

# **CHILD CUSTODY JURISDICTION IN NEVADA**

by

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**TABLE OF CONTENTS**

**I. BRIEF HISTORY LEADING UP TO THE CURRENT LAW. . . . . 1**

**A. Pre-UCCJA. . . . . 1**

**B. UCCJA. . . . . 2**

**C. PKPA. . . . . 3**

**D. UCCJEA. . . . . 4**

**E. New Uniform Child Abduction Prevention Act (UCAPA). . . . . 7**

**II. CONCEPTS IN THE UCCJEA. . . . . 11**

**A. Distinction Between Initial Jurisdiction and Exclusive Modification  
    Jurisdiction. . . . . 11**

**B. Right of Counsel to Participate in Communication Between Courts  
    Where There Are Simultaneous Proceedings. . . . . 14**

**C. What to Argue If Seeking to Prevent a Court with Jurisdiction from  
    Exercising it. . . . . 14**

**III. CONCLUSION. . . . . 16**

## **I. BRIEF HISTORY LEADING UP TO THE CURRENT LAW**

### **A. Pre-UCCJA**

By way of statutory provisions that trace back to 1861, a Nevada court with personal jurisdiction over both parties to the action acquires jurisdiction to determine the custodial arrangement for their children, whether or not the children are within the physical boundaries of the state. The statutes generally give the court broad powers over custody. NRS 125.510(1) provides that:

In determining custody of a minor child in an action brought under this chapter, the court may, except as otherwise provided in this section and chapter 130 of NRS:

(a) During the pendency of the action, at the final hearing or at any time thereafter during the minority of any of the children of the marriage, make such an order for the custody, care, education, maintenance and support of the minor children as appears in their best interest  
.....

On their face, the statutes mandate a custody and support determination in every case involving children. NRS 125.450(1), which dates to 1983, provides that:

No court may grant a divorce, separate maintenance or annulment pursuant to this chapter, if there are one or more minor children residing in this state who are the issue of the relationship, without first providing for the medical and other care, support, education and maintenance of those children as required by chapter 125B of NRS.

The statutes granting jurisdiction to make certain interim orders appear to have originally contemplated the situation in which one of the parties removes a child from the jurisdiction prior to filing, although NRS 125.470(1) was modified to explicitly permit the court to enter the same type of orders either before or after a “final order” is granted:

If, during any proceeding brought under this chapter, either before or after the entry of a final order concerning the custody of a minor child, it appears to the court that any child of either party has been, or is likely to be, taken or removed out of this state or concealed within this state, the court shall forthwith order such child to be produced before it and make such disposition of the child’s custody as appears most advantageous to and in the best interest of the child and most likely to secure to him the benefit of the final order or the modification or termination of the final order to be made in his behalf.

The court has continuing jurisdiction to modify child custody awards after entry of a decree, irrespective of any express statement of continuing jurisdiction, under the above statute and NRS 125.510 (permitting a determination of custody during the pendency of an action, at the final hearing, or any time thereafter during the child’s minority, and permitting modification or the vacating of any such order, “even if the divorce was obtained by default with an appearance in the action by one of the parties,” but providing that the person seeking such an order “shall submit to the jurisdiction of the court.”)

The problem was that every State had its own system of granting and enforcing child custody cases, and there was no reliable mechanism for resolving conflicts when two parties would file in two different States, obtaining inconsistent custodial orders. Ultimately, the federal courts declared themselves unable to resolve conflicting State custody orders,<sup>1</sup> leading to stalemate and a great deal of self-help (child snatching).

## B. UCCJA

The UCCJA was a project of the National Conference of Commissioners on Uniform State Laws (NCCUSL)<sup>2</sup> Nevada adopted the UCCJA and incorporated it into NRS 125A.050 in 1979; its jurisdictional criteria applied to all custody-related proceedings, including adoption, guardianship, parental termination, visitation disputes, and child neglect and dependency proceedings.

