

THE UCCJEA IN A NUTSHELL

by

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BIOGRAPHY

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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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I. THE CONCEPT OF DIVISIBLE DIVORCE

Subject matter jurisdiction. Jurisdiction over the nature of the case and the type of relief sought; the extent to which a court can rule on the conduct of persons or the status of things. – Also termed *jurisdiction of the subject matter*.¹

“Subject matter jurisdiction” refers to a subject as to which a court either does, or does not, have jurisdiction to hear depending entirely on something external to the case before it. If the external thing is lacking, then there is “a jurisdictional defect of the fundamental type. . . . where there is ‘an entire absence of power to hear or determine the case.’”² Any purported orders entered as to a subject matter over which the court lacks jurisdiction are void.³

Personal jurisdiction. A court’s power to bring a person into its adjudicative process; jurisdiction over a defendant’s personal rights, rather than merely over property interests. – Also termed *in personam jurisdiction; jurisdiction in personam; jurisdiction of the person; jurisdiction over the person*.⁴

Subject matter jurisdiction over a marriage is present as long as the court has personal jurisdiction over *either* of the parties to the marriage, and every State is required under the Full Faith and Credit clause of the United States Constitution to recognize decrees entered by other States if the other States had such personal jurisdiction over one party and afforded notice in accordance with procedural due process.⁵

The Nevada Supreme Court, like many appellate courts, has held that a failure of subject matter jurisdiction “cannot be waived.” Even when a party does not raise the question, the court is to do so *sua sponte*, if appropriate, and the question can be raised for the first time on appeal.⁶

¹ Black’s Law Dictionary 857 (7th ed. 1999).

² *State Indus. Ins. System v. Sleeper*, 100 Nev. 267, 269, 679 P.2d 1273, 1274 (1984) & *Shisler v. Sanfer Sports Cars, Inc.*, 83 Cal. Rptr. 3d 771, 775 (Ct. App. 2008) (quoting *Abelleira v. District Court of Appeal, Third District*, 109 P.2d 942, 947 (Cal. 1941)).

³ *Vaile v. District Court*, 118 Nev. 262, 44 P.3d 506 (2002).

⁴ Black’s Law Dictionary 857 (7th ed. 1999).

⁵ *Williams v. North Carolina*, 317 U.S. 287 (1942); see also *Sherrer v. Sherrer*, 334 U.S. 343 (1947); *Coe v. Coe*, 334 U.S. 378 (1947).

⁶ *Swan v. Swan*, 106 Nev. 464, 468, 796 P.2d 221, 224 (1990).

Under the principle of “divisible divorce,” jurisdiction over a marriage does not necessarily carry with it jurisdiction to alter every legal incident of marriage.⁷ In *Estin*, the wife had obtained a New York separate maintenance award, and the husband subsequently sought a Nevada divorce to terminate the marriage, which had been denied him in New York.

Entry of the divorce decree was affirmed, but the Court added that if the divorce proceeded *ex parte*, the Nevada court could only terminate the marriage, not alter or terminate orders such as the support order in the New York separate maintenance decree. The decree would not prevent a court of another State with jurisdiction over the parties from adjudicating the remaining *incidents* of the marriage.

II. CHILD CUSTODY – INITIAL JURISDICTION⁸

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,⁹ inconsistency of interpretation of the earlier uniform act – the UCCJA – and the technicalities of applying the PKPA,¹⁰ 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.

NCCUSL¹¹ 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*.

⁷ *Estin v. Estin*, 334 U.S. 541 (1948).

⁸ 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).

⁹ *Obstacles to the Recovery and Return of Parentally Abducted Children* (ABA 1993) (“Obstacles Study”).

¹⁰ Parental Kidnaping Prevention Act (“PKPA”), 28 U.S.C. § 1738A.

¹¹ The National Conference of Commissioners on Uniform State Laws. 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.

The revised enactment has been adopted in every State but Massachusetts. It was intended to eliminate 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.

