Current Status and Unanswered Questions in Nevada Family Law Jurisdiction

by

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BIOGRAPHY

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We have been repeatedly surprised at the apparent lack of understanding by many of the most fundamental of case attributes – jurisdiction. This primer is intended to provide a short guide to what must be present for a court to take action in various family law matters.

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 labeled *jurisdiction of the subject matter*.[1]

"Subject matter jurisdiction" refers to a kind of matter 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 such 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 another State if that other State had personal jurisdiction over one party and afforded notice to the other in accordance with procedural due process.[5]

The Nevada Supreme Court 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]

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[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. DIVORCE JURISDICTION

A. Residence and Domicile

Normally, a person's State of residence is where that person is actually living, but State laws diverge surprisingly widely on the meaning of the terms "residence" and "domicile." In the apparent majority, "residence" is a physical question of location at the time of filing, while "domicile" is that permanent home "to which one returns."

In 2021, the Nevada Supreme Court clarified in *Senjab*[8] that residence and domicile are distinct concepts and that only residence is required for divorce jurisdiction. The Court noted that in NRS 125.020, the two terms are separately addressed in different clauses, and that the definition of residence provided in NRS 10.155 requires only "physical presence." Prior case law finding residence and domicile "synonymous"[9] was overruled. Since Senjab had been physically present in Nevada for at least six weeks before filing her complaint, she satisfied the NRS 125.020 requirement of residence, and the district court had subject-matter jurisdiction to adjudicate the divorce under NRS 125.020.

B. Subject Matter Jurisdiction

Most Nevada litigation as to jurisdiction has involved not the "causes" authorizing suits for divorce, but the requisites for filing a complaint under NRS 125.020. What appears to cause confusion in some quarters is the seeming blurring of tests for subject matter jurisdiction, on the one hand, and personal jurisdiction, on the other. They are distinct, but the Nevada divorce statute makes it necessary for at least one party to be a bona fide resident of this State (which incidentally gives the

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

[8] *Senjab v. Alhulaibi*, 137 Nev. ___, 497 P.3d 618 (Adv. Opn. No. 64, Oct. 21, 2021).

[9] *Vaile v. Eighth Judicial Dist. Court*, 118 Nev. 262, 269-70, 44 P.3d 506, 511 (2002) (*quoting Aldabe v. Aldabe*, 84 Nev. 392, 396, 441 P.2d 691, 694 (1968)).

court personal jurisdiction over that person), for the court to have ***subject matter jurisdiction*** to entertain a divorce.[10]

As noted, subject matter jurisdiction over the marriage itself – and therefore, jurisdiction to grant a divorce – is present as long as the court has personal jurisdiction over ***either*** of the parties to the marriage.[11]

C. Personal Jurisdiction, "Long-arm" Jurisdiction, Comity, and Abstention

Nevada's "long-arm" statute subjects a person outside Nevada to the personal jurisdiction of Nevada's courts in certain circumstances. In 1993, the Nevada Legislature replaced a much longer provision with a simple statement maximizing the reach of the Nevada courts:

> A court of this state may exercise jurisdiction over a party to a civil action on any basis not inconsistent with the constitution of this state or the Constitution of the United States.[12]

Previously, the courts had given attention to the various subsections setting out the grounds for exercising long-arm jurisdiction in different circumstances. The section most affecting domestic cases was former NRS 14.065(2), which provided in part:

> Any person who, in person or through an agent or instrumentality, does any of the acts enumerated in this subsection thereby submits himself and, if a natural person, his personal representative to the jurisdiction of the courts of this state as to any cause of action which arises from:
>
> . . . .
>
> > (e) Living in the marital relationship within this state notwithstanding subsequent departure from this state, as to all obligations arising for alimony, child support or property settlement, if the other party to the marital relationship continues to reside in this state.

Substantial case law addressed this earlier provision. The stated intent of the 1993 amendment was to expand the reach of the Nevada courts to the greatest extent. Thus, the earlier case law is still relevant, although the cases should probably be read as the minimum extent to which jurisdiction might be found to extend under the current law.

The long-arm statute only works in one direction. Our courts have jurisdiction over a party who ***left*** Nevada and moved elsewhere, as to all incidents of the marriage (with the exception of child custody; if more than six months elapses before litigation is begun, initial child custody litigation

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[10] *See Plunkett v. Plunkett*, 71 Nev. 159, 283 P.2d 255 (1955); *but see Vaile v. District Court*, 118 Nev. 262, 44 P.3d 506 (2002) (where a "colorable claim" for jurisdiction had been made, the resulting divorce as to status was only voidable, not void, and was permitted to stand despite the fact that neither party was a Nevada resident).

[11] *Williams v. North Carolina*, 317 U.S. 287 (1942).

[12] NRS 14.065(1).

would rest with the child's Home State).[13] If a party left somewhere else and moved here, our courts would gain jurisdiction over only the status of the marriage and (perhaps) the property that happened to be within the State.[14]

The full shaggy-dog explanation of the concepts of divorce grounds and jurisdiction is set out in volume one, chapter one, section one of the Nevada Family Law Practice Manual, along with all relevant statutory and case citations.

D. Divorce Jurisdiction for Military Families

There are exceptions to almost every rule and jurisdiction for divorce for military families is one of those exceptions. Where one party to a marriage is a member of the military, that party has long enjoyed the ability to maintain a State of residence in one place, while actually living in a number of other places during the military career. Many states permit a military member present in a state to file in that jurisdiction, despite lack of "domicile" in the jurisdiction.[15] Nevada law is in the mainstream on this issue.

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[13] NRS 125A.085, 125A.305.

[14] *Simpson v. O'Donnell*, 98 Nev. 516, 645 P.2d 1020 (1982). Where a party moves to Nevada and files, this State might not even have jurisdiction over property located here. In *Austin v. Dawson-Austin*, 968 S.W.2d 319 (Tex. 1998), the Texas Supreme Court considered a case in which a very wealthy man separated from his wife and high-tailed it to Texas (which has essentially no alimony, and under the laws of which the enormous appreciation in the value of a company was expected to stay in the husband's hands). He took with him stock certificates in his name for the Minnesota company through which he had made his fortune. The husband immediately bought a home and deposited large sums in Texas banks. He filed for divorce the first day he was able to do so, and obtained a judgment giving him virtually all of the property. The Texas Supreme Court reversed, after reviewing case law from *Pennoyer v. Neff*, 95 U.S. 714, 24 L. Ed. 565 (1877) to *Shaffer v. Heitner*, 433 U.S. 186, 53 L. Ed. 2d 683, 97 S. Ct. 2569 (1977), and ultimately holding that absent sufficient "minimum contacts," the Texas courts could not exercise jurisdiction over property located in the State.

