

## ALABAMA

*I.F.R. v. N.F. B.; M.M.A. v. N.F.B.*, 2000551, 2000552, Court of Civil Appeals of Alabama 2001 Ala. Cir. App. Lexis 729, November 9, 2001.

This case involves the custody of a six-year-old child who was born in 1995 during the marriage of her mother, M.M.A., to a man who was not the biological father. The couple was divorced in 1996 in Somers County, West Virginia. However, they placed on the record at the time of the divorce the issue of paternity and as such, the West Virginia court entered an order which stated that the paternity of the child was at issue, therefore the matter was bifurcated and the court retained jurisdiction for the purposes of future paternity determination.

Nearly 3½ years later, suit was filed by a man claiming to be the biological father of the child and petitioning for a change of custody in Raleigh County, West Virginia. By that time, the natural mother of the mother had been incarcerated in Federal Prison in Danbury, CT and had “given custody” of the child to her mother (I.F.R.) without the natural father’s consent. Further, he alleged that the child was not being properly cared for by this woman.

No action was taken on the matter and nearly a year later in September of 2000, a dependency complaint was filed in the Family Court of Jefferson County, Alabama. That petition was filed by F.M., the uncle of the subject child’s half-sister, his adoptive daughter. In that petition, F.M. alleged that the child’s natural parents were both incarcerated, the mother in Danbury, CT and the father in a county jail in West Virginia. He requested that the Alabama court allow the child to continue to reside with him and the child’s half-sister in Alabama.

The Court responded by appointing an attorney to represent the incarcerated mother and entered an order awarding temporary custody to the uncle and ordering a home study of the maternal grandmother in West Virginia. A hearing was set for March 1, 2001.

In the meantime, the natural father’s petition in Raleigh County, WV had been dismissed administratively due to inactivity. Neither the natural father nor the husband of the natural mother were parties to this action on appeal.

In the same month as the administrative dismissal, the maternal grandmother moved to intervene in the dependency proceeding being conducted in Alabama, seeking to dismiss the complaint by arguing that the court in West Virginia, and not the court in Alabama, had jurisdiction over the minor child. In December 2000 the maternal grandmother moved a second time to dismiss the dependency petition filed by the uncle, again arguing that Alabama had no jurisdiction over the child. Subsequently, the court entered an order finding that they did have jurisdiction over the cases involving the dependency of the child even though West Virginia had retained jurisdiction regarding the issue of paternity. In January of 2001 the grandmother renewed her motion to dismiss

or to provide for in the alternative to award the child to the half-sister with visitation to the maternal grandmother. Days later, the natural mother moved to dismiss the two dependency custody petitions pending in Alabama. She argued, among other things, that the child had been removed from her home in West Virginia and that she had executed a power of attorney to allow the grandmother to act on behalf of the child, and that the grandmother had subsequently executed another power of attorney allowing the half-sister to act on behalf of the child, and pursuant to the UCCJA and the PKPA, that the state of West Virginia continued to exercise jurisdiction over the child and all matters related to custody.

Subsequent to that, within days, an order was entered by the Alabama court which ratified an agreement between the uncle, the half-sister and the maternal grandmother, and awarded custody of the child to the half-sister. The natural mother joined by the maternal grandmother took an appeal, arguing that the court erred in declining the motions to dismiss for lack of subject matter jurisdiction.

As an initial proposition, the decision points out that Alabama's version of the UCCJA was repealed effective January 1, 2000, and therefore, the court is applying the UCCJEA in resolving the appeal. The court determined that as a matter of fact as well as law, because the two dependency custody petitions filed in Alabama were filed after the West Virginia court had administratively dismissed their proceedings, finding that there was no adjudication of paternity, the first application for a child custody determination was the one filed in Alabama. The grandmother testified that her daughter had given her temporary custody before she had been incarcerated in federal prison and that together they had agreed that the half-sister would be keeping the child in Alabama because the alleged putative father was seeking custody of the child in West Virginia. The grandmother asserted that she and the child's natural mother wanted the child back in West Virginia, but if she were to become ill or incapacitated, she would want the half-sister to raise the child. She also admitted that the child may have been sexually abused by paternal relatives while in her care in West Virginia.

The trial court made additional findings that essentially went to a best interests analysis regarding the minor child and noted that the trial court accepted the agreement between the parties, noted that paternity had never been established and that there was no existing order of child support as to this child. They found that the child was dependent and therefore, the court could make any order of disposition necessary to protect the welfare of the child, including transferring legal custody of the child to a relative or non-relative.

The court concludes, essentially, that this is an initial child custody determination; the child had resided in Alabama for more than six months next preceding the commencement of the action; that the child's mother was incarcerated in Connecticut and therefore, unable to discharge her parental responsibilities; and that there had never been an adjudication of paternity. There was no pending action in West Virginia and that state had closed the case initially filed by the alleged biological father and therefore, essentially was declining jurisdiction.

**G.P. and A.P. v. A.A.K. and L.M.P. n/k/a/L.M.K.**, 2000496 Court of Civil Appeals of Alabama 2001 Ala. Cir. App. Lexis 890, December 21, 2001.

This case involves a child born in 1995 to a mother, L.M.K., and father, M.P. Six months later, the father is killed in an automobile accident. His parents, G.P. and A.P., desired to see their grandchild, but the mother was refusing visitation. In December of the same year, the grandparents sued in a Kentucky court to exercise rights of grandparental visitation under Kentucky grandparent visitation statute. After a year of litigation, the Kentucky court awarded the grandparents visitation rights. The mother remarried in November of 1997 and the following March, her husband adopted the child. That November, the Kentucky court modified the prior grandparental visitation order on the petition of the grandparents because the mother, the adoptive father and the child had moved to Pensacola, FL.

After the grandparents were denied the Thanksgiving visitation that was contained in the order, the petitioned the Kentucky court to enforce their visitation order. The mother, meanwhile, had petitioned a Florida court, requesting that it modify the Kentucky court's 1996 order. The parties reached an agreement, however, and in February of 1999, the Florida court adopted the 1998 Kentucky judgment. The mother, adoptive father and child then moved from Florida to Alabama.

In March of 2000 the mother filed a new application in the Circuit Court of Houston County, Alabama for the modification of the grandparental visitation judgment. Alabama determined that it had jurisdiction pursuant to the UCCJEA and the grandparents in response, petitioned the Kentucky court requesting that it retain jurisdiction under Kentucky's version of the UCCJA. The Kentucky trial court retained jurisdiction and the mother took an appeal to the Kentucky Court of Appeals. In a decision that remains unpublished, the court determined that Alabama was the more appropriate forum for the resolution of this issue and vacated the Kentucky trial court's order retaining jurisdiction.

While this litigation was ongoing, the United States Supreme Court decided *Troxel v. Grenville*, 530 U.S.57, 147, L. Ed. 2d 49, 120 Sup. Ct. 2054 (2000). That decision, of course, struck down as unconstitutional, the Washington state third party visitation statute. Thereafter, the child's mother petitioned the Alabama trial court to terminate the grandparents visitation rights, arguing that based upon the application of *Troxel*, Alabama's statute was unconstitutional. The Attorney General was properly served, but declined further service or argument.

The trial court addressed the issue of the constitutionality of the Alabama's statute and held that it was unconstitutional per se. The court declined, therefore, to enforce or to modify the grandparents' visitation judgment, stating that it lacked jurisdiction to modify another state's judgment or to entertain a new suit in reference to grandparental rights under Alabama's current law. The grandparents appealed that determination.

After the trial court's decision in a separate unrelated case, the Alabama appellate court considered the constitutionality of its statute in light of *Troxel* and struck down the rebuttable presumption in favor of grandparental visitation that had been found in it. *R.S.C. v. J.B.C.*, Aug. 31, 2001, S. 2d. 2001 Ala. Civ. App. Lexis 508 (Ala. Civ. App. 2001).

However, the court in reviewing this case in light of the UCCJEA determined that the disposition of the case at bar did not turn on whether the Alabama statute was or was not constitutional. The judgment which awarded the grandparents visitation with their grandchild was a child custody determination as defined under the UCCJEA. As such, and consistent with its purposes, judgments providing for visitation with respect to a child must be recognized and enforced by Alabama courts if the other state court which rendered the judgment exercised its jurisdiction in substantial conformity with the UCCJEA.

The court went on to acknowledge that the grandparents' visitation judgment was not appealed by the mother when it was made. Thus, the Kentucky court's determination of the grandparents underlying rights to visitation with the child was binding upon the parties as well as upon the trial court of Alabama. The effect of the extant Kentucky court's judgment under the Kentucky statute was to create an entitlement of visitation. The court noted that the parents in this case had the same constitutional rights to direct the child's upbringing in 1996 as they did in the year 2000, and could have raised, but apparently did not, constitutional objections to the Kentucky court's award of visitation when it was made. "Their failure to do so prevents them from reviving their foregone rights to raise any constitutional objections that they might have had to the visitation ordered by the Kentucky court."

The court reiterated in citing traditional case law of the United States Supreme Court: "When a court acts pursuant to a statute later declared unconstitutional, prior final proceedings based on that statute are immune to collateral attack."

