NEVADA CHILD CUSTODY
A PRIMER

by

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July 12, 2013

BIOGRAPHY

Mr. Willick is the principal of the Willick Law Group, an A/V rated Family Law firm in Las Vegas, Nevada, and practices in trial and appellate Family Law. He is a Certified Family Law Specialist, a Fellow of both the American and International Academies of Matrimonial Lawyers, former Chair of the Nevada Bar Family Law Section and past President of the Nevada chapter of the AAML. He has authored several books and articles on Family Law and retirement benefits issues, and was managing editor of the Nevada Family Law Practice Manual.

In addition to litigating trial and appellate cases in Nevada, Mr. Willick has participated in hundreds of divorce and pension cases in the trial and appellate courts of other States, and in the drafting of various State and federal statutes in the areas of pensions, divorce, and property division. He has chaired several Committees of the American Bar Association Family Law Section, and has repeatedly represented the entire ABA in Congressional hearings on military pension matters. He has served on many committees, boards, and commissions of the ABA, AAML, and Nevada Bar, has served as an alternate judge in various courts, and is called upon to testify from time to time as an expert witness. He serves on the Board of Directors for the Legal Aid Center of Southern Nevada.

Mr. Willick received his B.A. from the University of Nevada at Las Vegas in 1979, with honors, and his J.D. from Georgetown University Law Center in Washington, D.C., in 1982. Before entering private practice, he served on the Central Legal Staff of the Nevada Supreme Court for two years.

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As with any area of the law, child custody cases are multi-faceted and can be very complex. The interplay between jurisdiction, parental rights, custody and visitation by non-parents, and concerns relating to domestic violence and child abduction all must be considered in each and every case.

This course is intended to give the practitioner a basic understanding of the law in Nevada – and in other jurisdictions – as it applies to child custody cases.[1]

I. BRIEF HISTORY LEADING UP TO THE CURRENT JURISDICTIONAL 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

[1] Because this is one of a series of courses, only passing references will be made, where possible, to subject matters explored in detail during other course sessions, including domestic violence and interstate applications, child support, and relocations.

> 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,[2] 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),[3] which has more recently changed its name to the Uniform Law Commission ("ULC"). Nevada adopted the UCCJA and incorporated it into NRS 125A.050 in 1979; its jurisdictional

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[2] 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").

[3] 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.

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.
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> (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.
>
> (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.[4] 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.[5] 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,[6] 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

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[4] *See* 28 U.S.C. § 1738A(d).

[5] 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).

[6] *Obstacles to the Recovery and Return of Parentally Abducted Children* (1993) ("Obstacles Study").

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 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.
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> **2. Clarification of emergency jurisdiction.** There are several problems with the current emergency jurisdiction provision of the UCCJA § 3(a)(3).
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> 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.
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> 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.
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> 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.

II. BASIC 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.[7] The Court has spoken to both initial jurisdiction and modification jurisdiction.

In *Vaile v. District Court*,[8] a district court had entered orders purporting to establish custody rights 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.[9]

The test for initial custody jurisdiction highlights the importance of determining a child's home State:

> 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:

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[7] *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.

[8] 118 Nev. 262, 44 P.3d 506 (2002).

[9] *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***).

(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 (a), 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

(2) 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[10] (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. . . .
>
> 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

[10] For convenience, we have posted the 1997 Model UCCJEA, with Comments, on our firm web site, www.willicklawgroup.com, on the Child Custody and Visitation page.

modify its own determination only if it has jurisdiction under the standards of Section 101 . . . .

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.[11] This does not apply to preliminary communications to set up times for the substantive discussion, etc.[12] 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.[13]

C. What to Argue If Seeking to Prevent a Court with Jurisdiction from Exercising The Same

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 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;

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[11] NRS 125A.275(2).

[12] NRS 125A.275(3).

[13] NRS 125A.275(2), (4).

(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.[14]

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

   (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

[14] This thought is an analog of Nevada's "one family, one court" policy.

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. DETAILED UCCJEA DISCUSSION

A. CHILD CUSTODY – INITIAL JURISDICTION[15]

Perhaps the simplest way of determining the meaning of the initial jurisdiction rule is to review what the drafters were trying to accomplish. As documented in an extensive study by the American Bar Association's Center on Children and the Law,[16] inconsistency of interpretation of the earlier uniform act – the UCCJA[17] – and the technicalities of applying the PKPA,[18] 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.

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.

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[15] Much of the information in this and the following section is gone over in detail in "Child Custody jurisdiction in Nevada" (CLE for State Bar of Nevada, May 22, 2008, posted at: http://willicklawgroup.com/published_works).

[16] *Obstacles to the Recovery and Return of Parentally Abducted Children* (ABA 1993) ("Obstacles Study").

[17] Uniform Child Custody Jurisdiction Act, the prior NRS ch. 125A.

[18] Parental Kidnaping Prevention Act ("PKPA"), 28 U.S.C. § 1738A.

For the purpose of these materials, the messages are short and simple. If there is a Home State, no further inquiry about the significance of anyone's connections with anywhere else has any relevance. Only if there is ***no*** Home State are such "significant connection" analyses relevant.[19]

The test is considerably different from the personal jurisdiction test for divorce – the statute states on its face that "physical presence of, or personal jurisdiction over, a party or a child is not necessary or sufficient to make a child custody determination."[20]

Those lawyers who insist on arguing personal jurisdiction matters in child custody proceedings – and those judges who indulge such expositions, as opposed to staying focused on the statutory inquiry – waste the time and money of everyone involved.

NRS 125A.305 says that the ***exclusive*** potential bases of jurisdiction are a cascade of four choices:

> **1. Home State. Nevada is the Home State on the date proceedings were commenced, or was the Home State within six months prior to that commencement, and the child is absent, but a parent or person acting as parent continues to live in Nevada.**
>
> **2. Significant Connection. *Either* no other court has jurisdiction as the Home State, *or* that court has declined to exercise jurisdiction based on its finding that Nevada is the more appropriate forum based on Nevada being the more "convenient" forum, or based on the "unjustifiable misconduct" of the party seeking jurisdiction in that other State.**
>
> Exercising jurisdiction based on this second category requires two ***additional*** findings:
>
> A. That the child and at least one parent or person acting as a parent have a significant connection with Nevada "other than mere physical presence," ***and***
>
> B. That "substantial evidence" is available in Nevada concerning the child's care, protection, training, and personal relationships.
>
> **3. Only State Interested. All courts having jurisdiction under those two rules have declined to exercise jurisdiction on the basis that Nevada is the more appropriate forum based on Nevada being the more "convenient" forum, or based on the "unjustifiable misconduct" of the party seeking jurisdiction in the other States.**
>
> **4. Vacuum. No court of any other State would have jurisdiction based on any of the above three rules.**

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[19] NRS 125A.305.

[20] NRS 125A.305(3).

Since statutory law now provides that the above are the "exclusive" bases of jurisdiction for child custody, traditional long-arm jurisdiction would presumably fail. If the custodial parent and child leave Nevada and move to another State, leaving the non-custodian behind, then Nevada would apparently lose jurisdiction to make an initial child custody award after 6 months, absent a relinquishment of jurisdiction by a court in that other State.

The question is sometimes asked whether these rules are really as clear, and "harsh," as they seem. For example, what if parents had been separated for more than 6 months, with the custodial parent and children living elsewhere, and the non-custodial parent living in Nevada, but they agreed that they wanted to go through a single, simple joint petition divorce here in Nevada disposing of all issues?

It is possible that no one would ever notice. But if either party filed an action in the children's Home State claiming that Nevada never had jurisdiction to determine custody, the rule indicates that such a filing would succeed.[21]

The bottom line is that the face of the statute requires jurisdiction under its terms for a valid custody order to be entered. Under the facts set out above, the parties would be required to either get a child custody order in the children's Home State, or obtain an order of the courts of that State declining to exercise jurisdiction. Absent the latter, the Nevada action should not include child custody.

One wrinkle that seems to cause a lot of confusion is the phrase in the Home State provision "or was the Home State within six months prior to that commencement." The easiest way to conceptualize this rule is by realizing that "There can be only one." Until and unless a ***new*** State is the Home State, the ***old*** Home State continues to ***be*** the Home State, and is the place in which custody litigation should be commenced, ***if*** anyone relevant continues to reside there.

If all parties and children leave the State, the analysis is different. As discussed in the following section, whether a State ***would have been*** the Home State of the child within 6 months of the start of proceedings becomes irrelevant if it cannot exercise Home State jurisdiction because its courts cannot find (as required) that at the moment of the first filing, "the child is absent, but a parent or person acting as a parent continues to live in" the State.

In the unusual circumstances supporting an assertion of initial emergency jurisdiction (the child is present here and has been abandoned or an emergency amounting to actual or threatened mistreatment or abuse is presented), it is now clear that such an order only lasts until a State with initial or continuing jurisdiction under NRS 125A.305, 125A.315, and NRS 125A.325, issues an order relating to the matter.

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[21] Obviously, this sketch hypothetical does not deal with all the myriad issues that might be raised, such as whether the action elsewhere might be found barred by application of judicial estoppel or otherwise. *See Vaile v. District Court*, 118 Nev. 262, 44 P.3d 506 (2002) (discussing judicial estoppel doctrine).

Only in the peculiar situation that such other State does not issue any order on the subject within the time specified in the Nevada order would it either continue, or expire, as the order provides.[22] And only if that other State ***never*** acts could the emergency order of this State become a final determination, making this State the Home State of the child.[23]

An additional oddity of jurisdiction fitting in the "custody" section is the Uniform Child Abduction Prevention Act, enacted in Nevada as Chapter 125D. The statute itself is an unusual mash-up of terminology from the UCCJEA and the Hague Convention.[24] The jurisdictional section of the Nevada enactment[25] has two provisions. The first states that a petition under the chapter may only be filed in a court that has jurisdiction to make a child custody determination under the UCCJEA (Chapter 125A). The second, however, states that "A court of this State has temporary emergency jurisdiction pursuant to NRS 125A.335 if the court finds a credible risk of abduction."

What this means is that the rather loose language defining "emergency jurisdiction" in the UCCJEA[26] includes, at a minimum, any circumstances in which a court finds a "credible risk" of abduction. More on UCAPA later.

B. CHILD CUSTODY – MODIFICATION JURISDICTION

Once again, the intent of the drafters was pretty clear as to the problem they sought to address, and the solution they reached:

> **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

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[22] NRS 125A.335(2)-(3).

[23] NRS 125A.335(2).

[24] "The Convention on the Civil Aspects of International Child Abduction, done at the Hague on 25 Oct. 1980" [commonly referred to as "the Hague Convention"], the implementing legislation for which is the International Child Abduction Remedies Act ("ICARA"), 42 U.S.C. §§ 11601-11610.

[25] NRS 125D.160.

[26] "A court of this state has temporary emergency jurisdiction if the child is present in this state and the child has been abandoned or it is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse." NRS 125A.335(1).

> 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.

Of the referenced model sections, the key is Section 202, which became NRS 125A.315. This new provision defines "Exclusive, Continuing Jurisdiction" (commonly, if oddly, abbreviated as "CEJ"). It provides a few very simple rules by which continuing jurisdiction can nearly always be easily and quickly ascertained.

Once a court here has made a custody determination, only this court has jurisdiction to modify that order, until one of two things happens:

> ◆ ***Our*** court determines that neither the child, nor a parent, nor any person acting as a parent has any significant connection to this State, and that no substantial evidence exists here as to the child's care, protection, training, and personal relationships;
>
> ***OR***
>
> ◆ A Court of this State, ***or*** elsewhere, determines that the child, the child's parents, and any person acting as a parent do not reside here.

The comments make it clear that the statutory language is intended to deal with where the people involved ***actually live***, not with any sense of a technical domicile.[27] Regardless of whether a State

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[27] There appears to be developing an exception to the general rule on where a person resides when considering residence of a military member. *In re Marriage of Brandt*, ___ P.3d ___ (Colo. Case No. 11SA248, Jan. 23, 2012) held that the determination of residence of a military member, especially when it is claimed that an issuing State has lost CEJ, depends on the totality of the circumstances including, where the member has a driver's license, registered to vote, any professional licensure, pays taxes, military assignment, maintains a home, registers a car, and any other relevant facts. A practitioner must also review the recently enacted "Deployed Parents Custody and Visitation Act" as it attempts to resolve issues of jurisdiction concerning military parents that relocate because of military assignment but intend to keep their official residence in another State. Yes, this means that a military person could be physically gone from a State for years, but that State may still have jurisdiction to enter a child custody modification order under the UCCJEA. *See also In re Amezquita*, 124 Cal. Rptr. 2d 887, 890, 28 FLR 1526 (Cal. Ct. App. 2002) (a State can maintain child support modification jurisdiction despite deployment elsewhere of obligor parent).

considers a parent a domiciliary, the State loses exclusive, continuing jurisdiction after the child, the parents, and all persons acting as parents have moved from the State.

The statutory scheme makes it clear that only the State with CEJ can determine that there is no significant connection remaining. So it simply makes no sense for lawyers to continue filing motions asking our courts to determine that some ***other*** State should not exercise its CEJ. The only thing that could be asked of our Court is the factual determination that all relevant persons do ***not*** reside in the State issuing the earlier order; if any other basis for changing or relinquishing jurisdiction is required, the request must be made in the State issuing the earlier order.

If it has been determined that the original State with CEJ lost that jurisdiction, then the question becomes whether there is a new Home State, which becomes the place where further custody litigation should take place.[28] Again, until and unless there is a ***new*** Home State, the ***prior*** Home State is presumptively where any custody-related litigation should proceed – until both parents, and all children, have left that State.[29] At that point, the contest "ratchets down" to a dispute as to which State or States has "significant connection" jurisdiction.