There is some indication that Nevada courts might rule similarly. In *Solomon v. Eighth Judicial Dist. Court of Nev.*, 2019 Nev. App. Unpub. LEXIS 4 (Ct. App. Jan. 16, 2019) (unpublished), the court held that it had in rem jurisdiction to divide real property located in Nevada, even if did not have personal jurisdiction over the defendant spouse, but "[T]he fictitious presence of [intangible personal property] in [the forum] does not, without more, provide a basis for concluding that there is *any* contact in the *International Shoe* sense between [the forum] and the [defendant]." *Solomon* at *6 (bracketed insertions and italic by the *Solomon* court), quoting *Rush v. Savchuk*, 444 U.S. 320, 329-30 (1980).

Austin and *Solomon* give rise to the concern that spouses could each leave the State of last matrimonial domicile, so that ***no*** State had the kind of "minimum contacts" with both parties and their property that the courts apparently believed is required.

[15] *See*, *e.g.*, *Wallace v. Wallace*, 320 P.2d 1020 (N.M. 1958) (it is "within the power of the legislature to establish reasonable bases of jurisdiction other than domicile. . . . Assuming that appellant is correct in his contention that the parties were not domiciled in New Mexico at the time instant action was filed, does it follow that the court was without jurisdiction? We think not."); *Wheat v. Wheat*, 318 S.W.2d 793, 797 (Ark. 1958) (upholding state law based on residency rather than domicile); *Craig v. Craig*, 56 P.2d 464 (Kan. 1936) (upholding divorce based on residence rather than domicile).

No such protection, however, has ever previously been available to the *non*-military spouse in such a marriage, who has generally been held to be a resident in whatever State the member spouse was stationed (presuming the parties lived together).

That changed when the Servicemembers Civil Relief Act ("SCRA")[16] was amended by the "Military Spouses Residency Relief Act" in 2010 to essentially extend to spouses of military personnel the protections previously afforded just to military members. It is easiest to think of the new law in the negative; boiled down, it says:

> A spouse of a military member accompanying a servicemember who is on military orders who relocates from one State to another neither loses nor gains a domicile or State of residence by that relocation for purposes of federal or State voting rights or taxation.

Presumably, this will be applied to "residence" for purposes of legal actions as well. And most States, including Nevada, treat personal service of process within their borders as equivalent to residence for purposes of jurisdiction over a defendant.[17]

For purposes of divorce litigation, the new law creates something of a brave new world, since it now seems to be possible for either party to a military marriage to be a resident of one or more other States than where the parties actually live. Conceivably, the law could create a bizarre situation in which the parties live in Nevada, but: only the military member's State of residence elsewhere would have jurisdiction to divide the military retirement under the Uniform Services Former Spouses Protection Act[18]; Nevada would be the mandatory jurisdiction for determination of child custody under the Uniform Child Custody Jurisdiction and Enforcement Act;[19] while the non-military spouse could be a resident of yet a third State.

Even in non-family law matters, this new residency law could alter legal relationships, liability to suit, and enforceability of judgments in a host of contractual and tort matters.

The federal government does not have a wonderful track record when it comes to Supremacy Clause impacts on State-law governed litigation, especially in family law. It's a pretty safe bet that this change will, through the law of unintended consequences, cause a pretty wide variety of unexpected obstacles and complications in various State court actions. Practitioners – and litigants – should watch out for them.

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[16] 50 U.S.C. App. §§501-597b1.

[17] *Cariaga v. Eighth Judicial Dist. Court*, 104 Nev. 544, 762 P.2d 886 (1988).

[18] 10 U.S.C. § 1408.

[19] NRS ch. 125A.

E. Competing Claims of Divorce Jurisdiction in Two States

When might a court arguably have jurisdiction to entertain a divorce case but nevertheless decline to do so? When another divorce action is pending elsewhere, and the other court has jurisdiction over a greater number of the incidents of marriage. For example, where one party comes to Nevada and files for divorce, but the other party does not appear here, instead initiating a divorce action in the State from which the party came, and that State has jurisdiction over issues of child custody, child and spousal support, and the bulk of the parties' property.

The rationales are the doctrines of comity and abstention,[20] and the Nevada Supreme Court's repeated admonitions against bifurcating divorce actions.[21] Where actions are pending in courts of different States, whether to stay or dismiss one action or the other should be raised by motion.[22] A ruling on whether to stay or dismiss must take into consideration matters outside the pleadings, such as the seriousness of the threat of multiple and vexatious litigation, the convenience of the parties, the status of the foreign actions, and the competing interests of the two forums.[23] Considerations of comity and prevention of multiple and vexatious litigation will most often militate in favor of dismissal of the later-filed action, unless there is some clear superiority to that action being the one that proceeds.[24]

Whether or not another action has been filed elsewhere makes a difference. In a strictly default divorce situation when ***no*** other action is pending elsewhere, a Nevada court with jurisdiction over only one party can dissolve the marriage, but not adjudicate any rights as to alimony, child support, or child custody without obtaining personal jurisdiction over both parties.[25] Where there ***is*** another action pending, granting a "status-only" divorce effectively bifurcates the action. Since this is forbidden under *Gojack*, the "status-only" State should defer to the other under principles of comity and abstention.

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[20] "Comity," strictly speaking, is a "rule of courtesy by which one court defers to the concomitant jurisdiction of another." Gifis Law Dictionary (Barron's 1984 ed.) at 79. As the dictionary definition further explains, "judicial comity is not a rule of law, but one of practical convenience and expediency based on the theory that a court which first asserts jurisdiction will not be interfered with in the continuance of its assertion by another court . . . unless it is desirable that one give way to the other."

[21] *See*, *e.g.*, *Gojack v. District Court*, 95 Nev. 443, 596 P.2d 237 (1979); *Smith v. Smith*, 100 Nev. 610, 691 P.2d 428 (1984).

[22] *See*, *e.g.*, *Marriage of Hanley*, 199 Cal. App. 3d 1109 (Ct. App. 1988).

[23] *Engle v. Superior Court*, 140 Cal. App. 2d 71, 82-83 (Ct. App. 1956).

[24] *Id*. at 83.

[25] *Simpson v. O'Donnell*, 98 Nev. 516, 645 P.2d 1020 (1982). In the years since this case was decided the various uniform acts governing matters of child support and custody may have altered its holding on those points; if permitted under the uniform acts, the court would gain jurisdiction over those issues irrespective of jurisdiction over the other party.

