

UNIFORM CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT

A Primer for the Practitioner

All fifty states had by 1981 enacted their individual versions of the Uniform Child Custody and Jurisdiction Act (UCCJA). The UCCJA was the first comprehensive attempt at setting forth “rules of engagement” to resolve jurisdictional disputes in child custody matters and discourage the wrongful removal and retention of children for the purpose of obtaining a juridical advantage.

Nevertheless, despite the enactment of uniform law, significant difficulties in actual practice continued. In the effort to minimize conflicts in the exercise of subject matter jurisdiction, particularly for the purposes of making an initial child custody determination, the Parental Kidnapping Prevention Act (PKPA) 28 USC 1738A had been enacted in 1980 providing a federal preemptive component to interstate child custody practice. The PKPA established a “home state” jurisdictional priority in the exercise of subject matter jurisdiction when making an initial child custody determination and reiterated that child custody determinations made in conformance with the Act were entitled to full faith and credit throughout the United States. Later, the Hague Convention on the Civil Aspects of International Child Abduction was ratified by the United States in 1986 incorporating into federal legislation as the International Child Abduction Remedies Act (ICARA) (12 USC 11601 et. seq.) in 1988, a civil mechanism for the return of children removed or retained abroad. A complex matrix was created into which family law practitioners were unwittingly thrust in the increasingly common fact pattern of interstate and international child custody disputes.

In 1996 the Violence Against Women Act (VAWA) added an additional dimension in directing sister states and Native American tribal entities to enforce the protective orders of other states, many of which contained provisions which would qualify as child custody determinations.¹

The preliminary comments which accompanied the draft of the revision of the Uniform Child Custody Jurisdiction Act sets forth a succinct review of the weaknesses of the prior Act. The inconsistencies between each State's versions of the UCCJA, often in conflict with the Parental Kidnapping Prevention Act, coupled with the cumulative effect of thirty years of adversarial litigation had produced a body of law which defied the ability of any practitioner to reasonably anticipate what could be expected to happen in the case of a jurisdictional contest. The National Conference of Commissioners on Uniform State Laws went so far as to say, "...the goals of the UCCJA were rendered unattainable in many cases." Additionally, the Uniform Interstate Family Support Act promulgated in 1992, which provided uniform rules for the enforcement of family support orders, provided the final motivation which inspired a drafting committee to address a revision of the UCCJA. The Act's text was finally completed by the Uniform Law Commissioners in 1997 and has now been adopted in 41 states² with additional

¹ In 2001 the National Conference of Commissions of Uniform State Laws promulgated the Uniform Interstate Enforcement of Domestic Violence Protections Order Act (UIEDVPOA). The UIEDVPOA is a full faith and credit statute that empowers states to register and enforce out-of-state domestic violence orders. The statute is enacted in Alabama, California, Delaware, District of Columbia, Idaho, Indiana, Mississippi, Montana, , Nebraska, North Dakota, South Dakota, Texas, West Virginia and has been introduced in Kansas, Oklahoma and U.S. Virgin Islands.

² Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois ,Iowa, Kansas, Kentucky, Maine, Michigan, Minnesota, Mississippi Montana ,Nebraska, Nevada, New Jersey, New Mexico, New York., North Carolina, North Dakota, Oklahoma, Oregon, Rhode Island, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, Wyoming.

states considering pending legislation.³ An updated review of the status of the Uniform Child Custody Jurisdiction and Enforcement Act and other Uniform Acts addressing family law can be found on the web site of the National Conference of Commissioners on Uniform State Laws, http://www.nccusl.org/nccusl/uniformact_factsheets/uniformacts-fs-uccjea.asp.

The focus of this primer will be to briefly identify the major differences between the UCCJEA and its predecessor UCCJA. It will address what new tools are available to practitioners in the prosecution and resolution of interstate and international child custody disputes while identifying potential pitfalls associated with interstate and international child custody litigation, particularly in the context of the military family.

Part I: What's new about the UCCJEA?

A. Types of Proceedings

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

Unlike the UCCJA, the UCCJEA does not, as a general proposition, apply to adoption cases. [§102(4) Definitions]⁴.