As originally enacted, the UCCJA set forth four predicate grounds for finding original “establishment” jurisdiction in Nevada:

- (1) Home state jurisdiction. The UCCJA’s primary basis for jurisdiction was the child’s home state, i.e. the state where the child had lived for six months prior to the commencement of the custody proceeding.
- (2) Significant connection. A court could assume jurisdiction when the child and at least one party had a “significant connection” with the forum state and there was substantial evidence in the state concerning the child’s present or future care.
- (3) Emergency Jurisdiction. When a child had been abandoned or an emergency existed requiring the exercise of jurisdiction to protect the child from actual or threatened harm, the court could assume temporary jurisdiction if the child was actually present in the state.

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<sup>1</sup> The federal courts long ago judicially carved out a “domestic relations” exception to diversity jurisdiction, which originated from early Supreme Court law. *Vaughan v. Smithson*, 883 F.2d 63, 64 (10th Cir. 1989); *see also Ex Parte Burrus*, 136 U.S. 586, 593-94 (1890) (“The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States”); *Barber v. Barber*, 62 U.S. (21 How.) 582, 584 (1858) (“We disclaim altogether any jurisdiction in the courts of the United States upon the subject of divorce, or for the allowance of alimony”). More recently, the Supreme Court reaffirmed the propriety of the domestic relations exception as a matter of statutory construction, and holding that Congress “‘adopt[ed] that interpretation’ when it reenacted the diversity statute [in 1948].” *Ankenbrandt v. Richards*, 504 U.S. 689, 701 (1992) (*quoting Lorillard v. Pons*, 434 U.S. 575, 580 (1978)). Eventual passage of the PKPA did not alter this result. *Thompson v. Thompson*, 484 U.S. 174, 187 (1988) (PKPA did not furnish a “cause of action in federal court to determine which of two conflicting state custody decrees is valid”).

<sup>2</sup> Now 116 years old, NCCUSL provides states with non-partisan draft legislation intended to bring “clarity and stability” – and most especially, consistency, to various areas of the law. Explicitly supportive of the federal system, members of NCCUSL must be lawyers, and include lawyer-legislators, attorneys in private practice, state and federal judges, law professors, and legislative staff attorneys, who have been appointed by state governments as well as districts and territories to research, draft and promote enactment of uniform state laws in areas where uniformity is desirable and practical.

(4) No other state with jurisdiction. This provision was intended to act as a “catch-all” in the event no other state could exercise jurisdiction under the first three predicates. Because typically at least one state had and would assert either home state or significant connection jurisdiction, this section had limited application.

The rules required parties to provide information at the outset of a custody proceeding to assist the court in resolving jurisdictional issues. Specifically, each party in his or her first pleading, or in an affidavit attached to that pleading, was required to provide the court with (1) the child’s present address; (2) the place where the child had lived for the last five years; and (3) the names and addresses of persons with whom the child lived during that period.

Hoping to eliminate parties crossing State lines during proceedings, hoping to get a better result elsewhere, the UCCJA required each party to declare under oath whether: (1) he or she had been a party, witness, or litigant in any capacity, concerning custody of the same child in this state or any other state; (2) he or she had information of any custody proceeding concerning the child pending in Nevada or elsewhere; (3) he or she knew of any other person, not a party to the proceeding before the court, who had physical custody of the child or claimed to have custody or visitation rights with respect to the child.

The UCCJA also attempted to address the continuing jurisdiction of the court, providing that if a court of another state had made a custody decree, a court of this state could *not* modify that decree unless (1) it appeared that the court which rendered the decree no longer had jurisdiction or had declined to assume jurisdiction to modify the decree; and (2) the court of this state had jurisdiction. Our courts were required to recognize and enforce custody orders issued by other states as long as the jurisdiction requirements of the UCCJA had been satisfied.

The UCCJA was adopted as law in all 50 States, the District of Columbia, and the Virgin Islands. A number of adoptions, however, significantly departed from the original text. In addition, almost thirty years of litigation since the promulgation of the UCCJA produced substantial inconsistency in interpretation by state courts. As a result, the goals of the UCCJA were rendered unobtainable in many cases.

### **C. PKPA**

The dissatisfaction on many fronts with the limited success of the UCCJA led Congress to enact the Parental Kidnaping Prevention Act of 1980, 28 U.S.C. § 1738A (PKPA), to address the continuing interstate custody jurisdictional problems.