Simpson, which included a summary note that the district court had jurisdiction to dissolve the marital status if nothing else, was issued in 1982, but did not acknowledge the *Gojack* holding forbidding bifurcation.

The issue was raised in *Kehaly*, discussed below. The Court's decision not to take the case up left the issue in limbo. *Gojack* spoke of the potential complications arising where a court altered marital status without addressing all incidents of a divorce—in other words, of the dangers risked in granting a divorce without settling all issues at the same time. As summarized in the Nevada Family Practice Manual:

> The Court recited the "numerous problems inevitably flowing" from an interim divorce decree, such as the effect of such a Decree on the character of the property of the parties, the status of community property after the entry of the Decree (whether it was thereafter held as tenants in common), the allocation of rents, profits, and taxes, the effect of a subsequent death or remarriage of one or both of the parties prior to the final adjudication and disposition of community assets, and the "adverse effect" on "property settlement or reconciliation possibilities."[26]

The Court termed the "statutory mandate" to be "rather clear"[27] and held that a status-only divorce was "beyond the court's power to enter." In later cases, the Court used the term "disfavored," and held that such decrees could only be entered upon stipulation of the parties to the marriage.[28]

As a matter of public policy, the Court should overrule the offhand comment in *Simpson* in view of the policy directive set out in *Gojack*.

F. Special Appearances, Paternity, Annulments, and Miscellaneous Cases

While these materials are primarily concerned with the substantive law of jurisdiction, not procedure, one recurring point of procedure bears repetition here. "Special appearances" to defend against claims of jurisdiction over the person are no longer required – or permitted – in Nevada under NRCP 12. The Supreme Court held in *Fritz Hansen*[29] that a defendant need no longer appear specially to attack the court's jurisdiction. Almost lyrically, the Court announced the abrogation of the special appearance doctrine and the requisite procedure in its place:

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[26] Nevada Family Law Practice Manual, 2013 Edition § 2L.7, quoting *Gojack*, 95 Nev. at 445-46, 596 P.2d at 239.

[27] *Id*.

[28] In *Smith v. Smith*, 100 Nev. 610, 691 P.2d 428, 431 (1984), the Court reviewed a case in which it concluded that the parties' convoluted procedural conduct had effectively stipulated to a bifurcated trial, in which the status of the marriage was terminated but jurisdiction over property issues had been reserved. The Court added, however, that "despite our acceptance of the separate trials in this case, we wish to emphasize that bifurcated divorce proceedings and the problems they are likely to engender are disfavored and should generally be avoided."

[29] *Fritz Hansen A/S v. Dist. Ct.* 116 Nev. 650, 6 P.3d 982 (2000).

> He is no longer required at the door of the ... courthouse to intone that ancient abracadabra of the law, de bene esse, in order by its magic power to enable himself to remain outside even while he steps within. He may now enter openly in full confidence that he will not thereby be giving up any keys to the courthouse door which he possessed before he came in. This, of course, is not to say that such keys must not be used promptly.

As the Court further explained, before a defendant files a responsive pleading such as an answer, that defendant may move to dismiss for lack of personal jurisdiction, insufficiency of process, and/or insufficiency of service of process, and such a defense is not "waived by being joined with one or more other defenses." Alternatively, a defendant may raise its defenses, including those relating to jurisdiction and service, in a responsive pleading. Objections to personal jurisdiction, process, or service of process are waived, however, if not made in a timely motion or not included in a responsive pleading such as an Answer, under NRCP 12(g), (h)(1).

The bottom line is that, to avoid waiver of a defense of lack of jurisdiction over the person, insufficiency of process, or insufficiency of service of process, a defendant should raise its defenses in its very first filing – either in an Answer or in a pre-Answer motion.

One of the many unique aspects of family law, distinguishing it from all other civil litigation, is the myriad ways in which jurisdiction can be provided over individual claims and causes of action, while absent from others. For example, under NRS 126.091(2), a court of this state has jurisdiction over a paternity/parentage action whenever a person "has sexual intercourse in this state . . . as to an action . . . with respect to a child who may have been conceived by that act of intercourse."[30] Even family law service of process rules are unique; the same provision provides that "[i]n addition to any other method provided by law, personal jurisdiction may be acquired by personal service of summons outside this state or by certified mail, restricted delivery, with return receipt requested.

So in the common factual circumstance in which parties have had sex in Nevada but do not live here, the Nevada courts would have jurisdiction over the questions of paternity and child support, but no over custody of that same child[31] or to dissolve any marriage of the parents.

The jurisdictional requirements for filing an ***annulment*** action are different, in some cases, from that of divorce cases. By statute, the Nevada courts have jurisdiction to entertain an action for annulment even when ***neither*** party is a resident of Nevada – so long as the marriage occurred here.[32]

And, of course, divorce jurisdiction does not answer all questions, since family law cases and issues can arise in a variety of pre-divorce, post-divorce, or entirely non-marital, actions. In all such matters, and with increased precision and certitude in the recent age of uniform laws, the governing statutes control when a court may, or may not, act.

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[30] As discussed below, such an act of sexual intercourse also provides child support jurisdiction under NRS 130.201(6).

[31] NRS 125A.305.

[32] NRS 125.360.

G. The *Kehaly* Contradiction

Pamela and William Kehaly lived in numerous states during their decades-long marriage—most recently before divorce litigation in Arizona, where they lived together from 2017 to 2022, and before that in Nevada for a year, and before that in California for many years.

William left Arizona for Nevada in the summer of 2022, waited six weeks to re-establish Nevada residency, and then sued for divorce here. Pamela hired counsel and filed for divorce in Arizona. William filed first.

Pamela filed a motion to dismiss the Nevada action, asserting that Arizona, as the last matrimonial domicile, had long-arm jurisdiction over William, that Nevada might have jurisdiction over status but had no personal jurisdiction over her and should dismiss the Nevada case under the *Gojack* anti-bifurcation rule, and defer to Arizona as a matter of comity and abstention.

At the resulting hearing, the district court determined that the "last matrimonial domicile" was no longer relevant under the revised statute, that the question is not the parties' current contacts with Nevada but their lifetime contacts, so that *Friedman*[33] and *Simpson*[34] are "irrelevant," that owning property here confers personal jurisdiction, and basically that having lived in Nevada at some point in the past gives the state jurisdiction over a party who once lived here, however briefly, and moved from here years ago.