Thus, the Alabama court had jurisdiction in the present case under the UCCJEA to modify the child custody determination, particularly when the rendering state's court (in this case, Kentucky) had already determined that continuing jurisdiction no longer existed in its state. However, the petitioning mother was, in effect, asking the Alabama court not to substantively modify of the grandparent's rights, but to determine *ab initio* whether the grandparents should have been granted visitation rights to begin with. This, the Alabama court reiterates, is inappropriate under the terms of the jurisdictional statute.

The judgment, therefore, of the trial court was reversed and the cause was remanded for further proceedings consistent with the opinion.

**Practice Note:**

This is an excellent review of the relationship of *res judicata* and collateral estoppel principles to the presumptions of full faith and credit which underlie the

Uniform Child Custody Jurisdiction and Enforcement Act. Since most of the case law cited for that proposition originates with the Supreme Court of the United States, this would provide good authority for the proposition regardless of which state is considering the application.

## **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. 4<sup>th</sup> 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. 4<sup>th</sup> 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.

**NOTE:** Both of the following cases are denominated "not to be published" in official reports. Pursuant to California Rules of Court R. 977(a) the circumstances for citing such cases within California jurisprudence is set forth therein.

*Nieto v. Ramos*, Court of Appeal of California, 2<sup>nd</sup>. Appellate District, Division One, 2001 Cal. App. Lexis 1944, decided November 7, 2001.

This matter begins as a marital dissolution petition between residents of California (father) and Kentucky (mother). The family originally had moved to California in May of 1999 and less than six months later in September, the mother took the minor child without the father's permission and moved to Kentucky. A month later, the father filed for divorce in California. Along with his petition for divorce, he filed an Order to Show Cause in the divorce proceeding seeking the sole custody of the child and the child's immediate return from Kentucky to California. The trial court denied the Order to Show Cause on the grounds that the father had not lived in California the requisite six-six month time period to meet the residency requirement to file the underlying Complaint for divorce. Therefore, in August of 2000, having now lived in

California in excess of six months, the father renewed his Complaint along with his Order to Show Cause, seeking the immediate return and sole custody of the child. The minor child was still living with the mother in Kentucky.

The mother filed a special appearance to challenge the court's exercise of subject matter jurisdiction in the divorce proceeding over the custody issues. The mother contended that under the UCCJEA, California did not have "home state" jurisdiction over the custody issues because the minor had never lived in California for six months. She asked that the custody dispute to be transferred to Kentucky where the minor had lived for over a year. However, at the time that she made the application, there was no custody action pending in Kentucky.

The trial court was persuaded by the father's contention that the mother should not be allowed to assert subject matter jurisdiction in a venue which had acquired it by wrongful removal or retention. Therefore, the trial court concluded that California had acquired home state jurisdiction, even though the minor had not lived there for six months. The court set a hearing on the Order to Show Cause and issued an interim order which required the minor's immediate return to California and the transfer of physical custody to the father. From the transfer of physical custody in October 2000 and the subsequent year, the child remained in California. The mother, at the jurisdictional hearing, had moved to vacate the order and stay all further custody proceedings in California. She informed the court that she had filed a custody petition in Kentucky on November 3, 2000 and that when she removed the minor child to Kentucky, there was no custody order or legal impediment precluding her from doing so. The trial court refused to vacate its prior jurisdictional order, and the court concluded that Kentucky did not have home state jurisdiction.

The trial court granted the Order to Show Cause and awarded father sole legal and physical custody. The mother's counsel objected in that no hearing had been held on parental fitness in support of the child's best interest. The court acknowledged that that was the case, but given that the mother was not going to be staying in California and a child custody evaluation was not contemplated, it was appropriate to make interim orders. The mother raised domestic violence issues against the father in her initial declaration, however the trial court discounted those allegations, stating that they were of "recent vintage" and had not been raised at earlier proceedings.

On appeal, the court found that under the UCCJEA, California was never the minor's home state because the minor had never lived there for at least six consecutive months immediately before the commencement of a child custody proceeding. The court reiterated that the Parental Kidnapping Prevention Act, which was cited for support of the proposition by the trial court, does not go so far as to set forth the principle that the time that the minor spent in Kentucky could be ignored by the trial court because of the allegation of wrongful removal. The court outlined, based on the reading of the UCCJEA, the time a minor spending in a new state may be ignored only if on the date that the custody proceeding is filed in the left-behind state, the former state had been the

child's home within the preceding six months and one of the parents was still in residence there.

Further, the court concluded that the mother's conduct was not, under the circumstances of this matter, unlawful:

“One parent's removal of a child from the other parent's custody may startle, enrage the other parent but it is not legally wrongful because prior to the custody order, both parents are the natural guardians of their child.” See Goldstein, *“Tragedy of the Interstate Child: A Critical Re-examination of the Uniform Child Custody Jurisdiction Act and the Parental Kidnapping Prevention Act”* (1992), 25 U.C. Davis Law Review 845, 847, footnotes omitted.

Therefore, the appellate court determined that in finding that Kentucky did not have home state jurisdiction over the mother's custody petition, it was an abuse of the trial court's discretion and as such, given that the mother's conduct was not illegal, the Kentucky court should be free to make its own jurisdictional ruling in the matter. If it turns out that Kentucky declines to exercise jurisdiction, for any reason, the father has the option of re-filing his Order to Show Cause in the dissolution proceeding.

**Practice Note:**

Had the father filed a Complaint for custody rather than a divorce complaint in California and asserted that the child in being removed from his care and custody to Kentucky, the issue of jurisdiction to resolve the subject matter (the best interest of the child) would not have been challenged. The residency requirement was for a dissolution petition, not for a resolution of a custody issue. It is clear that the father's counsel thought of only one way to bring a custody petition and thus, confined the father to waiting until six months had passed to establish residency in California.

Unfortunately, although the record does not reflect why, even with that delay, the father waited not an additional one month, filing in November of 1999, which would have satisfied the six-month residency requirement, but an additional 10 months so that by the time the matter is heard, the child had been for one year in Kentucky. Had the father filed an application asserting a custody petition and alleging the child was in need of the exercise of the jurisdiction of the court, there would have been no jurisdictional pre-requisite upon which to base the Kentucky action. Kentucky would have almost certainly had to defer to California. Even if the mother had filed for a domestic violence restraining order upon arriving in Kentucky, arguments could have been made that the facts and underlying allegations of the domestic violence would have necessarily been located in California and therefore, the appropriate venue to assess the affect of domestic violence upon the parent-child relationship would be the court of California.

**Practice Note 2:** Each and every state has a statute with respect to interference with custody. While it may not have been illegal to remove the child from the State of California in the absence of a child custody order, in a state like New Jersey, for example,

no prior order is necessary to assert the wrongful removal or retention of the child away from the state. New Jersey's statute (*N.J.S.A. 2C:13-4*) requires either an order of the court or the permission of the biological parent in order to permanently remove a child from the state. Therefore, when advising a client in the absence of any orders previously filed whether or not the child can be removed without consent, a review of the state both from which the child is removed and to which the child is brought is critical.

## **CONNECTICUT**

There have been fourteen cases in Connecticut which computerized legal research identifies as addressing the Uniform Child Custody Jurisdiction and Enforcement Act. However, most if not all of the cases are "unreported". The issues addressed are briefly described with the citations. But as always, if practicing under Connecticut's rules, the reader is cautioned to make "independent determination" of the status of each case and its possible appellate review.

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.” See also In the Interest of P.D.M., Minor Child, K.B., Father, Appellant, No. 1-728/01-0872, Court of Appeals of Iowa 2001 Iowa App. Lexis 717 November 28, 2001, filed (see Iowa)

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 (Georgia) which is exercising jurisdiction but reserves it’s 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 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 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 sets forth the distinction between an application to dismiss for lack of subject matter jurisdiction and an application to dismiss on 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 brought during 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 as such 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 where ambiguities as to 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 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" grounds.

**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 Litichfield, 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 course was completed and the prohibition 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 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 when she removed the child.

*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 no longer lived 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 (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 due to 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.

*Venditti v. Plonski*, FA 010076354S Superior Court of Connecticut, Judicial District of Ansonia-Milford, at Milford, 2002 Conn. Super. Lexis 339, February 5, 2002.

This case arises from a motion to dismiss filed by the defendant mother to the plaintiff father's request that the state of Connecticut retain jurisdiction to hear a custody

petition under the Uniform Child Custody Jurisdiction and Enforcement Act. The father, Jason Venditti, filed a custody and visitation petition on November 26, 2001 against the defendant, Julia Plonski, with regard to their minor child, Alex Venditti. The father asserted that Connecticut had jurisdiction over the matter because it was the home state of the child and in the alternative, argues that the child has had significant connections to Connecticut so that it is the most appropriate forum.

The Court found the following facts relevant to its analysis of jurisdiction: The child was 18 months old; was born in Arizona on July 15, 2000. At the time of the determination, he resided in Arizona with his mother and grandmother. His mother argues that she and the child have continuously resided in Arizona since the child's birth with the exception of five months from July 2, 2001 to November 26, 2001, during which they lived in Connecticut and resided with the plaintiff father in his apartment. The mother argues that this five-month period should not be considered permanent and qualifies as a temporary absence from the home state. The father argues that the move was intended to be permanent and that the mother abruptly left the state for Arizona without notifying him which is contrary to the public policy of the state of Connecticut.

