellate Court found that there was no evidence in the record regarding attempts at communication by the juvenile court, no testimony was proffered regarding the enforceability of the Saudi Arabian decree under the provisions of the UCCJEA and therefore remanded the matter to the juvenile court to determine whether California could continue to assert continuing jurisdiction without communicating with the Saudi Arabian Court.

On the evaluation issues, the Appellate Court characterized the juvenile court's Order therefore as one that went to the reliability of telephonic testimony, which was the type of evidence which had proffered by the father and refused to permit the presentation of the evidence in that format.

There was no effort by the father after those rulings to present those witnesses in person or any other witnesses with regard to the Saudi Arabian legal issues he wished to raise.

Further, the Appellate Court found that the proffered testimony of an expert on Saudi Arabian matrimonial law had been properly excluded. Because there had not been an opportunity for the mother's attorneys to have notice of the proposed expert's testimony and the proffered expert had no personal knowledge of what specific action the mother had taken the court felt that the importance of this testimony in the emergent dependency matter was of minimal importance. [It must be recalled this was not an application affirmatively made by the father to enforce the Saudi Arabian decree under the UCCJEA].

This case provides a thoughtful and interesting review of the sometime competing interest set forth in the UCCJEA and the difficulty associated with its international application.

In re: Marriage of Newsome, 68 Cal. App. 4th 949 1998 Cal. App. Lexis 1056; 80 Cal. Rptr., 2d 555; 98 CAL. Daily Opp. Service 9265; 98 Daily Journal, Decided November 30, 1998.

In one of the first cases to address the Uniform Child Custody Jurisdiction and Enforcement Act Appellant Mother challenged the order of a Los Angeles County Superior Court which denied her application to set aside an Order and Judgment which had awarded custody of the parties' minor children to the father.

Mother argued that the interim Order and Judgment were void for lack of subject matter jurisdiction. The Appellate Court found that the children had lived in Texas with the Appellant Mother for over three years at the time that the father's proceeding had been commenced. Further, they found that there was no indication that the Respondent

Father had visited his children in Texas or that the children had visited him in California during the three-year period, although there may have been communication and talks on the phone. The Court concluded that while the children had lived with their parents in California for approximately four years that it was clear at the time of the proceedings the bulk of relevant information relating to the children, their family relationships, their schooling, their friends and future care and training was exclusively in Texas. As a result the Court reversed and concluded that the Trial Court had lacked jurisdiction over the issue of child custody should have granted the mother's Motion to Vacate the custody and visitation provisions of its Orders and directed the Trial Court to enter an Order consistent with its determination.

Practice Note:

Again this case straddles the UCCJA and the UCCJEA at interpretation. As a result the court relies on the language of the UCCJA and refers briefly to the UCCJEA as supporting the analysis as well. While I agree it would support the analysis it would not be for the same reasons set forth in the decision. What is contained in the analysis of this case would actually be a forum non conveniens analysis in the event that there was an original California Order and Dad still continued to reside in California.

CONNECTICUT

There have been twelve cases in Connecticut which computerized legal research identifies as addressing the Uniform Child Custody Jurisdiction and Enforcement Act. However, all twelve cases are unreported. The issues addressed are briefly described with the citations. But as always, under Connecticut's rules the reader is cautioned to make "independent determination" of the status of each case and its possible appellate review.

Nevertheless I would note that the case of Anselmo v. Anselmo, FA 000181708, Superior Court of Connecticut, Judicial District of Stamford-Norwalk at Stamford, 2001 Conn. Super, Lexis 863, March 28, 2001 decided, is perhaps the most unique. In that case defendant wife, who is pregnant, filed an ex-parte motion for an injunction against the plaintiff husband to prevent his pursuit of a Texas cause of action concerning the custody of their unborn child and for breach of both pre and post marital agreements. The husband had commenced divorce and custody proceedings both in Texas and in Connecticut. The wife sought an anti-suit injunction in the Texas action. The Connecticut Court found that the husband had been essentially forum shopping in an attempt to prevent the wife from defending the action successfully. Significantly however the Appellate Court found that the Connecticut Uniform Child Custody Jurisdiction and Enforcement Act as enacted in 1999, Connecticut Acts 185 did cover custody actions pertaining to unborn children. The prior stipulation of the parties regarding their unborn child constituted a waiver of either party's right to argue that the court lacked subject matter jurisdiction over the unborn child. As such sole custody of the unborn child was awarded to the mother, and it was determined that it was in the best

interest of the child and both parents to suspend any further substantive litigation until after the child's birth.

The anti-suit temporary injunction was granted, all litigation was suspended and the parties were referred to mediation on the prospective visitation issues.

Practice Note:

While it is clear that this case goes into some novel territory, it is important to recall that the court relied significantly on a stipulation that the parties had entered in which they had been found to have consented to such jurisdiction and in fact entered Orders in connection therewith. As such the court found that the parties were collaterally estopped from attacking those Orders by separate litigation in any other jurisdiction or sensibly by arguing that the Court lacked subject matter jurisdiction over the birth and custody of the unborn child. The Court commented "that while the defendant has defacto custody of the unborn infant in her womb, in light of the legitimate interest of the State of Connecticut and the well-being and best interest of same, it is appropriate for the court to sua sponte award immediate and temporary sole custody of the infant, both now and following the birth to the defendant mother."

The remaining Connecticut cases are as follows:

Trofort v. Trofort, FA 010182325, Superior Court of Connecticut, Judicial District of Stamford-Norwalk, at Stamford, 2001 Conn. Super. Lexis 2876 decided October 4, 2001. This case outlines a forum non conveniens analysis and determined that there is an alternate jurisdiction from (Georgia) which is exercising jurisdiction but reserves its powers to act potentially in the future.

Holtzman v. Holtzman, FA 990174543F, Sup. Ct. of Conn., Judicial District of Stamford – Norwalk at Stamford, 2001 Conn. Super. Lexis 2885 Decided October 3, 2001. In this decision the court discusses the extent of continuing exclusive jurisdiction in a pendente lite situation in which during the pendency of the action both parties leave the state, in this case Connecticut, which entered the Pendente Lite Orders. The Court determined that the Pendente Lite Orders remain in full force and effect until such time as the Connecticut Court makes a finding that Connecticut no longer has jurisdiction or chooses to decline jurisdiction. The Court points out that such a determination is best made by contact with the other state and through hearing where all effected parties have an opportunity to be heard. The Court remanded the motions, which are pending, to the Trial Court to determine whether or not it should retain jurisdiction regarding custody and visitation under the UCCJEA's continuing jurisdiction provisions.