It is also necessary to stress that the question of jurisdiction is a "snapshot" taken at the moment of filing the action. In the language of the comments, "jurisdiction attaches at the commencement of a proceeding."[30] The way NCCUSL put it: "If State A had jurisdiction under this section at the time a modification proceeding was commenced there, it would not be lost by all parties moving out of the State prior to the conclusion of the proceeding. State B would not have jurisdiction to hear a modification unless State A decided that State B was more appropriate under Section 207."[31]

Nor is it possible to override this law by contract or agreement. In *Friedman*, the Nevada Supreme Court agreed that the very purpose of creating the UCCJEA was to eliminate inter-jurisdictional interpretations that previously stemmed from the looser wording of the UCCJA. The Court agreed

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[28] NRS 125A.325.

[29] *Friedman v. Dist. Ct.*, 127 Nev. ___, 264 P.3d 1161 (Adv. Opn. No. 75, Nov. 23, 2011). Even though the State of prior residence ***would have been*** the Home State of the child if litigation was commenced within 6 months of the time all parties left that State, the State of prior residence could not exercise Home State jurisdiction because its courts could not find (as required) that at the moment of the first filing, "the child is absent, but a parent or person acting as a parent continues to live in" that State. *See* NRS 125A.325(2); 125A.315(2); 125A.305(1)(a).

[30] *Friedman* confirmed the "jurisdiction is a snapshot at moment of filing of a proceeding" concept.

[31] Our statutes list Section 207 as NRS 125A.365 – "Inconvenient Forum," which contains the laundry list of reasons why a State that has jurisdiction might choose not to exercise it. But such questions are beyond the scope of this paper, which is solely concerned with jurisdiction.

that the place that issued the original order is irrelevant, and that whether that order purported to maintain "exclusive modification jurisdiction" is irrelevant. The statute mandates the result.[32]

What happens to CEJ when parties move out and back depends on whether and when an action is filed, and who it is that is doing the moving. If all parties leave, but the custodial parent and child return to Nevada (after however long an absence) before some other State makes the requisite finding (that all persons had left) and assumes jurisdiction, then Nevada remains the only place where a modification motion could be filed.

But when all relevant persons have left, and the ***non***-custodial parent returns here, there is no such effect. Or, as NCCUSL put it: "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." So if all parties leave, and the non-custodial parent later returns, the child's new Home State (or if there is none, a significant-connection State) assumes jurisdiction to make custody orders.

And yet some judges convene lengthy, costly "evidentiary hearings," despite those facts being agreed by all parties, to determine "what ought to be done," when the resolution was a clear matter of law based entirely on the absence of jurisdiction.

IV. PRACTICAL CHILD CUSTODY JURISDICTION (Soup to Nuts)

The UCCJEA creates a registration process for custody determinations.[33] The statute also permits courts to enforce valid child custody determinations of other States by any remedy available under that State's law, including issuing warrants to take immediate physical custody of a child.[34] Nevada Senate Bill 57 which became effective on May 30, 2011, allows the Children's Advocate at the Office of the Nevada Attorney General (or his or her designee) to obtain a warrant to take physical custody of a child.

NRS 125A.385 sets out the required information that must be provided by each party at the commencement of a child custody proceeding to assist the court in determining whether it has jurisdiction under NRS § 125A. Specifically, each party in a custody proceeding in his or her first

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[32] *Friedman* established the supremacy of the UCCJEA in Nevada. The Judge in that case originally had found that the parties had "contracted" that jurisdiction be retained by Nevada no matter where the parties were residing at the time of the initiation of proceedings. All parties were living in California at the time of the initiation of proceedings in Nevada and none of the parties had resided in Nevada for well over six months. It would have been impossible to even find ***any*** connection the children had to Nevada – except that their grandparents continued to live here – let alone any significant connection.

[33] NRS 125A.465.

[34] NRS 125A.525.

pleading, or in an affidavit attached to that pleading, must provide the court with the following information:

1. The child's present address;

2. The place(s) where the child has lived for the last five years; and

3. The names and addresses of persons with whom the child lived during that period.[35]

Furthermore, each party shall declare under oath whether:

1. He or she has been a party, witness, or litigant in any capacity, concerning custody or visitation of the same child in this State or any other State;

2. He or she knows of any other proceeding that could affect the current proceeding (including proceedings for enforcement, domestic violence, protective orders, termination of parental rights and adoption) and, if so, information regarding the other proceeding;

3. He or she knows of any other person, not a party to the proceeding before the court, who has physical custody of the child or claims to have custody or visitation rights with respect to the child, and, if so, the name and address of the other person.[36]

SCR 251 provides that in all cases affecting custody or visitation of minor children, including termination of parental rights cases, but not including juvenile cases, the district courts must resolve the issues within six months of the filing of a responsive pleading contesting the issues. Courts may extend that deadline in "extraordinary cases that present unforeseeable circumstances," but only upon the filing of "specific findings of fact" regarding the circumstances that justify that extension.

The rule provides that if an appeal is taken in the Nevada Supreme Court from an order affecting custody, the decision in that court shall be "expedited."

NRAP 31(a)(2) provides that instead of a deadline of 120 days from the docketing of an appeal within which an opening brief must be filed, the appellant has 90 days, and instead of 30 days each for the answering and reply briefs, the respective times are shortened to 20 and 10 days. The rule further provides that if oral argument is not scheduled, the matter "shall be submitted for decision on the briefs and the appendix within sixty (60) days of the date that the final brief is due." In cases governed by the rule, the Supreme Court is to grant extensions only "in extraordinary cases that present unforeseeable circumstances," and no stipulated extensions of time are permitted.[37]

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[35] NRS 125A.385(1).

[36] NRS 125A.385(l)(a)-(c).

[37] NRAP 31(b).

There are a few cases in Nevada addressing the former UCCJA, the UCCJEA, and the PKPA that every practitioner should review:[38]

In *Friedman v. Eighth Jud. Dist. Ct.*,[39] the parties' Nevada divorce decree incorporated the parents' agreement that Nevada would have exclusive jurisdiction over future custody disputes. The parents had joint legal custody, but when the husband and wife were not able to work out a schedule for joint physical custody, the wife applied to Nevada's district court for an order awarding her primary physical custody.

At this point, both parents and their children had moved to California. The husband initiated competing custody proceedings in California, maintaining that Nevada lacked subject matter jurisdiction over the dispute. The Nevada district court, meanwhile, provisionally granted the wife primary physical custody. The husband petitioned for a writ of prohibition and/or mandamus, directing the Nevada district court to stand down from its assertion of jurisdiction. The Supreme Court granted the writ, holding that under the UCCJEA, which Nevada and California had both adopted, California had jurisdiction as the children's home State, and Nevada could not proceed unless California determined that Nevada was the more convenient forum.

In *Ogawa v. Ogawa*,[40] the parties and children moved back and forth between Japan and the United States. In 2003, the family traveled to the United States and established residence. Shortly thereafter, the father returned to Japan, while the mother and the children remained in the United States.

The children enrolled in school in Henderson. Approximately a year later, the children returned to Japan. The mother asserted that it was only for a three month vacation, while the father alleged the move was permanent. The children never returned to the United States. After the children were in Japan for nearly eight months, the mother filed an action in Nevada, seeking to establish jurisdiction and for return of the children.

The district court determined that Nevada had "home state" jurisdiction pursuant to the UCCJEA The father appealed, and the Nevada Supreme Court upheld the district court's exercise of jurisdiction. On appeal, the Nevada Supreme Court stated that, "Although the children had been absent from the State for eight months when [Mother] filed her custody action, the testimony and evidence supported that the children left Nevada for a temporary three-month vacation, and under the UCCJEA, temporary absences do not interrupt the six-month pre-complaint residency period necessary to establish home state jurisdiction." Therefore, the Nevada Supreme Court concluded

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[38] *See Ogawa v. Ogawa*, 125 Nev. 660, 221 P.3d 699 (2009); *Swan v. Swan*, 106 Nev. 464, 796 P.2d 221 (1990); *Adams v. Adams*, 107 Nev. 790, 820 P.2d 752 (1991); *Lewis v. Second Iud. Dist. Ct.*, 113 Nev. 106,930 P.2d 770 (1997); *Vaile v. Eighth Jud. Dist. Ct.*, 118 Nev. 262,44 P.3d 506 (2002).

[39] *Friedman v. Eighth Jud. Dist. Ct.*, 127 Nev. ___ 264 P.3d 1161 (2011).

[40] *Ogawa v. Ogawa*, 125 Nev. 660,221 P.3d 699 (Nev. 2009).

that, taking into account the temporary absence, the action was filed timely under the UCCJEA, and the Nevada district court had home-state jurisdiction.

In *Swan v. Swan*,[41] the Nevada Supreme Court held that Nevada lacked subject matter jurisdiction over a custody battle between divorcing parents where the husband had removed the children from their home State of Utah and brought them to Nevada less than 40 days before commencement of divorce proceedings.

In this case, there was evidence demonstrating that an action on the same subject matter was already pending in Utah, and the Utah trial court sent a letter to the Nevada judge 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. The Nevada Supreme Court reversed the decision on appeal, stating that "residing in Nevada for less than forty days can hardly constitute a significant connection" with the State.

The *Swan* court also noted that a challenge of the court's subject matter jurisdiction can be raised at any time, even for the first time on appeal. Furthermore, because subject matter jurisdiction cannot be obtained by consent of the parties (or by waiver), the court held that a parent residing in another State does not waive his or her challenge to the court's jurisdiction by declining to take action to protect his or her custodial rights when served to appear in Nevada.

In *Adams*[42], the Nevada Supreme Court held that Nevada did not need to extend full faith and credit to a California custody order that attempted to modify a pre-existing custody order issued by a Nevada court just one month earlier. Based upon its analysis of the PKPA and the former NRS 125A.170, the Nevada Supreme Court found that Nevada maintained continuing jurisdiction over custody issues involving the parties, and therefore, Nevada had no obligation to honor the subsequent California order.

In *Lewis v. Second Iud. Dist. Ct.*,[43] the Nevada Supreme Court upheld the jurisdiction of the lower court to modify a prior custody decree pursuant to the former NRS 125A.050(l)(b)(2) even though the children and their mother had been residing in California for several years. The court reasoned that Nevada maintained continuing jurisdiction where:

1. Both parties and their children previously resided in Nevada for several years prior to the divorce proceedings;

2. The husband has continuously resided in Nevada and plans to continue residing in this state;

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[41] *Swan v. Swan*, 106 Nev. 464, 796 P.2d 221 (1990).

[42] *Adams v. Adams*, 107 Nev. 790, 820 P.2d 752 (1991).

[43] *Lewis v. Second Iud. Dist. Ct.*, 113 Nev. 106,930 P.2d. 770 (1997).

3. The children were born in Nevada and lived here for several years until wife moved them to several other states;

4. The parties have previously litigated the issue of child custody in Nevada and the entire court record concerning the children's custody is located in Nevada; and

5. The parents are subject to an existing order of the district court concerning the custody and visitation of their children.

In *Vaile v. Eighth Jud. Dist. Ct.*,[44] a district court had granted a divorce, and later entered orders modifying custody, although neither the parties, nor the children, had ever been residents of Nevada. The court held that unless a court can properly exercise subject matter jurisdiction according to the terms of the UCCJA (now repealed and replaced by the UCCJEA), it is without authority to enter any order adjudicating the rights of the parties with respect to custody and visitation. The court held the provisions in the divorce decree adjudicating custody and visitation to have been entered without subject matter jurisdiction and therefore declared them void.

When confronted with an interstate custody dispute, the prudent practitioner should thoroughly research the law and consider all possible arguments available to the client. The body of law in Nevada interpreting NRS Chapter 125A is sparse at best, and therefore, it is often necessary to look to the law of other states for guidance in analyzing jurisdictional issues. Although most states have adopted the UCCJEA, a number of states have departed from the original text. Therefore, the importance of carefully and thoroughly researching the law cannot be overstated. Also, every practitioner should keep in mind that both the UCCJEA and PKPA require that, prior to issuing a child custody decree or order, reasonable notice and opportunity to be heard must be given to the contestants as well as any person having physical custody of a child at issue.[45]

Therefore, whenever possible, actual notice should be given to all interested persons. Failure to provide adequate notice may later undermine the validity of any child custody determination obtained on behalf of your client.

NRS 125.130 requires that the social security numbers of both parties be confidentially maintained in the file, and provided to the State welfare division. Filing the information sheet with every initial filing, including joint petitions, is an easy way of assuring compliance with that statute.

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[44] *Vaile v. Eighth Jud. Dist. Ct.*, 118 Nev. 262,44 P.3d 506 (2002).

[45] NRS 125A.345.

V. DEFINITIONS OF LEGAL AND PHYSICAL CUSTODY

In *Rivero v. Rivero*,[46] the Nevada Supreme Court clarified the concepts of legal custody and physical custody:

Legal custody involves having basic legal responsibility for a child and making major decisions regarding the child, including the child's health, education, and religious upbringing.

Sole legal custody vests this right with one parent, while joint legal custody vests this right with both parents. As pointed out in *Rivero*, when parents share joint legal custody, they must consult with each other to make major decisions regarding the child's upbringing, while the parent with whom the child is residing at that time usually makes minor day-to-day decisions. If the parties in a joint legal custody situation cannot agree on a decision, then they may appear before the Court on an "equal footing" to have the Court decide what is in the child's best interests.

"Physical custody involves the time that a child physically spends in the care of a parent. During this time, the child resides with the parent and that parent provides supervision for the child and makes the day-to-day decisions regarding the child." "Parents can share joint physical custody, or one parent may have primary physical custody while the other parent may have visitation rights."

The type of physical custody arrangement has an impact on other related issues. First, it determines the legal standard to be applied by the court when modifying physical custody. Second, it affects the legal procedure if a parent wants to move out of State with the child. Third, the physical custody arrangement affects the manner in which child support is calculated.