Alternatively tribal court proceedings, which had been left in an ambiguous position because of the absence of language referring to them in both the UCCJA and the PKPA have now been addressed by provisions which a state may enact if relevant. Those provisions indicate that state courts will be required to treat tribes as if they were states and tribal court custody proceedings as if they were sister state court proceedings and to enforce tribal court custody orders. §104(b) and (c) See In re Marriage of Susan C. and

³ 2004 introduction: , Indiana ,Louisiana, Massachusetts, South Carolina, U.S. Virgin Islands .

⁴ For the purposes of this article I will refer to the Uniform Act designations and citations understanding that each state's individual citations will be unique.

Ian E., 114 Wn. App. 766; 60 P3d 644; 2002 Wash. App. Lexis 3184, Court of Appeals of Washington, decided December 31, 2002.

An area of surprising increase in litigation is the area of dependency and neglect proceedings which are now specifically included in the UCCJEA. While child custody practitioners in matrimonial cases may have a tendency to gloss over dependency proceedings as unrelated to the typical divorce case, there is an increasing number of cases in which, because of allegations of domestic violence or of sexual assault, dependency and neglect proceedings may be initiated during a matrimonial proceeding. Also, in the context of unmarried parents, some states provide separate “dependency-like” summary proceedings often referred to as “non-dissolution” proceedings.

When dependency and neglect are included, and third-party custodians are contemplated, the interrelationship between the UCCJEA and the Interstate Compact on the Placement of Children (ICPC) may be relevant. The ICPC addresses the rules regarding the out-of-state placement by a state agency of a child, either by agreement or at the direction of the court.⁵ This creates potential conflict of applicable law regarding the substantive and jurisdictional prerequisites of each Act, which may be very different. See S.B. v. State of Alaska, Department of Health and Social Services, Division of Family and Youth Services, 61 P.3d 6; 2002 Alas. Lexis 171, Supreme Court of Alaska, decided December 27, 2002.

B. International Application

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

⁵ Often when state welfare benefits are sought, the state agency must open a file – thus the ICPC may be implicated if, in addition to transferring custody, benefits are also transferred.

international jurisdictions for the purposes of the application of the act. The UCCJEA addresses the international context both in the exercise of jurisdiction for the purposes of an initial child custody determination, and the recognition and enforcement of custody determinations made by foreign courts. §105(b)(c). *Medill v. Medill*, 179 Ore. App. 630; 40 P.3d 1087; 2002 Ore. App. LEXIS 301.

C. Jurisdictional Prerequisites Tightened

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

1. Home State Priority In Initial Child Custody Determinations

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

Under the UCCJEA, a state can exercise “significant connection jurisdiction” in an initial determination only if the “home state” either declines jurisdiction in its favor or makes the determination of inconvenient forum or parental misconduct.

The UCCJEA makes it clear, and the case law supports, that it is not possible to confer subject matter jurisdiction by agreement. This is particularly problematic in cases involving military families. *See; Holder v. Holder*, 257274, 2002 WL 443397 (*Cal.App. March 20, 2002*); 305 F.3d 854 (9th Cir. Washington 2002).

2. Emergency jurisdiction removed as a basis in initial determination cases.

Under the new Act, in an effort to enhance the application of the jurisdictional factors with some conformity, the independent basis of “emergency jurisdiction” is removed as a possible jurisdictional option in initial child custody determinations. This speaks to the substantive distinction which the drafters wished to impress in the minds of practitioners and judges, that addressing emergencies that impact on child custody is significantly different from engaging in a substantive analysis of who is the better permanent custodian and where the evidence and witnesses to make that determination are likely to be located. Therefore, a new separate section of the Act, covering all types of emergencies and resolving them has been added to the UCCJEA. (§204).

3. Declining jurisdiction.

The UCCJEA provides for the declination of one state in favor of another on inconvenient forum or misconduct grounds, and identifies a third basis of “more appropriate forum”. Additionally, the UCCJEA makes it clear that if no other state would have jurisdiction under the preceding sections, a court may fill this vacuum and issue an initial child custody order. However, interestingly enough, the previous UCCJA language referring to the child’s “best interest” has been deleted. It is clear that in determining jurisdiction the court should not be determining the merits of the case. See *Don Van Wetchel, Appellee, And Concerning Leslie Mueller, Appellant* 2003 Iowa App. Lexis 54 *Court of Appeals of Iowa, No. 2-784 decided January 15, 2003*; and *In re Lewin, No. 03-04-11229-CV, 2004 WL 1193951 (Tex.App.2004)*

