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LAW AND THE FAMILY

**"CUSTODY JURISDICTION UNDER THE UCCJA AND PKPA "**

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**OFTEN WE** yearn for simpler times, but when it comes to child custody and visitation, our laws have improved with age.

The Supreme Court's 1953 plurality decision in *May v. Anderson* [FN1] held that custody and visitation orders were not "final" judgments but were readily modifiable in the state of rendition and elsewhere. Consequently, it was not uncommon for a second forum to substitute its preferences for those of the first forum, often tipping the balance in favor of the local party. The lack of finality to custody orders also rendered the Full Faith and Credit Clause impotent in custody disputes.

For example, Mary Jane, a middle-class, full-time mother of two boys casually waved goodbye to them one day as they happily left with their father on a seemingly pleasant weekend fishing trip in 1975. Soon after, she was fighting tooth-and-nail for the return of the children to her home in New York, in a Virginia Family Court, years after the judgment of divorce awarded her custody in New York.

The state of the law invited child abduction and self-help, placing children at grave risk. When it came to children new meaning was given to the term "possession is nine-tenths of the law."

Responding to a growing need, the National Conference of Commissioners on Uniform State Laws drafted the Uniform Child Custody Jurisdiction Act (UCCJA). By the 1980s it had been adopted, with variations, by all states and the District of Columbia. New York adopted it as Article 5-A of the Domestic Relations Law (DRL). [FN2]

**Conflicting Jurisdiction**

**Before the UCCJA there were four well established bases for custody jurisdiction: (1) The state where the defendant was domiciled, resident or was personally served, i.e., subject to personal jurisdiction, had child custody jurisdiction. (2) The state where the child was domiciled had custody jurisdiction, since it was concerned with the child's "status," that state being the domicile of the father or the person with whom the child was living. (3) The state where the child was physically present had custody jurisdiction, because of its concern over the child's welfare and its immediate access to custodial information. (4) Initial jurisdiction could be exercised on any one of the above bases, frequently resulting in concurrent custody jurisdiction in more than one state. [FN3]**

**Passage of the UCCJA resulted in codification of four bases of jurisdiction set forth in DRL s75-d and the provision in DRL s75-o that prohibits modification of a custody order of a court of another state under certain circumstances. These are that it appears to the court of this state that the court that rendered the order does not now have jurisdiction under prerequisites substantially in accordance with Article 75 or has declined to assume jurisdiction to modify the order and the court of this state has jurisdiction.**

**Under the provisions of the UCCJA, a court of this state that is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree but only when one of four specified sets of circumstances exists. Physical presence of the child, while desirable, is not a requisite for jurisdiction to determine his custody [FN4] and physical presence of the child, or of the child and one of the contestants, is not alone sufficient to confer jurisdiction to make a child custody determination. [FN5]**

**In the absence of such circumstances, the custody decrees of sister states entered pursuant to the UCCJA must be enforced. Where New York does not satisfy any of the jurisdictional requirements, it is error for a court in New York to take jurisdiction of a custody proceeding. [FN6]**

**Likewise, these same jurisdictional requirements are used to determine whether a court of another state that has rendered a custody decree, had proper jurisdiction at the time of such decree and currently has jurisdiction to modify that decree.**

**The UCCJA offers a standard for determining whether the necessary predicate for jurisdiction exists. Even if it does, the inquiry does not end there. The court must then determine whether to exercise its**

jurisdiction. The UCCJA guides the court by asking it to consider whether it is an inconvenient forum, or whether the conduct of the parties militates against an exercise of jurisdiction.

It also provides a common sense approach that notwithstanding that New York has jurisdiction, a court shall not exercise its jurisdiction if when the proceeding began another proceeding concerning the custody of the child was pending in a court of another state exercising jurisdiction substantially in conformity with UCCJA. [FN7]

### **New York Jurisdiction**

Certain circumstances allow for New York courts to claim jurisdiction to make a child custody determination. The first of these is when New York is the home state of the child at the beginning of the custody proceeding. Another basis is where New York had been the child's home state within six months before commencement of such proceeding and the child is absent from New York because of his removal or retention by a person claiming his custody or for other reasons, and a parent or person acting as parent continues to live in this state. [FN8]

Under the UCCJA, "home state" means the state in which the child, when the custody proceeding begins, has resided with the parents, a parent, or a person acting as parent for at least six consecutive months. [FN9] If a child less than 6 months old at the time of the commencement, home state means the state in which the child has resided with any of such persons for most of the time since birth.

The UCCJA provides that a New York court has jurisdiction to make a child custody determination when it is in the best interest of the child that a New York court assume jurisdiction because the child and his parents, or the child and at least one contestant, have a significant connection with New York, and there is, within the jurisdiction of the court, substantial evidence concerning the child's present or future care, protection, training and personal relationships. [FN10] While the general language of the provision permits a flexible approach to various fact patterns, it has been said that maximum rather than minimum contacts with New York are required and that the imprecision of the language must not destroy the legislative design to limit jurisdiction rather than proliferate it. [FN11]

At the same time, overseeing the interests of children is the driving force behind the act. As such, a court of this state has jurisdiction to make a custody determination when the child is physically present in

the state and has been abandoned or an emergency necessitates protection of the child. [FN12] To meet the "emergency" it must be demonstrated that the child would suffer physically or mentally in some manner if jurisdiction were not exercised. While specific allegations of abuse which are substantiated by testimony and documentary evidence may trigger "emergency" jurisdiction, vague and unsubstantiated allegations which are denied are insufficient. [FN13]

When it appears that no other state would have jurisdiction under prerequisites substantially in accordance with those mentioned, or another state has declined to exercise jurisdiction on the ground that New York is the more appropriate forum to determine the custody of the child, and it is in the best interest of the child, New York can assume jurisdiction.