Because the physical custody arrangement can impact these decisions, the Nevada Supreme Court sought to clarify in *Rivero* the definitions of "joint physical custody" and "primary physical custody" under Nevada law. Specifically, the Nevada Supreme Court determined that "each parent must have physical custody of the child at least 40 percent of the time to constitute joint physical custody."[47] If a parent does not have physical custody of the child at least 40 percent of the time, then the custodial arrangement is considered primary physical custody with visitation.

When calculating the time-share, the Nevada Supreme Court stated that district courts should consider the entire calendar year, taking into consideration both the weekly schedule as well as holidays and summer vacations.[48] The focus should be on the number of days that a parent is responsible for making day-to-day decisions for the child and/or supervising the child, or that the child resides with the parent. The focus should not be on counting hours in a day, whether the child was asleep or awake or in the care of a third party care provider.

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[46] *Rivero v. Rivero*, 125 Nev. 410, 216 P.3d 213(2009).

[47] *Id.* at 425-426, 216 P.3d at 224.

[48] *Id.* at 427,216 P.3d at 225.

VI. CUSTODY BETWEEN PARENTS

In Nevada, parents involved in a custody dispute generally are considered to have equal custody rights with respect to their child, and, absent unusual circumstances, both parents have rights superior to third parties. NRS 125.480(3), sets forth Nevada's underlying policy "To ensure that minor children have frequent associations and a continuing relationship with both parents" and "To encourage such parents to share the rights and responsibilities of child rearing." In furtherance of that policy, NRS 125.465 provides that until such time as a determination regarding custody has been made, if the parents of the child are married to each other, each parent has joint legal custody of the child until otherwise ordered by the court.

In Nevada, as in most other jurisdictions, the paramount consideration of the court in determining custody of a minor child is the best interest of the child.[49] Because the best interest standard is rather broad and undefined, many State legislatures have enacted specific statutory guidance to assist courts when applying the standard - and Nevada is no exception.[50] For example, the Nevada Legislature has adopted several statutory factors that courts must consider when determining custody, including, but not limited to:

l. Which parent is more likely to allow the child to have frequent associations and a continuing relationship with the non-custodial parent;

2. The wishes of a child of sufficient age and capacity; and

3. Whether either parent has engaged in an act of domestic violence against the child, a parent of the child, or any other person residing with the child.[51]

Of course, these are not the only factors or circumstances a court can consider when applying the best interest test; they have simply been identified by the Legislature, among other factors, as those matters courts must consider. The Legislature also mandates that preference may not be given to either parent based solely on his or her gender.[52] Also in furtherance of Nevada's Stated policy in favor of equal sharing of parental rights and responsibilities, NRS 125.490(1) establishes a presumption that joint custody would be in the best interest of a child if the parents have agreed to such an arrangement. In those instances where a court does not award the parents joint custody of

[49] NRS 125.480(1).

[50] *See* NRS 125.480(4).

[51] NRS 125.480(4)(a).

[52] NRS 125.480(2).

a child after either parent has applied for joint custody, the court is required by statute to state in its decision the reason for its denial of the parent's application.[53]

Due to growing concern over child and spousal abuse, the Nevada Legislature has adopted statutes and court rules expressly requiring courts in Nevada to consider child or spousal abuse in custody cases.[54] For example, NRS 125C.230 establishes a rebuttable presumption that sole or joint custody of a child by a parent who is found to have engaged in domestic violence against the child, or the other parent of the child, is not in the best interest of the minor child. Similarly, NRS 125C.220 establishes a rebuttable presumption that sole or joint custody of a child by a parent who is convicted for murder of the first degree of the other of parent the child is not in the best interest of the minor child. Additionally, all divorce decrees are required to set out on their face a warning to parents regarding possible criminal sanctions for violation of a custody order. NRS 125.510(6) requires that all custody orders contain the following clause:

PENALTY FOR VIOLATION OF ORDER: THE ABDUCTION, CONCEALMENT OR DETENTION OF A CHILD IN VIOLATION OF THIS ORDER IS PUNISHABLE AS A CATEGORY D FELONY AS PROVIDED IN NRS 193.130. NRS 200.359 provides that every person having a limited right of custody to a child or any parent having no right of custody to the child who willfully detains, conceals or removes the child from a parent, guardian or other person having lawful custody or a right of visitation of the child in violation of an order of this court, or removes the child from the jurisdiction of the court without the consent of either the court or all persons who have the right to custody or visitation is subject to being punished for a category D felony as provided in NRS 193.130.

In line with virtually all other jurisdictions, the Nevada Supreme Court has held that when deciding issues pertaining to the custody of children, the court's paramount consideration should always be the welfare of the child.[55] Furthermore, the Nevada Supreme Court has acknowledged that the foundation of all custody determinations lies in the particular facts and circumstances of each case.[56] In Nevada, trial courts enjoy broad discretionary powers in determining questions of child custody, and the Nevada Supreme Court will not disturb the trial court's determination absent a clear abuse of discretion.[57] It is even presumed on appeal that a trial court has properly exercised its judicial discretion in determining the best interests of the children.[58] However, the appellate court must be

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[53] NRS 125.480(3)(a).

[54] *See* NRS §§ 125.480(4)(j)-(k), 125.480(5)-(7), 125C.220, 125C.230.

[55] *Culbertson v. Culbertson*, 91 Nev. 230, 533 P.2d 768 (1975).

[56] *Arnold v. Arnold*, 95 Nev. 951, 604 P.2d 109 (1979).

[57] *Primm v. Lopes*, 109 Nev. 502, 853 P.2d 103 (1993).

[58] *Howe v. Howe*, 87 Nev. 595,491 P.2d 38 (1971).

satisfied that the trial court's determination was made for appropriate reasons.[59] For example, in *Sims*, the Nevada Supreme Court determined that the lower court abused its discretion in denying a mother custody of her daughter as a result of the mother's failure to abide by a questionable and seemingly absurd order of the trial court.

Because the welfare of the child should be of paramount importance in matters relating to custody of children, the Nevada Supreme Court has often stated that custody may not be denied or changed as a means to punish a parent.[60] However, in *Mosley v. Figliuzzi*,[61] the Nevada Supreme Court addressed at length, Nevada's stated policy in favor of joint legal custody and frequent associations between child and both parents.[62]

In *Mosley*, the Nevada Supreme Court emphasized the importance of the cooperation factor in custody determinations, but the court rejected the notion that a father should be denied custody because of the constant quarreling of the parents and their inability to get along and cooperate. The court did note that such behavior is not irrelevant to the decision when it adversely affects the child; however, the important factor for courts to consider is which parent will allow the child to have frequent associations and a continuing relationship with the other parent.[63] The court further reasoned that rewarding a parent for his or her intransigence by awarding that parent sole custody would simply encourage such inappropriate conduct.

Generally, courts faced with a child custody dispute will consider any relevant factor or circumstances that may impact the child's welfare. Litigants, however, should focus on evidence that is relevant to the current situation rather than on matters pertaining to past misdeeds that are of questionable relevance to the custody determination. Courts will only consider parental conduct or misconduct that directly impacts the child or upon the parent-child relationship.

Custody is not awarded to punish one party or to reward another for past conduct. Furthermore, custody proceedings should not be treated as a forum to "personally attack" the other side for the sole purpose of disparaging his or her character. As a practitioner, it is important to explain the ground rules to your client and be sure that he or she understands that the child's welfare is at issue, not winning or losing.

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[59] *Sims v. Sims*, 109 Nev. 1146,865 P.2d 328 (1993).

[60] *Dagher v. Dagher*, 103 Nev. 26, 731 P.2d 1329 (1987); *Sims*, 109 Nev. at 1149,330 ("[A] court may not use changes of custody as a sword to punish parental misconduct; disobedience of court orders is punishable in other ways.").

[61] *Mosley v. Figliuzzi*, 113 Nev. 51, 930 P.2d 1110 (1997).

[62] *See* also NRS 125.460.

[63] *See* NRS 125.480(4)(c).

Although there are no Nevada cases or statutes addressing this issue, the historical primary caretaker usually has an advantage in gaining custody. As a practical matter, where both parents are fit, courts tend to give preference to the parent who has been most involved in the child's day-to-day activities, based on the parent's demonstrated commitment to caring for the child. Therefore, the parent with de facto custody usually has an edge.

On the other hand, several judges have announced a policy of starting custody determinations from a presumption of joint, equally shared custody, treating the divorce as a bright line where parties who have had any substantial involvement with their child share physical custody equally until one of them establishes a lack of willingness or ability to do so. In any event, a practitioner should not allow clients to subject the child to a literal tug-of-war prior to the first custody hearing. Instead, encourage clients to address custody matters or disputes promptly, so that these issues are not left unresolved, as that will only lead to further problems.

Given the fact that many families today consist of two wage-earning spouses, as a practical matter, courts will carefully examine the competing schedules of the parties to determine which parent will have more time to spend with the child following a divorce. In these cases, courts tend to avoid awarding custody to either parent over the other, but instead strive to fashion a co-parenting schedule that serves everyone's needs to the degree possible. On the other hand, if one parent works and the other stays home, the at-home parent tends to have an advantage. However, do not ignore the amount of time a parent may devote to other activities that take him or her away from the child, such as a side business or hobby. Be sure to explain to your clients the benefits of remaining cooperative in all matters affecting custody of children.

Because children seem to function better when they have continuing access to both parents, there is both statutory and case law authority for awarding custody to the parent that is more willing and able to cooperate and encourage the child's relationship with the other parent. Courts tend to disfavor parents who consistently violate the terms of a set visitation schedule or who refuse to exchange information pertaining to the children's health, schooling, or extracurricular activities. Most judges are concerned about preventing the issue of custody from being used in an abusive way, for example, as a coercive weapon to affect the level of support payments or the outcome of other financial issues in the underlying divorce proceeding. Be sure that your client's motives are honorable before undertaking representation of a litigant vying for custody of a child. Furthermore, in Clark County, keep in mind EDCR 5.81, which requires that all custody and visitation disputes be "submitted to the judge prior to the setting of a trial date" regarding financial issues. It is common knowledge that the wishes or desires of a child can be relevant to a custody proceeding assuming the child is of suitable age and maturity. In fact, NRS 125.480(4)(a) requires that courts consider the wishes of a child of sufficient age and capacity.

Unfortunately, the phrase "of sufficient age and capacity" has never been defined in Nevada, either through case law or statutes. As such, there is no magical age in Nevada at which a child's wishes become relevant. Obviously, the older the child becomes, the greater the weight that should be given to his or her custody preference. However, even though the child's wishes are a factor that must be

considered by the court, they do not necessarily need to be given considerable weight when the evidence indicates that what he or she desires is not in the child's best interest.

If the child's preferences may be an issue, be sure to request that the judge interview the child or that the judge appoint a qualified counselor or psychologist to meet with the child and report back to the court.

Furthermore, evaluations of the child and/or the custody issues by social workers, psychologists, and psychiatrists are increasingly utilized in hotly-contested custody cases, particularly when one or both of the parents' fitness is challenged. A court-ordered investigation theoretically has the advantage of being a relatively neutral investigation, and avoids the added expense of both sides having to retain their own experts. If a court-ordered investigation is mandated, attorneys should obtain copies of the reports and investigate the qualifications of the investigator, the depth of the investigation (i.e. were all parties interviewed and was all relevant, available information considered?), the techniques used, whether the child was interviewed, and the conclusions reached. Even if the report is favorable, the attorney should still make such inquiries for purposes of substantiating the report. EDCR 5.13, mandates that such reports remain confidential, and places restrictions on an attorney's use and dissemination of such reports.

VII. VISITATION RIGHTS OF THE NON-CUSTODIAL PARENT AND OTHERS

A. Visitation With Non-Custodial Parent

Courts have the authority to award custody and to set visitation in the child's best interest. One parent may be designated as the child's primary custodian, with the other parent awarded reasonable rights of visitation. Because of the importance placed on maintaining the child's relationship with the non-custodial parent, there are several statutes and court rules in Nevada affecting visitation.

For example, pursuant to NRS 125C.010, any order issued by a Nevada court awarding visitation rights must define those rights with sufficient particularity to ensure that they can be properly enforced. Furthermore, in an effort to safeguard those visitation rights, Nevada courts may award compensatory visitation time to a non-custodial parent who has been wrongfully deprived of his or her visitation with a child, as long as the compensatory visitation is of the same type and duration as the missed visitation, and certain statutory notice requirements are satisfied. NRS 125C.020.

Disputes over visitation rights are usually factually driven. In fact, there are only a few cases in Nevada focusing specifically on visitation (as opposed to considering it in the context of determining custody), except in the relocation cases, which are addressed separately.

In *Hern v. Erhardt*,[64] the Nevada Supreme Court rejected a mother's claim that the lower court's order regarding visitation was excessive. In doing so, the Court acknowledged that with respect to visitation, each case must be decided according to its own merits, rejecting the notion that in all cases a one-month visitation period is sufficient to maintain the bond between a child and the non-custodial parent.[65] The Court also took the opportunity to address NRS 125C.010 (formerly NRS 125A.290), and concluded that the trial court's order had defined the non-custodial parent's right of visitation with "sufficient particularity" where the order: (1) awarded the father visitation the first week of Christmas vacation in odd numbered years, the second week of Christmas vacation in even numbered years, during Easter vacation and from June 16, each year until the end of summer vacation; (2) specified the days visitation was to begin and manner in which travel arrangements were to be made; and (3) indicated that during summer vacation, the mother would have visitation on every fifth weekend.

In *Wallace v. Wallace*,[66] the Nevada Supreme Court found that the lower court had imposed a visitation schedule without adequate notice or hearing, holding that a visitation decision is a "custody determination." The Court held that the order below went beyond the issues that had been noticed to the mother as being before the lower court; she had no notice that the court would be considering visitation across thousands of miles, and therefore no opportunity to present evidence on that issue; this was error, since under *Wiese v. Granata*,[67] a party threatened with a loss of parental rights must be given an opportunity to disprove evidence presented, and under *Moser v. Moser*,[68] litigants have a right to a full and fair hearing, and findings supporting a change of custody award must be supported by factual evidence. This case therefore extended the change-of-custody cases (*see Murphy v. Murphy*[69]) to apparently encompass all changes to visitation, which must now pass due-process muster to stand.