Upon filing of a *Petition for Writ of Mandamus* to have the Nevada Supreme Court issue a mandate that Nevada lacks personal jurisdiction over Pamela, that Court first accepted the case and set it for *en banc* argument, and then issued a surprising refusal to hear the case stating that the parties had a "plain and speedy remedy" through an appeal.[35]

This, of course, was a decision that flies in the face of all previously held decisions that minimum contacts with the state are required before personal jurisdiction can be found and trial of the claim should be conducted. At present, the trial court decision endorses the holding that any party that once lived in a state no matter how long ago could be hauled back to that state despite having no or very limited current contacts.

The Supreme Court's holding in *Arbella*[36] "focuses on the relationship between the defendant, the forum, and the litigation, and 'the defendant's suit-related conduct,' which 'must create a substantial

[33] *Friedman v. Dist. Ct.*, 127 Nev. 842, 264 P.3d 11 (2011).

[34] *Simpson v. O'Donnell*, 98 Nev. 516, 654 P.2d 1020 (1982).

[35] As discussed above, once a responsive pleading is filed and the issue of personal jurisdiction is dealt with, the jurisdiction of the court is confirmed. It is too late to wait for an "appeal" as to personal jurisdiction and if it was nevertheless pursued, the waste of time and money to fully litigate an action that should not be in our courts at all is enormous.

[36] *Arbella Mut. Ins. Co. v. Eighth Judicial Dist. Court*, 122 Nev. 509, 134 P.3d 710 (2006).

connection with the forum.'"[37] None of that existed in this case and the Supreme Court ignored this when they declined to hear the writ proceeding and decided to allow the district court case to proceed when no proof of personal jurisdiction was actually present.

In short, this case calls into question decades of case law concerning personal jurisdiction in the context of a divorce action and leaves the door open to an enormous expansion of personal jurisdiction.

III. CHILD CUSTODY – INITIAL JURISDICTION[38]

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,[39] inconsistency of interpretation of the earlier uniform act – the UCCJA[40] – and the technicalities of applying the PKPA,[41] 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 Uniform Law Commission ("ULC")[42] 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 inconsistent State interpretations in several ways, as explained in the preamble to the modified uniform act:

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[37] *Id*., citing *Tricarichi v. Cooperative Rabobank, U.A.*, 135 Nev. 87, 440 P.3d 645 (2019). That principle was at the heart of the few cases he does cite, as set out below.

[38] 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).

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

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

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

[42] Previously known as The National Conference of Commissioners on Uniform State Laws (NCCUSL). Now 116 years old, the ULC 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 the ULC 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.

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.[43]

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."[44]

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:

[43] NRS 125A.305.

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

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.

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 should succeed.[45]

[45] 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); *Kaur v. Singh*, 136 Nev. ____, 477 P.3d 358 (Adv. Opn. No. 77, Dec. 19, 2020) (same).

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.

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.[46] 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.[47]

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.[48] The jurisdictional section of the Nevada enactment[49] 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."

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

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

[48] "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.

[49] NRS 125D.160.

What this means is that the rather loose language defining "emergency jurisdiction" in the UCCJEA[50] includes, at a minimum, any circumstances in which a court finds a "credible risk" of abduction.

IV. 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 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.

A. Exclusive, Continuing Jurisdiction

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.

[50] "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).

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.[51] 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 file 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.[52] 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.[53] 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."[54] The way the ULC put it: "If State A had jurisdiction under this section at the time

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[51] There appears to be developing an exception to the general rule on where a person "resides" when considering residence of a military member. *See In re Marriage of Brandt*, 268 P.3d 406 (2012), discussed *infra*.

[52] NRS 125A.325.

[53] *Friedman v. Dist. Ct.*, 127 Nev. 842, 264 P.3d 1161 (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).

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

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."[55]

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.[56]

B. Parties Leaving and Returning to the State

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 the ULC 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.

C. Special Problems with Military Members

As briefly noted above, there appears to be developing an exception – or at least a conflict between jurisdictions – to the general "objective" rule on where a person "resides" in the context of determining the residence of a military member to determine if a State has lost CEJ. The Colorado Supreme Court has strayed from the "purely objective" focus of the UCCJEA, and opined that a

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[55] Comment 2 to § 202 of the UCCJEA. 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.

[56] *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.

court should review 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, in determining the "residence" of a military member.[57]

A practitioner must also review the "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. The same considerations could alter the analysis of child support modifications.[58]

These cases are creating uncertainty for jurisdictional analyses when military members are involved in the case. Some decisions have held that a two year permanent change of station move elsewhere terminated Home State Jurisdiction for initial UCCJEA purposes.[59] Others have held that a six month residence overseas caused by assignment of the spouse of the custodial parent was considered a "temporary absence" preserving Home State jurisdiction for modification jurisdiction in the State from which they left, where the custodial parent returned to that State following the overseas assignment.[60]

Other courts, sometimes from the same State, have pushed back, stating that the test is a matter of objective reality of location, and should not concern itself with the intent of anyone involved in any way.[61] This is a subject that may require further statutory amendment or Supreme Court decision to reach stability.

D. UCCJEA Variations and Conflicts

It appears that even though the UCCJEA was designed to protect against more than one court having jurisdiction over custody matters, as time goes by, some courts are findings reasons to not apply the specifics of the uniform act. As an example, the court in *Matter of Marriage of AlHaidari*, No. 38084-0-III (Washington Court of Appeals, Division Three, November 14, 2023) found that the

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[57] *In re Marriage of Brandt*, 268 P.3d 406 (Colo. 2012) ("The statutory term 'presently reside' is not equivalent to 'currently reside' or 'physical presence').

[58] *See 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).

[59] *Carter v. Carter*, 758 N.W.2d 1 (Neb. 2008)

[60] *Lemley v. Miller*, 932 S.W.2d 284 (Tex. Ct. App. 1996); *see also In re Brilliant*, 86 S.W.3d 680 (Tex. Ct. App. 2002) ("without providing a bright-line test, holding that "logic at least supports a conclusion that a military absence is a temporary absence").

[61] *Powell v. Stover*, 165 S.W.3d 322 (Tex. 2005); *State v. Donna*, 2006 NMCA 23 (N.M. Ct. App. 2006) (irrelevant that a party was in the state only by reason of incarceration; that is where she was "living").

appeal presented a unique questions of whether Washington courts should decline subject matter jurisdiction over a child custody dispute or enforce an earlier child custody decree and agreement entered in Saudi Arabia.