4. Modification and Continuing Exclusive Jurisdiction.

Regarding modification jurisdiction, the most significant contribution of the UCCJEA is the strengthening of the concept of “continuing exclusive jurisdiction”. The UCCJEA rejects the earlier interpretation of some State Courts which endorsed the possibility of concurrent modification jurisdiction (i.e. that more than one state can exercise modification jurisdiction over one child at a time). Succinctly put, exclusive jurisdiction continues in a court that has made a qualifying child custody determination until neither the child, nor either of the parties, remains in the state. Or, neither the child, parent and child, nor the child and a person acting as a parent, maintain “significant connection” with the state and, as a result, substantial evidence regarding the child is no longer available in the initiating state. While this was a result the PKPA tried to accomplish, the UCCJEA’s language is, in a subtle way, different than that PKPA. The mere presence of one of the contestants does not require the continuing exercise of exclusive jurisdiction if that presence does not also carry with it some involvement or contact with the subject child. Nevertheless, only the state that entered the original child custody determination can decide if it should continue to exercise exclusive jurisdiction. A sister state cannot decide, for example, based on the child’s permanent relocation or allegations that the relationship between the resident parent and the child have broken down, that the decree state is now deprived of continuing exclusive jurisdiction. The furthest the new state can go is to make a factual determination that all parties have left the original decree state, and request the sister state to decline in favor of its exercise jurisdiction. *Escobar v. Reisinger*, No. 22,869, 2003 NMCA 47; 2003 N.M. App. Lexis 6; Court of Appeals of New Mexico, decided January 3, 2003.

D. Judicial communication.

Another of the substantive changes in the UCCJEA that directly affects practitioners and judges are the provisions for judicial communication and cooperation, many of which are mandatory. The general overview of the Act specifies that a court should communicate with the court of another involved state about any proceeding arising under the Act. That authority to communicate includes communications with foreign courts and tribal courts. However, it is important to note that some proceedings: §204 (Temporary Emergency Jurisdiction), §206 (Simultaneous Proceedings) and §307 (Expedited Enforcement) require communication. However, the means or the process for arranging it are unspecified. Although subsection 110(b) provides that courts should allow parties to participate in judicial communication, it does not mandate their participation. The act makes it clear that if the parties are not provided the opportunity at some point to participate in the communication, they must have an opportunity to present facts and legal arguments before a judicial determination on jurisdiction or forum is made. Under the precise terms of the Act oral argument is not required, although, substantive state law may provide independent authority for the right to oral argument in such a circumstance. The court is required to make a record although the type of record is unspecified of the judicial communications and to inform the parties of those communications.

E. Enforcement.

The UCCJEA, as an enforcement tool, mandates the recognition and enforcement of child custody determinations wherever they are made, when they are made in “substantial conformity” with the Act or made under factual circumstances which meet the jurisdictional standards of the UCCJEA. The primary way in which the UCCJEA changes the law of enforcement is in the provision of practical procedures available to enforce custody and visitation on an interstate and international basis. The UCCJEA creates a uniform registration process, provides for the interstate enforcement of visitation rights, provides for expedited enforcement of custody determinations (*turbo habeas*), provides for a warrant to take physical custody of a child and, if necessary, the public enforcement by law enforcement and prosecutorial staff, particularly in circumstances of recovery of an abducted child or international child custody disputes.

Part II: What are the New Tools?

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

A. Continuing Exclusive Jurisdiction:

UCCJEA §201(b) makes it clear that §201(a), (that is, the four-pronged outline of jurisdictional prerequisites), is the exclusive jurisdictional basis for making an initial

child custody determination.⁶ Personal jurisdiction over a party or a child is neither necessary nor sufficient to make a child custody determination. You must have subject matter jurisdiction, and that is determined exclusively by complying with the Act. Under the new Act, a child need not be physically present in the state for the state to exercise subject matter jurisdiction, nor does a child's absence from the state defeat extended jurisdiction if a parent, or a person acting as a parent, continues to live in the state. *State of Utah in the interstate of W.A., a child under eighteen years of age, D.A., v. State of Utah*, 2002 UT 127; 63 P.3d 607 463 Utah adv. Rep. 13; 2002 Utah Lexis 214 decided December 20, 2002.