Lord v. Lord, FA 970348367S, Sup. Ct. of Conn., Judicial District of Fairfield at Bridgeport, 2001 Conn. Super. Lexis 2646, September 14, 2001. This now sets forth well the distinction between an application to dismiss for lack of subject matter jurisdiction and an application for forum non conveniens.

White v. Armstrong, FA 990629099, Sup. Ct. of Conn, Judicial District of Hartford, Family Support Magistrate, Division at Hartford, 2001 Conn. Super. Lexis 2067. This case derives from a paternity suit addressing the state's application for arrearage against two non-custodial parents. The relevance of the UCCJEA in this matter goes to the interstate issues associated with a determination of who is a "custodial parent" and entitled to receive support as such.

Gyurovszky v. Tramontano, FA 980416301, Sup. Ct. of Conn., Judicial District of New Haven at New Haven, 2001 Conn. Super. Lexis 1773 decided June 27, 2001. This matter addresses a strategic effort on the part of the moving father to "end around" the jurisdictional prerequisites of a changing statute. Father's case was dismissed from the court docket under a dormancy judgment. He then attempted to reinstate the action and enter initial custody orders, therefore avoiding the jurisdictional prerequisites of the UCCJEA. The father's position would have allowed a party to bring custody action in Connecticut, not pursue that action, set the dismissal by failing to pursue the case with diligence and wait until the jurisdictional prerequisites of the UCCJEA were no longer negatively applied to his matter. The Court denied the Motion to reopen the matter.

Gilman v. Gilman Sup. Ct. of Conn. Judicial District of New London at Norwich 2001 Conn. Super. Lexis 1453 decided May 22, 2001. Defendant mother successfully moved for dismissal of the father's petition for sole custody on the basis of lack of subject matter jurisdiction. The Court found that while there may have been some ambiguities as to whether mother planned to reside. The child had lived with a parent in the state of Maryland. The father's removal of the child to the state of Connecticut, regardless of the circumstances of why the child was living there is irrelevant to the UCCJEA determination.

Practice Note.

There was no allegation that is reflected in the decision of allegation of wrongfulness of the removal or retention which would give rise to an application to decline jurisdiction based upon "unjustifiable conduct".

Campagna v. Campagna fa60539516s Superior Court of Connecticut, Judicial District of New London at New London 2001 Con Super Lexis 651 decided February 27, 2001. The Court denies an application made under the UCCJEA to transfer jurisdiction and/or dismiss this on a claim that mother and children resided in Minnesota, now the home state of the children, at which significant information was located. Defendant mother had brought petition in Minnesota to modify the access schedule of Connecticut father. Court found because there was no dispute that the father continued to reside in Connecticut, and the precise issue of the dispute dealt with visitation awarded to the father in Connecticut, to be exercised in Connecticut the Court would not decline the continuing exclusive jurisdiction provided by the statute and denied the mother's petition to dismiss.

Kearney. Hudson, FA 000082189F, Superior Court of Connecticut, Judicial District of Litchfield, 2001 Conn. Super. Lexis 267, January 22, 2001 decided. This case arises after a bad domestic violence incident where a protective order precluded plaintiff father from contact with his child until he completed an anger management course. When the order was lifted he discovered that the defendant mother and child had been living in South Carolina for more than six months. Because there was some question as to whether the defendant fled Connecticut to avoid the court's exercise of jurisdiction and an issue as to when the plaintiff actually found out where the child was, the court determined its jurisdiction under Connecticut's prior UCCJA test rather than the UCCJEA test. The mother argued that based upon the PKPA, that once she was in South Carolina for six months South Carolina became the proper forum.

The court denied the mother's application and indicated that the State of residence could not be found to be the child's home state for the purposes of federal law where it was allegedly based on a time period during which the plaintiff did not know the child's whereabouts. Therefore, the substantial evidence test of the Connecticut's statute controlled and therefore Connecticut continued to be the appropriate forum.

There are precious few cases that deal with this issue of knowledge of a parent where a child is located or wrongful removal or retention and the case is significant because of that. The other interesting point is the application of the UCCJA over the UCCJEA despite the fact that the petition in Connecticut was clearly brought within the UCCJEA time period. The Court determined because mother's alleged actions and motivations were at issue, that the statute to be applied to her alleged wrongful behavior had to be the one in being at the time of her actions, that is her removal of the child took place.

Duncan v. Duncan, FA 940529813F, Superior Court of Connecticut, Judicial District of New London at New London, 2001 Conn. Super. Lexis 170, January 12, 2001 decided. Applying the positions of the UCCJEA the court declined the exercise of jurisdiction because both of the parties and the minor child do not reside in Connecticut.

Stern v. Stern, FA 0072572, Superior Court of Connecticut, Judicial District of Tolland at Rockville, 2000 Conn. Super. Lexis 2630, decided October 2, 2000.

In this matter the New Hampshire Court had requested that the Connecticut Court make a determination of convenient forum. The Court looked at issues of residency, whether there was an agreement between the parties with respect to the assumption of jurisdiction in the event of a dispute, the allegations of wrongful behavior on the part of the parents and where the children attended the school and had most of their significant contacts and evidence. As a result the court found that New Hampshire was the most convenient forum for the resolution of the disputes of custody, since the children had

lived there for more than a year and the New Hampshire Court would presumably be more familiar with the issues.

Notoa v. Kaanapu, FA 000063403S, Superior Court of Connecticut, Judicial District of Windham, at Putnam, 2000, Conn. Super. Lexis 1757, July 14, 2000 decided.

In this case the court made a decision under the Uniform Child Custody Jurisdiction and Enforcement Act to stay the exercise of any jurisdiction based upon the pendency of a proceeding, which at the time of the Connecticut application had already been commenced in Hawaii. The Court determined that a paternity action had already been commenced and therefore after communicating with the appropriate Hawaiian Court and determining that Hawaii had also adopted the UCCJEA, and was exercising jurisdiction consistent with it, determined to stay the Connecticut proceeding and declined to exercise jurisdiction unless and until Hawaii terminated its proceedings or stayed its proceedings after a forum non conveniens determination.

Ward v. Ward, 30 P. 3d, 1001; 2001 Kan. Lexis 593, Supreme Court of Kansas, decided September 14, 2001.