It is not disputed that the child was not living in Connecticut for the requisite six months prior to the commencement of the custody proceedings. Further, there is no disputed fact that the child and the defendant are currently residing in Arizona. Accordingly, the trial court determined that either Arizona is the child's home state or there is no home state, in which case the court must look to see which state has the most significant connections to the child. Whether Arizona qualified as the home state of the child would be entirely dependent upon whether the five-month absence constituted a temporary absence as contemplated by the statute. The court notes that

“the fact that an absence if for a lengthy period of time, as here, does not preclude its characterization as a ‘temporary absence’. The significant consideration would appear to be the intent which prompted the absence from the state of origin. A move with such intent could well affect (i) the continued maintenance of strong contacts with the state of origin as well as (ii) the extent to which efforts are made to establish roots in and assimilate into the new community.” Citing *Kleiner v. Kleiner*, Super. Ct., Judicial Dist. of New London at New London, Dkt. #548050 (February 19, 1999) (Solomon J) (24 Conn. L. Rptr. 158).

There is a factual dispute as to the intention of the defendant mother. The father asserts that she obtained full-time employment, entered into a one-year lease and enrolled the child in a day care facility. He maintains that her leaving of the state was unplanned and “abrupt”, without notification, and that that conduct violates the public policy supporting in the Parental Kidnapping Prevention Act, 28 USC 1738 (a).

The court determined that the conduct of the defendant mother in the present case while troubling, did not rise to the level of egregious conduct that would move the court to waive the statutory requirement in favor of the state's public policy. Furthermore, Connecticut was not the original state and the defendant has not kept her whereabouts a

secret. The mother argued that she maintained her residency in Arizona during the five-month period in Connecticut with the full intention of returning. The child was born there; his physicians are there; he's part of a weekly play group and continuously resided there with his mother and maternal grandmother since birth in the same home.

The court acknowledges that determining the defendant's permanent intentions are unclear, but finds that Arizona is, in fact, the home state of the minor child. Using the significant connections test, it is clear that the child has more ties to Arizona and that jurisdiction should reside in that state. Therefore, the motion to dismiss was granted.

***Graham v. Graham***, FA 9265185 Superior Court of Connecticut, Judicial District of Middlesex and Middletown 2002, Conn. Super. Lexis 288, February 6, 2002 decided.

The plaintiff mother was requesting the court to modify the primary residence of her children and to modify child support. In response the defendant father contested the court's jurisdiction. Notably, the court begins its opinion with, "Again, this case is before the court".

In it, the petitioning mother is requesting that the underlying orders of the Connecticut court be modified as the circumstances concerning the case have changed so substantially. She alleges that the minor child, Jacob Graham, and the 18-year-old child, John Graham, have resided with their mother and attended school in St. Croix, US Virgin Islands since September 6, 2001 (The prior orders entered by the court were entered on January 4, 1999 and provided for joint custody with primary residential custody in the defendant father who at the time of the determination had been residing in Colorado since July 3, 1998. The judgment provided for the payment of support from the mother to the father and there is no mention in the orders of the United States Virgin Islands.)

The petitioning mother asserted that the application had been made at her children's request and with the approval of their father. The return date was to be June 2001. The plaintiff asked the court to modify the prior orders of the court by denominating primary residence with the plaintiff mother; joint custody to continue; and to decrease the amount of child support she had to pay to the father retroactive to the children's arrival in St. Croix. The defendant father challenged the court's exercise of jurisdiction or in the alternative, for a finding of forum non conveniens. He had not claimed that the proceeding was covered by the Uniform Child Custody Jurisdiction and Enforcement Act, and neither party's brief mentions the act. However, the court acknowledges that the Act became effective in Connecticut on July 1, 2000. The court denominated the pending proceeding as a child custody proceeding.

As an initial proposition, the court held that there was no jurisdiction over the custody and/or primary residence issues regarding John, John having been born May 20, 1982 and turning 18 on May 20, 2000. The definition of a child under the UCCJEA is an individual who has not yet attained the age of 18 years, thus, the only determination the court is being asked to make is whether Connecticut was the home state of the younger child, Jacob, on April 11, 2000. "Home state" is defined as the state in which the child lived with a parent or person acting as a parent for at least six consecutive months

immediately before the commencement of a child custody proceeding. The plaintiff's own application sets forth that the child Jacob had resided in the U.S. Virgin Islands since September of 2000. As such, on April 11, 2001, the date that she commenced the action in Connecticut, more than six months had elapsed since September 6<sup>th</sup>, and Connecticut could not be Jacob's home state on April 11<sup>th</sup>.

The plaintiff argues that hers and Jacob's absence from Connecticut were temporary. The court determined that it was not necessary to decide where the domicile was located since under the UCCJEA, concepts such as "domicile" are not relevant. The test is where the child actually lives or lived at the relevant time. Jacob, at the relevant time, lived in the Virgin Islands, not in Connecticut. It is undisputed by the parties that Jacob had not lived in Connecticut for nearly 3 years before April 11, 2001 when the application was filed. Before living in the Virgin Islands, Jacob lived in Colorado. There is no claim that Jacob's time in Colorado constituted a temporary absence from Connecticut. Even if Jacob's move to the Virgin Islands was temporary, any such temporary absence would be from Colorado, where he lived when the supposed temporary sojourn to the Virgin Islands began. Thus, Jacob's move to the Virgin Islands, temporary or otherwise, precluded a determination that Connecticut could be his home state.

The court reiterated that the United States Virgin Islands, a territory of the United States, is a state for UCCJEA purposes. However, the U.S. Virgin Islands had not adopted the UCCJEA. It had, however adopted the UCCJA, its predecessor. Therefore, "home state" under Virgin Islands law is substantially similar to that under the UCCJEA. Factually, as of the date of the filing of the Complaint, the defendant father had resided in Colorado for several years. Plaintiff had resided in the Virgin Islands from at least September 6, 2000 to April 11, 2001 and neither parent resided in Connecticut when the application was filed. Plaintiff did not claim that any court in the Virgin Islands has declined exercise of jurisdiction and no other court has declined to exercise jurisdiction.

Finally, it is advanced that Connecticut may retain jurisdiction if no other state had jurisdiction under the Act. However, since the court found that the Virgin Islands would have jurisdiction under sec. 1 of the Act in that it is the home state, Connecticut could not appropriately exercise jurisdiction or a determination of child custody.

The court parenthetically notes that the application for modification also seeks the modification of child support orders. The outstanding child support order contained in the original judgment required the plaintiff to pay the defendant a certain amount each week. It also required her to pay certain travel expenses in connection with the children's visitation. The plaintiff's request for child support modification was tied to her request for a transfer of physical custody. Since the court did not have jurisdiction over the child custody (primary physical residence aspect) and could not issue an order transferring physical residence to the plaintiff, the premise for the plaintiff's requested modification of child support does not exist.

**PRACTICE NOTE:**

The last paragraph of this opinion as a catchall, ties the application for custody and the request for child support modification. Nevertheless, the Uniform Interstate Family Support Act (UIFSA) is an Act which is predicated upon the “one order” concept. Additionally, parties can, unlike in the case of child custody jurisdiction, denominate subject matter for future child support modification by agreement. The provisions of UIFSA (assuming there is no specified agreement to retain jurisdiction in Connecticut) would require the petitioner make an application for modification where the parties had all left the state issuing the CEJ, or Continuing Exclusive Jurisdiction order, to “play away” jurisdictionally. As such, she would be required to bring an application for modification in the jurisdiction where the obligee is located, i.e. Colorado. In the instant case the court simply does not address that issue, presumably since it was not referenced or briefed by the parties.

## **IOWA**

***In the Interest of P.D.M., Minor Child, K.B., Father, Appellant***, No.1-728/01-0872 Court of Appeals of Iowa 2001 Iowa App. Lexis 717, November 28, 2001.

It should be noted that this decision is unpublished. The comments under Iowa procedure set forth that no decision has been made on publication of the opinion and the opinion is subject to modification or correction by the court, and is not, since until the time for rehearing or further review has passed. They caution that an unpublished opinion of the Court of Appeals may not be cited by a court or by a party in any other action. Nevertheless, this case represents a trend in developing case law, particularly under the UCCJEA (see Connecticut case *Anselmo v. Anselmo* cited earlier).

The case is on appeal from the Iowa District Court for Blackhawk County where the father is taking an appeal from the court’s denial of his motion to dismiss in a termination of parental rights proceeding filed privately under Iowa law. The parties are the parents of Perry, a child born approximately, March 2, 2001. The mother is married to someone else, but genetic testing demonstrated that Kevin (K.B.) is the child’s biological father. Prior to the child’s birth, Kevin, the mother and her husband all resided in Wisconsin. In January of 2001 Kevin filed a petition in Wisconsin seeking to establish his paternity of the then unborn child. He also sought a determination of custody and support for the child. A guardian ad litem was appointed for the child.

On February 22, 2001, a hearing was held. The court ordered that the mother was to inform the guardian ad litem of the child’s birth and whereabouts within 24 hours. The order also provided that once the baby was born, the mother would not remove or allow anyone else to remove the baby from the state of Wisconsin.” A further hearing was set for March 12, 2001 to determine paternity and custody.