For the same reasons, the Court held that notice in the moving papers that the non-custodian seeks to alter visitation is not sufficient to permit the Court to effect a change of custody at the resulting hearing. *Wiese v. Granata*,[70] (vacating order changing custody because father did not receive notice that the issue of child custody was before the district court, and he therefore did not receive a full and fair hearing, among other reasons).

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[64] *Hern v. Erhardt*, 113 Nev. 1330, 948 P.2d 1195 (1997).

[65] *Id.* at 1337.

[66] *Wallace v. Wallace*, 112 Nev. 1015, 922 P.2d 541 (1996).

[67] *Wiese v. Granata*, 110 Nev. 1410, 1413, 887 P.2d 744, 746 (1994).

[68] *Moser v. Moser*, 108 Nev. 572, 576-77, 836 P.2d 63, 66 (1992).

[69] *Murphy v. Murphy*, 84 Nev. 710, 447 P.2d 664 (1968).

[70] *Supra*.

Generally, courts refuse to let a parent use support as a tool to secure visitation, as provisions for support and visitation are generally to be regarded as independent. For example, in *Westgate v. Westgate*,[71] the Nevada Supreme Court held that the custodial parent's failure to provide visitation to the non-custodial parent may not be relied upon as a reason to reduce child support.[72] *But see Noble v. Noble*,[73] (a case which predated modern child support guidelines) (validating the traditional practice of reducing child support as a means to punish the custodial parent for refusing visitation) and *Chesler v. Chesler*,[74] (denying father the ability to transport the child away from Las Vegas for visitation until he was current in all child support payments).

Parents should be encouraged to arrive at a visitation schedule on their own, or with the assistance of their counsel, or a mediator. Even with a detailed parenting plan in place, unforeseen circumstances will undoubtedly arise that require the parties to communicate and cooperate with respect to the visitation schedule. Parents who were successful in negotiating the underlying visitation schedule on their own are far more likely to be successful in resolving their differences in the future. Therefore, a successful mediation experience at the beginning of a divorce case sets a very good precedent for the parties as to how they can and should resolve subsequent problems.

For the child's benefit, regular and generous visitation should be allowed in most circumstances. Generic awards of "reasonable visitation" or visitation "at such times and places as mutually agreed upon by the parties" are expressly prohibited by the current version of the statutes. The change came from the conclusion that such general terms, while attractive for litigants trying to avoid conflict at the time of divorce, and attorneys trying to conclude cases as quickly as possible, generally led to further litigation due to the potential for conflict based on opposing expectations or interpretations. It is commonly presumed that the statutory requirements of NRS 125C.010 regarding specificity in the description of visitation rights also applies to holiday visitation and sharing of special occasions.

Under the current trend of cases (and following the adoption of Nevada's modern child support guidelines), judges are prohibited from allowing a custodial parent to withhold visitation as a means to collect child support, as issues pertaining to visitation and child support are to be regarded as independent. Moreover, due to the emphasis placed on allowing the child frequent and continuing access to both parents, courts tend to deal harshly with parents who repeatedly interfere with the visitation rights of the non-custodial parent.

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[71] *Westgate v. Westgate*, 110 Nev. 1377, 887 P.2d 737 (1994).

[72] *Id*. at 1380.

[73] *Noble v. Noble*, 86 Nev. 459, 470 P.2d 430 (1970).

[74] *Chesler v. Chesler*, 87 Nev. 335, 486 P.2d 1198 (1971).

B. Visitation With Non-Parents

In addition to the statutes referenced above, Nevada has also adopted several statutes governing the rights of certain relatives and other non-parents to obtain visitation with a minor child.[75]

With respect to grandparent and great-grandparent visitation, NRS 125C.050(1) provides that if a parent of an unmarried minor child is either (a) deceased, (b) divorced or separated from the parent who has custody of the child, (c) has never been legally married to the other parent, and the other is now deceased or separated, or (d) has relinquished his parental rights or such rights have been terminated, the court may grant to the grandparents and great-grandparents of the child and to other children of either parent of the child a reasonable right to visit the child during his minority.

NRS 125C.050(2) provides that if the child has resided with a person with whom he has established a meaningful relationship, the court also may grant to that person a reasonable right to visit the child, regardless of whether the person is related to the child.

A party may seek rights of reasonable visitation only if a parent has "denied or unreasonably restricted" visits with the child.[76] Even in that case, there is a rebuttable presumption that granting the visitation rights sought is not in the best interest of the child, which presumption may be overcome only by proof by clear and convincing evidence that such visits would be in the child's best interest.[77]

NRS 125C.050 goes on to state that in determining whether to actually grant visitation rights to a petitioner pursuant to subsection 1 or 2, the court shall consider such factors as: (a) the love, affection and other emotional ties existing between the party seeking visitation and the child; (b) the capacity and disposition of the party seeking visitation to give the child love and affection (including the ability of the person seeking visitation to serve as a role model, cooperate in providing food, clothing, and other material needs during visitation, and cooperate in providing health care or alternative care); (c) the prior relationship between the child and the party seeking visitation; (d) the moral fitness of the party seeking visitation; (e) the mental and physical health of the party seeking visitation; (f) the reasonable preference of the child if of suitable maturity; (g) the willingness and ability of the party seeking visitation to facilitate and encourage a close and continuing relationship between the child and other relatives; (h) the medical and other needs of the child as affected by the visitation; (i) the support provided by the party seeking visitation, including financial support; and (j) any other factor arising solely from the facts and circumstances of the particular dispute.[78]

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[75] *See* NRS 125C.050(1).

[76] *See* NRS 125C.050(3).

[77] *See* NRS 125C.050(4)-(5).

[78] *See* NRS 125C.050(6).

If the parental rights of either or both parents have been relinquished or terminated, the same list of factors is to be considered by a court in determining whether to grant visitation, but the standard of proof drops to a preponderance of the evidence.[79] The petition for visitation must have been filed before the date on which the parental rights are relinquished or terminated, for the court to have jurisdiction.[80]

The Nevada Supreme Court has steadfastly protected the parental preference presumption established by statute, making it extremely difficult for third parties to bypass the presumption.[81]

In *Litz v. Bennum*, a teenage mother while in police custody for a parole violation designated her parents as temporary guardians of her one year old child. She consented to the guardianship in order to prevent her child from being placed in foster care. Four years after her release from prison, the mother re-married, stabilized her life, and petitioned the court to dissolve the guardianship. The district court acknowledged the parental preference doctrine, but held that it was just one of many factors to consider, the most important being the best interest of the child. The court awarded primary physical custody of the child to the grandparents, and awarded the mother reasonable visitation rights.

The Nevada Supreme Court reversed the lower court's decision on appeal, stating that "because [the mother] is a fit parent and has continually played an active role in the [child's] life, the fact that the [grandparents] have had custody of [the child] for an extended time does not amount to an extraordinary circumstance that could overcome the parental preference doctrine."[82] The Court reversed the award of primary physical custody to the grandparents, but acknowledged that the grandparents have dedicated their lives to the well-being of the child and should be awarded liberal visitation rights.[83]

Similarly, in *Locklin v. Duka*,[84] the Nevada Supreme Court found an insufficient basis to overcome the parental preference presumption. The facts in *Locklin* involved a young mother who cared for her newborn child for approximately one year until her life began to deteriorate. She began using drugs and eventually took the child to live with her grandparents. The grandparents petitioned for guardianship in 1988. The mother did not object to the guardianship due to the fact that she was addicted to drugs and not capable of properly caring for her child at the time.

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[79] *See* NRS 125C.050(7).

[80] *Id*.

[81] *See Litz v. Bennum*, 111 Nev. 35, 888 P.2d 438 (1995); *Locklin v. Duka*, 112 Nev. 1489, 929 P.2d 930 (1996).

[82] *Id.* at 38.

[83] *Id.*

[84] *Locklin v. Duka*, 112 Nev. 1489, 929 P.2d 930 (1996).

The mother later moved to Chicago and married. In 1993, she returned to Las Vegas to be close to the child, and visited frequently. However, relations between the mother and the grandparents eventually deteriorated. In 1995, the mother petitioned to dissolve the guardianship established back in 1988. Following a hearing, the trial court determined that the mother (1) exhibited concern for the child over the years; (2) had never showed any intent to abandon her daughter; (3) had consistently been involved with the child since overcoming her habit; and (4) realistically took considerable time to create a relationship with her daughter and did not selfishly seek her own interests. The court found the mother to be a fit parent, and that sporadic contact with the child for approximately four years was not a sufficiently inordinate circumstance to overcome the parental presumption set forth in NRS 125.500(1). The district court awarded custody to the mother and visitation to the grandparents.

On appeal, the Nevada Supreme Court took the opportunity to interpret the statutory language contained in NRS 125.500(1). Specifically, the Court provided further guidance concerning the factors Nevada trial courts should evaluate in determining what circumstances are sufficiently "extraordinary" to overcome the parental preference presumption as those which result in serious detriment to the child.[85] The Court noted that "extraordinary circumstances" sufficient to overcome the parental preference are those which result in serious detriment to the child. The Court then listed a host of factors, any one of which or combination of which may be sufficient to establish extraordinary circumstances, including but not limited to the following:

> Abandonment or persistent neglect of the child by the parent; the likelihood of serious physical or emotional harm to the child if placed in the parent's custody; extended, unjustifiable absence of parental custody; continuing neglect or abdication of parental responsibilities; provision of the child's physical, emotional and other needs by persons other than the parent over a significant period of time; the existence of a bonded relationship between the child and the non-parent custodian sufficient to cause significant emotional harm to the child in the event of a change in custody; the age of the child during the period when his or her care is provided by a non-parent; the child's well-being has been substantially enhanced under the care of the non-parent; the extent of the parent's delay in seeking to acquire custody of the child; the demonstrated quality of the parent's commitment to raising the child; the likely degree of stability and security in the child's future with the parent; the extent to which the child's right to an education would be impaired while in the custody of the parent; and any other circumstances that would substantially and adversely impact the welfare of the child.[86]

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[85] *Id*. at 1495.

[86] *Id.* at 1496.

Ultimately, the Supreme Court affirmed the lower court's order terminating the guardianship on the basis that the circumstances of the case were not sufficiently extraordinary to overcome the parental preference presumption.

In much the same way that it has applied and interpreted NRS 125.500, the Nevada Supreme Court has applied the grandparent and other non-parent visitation statutes scrupulously.[87]

In *Steward*, the Nevada Supreme Court determined that visitation between grandparents and grandchild was not shown to be in the best interest of the child where: (1) a strong emotional tie did not exist between child and grandparents; (2) the grandparents were unable to care for the child properly; (3) the grandmother's mental stability and moral character were not exemplary; (4) allowing such visitation would have exposed the child to conflict between members of the family; and (5) the visitation would not have facilitated a close relationship between child and his parents.

Similarly, in *Wallace*, the Nevada Supreme Court reversed an award of non-parent visitation rights where the lower court failed to consider all of the factors set forth in NRS 125C.050(1) before allowing the visitation to proceed. The Court remanded the case for a proper consideration of all factors identified in the statute.

However, the parental preference only applies in the original determination; once a grandparent has custody, or visitation rights, the preference may not be used in subsequent litigation to remove the access previously granted.

In *Hudson*,[88] the grandmother was awarded custody of minor child after the mother was killed in a drive-by shooting, and the father was adjudicated unfit, overcoming the parental preference.

Ten years later, the father moved to modify custody, requesting sole legal and physical custody, and claiming that he had turned his life around was living a productive, law-abiding lifestyle. The district court interviewed the minor, who expressed a desire to live with her father, and granted the custody change, finding that it was bound to do so under the parental preference.

The Supreme Court reversed, holding that when a non-parent is granted joint legal and primary physical custody of a child, the parental preference doctrine does not apply in any later modification motion, but instead the same rules that would apply to such a motion between parents govern the outcome.

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[87] *See Steward v. Steward*, 111 Nev. 295, 890 P.2d 777 (1995); *Wallace v. Wallace*, 112 Nev. 1015, 922 P.2d 541 (1996).

[88] *Hudson v. Jones*, 122 Nev. 708, 138 P.3d 429 (2006).

Similarly, in *Rennels*,[89] a child lived with the father and his mother for five months. The father and child then moved to Texas, but the child visited with the grandmother. When the father returned to Las Vegas, he remarried to a woman who adopted the child.

The father subsequently restricted contact between child and grandmother, who filed for nonparental visitation pursuant to NRS 125C.050. The parties settled; their stipulation detailed visitation schedule for the child.

In later litigation, the father tried to terminate the grandmother's contact under *Troxel*,[90] and the district court terminated the grandmother's visitation rights.

The Supreme Court reversed, finding that the earlier stipulated visitation order was a final decree entitled to res judicata protections. Expanding the holding of *Hudson*,, the Court held that while the parental presumption applies at the time of the court's initial determination of a nonparent's visitation rights, when a parent seeks to modify or terminate the judicially approved visitation rights of a nonparent, the parental presumption is no longer controlling, and the proper legal test is under *Ellis*.[91]

Finding that the district court had not articulated any such substantial change in circumstances, the Court reversed.

Custody and visitation disputes involving relatives and other non-parents can be extremely emotionally charged. The interplay (and often times conflict) between the best interest standard and a parent's constitutionally protected right to establish a home and raise his or her children has resulted in considerable litigation. Furthermore, these types of cases often involve intra-family conflict, which tends to only exacerbate the issues at hand.

In many ways, the fundamentals of representing a litigant involved in a custody or visitation dispute with relatives and other third parties is like any other custody or visitation proceeding. Practitioners should pay special attention to the specific statutes and case law pertaining to these issues. In light of federal cases challenging the validity of grandparental visitation and custody statutes elsewhere, this is an area likely to have significant future developments.