Continuing exclusive jurisdiction carries with it the greatest promise toward continuity and enforcement of child custody decrees. In the context of modification nothing can be more important, particularly given the forced relocation of military families. The "home state" of children may shift away from non-custodial parents. This is particularly frustrating when the designation of custody was a result of a negotiated agreement conferring primary residential custody merely to facilitate school enrollment or other practical considerations. The non-custodial parent may have negotiated for equal parental access time and believe that his or her involvement in the life of their child

⁶ 201(a) Except as otherwise provided in Section 204, a court of this State has jurisdiction to make an initial child-custody determination only if: (1) this State is the home State of the child on the date of the commencement of the proceeding, or was the home State of the child within six months before the commencement of the proceeding and the child is absent from this State but a parent or person acting as a parent continues to live in this State; (2) a court of another State does not have jurisdiction under paragraph (1), or a court of the home State of the child has declined to exercise jurisdiction on the ground that this State is the more appropriate forum under Section 207 or 208, and: (A) the child and the child's parents, or the child and at least one parent or a person acting as a parent have a significant connection with this State other than mere physical presence; and (B) substantial evidence is available in this State concerning the child's care, protection, training, and personal relationships; (3) all courts having jurisdiction under paragraph (1) or (2) have declined to exercise jurisdiction on the ground that a court of this State is the more appropriate forum to determine the custody of the child under Section 207 or 208; or (4) no State would have jurisdiction under paragraph (1), (2), or (3).

would be intense and daily. Then the “custodial parent” is transferred or deployed or remarried. Very often, these cases result in protracted and difficult litigation filed by the physical custodian requesting permission to remove in which a tortured decision may be reached.⁷ The court may only permit the move conditioned on precise arrangements for enforceable parental access along with the allocation of access expenses and the provision of telephone or computer contacts for the non-custodial parent.

Without the concept and provision for continuing exclusive jurisdiction as set forth by the Act, there is no way to insure that the physical move of the children does not mean that enforcement of such provisions reached by either judicial determination or agreement are illusory. By making it clear that only the decree state may determine whether it continues its superior and significant connection to this family or has lost continuing exclusive jurisdiction, it insures that at the least, the court that made the decision to let the custodial parent move (provided the non-custodial parent remains in the jurisdiction) is the one that will make a determination as to whether or not the custodial parent should be permitted to modify those conditions before a new tribunal.

This is one of the primary reasons why, in a military divorce, where the movement of one or both parents is likely, that the agreement be drafted in a way that denominates the process which will be employed to address the necessary changes to shared parenting agreements.

For the attorney who is representing the parent who has moved, and who is arguing that the circumstances have changed as to require a review of those access or custody components in the new state, the way the question is framed will have a

⁷ Indeed, some states require the permission of the non-custodial parent or an order of the court prior to the permanent removal of the child from the state. Violation of same would result in criminal penalties.

significant impact on the choice of forum. The act would require the original decree court to make the decision to decline jurisdiction in favor of the children's new "home state" based on the inconvenience of the forum.

As a family litigator, the "trick" in moving the action to the new state will be the relationship between the evidence and the forum.

If, for example, the custodial parent who has moved alleges that it is the behavior of the parent still in the decree state and the conditions or circumstances of home life of the children while visiting that parent which require modification, it is clear that the substantial evidence and witnesses would necessarily be where that non-custodial parent resides. Thus, the argument will defeat the application to remove the forum.

In the alternative if the modification is being sought based upon changes in the needs of the children, their psychological or emotional health or other dynamics located in the new home state which make the prior parental access schedule either unworkable or untenable, then arguably, the evidence with respect to the children, the custodial parent, their peer groups or other personal issues involving their emotional support are more likely to be located in the new home state. Thus, the forum change makes sense.

As you are drafting and framing the modification issues, those considerations should be foremost in your mind.

B. Emergencies/Temporary Orders:

Tools that are the most helpful are those which deal with the concept of "emergency". Under the UCCJEA the term "emergency" has been defined to limit rather than expand the exercise of jurisdiction. When a child is abandoned; when a child is in need of protection because that child is threatened with mistreatment or abuse, such can

be considered an “emergency”. New to the UCCJEA is the acknowledgment that if such emergency affects a sibling, the emergency can be considered applicable to the subject child as well. This is particularly helpful in circumstances in which siblings may have different parents or permanently reside with different parents. Neglect is no longer included in the definition of “emergency” under UCCJEA.