Unfortunately, some time prior to March 2, 2001, the mother went to Waterloo, Iowa, where she gave birth to Perry. On March 6<sup>th</sup>, the mother and an attorney, as co-petitioners, filed a petition in Iowa to terminate the parental rights of both Kevin, the natural father, and George, the woman’s husband, to the child Perry. They did not inform the Iowa court in the declarations contained in their petition of the pending actions or

orders in Wisconsin. After the child's birth, the mother returned to Wisconsin. The mother and her husband filed releases of custody in Iowa, a guardian ad litem was appointed in Iowa for the child, and the attorney was appointed as the child's custodian. He placed the child with a prospective adoptive couple who lived in Iowa.

On March 20, 2001, Kevin filed a motion to dismiss the Iowa action, claiming that Iowa should not accept jurisdiction of the case because there was already pending a proceeding in Wisconsin. He asserted that Wisconsin was a more convenient forum for the parties; and the mother had engaged in unjustifiable conduct by wrongfully taking the child to the state of Iowa. Hearing was held on April 18, 2001. The Iowa juvenile court denied the motion to dismiss. The court determined that Iowa was the child's home state under its own code because the child had lived in Iowa from the time of its birth. The court found the earlier Wisconsin proceeding did not meet the requirements of the Parental Kidnapping Prevention Act and, therefore, was not entitled to full faith and credit in Iowa. The court found that although Kevin, the mother and her husband all lived in Wisconsin, Iowa was not an inconvenient forum. In addition the court concluded that the mother's conduct in coming to Iowa did not rise to the level of "unjustifiable conduct" which would cause the court to decline jurisdiction under its version of the UCCJEA. Kevin appealed.

The scope of review for the appellate court in Iowa is de novo. The court begins the analysis by addressing "home state" for the purposes of the application of the UCCJEA. The appellate court agreed that Iowa was the only state capable of being the child's home state as that term is defined: "In the case of a child less than six months of age, the term means, the state in which the child has lived from birth with any of the persons mentioned". Since the child was less than six months of age at the time the motion to dismiss was considered, the only state he had lived in was Iowa and they agreed that under the definition, Iowa should be considered the home state.

However, the court went on to indicate that the determination that Iowa was the home state does not end the consideration. Kevin requested that Iowa decline to accept jurisdiction on the basis that a proceeding considering the custody of the child had been commenced in a court of another state. The court refers to simultaneous proceedings portions of the UCCJEA which reiterates that a court shall not exercise its jurisdiction under this article if at the time of the commencement of the proceeding, a proceeding concerning the custody of the child has been commenced in the court of another state having jurisdiction substantially in conformity with this chapter, unless that proceeding has been terminated or stayed by the court of another state because the court of this state is the more convenient forum under the analysis set forth in the act.

The juvenile court determined that Wisconsin did not have jurisdiction substantially in conformity with the UCCJA. It reached that conclusion because Wisconsin was not the child's home state, jurisdiction in Wisconsin could not meet the requirements of the statute. The appellate court pointed out that substantive law in Wisconsin allowed a paternity suit to be initiated before the child's birth. Neither the PKPA, UCCJEA nor UCCJA address the question of the state's exercise of jurisdiction

before a child is born. [citing *In re unborn child of Starks*, 2001 OK 6, 18 P. 3d. 342, 347 (Okla. 2001)] (“Home State” arises at the time of the child’s birth).

The court points out that at the time that the Wisconsin action was initiated, all the parties resided in Wisconsin, and that was obviously the proper state in which to file the paternity action. There was no choice of law problem, and Wisconsin’s exercise of jurisdiction over the case was valid and should have been given recognition as a proceeding substantially in conformity with the UCCJEA. The appellate court directs that where there are simultaneous proceedings, the procedure to be employed would be that a court would stay its proceeding and communicate with the court of the other state. If Wisconsin did not determine that Iowa was the more appropriate forum, the Iowa case would have to be dismissed.

The appellant father further contended that the juvenile court abused its discretion by refusing to dismiss the action on the ground that the mother had engaged in unjustifiable conduct. The appellate court found that this is a discretionary ground for denying jurisdiction and in referring to the Wisconsin order which prohibited the removal of the baby from the state of Wisconsin, noted that obviously, the court anticipated that the child would be born in Wisconsin and would remain in Wisconsin. The court set a hearing date for further consideration of the child’s paternity, custody and placement.

The appellate court found that the mother knew and understood the Wisconsin orders and left Wisconsin and gave birth to the child in Iowa nevertheless. She then initiated a new proceeding in which she sought to terminate the parental rights of herself, the putative father and her husband. Notably, she did not mention in the proceedings that she filed, the Wisconsin proceedings as would be required in any UCCJEA compliant. The mother’s defense was that there was nothing in the Wisconsin order that prevented her from giving birth in Iowa. The appellate court found that those actions violated the terms of the Wisconsin order and although the removal occurred prior to the child’s birth, “the child has clearly been removed from the state of Wisconsin” and found that the mother’s actions constituted “unjustifiable conduct” under the sections of its Act. The appellate court noted that the mother violated the intent of the Wisconsin order for the express purpose of creating jurisdiction in Iowa. To put it another way, “jurisdiction in Iowa exists only because the mother ignored the clear intent of the Wisconsin order that the child remain in Wisconsin”.

The court noted that none of the exceptions found in the UCCJEA to ameliorate the unjustifiable conduct exist in the case. The father did not acquiesce to the exercise of jurisdiction in Iowa; Wisconsin had not determined that Iowa would be a more appropriate forum; and finally, there was not an absence of jurisdiction in any other location. Based upon all the facts, Iowa determined that the juvenile court abused its discretion by not declining jurisdiction on the basis of the mother’s “unjustifiable conduct”, and concluded that the petition for termination of parental rights filed in Iowa should have been dismissed under the section. The appellate court reversed the decision of the Iowa juvenile court and remanded solely for proceedings regarding fees and costs to be awarded to the petitioning father as permitted under Iowa law.

## **PRACTICE NOTE:**

While the substantive law of Wisconsin regarding paternity litigation may give the ultimate authority associated with the consideration of a child custody determination in a pre-natal context, this case is notable as is any case that it addresses the discretionary analysis of “unjustifiable conduct”, since courts are so reluctant to rely on that basis to decline jurisdiction. The language which I have taken the time to go through focuses on a violation of the “intent” of the prior orders. That is certainly language that would be helpful in addressing alleged unjustifiable parental.

## **KANSAS**

***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 by the maternal Aunt and Uncle urged that the custody decree which had been rendered by an Oklahoma Court in the original 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 Kansas’ substantive law and the appointment of the paternal Aunt and Uncle was according to that 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 should 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 in Minnesota 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 legal analysis seem fairly straight forward, on closer view they demonstrate some of the difficulties associated with the inherent transience of our lives and, in particular, military service issues. 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 in the original North Carolina decree for the appellant mother because she knew 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 was that the father did not cooperate with the scheduling of visitations and refused to contribute to the cost of travel.

The mother alleged that the father indicated that he was traveling to Minnesota for one week visitation but that he refused to tell her where he was staying and how he could be contacted. However, he indicated that that the child would fly to Minnesota from North Carolina on the 15<sup>th</sup> of November of 1999. In anticipation of same the mother filed an application to modify the custodial decree in Minnesota court.

After the child boarded the plane to Minnesota, the father was personally served with motion papers that the mother had filed. 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 November.

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 in time 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 action 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.

**Stone v. Stone, 636 N.W. 2d. 594; 2001 Minn. App. Lexis, 1309 Court of Appeals of Minnesota filed December 11, 2001.**

The appellant mother challenged the Big Stone County District Court's order vacating her registration in Minnesota of a South Dakota post-dissolution order modifying child support and visitation. The mother claims that the refusal to register the order violated Minnesota law governing the registration of foreign child custody determinations and child support orders.

The appellant and respondent dissolved their marriage in South Dakota in 1989. The court noted that it was unclear from the record, but the parties appeared to have two children who are in the appellant's custody and the respondent pays child support. At some point subsequent to the dissolution, the parties moved out of South Dakota. The appellant mother now lived in Minnesota with the children and the respondent father lived in Missouri. On July 30, 1996, the respondent father filed in the South Dakota court for the modification of amount of his child support obligation. The court granted the motion and ordered the modification. Then in February of 1997, the parties stipulated to a further modification of child support and visitation. The South Dakota court ordered the modification as had been stipulated by the parties. Five years later, the appellant mother registered both the 1996 and 1997 South Dakota orders in Minnesota. The respondent father then filed a motion in Minnesota court to vacate the registration of the South Dakota orders and for an award of counsel fees and costs. The mother filed a motion to have the Minnesota courts now assume jurisdiction over custody, support and

health insurance, and to require the respondent to provide proof of his life insurance benefits.

On May 1, 2001, after a hearing was conducted, a Minnesota court ordered the registration of the South Dakota orders vacated and denied the respondent father's motion for attorney's fees and all of the mother's motions. The court ruled that the appellant mother failed to meet the statutory requirements for the registration of a foreign order and there had been no basis for the exercise of jurisdiction over the parties in Minnesota.