The father petitioned the Kansas District Court for the appointment of his aunt and uncle as co-guardians and co-conservators of his child. Aunt and Uncle of the child's mother who had recently died, claimed that the guardianship proceedings were jurisdictionally defective. Their application was denied and they took an appeal. The gravamen of the appeal was that the maternal Aunt and Uncle urged that the custody decree which had been rendered by an Oklahoma Court in a matrimonial case should have been recognized and enforced in Kansas. The Trial Court concluded that upon the death of the mother sole legal custody of the child immediately and automatically vested in the father and the Appellate Court agreed with this analysis. They determined that the provisions of the Uniform Child Custody Jurisdiction Act, unlike the UCCJEA did not apply to a guardianship proceeding. Therefore, the guardianship provisions properly followed the substantive law applied and the appointment of the paternal Aunt and Uncle was under that substance of law appropriate. As such the District Court properly exercised subject matter jurisdiction. Further, no application of the Oklahoma Custody Decree was appropriate.

Practice Note:

Had the UCCJEA been applicable it is clear that guardianship proceedings would have been cognizable under the new statute and as such at the very least a forum non conveniens analysis could have been required of the Trial Court. Of course this creates interesting questions about applicable law in the current context of the primacy of parental rights.

MAINE

Shanoski v. Miller, 2001 Me. 139 Supr. Judicial Ct. of Maine.

The parents in this case had been married in North Carolina and moved to Maine where their minor daughter had been born. Subsequently the mother returned to North Carolina with her child and established residence in that State. Thereafter the father filed a divorce petition in Maine and the Maine Trial Court accepted jurisdiction, granted the petition for divorce and awarded the father and mother shared parental rights. Additionally the court established a visitation schedule and adopted a provision that Maine had jurisdiction over subsequent actions related to parental contact. Four years later the mother filed an application in North Carolina asking a Trial Court there to amend the Maine visitation Order. The father responded by filing a motion in Maine asking the Court to enforce its visitation schedule. In response the mother filed a motion in Maine asking the Court to decline subject matter jurisdiction. The Trial Court granted the mother's application and the father took an appeal. This decision confirms that Maine is to apply the UCCJEA and provide for the analysis of specific factors to be considered by a court with continuing exclusive jurisdiction in determining on forum non conveniens grounds whether it continues to be the appropriate forum to modify an existing order or whether another state would be the more appropriate forum for a child custody determination. In reviewing the factors set forth under the UCCJEA the Maine Court determined that because of the length of time the child had lived in North Carolina and because more of the evidence related to the child was located in North Carolina Maine was not the convenient forum and North Carolina was the more appropriate forum. The Supreme Court determined that nothing about the record suggested that the Trial Court had exceeded or abused its discretion in making that determination.

Practice Note:

If you were representing the father in this case and attempting to support the continued exercise of jurisdiction, the narrowing of the analysis to focus on the actual application, which was being made would be important in the resolution of jurisdiction. For example, if the allegations being made by the mother with regard to a modification of visitation contained allegations of acts or omissions which are alleged to have occurred in Maine then the normal forum non conveniens analysis of "more of the evidence relating to the child" existing in North Carolina would not be persuasive. While there may be more evidence associated with the child and the child's day-to-day life in North Carolina, if the allegations of wrong-doing or the reasons for the modification are related to facts and witnesses which would be primarily available in Maine then forum non conveniens would require that the application be heard there.

MINNESOTA

In the Welfare of D.K., 2001 The Minnesota App. Lexis 367, decided April 10, 2001, Court of Appeals of Minnesota (Note: The Opinion is Unpublished).

The primary issue raised in this matter was whether the Court could interpret a section of the Uniform Child Custody Jurisdiction and Enforcement Act to permit the exercise of temporary emergency jurisdiction by the Minnesota Court upon a finding of abuse or mis-treatment regardless of whether the child was actually present in the state. The Court concluded that the Trial Court had properly found that it had no jurisdiction

pursuant to the UCCJEA on temporary emergency jurisdiction basis in that Illinois was the child's home state, and continued to exercise jurisdiction over the child.

Castilio v. Bethke, C2-00-490, Ct. of App. of Minnesota, 2000, Minnesota, App. Lexis 940, August 29, 2000 filed (Unpublished).

This matter involved the issues associated with the international aspects of the UCCJEA. Appellant mother had moved to modify child custody and that application was dismissed from which she took an appeal.

The parties had been divorced in North Carolina and a decree entered granting child custody to the responding father. The respondent father resided in Turkey. Mother was a Minnesota resident and filed a motion to modify the child custody determination made by North Carolina in Minnesota. The Minnesota Court denied appellant's motion because it found that it lacked jurisdiction and that North Carolina was the more appropriate forum to resolve the child custody dispute. While the facts seem fairly straight forward in closer view they demonstrate some of the difficulties associated with the inherent transience of our lives. The appellant mother had resided in Minnesota since the fall of 1996, her former husband, who had physical custody of the parties minor child, serves in the United States Air Force and since 1998 had been stationed at the United States Air Force Base in Turkey, where the minor child resided. A visitation schedule had been arranged for the appellant mother and because she knew at the time that the decree was entered that she would be moving to Minnesota the visitation schedule called for eight consecutive weeks each summer and one week at either Thanksgiving or Christmas. Nevertheless, despite that access schedule set forth in the decree in the two and a half years since the decree had been entered and the father had resided in Turkey the mother had very minimal visitation with her daughter. Her allegation were that the father did not cooperate with the scheduling of visitations and refused to contribute to the cost of travel.

Immediately prior to the application the mother alleged that the father indicated that he was traveling to Minnesota for one week visitation but that during that time period he would refuse to tell her where he was staying and how he could be contacted, but that the child would fly to Minnesota from North Carolina on the 15th of November of 1999. In anticipation of same the mother filed an application to modify.

After the child boarded the plane the father was personally served with motion papers that had been filed in Minnesota. The father removed the child from the plane, filed an emergency ex-parte motion in Wayne County, North Carolina seeking to suspend any further visitation pending resolution of the custody dispute. That application was granted and a hearing was set for later in the month.

