

UCCJEA: BRIGHT LINE RULES ARE EMERGING

Harry L. Tindall

Angela G. Pence

Tindall & Foster, P.C.

1300 Post Oak, Suite 2200

Houston, Texas 77056-3014

Telephone: (713) 622-8733

Fax: (713) 622-8744

Email: htindall@tindallfoster.com

apence@tindallfoster.com

Web: www.tindallfoster.com

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I. Call for a Change

Effective September 1, 1999, Texas adopted the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), which was adopted by the National Conference of Commissioners on Uniform State Law in 1997, as an effort to revise the 1968 Uniform Child Custody Jurisdiction Act (UCCJA), and bring it into compliance with the Parental Kidnapping Prevention Act (PKPA). The UCCJEA was recommended for approval by all states by the American Bar Association in 1998, and has currently been adopted by Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, District of Columbia, Idaho, Iowa, Kansas, Maine, Minnesota, Montana, North Carolina, North Dakota, Oklahoma, Oregon, Tennessee, Texas, Utah, West Virginia. Legislation is pending in Georgia, Hawaii, Indiana, Mississippi, Missouri, New Jersey, New Mexico, Virginia, and Washington. In Texas, the UCCJEA is found in Chapter 152 of the Texas Family Code.

Thus, the rules that we have learned in applying the UCCJA are no longer applicable to interstate custody proceedings. As Justice McClure pointed out in the case of *McGuire v. McGuire*, “case law under the former Texas version of the Uniform Child Custody Jurisdiction Act regarding continuing jurisdiction will have little, if any, precedent value under the new act.” 18 S.W.3d 801, 806 (Tex. App.—El Paso 2000, no pet.). See also *Allison v. Allison*, 3 S.W.3d 211 (Tex. App.—Corpus Christi, 1999).

It may be some time before we have extensive case law on the Act itself. In fact, other than references to the new Act in cases in which the UCCJA provisions were actually in effect at the time the proceeding was filed, there have been no reported UCCJEA cases to date. *But see Castillo v. Bethke*, 2000 WL 1221590 (Minn. App. August 29, 2000) (discussing the conflict between an interstate custody dispute involving one UCCJA state and one UCCJEA state).

However, the UCCJEA is intended to provide much needed clarity to the confusion created by the conflicts between the old UCCJA and the PKPA. Secondly, the UCCJEA adds interstate civil enforcement for child custody orders.

These interstate custody acts are necessary because Americans are mobile people who seldom stay in one state. This problem is particularly seen when a parent lives in a different state from the child and other parent. More than one state may have the power to adjudicate a dispute between them, and as a result, the competing decisions confuse, but not necessarily conclude, the dispute. To add to the confusion, child custody orders can be modified and are subject to reconsideration and change over the life of a minor child. Furthermore, orders must be given enforcement to provide any meaningful life to the order itself. The UCCJEA attempts to provide some bright line rules, once and for all, to discourage, and hopefully eliminate, competing child custody orders.

II. Terminology

While most of the definitions are similar to those of the UCCJA, there are a couple of terms of art that bear mentioning within the context of the UCCJEA.

A "**Child custody determination**" means a judgment, decree, or other order of a court providing for legal custody, physical custody, or visitation with respect to a child. The term includes permanent, temporary, initial, and modification orders. The term does not include an order relating to child support or another monetary obligation of an individual. TEX. FAM. CODE ANN. § 152.102 (3). This closely tracks the PKPA definition.

A "**Child custody proceeding**" means a proceeding in which legal custody, physical custody, or visitation with respect to a child is an issue. The term includes a proceeding for divorce, separation, neglect, abuse, dependency, guardianship, paternity, termination of parental rights, and protection from domestic violence in which the issue may appear. The term does not include a proceeding involving juvenile delinquency, contractual emancipation, or enforcement under Subchapter D. TEX. FAM. CODE ANN. § 152.102 (4). Adoptions, as well as proceedings pertaining to the authorization of emergency medical care of a child, are also expressly excluded from the UCCJEA. TEX. FAM. CODE ANN. § 152.103

"**Court**" means an entity authorized under the law of a state to establish, enforce, or modify a child custody determination. TEX. FAM. CODE ANN. § 152.102 (6).

"**Home state**" means the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding. In the case of a child less than six months of age, the term means the state in which the child lived from birth with a parent or a person acting as a parent. A period of temporary absence of a parent or a person acting as a parent is part of the period. TEX. FAM. CODE ANN. § 152.102 (7).

An "**Initial determination**" means the first child custody determination concerning a particular child. TEX. FAM. CODE ANN. § 152.102 (8).

A "**Modification**" means a child custody determination that changes, replaces, supersedes, or is otherwise made after a previous determination concerning the same child, whether or not it is made by the court that made the previous determination. TEX. FAM. CODE ANN. § 152.102 (12).

A "**Person acting as a parent**" means a person, other than a parent, who has physical custody of the child or has had physical custody for a period of six consecutive months, including any temporary absence, within one year immediately before the commencement of a child custody proceeding; and has been awarded legal custody by a court or claims a right to legal custody under the law of this state. TEX. FAM. CODE ANN. § 152.102 (13).

"**Visitation**" means the possession of or access to a child. TEX. FAM. CODE ANN. § 152.102 (13).