The day after, the appellant mother filed a notice of motion in Minnesota to modify child support. That motion remained pending at the time that the appellate court heard this application. The mother challenges the district court's order vacating the registration of the South Dakota orders. The mother contends that the Minnesota statutory law permits her to register the South Dakota visitation and support orders in Minnesota. Minnesota has adopted UIFSA which specifically provides for the registration of a support order from another state for enforcement purposes. Among the procedural prerequisites for such registration is the filing of a sworn or certified statement "showing the amount of any arrearage". The trial court found that there were no arrearages in child support in Minnesota, thus, no "enforcement" issue as to the South Dakota support order and the appellant is not entitled to register it for enforcement in Minnesota.

Minnesota also allows for the registration of a child support order from another state for modification purposes. Minnesota can only modify a court order if it finds, among other things, that the petitioner is a non-resident of Minnesota. Appellant mother is a resident of Minnesota and thus cannot satisfy the requirements for modification of the South Dakota support order. The court found that because the mother is unable to satisfy the statutory requirements for registration of the South Dakota support order for either enforcement or modification, the district court did not err in vacating the registration of that order.

Further, the appellant mother claims that because Minnesota is the home state of the children and, thus the proper state for the exercise of jurisdiction, the district court was required under Minnesota law to register the South Dakota orders for the purpose of exercising jurisdiction over custody and access issues. The appellate court acknowledged that a child custody determination made by the court of another state may be registered in Minnesota with or without a simultaneous request for enforcement. A party requesting the registration of a child custody order under the UCCJEA must send to the district court in Minnesota a letter or other document requesting registration of another state's child custody order, copies of the child custody order and the names and addresses of the parties seeking registration and the party awarded custody or visitation.

The court confirmed that Minnesota had the jurisdiction to modify the South Dakota visitation determination because Minnesota is currently the home state of the mother and the children who have live in Minnesota for more than four years. However, the court points out that the mother had not alleged an existing child custody dispute and

had not registered the South Dakota under the UCCJEA. Although the appellant initially attempted to register the South Dakota orders under the Uniform Interstate Family Support Act, she failed to seek registration of the South Dakota order as required by the UCCJEA, noting that the UCCJA and UIFSA operate under different standards. See *Abu-Dalbouh v. Abu-Dalbouh*, 547 NW 2d. 700, 705 (Minn. App. 1996).

Minnesota cannot take jurisdiction of custody issues when there is neither proper registration under the UCCJEA, nor assertion of an existing custody dispute. Thus, the district court did not err in denying appellant's motion to have the court take jurisdiction over the visitation issue.

#### **PRACTICE NOTE:**

It is entirely unclear from this determination what defect in the defendant mother's registration process allow Minnesota to divest her of the opportunity to register the order. Both the UCCJEA and UIFSA permit the registration of orders for the purposes of enforcement anywhere where such enforcement may be sought. Thus, it is not only conceivable, but predictable that in circumstances in which parties live in more than one state, that under the UCCJEA, the custody provisions could be registered for the purposes of future enforcement in both states. Similarly, under UIFSA, an order can be registered in the absence of a representation of an arrearage, the appellant mother's motion in Minnesota to modify, however, requires some jurisdictional prerequisites. Clearly, the mother could modify the child custody provisions in Minnesota. While there is no current application to do so, the fact that it was the children's home state should have given her independent reason to do so which is why I wonder if there were not some other technical defects asserted in her registration petition, i.e. she did not reference the UCCJEA or set forth the statutory required components.

It is clear that in order to modify the provision of child support, again, UIFSA would require her to "play away". That is, she would not be permitted to modify in the state in which she resides absent prior agreement of the defendant father. The motion to modify requires one to bring the application under UIFSA in the defendant's jurisdiction. The difficulty should not be with the registration procedure for the purposes of enforcement, but allegations of the appropriateness of Minnesota's exercise of jurisdiction for the purposes of modification. It is unfortunate that the language of the decision seems to confuse those two elements.

#### **MISSISSIPPI**

***The Matter of the Guardianship of Z.J., Minor***, 804 So. 2d. 1009, Supreme Court of Mississippi, January 10, 2002 Lexis 12.

This case comes from the Supreme Court of Mississippi in an appeal taken from the Jackson County Chancery Court judgment November 15, 2000. In it the appellant grandparents filed a petition for guardianship of their granddaughter. The Chancery Court of Jackson County (Mississippi) held that it did not have jurisdiction and denied the petition from which the grandparents took an appeal.

This is a circumstance in which the Supreme Court of Mississippi is referring the Uniform Child Custody Jurisdiction and Enforcement Act, despite the fact that as the matter was heard, that Act had not been enacted in Mississippi. However, the court must address the UCCJEA because the other relevant jurisdiction, Alabama, has enacted the statute.

The facts relevant to the determination in this matter are as follows.

On September 15, 2000, the Greens (Amanda and Calvin) filed a petition for letters of guardianship of Z.J. (their grandchild) in the Chancery Court of Jackson County, Mississippi. They sought permission to be appointed the guardians of the child's person only and the petition states that the child has no estate, real or personal. The Greens reside in Mobile County, Alabama. The subject child, Z.J., is the 3-year-old daughter of Chastity Jackson, herself a minor, and Cassidy Lett, also a minor. Chastity resides in Jackson County, Mississippi with her grandparents, the maternal great-grandparents of the child at issue, Robert and Annie Tucker. The Tuckers were appointed as general guardians of Chastity in 1984. The natural mother, her guardians (great-grandparents), the child's father and the paternal grandmother, Jacqueline Lett, joined in the petition. At the time that the petition was filed, the natural mother was a high school senior, and upon her expected graduation from high school in May of 2001, planned to enter the United States Air Force. In order to do this, the Air Force required that general guardianship for her 3-year-old child be accomplished prior to enlistment. All parties agree that Z.J. would continue to reside in Jackson County, Mississippi until her mother's departure in June of 2001, at which time, the child would reside with the Greens in Alabama.

The Chancery Court expressed reservations regarding its jurisdiction at a hearing held on September 20, 2000. Argument regarding jurisdiction was heard November 14, 2000. At that hearing, the court stated that it did not have jurisdiction to establish a guardianship which would be administered in the state of Alabama. The court entered judgment on November 15<sup>th</sup>, by which it denied the petition for guardianship indicating that it did not have the subject matter jurisdiction over the parties or the subject matter. The Greens timely filed their Notice of Appeal to the Mississippi court. The only issue presented for review was whether the Chancery court erred in finding that it lacked subject matter jurisdiction to grant the petition for guardianship. The Supreme Court's standard of review in determining whether the Chancery Court had jurisdiction to hear a particular matter is a question of law to which the court would apply a de novo standard of review.

The Supreme Court begins by indicating that there was no question that the Chancery Court was exercising adequate personal jurisdiction over the parties, the three-year-old, the natural mother and the natural father, who all resided in Jackson County. All the parties, including the potential guardians, who resided in Alabama, submitted themselves voluntarily to the jurisdiction of the court by their appearance. The question of subject matter jurisdiction they acknowledge is not as easily disposed of. Though all

the parties agree that the Chancery Court possessed subject matter jurisdiction, the petitioners cannot by agreement confer such jurisdiction on any court. Nevertheless, the Supreme Court indicates that they were of the opinion that the Chancery Court possessed such subject matter jurisdiction over the matter.

The substantive law of Mississippi provides that the Chancery Court, where the ward resides may appoint a guardian, noting that if a child has no estate, the chancery court of the county of residence of such ward may appoint a general guardian of his person only for him, giving preference in all cases to the natural guardian or next-of-kin if any apply, unless the applicant be manifestly unsuitable for the discharge of those duties. The maternal grandparents (Greens) asserted that Mississippi code provides that, "Proceedings may be brought by or against a resident or non-resident of the state of Mississippi whether or not having actual custody of minor children for the purpose of judicially determining legal custody of a child. All actions herein authorized may be brought in the county where the child is actually residing, or the county of residence of the party who has actual custody, or the residence of the defendant."

The concerns of the chancellor which address the circumstance of loss of the court's jurisdiction once the child leaves the state reflect, according to the Supreme Court, against substantive law of the state of Mississippi which provides that in the case of guardianship, the court acting through the guardian as its appointee carries the principle responsibility for wards under its jurisdiction. 38 C.J.S. Guardians and Wards, sec. 7 (1976).

The court notes that Alabama statutes have been amended to incorporate a more modern view espoused by the Uniform Guardianship and Protective Proceedings Act of 1982 (UGGPA) according to which guardianship status continues until judicially terminated without regard to the location of the guardian and ward. Ala. Code 26-2A-70.

Nevertheless, the Supreme Court asserts that if a guardian desires to remove a person or personal property of this ward out of the state, on petition and on making of a settlement of his guardianship accounts, the court which appointed him may make an order to that effect, conditioned only that he will qualify as a guardian of the ward in the state or the country to which he intends to remove. The court notes that the route chosen by the Greens in addressing this case does not appear to have been the simplest course of action, implying that they should have simply filed in Alabama upon physical transfer of the child. The Greens state that what necessitated the preemptive application was the Air Force requirement that guardianship be established prior to the natural mother's application for enlistment and that the Mississippi court was the only court with the jurisdiction at that time.