When the minor child did not arrive on the flight as planned the mother filed an ex-parte application in Minnesota seeking a temporary modification of custody. That application was denied and the matter was continued to the previously scheduled hearing date in December. At that hearing the father through his counsel challenged Minnesota's exercise of subject matter jurisdiction and contended that the dispute was properly before

the District Court in North Carolina. At sometime prior to issuing its Order the Minnesota Court spoke with the North Carolina Court. The North Carolina Court asserted that it believed jurisdiction was proper in North Carolina and that it was willing to exercise jurisdiction to resolve the dispute. The Minnesota Court thereafter denied the mother's application for modification. An Amended Order and Memorandum was filed and it asserted that the dispute was appropriately resolved in North Carolina.

The case is a fascinating review of the Uniform Child Custody Jurisdiction and Enforcement Act. The Minnesota Court determined that the original ex-parte Order which was entered by North Carolina based on its review did not properly apply North Carolina's own version of the UCCJEA in that it referred to continuing jurisdiction which clearly, under the statute, would not have been available since both parties had left North Carolina. Nevertheless because the Order of the North Carolina Court preceded the Minnesota Order and because it is determined that under the United States Constitution full faith and credit would have to be provided to the resolution of the issue by a sister state, and because it was unclear whether North Carolina had "fully and fairly" decided the issue of the exercise of its own jurisdiction it was premature for the Minnesota Court to make a determination regarding North Carolina's jurisdiction or to assess its ability to modify a North Carolina custody Order where that determination depended in part on North Carolina's continued exercise of jurisdiction. The Minnesota Court goes on to say that it must trust any jurisdictional ruling by North Carolina was or will be the result of the fair and full decisional process and that the appealing mother would have the opportunity to fully and fairly litigate that issue in that jurisdiction if she so desires, but cautions her that until there is evidence of how that issue is or was resolved in North Carolina it is powerless to exercise jurisdiction in the face of the original North Carolina Decree and subsequent Order. The Minnesota Court asserts that at a minimum a Minnesota Court may be able to modify the North Carolina custody Order only if North Carolina ultimately decides it does not have jurisdiction or ultimately declines to exercise that jurisdiction pursuant to the UCCJEA.

NEW JERSEY

Ivaldi v. Ivaldi, 147 NJ 190; 685 A. 2d 1319; 1996 Supr. Ct. of NJ.

While New Jersey has not yet enacted the UCCJEA, in addressing for the first time the application of the existing version of the UCCJA to international matters, it recognized and applied the provisions of the UCCJEA (then in its draft form) to a jurisdictional determination under substantive New Jersey law.

The case is the first citing the UCCJEA and provides a comprehensive review of the substantive law throughout the country on the application of the UCCJA to international matters.

It also addresses the requirement as a prerequisite of courts to communicate on international cases prior to rendering a decision.

NEW MEXICO

Harbison v. Johnston, 2001 NMCA 51; 28 P. 3d 1136; 2001 N.M. at Lexis 45, 40 N.M. Ft. B. Boll, 33. Ct. of Appeals of N.M. decided June 22, 2001.

While this case does not actually apply the UCCJEA, determining that it is not enacted in New Mexico and, therefore, inapplicable, there is an interesting discussion of the immunity provisions of the UCCJEA. In this case, the New Mexico district court dismissed on jurisdictional grounds the appellant-mother's motion to modify and enforce child support provisions of a Texas support and visitation judgment. The trial court determined that New Mexico lacked jurisdiction over the father. The father entered a general appearance, pursuant to New Mexico statute, when he filed a visitation enforcement petition. New Mexico determined that he invoked the jurisdiction of the district court. In an incremental analysis the court pointed out that although there was a limited immunity provision of the Texas UCCJEA that set forth as follows:

“A party to a child custody proceeding, including a modification proceeding, where a petitioner or respondent in the proceeding to enforce or register a child custody determination is no subject to personal jurisdiction in this state for another proceeding or purpose solely by reason of having participated, or of having been physically present for the purpose of participating, in that proceeding”. *Texas Family Code Ann.*, §152.109(a) 1999.

While the father lived in Texas and obviously had been provided advice pursuant to the Texas Code, the UCCJEA had not been adopted in New Mexico and was, therefore, inapplicable. Thus, the appellate court found that no immunity provision governing the visitation proceeding could be asserted.

With respect to the child custody proceeding, the father pointed out that UIFSA (Uniform Interstate Family Support Act) contained a similar immunity provision. However, the appellate court pointed out that neither party challenged the district court's jurisdiction in a visitation proceeding. Thus, the father's limited immunity argument with respect to UIFSA falls as well. The district court erred in finding that it lacked personal jurisdiction over the father. With respect to the mother's contention that the court erred in determining that it did not have jurisdiction to consider the motion to modify and enforce the Texas support order, the court made it clear that the district court correctly concluded it did not have jurisdiction to confer subject matter jurisdiction to modify a Texas support order. UIFSA provides for continuing exclusive jurisdiction of the decree state. Nevertheless, the district court incorrectly concluded that it did not have jurisdiction to enforce the support order.

The Full Faith and Credit for Child Support Act [28 U.S.C.S. 1738(b)] obligated the trial court to give full faith and credit to child support orders properly issued by other states. Thus, mother could have the child support provisions enforced, but would have to seek modification of those provisions absent agreement of the father in Texas.

OKLAHOMA

Oklahoma enacted the UCCJEA in 1998, one of the first states to do so. As such it has more developed litigation with respect to the application of the UCCJEA than most other states.

F.W., D.W. and D.W., Petitioners v. The Honorable Jacqueline Duncan, Judge of the District Court of Custer County, and S.R.G. and T.G., real parties in interest, 2001 OK 39; 24 P. 3d. 846; Supr. Ct. of OK decided May 8, 2001.

The procedural device which gives rise to this particular action is an application to assume original jurisdiction in a petition for Writ of Prohibition contesting an order which temporarily placed the physical custody of the minor child with the maternal grandmother, and making a finding that the petitioner-father was not fit to have custody of the child.

Much like the Kansas case reviewed above, this case arises after a custodial mother's death. When that happened simultaneous proceedings for child custody modification among the parties were filed in both the Oklahoma trial court and the Kansas court. The trial court in Oklahoma ordered that physical custody of the minor child be temporarily placed with the maternal grandmother, as well as concluding at the same time that the petitioning father was not fit to have custody of his child. Father and father's family challenged that order. The Supreme Court deemed the petitioner's challenge to be an application to assume original jurisdiction, and a petition for Writ of Prohibition. The Supreme Court granted in part and denied in part the application to assume original jurisdiction, but denied the petition for Writ of Prohibition. The determination against the Writ of Prohibition was based on the finding that the petitioners were not entitled because the trial court had made the initial child custody determination at the time of the divorce, and the Kansas court could not have jurisdiction in substantial conformity with the UCCJEA as a result. Any non-jurisdictional challenges were beyond the scope of the writ and inadequate remedy existed for their review.