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

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

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

It is important when drafting pleadings that contain prayers for relief that go beyond child custody and perhaps to issue of emergent child support, relief from domestic violence or complaints for divorce, that one keeps in mind that the notice requirements and the service requirements of each separate action will be very different.

An international matter may require strict compliance with international treaties if a money judgment or maintenance obligation will be sought. Your entire process will be meaningless to obtain remedy if such treaties are ignored. If your primary concern is to obtain custody, stick to it. A separate application in order to protect the custodial interest is by far the cleanest way to address multiple service and notice requirements.

In the event that a temporary emergency order is the first proceeding which has been filed by a litigant, and no other proceeding has been commenced in any other court asking for a child custody determination, the UCCJEA provides that the temporary emergency order can be converted into a final "determination" if the state that entered it becomes the child's home state and remains so for six (6) months. This would include, by way of example, domestic violence restraining orders which include child custody components.

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

C. Declining Jurisdiction:

There are two reasons why a court can decline jurisdiction. The first is because it determines that the forum is no longer convenient; the other is based upon the unjustifiable conduct of the party seeking the exercise of jurisdiction.

1. Inconvenient Forum.

The new provisions of the UCCJEA provide that the court may sua sponte address the issue of inconvenient forum. Inconvenient forum can be addressed upon motion of

either party or can be addressed on the formal request of a sister state court. The UCCJEA also permits the parties to submit information in support of an inconvenient forum motion and once done, requires the court to consider all of the relevant statutory factors as well as additional relevant factors, including the newly added consideration of domestic violence. See case materials *Stoneman v. Drollinger*, 2003 MT 25; *Mont. 139 Lexis 28*, decided February 18, 2003, *Supreme Court of Montana*.

Section 207(b) provides that the court is to determine, in reviewing an inconvenient forum application, whether domestic violence has already occurred or would be likely to occur in the future and, in that event, which state could “best protect” the parties and the child.

With this provision, it is clear that in the case of a domestic violence complaint, if those allegations are contested, it is critical to address the issues immediately. To contest the treatment of the domestic violence petition as an initial child custody determination, you must seek a dismissal of the custodial components of any domestic violence temporary restraining order unless the issue of forum is to be conceded.

If a court declines to exercise jurisdiction on inconvenient forum grounds the UCCJEA makes it clear that it must retain jurisdiction to transfer the case. The order is not a dismissal or declaration that the State lacks subject matter jurisdiction. It is a stay of its exercise of jurisdiction which is conditioned on a proceeding being commenced promptly in the other, more convenient state (or alternate appropriate forum, for example, in another foreign jurisdiction). Therefore, if you are addressing an international matter, it is important, to set forth precisely what will be jurisdictionally required in bringing the foreign action, including what actions each party must take, and accurately identifying

the time frame in which the application will be brought, as well as how long the prosecution of the child custody determination will take. If for example you were defending a forum application and you wanted to maintain a child custody action in what is arguably an “inconvenient forum”, you might want to demonstrate that the process to accomplish a child custody determination in the alternate forum, would involve serious deficiencies in time, cost or process.

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

2. Unjustifiable Conduct.

The UCCJEA takes away the prior UCCJA language of ‘unclean hands’ in favor of describing the court’s discretion, “because a person seeking to invoke [jurisdiction] has engaged in unjustifiable conduct”. (§208). The court does not define “unjustifiable conduct” and further sets forth three exceptions from consideration of such conduct. (1) Where there has been acquiescence; (2) where there has been deference to the court on inconvenient forum grounds or (3) where no other court would have jurisdiction. In those three circumstances, even after finding the jurisdictions proponent to have engaged in “unjustifiable” parental conduct, the court should maintain the exercise of jurisdiction. However, in the event that unjustifiable conduct can be demonstrated, the court is “required” to assess necessary and reasonable expenses against the party who sought to evoke the jurisdiction. See *Seamans v. Seamans*, 73 Ark. App. 27; 37 S.W. 3d 693; Court of Appeals, Arkansas 2001.

If the court is determined to decline jurisdiction by reason of unjustifiable conduct, and award necessary expenses and counsel fees, it is important that it either retain jurisdiction for the purposes of transferring the case and enforcing those expenses or, in the alternative, that the court conditions the transfer of jurisdiction on the payment of such expenses or the acceptance, recognition and enforcement of the attorneys' fees and reasonable expenses portion of the order by the court to which the matter is sent.