The prior jurisdictional Act (UCCJA) allows a court competent to decide child custody matters to decline to exercise jurisdiction if it finds that it is an inconvenient forum and the court of another state is more appropriate. At the time of this proceeding, Mississippi had yet to decide whether the UCCJA, in its original form, applied in guardianship proceedings, though many sister state courts had addressed the issue. The

question of whether or not guardianship proceedings with respect to minors are covered under the term “custody proceedings” under the UCCJA had not been constitutionally addressed. The court notes that several of the sister states had concluded that guardianship proceedings are so included and this decision sets forth a comprehensive review of case law of Alabama, California, Ohio, Oregon, Oklahoma and Wisconsin and then indicates that those states which have adopted the UCCJA and either presently have a definition of “custody proceeding” identical to that of Mississippi’s or had, at the time of the decision, an identical statute. Those states which no longer have an identical language have repealed their versions of the UCCJA and have adopted instead UCCJEA. Clearly, the definition of “custody proceeding” contained in the new act specifically states that custody proceedings do include guardianship proceedings. The court notes that subsequent to the statutory change, the Kansas courts have advanced the proposition that the old act did not apply to guardianship proceedings. See *Ward v. Ward* in these notations under Kansas.

The grandparents argue that as a general rule that the UCCJA is applicable only where there is a dispute over the exercise of jurisdiction and note that there is no dispute between Mississippi and Alabama. Of course, the Supreme Court notes that the purpose of the Act is intended to prevent potential as well as actual conflict, and prevents parties from bringing applications in unsuitable forums without making a bona fide attempt to evoke the appropriate jurisdiction. The Greens also argued that should the UCCJA be deemed applicable to the case at bar, then they believe the guardianship petition needs to be brought in Mississippi. The Supreme Court answers that a court first has to determine if it has the authority to act and if so, whether it is the appropriate forum and it accepts jurisdiction as the most appropriate forum, whether the action to be taken is foreclosed by an order or judgment from another state court. The Supreme Court found that it had the power and authority to exercise its jurisdiction. Mississippi was the home state of the three-year-old as well as her parents. She has continued to reside in Mississippi until June of 2001 and has the most significant connections to the state. Conversely, Alabama meets none of those pre-requisites.

The Supreme Court found that with respect to the “second hurdle”, there was no indication in the factual findings that the Chancery Court applied the provisions of the UCCJA in declining or communicating with the Alabama courts in determining which arena was the most appropriate jurisdiction. The Supreme Court notes that since this decision was being rendered 6 months after the expected date that the child would have moved to Alabama, the question of whether the child would continue to reside in Mississippi for any length of time should the guardianship be granted should be determined. This would, of course, go to the issue of forum, but directs that the court note that the parties’ agreement on another forum which is no less appropriate is to be taken into account.

The Supreme Court opines that the findings which justify the court retaining or declining jurisdiction under the UCCJA are usually findings of fact of a consideration of judicial convenience and the best interest of the minor child. Normally, the Supreme Court would not disrupt those findings. However, because no such findings were made

by this court, and because the circumstances of the natural mother's enlistment in the military and the schedule of removing guardianship to Alabama is necessarily different from the stated position in the petition and that addressed by the chancellor, the judgment of the chancery court must be reversed and the matter remanded for determinations applying the provisions of the UCCJA.

This case is well-reasoned, and hopefully, soon to be obsolete. It does, however, outline the necessity of the UCCJEA and one of the few clear distinctions between the UCCJA and the UCCJEA. Guardianship proceedings are not listed as cognizable under the old UCCJA. As such, it would be important to make a determination in a state still operating under the UCCJA whether or not the analysis which is supported by the Supreme Court of Mississippi, that is that guardianship is cognizable under the UCCJA, is to be advanced or, if the court adopts the position set forth in the Kansas case, *Ward v. Ward*.

### **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 a case of first impression in New Jersey the application of the existing version of the UCCJA to international matters, it recognized and referred to the text of 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, having made a determination that it is inapplicable in New Mexico, 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 in the Texas version of the UCCJEA. New Mexico had no such provision.

The Texas Code reads:

“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 not 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 regard to the child support component, the father pointed out that UIFSA (Uniform Interstate Family Support Act) contained a similar immunity provision which was in effect. However, the appellate court pointed out that neither party challenged the district court’s exercise of jurisdiction in the 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 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 *Ward v. Ward* 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 court which had rendered earlier orders 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 father 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 in 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 would 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 graveman 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 as took place in this case.

**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 the State of Colorado provided, and Colorado sought reimbursement for payments made to the mother 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 summer visitation with the child. It does not appear that there were any child custody orders which provided documentation of any of the custody and access arrangements of the parties.

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 with 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 Oklahoma order.

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 20<sup>th</sup> 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 the child’s 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 father 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 in truly creative writing determined that it cannot find an abuse of discretion of the trial court 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 the appellate court’s 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 revises the custody determination on “the weight of evidence” and by doing so, makes further appeal ineffective. 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.

*Medill v. Medill*, Court of Appeals of Oregon, 2002, Ore. App. Lexis 301. Argued and submitted on December 5, 2001; re-submitted en banc and filed February 20, 2002.

This case arises from an appeal taken by a father who sought review of the Circuit Court of Clackamas County, Oregon, which dismissed for lack of subject matter jurisdiction his motions to modify the child custody and parenting plan provisions of a previously entered dissolution judgment; to terminate, modify, or suspend his obligation to pay child support; and to hold the respondent mother in contempt of court for violating the parenting plan. Father also assigns error to an entry of an order denying his motion to set aside the order of dismissal which had been previously entered. The father was contending that the court retained subject matter jurisdiction over the initial child custody determination under the Uniform Child Custody Jurisdiction Act, that is, the prior act, and that it had the authority to modify that determination under the provisions of the Uniform Child Custody Jurisdiction and Enforcement Act which was enacted in Oregon in 1999.

This is a case that arises in the context of military service. The father, while serving in the United States military, met and married the mother, a German national, in Denmark in 1985. The parties lived in Germany after their marriage until 1997. Two children were born of the marriage, both in Germany, in 1986 and 1988. The father moved to Oregon in the fall of 1997 expecting that the mother and children would follow. Subsequently, the mother informed the father that she and the children would remain in Germany. The parties agreed that the father would seek a dissolution of the marriage in Oregon and in May of 1998, the Clackamas County Circuit Court entered, with the mother's consent, a dissolution judgment that included a parenting plan. That parenting plan called for joint custody of the children with the mother retaining physical custody in Germany and awarded the father parenting time with the children during any school vacation period that lasted at least 2 weeks. In July of 1998, the children traveled to Oregon to visit their father. Based upon information that the father obtained from the children during the visit, the father sought and received from the Oregon court a temporary protective order that prevented the children from returning to Germany as previously scheduled. The mother then came to Oregon to contest the protective order. After a hearing, the trial court vacated the order and the children returned to Germany in September of 1998 with their mother. The vacating order specified that the timing and frequency of telephonic access between father and children; reaffirmed the father's right to parenting time with the children; and provided that the court should be notified of any further parenting time violations of the mother.

In December of that same year, the father filed a contempt proceeding against the mother, alleging that she was repeatedly violating the parenting plan. That following spring, in April of 1999, the trial court entered a judgment finding the mother in contempt, sentencing her to one year court probation and modifying the parenting plan once more to clarify the terms of the father's access. Later, in 1999, the father sent a series of affidavits to the court, reporting additional alleged violations of the parenting plan by the mother.

In October of 1999, the mother initiated custody proceedings in Germany in the family court, asserting that the father had engaged in a bad faith campaign to undermine her custody of the children throughout the previous court proceedings. In her pleadings, the mother asserted for the first time, that the German court had exclusive subject matter jurisdiction over custody and parenting plan issues regarding the children. In response the father initiated a modification proceeding in Oregon which is the subject of the appeal in this matter. His third Amended Motion and Order to Show Cause sought a change of custody or alternatively, a modification of the parenting plan as well as modification or termination of his child support obligation, suspension of child support based on the mother's interference with the parenting plan, a judgment of contempt based upon mother's alleged violations of the parenting plan and various sanctions for the violations.

The trial court held a hearing on father's motion in Oregon in August of 2000 from which for the first time, the mother was absent. In November of 2000, the court entered an order dismissing the father's motions, holding on its own motion that it lacked subject matter jurisdiction over the application. The court's written findings were that the mother was a citizen of Germany; that she and the children had always been and remain residents of Germany; that the mother submitted herself to the jurisdiction of the court for the purposes of dissolving the marriage, though never present within Oregon; that thereafter, the father withheld the children from the mother after summer visitation; forcing the mother to travel to Oregon from Germany to secure the return of the children; that the mother participated in the proceedings in Oregon which resulted in the court finding the mother in contempt for violating a temporary order of restraint regarding the father's phone contact with the children and which returned custody of the children to her; that the mother makes credible claims in correspondence by her and that of her German, attorney submitted to the court, which may constitute a defense to this contempt proceeding; that the local German youth office has been involved and provided counseling and other services to the mother and the children related to what the mother claims are the father's ongoing efforts to undermine the children's relationship with their mother; all of the witnesses necessary to resolve the issues presented and fashion an appropriate judicial response, except for the father, are located in Germany; and there were pending at the time of the hearing date on the current application, proceedings in German Family Court related to the same general issues. From those findings, the trial court concluded that Oregon was not and never had been the children's home state for the purposes of either the application of the UCCJA or the UCCJEA, and that the German Family Court was an available forum in which to litigate the parties' ongoing disputes. The trial court also concluded that it lacked jurisdiction over the custody and parenting time issues raised by the father and, therefore, lacked the authority to enforce any order it may later enter.