This case is really the corollary to the early Kansas case, *Ward v. Ward*. In the Oklahoma case, the UCCJEA application is clear. The decision outlines the UCCJEA is, in fact, applicable to this type of proceeding, and that guardianships and divorces are child custody matters within the scope of the Act.

White v. In the matter of baby boy D. a/k/a R.D.W., 2000 OK 44; 10 P. 3d 212; 2000 OK Lexis 43.

Looking at the caption of this case, one would think that this should not have much to do with the UCCJEA in that the act is inapplicable to adoption cases. However, the procedural posture of this case and its timing create a collection of procedural, substantive and constitutional issues that ultimately involve the UCCJEA as well as the PKPA.

In this case the petitioning father appeals from an order of a Tulsa district court terminating his parental rights and deeming a baby eligible for adoption. The responding mother, a resident of Missouri, gave birth to the child in Kansas, but entered her consent to a termination of her parental rights in Oklahoma. The father filed an application for an emergency temporary order in Oklahoma. Custody, pending an anticipated adoption, had already been placed with prospective parents, residents of Idaho, under the Interstate Compact on the Placement of Children. The pre-adoptive parents are interveners in the case. The trial court in Oklahoma held a hearing and found that the child had abandoned the child by not exercising his parental rights. Based upon the best interests of the child, the court terminated the father's parental rights and declared the baby eligible for adoption. The court rejected the father's various arguments challenging Oklahoma's subject matter jurisdiction under the UCCJEA.

In this case the pre-adoption proceeding to terminate parental rights is ancillary to the adoption proceeding under the Oklahoma adoption code. The trial court deferred jurisdiction over the actual adoption proceeding in the matter to the Idaho courts where the pre-adoptive parents were residing. Prior to the enactment of the UCCJEA, Oklahoma had determined that the exclusive method to determine subject matter jurisdiction in all custody proceedings was the UCCJA. Further, it had determined an adoption as an "ultimate" custody determination and as defined by the first draft of the UCCJEA, it encompassed adoption actions. However, that decision had been handed down prior to the 1998 amendments to the UCCJEA and amendments to Oklahoma's adoption code.

The Supreme Court of Oklahoma found that the UCCJEA, in its newer form, no longer encompassed adoption actions. The Court went on to say that the argument that the petitioner and the baby had no significant contacts in Oklahoma and the UCCJEA, ICPC and PKPA had been violated were unpersuasive. The court found that once the biological mother had relinquished her parental rights, the baby had effectively been abandoned, and the trial court appropriately assumed emergency jurisdiction under the Oklahoma adoption code. The court went on to say that prior to the 1998 amendments, emergency jurisdiction would also have been proper under the temporary emergency jurisdiction provision in the UCCJEA. However, given the changes, the court is basically indicating that they can rely on the Oklahoma adoption code exclusively for support in exercising emergency jurisdiction. The gravamen of the father's argument on the PKPA was similarly dismissed, indicating that there was no full faith and credit issue that had been raised or applicable in this matter.

It should be noted that in a scathing dissent, Justices Boudreau and Summers indicate that they do not believe there is authority under Oklahoma's adoption act for the position taken by the majority. Furthermore, it rejects the construction of emergency jurisdiction as is provided for in the adoption code, and comments that the emergency jurisdiction provision under the UCCJA had been interpreted under earlier case law as to be reserved for extraordinary circumstances and not be misused to defeat the purpose of the Act. The dissent argues that emergency jurisdiction is being used precisely for that purpose in undermining the policies of Oklahoma's adoption code. As a result, basing it

primarily on the construction of the adoption code, the dissent argues that the father's application regarding lack of subject matter jurisdiction should be upheld. The petition to terminate father's parental rights should proceed in Idaho, the state which has jurisdiction under the adoption code to address the issue. Oklahoma's contacts with the parents whose rights are being terminated should clearly be, in the dissent's opinion, neither fundamentally unfair, nor arbitrary in the proceeding as it took place in this case the dissent believes it has been.

Oklahoma Wood v. Redwine, 2001 OK Civ. App. 115; 2001 OK Civ. App. Ct. of Civil Appeals of OK, Div. 1.

The case comes to the court reviewing a trial court's order granting custody of the parties' minor child to his father. In the appeal, the mother challenges the trial court's assumption of subject matter jurisdiction as improper, and its determination of custody is affected by an abuse of discretion. Mother and father had cohabited in Colorado where the child was born. When the child was approximately 3 ½ years old, the father moved to Oklahoma and the mother remained in Colorado, living with or near her mother. During the next three years, the father had little contact with the child and paid what the record describes as "less than the bare minimum of child support". The mother consistently sought child support assistance from the State of Colorado, which as provided, and Colorado sought reimbursement from the father through its state enforcement services.

In June 1998 the child visited the father in Oklahoma for the first time. The next year, the mother moved to Utah, and sought child support assistance from that state. During that same year, the father, again, requested and obtained from the mother agreed to summer visitation from the child. It does not appear that there were any child custody orders which provided documentation of any of those arrangements.

At the end of that summer visitation, the father refused to return the child to the mother. Instead, the father commenced an action in Oklahoma seeking to establish paternity, to gain custody of the child and to obtain child support from the mother on the allegation that this child was a resident of the state of Oklahoma.

The mother entered a special appearance and objected to the exercise of jurisdiction, arguing that Oklahoma was not the child's home state.

The trial court overruled the mother's jurisdictional challenge, but allowed the child to return with the mother to Utah pending further proceedings, with provisions for the father's visitation with the child on request to notice to the mother. Father apparently attempted to visit this child in October of 1999, but on advice of her Utah counsel, mother refused to allow visitation for father's failure to give notice prescribed by the trial court.

After a hearing on the merits, the trial court awarded custody of the child to the father, ordered the mother to pay child support and directed the mother to relinquish physical custody of the child to the father on Christmas Day, which the mother appealed.

The Supreme Court is cited at the beginning of the appellate court's decision with the following words:

“The question of whether jurisdiction exists and the question of who should have custody are two entirely different matters.” *Citing Holt v. District Court for the 20th Judicial District*, Ardmore, Carter County, 1981, OK 38 P. 23 626 P. 2d, 1336, 1343.