VIII. UNIFORM CHILD ABDUCTION PREVENTION ACT (UCAPA)

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[89] *Rennels v. Rennels*, 127 Nev. ___, 257 P.3d 396 (Adv. Op. No. 49 Aug 4, 2011).

[90] *Troxel v. Granville*, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000).

[91] *Ellis v. Carucci*, 123 Nev. 145, 150, 161 P.3d 239, 242 (2007) (modification or termination of such visitation rights is only warranted upon a showing of a substantial change in circumstances that affects a child's welfare such that it is in the child's best interest to modify the existing visitation arrangement).

Parental and family abduction of children is a serious problem in the United States today, involving every aspect of the legal system at both the State and federal level, and both the civil courts and the criminal justice system.

The U.S. Department of Justice (Office of Juvenile Justice and Delinquency Prevention) defines family abduction as the "taking or keeping of a child by a family member in violation of a custody order, a decree, or other legitimate custodial rights, where the taking or keeping involved some element of concealment, flight, or intent to deprive a lawful custodian indefinitely of custodial privileges."

Over 200,000 abductions occur each year in the United States, 78% of which are perpetrated by family members. Over 1,000 of those violations are international in nature – where a parent takes a child from the United States to another country.

Once a court makes a child custody determination, the government is involved in where that child lives. Many parents are mistaken as to the consequences of removing a child from the jurisdiction that entered the order. Some parents apparently believe it to be acceptable to remove a child without the consent of the other parent or the appropriate court. That belief can have disastrous consequences for both the child and the abducting parent under State and federal law.

A. Civil Responses and Remedies

It is important to realize that just leaving the State does not deprive the divorce court of jurisdiction. Through the previously discussed UCCJEA, the court in Nevada generally retains jurisdiction so long as either party remains here, even if the child and the other party leave the State. The rules can be complex.

In addition to regular custody or visitation motions in family court, there are pre-emptive orders that can be sought through the Uniform Child Abduction Prevention Act ("UCAPA"). Nevada was the second State to adopt the Act, in 2007, to curtail the threat of child abduction.

The Act, codified in NRS 125D, allows Nevada courts to issue "abduction prevention orders" after they have reviewed a standardized list of factors determined to predict the likelihood of abduction. The list of factors courts consider include whether a party has previously abducted the child, or has threatened to abduct the child; has engaged in domestic violence; has refused to follow a custody order; or has strong family or cultural ties to another State or country.

NRS 125D allows the courts of Nevada to prevent the imminent abduction of a child by issuing a warrant to take physical custody of the child pursuant to NRS 125D.200 or directing law

enforcement to take any action reasonably necessary to locate the child and order return of the child.[92] The court may also grant "any other relief allowed under the law" to prevent an abduction.

An abduction prevention order can remain in effect until the child becomes emancipated or turns 18 years of age. This lengthy protection can help ensure that the subject child is never the victim of an unlawful abduction.

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.[93]

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.[94]

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.

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[92] At a recent Bench Bar Meeting, the Nevada Attorney General made a point of stating that NRS125D.200 is one of the few statutes used in family law that can grant an enforceable pick-up order for an abducted or wrongfully held child. Practitioners need to be aware of this as the local Sheriff may refuse to assist in the pick-up of a child if the warrant is not issued under the correct statute.

[93] NRS 125D.160.

[94] Abduction is defined as "the wrongful removal or wrongful retention of a child." NRS 125D.030.

(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:

(a) The Hague Convention on the Civil Aspects of International Child Abduction is not in force between the United States and that country.

(b) Is non-compliant according to the most recent compliance report issued by the United States Department of State.

(c) Lacks legal mechanisms for immediately and effectively enforcing a return order pursuant to the Hague Convention on the Civil Aspects of International Child Abduction.

(3) Poses a risk that the child's physical or emotional health or safety would be endangered in the country because of specific circumstances relating to the child or because of human rights violations committed against children.

(4) Has laws or practices that would:

(a) Enable the Respondent, without due cause, to prevent the Petitioner from contacting the child.

(b) Restrict the Petitioner from freely traveling to or exiting from the country because of the Petitioner's gender, nationality, marital status or religion.

(c) Restrict the child's ability legally to leave the country after the child reaches the age of majority because of the child's gender, nationality or religion.

(5) Is included by the United States Department of State on a current list of state sponsors of terrorism.

(6) Does not have an official United States diplomatic presence in the country.

(7) Is engaged in active military action or war, including a civil war, to which the child may be exposed.

i. Is undergoing a change in immigration or citizenship status that would adversely affect the Respondent's ability to remain in the United States legally.

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.[95]

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.[96]

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."

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.

Since 1988, the United States has been a party to the Hague Convention on the Civil Aspects of International Child Abduction ("Hague Convention") in response to the problem of international child abductions during domestic disputes. It was codified into U.S. law by way of the International Child Abduction Remedies Act ("ICARA"). As an international treaty, the Hague Convention is on par with the U.S. Constitution, and supersedes any conflicting law.

The purpose of the Hague Convention is to ensure the "prompt return" of children who have been abducted across international lines to their habitual country of residence. The Convention seeks to

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[95] *See* NRS 125D.200.

[96] 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.

restore the status quo of living arrangements and deter parents from crossing international borders in search of a more sympathetic court.

The Convention does not give rise to custody proceedings; it simply permits the return of children to their habitual place of residence, where custody proceedings can then be held. Not all countries are parties to the Convention, and it only applies if both the country from which the child is taken, and to which the child is brought, are parties to the Convention.

A Hague case is filed in the place to which the child has been taken. So such a case is filed in Nevada when a child is abducted elsewhere and brought here. If a child abducted ***from*** Nevada and brought somewhere else, an application for return can be made to the United States Central Authority, which then forwards the application to the place to which the child was taken so a case can be filed there.

Hague cases are unusual in that federal and State courts have "co-extensive jurisdiction" – they may be heard either in Nevada State court, of federal court. In general, a Hague case should be filed in whichever court would hear the matter most quickly; often, this is federal court.

A court hearing a Hague case has authority to determine the merits of an abduction claim only, ***not*** the merits of an underlying custody claim. The court will determine only whether the removal or retention of the child in another country was "wrongful" under the Convention and, if so, order the return of the child unless the alleged abductor can establish one of a very few valid defenses.

The most important defenses are that the left-behind parent consented or acquiesced in the removal or retention, or that there is a "grave risk" of physical or psychological harm to the child if returned, or that a child of sufficient "age and degree of maturity" objects to being returned.

Marshal Willick wrote both summary and extended articles concerning the Hague Convention and internationally abducted children: International Kidnaping and the Hague Convention: A Short Introduction & International Kidnaping Response for Fun and Profit. He also designed two flowcharts on the legal test and procedural process of Hague cases: Hague Convention Legal Test Flow Chart & Hague Convention Procedural Steps. Mr. Willick's flowcharts have been adopted and posted by the National Center for Missing and Exploited Children. For attorneys, the posted materials on our Published Works page includes a forms set.

B. Criminal Responses and Remedies

In addition to steps litigants can take in the civil courts, parental or family abduction of children can lead to criminal prosecution.

In Nevada, the abduction, concealment, or detention of a child in violation of a court order regarding custody is punishable as a category D felony.[97] A category D felony is a serious offense for which the sentence is imprisonment for 1 to 4 years and/or a fine of up to $5,000. In most cases, however, prosecutors recommend lesser sanctions for a first offense. In either case, the abducting parent can be held responsible for any expenses incurred in locating and recovering the child. NRS 200.359(5). Such an abduction could be in-State, across State lines, or international.

Under U.S. law, international parental child abduction is a federal crime pursuant to 18 U.S.C. § 1204 (the "International Parental Kidnapping Act"). That statute makes it a federal crime to remove or retain a child in a foreign country with the intent to obstruct the lawful exercise of parental rights. Such an offense is punishable by fine and/or imprisonment for no more than 3 years.

WILLICK LAW GROUP has extensive experience handling child abduction cases and has represented many clients in such cases in both State and federal courts. We take seriously our responsibility to advise our clients regarding every available option under the law, and to represent our clients in these sensitive matters, always with an eye towards the welfare of the children involved.

IX. HAGUE CONVENTION BASICS

A. Framework of the Hague Convention

A proceeding seeking the return of a child from one signatory country to another is governed by the "The Convention on the Civil Aspects of International Child Abduction, done at the Hague on 25 Oct. 1980" [commonly referred to as "the Hague Convention"], and its implementing legislation, the International Child Abduction Remedies Act ("ICARA").[98] The United States of America has been a Contracting State under the Convention since July 1, 1988; there are at this time 52 contracting States.[99]

The Hague Convention addressed the increasing problem of international child abduction in the context of international law while respecting rights of custody and visitation under national law.[100] According to its Preamble, the Convention aims "to protect children internationally from the harmful

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[97] *See* NRS 125.510.

[98] 42 U.S.C. §§ 11601-11610.

[99] The list of participating countries is maintained at http://travel.state.gov/hague_list.html.

[100] Hague Convention, Art. 1., *Mozes v. Mozes*, 239 F.3d 1067, 1069-70 (9th Cir. 2001); *Shalit v. Coppe*, 182 F.3d 1124, 1127 (9th Cir. 1999).

effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence."[101]

As a treaty entered into by the United States, the Hague Convention is on par with the Constitution of the United States, and supersedes any conflicting statute, case, or rule. The objectives of the Convention are: under Article 1(a), to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and under Article 1(b), to ensure that the rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.[102]

Because the language of the Convention is somewhat conclusory, United States courts look to two sources of official commentary for guidance: (1) the Explanatory Report by Elisa Perez-Vera, the official Hague Conference reporter (the "Perez-Vera Report"); and (2) the Legal Analysis of the Hague Convention on the Civil Aspects of International Child Abduction ("Legal Analysis") found in the Federal Register.[103] As the Legal Analysis notes:

> [The Perez-Vera] explanatory report is recognized by the Conference as the official history and commentary on the Convention and is a source of background on the meaning of the provisions of the convention available to all States becoming parties to it.[104]

One of the paramount purposes of the Hague Convention is to "restore the status quo and deter parents from crossing international borders in search of a more sympathetic court."[105] The Convention sought to eliminate this motivation by allowing for the prompt return of abducted children.[106]

It can hardly be adequately stressed that the Convention does ***not*** give rise to custody proceedings; as explained in greater detail below, it is 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,

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[101] Hague Convention, Preamble, T.I.A.S. No. 11670 at 4.

[102] Hague Convention, Art. 1; *see also In re Prevot*, 59 F.3d 556, 558 (6th Cir. 1995).

[103] 51 Fed. Reg. 10503 (Mar. 26, 1986).

[104] *Id*.

[105] *See Nunez-Escudero v. Tice-Menley*, 58 F.3d 374, 376 (8th Cir. 1995); *Friedrich v. Friedrich*, 983 F.2d 1396, 1400 (6th Cir. 1993) (*Friedrich I*); *see also Mozes*, *supra*, 239 F.3d at 1070.

[106] Hague Convention, Art. 2, *Mozes*, *supra*, 239 F.3d at 1070.

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.[107]

B. Jurisdictional Issues

Preliminary questions regarding whether a court can and will properly make a Hague Convention determination concern both choice of forum and the decision that is to be made.

1. Territorial Jurisdiction, Time Limits, and Age of the Child

The Hague Convention is not much concerned with the niceties of jurisdiction, but rather is deliberately expansive in scope, stating that a proceeding may be initiated in any State (meaning country) "to which the child has been removed or in which it has been retained."[108] It does not appear to make a difference ***why*** a child is within the territorial jurisdiction of a court, or for how long. If a court finds that a child has been "removed to" or "retained in" that territorial jurisdiction for ***any*** amount of time, a Hague Convention action may be filed there.

ICARA provides that a Hague Convention action may be filed in "any court which has jurisdiction of such action and which is authorized to exercise its jurisdiction in the place where the child is located at the time the petition is filed."[109] ICARA ***also***, however, defines "petitioner" as one who files a petition ***in court***, and times the "commencement of proceedings" as of the court filing, and not the application filed with a Central Authority, either in the other country or in the United States.[110]

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[107] 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.

[108] Hague Convention, Art. 16. Unfortunately, ICARA uses the word "state" inconsistently, in some sections using the word to refer to countries, as where it speaks of "state of habitual residence" in 42 U.S.C. § 11603(f)(1), but also defining the word "State" in 42 U.S.C. § 11602(8) as "any of the several States, the District of Columbia, and any commonwealth, territory, or possession of the United States."

[109] 42 U.S.C. § 11603(4)(b).

[110] 42 U.S.C. §§ 11602(4) & 11603(b)&(f)(3).

Where a child was located in one U.S. State at the moment that a petition for return of child was filed with the Central Authority of the State of a left-behind parent, but was relocated in a second U.S. State when a formal court action was filed, and a third U.S. State when that action was actually heard, the U.S. State where the child ***was*** at the time of the ***court filing*** technically continues to have jurisdiction to hear the case, even if no person involved has any significant connection to that jurisdiction.[111] Venue transfers in these cases seem to be handled somewhat *ad hoc*.

Proceedings must be "commenced" (by the filing of a court petition for return in the State where the child is located) within one year of the removal or retention, in order to fall within the Hague Convention provision requiring "the return of the child forthwith" if the requisite substantive findings are made.[112]

If a longer period has gone by, a court may still order the return of the child, ***unless*** the court determines that the child "is now settled in its new environment."[113] What this means, from a practical perspective, is that a defensive claim for the alleged abducting parent is available, or not, depending on the promptness with which the left-behind parent seeks relief and actually gets a case on file in a court.

The Convention, by its own terms, "ceases to apply" when the child attains the age of 16 years.[114] In keeping with normal rules of statutory construction, this time limit presumably goes to the ***initiation*** of proceedings, not the final order, so as not to provide any incentive for delay.