On November 14, 2000, the court entered an order dismissing the father's motion and order to show cause in its entirety. Unknown to the trial court, the German Family Court had ustprior entered an order declining to exercise jurisdiction over the custody issues involving the parties' children and in its decision, the German court explained

“It is important to recognize that the mother previously consented to the American court’s divorce decision which also dealt with parental custody. The divorce decision’s provision that the mother would have the actual physical custody for the minor children, otherwise both parties would have joint legal custody with the caveat that the mother had the sole right to determine the children’s permanent place of residence, is a decision that could also have been reached under German law. It corresponds approximately to German law which allows the parents joint custody and gives the mother the right to determine permanent residence. In this case, mother can, in accordance with German law, exercise actual custody. In view of the previous proceedings regarding parental custody in the United States, and in view of the pending custody proceeding in the Oregon Circuit Court which can be recognized under German law, the German court considers the custody decision impermissible.”

After receiving a copy of the German court’s decision, and after the dismissal order had been entered, the father filed a new motion to set aside the trial court’s order of dismissal. In it, he argued that the German courts failed to assert jurisdiction over the children, freeing the Oregon court to do so. On January 8, 2001, the trial court denied the motion to set aside the dismissal. In a written order, it explained that German’s court decision to defer to the court in Oregon was based on the father’s filed objection to their exercise of jurisdiction, its determination the proceeding here had been initiated prior to the proceeding there and its mistaken belief that the mother had petitioned this court for modification of judgment in the Oregon proceeding. That, the court concluded, could not create subject matter jurisdiction in Oregon where, by application of the governing statutes, such jurisdiction could not be obtained. The German court’s ruling was only that they could not proceed on the petition filed by the mother over the father’s objections, not the reverse. The court reiterated that Oregon never had jurisdiction to make an initial child custody determination. Additionally, the court concluded that even if Oregon had jurisdiction to make an initial child custody determination, it would have necessarily lost that jurisdiction pursuant to the statutes by the time of the hearing. The father appealed from the trial court’s dismissal of its motion and show cause order, and his denial of the reconsideration of that dismissal.

In addressing this very common problem of the existence of parallel foreign proceedings, the first analysis is the father’s contention that the trial court erred in concluding that it lacked subject matter jurisdiction to make an initial child custody determination. The court reiterates that if it did not have jurisdiction over the custody determination under the UCCJA, then the proceeding is flawed. The court notes that it is undisputed that the children and the mother, the physical custodian, had never resided in Oregon, and that only the father had any connection with the state when the initial child custody determination was made. Accordingly, it was readily apparent that under the prior version of the UCCJA, the trial court could not acquire subject matter jurisdiction under provisions of the Act that are based upon “home state”, significant connection and the availability of evidence or the physical presence of the children.

However, the court did have subject matter jurisdiction based on an application of the fourth subsection of the prior act. That subsection applied when no other state had jurisdiction over the custody determination under the UCCJA as it had been enacted and interpreted in Oregon in 1997. “State” had been interpreted under Oregon law in the case of *Hariba and Hariba*, 326 Ore. 627, 151 Ore. App. 489, 499-500, 950 P. 2d. 340 (1997), rev. den. 326 Ore. 627 (1998) to exclude a foreign nation and there was no evidence presented on the record that any other state, territory, possession of the United States had jurisdiction over the initial child custody determination.

The court also cited that subsection (d) includes language called a “best interest” component which was met in this circumstance for Oregon to assume jurisdiction. The court notes that because no German court had made a custody determination when the trial court made its initial determination, and indeed there were no pending proceedings anywhere else, that none of the provisions and policies of the UCCJA as it then existed relating to the enforcement of foreign custody judgments was in any way infringed by the trial court’s asserting of jurisdiction. Therefore, the assumption of jurisdiction and initial child custody determination in the original dissolution action was under the UCCJA, appropriate.

However, when addressing the exercise of jurisdiction for the purposes of modification, the court concludes that the trial court did not have jurisdiction to decide portions of the current motion or order to show cause as the law had changed by the time the motion was filed. The court notes that subsection (a) of the UCCJEA makes it clear that the Oregon court does not have jurisdiction over a custody determination where the child lacks significant connection with the state and the substantial evidence involving the children would be located elsewhere.

In its factual findings supporting its order of dismissal, the trial court found that the children had never resided in Oregon and all of the witnesses with information concerning their welfare would have been exclusively in Germany. Further, in denying the reconsideration application, the trial court stated that it did not have exclusive continuing jurisdiction as contemplated by the UCCJEA in that in combination, there was no significant connection to the state and substantial evidence concerning the welfare of the children was not available in Oregon. Those factual findings are not challenged by the father and a review of the record by the appellate court discloses that they are beyond reasonable dispute.

Notably, the dissent in this case disagreed, asserting that Oregon holds exclusive jurisdiction under the UCCJEA even though home state of the children under the provisions would have shifted. The majority described itself as “perplexed” by that determination, finding that Oregon’s jurisdiction simply could not be exclusive if Germany could exercise home state jurisdiction. The UCCJEA expressly prefers jurisdiction be exercised in the child’s home state and identifies the dissent’s belief that Oregon retains exclusive jurisdiction to be contravening that preference.

For the proposition, the dissent cites the official comments to the UCCJEA which make it clear that even in the circumstances in which home state is shifted, so long as one parent resides in the initial decree state, that state has continuing exclusive jurisdiction until it makes the determination that that jurisdiction has, in some way, lapsed or it declines to exercise jurisdiction. The majority notes in a footnote that this portion of the commentary in no way supports the maintenance of concurrent jurisdiction and is not inconsistent with the conclusion drawn by the majority since the findings of fact support that however articulated, the lack of substantial connection jurisdiction makes Germany the appropriate forum.

The dissent raises the issue of what constitutes substantial evidence concerning the care, protection, training and personal relationships of the children by pointing out four factors to support the assertion that Oregon has retained such connection. The first is the time the children spent in the state during the time of the exercise of parental access. The second is the father's continued residence in the state since 1997 and the presence of extended family members. The third is psychological evaluations of the children performed in 1998 in aid of the application to retain the children in Oregon. The last is the court-ordered custody evaluation also initiated in that time period. The majority opinion qualitatively viewed those as limited contacts rather than significant connections between the children and the state and points to Oregon case law that had previously, under the UCCJA, defined significant connection as maximum rather than minimum contact. The dissent asserts that potential testimony to be offered by family members located in Oregon constituted substantial evidence as contemplated by the applicable provisions of the UCCJEA. The court points out that the relative evidence existing in Oregon and Germany relegate Oregon's context to a minimal quantity and in total, finds that the trial court lacked continuing jurisdiction to modify the custody determination unless in December 1999, it would have had jurisdiction to make an initial custody determination.

The court then looks at the new UCCJEA and the four possible grounds for asserting jurisdiction under the new act. Clearly, subsection (a) is plainly inapplicable because Oregon was not the children's home state at any time. Subsections (b) and (c) would also be inapplicable because of the fundamental change in the definition of "state" under the UCCJEA. Unlike the UCCJA, the UCCJEA requires state courts in the United States to "treat a foreign country as if it was a state of the United States for the purposes of applying the provisions of the act." As a consequence, Germany is the children's home state and the trial court could not have asserted jurisdiction under any of the subsections (b) or (c) of the act unless the German court had declined jurisdiction on the ground that it was an inconvenient forum, or because the mother had engaged in some unjustifiable conduct which permitted this court to ignore the German proceedings.

The German court did defer to the Oregon court, but had articulated that reason because the Oregon court had made an initial custody determination under substantive legal principles that the German court believed were compatible with German law and because the mother had consented to the trial court's initial exercise of jurisdiction over her. However, because the German court did not decline to exercise jurisdictions on the

specific grounds set forth in the act, i.e. those factors related to convenient forum or because of unjustifiable conduct on the part of the mother, Oregon could not have had jurisdiction to make a child custody determination.

Finally, the trial court would also have lacked jurisdiction under subsection (d) of the UCCJEA because under the new act, there is no “best interest catchall” phrase, and there existed a viable “home state” jurisdiction, in this case, Germany. The court reiterated that the German court’s rationale for declining to exercise jurisdiction does not affect the conclusion. Despite the substantive compatibility of German and Oregon law, that cannot override the statutory limitations on the exercise of subject matter jurisdiction for modification in the United States. Further, the mother’s consent to the trial court’s jurisdiction over the initial determination in the decree would have no effect if the court lacked jurisdiction substantively, i.e. subject matter jurisdiction cannot be conferred by consent.

The dissent advanced that, in essence, the German court’s declination of jurisdiction was on assertion of inconvenient forum. However, in order to meet the inconvenient forum requirements, the record must reflect findings of fact and conclusions of law that support a precise inquiry which is set forth in the UCCJEA. This includes but is not limited to, the nature and location of evidence, and other factors which are consistent with a forum non conveniens analysis. The appellate court, therefore, found that in dismissing that portion of the father’s motion and order to show cause that sought to modify the custody determination and parenting plan and in declining to reconsider that dismissal, the court had acted properly.