The PKPA mandated that State authorities give full faith and credit to other States’ custody determinations, so long as those determinations were made in conformity with the provisions of the PKPA. The PKPA provisions regarding bases for jurisdiction, restrictions on modifications, preclusion of simultaneous proceedings, and notice requirements were similar to those in the UCCJA. There were, however, some significant differences.

For example, the PKPA authorizes continuing exclusive jurisdiction in the original decree State so long as one parent or the child remains there and that State has continuing jurisdiction under its own law.<sup>3</sup> This is typically referred to as “exclusive modification jurisdiction,” but was not directly addressed in the UCCJA.

To further complicate the process, the PKPA partially incorporated state UCCJA law in its language. It became increasingly difficult and technical to determine which law applied, and how the two statutes should be construed.<sup>4</sup> Whenever a conflict arose between the statutes, the PKPA, as federal legislation, was supposed to take precedence as a matter of federal pre-emption.

#### D. UCCJEA

As documented in an extensive study by the American Bar Association’s Center on Children and the Law,<sup>5</sup> inconsistency of interpretation of the UCCJA and the technicalities of applying the PKPA, resulted in a loss of uniformity among the States. The Obstacles Study suggested a number of amendments which would eliminate the inconsistent state interpretations and harmonize the UCCJA with the PKPA.

NCCUSL went back to work and in 1997 issued revisions of the jurisdictional aspects of the UCCJA in a new act, the Uniform Child Custody Jurisdiction *and Enforcement* Act, or UCCJEA. The replacement act was intended to provide clearer standards for which States can exercise original jurisdiction over a child custody determination, enunciate a standard of continuing jurisdiction for the first time, and to clarify modification jurisdiction. It also sought to harmonize the law on simultaneous proceedings, clean hands, and forum non conveniens.

Nevada adopted the new act as of October 1, 2003. The revised enactment was intended to eliminate the inconsistent state interpretations in several ways, as explained in the preamble to the modified uniform act:

**1. Home state priority.** The PKPA prioritizes “home state” jurisdiction by requiring that full faith and credit cannot be given to a child custody determination by a State that exercises initial jurisdiction as a “significant connection state” when there is a “home State.” Initial custody determinations based on “significant connections” are not entitled to PKPA enforcement unless there is no home State. The UCCJA, however, specifically authorizes four independent bases of jurisdiction without prioritization. Under

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<sup>3</sup> See 28 U.S.C. § 1738A(d).

<sup>4</sup> As noted in the Reporter’s notes to the UCCJEA, commentators found that the relationship between the statutes became “technical enough to delight a medieval property lawyer.” Homer H. Clark, *Domestic Relations* § 12.5 at 494 (2d ed. 1988).

<sup>5</sup> *Obstacles to the Recovery and Return of Parentally Abducted Children* (1993) (“Obstacles Study”).

the UCCJA, a significant connection custody determination may have to be enforced even if it would be denied enforcement under the PKPA. The UCCJEA prioritizes home state jurisdiction in Section 201.

**2. Clarification of emergency jurisdiction.** There are several problems with the current emergency jurisdiction provision of the UCCJA § 3(a)(3). First, the language of the UCCJA does not specify that emergency jurisdiction may be exercised only to protect the child on a temporary basis until the court with appropriate jurisdiction issues a permanent order. Some courts have interpreted the UCCJA language to so provide. Other courts, however, have held that there is no time limit on a custody determination based on emergency jurisdiction. Simultaneous proceedings and conflicting custody orders have resulted from these different interpretations.

Second, the emergency jurisdiction provisions predated the widespread enactment of state domestic violence statutes. Those statutes are often invoked to keep one parent away from the other parent and the children when there is a threat of violence. Whether these situations are sufficient to invoke the emergency jurisdiction provision of the UCCJA has been the subject of some confusion since the emergency jurisdiction provision does not specifically refer to violence directed against the parent of the child or against a sibling of the child.

The UCCJEA contains a separate section on emergency jurisdiction at Section 204 which addresses these issues.