### **Parental Kidnapping**

The UCCJA must be read in conjunction with the federal Parental Kidnapping Prevention Act of 1980 (PKPA). [FN14] The PKPA empowers the appropriate authorities of every state to enforce according to its terms, any child custody determination made consistently with the provisions of the PKPA by a court of another State. The enforcing State cannot modify the determination except as provided in subdivision (f) of the PKPA.

Under the PKPA, [FN15] a child custody court determination is consistent with the provisions of the PKPA only if such court has jurisdiction under the law of such state and, meets one of the following conditions:

(1) such state is the home state of the child on the date of the commencement of the proceeding, or had been the child's home state within six months before the date of the commencement of the proceeding and the child is absent from such state because of his removal or retention by a contestant or for other reasons, and a contestant continues to live in such state;

(2) it appears that no other state would have jurisdiction under such home state provision and it is in the best interest of the child that a court of such state assume jurisdiction because the child and his parents, or the child and at least one contestant, have a significant connection with such state other than mere physical presence in the state and there is available in that state substantial evidence concerning the child's current or future care, protection, training and personal relationships;

**(3) the child is physically present in such state and has been abandoned or it is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse;**

**(4) it appears that no other state would have jurisdiction under the above conditions, or another state has declined to exercise jurisdiction on the ground that the state whose jurisdiction is at issue is the more appropriate forum to determine the custody of the child, and it is in the best interest of the child that such court assume jurisdiction; or,**

**(5) the court has continuing jurisdiction pursuant to the statute. [FN16]**

**The jurisdiction of a court of a state that has made a child custody determination consistently with the provisions of the PKPA continues as long as the court has jurisdiction under the law of that state and that state remains the residence of the child or of any contestant. [FN17]**

**Because of the Supremacy Clause of the U.S. Constitution, the PKPA controls and preempts any inconsistent state law, including the UCCJA, [FN18] that conflicts with the jurisdictional provisions of the PKPA. The federal statute, in effect, places continuing exclusive jurisdiction for modification purposes in the "home state" as long as the child or one contestant remains in such state and even though a second state currently has a greater concern with the child's welfare.**

**The jurisdictional differences between the PKPA and the UCCJA, especially as to enforcement and modification, have precipitated considerable confusion and uncertainty. For example, under the UCCJA "Home State" means the state in which the child at the time of the commencement of the custody proceeding, has resided with his parents, a parent, or a person acting as parent for at least six consecutive months. [FN19] In the case of a child less than six months old at the time of the commencement of the proceeding. "Home State" means the state in which the child has resided with any of such persons for a majority of the time since birth.**

**In contrast, under the PKPA "Home State" means the state in which, immediately preceding the time involved, the child lived with his parents, a parent or a person acting as parent, for at least six consecutive months, and in the case of a child less than six months old, the state in which the child lived from birth with any of such**

persons. Under the PKPA periods of temporary absence of any of such persons are included in the six-month or other period.

The UCCJA definition of "home state" uses the word "resided" while the PKPA definition of it uses the word "lived." Thus, the child must be a "resident" although not a domiciliary, to qualify for home state jurisdiction under the UCCJA. In contrast, under the PKPA residence is not a prerequisite to qualify for "home state" jurisdiction. The child simply has to live in the state.

FN1. 345 US 528, 97 L.Ed. 1221, 73 S Ct 840.

FN2. Laws 1977, ch. 493, eff. Sept. 1, 1978.

FN3. See *Sampsell v. Superior Court of Los Angeles County* (1948) 32 Cal2d 763, 197 P2d 739.

FN4. DRL s75-d(3).

FN5. DRL s75-d(2).

FN6. *De Passe v. De Passe* (1979, 4th Dept.) 70 AppDiv2d 473, 421 NYS2d 497.

FN7. *Vanneck v. Vanneck* (1980) 49 NY2d 602, 404 NE2d 1278.

FN8. DRL s75-d(1)(a).

FN9. DRL s75-d(5).

FN10. DRL s75-d(1)(b).

FN11. *Vanneck v. Vanneck*, *supra*.

FN12. DRL s75-d(1)(c).

FN13. *Hernandez v. Collura* (1985, 2d Dept.) 113 AppDiv2d 750, 493 NYS2d 343.

FN14. 28 USC 1738A

FN15. 28 USC 1738A(c)(1)(A)

FN16. 28 USC s1738A(c)

FN17. 28 USC s1738A(d).

**FN18. Enslein v. Enslein, (1985, 2d Dept.) 126 AppDiv2d 973, 492 NYS2d 785.**

**FN19. DRL s75-d(5).**

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