However, the majority notes that this does not complete the analysis because the father’s notice of motion and order to show cause sought relief beyond a change of custody or modification of the parenting plan. The father also requested termination, modification or suspension of his child support obligations, as well as contempt sanctions for alleged violation of the parenting plan, i.e. enforcement remedies, including the recovery of expenses and attorney’s fees. The UCCJEA’s jurisdiction primacy applies to a child custody determination. Therefore, it specifically excludes a jurisdictional analysis related to seeking of an order regarding child support or other monetary obligations of the individual. Thus, the UCCJEA does not deprive Oregon of jurisdiction to address the child support issues. UIFSA, which is then cited by the Oregon court, makes it clear that a tribunal of a state issuing a support order consistent with the laws of the state, has continuing exclusive jurisdiction over the support order as long as the state remains the residence of the obligor. Therefore, the trial court erred in dismissing the father’s motions to terminate, modify or suspend his child support obligation.

The trial court’s jurisdiction to hold the mother in contempt for violations of the current parenting plan, or to impose sanctions for those violations, presents different issues. The UCCJEA does not expressly address the enforcement of a custody determination made, as here, by the court of a state that no longer has jurisdiction to modify that determination. However, the UCCJEA does contain extensive provisions concerning the enforcement of child custody determinations made by another state.

Indeed, one of the primary reasons for the redrafting of the UCCJEA is to enhance interstate and international enforcement.

The appellate court distinguishes those applications which are subject to the jurisdictional provisions of the UCCJEA to exclude applications for enforcement. The court notes that any other interpretation would have, necessarily, left the parties, after Germany's failure to exercise jurisdiction, with no enforceable custody determination, a result that is inconsistent with the purposes of the Act. Thus, unless and until a further custody determination is made by a court having jurisdiction to modify the determination, the Oregon court has the authority to enforce, by contempt proceedings, the only custody determination and parenting plan that is currently in existence and, if necessary, to impose sanctions for the contempt of those orders. Accordingly, the court finds that the trial court erred in dismissing for lack of subject matter jurisdiction, the portions of the father's application which sought enforcement and contempt for violations of the existing custody determination.

The majority cautions that the judgment imposing any such sanctions must be carefully drawn, however, not to include in its remedy any substantive modification, or change of custody as a sanction for contempt. In doing so the change would qualify as a custody determination and the subject matter jurisdictional concerns previously raised would again be implicated.

#### **PRACTICE NOTE:**

This case and the dissent are well worth the time to read as it provides a circumstance capable of repetition, i.e. agreements that have been reached under the old act and that were entered with subject matter jurisdiction consistent with the UCCJA and new applications for modification associated with the UCCJEA. I would note that applications addressing visitation can, despite the subject matter concerns raised in the enforcement context, provide as a remedy temporary modifications of the time period of parental access to give effect qualitatively to the existing order. Therefore, I believe that the majority is in error in indicating that in a contempt proceeding or an enforcement proceeding, the Oregon court would not have jurisdiction to modify for the purposes of enforcement, the days or dates of the exercise of parental access in circumstances in which it had been withheld. As a practical matter, because we are talking about international rather than interstate circumstances, even if Oregon were to do so, the enforcement of that order would still depend on German's recognition of such an order.

#### **TENNESSEE**

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 mental illness. 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 court in the alleged home state, Mississippi. Mississippi 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 had been “emergency” hearing. There was already an ex part application made and there is nothing in the record 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 in the event of a proceeding filed by the mother in Mississippi, or upon request of the mother to the Tennessee court to 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 principles of continuing exclusive jurisdiction, to determine the convenience of the forum, and under this fact scenario, would have to apply the specific 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 any issue. This is not consistent with the provisions of the UCCJEA.

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 any pending proceeding. From a strategic standpoint, it would certainly have made sense if the mother was serious about the convenience of the forum, file 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, Tennessee enacted the UCCJEA, but establishes that the act was not in affect in February of 1999 when the father filed his pleadings 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 that Tennessee was not in compliance. Further, the jurisdictional prerequisites of emergency jurisdiction must be specific in time and contact and the

alternate jurisdiction must be contacted immediately to effect a transfer of the matter as soon as practicable to the more appropriate venue.

It seem clear that the court in this case sua sponte may have initiated the judicial communication and not an application by either 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. 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 form:

**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. Beaver*, 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 14<sup>th</sup> 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, 13<sup>th</sup> 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, 10<sup>th</sup> 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, 8<sup>th</sup> 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, 5<sup>th</sup> 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.

**In the interest of Shannon Danielle Bellamy, a child**, Court of Appeals, 6<sup>th</sup> Dist. Texarkana, 2002, Tex. App. Lexis 411, decided January 23, 2002

This case arises in the context of a modification application. According to the decision, "Dan and Cindy Bellamy divorced in 1988 or 1989", and Dan was unaware of Cindy's pregnancy. Subsequent to the divorce, Dan learned of the pregnancy and has been a part of Danielle's life since her birth. In 1996 the Texas Attorney General filed suit in Cass County, Texas for paternity establishment. The 1996 paternity order determined Dan as the father and appointed both he and Cindy, as Texas terms it, joint managing conservators, but ordered that Cindy have primary possession of Danielle and

the sole right to establish her residence. In March of 2000, the Texas Attorney General's office filed a motion to modify support on the mother's behalf. In response to that petition, the father filed a counter-petition to modify, seeking the court to give him primary possession of the child with the sole right to establish her residence. The Attorney General's office non-suited the motion to modify support. The only issue left before the trial court is the counterpetition of the father. The Texas court modified the 1996 order by granting the father primary possession of Danielle with the sole right to determine her residence, but continued Cindy and Dan as joint managing conservators.

The court notes that "Cindy and Danielle are residents of Louisiana and it is uncontested that under Texas Family Code, their home state is Louisiana". At the hearing on the counterpetition, the mother contended that the trial court lacked subject matter jurisdiction to hear the case because Texas was no longer her home state. Because the question raised is a legal one regarding the exercise of subject matter jurisdiction, the court applied a de novo standard of review.

The mother contends Texas no longer retains jurisdiction because Danielle's home state is Louisiana and not Texas, relying on the 1996 version of the Texas Code. However, the appellate court notes that the 2002 version of the Texas Family Code Annotated controls in this case, and grants Texas exclusive continuing jurisdiction. The court notes that in 1999 the Texas legislature amended the Family Code and replaced the UCCJA with the UCCJEA. In 1999, with the adoption of the UCCJEA, so long as a parent remains in Texas, regardless of the child's new home state, and there is still a significant connection with Texas and substantial evidence is still available in Texas, Texas retains jurisdiction. The court notes that jurisdiction terminates if the relationship between the child and the parent remaining in the state exercising jurisdiction becomes so attenuated the court can no longer find significant connections and substantial evidence.

The court notes that portions of the Texas Family Code which had language indicating that upon the shift of home state, subject matter jurisdiction automatically terminated, was in conflict with the UCCJEA. The court found that the trial court properly exercised its jurisdiction in determining the domicile of Danielle. In fact the UCCJEA requires the original decree state to determine whether jurisdiction continues.

In her second point of error the mother contends that even if that statute is applied, Texas courts can no longer retain jurisdiction. She asserts that substantial evidence is no longer available in Texas concerning Danielle's care, protection, training and personal relationships. The court then indicates that because this is a question of subject matter jurisdiction, the appropriate standard of review is de novo, and they must review the evidence below and determine if the child or mother still have significant enough connection with the state, and if substantial evidence is available in Texas. The court notes that the mother contends that because most of the exhibits submitted into evidence by the father were from Louisiana, this demonstrates that substantive evidence is no longer available in Texas. The court retorts that just because evidence is introduced from other states does not mean substantial evidence in Texas is lacking.

The court, in a somewhat tongue-in-cheek recitation, states:

“Despite the introduction of criminal records from Louisiana pertaining to the mother, her current husband, a former husband and two personal friends, there is still substantial evidence relating to the child’s care, protection, training and personal relationships in Texas.” Although the child’s home state is Louisiana, she has attended school in Texas and lived only a few miles from her grandparents in Texas. Oral testimony was solicited from the mother and from the mother’s sister, and the maternal grandmother, which indicates that the child is picked up from school at her maternal grandparents’ home in Texas. The child has strong personal relationships with her maternal grandparents in Texas as well as with her father, stepmother and two stepbrothers, all of whom live in Texas. The father has remained a resident of Texas since the original decree was entered in 1996. He has paid his child support and has maintained his relationship with the child. The evidence demonstrates that the father has been actively involved in the child’s life, is close with her siblings and that she stays with him during the summer for six (6) weeks, holidays and numerous long weekends. The child visits the dentist and orthodontist while visiting the father in Texas, attends school in Texas, uses the address of the trailer home which the mother has on her parents’ property in Texas for her educational address. The home study, conducted by agreement between the parties, was done by a group in Texas, and the child’s mother took her to a psychologist located in Texas. This evidence shows that the child maintains significant connection with Texas and that there is substantial evidence in Texas regarding her care, protection, training and personal relationships.