**3. Exclusive continuing jurisdiction for the State that entered the decree.** The failure of the UCCJA to clearly enunciate that the decree-granting State retains exclusive continuing jurisdiction to modify a decree has resulted in two major problems. First, different interpretations of the UCCJA on continuing jurisdiction have produced conflicting custody decrees. States also have different interpretations as to how long continuing jurisdiction lasts. Some courts have held that modification jurisdiction continues until the last contestant leaves the State, regardless of how many years the child has lived outside the State or how tenuous the child's connections to the State have become. Other courts have held that continuing modification jurisdiction ends as soon as the child has established a new home State, regardless of how significant the child's connections to the decree State remain. Still other States distinguish between custody orders and visitation orders. This divergence of views leads to simultaneous proceedings and conflicting custody orders.

The second problem arises when it is necessary to determine whether the State with continuing jurisdiction has relinquished it. There should be a clear basis to determine when that court has relinquished jurisdiction. The UCCJA provided no guidance on this issue. The ambiguity regarding whether a court has declined jurisdiction can result in one court improperly exercising jurisdiction because it erroneously believes that the other court has declined jurisdiction. This caused simultaneous proceedings and conflicting custody orders. In addition, some courts have declined jurisdiction after only informal contact between courts with no opportunity for the parties to be heard. This raised significant due process concerns. The UCCJEA addresses these issues in Sections 110, 202, and 206.



**4. Specification of what custody proceedings are covered.** The definition of custody proceeding in the UCCJA is ambiguous. States have rendered conflicting decisions regarding certain types of proceedings. There is no general agreement on whether the UCCJA applies to neglect, abuse, dependency, wardship, guardianship, termination of parental rights, and protection from domestic violence proceedings. The UCCJEA includes a sweeping definition that, with the exception of adoption, includes virtually all cases that can involve custody of or visitation with a child as a “custody determination.”

**5. Role of “Best Interests.”** The jurisdictional scheme of the UCCJA was designed to promote the best interests of the children whose custody was at issue by discouraging parental abduction and providing that, in general, the State with the closest connections to, and the most evidence regarding, a child should decide that child’s custody. The “best interest” language in the jurisdictional sections of the UCCJA was not intended to be an invitation to address the merits of the custody dispute in the jurisdictional determination or to otherwise provide that “best interests” considerations should override jurisdictional determinations or provide an additional jurisdictional basis.

The UCCJEA eliminates the term “best interests” in order to clearly distinguish between the jurisdictional standards and the substantive standards relating to custody and visitation of children.

**6. Other Changes.** This draft also makes a number of additional amendments to the UCCJA. Many of these changes were made to harmonize the provisions of this Act with those of the Uniform Interstate Family Support Act. One of the policy bases underlying this Act is to make uniform the law of interstate family proceedings to the extent possible, given the very different jurisdictional foundations. It simplifies the life of the family law practitioner when the same or similar provisions are found in both Acts.

Perhaps the biggest change in the UCCJEA was the creation of a uniform methodology for *enforcement* of a child custody order across State lines, to cope with the reality that the law of enforcement evolved very differently from place to place, requiring proceedings as varied as a Motion to Enforce or a Motion to Grant Full Faith and Credit, or a Writ of Habeas Corpus, or of Mandamus and Prohibition, or a Citation for Contempt to initiate an enforcement proceeding.

NCCUSL was also concerned with the reality that in some places, courts broadened the scope of enforcement proceedings beyond the question of whether the court which issued the custody determination had jurisdiction to do so, to include an inquiry into whether enforcement would be in the best interests of the child. The absence of uniform procedures was seen to create multiple harms, including increasing costs (perhaps requiring counsel in both involved States), decreasing certainty of outcome, and lengthening the enforcement process by months or even years.

NCCUSL’s solution was creation of the multiple provisions of Article 3. It provides a simple procedure for registering a custody determination in another State, allowing a party to know in advance whether that State will recognize the party’s custody determination. The registration process was seen as a key way to estimate the risk of the child’s non-return when the child is sent on visitation, and was expected to prove useful in international custody cases.

Article 3 also provides a swift remedy along the lines of habeas corpus. The Commissioners reasoned that time is extremely important in visitation and custody cases, and that if visitation rights cannot be enforced quickly, they often cannot be enforced at all, particularly if there is a limited time for exercising visitation such as a brief holiday period. Without speedy consideration and resolution of the enforcement of such visitation rights, the ability to visit may be lost entirely.