2. Either Federal or State Courts May Make the Hague Determination

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[111] ICARA is a little unclear about where a petition should be filed, stating that a Hague Convention action is commenced by filing "a petition for the relief sought in any court which has jurisdiction of such action and which is authorized to exercise its jurisdiction in the place where the child is located at the time the petition is filed." 42 U.S.C. § 11603(b). This creates two difficulties. First, a petition for return is often filed first, not in a court, but with the Central Authority of another country, then transferred to the American Central Authority, and ultimately turned over to private counsel for the filing of an action court filing. The children's physical location can easily change one or more times during that process, and their actual location can be uncertain when the time comes to file. Second, as a technical matter, an abductor getting wind of an impending Hague Convention filing could evade the law as phrased by the simple expedient of stepping over the State line with the children in the hours before it can be filed. Since the Convention encourages "all appropriate measures in order to obtain the voluntary return of the child" (Art. 10), it is common for the authorities to give notice of impending proceedings. In practice, some judges have implied a "or has been located" clause into § 11603(b), but the matter is awkward.

[112] Hague Convention, Art. 12; 42 U.S.C. § 11603(4)(f)(3).

[113] *Id*.

[114] Hague Convention, Article 4.

Under the terms of ICARA, both State and federal district courts have original and concurrent jurisdiction.[115] Neither court is entitled to a priority of jurisdiction.[116]

Hague Convention judgments by either State or federal courts ordering or denying a return of a child are afforded full faith and credit.[117] However, full faith and credit is only to be accorded a decision if a Hague Convention claim was actually adjudicated in the action in accordance with both the Hague Convention and ICARA.[118] Thus, a Hague determination should not be considered either precluded or implied from a State court custody decision.

A case may be removed from State court to federal court, and delay by the State court in making a determination is by itself considered a valid reason for removal.[119] Further, the federal abstention doctrine applicable to domestic relations generally does not apply to Hague Convention cases.[120]

3. Factors to Consider in Deciding Whether to File in Federal or State Court[121]

Under ICARA, the petitioner may choose the court in which to file a Hague Convention proceeding. It should be heard in ***any*** forum on an expedited calendar, but practical concerns could lead to different results in different places.

An important consideration in making this choice is the petitioner's belief as to which court would likely be able to hear the matter in the shortest period of time. Checking the dockets of the various potential courts can help determine which court can hear the matter soonest. It is also wise to

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[115] 42 U.S.C. § 11603.

[116] *See*, *e.g.*, *Lops v. Lops*, 140 F.3d 927, 943 (11th Cir. 1998).

[117] 42 U.S.C. § 11603(g); *Morton v. Morton*, 982 F. Supp. 675 (D. Neb. 1997) (full faith and credit accorded to a federal decision); *Burns v. Burns*, 1996 WL 71124, (E.D. Pa. 1996) (full faith and credit relating to a State decision).

[118] 42 U.S.C. § 11603(g); *Holder v. Holder*, 305 F.3d 854, 864 (9th Cir. 2002).

[119] 28 U.S.C. § 1441(a); *Lops v. Lops*, 140 F.3d 927, 943 (11th Cir. 1998).

[120] *Silverman v. Silverman*, 267 F.3d 788, 792 (8th Cir. 2001) (*Silverman I*).

[121] Adapted, with thanks, from discussion in Patricia M. Hoff, *Hague Child Abduction Convention Issue Briefs* (Obstacles to the Recovery and Return of Parentally Abducted Children Project, American Bar Association Center on Children and the Law, 1997).

investigate the manner in which Convention cases are heard. Federal courts, for instance, tend to treat Hague return petitions as petitions for writs of habeas corpus, a procedure designed to provide virtually immediate relief.

The most time consuming part of a Hague Petition is educating the court about the Convention, with an emphasis on the need for prompt judicial action. An important fact in determining choice of forum, therefore, may well be the familiarity of the various potential courts with prior Hague cases. To assist in educating a court new to the issues, counsel can request the U.S. Central Authority in the Department of State to send the court its form letter on the background, purpose and requirements of the Convention.

Federal courts have historically been reluctant to get involved with domestic cases and are less likely to treat a Hague Petition like a traditional custody case – a mistake often made by State courts accustomed to hearing divorce cases. The petitioner, or petitioner's counsel, might also have a belief that a potential forum has a bias – against petitioner, counsel, or even against giving Hague Convention cases proper and prompt consideration.

Another practical consideration in the petitioner's choice of venue is the expertise and experience of the petitioner's attorney in the various courts. If an attorney is not admitted to practice in federal court, taking the time to get admitted would probably not be beneficial.

In short, the following are beneficial questions to ask when deciding choice of venue:

1. Which court can hear the matter sooner?
2. Does either court have experience with Hague cases?
3. Is either the State or federal court more likely than the other to mistakenly treat the case as a substantive custody matter?
4. Is there any reason to believe that either the State or federal court has any bias against petitioner, counsel, or the proper decision of Hague Convention cases?
5. Is the attorney admitted, and have experience litigating, in federal court?

By asking the right questions ahead of time, savvy counsel can get a Hague Convention case heard – and in an appropriate case, get a child returned – far more quickly and efficiently than might otherwise be the case.

4. Only the Question of Return – Not Custody – Is to Be Determined

The Hague Convention analysis is ***not*** a determination of custody rights. Under Article 19 of the Hague Convention and 42 U.S.C. § 11601(b)(4), "a United States district court has authority to determine the merits of an abduction claim, but not the merits of the underlying custody claim."[122]

The essence of the inquiry by a court hearing a Hague Convention case is to determine ***ONLY*** whether the removal or retention of a child from another country was "wrongful."[123] If so, the court is to order the return of the child to that place for the court there to decide the merits of the custody dispute,[124] unless the alleged abductor can establish one of a few defenses.[125] As bluntly stated by the Ninth Circuit Court of Appeals: "The conclusion that a child has been wrongfully removed under the Convention obligates a court to order him returned to the country from which he was taken."[126]

However, as the Legal Analysis points out:

> The obligation to return an abducted child to the person entitled to custody arises only if the removal or the retention is wrongful within the meaning of the Convention.[127]

The question thus becomes whether one parent's act of removing or retaining the child is in breach of the other parent's rights of custody under the law of the State of the child's habitual residence.[128] This is not to say that a ***custody dispute*** between the parents is conducted under the law of the child's State of habitual residence – the law of the State of habitual residence "is taken into consideration only so as to establish the wrongful nature of the removal."[129]

The essential inquiry made in a Hague proceeding therefore splits into three questions: ***Where*** was the child's habitual residence? Did the parent who had the child in the other contracting State ***have*** a right of custody under the law of the State of the children's habitual residence, which was actually

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[122] *See*, *e.g.*, *Friedrich I*, *supra*, at 1400 (citing 42 U.S.C. § 1160(b)(4)).

[123] This substantive issue is explored in detail below.

[124] *See*, *e.g.*, *Ohlander v. Larson*, 114 F.3d 1531, 1534, 1541 (10th Cir. 1997), *cert. denied*, 118 S. Ct. 702 (1998); *Friedrich v. Friedrich*, 78 F.3d 1060, 1067 (6th Cir. 1996) ("Friedrich II").

[125] Of particular importance, the abductor may attempt to show that the child would suffer a "grave risk" of "physical or psychological harm" if the child was returned. Hague Convention, Art. 13(b), 42 U.S.C. § 11603(e)(2)(A); *See*, *e.g.*, *Ohlander v. Larson*, 114 F.3d 1531, 1534, 1541 (10th Cir. 1997), *cert. denied*, 118 S. Ct. 702 (1998); *Friedrich v. Friedrich*, 78 F.3d 1060, 1067 (6th Cir. 1996) ("Friedrich II").

[126] *Gonzalez v. Gutierrez*, ___ P.3d ___ (No. 02-55079, 9th Cir., Nov. 20, 2002).

[127] 51 Fed. Reg. at 10506.

[128] *See* Hague Convention, Art. 3, T.I.A.S. No. 11,670 at 4; *Friedrich I*, 983 F.2d at 1400

[129] Perez-Vera Report at ¶ 36.

being exercised (or would have been but for the removal or retention)? If so, did the removing or retaining parent's actions ***violate*** those rights?

If the child's habitual residence is in another State, and the child was removed, or retained, from that State in violation of a right of custody of the left-behind parent, the child is to be returned to the other country forthwith.[130] A federal or State court has jurisdiction under the Hague Convention to make a determination regarding return if proceedings filed in that court attempt to resolve the above issues (required for a Hague Convention determination), as to children found within the territorial jurisdiction of that court when the action is filed. It is to the specific questions "to be resolved" that this examination now turns.

C. Substantive Issues

1. The Child's Habitual Residence at the Time of Removal or Retention

The term "habitual residence" is not specifically defined in either the Hague Convention or ICARA; the Perez-Vera Report makes it clear that this omission was deliberate, for the purpose of requiring courts to treat the issue as "a question of pure fact, differing in that respect from domicile."[131] As discussed below, however, some American courts have come to the opposite conclusion, despite the deference accorded to the Perez-Vera report, and have decided that the question is one of law, or at least a mixed question of law and fact.

In many cases, children of divorce spend at least some time with each parent, even when those parents live in different countries. Hague cases often arise during actual or purported visits or "trial periods" in the country of the alleged abducting parent. It is important for counsel to fully explore who lived where, when, and for what reason, as the reviewing court will want to know the details of the decision leading up to travel from one country to another, and then what happened once the child was there.[132]

A handful of decisions illustrate the importance of determining the child's "habitual residence" to the outcome of these cases. In *Feder v. Feder*,[133] Mr. Feder had convinced Mrs. Feder to come to Australia with their son, Evan. They remained in Australia for six months, during which Mr. Feder was gainfully employed, and changed his driver's license. The couple obtained housing, and

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[130] *See Vaile v. District Court*, 118 Nev. ___, 44 P.3d 506 (Adv. Opn. No. 27, Apr. 11, 2002).

[131] Perez-Vera Report at ¶ 66.

[132] *See Toren v. Toren*, 26 F. Supp. 2d 240, 243 (D. Mass. 1998) (habitual residence was in United States with mother, regardless of fact that parents had agreed that children would return to Israel on a date certain and that United States was not intended to be the children's "permanent residence").

[133] 63 F.3d 217 (3d Cir. 1995).

enrolled their child in school. After six months, Mrs. Feder decided she was unhappy in Australia, and together with Evan, returned to the United States of America without Mr. Feder's consent.

The court scrutinized the case law and held that "there is no real distinction between ordinary residence and habitual residence." The court declared the minor's habitual residence at the time of the removal to be the place where he had been living with both of his parents and attending school for the previous six months, finding that six months is "a significant period of time for a four-year old child." The court specifically adopted a ***child-centered*** view of habitual residence. Specifically, the court said that habitual residence is determined by looking back in time, and determining the place, at the moment of removal, where the child had been physically present for a sufficient amount of time to show a settled purpose to be, focusing on the child's circumstances. Where the child was in school, a home had been purchased, and the parents were working, the court considered that the test was easily met.

The *Feder* court recognized that the mother went to Australia reluctantly, but found that she consented to the move, and was not coerced. The court found that Mrs. Feder had a "settled purpose" to remain in Australia and that, therefore, Evan was settled: "That Mrs. Feder did not intend to remain in Australia permanently and believed that she would leave if her marriage did not improve does not void the couple's settled purpose to live as a family in the place where Mr. Feder had found work."[134] Australia was found to be Evan's habitual residence, and therefore was the proper jurisdiction to determine the parties' conflicting claims for custody.

Other courts have expanded upon the analysis in *Feder*. In *Mozes*, *supra*, the mother had relocated to the United States in 1997 with the children, and a year later filed for divorce. It was then that the father filed a Hague Convention petition for return; despite the passage of time, the appellate court remanded the question of whether the children's habitual residence had been changed to the United States to the district court.[135]

In *Silverman II*,[136] however, a deeply-divided Eighth Circuit held that the determination of "habitual residence" was not strictly a factual inquiry, but a "conclusion of law or at least a determination of a mixed question of law and fact," altering the review on appeal from determination of "clear error" to a *de novo* review.[137]

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[134] *Id*. at 224.

[135] *Id*., 239 F.3d at 1075-76.

[136] *Silverman v. Silverman*, 338 F.3d 886 (8th Cir. 2003) (*Silverman II*), *reversing on rehearing* 312 F.3d 914 (8th Cir. 2002).

[137] *Id*., citing *Mozes*, *supra*, 239 F.3d at 1073, and quoting from *Feder*, *supra*, 63 F.3d at 222 n.9. This holding indicates a split of authority, with the majority of the Eighth Circuit claiming that it was aligned with the Third and Ninth Circuits, despite the language in the Perez-Vera Report. The dissent, however, claimed that majority mis-read the position of the Ninth Circuit, and was in direct opposition to clear holdings from the First and Second Circuits, which require a finding of "clear error" to overturn a lower court decision as to habitual residence. *See Silverman II*, *supra*,

Feder characterized the habitual residence inquiry as a search for an indication of a "settled purpose" to relocate, not necessarily "forever," but at least that the family must have a "sufficient degree of continuity to be properly described as settled."[138] The courts seem to be in agreement that such a "settled purpose" cannot be found when the intention of one of the parties to remain in a foreign country is concealed from the other spouse,[139] or when the presence of the other spouse or children in a foreign country is the result of involuntary coercion or abuse.[140]

But it also seems clear that a reviewing court can choose to ignore evidence of abuse as the reason for the passage of sufficient time in the foreign country to find a "settled purpose," as the dissent in *Silverman II* complained that it was only the father's abuse that caused the mother and children to remain in Israel beyond the month of their arrival.

There is a significant level of consistency in the foreign decisions with the basic reasoning of *Feder*. In *Cohen v. Cohen*,[141] for example, the parties came ***from*** Israel to New Jersey. The mother took the child back to Israel in April, 1992, against the wishes of the father. He applied under the Convention for the return of the child to the United States from Israel, and his request was granted. Even though the mother argued that her job and move to the United States of America was temporary, and that she did not have immigrant status here, the court found that the United States of America was the habitual residence ***of the child*** and ***that*** was the determining factor of the Convention.