The father challenged the Chelan County Superior Court's exercise of jurisdiction and award of temporary custody of the child to the mother; Washington's Uniform Child Custody Jurisdiction and Enforcement Act was determined to be controlling.

The Court of Appeals affirmed the superior court's exercise of jurisdiction on the basis of Washington's UCCJEA, which allows its courts to exercise jurisdiction, despite a foreign custody decree, "if a parent is subject to the death penalty if she returns to the foreign nation." In particular, during the custody battle, the father accused the mother of "gender mixing," adultery, and insulting Islam and Saudi Arabia. Gender mixing, a punishable crime in Saudi Arabia, entails a woman having a male friend. To prove the charge of adultery, the father submitted a photograph of the mother with a male who the father claimed to be her boyfriend. The crimes of adultery, insulting Islam, and insulting Saudi Arabia carry a death penalty in Saudi Arabia.[62]

This demonstrates that state's desire to politicize the issue of child custody. It is common that if the foreign court violates a party's due process rights – as they are viewed from the American State's point of view – then the foreign state can lose jurisdiction over a custody dispute.

Unfortunately, in polarized and politicized America, even the supposedly content-neutral UCCJEA has become a football in the culture wars, with Florida amending its version of the act to give jurisdictional preference to anyone trying to prevent an abortion, and California amending its version of the act to do the opposite. This is extremely unfortunate, and may well lead to collapse of the UCCJEA as a uniform rule-based framework that makes content-neutral determinations of which state should proceed to a child custody determination.

V. CHILD SUPPORT – INITIAL JURISDICTION

A. Generally

The Uniform Interstate Family Support Act ("UIFSA") has been adopted in ***every*** State. Nevada adopted it in 1997 as NRS Chapter 130; the additional federally-mandated provisions are contained in NRS chapters 31A, 125B, and 425. Like the UCCJEA did with the federal PKPA, it follows up on a federal enactment with a similar purpose and construction.[63]

[62] (Ed. Note: Washington's UCCJEA, RCWA 26.27.051, adds a provision to UCCJEA § 105, to provide: (4) A court of this state need not apply this chapter if the law of a foreign country holds that apostasy, or a sincerely held religious belief or practice, or homosexuality are punishable by death, and a parent or child may be at demonstrable risk of being subject to such laws. For the purposes of this subsection, "apostasy" means the abandonment or renunciation of a religious or political belief.)

[63] *See* 28 U.S.C. § 1738B (1994) (Full Faith and Credit for Child Support Orders Act, or "FFCCSOA").

Notably, the rules governing support and custody operate independently of one another. The courts of this State might be called upon to enforce a child support obligation against someone found here, or filing here, while having no jurisdiction over custody matters.[64] The obligor parent can ***always*** be sued for child support where that parent lives,[65] because child support is set by the court with personal jurisdiction over the paying parent.

The ULC put significant energy into trying to harmonize the provisions of the UCCJEA with those of UIFSA. It is not always possible to do so, given their very different jurisdictional foundations, but the intention is there, which is why so many of the definitional and other provisions read so similarly. Still, distinctions remain.

For example, while the child custody jurisdictional rules are deliberately child-centered, the jurisdictional rules for support initiation are deliberately expansive, and titled "Extended Personal Jurisdiction."[66] There are multiple bases for exercise of child support jurisdiction over a non-resident obligor, operating independently and in the alternative:[67]

1. Personal service of summons or other notice of the child support proceeding within this State.

2. Submission by the obligor to the jurisdiction of this State by consent, by entering a general appearance or filing a responsive document having the effect of waiving any contest to personal jurisdiction.

3. Having resided with the child in this State.

4. Having resided in this State and providing prenatal expenses or support for the child.

5. The child resides in this State by acts or directives of the non-resident.

6. The non-resident obligor engaged in sexual intercourse here, and the child may have been conceived thereby.

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[64] *See Vaile v. District Court*, 118 Nev. 262, 275, 44 P.3d 506, 515 (2002) ("Simply because a court might order one party to pay child support to another in the exercise of its personal jurisdiction over the parties does not permit the court to extend its jurisdiction to the subject matters of child custody and visitation"); *see also Kulko v. California*, 436 U.S. 84, 91-92, 56 L. Ed. 2d 132, 98 S. Ct. 1690 (1978) (where a defendant is subject to a State's jurisdiction, his rights in the matters ancillary to divorce may be determined by its courts).

[65] *See* NRS 130.201(1)-(2); *see also*, *e.g.*, Prof. John J. Sampson, "UIFSA: Ten Years of Progress in Interstate Child Support Enforcement" (Legal Education Institute National CLE Conference on Family Law, Aspen, Colorado, 2003) at 184 (Prof. Sampson was the official Reporter for the UIFSA legislation for NCCUSL, which created it).

[66] *See* NRS ch. 130, Article 2 (Jurisdiction).

[67] NRS 130.201.

7. Any other basis "consistent with the Constitution of this State and the Constitution of the United States for exercise of personal jurisdiction."

In other words, unlike the situation for custody, it is easy to propose facts under which more than one State would have initial child support jurisdiction, simultaneously.

It is for that reason (among others) that Mr. Vaile submitted himself to the jurisdiction of the courts of Nevada for the setting of a child support order, even though his divorce *Complaint* contained a fraudulent assertion of residency and Nevada had no jurisdiction over questions of child custody.

B. Competing Child Support Claims in Two States

NRS 130.204 directs the court what to do in the specific circumstance of a "simultaneous proceedings" in two States. The statute has two parts, depending on which State's case was filed first, and it sounds a bit confusing, because so much of it is framed in the negative, but the rules actually do make sense.

If the Nevada case was filed *second*, the first part of the statute applies:

> 1. A tribunal of this state may exercise jurisdiction to establish a support order if the petition or comparable pleading is filed after a petition or comparable pleading is filed in another state only if:
>
> (a) The petition or comparable pleading in this state is filed before the expiration of the time allowed in the other state for filing a responsive pleading challenging the exercise of jurisdiction by the other state;
>
> (b) The contesting party challenges the exercise of jurisdiction in the other state in a timely manner; and
>
> (c) If relevant, this state is the home state of the child.

If the Nevada case was filed *first*, the second part of the statute applies:

> 2. A tribunal of this state may ***not*** exercise jurisdiction to establish a support order if the petition or comparable pleading is filed before a petition or comparable pleading is filed in another state if:
>
> (a) The petition or comparable pleading in the other state is filed before the expiration of the time allowed in this state for filing a responsive pleading challenging the exercise of jurisdiction by this state;
>
> (b) The contesting party challenges the exercise of jurisdiction in this state in a timely manner; and
>
> (c) If relevant, the other state is the home state of the child.