Speed was also deemed essential for the situation in which a noncustodial parent refuses to return a child at the end of authorized visitation, such as when a summer visitation extension would infringe on the school year. Thus a swift enforcement mechanism was deemed desirable for violations of both custody and visitation provisions.

NCCUSL made the revised act much clearer as to the allowable scope of inquiry of the enforcing court, to just the issue of whether the decree court had jurisdiction and complied with due process in rendering the original custody decree. No further inquiry is necessary because neither Article 2 nor the PKPA allows an enforcing court to modify a custody determination.

The revised act also gave the enforcing court the extraordinary remedy of a warrant to take physical possession of the child if the court is concerned that the parent with physical custody of the child will flee or harm the child.

Finally, the revised act provided for public authorities, such as prosecutors, to be involved in the enforcement process if necessary, which was thought likely to deter parents from violating court orders, and help ensure that enforcement would be available regardless of income level.

#### **E. New Uniform Child Abduction Prevention Act (UCAPA)**

While a bit outside the scope of this seminar, practitioners should be aware that as of October 1, 2007, Nevada adopted the Uniform Child Abduction Prevention Act of 2006 (UCAPA), enacted as new chapter 125D of NRS. Jurisdiction to make an order under the statute is present so long as the Court would have had jurisdiction to make a child custody determination under the UCCJEA, including the emergency jurisdiction provision of that act.<sup>6</sup>

In accordance with NRS 125D.180, the Court is to look at the following factors when determining if there is a credible risk of abduction of a child, inquiring whether the party against whom an order is sought:

- a. Has previously abducted or attempted to abduct the child.***<sup>7</sup>

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<sup>6</sup> NRS 125D.160.

<sup>7</sup> Abduction is defined as “the wrongful removal or wrongful retention of a child.” NRS 125D.030.

- b. Has threatened to abduct the child.*
- c. Has recently engaged in activities that may indicate a planned abduction, including:*
  - (1) Abandoning employment.*
  - (2) Selling a primary residence.*
  - (3) Terminating a lease.*
  - (4) Closing bank or other financial management accounts, liquidating assets, hiding or destroying financial documents, or conducting any unusual financial activities.*
  - (5) Applying for a passport or visa or obtaining travel documents for the respondent, a family member or the child.*
  - (6) Seeking to obtain the child's birth certificate or school or medical records.*
- d. Has engaged in domestic violence, stalking, or child abuse or neglect.*
- e. Has refused to follow a child custody determination.*
- f. Lacks strong familial, financial, emotional or cultural ties to the State or the United States.*
- g. Has strong familial, financial, emotional or cultural ties to another State or country.*
- h. Is likely to take the child to a country that:*
  - (1) Is not a party to the Hague Convention on the Civil Aspects of International Child Abduction and does not provide for the extradition of an abducting parent or for the return of an abducted child.*
  - (2) Is a party to the Hague Convention on the Civil Aspects of International Child Abduction but:*



- j. Has had an application for United States citizenship denied.***
- k. Has forged or presented misleading or false evidence on government forms or supporting documents to obtain or attempt to obtain a passport, a visa, travel documents, a social security card, a driver's license or other government-issued identification card or has made a misrepresentation to the United States Government.***
- l. Has used multiple names to attempt to mislead or defraud.***
- m. Has engaged in any other conduct the court considers relevant to the risk of abduction.***

After weighing all those factors, which may be brought before the Court by way of *Ex Parte Petition*, the court is empowered to grant an immediate warrant to take physical custody of the child as long as the Court determines that the allegations pose a credible risk of imminent likely wrongful removal of the child.<sup>8</sup>

What is particularly notable about the new enactment is the blending and blurring of terminology from the UCCJEA and the Hague Convention, which explicitly does *not* give rise to custody proceedings, but is solely concerned with return of children to their countries of habitual residence, which is where any custody proceedings should be held. To the degree that the order rendered by a court deciding a Hague Convention case provides physical “custody” of a child, it does so only long enough to allow a petitioner to reach and enter another State, and perhaps long enough to initiate appropriate custody proceedings there.<sup>9</sup>

The UCCJEA is concerned solely with jurisdiction for the making of custody decisions, and “best interest” determinations are explicitly excluded. The Hague Convention is concerned solely with returning children to their country of habitual residence, again without making any kind of best interest determination. But UCAPA is explicitly concerned with allegations of past, present, and future wrongful behavior, and “the child’s physical or emotional health or safety.”