The appellate court found first that it is clear from the onset that the home state of the child for the purposes of jurisdiction under the UCCJEA can not be Oklahoma. In the presents case, Oliver, CO, where the child lived for substantially all of its life or Utah, where the child lived for five months prior to the commencement of the Oklahoma proceeding, would qualify. The child attended Utah schools; the mother sought child support assistance from Utah. The child visited the child in Oklahoma only during the previous two summers for a limited period of time which did not , even in combination, amount to six months in duration.

The decision goes on to talk about the issues of present and future case, and the analysis in the forum non conveniens setting. Of particular interest is father's argument that the filing of the application, particularly since it is the first application, may constitute a significant connection. It is an argument that the court rejected.

The court goes on to say that Oklahoma could only exercise jurisdiction if another court having jurisdiction under the UCCJEA had purposefully declined to exercise it for either inconvenient forum or unreasonable conduct grounds. The appellate court basically determined that it cannot find an abuse of discretion because it is possible that the trial court implicitly reasoned that Colorado could not be the home state because the parties did not live there at the time of the commencement of the proceeding, and implicitly concluded that Utah could not be the “home state” as the evidence was conflicting on how long, if at all, the child had lived in that state before the commencement of the proceedings. Therefore, the appellate court found that it cannot say the trial court erred in assuming jurisdiction, but it cautions that the spirit and intent of the UCCJA and UCCJEA require a review of the trial court's grant of custody to the father.

The appellate court then went through the testimony and procedural history of the matter and determined that there is no evidence on the record before them that the child's best interests could be served by removing her from her mother and siblings, a life with which the child had been demonstrated to be familiar and content with, in favor of custody with her father. Accordingly, it found that the trial court's order granting custody of the child to the father was against the clear weight of the evidence and affected by an abuse of discretion. As such, the order was reversed.

Practice Note;

This is a perfect example of wanting to get to the right result and protect the statute. While it is possible that the trial court implicitly made the determinations which were set forth under the UCCJEA before it acted, the appellate court here seems to be saying that it finds no real evidence of that. It made a determination based on the weight of the evidence and by doing so, makes appeal effective since it is based on findings with regard to evidence as opposed to the jurisdictional construct. The appellate court here wanted to make it very clear that if this had been done or argued the way it should have been, it does not feel Oklahoma would be exercising jurisdiction. Nevertheless, rather than create bad law, it carves a narrow analysis that supports the UCCJEA.

OREGON

In the matter of Aja Juan Hays, a minor child, Kre and E. McCulley and Eugene Forte v. Lolita Bone, respondent, 160 Ore. App. 24 979 P. 2d 779; 1999, Ct. of App. of Oregon.

The procedural application being made is one which seeks review by adoptive parents of the trial court's determination to set aside an adoption by the biological mother. In this case the biological mother, an Arkansas resident, agreed to place her child up for adoption through a private attorney who represented the adoptive parents. The respondent signed a consent form, without independent counsel, and after she turned the child over, expressed some reservations.

The petitioners in this matter were Oregon residents and filed for adoption in Oregon without serving notice on the respondent-mother. The adoption was finalized and the respondent filed a Revocation of Consent in Oregon, and moved to set aside the adoption. The trial court granted the motion and the petitioners sought review.

The threshold question on the appeal was whether Oregon had subject matter jurisdiction over the adoption proceeding. The question involved, according to this case, three conflicting statutes: (1) Oregon's adoption statutes; (2) Oregon's version of the UCCJA; and (3) the Federal PKPA of 1980. This decision came about prior to the UCCJEA being enacted in Oregon, but the decision comments the new model act, if adopted by Oregon, will resolve the state court jurisdiction pursuant to laws specifically designed for adoption cases, and not under the child custody statutes. It should be noted that the appellate court seems to commend that position. The decision notes that the UCCJEA expressly excludes adoption cases from its coverage, allowing that those cases are intended to be dealt with by the 1994 Uniform Adoption Act which sets forth separate jurisdictional provisions for adoption proceedings.

The Uniform Adoption Act permits a state to exercise jurisdiction in the prospective parent's home state if substantial evidence concerning the child's present or future care exists in that state. Interestingly enough, as it goes through the analysis under

the UCCJEA and PKPA in the absence of these new acts, in a footnote that speaks volumes, the court indicates that the conclusions they are being forced to reach in this adoption context is not necessarily the same one they would reach were this a child custody dispute between two divorcing parents, and essentially, points out that the extent to which significant contact jurisdiction would be reviewed in this context are likely to be far different. Accordingly, the appellate court found that the trial court had subject matter jurisdiction for the purposes of entertaining the motion, despite the relatively short time the child had resided in the state.

TENNESSEE

Tennessee has enacted the UCCJA and as a result, there are a number of decisions, primarily at the Court of Appeals level, which deal with the application of the Act. Nevertheless, a number of the decisions focus on procedural and venue issues between the juvenile court and the chancery court which are internal to Tennessee law and do not address the UCCJEA as a whole. Perhaps as representative of one of the issues that will certainly be repeated until all 50 states have enacted the UCCJEA is *Bossi v. Bossi*.

Bossi v. Bossi, #W1 1999-01533-COA-R3-CV-Ct. of App. of TN, decided May 24, 2000.

In this case there is the application made by mother challenging the decision of the circuit court for Shelby County, awarding sole custody of the minor child to the father. The parties had been divorced in 1997 in the State of Tennessee. The dissolution agreement provided that the mother would be the child's primary residential custodian and further provided that the mother could relocate from Tennessee without the father's "interference", and that the father would enjoy rights of reasonable access. A year later, the mother and child moved to Mississippi with the mother's fiancé. The father continued to have access and, with only one exception, all of that parental access took place at the father's home which remained in Memphis, TN.

In January of 1999 the mother notified the father of the possible hospitalization of the minor daughter to determine whether the child suffered. The father questioned the course of action and the child was admitted to a hospital for testing and diagnosis. (Note that it is unclear from the record, but presumed by the context that the child was hospitalized in Tennessee.) In contacting the hospital, the father was informed that the child did suffer from mental illness, and was further informed that the child had likely been sexually abused and was not in a "healthy environment". The father became aware that the child had suffered repeated lice infestations while in the mother's care. Six days later, the father filed a petition for modification of custody in the Shelby County, TN Circuit Court, and sought the appointment of a guardian ad litem and ex parte hearing held on that date. Later in the same month, the court awarded temporary custody to the paternal grandfather pending an investigation by the guardian ad litem. Both the mother and the father were permitted supervised access with the child. Shortly thereafter, the

mother attempted to retrieve the child from the grandfather's care, and her rights of access were suspended.