In other words, where simultaneous child support proceedings are ongoing both here and elsewhere, the first question is which action was filed first. If it was the Nevada case, the action proceeds here unless the out-of-State party filed the other action within the time to answer or otherwise plead here, the objection to jurisdiction is timely filed here, and the other State is the child's Home State.

If the other State's action was filed first, the Nevada action proceeds only if the Nevada action was filed within the time to answer or otherwise plead in the other State, the objection to jurisdiction is timely filed there, and Nevada is the child's Home State.

Together, these "tie-breaking" rules should be mutually exclusive, so only one State's action should proceed to a child support order.

Since UIFSA permits jurisdiction over a nonresident to be established on any basis "consistent with the Constitution of this State and the Constitution of the United States for the exercise of personal jurisdiction,"[68] the Nevada long-arm statute[69] would apparently permit a child support case whenever Nevada was the last matrimonial domicile.[70]

C. Limited Immunity from Other Actions

The uniform acts go a long way toward avoiding a "Catch-22" for an obligor by providing limited immunity – a party participating in a UIFSA proceeding has immunity from both accidental appearance and from service of civil process while litigating the UIFSA proceedings or while physically present to participate in them.[71] A similar provision is included in the UCCJEA,[72] so it should not be possible to "boot-strap" a child custody case onto a child support case, or vice-versa; rather, it is necessary to have independent jurisdiction under the respective statute to conduct proceedings on that subject.

VI. CHILD SUPPORT – MODIFICATION JURISDICTION

The rules for modifying child custody orders, on the one hand, and child support orders, on the other, are radically different. As set out above, when all parties leave the State establishing a ***custody***

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[68] NRS 130.201.

[69] NRS 14.065.

[70] As discussed above, the ruling of at least one district court judge has cast some doubt on the continued vitality of the last matrimonial domicile rule and the Nevada Supreme Court declined to address the issue.

[71] NRS 130.314. The immunity furnished, however, might only apply to a person petitioning for a change in support (not responding to a petition filed by someone else), since the immunity is phrased as applying to "a petitioner in a proceeding under this chapter." A potential obligor responding to a petition to establish an original support order, even if not properly brought in that jurisdiction, might have to argue by analogy or reference other authority.

[72] NRS 125A.265. This immunity provision more clearly covers a "party to a child custody proceeding."

order, the Home State of the child becomes the central inquiry. Not so for a child ***support*** case. When all parties have left the State with CEJ over child support, they are entitled to ***enforce*** the support anywhere they choose to register it. In order to ***modify*** it, however, each has precisely the same burden – to register it in and move to amend it where the ***other*** party (custodian or non-custodian) happens to be living.[73]

As with the custody statutes, establishment of jurisdiction to modify a child support order is a matter of a "snapshot" taken at the moment of commencement of proceedings.[74] As stated by the Nevada Supreme Court in 2007, "Jurisdiction to modify a foreign support order is properly determined by the residence of the parties at the time a motion to modify is filed."[75]

The same parties to that unpublished order were involved in a later appeal in which the Supreme Court held, "When a Nevada court takes jurisdiction of a support order issued in another state, it takes jurisdiction to modify the order, not to reestablish an initial support amount. NRS 130.611(2) provides that the '[m]odification of a registered child-support order is subject to the same requirements, procedures and defenses that apply to the modification of an order issued by a tribunal of this State.'"[76]

The ULC modified UIFSA in 2001 to clearly provide that for UIFSA, as for the UCCJEA, jurisdiction is determined by the parties' ***actual physical*** residence at the time a motion to modify is filed.[77] The Nevada Legislature adopted those amendments in 2007.[78] Any contrary reading would be antithetical to the "certainty and predictability" that the provisions are intended to create, contrary to the case law that exists, and lead to interpreting the two statutes differently from one another for no valid purpose.

Despite this, a number of Nevada attorneys have attempted to manipulate matters by having their clients flee the State after registration of a child support order and filing of a modification motion here, and have actually gone into court claiming that the post-commencement relocation of their clients has an effect on the jurisdiction of the court. Mystifyingly, at least a couple of judges in this State have actually entertained such arguments, and resolved the question of jurisdiction based on the ***post***-commencement relocation of the party resisting the support modification.

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[73] NRS 130.611. If ***all*** parties move to Nevada, the courts here may also modify the order. NRS 130.613.

[74] *See*, *e.g.*, *Goddard v. Heintzelman*, 875 A.2d 1119 (Pa. Super. 2005); *Welsher v. Rager*, 491 S.E.2d 661 (N.C. App. 1997); *Child Support Enforcement Division of Alaska v. Brenckle*, 675 N.E.2d 390 (Alaska 1997).

[75] *Smith v. Thompson*, No. 46036 (Order of Reversal and Remand, Feb. 13, 2007).

[76] *Thompson v. Smith*, No. 52295 (Order of Reversal and Remand, Mar. 10, 2011).

[77] In the words of the official comment: "the time to measure whether the issuing tribunal has continuing, exclusive jurisdiction to modify its order, or whether all parties and child have left the State, is explicitly stated to be at the time of filing a proceeding to modify the child support order." Any "intent" to change residence at any moment after the actual filing of a motion is entirely irrelevant to the analysis. *See Smith*, *supra*.

[78] *See* NRS 130.205(a) (2007 amendments); SB 77 § 17 (2007 Legislature).

Any such argument, or ruling, is improper. The relocation of any party ***after*** the filing of a motion to modify child support is entirely irrelevant to the jurisdiction of the court. No such argument should ever be made, or entertained.

Many of the jurisdictional rules for modification of a child support order are the same as those discussed above for initiation of such a case – such as the permissible bases for exercise and application of the long-arm statute.

And there is authority governing what to do in the circumstance when all parties have left the issuing State, but one of them moves back before any other State assumes jurisdiction to modify the support order.