D. Interjurisdictional Discovery Tools:

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

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

The court can permit an individual to be deposed, or to testify by telephone, audio/visual means or electronic means before either an alternative court that it designates or at another location. This is strengthened by §112 which authorizes courts to seek assistance from, or give assistance to, a court of another state. Therefore, in a circumstance, for example, where a Notice for Deposition, or subpoena were issued to an out-of-state witness and subsequently ignored, judicial assistance could be sought by way

of application or sua sponte by the court. The trial court would request the court in the deponent's jurisdiction to issue an administrative subpoena under its signator, in order to produce the individual in their court, either to conduct an evidentiary proceeding in that jurisdiction or, in the alternative, to produce the party for the purposes of telephonic testimony to be offered to the court. This provision covers the production of evidence, custody evaluations or the collection of records by subpoena duces tecum.

E. Registration and Enforcement of Orders:

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

1. Registration of Child Custody Determination – Sister State.

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

Even if a hearing is requested, there are only three defenses available: (1) the lack of jurisdiction on the part of the issuing court; (2) the lack of notice and opportunity to be heard in the child custody proceeding that resulted in the order or (3) the child custody determination for which recognition is sought has been vacated, stayed or subsequently modified.

Once the registration proceeding is confirmed, either by operation of law or by hearing, further contest is precluded. If there is an enforcement hearing subsequent to it, the only defense available is that the registered order has since been vacated, stayed or modified since the registration process. §205(f), §308(d) See *Harris v. Harris*, 2003 Tex. App. Lexis 1913, Court of Appeals of Texas, Third District Austin denied March 6, 2003.

2. Registration of International Child Custody Determination.

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

3. Access Rights.

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

4. “Turbo Habeas”.

“*Turbo habeas*”, a colloquial term coined by the Honorable David Peeples, refers to a speedy enforcement mechanism for the prompt recovery of children wrongfully removed or retained outside of the decree state. The new procedure provides for an enforcement hearing, normally the next judicial day after service, which will result in an order authorizing the petitioner to take the immediate physical custody of the child, unless the respondent establishes one of a very few defenses available in the statute.

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

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

Part III: Dangers and Pitfalls:

The greatest potential pitfalls for practitioners exists in assumption and inadvertence.

A. Domestic Violence.

First, the technical issues presented by domestic violence practice have a number of jurisdictional pitfalls associated with them. There is already case law that addresses acquiescence when an out-of-state litigant responds to a domestic violence application in an interstate context under the UCCJA. The new statute addresses in a number of provisions the problems of domestic violence and the relationship between domestic violence and choice of forum. Additionally, it is important to remember that the UCCJEA applies when courts adjudicate custody and visitation issues that arise exclusively in the context of custody determinations in a domestic violence proceeding. [UCCJEA §102(4)] As a consequence, there are a number of considerations.

(1) The mandatory judicial communication provisions of the UCCJEA always apply to components of a domestic violence restraining orders, which qualify as a child custody determination. When there has been a prior child custody determination or the parties reside in separate states and home state may not have shifted these orders always are, by definition, “emergency orders”.

(2) If notice is not given in accordance with the UCCJEA, custody and visitation portions of a domestic violence protection order would not be entitled to interstate enforcement under the UCCJEA.

(3) The custody components of a temporary restraining order which go unchallenged for six months becomes a final order for enforcement purposes under the UCCJEA.

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

B. International Litigation.

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

expert testimony, and providing an informative affidavit at the time at which you file your initial pleading.

C. Forum Non Conveniens.

Finally, understanding the concept of forum non-conveniens has never been more important. Forum and applicable law will now become much more meaningful in the context of an application to decline to exercise jurisdiction and the exercise of continuing exclusive jurisdiction. Dissolution and parenting agreements which intend to confer continuing jurisdiction to be maintained in the “left-behind state” should set forth not only the standard terms indicating the choice of law of, for example “the law of the State of Oregon should apply”, but should set forth the current and anticipated significant contacts which will be maintained in that state and the reasoning behind the maintenance of the left behind state as the determining state for all potential modification proceedings. Further, the parties should identify what factual circumstances will not be considered changes significant enough to disturb the agreement, for example, the remarriage of the custodial parent or the deployment of a parent and temporary places of the minor child.

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

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

reasonably predict the process their client should take in addressing jurisdictional difficulties.