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<sup>8</sup> See NRS 125D.200.

<sup>9</sup> While it is within the court’s authority to release the child into the physical custody of the mother, the father, or some third party, in order to facilitate the required return, as a practical matter, courts resolving such petitions tend to turn the child over to the left-behind parent, for return to the country of which the left-behind parent is a resident at the time of the decision. This could be a different country from the one from which the child was wrongfully removed or retained. See Perez-Vega Report ¶ 110:

... when the applicant no longer lives in what was the State of the child’s habitual residence prior to its removal, the return of the child to that State might cause practical problems which would be difficult to resolve. The Convention’s silence on this matter must therefore be understood as allowing the authorities of the State of refuge to return the child directly to the applicant, regardless of the latter’s present place of residence.

The blurring and blending of tests and terminology from the UCCJEA and the Hague Convention in the UCAPA seems likely to promote some confusion among courts and counsel as to what legitimate objectives and arguments might be raised in which kinds of proceedings. Counsel must be diligent in seeing that proceedings under all three laws remain focused on the legitimate objectives of the proceedings.

## II. CONCEPTS IN THE UCCJEA

### A. Distinction Between Initial Jurisdiction and Exclusive Modification Jurisdiction

The Nevada Supreme Court has been extremely clear in holding that the issue of whether a court has subject matter jurisdiction to enter orders relating to custody is critical, and can be raised at any time – even for the first time on appeal.<sup>10</sup> The Court has spoken to both initial jurisdiction and modification jurisdiction.

In *Vaile v. District Court*,<sup>11</sup> a district court had entered orders modifying custody although neither the parties, nor the children, had ever been residents of Nevada. The Court took the time to expound at length on the matter of subject matter jurisdiction. It held that unless a court can properly exercise subject matter jurisdiction according to the terms of the uniform act, it is without authority to enter **any** order adjudicating the rights of the parties with respect to custody and visitation. In that case, the Court held the adjudications of custody and visitation were entered without subject matter jurisdiction and therefore declared them void.

As to modification, the Court has held that only where Nevada maintains continuing jurisdiction may it validly enter custody issues involving the parties to a prior divorce.<sup>12</sup>

It is the test for initial custody jurisdiction that provides the importance of determining a child's home State:

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<sup>10</sup> *Swan v. Swan*, 106 Nev. 464, 796 P.2d 221 (1990). The Court held that Nevada lacked subject matter jurisdiction to enter orders regarding custody where the children's home state was Utah, apparently a custody action was already pending in Utah, and the trial court there sent a letter asking that the case be returned to Utah. Notwithstanding those facts, the trial court entered a divorce decree and granted custody of the children to the husband. *Id.* at 467. The Supreme Court reversed, stating that subject matter jurisdiction cannot be obtained by consent of the parties (or by waiver), and that a parent residing out of state does not waive his or her challenge to the court's jurisdiction by either participating in proceedings here or declining to do so.

<sup>11</sup> 118 Nev. 262, 44 P.3d 506 (2002).

<sup>12</sup> See *Adams v. Adams*, 107 Nev. 790, 820 P.2d 752 (1991); *Lewis v. District Court*, 113 Nev. 106, 930 P.2d 770 (1997) (continuing jurisdiction requires that at least one party **continued to reside in Nevada continuously since the prior order**).

NRS 125A.305 INITIAL CHILD-CUSTODY JURISDICTION

1. Except as otherwise provided in NRS 125A.335, a court of this State has jurisdiction to make an initial child-custody determination only if:

(a) 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 6 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;

(b) 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 pursuant to NRS 125A.365 or NRS 125A.375 (UCCJEA Section 207 or 208), and:

(1) 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;

(c) all courts having jurisdiction under paragraph (a) or (b) 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 NRS 125A.365 or NRS 125A.375; or

(d) no court of any other State would have jurisdiction under the criteria specified in paragraph (a), (b), or (c).