The current version of UIFSA § 611, enacted in Nevada as NRS 130.611, in combination with the "snapshot" rule described above, provides that even when both parties have left the original issuing State, and that State thus loses continuing, exclusive jurisdiction, when one party moves ***back*** to that State before any other state has taken continuing, exclusive jurisdiction, then the original issuing State's continuing, exclusive jurisdiction "springs back" into being.[79]

The 2001 amendment to UIFSA § 611 changed "remains the residence" to "is the residence" to make clear the original intent of the drafters that when a party returns to the original issuing State and no other State has modified the order, the original issuing State's continuing, exclusive jurisdiction is restored.[80]

An important distinction between the UCCJEA and UIFSA is that the latter does not include any grounds under which a court can decline jurisdiction over a support case once it has it. Under UIFSA, a court ***may not elect to decline*** jurisdiction to hear the merits of a modification motion once the jurisdictional basis for proceeding here has been established.[81] At the moment a motion for modification is filed in a court that has UIFSA jurisdiction, the prior State no longer has jurisdiction, and the Nevada court lacks the "privilege of declining jurisdiction."[82]

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[79] Special thanks to Laura Morgan, Esq., from whom this description was taken.

[80] *See* Laura Morgan, *UIFSA's "Spring Back" Provisions of Continuing, Exclusive Jurisdiction* (2006), posted at http://www.supportguidelines.com/articles/article200507.html, and *citing* John J. Sampson and Barry J. Brooks, *Uniform Interstate Family Support Act (2001) with Prefatory Notes and Comments (with Still More Unofficial Annotations)*, 36 Fam. L.Q. 329, 368 (2002).

[81] Specifically, the Official Comments to § 611 (our NRS 130.611) explain:

> Modification of child support under Subsections (a)(1) and (a)(2) is distinct from custody modification under the federal Parental Kidnaping Prevention Act, [28 U.S.C. § 1738A], which provides that the court of continuing, exclusive jurisdiction may "decline jurisdiction." Similar provisions are found in the UCCJA, Section 14. In those statutes the methodology for the declination of jurisdiction is not spelled out, but rather is left to the discretion of possibly competing courts for case-by-case determination. The privilege of declining jurisdiction, thereby creating the potential for a vacuum, is not authorized under UIFSA, see *Rosen v. Lantos*, 938 P.2d 729, 734 (N.M. App. 1997).

[82] NRS 130.611 & Official Comments.

It should also be made clear that once child support has been established in one State, not ***every*** aspect of the support order may later be modified elsewhere. The 2001 amendments made it clear that the ***duration*** of child-support obligation is fixed by the controlling order.[83]

In other words, the original time frame for support is not modifiable unless the law of the issuing State provides for modification of its duration. If the duration of child support was through age 21 in the State from which the original order came, then the age for termination of support is 21 here, even if everyone has moved to Nevada, where the age is 18 (or 19, if still in high school).[84] The reverse is also true – if child support is set in Nevada, it cannot be extended to a later age no matter who moves to any other State with different child support laws.

While slightly off-topic, one recurring error bears additional mention here. The State issuing a spousal support order is the ***only*** State that can ever modify that spousal support award, even if no one still remains in the issuing State, and even if all parties have now moved to the same other State.[85] So lawyers should not file, and judges should not entertain, motions to modify alimony orders entered elsewhere.

VII. DIVISION OF MILITARY RETIREMENT BENEFITS AS PROPERTY

An oddity which has arisen in the modern world of increasing federalization of traditional State regulation of domestic relations law bears repetition in this jurisdiction primer. Specifically, when a Court intends to divide military retired pay as the community property of a member and a spouse, another requirement besides traditional subject matter and personal jurisdiction is in play.

In enacting the Uniformed Services Former Spouses Protection Act,[86] Congress was concerned that a forum-shopping spouse might go to a State with which the member had a very tenuous connection and force defense of a claim to the benefits at such a location.

Accordingly, the USFSPA included special jurisdictional rules that must be satisfied in military cases to get an enforceable order for division of the benefits as property. In ***other*** public and private retirement plans, ***any*** State court judgment valid under the laws of the State where it was entered is generally enforceable to divide retirement benefits; this is not true for orders dividing military

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[83] *See*, *e.g.*, *Robdau v. Commonwealth, Virginia Dept. Social Serv.*, 543 S.E.2d 602 (Va. App. 2001).

[84] NRS 130.611(3); NRS 130.613. And the reverse is true as well, of course. If, for example, the State issuing the original child support order has a termination date like ours of 18 (or 19 if still in high school), that date applies no matter where the custodian, non-custodian, or child move subsequently. One particularly ineducable member of the Nevada Bar wasted a year of everyone's time and money trying to defeat Nevada jurisdiction so his client could re-file in Oregon, to get a couple years more child support, even though it was legally impossible for her to do so. Unfortunately, the judge – who did understand the rule – never publicly identified the absurdity of the ploy, and allowed the lawyer to play it out all the way to trial.

[85] NRS 130.2055.

[86] 10 U.S.C. § 1408 *et seq.*

retirement benefits as property. The rules do not restrict alimony or child support orders, which will be honored if the State court had personal and subject matter jurisdiction under its own law.

However, in a military case, an order dividing retired pay as the property of the member and the former spouse will only be honored by the military if the issuing court exercised personal jurisdiction over the member by ***reason of***: (1) residence in the territorial jurisdiction of the court (other than by military assignment); (2) domicile in the territorial jurisdiction of the court; or (3) consent to the jurisdiction of the court.[87]

These limitations override State long-arm rules, and must be satisfied in ***addition*** to any State law jurisdictional requirements. Cases lacking such jurisdiction can go forward, but they will not result in enforceable orders as to the retirement benefits. The statute effectively creates an additional jurisdictional requirement, which for lack of a better title can be called "federal jurisdiction."[88]

The essential lesson of this jurisdictional point (for the spouse) is to ***never*** take a default divorce against an out-of-State military member if seeking to divide the retirement benefits. The resulting judgment will not be enforceable; if valid jurisdiction under both State and federal law cannot be achieved, then the action may have to be dismissed and re-filed in the State in which the military member resides.

VIII. JURISDICTION TO CONSIDER MILITARY DISABILITY PAY IN CALCULATION OF CHILD SUPPORT AND SPOUSAL SUPPORT

The issue of disability awards, their division by Courts, and the establishment of both child support and spousal support for veterans and military retirees has been a hot topic at least since the *Howell* decision in 2017.[89]

Howell overturned decades of state case law across the country when it stated that disability benefits awarded to a veteran are ***never*** divisible, which the Court held included court-ordered indemnification for a post-divorce waiver of retirement benefits in favor of a disability award. In other words, a military member could, post-divorce, waive a portion of his military retired pay and reduce the amount that the other spouse would receive. Unless counsel for the former spouse took precautions to preserve jurisdiction over the divorce – usually affecting spousal support – the spouse could lose a benefit that they relied on receiving throughout the marriage, which is typically the largest marital asset.

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[87] 10 U.S.C. § 1408(c)(4).