2. The Left-Behind Parent's "Rights of Custody"

Presuming the petitioning parent establishes that another country was the habitual residence of the child at the time of the child's removal or retention, the next question is whether the left-behind parent had "rights of custody" regarding that child. The Hague Convention provides three potential sources of custody rights: (1) operation of law, (2) judicial or administrative decision, or (3) an agreement having legal effect under the law of that State.[142]

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dissenting opinion of Justice Heaney, citing *Blondin v. DuBois*, 238 F.3d 153 (2d Cir. 2001); *Walsh v. Walsh*, 221 F.3d 204 (1st Cir. 2000).

[138] *Id*., 63 F.3d at 222-23; *see also In re Bates*, No. CA 122-89 High Court of Justice, Family Div'l Ct. Royal Courts of Justice, United Kingdom (1989).

[139] *Ponath v. Ponath*, 829 F. Supp. 363, 367 (D. Utah 1993); *Tsarbopoulos v. Tsarbopoulos*, 176 F. Supp. 2d 1045, 1055 (E.D. Wash. 2001).

[140] *Tsarbopoulos*, *supra*.

[141] Dist. Court of Tel Aviv, May 25, 1992, Hiltonhouse/Cohen.

[142] Hague Convention, Art. 3; T.I.A.S. No. 11,670 at 5.

a. Operation of Law

A left-behind parent will have ***some*** kind of relationship with the child at issue (i.e., natural parent married to the other parent, putative parent, divorced custodial parent, divorced non-custodial parent, etc.) The first step in determining rights of custody is to determine the relationship between the left-behind parent and the child.

In the United States, generally, married parents are presumed to have joint legal and physical custody. Even after divorce, a parent with joint legal custody generally has an equal right to determine questions such as where the child attends school, and any proceeding to alter the *status quo* of custody and visitation must pass due process muster.[143] When a child has been removed to the United States from another country determined to be the child's habitual residence, however, the underlying parent-and-child law of that country should be reviewed to see if a left-behind parent with whatever relationship exists between the child and that parent has a legal right of custody as defined by the law of that country. The Convention is "deliberately expansive" on this point, and counsel should be sensitive to allowing the widest possible scope of a basis of rights under the law of other States for the exercise of "rights of custody" by a parent.[144]

Additionally, the "law" referred to in Article 3 of the Hague Convention encompasses both substantive law and the conflict of law rules of the State of habitual residence, so that the inquiry into whether the parent has custody rights entails a determination of whether the other country's parent-and-child laws would apply its own or United States law in the circumstances:

> Thus, custody *ex lege* [as a matter of law] can be based either on the internal law of the State of the child's habitual residence, or on the law designated by the conflict rules of that State.[145]

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[143] *See*, *e.g.*, *Wallace v. Wallace*, 112 Nev. 1015, 922 P.2d 541 (1996) (where parties have joint legal custody, a party threatened with a loss of parental rights must be given an opportunity to disprove any evidence presented, and all changes to visitation must pass due-process muster to stand); *Wiese v. Granata*, 110 Nev. 1410, 887 P.2d 744 (1994) (due process requires that notice be given before a party's substantial rights (such as custody) are affected).

[144] As the Ninth Circuit noted:

> [T]he Convention favors the interpretation of custody rights that would allow the "greatest possible number of cases to be brought into consideration." *Perez-Vera Report* ¶ 67. The Convention was drafted with the intent of encompassing many custodial situations emanating from many different legal regimes. . . . Paragraph 67 introduces the three sources of rights from which custody may be identified. First, custody may arise by "operation of law," so that custodial rights may be found *ex lege*, even though a custodial decision has not yet been made. *Perez-Vera Report* ¶ 68.

Gonzalez v. Gutierrez, ___ P.3d ___ (No. 02-55079, 9th Cir., Nov. 20, 2002).

[145] Perez-Vera Report at ¶ 68.

There are several possible complications beyond the scope of this paper that can arise once the parent-child relationship and law of the habitual residence are known.[146] In the majority of cases, however, the issue will be a simple one.

b. Judicial or Administrative Decision

Simply put, a tribunal might have determined the extent of a left-behind parent's rights of custody by decision. The reference in Article 3 to a "judicial or administrative decision" as a source of custody rights is "used in its widest sense," specifically contemplating that such a decision "may have been issued by the courts of the State of the child's habitual residence as well as by the courts of a third country."[147]

c. Agreement Having Legal Effect

Article 3 states that rights of custody may arise "by reason of an agreement having legal effect under the law of [the State of habitual residence]."[148] This can take several forms.

If the parties are still married, such an agreement could consist of a writing in the form of a property settlement or separation agreement, or even a letter, if the law of the State of habitual residence grants legal effect to such a writing. If the parties are already divorced, such an agreement could be a property settlement agreement (whether merged or not in a decree of divorce), or other document in or outside court proceedings, again depending on how the law of the State of habitual residence treats such writings. It is even possible that such an agreement could be entirely oral, if proof adequate to the court was presented.[149]

3. Whether the Left-Behind Parent was "Actually Exercising" Rights of Custody

Article 3(b) of the Hague Convention provides that a removal or retention can only be considered wrongful if, "at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention."

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[146] *See*, *e.g.*, *Gonzalez v. Gutierrez*, ___ P.3d ___ (No. 02-55079, 9th Cir., Nov. 20, 2002) (exploring legal ramifications of Mexican law of *patria potestas* on rights of custody relating to unmarried parents).

[147] *See* Perez-Vera Report at ¶ 69.

[148] Hague Convention, Art. 3; T.I.A.S. No. 11,670 at 5.

[149] *See*, *e.g.*, *In re B (a minor)*, 2 F.L.R. 249, Fam. 606 (1994) (English court holding that father who lacked formal custodial rights yet physically cared for child possessed "rights of custody").

This will usually be a straight-forward factual inquiry. However, certain scenarios can create legal uncertainty, as in the case of a left-behind non-custodial parent who has little contact, or no physical or legal custody, of the child at issue. The Hague Convention also makes an explicit distinction between rights of custody and rights of access, which "include the right to take a child for a limited period of time to a place other than the child's habitual residence,"[150] but which do not give rise to a right to seek return of the child to the left-behind parent's country.[151]

4. Whether the Removal or Retention was "Wrongful"

a. Definitions of Removal and Retention

The cases addressing the question of the harms suffered by children from international abduction speak of those harms stemming from either "the 'removal [of a child] from its habitual environment,' or by 'a refusal to restore a child to its own environment after a stay abroad.'"[152]

The official commentary gives more specific descriptions:

> Generally speaking, "wrongful removal" refers to the taking of a child from the person who was actually exercising custody of the child. "Wrongful retention" refers to the act of keeping the child without the consent of the person who was actually exercising custody. The archetype of this conduct is the refusal by the noncustodial parent to return a child at the end of an authorized visitation period.[153]

b. Wrongfulness of Removal or Retention

The removal or retention of a child from his or her habitual residence is "wrongful" if it is in violation of rights of custody of the left-behind parent that were actually being exercised, or would have been but for the removal or retention.

In the language of the Convention, the petitioner must show that the removal was:

> a) . . . in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

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[150] Hague Convention, Article 5.

[151] Hague Convention, Article 21.

[152] *See*, *e.g.*, *Mozes v. Moze*s, *supra*, 239 F.3d at 1070 (quoting Perez-Vera Report at ¶ 11).

[153] 51 Fed. Reg. 10494.

b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.[154]

The standard of proof (for whether the removal of the child was "wrongful" under Article 3) is "preponderance of the evidence."[155]

c. Getting the Kids Home – What to File

There is more than one route to the filing of a formal petition in a court in the country to which the children have been transported. A left behind parent may file an application with the Central Authority of that parent's State, to be forwarded to the Central Authority of the country in which the child is found. Alternatively, an application can be made directly to the Central Authority of the State to which the child has been brought.

In the United States, the State Department, Office of Children's Issues, handles Hague Applications through a public/private enterprise known as the National Center for Missing and Exploited Children ("National Center"), which is based in Alexandria, Virginia, but with branches in California, Florida, Kansas City, New York, and South Carolina.

The National Center attempts to first locate the child's specific location, using resources ranging from Interpol to federal and State criminal and civil government departments.[156] The National Center often will send the abducting parent a letter requesting he or she return the child voluntarily, which will sometimes solve the problem. If the letter fails, the National Center then finds an attorney in the State in which the child is located who is willing to represent the parent; the National Center maintains lists of attorneys who have volunteered to take such case, on a *pro bono* basis or otherwise.

Once the National Center has located an attorney willing to review the case, it will send the attorney a packet of available information to assist the attorney in filing the Petition. The packet should also reveal at least some evaluation of the level of flight risk or risk of physical harm to the child posed by the circumstances, which should inform counsel as to whether or not it is necessary to request the child's physical removal from the abducting parent by means of a Warrant in Lieu of a Writ of Habeas Corpus. Tell-tale signs are indications of an unbalanced abducting parent, one who is known

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[154] Hague Convention Art. 3; see also 42 U.S.C. § 111603(e)(1), (f)(2).

[155] 42 U.S.C. § 11603(e)(1); *Friedrich I*, *supra*, 983 F.2d at 1400.

[156] The Center will often get the name and location of the child's school, the address in which the child is housed, and possibly the child's schedule if at all possible.

to have firearms, or who has a history of physical violence.[157] Arguments have also been made for a Warrant based on the risk of flight. The specific considerations regarding seeking a Warrant are discussed in greater detail below.

Once an attorney has been located, the attorney and client must decide in which court to file the Petition, based on the attorney's experience and knowledge regarding the factors which would favor one court over another (see Section II of this paper, *supra*).

It is then the attorney's job to finalize a retainer agreement of some sort with the client,[158] create the necessary paperwork, educate the court on the Convention and the particular client's situation, attend such hearings as are necessary, and complete the final paperwork and physical arrangements necessary to recover the child.

D. Initial Petition for Return

In our opinion, the weakest "forms" in current circulation are those intended to provide a framework for an initial Petition, so we have included one of our own as Appendix 1.[159] Other printed form sets provide perfectly workable models for most other documents that will be needed.[160]

Article 8 of the Hague Convention only ***requires*** a few items of information, and they are pretty generally described: "information concerning the identity of the applicant, of the child and of the person alleged to have removed or retained the child; where available, the date of birth of the child; the grounds on which the applicant's claim for return of the child is based; [and] all available information relating to the whereabouts of the child and the identity of the person with whom the child is presumed to be."

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[157] As a practical matter, law enforcement officers are very concerned about the dangers of any pick-up efforts; it is better to err on the side of caution when assessing whether firearms will be located at the residence, and in evaluating the danger posed by an abducting parent.

[158] We suggest ***always*** having a written retainer agreement with a client, even a client who is being represented *pro bono*, governing the scope of work to be performed, whether or not it includes any appellate work after the grant or denial of the Hague Convention petition, whether the client (or another, sometimes including the client's government) is expected to pay for services rendered, or costs incurred, and if so how much and when, and what to do with any attorney's fees or costs that might be awarded against the other side.

[159] We have created a full form set, for all documents discussed in these materials. Space limitation prevented us from reprinting them all in these materials, but we would gladly provide an electronic copy, either at the seminar, or by e-mail anytime thereafter. Please contact the author directly with any such requests.

[160] In our opinion, some of the best of these can be found in Gloria DeHart, ed., INTERNATIONAL CHILD ABDUCTIONS, A GUIDE TO APPLYING THE HAGUE CONVENTION, WITH FORMS, 2D ED. (ABA Family Law Section, 1993) ("Guide"). The book is a great resource, and includes the relevant sections from the Federal Register, the text of the Hague Convention, and ICARA, the Legal Analysis, and other reference materials.

The Petition should be conformed to style, of course, to the federal or State court in which it is to be filed. Substantively, it should recite that it is being brought pursuant to the Hague Convention and ICARA, explicitly state the statutory jurisdiction allowing it to be brought, and include a section (which we have entitled "Status of Petitioner and Child") both describing their relationship and providing sufficient allegations from which a finder of fact could conclude that the petitioner was "actually exercising rights of custody."

Next, the Petition should detail exactly how the child happened to be removed, or retained, from the child's habitual residence. This might require detailing a straight-forward kidnap,[161] or explaining how visitation terms set out in a decree were exceeded when the child was not returned (in the latter case, the better course is to attach as exhibits the relevant court documents setting out the visitation scheme). In either case, in our experience, it has proven helpful, given the various time limits set out in the Convention, to attach a timeline or calendar showing what was supposed to happen, when, and what actually happened.

Any custody proceedings that have occurred should also be identified , and if they resulted in orders, they should be attached. If there have been any such proceedings, their relevance to the Hague Convention proceedings should be discussed (*see* Section II(B)(4), *supra*).

If "provisional remedies" are being requested, that fact should be requested in the Petition. Such a request is discussed in more detail in the following sub-section of this article.

The relief requested should be specifically and clearly set out, along with a notice of hearing that would be adequate for the jurisdiction's domestic relations law in an interstate custody case.[162] If attorney's fees and costs are requested, they should be specifically identified in the Petition. Our sample form sets out such a request, and the relevant points and authorities necessary should counsel have to brief the issue are set out below in the next section of this article. Finally, many courts require an attorney verification, in place of a client affidavit, which is often impossible to get in a timely manner from a client in a foreign country.

Some courts new to Hague Convention cases will also require counsel to brief just why the court can, or should, grant the Petition, along with the Petition itself. The materials in Section II of this paper were designed to provide an easy organization of information and citations for insertion into such a brief.