Approximately four months after the petition was filed, the guardian ad litem's report recommended that the father be granted sole custody, as the mother was labeled a flight risk and was deemed unable to adequately protect the minor child. Two days after, the mother filed a motion to dismiss the father's petition for lack of subject matter jurisdiction because the child was a resident of Mississippi. She argued that home state had shifted to Mississippi and that jurisdiction to modify rested with the home state under Mississippi's and Tennessee's versions of the UCCJA. A hearing was held regarding the jurisdictional issues. The court took the matter under advisement without making a ruling, and contacted the alleged home state, Mississippi, court. That court was described to have "waived" the exercise of jurisdiction. The Tennessee court retained jurisdiction and proceeded with a hearing on the father's motion. The court found that there had been a material change of circumstances that warranted a change of custody and that the father should be named the sole custodian.

The mother appealed, asserting that the trial court erred in that the guardian ad litem's investigation excluded any evidence from Mississippi where the child had been living. In addition she argued that the court did not properly acquire jurisdiction in ordering temporary custody in the grandfather, or for any subsequent orders. Further, she argued regarding various points on the merits of the substantive custody case. The appellate court affirmed the Tennessee trial court.

While the decision may seem simple in that Mississippi was deemed to have declined jurisdiction, a careful reading of the case raises some immediate concerns. First of all, by the time Mississippi court was contacted, there was an "emergency" hearing. There was already an ex parte application made and there was no notification as to how or when the mother received notice. A guardian ad litem was ordered appointed. A report was rendered and a hearing was conducted. While the UCCJA would give Tennessee this authority under an emergency jurisdiction provision, it is doubtful that if the emergency jurisdiction provisions of the UCCJEA were followed, that the process would go the same way.

First, under the new emergency jurisdiction provisions, the Tennessee court would have to contact the Mississippi court at the point that it was exercising emergency jurisdiction. It would then determine whether or not there was any evidence or reports which would be helpful to the Tennessee court in making a determination on the merits, and presumably, should have included such information, evidence or report in any custody or guardian ad litem report generated. Under the UCCJEA, Tennessee would retain the authority, under continuing exclusive jurisdiction, to determine the convenience of the forum, and under this fact scenario, would have to apply the factors contained in the statute and determine whether its continued exercise of jurisdiction was appropriate under the circumstances. It appears that that analysis was reduced to a conversation between the two judges, was recorded nowhere and no opportunity was afforded to present testimony or legal arguments on the factors of inconvenient forum.

Further, it appears that when the Mississippi judge was called in this case, there was no pending matter in Mississippi. It would have been astonishing if the Mississippi court had argued to retain home state jurisdiction in the absence of a pending proceeding. From a strategic standpoint, it would certainly have made sense if the mother was serious about the convenience of the forum, potentially filing an application in Mississippi, particularly if the application in Tennessee were merely one based on emergency.

The court includes a footnote which indicates that subsequent to the original application, the father enacted the UCCJEA, yet then goes on to establish that the act was not in affect in February of 1999 when the father filed his position and, thus, not relevant to the proceedings. While a jurisdictional analysis is normally done at the time that the proceeding is filed, in the instant case, the decision hinges on the circumstances for judicial communication. If the UCCJEA was in affect when the Tennessee court contacted the Mississippi court, then the procedures of judicial communication require the exchange of pleadings and statutes, and the opportunity for counsel to be present and a record to be made. Further, the jurisdictional prerequisites of emergency jurisdiction must be specific in time and contact with the alternate jurisdiction must be initiated immediately to effect a transfer of the matter as soon as practicable.

It seem clear that the court in this case sua sponte may have initiated the judicial communication and not application of the parties. If this were being done by design, a companion application should have been made to the Mississippi court asserting subject matter jurisdiction or seeking an anti-suit injunction, and a complete package and letter memorandum addressing the judicial contact should have been provided to both courts.

The remaining Tennessee cases are provided in citation forms:

P.K. v. J.N. #N2000-02737-COA-R10-CV, Ct. of App. of TN, Middle Section at Nashville, 52 S.W. 3d 653, decided April 11, 2001.

In re: J.J.C. #E2000-01223-COA-R3-CV, Ct. of App. of TN, Eastern Section at Knoxville, decided March 15, 2001.

Wilson v. Wilson, #E2000-01181-COA-R3-CV, Ct. of App. of TN, Easter Section at Knoxville, 2001, TN App. decided February 26, 2001, rehearing denied April 24, 2001.

Hines v. Tilimon, #E2000-00912-COA-R3-CV, Ct. of App. of TN, Eastern Section at Knoxville, decided January 19, 2001.

Yother v. Yother, #E2000-0146-COA-R3-CV, Ct. of App. of TN, Eastern Section at Knoxville, decided September 20, 2000.

Wilson v. Tittle, #M2000-00115-COA-R3-CV, Ct. of App. of TN, Middle Section at Nashville, decided August 25, 2000; petition for rehearing denied October 10, 2000.

Graham v. Copeland (in re: Copeland), #E1999-01514-COA-R3-CV, Ct. of App. of TN, Easter Section at Knoxville, 43 S.W. 3d 483, 2000, decided March 30, 2000.

Adams v. Cooper, App. #M1999-022664-COA-R3-CV, Ct. of App. of TN, Middle Section at Nashville, decided February 29, 2000.

Clear v. Commer, 03A01-9812-CV-00423, Ct. of App. of TN, Eastern Section at Knoxville, decided November 22, 1999.

TEXAS

Texas' enactment of the UCCJEA intrigued practitioners. Texas was the only state under the UCCJA that had a specific provision that set forth that Texas lost continuing jurisdiction, even in the event that a parent remained in the state when the child's home state had actually physically shifted, i.e. six months after the child had left the state. It was in that procedural posture that the Texas cases began to address the UCCJEA.

Letner Philips v. Beaber, 995 S.W. 2d 655, decided June 3, 1999, Supr. Ct. of TX.