2. Subsection 1 is the exclusive jurisdictional basis for making a child-custody determination by a court of this state.

3. Physical presence of, or personal jurisdiction over, a party or a child is not necessary or sufficient to make a child-custody determination.

One important clarification in the new Act, is applicability of the UCCJEA to international cases. NRS 125A.225 provides that "A court of this state shall treat a foreign country as if it were a State of the United States for the purpose of applying NRS 125A.305 to NRS 125A.395." In other words, a Court is required to treat the child's residence in another country precisely the same as it would treat the child's establishment of a different home State.

The test for initial child custody jurisdiction is therefore pretty straightforward. Jurisdiction to modify the original determination, however, is a bit trickier:

NRS 125A.315 EXCLUSIVE, CONTINUING JURISDICTION

1. Except as otherwise provided in NRS 125A.335, a court of this state which has made a child-custody determination consistent with NRS 125A.305 or NRS 125A.325 has exclusive, continuing jurisdiction over the determination until:

(a) A court of this state determines that the child, the child's parents and any person acting as a parent do not have a significant connection with this state and that substantial evidence is no longer available in this state concerning the child's care, protection, training, and personal relationships; or

(b) a court of this State or a court of another State determines that the child, the child's parents, and any person acting as a parent do not presently reside in this State.

2. A court of this State, which has made a child-custody determination and does not have exclusive, continuing jurisdiction pursuant to this section may modify that determination only if it has jurisdiction to make an initial determination pursuant to NRS 125A.305

The official comment to Section 202 of the UCCJEA<sup>13</sup> (upon which NRS 125A.315 is based) provides that:

Continuing jurisdiction is lost when the child, the child's parents, and any person acting as a parent no longer reside in the original decree State. . . .

The phrase "remains the residence of" in the PKPA has been the subject of conflicting case law. It is the intention of this Act that paragraph (a)(2) of this section means that the named persons no longer continue to actually live within the State. Thus, unless a modification proceeding has been commenced, when the child, the parents, and all persons acting as parents physically leave the State to live elsewhere, the exclusive, continuing jurisdiction ceases. . . .

Once everyone leaves Nevada, a determination that such is the case can be made by a State that has initial custody determination, as the Comment makes clear:

If the child, the parents and all persons acting as parents have all left the State which made the custody determination prior to the commencement of the modification proceeding, considerations of waste of resources dictate that a court in State B, as well as a court in State A, can decide that State A has lost exclusive continuing jurisdiction. . . .

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<sup>13</sup> For convenience, we have posted the 1997 Model UCCJEA, with Comments, on our firm web site, [www.willicklawgroup.com](http://www.willicklawgroup.com), on the Child Custody and Visitation page.



Exclusive, continuing jurisdiction is not reestablished if, after the child the parents, and all persons acting as parents leave the State, the non-custodial parent returns. As subsection (b) provides, once a State has lost exclusive, continuing jurisdiction, it can modify its own determination only if it has jurisdiction under the standards of Section 101

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### **B. Right of Counsel to Participate in Communication Between Courts Where There Are Simultaneous Proceedings**

Pursuant to NRS 125A.275, when the judges of two States in which simultaneous proceedings are pending confer to determine which court will proceed, the court “may” allow the parties (and thus counsel) to participate in the communication.<sup>14</sup> This does not apply to preliminary communications to set up times for the substantive discussion, etc.<sup>15</sup> A record must be kept of any substantive communication, and if they are not allowed to participate in it, they must be permitted to present facts and legal argument to the Court before any decision as to jurisdiction is made.<sup>16</sup>

### **C. What to Argue If Seeking to Prevent a Court with Jurisdiction from Exercising it**

There are two potential bases for a court with jurisdiction to decline to exercise it: “inconvenient forum” and “unjustifiable conduct.”

A court which is an appropriate court to exercise initial or modification jurisdiction regarding child custody may nevertheless decline to do so, if the court determines that this is an “inconvenient forum” under NRS 125A.365. The statute reads:

#### **NRS 125A.365. Inconvenient Forum.**

1. A court of this state which has jurisdiction pursuant to the provisions of this chapter to make a child custody determination may decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances and that a court of another state is a more appropriate forum. The issue of inconvenient forum may be raised upon motion of a party, the court's own motion or request of another court.