E. Documents to Be Filed along with the Initial Petition for Return

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[161] Sometimes, a simple explanation is all that is required. In one of our prior cases, the judge read a sentence of our Petition to the respondent at the initial hearing in the form of a question. The respondent proudly declared that "Of ***course*** I planned to and kidnaped my child." This made the remainder of the case relatively straightforward.

[162] *See* 42 U.S.C. § 11603(c).

Because of the nod in ICARA to "the applicable law governing notice in interstate child custody proceedings,"[163] the better procedure is to file a "Declaration Establishing the Habitual Residence of the Child(ren)" in every Hague Convention case, using the format of the local version of the Uniform Child Custody Jurisdiction Act or Uniform Child Custody Jurisdiction and Enforcement Act in the State where the Petition is filed.

For the same reason, a separate Notice of Petition Under Hague Convention, also known as Notice of Hearing, should probably be filed, in addition to the statement of notice of hearing in the Petition itself, although local rules may govern this choice.

If it is feared that the abducting parent has some likelihood of trying to get a custody order in the local State courts, in an effort to frustrate or confuse the proceedings, it is probably worth taking the time to obtain a Notice of Stay of Custody Proceedings, which recites Article 16 of the Hague Convention. This should be served on the respondent, and can be filed in the State court if a custody action is initiated by the abducting parent. Such a notice should always be obtained if counsel is aware of any ongoing or concurrent custody proceedings; its filing puts all parties and courts on notice that the Convention prohibits any court from making a custody determination due to the filing of the Petition.

Finally, many courts appreciate counsel's filing (or attaching to the Petition as an exhibit) a proposed Order Directing Return of Minor Child, as the form of order required will not be known to courts new to such matters. Having such a proposed order prepared and attached can even allow all requested relief to be granted at the very first hearing, in some cases, without any further delay; some Hague Convention cases can be resolved in a day or two between initial filing and final orders.

Depending on local practice, there may also be a required civil cover sheet, a filing fee,[164] or other local court forms.

If it is determined that the child is not in danger, the Petition for Return (and all the necessary accompanying documents) can be personally served by a process server. If counsel determines that there is a danger, or the decision has been made to seek a warrant in lieu of writ of habeas corpus (see next subsection), the assistance of the local law enforcement agency can usually be obtained to serve the documents on the respondent.

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[163] *Id*.

[164] Some courts require a token filing fee, such as $5.00, ***despite*** the express admonition in Article 26 of the Hague Convention that: "Central Authorities and other public services of Contracting States shall not impose any charges in relation to applications submitted under this Convention. In particular, they may not require any payment from the applicant towards the costs and expenses of the proceedings or, where applicable, those arising from the participation of legal counsel or advisers." Similarly, ICARA states, in 42 U.S.C. §11607(a), that: "No department, agency, or instrumentality of the Federal Government or of any State or local government may impose on an applicant any fee in relation to the administrative processing of applications submitted under the Convention."

F. Documents to Be Filed If it Is Determined That an Emergency Pick-up Is Warranted

If counsel determines that there is a danger of harm to the child (or others), or of flight by the abducting parent to avoid return of the child, the Hague Convention specifically authorizes the obtaining of "provisional remedies."[165] Not all cases require an emergency pickup. The attorney must determine whether or not the court can be persuaded that an emergency exists which will justify such a warrant for emergency pickup. Facts that might justify the request would include a history of domestic violence, information that the child might be in danger with the abducting parent, or a history in which the child has previously been successfully hidden from the left behind parent.

Under ICARA, the court hearing a Hague Convention case is specifically empowered to "take or cause to be taken measures under Federal or State law, as appropriate, to protect the well-being of the child involved or to prevent the further removal or concealment before the final disposition of the petition."[166]

However, ICARA also includes a "limitation on authority" stating that no court issuing any such provisional remedies may "order a child removed from a person having physical control of the child unless the applicable requirements of State law are satisfied."[167] In practice, this statement has caused a great deal of confusion and delay in federal courts unfamiliar with State court procedures, as the courts attempt to verify that they can, for example, issue emergency pick-up orders for the protection of children, which procedures are not set out on the face of many States' versions of the UCCJA, but are either contained in other statutes, or a product of State common law.

Accordingly, if it is deemed necessary to pick up the child at the time of service of the Petition for Return, to secure the child's safety during the pendency of proceedings, counsel should prepare and file a separate Petition for Warrant in Lieu of Writ of Habeas Corpus, a proposed Order for Issuance of Warrant in Lieu of Writ of Habeas Corpus, and a proposed Warrant in Lieu of Writ of Habeas Corpus. If the court hearing the matter is unfamiliar with procedures, it might also be a good idea to either flesh out the Petition for Warrant, specifying in detail the grounds under which it may be issued, or file a separate brief on the subject.

Local procedures might vary, but we have found it most expedient to have the Warrant executed by the U.S. Marshals. This requires filling out the necessary forms with the Marshals' office and providing the Marshals with a 24 hour number at which someone can be reached. It is advisable to contact the specific authorities on their preferred procedures prior to getting the pickup order. There is a standard "coordination form USM 285" in use for the United States Marshals' Service.

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[165] Hague Convention, Article 7(b).

[166] 42 U.S.C. § 11604(a).

[167] 42 U.S.C. § 11604(b).

Also, in our experience, the Marshals have not been satisfied with some of the form orders published for this purpose, on their conclusion that such orders do not adequately authorize the Marshals to use such force as is necessary to accomplish recovery of the child. Accordingly, at their request, our orders for pick up include language along the following lines, in addition to the form "pick-up" language:

> **AUTHORITY TO SEARCH PREMISES**
>
> This Order gives the U.S. Marshal or any of his/her deputies and any peace officer within the State of Nevada the authority to use any and all force to enter and search the premises at ADDRESS, Las Vegas, Nevada 891XX, or any other place where NAME OF CHILD is reasonably believed to be present, for the purpose of determining whether CHILD is present.

G. Legal Authority For Use in Requesting an Emergency Pick-up

If the court questions its ability to order the requested pick-up, despite the existence of a *bona fide* emergency, the following points and authorities may be of use to practitioners.

Under the heading "provisional remedies," 42 U.S.C. § 11604(a) specifically empowers a court to enter such orders as are necessary, under federal or State law, "to prevent the child's further removal or concealment before the final disposition of the petition."[168] A request for such an order would be that the child at issue be taken into custody for her protection at the local child shelter until the hearing on the merits proceeds.

The Court may have concerns with 42 U.S.C. § 11604(b), which provides that a court may not order a child to be removed from a person having physical control of the child "unless the applicable requirements of State law are satisfied." In other words, the question is whether State law permits an *ex parte* temporary child custody order pending further hearing and final disposition of the petition.

The Court's concern is well-grounded from the face of ICARA, and the question posed has been asked by several federal district court judges in identical circumstances. In *In re Application of McCullough*, 4 Supp. 2d 411(U.D. Pa. 1998) a Canadian father filed a petition for return under the Hague Convention, along with an ex parte petition for the issuance of warrant in place of a writ of

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[168] The Convention itself contemplates such provisional orders. Article 7 of the Convention, requires a Court to:

> take all appropriate measures – . . . (b) to prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures; . . . (f) to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child . . .; (h) to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child . . . .

habeas corpus, seeking to take the two children of the parties into custody. The facts indicated that the mother might flee the area or country with the children.

The court issued the warrant without notice, finding that the provisional measure was consistent with the spirit of the Convention:

> Accordingly, this court had to promptly determine an issue not addressed in Feder: the propriety of an ex parte request to seize children who were alleged to have been wrongfully removed from their "habitual residence." Under the ICARA, which implements the Convention, any court exercising jurisdiction of an action seeking the return of a child "may take or cause to be taken measures under Federal or State law, as appropriate, to protect the well-being of the child involved or to prevent the child's further removal or concealment before the final disposition of the petition. 42 U.S.C. § 11604(a). At the same time, the Act prohibits a court from granting a provisional remedy pursuant to § 11604(a) which would remove a child from "a person having physical control of the child unless the applicable requirements of state law are satisfied." 42 U.S.C. § 11604(b). I find support in both Federal procedural rules, and in the substantive and procedural law of Pennsylvania, for the extraordinary emergency relief being sought by petitioner. *Id.*

4 F. Supp. 2d at 414. In finding that the provisions of State law had been satisfied, justifying the *ex parte* removal of the children from the mother, the court went on to discuss the application of the "best interests" concept in the provisional remedy setting. Recognizing that the "best interests" standard does not apply to a determination of the merits of the Convention claim, the court held, nevertheless, that the "best interest" standard is applicable to the discrete determination of whether a provisional remedy is proper.

It is for this reason that both State law and the facts of the case are relevant. If the law did not allow such *ex parte* orders, or the facts indicated no danger of flight, the order would not be appropriate. *See Tsalafoas v. Tsalafaos*, 34 F. Supp. 2d 320 (D.C. Md. 1999) (when State law does not provide for *ex parte* procedures to cause the arrest or taking into protective custody of a child, the provisions of ICARA do not confer jurisdiction to obtain such relief); *Klam v. Klam*, 797 F. Supp. 202 (E.D.N.Y. 1992) (facts were insufficient for *ex parte* relief transferring immediate custody of children, where there was no indication of likelihood of flight and both parties had extensive ties to the area and had participated in litigation there).

As one nationally-recognized expert has capsulized the question:

> Certain situations may necessitate interim remedial measures before the court can hear the Hague return case. Under 42 U.S.C. 11604, petitioner may request the court to order provisional remedies to protect the well-being of the child or to prevent the child from being abducted or concealed again before final disposition of the case.
>
> The request for provisional remedies may be made in the return petition, or in a separate pleading filed immediately prior to filing the petition for return. Examples of the kind of relief petitioner may seek pending the outcome of the Hague case include orders: prohibiting

> the respondent from removing the child from the jurisdiction; directing respondent to post a bond; requiring respondent to surrender passports to the court; directing law enforcement officers to remove the child from the alleged abductor before the hearing on the Hague petition, ***provided this is allowed under state law.***

Patricia M. Hoff, *Hague Child Abduction Convention Issue Briefs; Obstacles to the Recovery and Return of Parentally Abducted Children Project* (American Bar Association Center on Children and the Law, under grant from the Office of Juvenile Justice and Delinquency Prevention, U.S. Department of Justice, 1997) (emphasis added).

The warrant to obtain protective custody of the child, to be accomplished at the same time as notice of the substantive hearing, is necessary to avoid the child being further hidden or kidnaped. The pick-up order secures ***temporary*** relief – it is just to guarantee that the child is not removed from this Court's jurisdiction before a hearing can be held on the *Petition for Return of Child*.

It is respectfully suggested that no further notice is required for the warrant in lieu of a writ of habeas corpus than was required by the earlier writ practice. State law specifically permits the issuance of ex parte custody orders in a variety of situations, including this one, and a temporary placement of the child into protective custody is necessary to serve the ends set out in the Convention and in ICARA, as well as the State law purposes of serving the child's best interest by protecting the child during the very short time during the pendency of proceedings until a noticed hearing can be held.

The Convention, and ICARA, require courts to do whatever is necessary to "secure the safe return of the child." In this case, there is a reasonable basis to believe that Respondent would flee and go into further hiding with the child to thwart the efforts of this Court to comply with the Convention, if notice in advance of a temporary protective custody order was given.

H. Hearing on the Petition for Return

Neither the Hague Convention, nor ICARA, has any particular requirement for a formal hearing prior to issuance of an Order Directing Return of Child. In practice, however, judges are loathe to issue any such orders without convening at least one hearing on the question of whether such an order should issue.

Generally, these are law-and-motion type hearings, but judges vary considerably in their handling of the matters. Some conduct spontaneous trials at the initial hearing, allowing presentation of evidence, witness testimony, etc. Some prefer to directly question the petitioner and respondent. Some insist on setting a second hearing, and giving both sides time to prepare and present the case like a normal trial, with abbreviated time schedules. Counsel's familiarity with the preferences and peccadilloes of particular jurists is believed more important in this regard than any precedential history under Hague Convention practice.

I. Follow-Up Orders

Depending upon the factual history and context of the particular case, it might be necessary to seek and secure additional orders from the judge hearing the Hague Convention case, either to allow the hearing to proceed at all, or to allow return of the child to the country of the left-behind parent.

For example, in one case in which the left-behind parent had once entered the U.S. unlawfully, and did not have a valid passport, we had to obtain from a federal judge an order directing the Border Patrol and immigration officers to permit the petitioner entrance into the United States, and specifically to the place of the Hague Convention hearing, and safe exit from the United States, without detention, thereafter. In another case, we were required to seek an order releasing the passports of the affected children, which had been impounded by a State court judge during custody proceedings filed by one of the parents prior to the Hague Convention case.

If the court finds in the petitioner's favor, it should issue an order with findings that the child's habitual residence (prior to the wrongful removal or retention) was the place the child was located just prior to the respondent's removal or retention, that the respondent's removal or retention was ***wrongful*** in accordance with the Convention, that the removal or retention was in violation of the petitioner's custody rights, and that the child is ordered returned to the country of the left-behind parent, in order for that country to determine custody.

Additionally, the child must somehow be returned to the country in question, or to the custody of the petitioner. Occasionally, the respondent will be ordered to travel with the child back to the left-behind parent's country and deliver the child to the petitioner. More often, however, the child is removed from the respondent's custody and entrusted to the petitioner or a representative for the petitioner.

To get the child home, counsel must get the Order Directing Return of Minor Child executed and filed; we make it a universal practice to give the petitioner a certified copy, and to keep another one in the file. The person returning the child should be specified on the face of the order as permitted to leave the country with the child.[169] Most often this person will be the petitioner, but sometimes it will be a designated third party.

That only leaves questions relating to fees, which are addressed in the following section of this article.

The point is that counsel should think through the aftermath of the Hague Convention case, ensuring that there are no obstacles to the safe return of the left-behind parent, and child, to the other country, and removing the ones found to exist.

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[169] This eliminates any problems at the border or airports relating to passports, holds placed because of pending legal cases or kidnaping reports, etc.