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

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

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

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.¹²

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.”¹³

¹² § 201.

¹³ § 201(c).

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.

Section 201 says that the *exclusive* potential bases of jurisdiction are a cascade of four choices:

1. [Home State.] This State is the home State of the child on the date of the commencement of the proceeding, or was the home State of the child within six months before the commencement of the proceeding and the child is absent from this State but a parent or person acting as a parent continues to live in this State.

2. [Significant Connection.] A court of another State does not have jurisdiction under paragraph (1), or a court of the home State of the child has declined to exercise jurisdiction on the ground that this State is the more appropriate forum under Section 207 [“inconvenient forum”] or 208 [“unjustifiable misconduct”].

Exercising jurisdiction based on this second category requires two *additional* findings:

A. That the child and the child’s parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this State other than mere physical presence; *and*

B. That substantial evidence is available in this State concerning the child’s care, protection, training, and personal relationships.

3. [Only State Interested.] All courts having jurisdiction under paragraph (1) or (2) have declined to exercise jurisdiction on the ground that a court of this State is the more appropriate forum to determine the custody of the child under Section 207 or 208.

4. [Vacuum.] No court of any other State would have jurisdiction under the criteria specified in paragraph (1), (2), or (3).

Since statutory law 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 moves to another State, leaving the non-custodian behind, then the left-behind State 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 still living in a State where the parties agreed that they wanted to go through a single, simple joint petition divorce 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 the forum State never had jurisdiction to determine custody, the rule indicates that such a filing would succeed.¹⁴

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 forum State 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* that State, however, 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 Sections 201, 202 [exclusive, continuing jurisdiction], and 203 [modification jurisdiction] issues an order relating to the matter.

Only in the peculiar situation that such other State does not issue any order on the subject within the time specified in the forum-State order would it either continue, or expire, as the order provides.¹⁵ And only if that other State *never* acts could the emergency order of the forum State become a final determination, making that State the Home State of the child.¹⁶

An additional oddity of jurisdiction fitting in the "custody" section is the Uniform Child Abduction Prevention Act, which has been enacted in 14 States as of 2016. The statute itself is an unusual

¹⁴ 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).

¹⁵ § 204 [temporary emergency jurisdiction].

¹⁶ § 204(b).

mash-up of terminology from the UCCJEA and the Hague Convention.¹⁷ The jurisdictional section¹⁸ 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. The second, however, states that “A court of this State has temporary emergency jurisdiction pursuant to UCCJEA § 204 if the court finds a credible risk of abduction.”

What this means is that the rather loose language defining “emergency jurisdiction” in the UCCJEA¹⁹ includes, at a minimum, any circumstances in which a court finds a “credible risk” of abduction.

III. 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 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

¹⁷ “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.

¹⁸ § 5.

¹⁹ “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.” § 204(a).

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, defining “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.²⁰ Regardless of whether a State 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 a court in one State to determine that some **other** State should not exercise its CEJ. The only thing that could be asked of a court without CEJ 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.

²⁰ There appears to be developing an exception to the general rule, at least in some places, on where a person resides when considering residence of a military member. *In re Marriage of Brandt*, 268 P.3d 406 (Colo. 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. Other States have been extremely hostile to any such approach seeking to focus on subjective matters of intent, and have wished to remain focused on the physical location of the parties and children. *See, e.g., Powell v. Stover*, 165 S.W.3d 322 (Tex. 2005); *State of N.M. ex rel. CYFD v. Donna J.*, 129 P.3d 167 (N.M. 2006). 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. If a State looks to that act, rather than the UCCJEA, 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).

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.²¹ 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.²² 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.”²³ 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.”²⁴

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 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.²⁵

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 the forum State (after however long an absence) before some other State makes the requisite finding (that all persons had left) and assumes jurisdiction, then the forum State remains the only place where a modification motion could be filed.

²¹ § 203.

²² *Friedman v. Dist. Ct.*, 127 Nev. ___, ___ P.3d ___ (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.