The petitioner mother appealed an order of the Court of Appeals of the 14th District of Texas which had reversed an order of the trial court dismissing a respondent-father's motion to modify their child custody agreement by granting him primary possession and the right to establish the residence of the child. In this case the father and the mother had been divorced and agreed to become joint managing conservators of their child. The term "joint manager conservator" is novel to Texas. The petitioning mother was given primary custody and control of the child. After the petitioner moved the child to another state, the respondent moved in the original court to modify the order by granting him primary possession and the right to establish the residence of the child. The court dismissed the application on the ground that it did not retain jurisdiction because the new action was one for custody and the petitioner and the child had a new home state. The Court of Appeals reversed, finding that the respondent's motion concerned possession rather than physical custody, and that the court still maintained jurisdiction over such an action. On appeal, the court reversed and dismissed the motion because the child had a new state under Texas' UCCJA. The respondent's motion sought the modification not only of possession but of custody, and it was deemed that no Texas court could exercise continuing jurisdiction over the agreed order.

In a footnote, the Supreme Court of Texas acknowledges that in 1997, the National Conference of Commissioners on State Laws adopted the UCCJEA to rectify the perceived shortcomings in the UCCJA. Interestingly, their comment follows to say that the UCCJEA more closely resembles Texas' UCCJA by affording priority to home state jurisdiction, but does not address the issue of continuing exclusive jurisdiction.

In re: Michelle Sharlene McCoy, Ct. of App. of TX, 13th Dist., Corpus Christi, 52 S.W. 3d 297, 2001, filed June 28, 2001.

This case is a fascinating mix of interstate and international issues. Husband filed a suit in the county court in Texas seeking the custody of his two minor children, among other relief. The wife subsequently requested the instant court to issue a Writ of Mandamus directing the court to dismiss the proceedings before the trial court because there was a proceeding concerning the same matters currently pending in Arkansas. The parties were former spouses who had two minor children. They are both United States citizens who lived most of their married life in Texas, but later moved to the foreign state of Qatar pursuant to husband's job. The family lived there together for three years until the wife took the children from Qatar and moved to Arkansas where her parents had been living. Shortly after the move to Arkansas, the wife filed suit in an Arkansas court seeking divorce, maintenance and child support. The husband disputed jurisdiction. The same month the wife filed in Arkansas, the husband filed suit in Qatar. Once year later, he filed suit with the Texas court, seeking custody of his children, division of the marital property and a judicial recognition of the Qatar divorce decree. In the meantime, the wife requested the instant court to issue a Writ of Mandamus, compelling the Texas trial court to dismiss the case.

The court conditionally granted the requested Writ, finding that the trial court had no subject matter jurisdiction to entertain this initial child custody determination under the Texas version of the UCCJA. Arkansas was the home state of the children, not Texas.

Apart from the particular predilections of the mandamus practice in Texas, the jurisdictional principles of the UCCJEA are specifically addressed in this context. The appellate court holds that Texas lacks jurisdiction under the UCCJEA in that it cannot be considered the "home state" of the child. When the suit was filed in Texas by the father, the home state had clearly been acquired by Arkansas since the wife had lived with the children in Arkansas for well over a year. The court went on to explore that Arkansas was not the home state of the children when the initial pleading in this matter was filed since Qatar was the home state of the children at the time that the Arkansas application was filed. Therefore, an argument was being made by the father that Texas would have jurisdiction if no other state had home state jurisdiction under the UCCJEA. At first blush, the subdivision would seem to confer jurisdiction on the Texas court because the Qatari court had declined jurisdiction on the grounds that Texas was the more appropriate forum. The appellate court confirms, however, that the operative date for determining the application of the statute in Texas is the date that the suit was filed in Texas.

Further, the court pointed out that the provision relating to simultaneous proceedings and finding that Arkansas was not exercising jurisdiction substantially in conformity with the UCCJA did not permit the Texas court to ignore the Arkansas court. By its plain language, the provision speaks to situations where the Texas court may not exercise jurisdiction. It does not, by its terms, confer jurisdiction.

Finally, the appellate court found that the Qatari court did not have the power to confer jurisdiction on the Texas court because that deferral of jurisdiction was made after the Arkansas court had gained home state status. While the Texas court agreed that the Qatari court could defer jurisdiction as described in the UCCJA, it made it clear that the deferral could only confer superior jurisdiction on a Texas court if it was done in conjunction with the other provisions of the statute. In other words the Qatari court could only effectively defer its home state status to Texas if it was done prior to the time that Arkansas acquired home state jurisdiction.

The court determined that Texas simply no longer had superior jurisdiction to Arkansas at the time that the father filed his suit in Texas. If the father had filed his suit in Texas while Qatar was still maintaining its status as home state, Qatar's deferral to Texas would have made Texas the state with superior right to jurisdiction. Arkansas had not yet become the home state; Qatar was clearly the home state. However, because the father waited to file suit in Texas until the children had lived in Arkansas for well over six months, Arkansas achieved home state status during the delay. Therefore, the date of the commencement of the proceedings for the purposes of this type of analysis has to be the date on which a proceeding is commenced in the state which is being asked to make the determination. No provision provides the opportunity to relate back to the date that the suit was filed either in Qatar or in Arkansas.

Again, it should be noted that this is not an application for enforcement of a Qatar decision on custody.

In the interest of B.O.G. #10-00-198-CV, Ct. of App. of TX, 10th District at Waco, 48 S.W. 3d, 312, decided May 2, 2001.

This indicates that the trial court had lost jurisdiction over any child custody related motions after a child had lived outside of the State of Texas for six months because of the timing of the filing in relationship to the September 1, 1999 effective date of the UCCJEA. The court determined that the trial court had jurisdiction over an application to modify conservatorship. The trial court did not have jurisdiction over an application to modify child support. An application to modify grandparental visitation, which was part of this case, and any new motions to modify conservatorship filed after January 31, 1999 (six months after the child moved to Virginia), or any motion of whatever character involving custody or visitation filed after September 1, 1999 (the effective date of the UCCJEA).

Maguire v. Maguire, #08-99-00343-CV, Ct. of App. of TX, 8th Dist., El Paso, 18 S.W. 3d, 801, decided March 30, 2001.

Texas lacked subject matter jurisdiction to alter a parent's conservatorship agreement where the parent's domicile was Illinois and case law at the time favored child's home state, and Illinois did not decline jurisdiction.

Essenberg v. Essenberg, #05-9701316-CV, Ct. of App. of TX, 5th Dist, Dallas, 1999, TX App., decided December 13, 1999 (unpublished).

In an appeal of a decision granting custody of children to appellee father, Texas court retained jurisdiction over the case. There was ample evidence on the record to support finding that the appellee had retained his Texas residence.