[88] A full explanation of "federal jurisdiction," what it is and how to get it, is set out in detail in the article "Divorcing the Military: How to Attack, How to Defend," posted at: https://www.willicklawgroup.com/military-retirement-benefits/.

[89] *Howell v. Howell*, 137 S. Ct. 1400, 581 US __, 197 L. Ed. 2d 781 (2017).

In 2015 and earlier, there was a push throughout the country to protect veterans benefits to the exclusion of concerns for a former spouse or minor children. This was attempted in Nevada with the introduction of AB140 in the Nevada legislature. Quoting the article by Melissa Exline Esq. from the Fall 2015 NFLR:[90]

> The first draft of AB 140 would have barred a Nevada family court from even considering the VA benefits. Importantly, AB 140, as enacted, was changed so that Nevada does not bar the court from acknowledging the existence of such an important federal benefit. Nevada's family courts would not be forced to pretend the federal disability did not exist. While it is not permissible to seize the federal disability, Nevada's approach maintains the ability of a family court judge to look at all revenue streams, consider all applicable legal factors, and determine what remedy applies given the assets available and resources for each side. It is extremely important to be aware that the *Shelton* analysis, under contract law, remains intact with the changes from AB 140.

In other words, AB140, now codified as NRS 125.165, ***does not*** exempt disability income when setting either a child support or a spousal support award. The Court can make any award of either child support or alimony as long as the Court does not specifically say where the money to pay it comes from. Ms. Exline's article concluded:

> In summary, a properly drafted agreement, or careful language put on the record (as applicable), can protect the spouse getting an appropriate alimony award when VA disability is a source of income for the paying party. It is best to acknowledge the VA disability income, but note that it is not set over to the alimony recipient at all. Rather, how the paying party satisfies the settlement or court ordered alimony obligation is up to the payor, based on the resources at the payor's disposal. This is not unlike what takes place in child support cases when a court sets the amount based on imputed income. The family court has discretion to find the payor has the ability to pay without ever explicitly directing the payor to use VA disability to satisfy the obligation. If a payor chooses to pocket the VA disability, and leave an alimony obligation unsatisfied, clearly, an Order to Show Cause for Contempt is on the table.

Some sitting Judges do not understand this concept and it is counsel's job to educate the judiciary to ensure that valuable benefits are not left out of these calculations. This issue is being tested in the Supreme Court in at least one recent appeal. The district court judge misread the Nevada statute recited above and relied on legislative comments from the proponents of the legislation, deciding that disability pay is ***not*** to be considered when awarding alimony. It was plain error, but as of this writing it is not certain whether the appellate courts will correct it.

IX. AWARDING FEES WHERE JURISDICTION IS CONTESTED

This is another area in which confusion seems rampant. It is not unusual for a party to have moved here and initiated litigation here, requesting among other things a fee award against an out-of-State

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[90] https://www.nvbar.org/wp-content/uploads/NFLR%20-%20Fall%202015.pdf

opposing party. Nevada may not order ***any*** such economic relief against a defendant over whom the court lacks personal jurisdiction.

As stated in the Nevada Family Law Practice Manual:

> Where a Nevada divorce court failed to obtain personal jurisdiction over the defendant spouse, the court's order purporting to terminate a duty of support under a New York statute was void to the extent that it sought to terminate that duty. *Estin v. Estin*, 334 U.S. 541 (1948); *Vanderbilt v. Vanderbilt*, 354 U.S. 416 (1957). Presumably, the same rule applies to initiating, rather than terminating, such a duty of support.[91]

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

But the converse is not true. Nevada courts have personal jurisdiction over Nevada 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 be awarded.

This is admittedly one-sided, but Nevada's abrogation of the special appearance doctrine, coupled with the limited immunity set out in the relevant statutes, pretty much creates this situation whenever the out-of State litigant does not consent to the jurisdiction of the Nevada courts. Such a statement, in a pleading or preliminary motion filing, is all that is apparently required to prevent Nevada from imposing fees against such a party, even as that party seeks custody, or litigates support, or even seeks fees from the Nevada resident.[92]

X. FAMILY COURT JURISDICTION

The Supreme Court confirmed in 2011 what family law practitioners have long asserted – that judges elected to the family court bench have greater jurisdiction to hear cases than do other district court judges in this State. The *Landreth*[93] decision on re-hearing held:

> By creating a family court division, prescribing its jurisdiction, mandating the number of district court judges who must be judges of the family court, and requiring specialized instruction and training, the Legislature did not restrict the judicial powers of a district court judge sitting in the family court division. Indeed, it would not have the constitutional authority to do so. Instead, the Legislature has recognized that district court

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[91] Nevada Family Practice Manual, 2008 Edition § 1.25.

[92] *See Fritz Hansen A/S v. Dist. Ct.*, 116 Nev. 650, 6 P.3d 982 (2000) (abrogating "special appearance doctrine," and stating that defense of lack of personal jurisdiction may be joined with other substantive requests); NRS 130.314 & NRS 125A.265 (a party participating in a UIFSA or UCCJEA proceeding has immunity from both accidental appearance and from service of civil process while litigating the proceedings or while physically present to participate in them).

[93] *Landreth v. Malik*, 127 Nev. 175, 251 P.3d 163 (2011).

judges sitting in the family court division have expanded authority to hear family court disputes by virtue of their specialized training.

The bottom line is that any district court judge can hear any case properly heard by a Nevada district court, but certain classes of cases are statutorily required to be assigned to the family division, and while judges sitting in one division can be transferred to another, for shorter or longer periods, if a judge is transferred to the family division for an extended period, that judge is required to obtain the additional training required of judges elected to the family division.

In other words, it takes a wider skill set and specialized training beyond that expected of other district court judges to be a family court judge. If the matter is properly before family court, the judge has jurisdiction to hear and rule on all aspects of the case.

This, of course, puts a greater responsibility on the family law practitioner, who may find that what was supposed to be a straightforward divorce can morph into a jury trial on other civil, or even criminal, matters.[94]

XI. CONCLUSIONS

It makes little sense to spend time or money arguing about the merits of 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.

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[94] In 1999, the Nevada Legislature enacted A.B. 154, and amended NRS 3.025 and NRS 3.223 to resolve any perceived conflict by providing that a matter previously decided as a domestic relations case is required to be assigned to the same court where the case first originated. The enactment clarified the rule already known in the family courts as the "One Case, One Court Rule," now more clearly enunciated as legislative policy of a "One Family, One Court Rule," and regulated in Clark County by EDCR 5.202, and in Washoe County by WDCR 37.