²³ *Friedman* confirmed the “jurisdiction is a snapshot at moment of filing of a proceeding” concept.

²⁴ Comment 2 to § 202 of the UCCJEA. Section 207, “Inconvenient Forum,” 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.

²⁵ *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.

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. GETTING THE FACTS STRAIGHT IS CRITICAL

It would be difficult to over-estimate the importance of gaining a clear time-line of who was where, when, in any case involving the UCCJEA. That task begins in the original client interview, where it is critical to get a coherent sequence of events from the client.

This is so because facts the client might not consider important – such as everyone leaving one State and living elsewhere for a year during which some action was filed somewhere – could completely alter the outcome of the analysis. Sometimes, orders have been entered but the facts (if explored) indicate that the issuing court never had jurisdiction to enter the order in question – discovering that before proceeding can be the critical point determining the outcome of litigation.

Since not all clients are good factual reporters, it is often useful to get them to provide a time line (chronology) for review by the legal staff. It is sometimes just as important to know what led to a problem as it is to know the details of the problem itself. Events from months or years earlier can determine the outcome.

A time line is just a tool used to gain an understanding of a case as efficiently and quickly as possible. The client should be reassured that it is not necessary to write a novel or to include every detail, but simply to provide the “major events” that led the client to their current circumstances, generally providing a history of the relationship, which should start at the beginning and move forward.

The client could be directed to answer questions such as “When did you meet? Move in together? Separate? Did you relocate from one place to another? Start or stop jobs or careers? What major events (births, deaths, illnesses, accidents, incidents) were turning points in your history?”

There is no required or “right” way to write a time line. For most people, it is easiest to create a time line in the form of a list, putting dates of major events on the left and writing a short description of those events next to them. For example:

June, 1985: We met on a blind date.

November, 1985: He moved into my apartment in New York; we started combining finances.

August, 1992: I lost my job with the accounting firm and started making ceramics at home.

May, 1993: Our first child, John, was born.

August-Dec. 1993: Spent a lot of time at the hospital during John’s serious illness.

September, 1993: We moved to Los Angeles; my husband started drinking heavily.

Etc.

Obviously, what is “important” varies enormously from case to case; the client should be encouraged to bring to the attention of counsel whatever they think is important, since it is often much easier to understand (and give advice regarding) the “why” of a situation once counsel understands the “what”

that led up to it. The client should be informed that, as a general rule, it is better to supply more information than less if they are not sure of the relevance of given facts.

V. AWARDING FEES WHERE JURISDICTION IS CONTESTED

It is not unusual for a party to have moved to a State and initiated litigation requesting among other things a fee award against an out-of-State opposing party. But a State may not order *any* such economic relief against a defendant over whom the court lacks personal jurisdiction.

Since both the UCCJEA and UIFSA contain limited immunity clauses, the mere participation by an out-of-State litigant in custody or support proceedings does not confer jurisdiction on the courts of the forum State to award fees against the out-of-State party.

But the converse is not true. The forum State *does* have personal jurisdiction over its residents, and when such a resident's filings give rise to a legitimate claim for fees in favor of the out-of-State party, such fees may apparently be awarded.

VI. CONCLUSIONS

It makes little sense to spend time or money arguing about the merits of custody cases when the court lacks jurisdiction to act on the subject at all. Lawyers should *always* focus on the existence or non-existence of jurisdiction as to the subject sought to be brought before the court when initiating (or responding to) any new matter.

And judges should consciously consider their jurisdiction to proceed before wading into the merits of cases, with sufficient knowledge of the jurisdictional rules both to understand what they should not do, and to ignore legally fatuous arguments based on indefensible attacks on their legitimate jurisdiction. If the agreed facts resolve a jurisdictional question, one way or another, the merits can be addressed; if not, the court should focus on convening such proceedings as are necessary to make the factual determinations that permit the jurisdictional call to be made promptly, economically, and correctly.