2. Before determining whether it is an inconvenient forum, a court of this state shall consider whether it is appropriate for a court of another state to exercise jurisdiction. For

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<sup>14</sup> NRS 125A.275(2).

<sup>15</sup> NRS 125A.275(3).

<sup>16</sup> NRS 125A.275(2), (4).

this purpose, the court shall allow the parties to submit information and shall consider all relevant factors, including:

- (a) Whether domestic violence has occurred and is likely to continue in the future and which state could best protect the parties and the child;
- (b) The length of time the child has resided outside this state;
- (c) The distance between the court in this state and the court in the state that would assume jurisdiction;
- (d) The relative financial circumstances of the parties;
- (e) Any agreement of the parties as to which state should assume jurisdiction;
- (f) The nature and location of the evidence required to resolve the pending litigation, including testimony of the child;
- (g) The ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence; and
- (h) The familiarity of the court of each state with the facts and issues in the pending litigation.

3. If a court of this state determines that it is an inconvenient forum and that a court of another state is a more appropriate forum, it shall stay the proceedings upon condition that a child custody proceeding be promptly commenced in another designated state and may impose any other condition the court considers just and proper.

4. A court of this state may decline to exercise its jurisdiction pursuant to the provisions of this chapter if a child custody determination is incidental to an action for divorce or another proceeding while still retaining jurisdiction over the divorce or other proceeding.

The NCCUSL comments make it clear that the list of factors to be considered is “not meant to be exclusive,” and may include a number of very fact-specific considerations, such as whether the other State might have jurisdiction over a custody proceeding for *another* child of the parties, so that one court could be made to resolve all disputes as to the family.<sup>17</sup>

Asking a court to decline jurisdiction under NRS 125A.375 for “unjustifiable conduct” is a bit different:

1. Except as otherwise provided in NRS 125A.335 or by other state law, if a court of this state has jurisdiction pursuant to the provisions of this chapter because a person seeking to invoke its jurisdiction has engaged in unjustifiable conduct, the court shall decline to exercise its jurisdiction unless:
  - (a) The parents and all persons acting as parents have acquiesced in the exercise of jurisdiction;
  - (b) A court of the state otherwise having jurisdiction pursuant to NRS 125A.305, 125A.315 and 125A.325 determines that this state is a more appropriate forum pursuant to NRS 125A.365; or

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<sup>17</sup> This thought is an analog of Nevada’s “one family, one court” policy.

- (c) No court of any other state would have jurisdiction pursuant to the criteria specified in NRS 125A.305, 125A.315 and 125A.325.
- 2. If a court of this state declines to exercise its jurisdiction pursuant to subsection 1, it may fashion an appropriate remedy to ensure the safety of the child and prevent a repetition of the unjustifiable conduct, including staying the proceeding until a child custody proceeding is commenced in a court having jurisdiction pursuant to NRS 125A.305, 125A.315 and 125A.325.
- 3. If a court dismisses a petition or stays a proceeding because it declines to exercise its jurisdiction pursuant to subsection 1, it shall assess against the party seeking to invoke its jurisdiction necessary and reasonable expenses including costs, travel expenses and child care during the course of the proceedings, unless the party from whom fees are sought establishes that the assessment would be clearly inappropriate. The court may not assess fees, costs or expenses against this state unless authorized by law other than the provisions of this chapter.

One point worth stressing is that an argument under this provision must be made in the State that *has* jurisdiction to make the custody determination – a party in Nevada cannot argue to a Nevada court that the other party, in some other State, should not be allowed to proceed there because of some alleged unjustifiable conduct.

### III. CONCLUSION

The modern world of family law involves multiple uniform acts, some of which have overlapping terminology, but which have different substantive bases for the assertions of jurisdiction, and different potential defenses to exercise of that jurisdiction. In such a world, practitioners are required to be conversant with the details of those bases and defenses to competently represent their clients, and avoid what might otherwise be considerable expense and delay to all concerned.