III. Information To Be Submitted to Court

Under section 152.209, each party, in its first pleading or in an attached affidavit, must provide, under oath, information as to the child's present address, the places where child has lived during the last five years, and the names and present addresses of the persons with whom the child has lived during that period. The pleading or affidavit must also state whether the party:

- 1) has participated, in any capacity, in any proceeding concerning the custody of or visitation with the court, including the court, cause number, and the date of the determination;
- 2) knows of any proceeding that could affect the current proceeding, including the court, cause number and nature of the proceedings; and
- 3) knows the names and addresses of any person not a party who has physical custody of the child or claims rights of legal custody or physical custody or visitation with, and their names and addresses.

TEX. FAM. CODE ANN. § 152.209(a). The Act also contains provisions to allow for this information to be filed under seal if the "health, safety, or liberty of a party or of the child would be jeopardized if disclosed to the other party or the public." TEX. FAM. CODE ANN. § 152.209(e).

IV. Initial Child Custody Jurisdiction

Under section 152.201 of the Texas Family Code, a Texas court has jurisdiction to make an initial child custody determination only if:

- 1) Texas is the home state of the child on the date the first pleading is filed, or was the home state of the child within 6 months before the first pleading is filed and the child is absent from the state but a parent or person acting as a parent continues to live in Texas;
- 2) A court of another state does not have home state jurisdiction, or a court of the home state of the child has declined to exercise jurisdiction on the ground that Texas is a more appropriate forum; and
 - A) the child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with Texas other than mere physical presence; and
 - B) substantial evidence is available in Texas concerning the child's care, protection, training, and personal relationships;
- 3) All courts having jurisdiction under (1) or (2) above have declined to exercise jurisdiction on the grounds that a Texas court is the more appropriate forum to determine the custody of the child; OR
- 4) No court of any other state would have jurisdiction under any of the criteria above.

TEX. FAM. CODE ANN. § 152.201(a).

Thus, under the UCCJEA, home state jurisdiction is given absolute priority over any other jurisdictional bases for initial custody determinations. Any state that is not the home state of the child will defer to the home state, if there is one, in taking jurisdiction over an initial child custody dispute.

Unlike the UCCJA, the UCCJEA no longer allows a Texas court to exercise jurisdiction over a child custody jurisdiction merely because it would be in the “best interest” of the child to do so. If there is no court with home state jurisdiction, or if the state having home state jurisdiction declines to exercise it, the Texas court can make an initial child custody determination based upon a significant connection. The UCCJEA requires that the significant connections be between the child, the child’s parents or the child and a person acting as a parent.

Finally, the UCCJEA makes clear that personal jurisdiction over, or the physical presence of, a parent or the child is neither necessary nor required under this Act. TEX. FAM. CODE ANN. § 152.201(b), (c). Neither minimum contacts nor service within Texas is required for the court to have jurisdiction to make the child custody determination. Furthermore, the presence of minimum contacts or service within Texas is not sufficient to confer this subject matter jurisdiction to make the child custody determination. And, because this is subject matter jurisdiction, an agreement of the parties to confer jurisdiction on a Texas court that would not otherwise have jurisdiction under the UCCJEA is ineffective—subject matter jurisdiction cannot be waived.

V. Exclusive Continuing Jurisdiction

The UCCJEA also provides for continuing exclusive jurisdiction. Once a Texas court has made a child custody determination, Texas will have exclusive continuing jurisdiction over the determination until:

- 1) the Texas court determines that neither the child, nor the child and one parent, nor the child and a person acting as a parent, have a significant connection with Texas AND that substantial evidence is no longer available in Texas concerning the child’s care, protection, training, and personal relationships OR
- 2) the Texas court or court of another state determines that the child, the child’s parents, and any person acting as a parent do not presently reside in Texas.

TEX. FAM. CODE ANN. § 152.202. Under the UCCJA, once a child established a new home state, jurisdiction shifted to the new home state, even if one parent remains in the child’s original home state. The UCCJEA, however, does not allow the jurisdiction to shift in this fashion, keeping it in the original home state as long as a parent remains there.

Once Texas has lost exclusive, continuing jurisdiction, it can modify its own determinations only if it has jurisdiction to make an initial child custody determination. TEX. FAM. CODE ANN. § 152.202(b). 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.

VI. Modification Jurisdiction

Except in cases of temporary, emergency jurisdiction, a Texas court may not modify a child custody determination made by a court of another state unless Texas has the requisite jurisdiction to make an initial child custody determination (as the home state or significant connection) AND:

- 1) the court of the other state determines that it no longer has exclusive continuing jurisdiction or that the Texas court would be a more convenient forum; OR
- 2) either the Texas court or the court of the other state determines that the child, the child's parents, and any person acting as a parent do not presently reside in the other state.

TEX. FAM. CODE ANN. § 152.203.

VII. Temporary Emergency Jurisdiction

Texas courts can exercise temporary emergency jurisdiction if the child is in the 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 subject to or threatened with mistreatment or abuse. TEX. FAM. CODE ANN. § 152.204(a).

If there is no previous child custody determination to be enforced and no proceeding has been commenced in a state having jurisdiction to make an initial child custody determination, a state having continuing exclusive jurisdiction, or a state with modification jurisdiction, the order issued by the state having temporary emergency jurisdiction shall remain in effect until an order is obtained from a state having the requisite jurisdiction under sections 152.201-152.203. TEX. FAM. CODE ANN. § 152.204(b). If no proceeding is brought in a court having the necessary jurisdiction, a child custody determination made under temporary emergency jurisdiction becomes a final determination if it so provides and if Texas becomes the home state of the child. TEX. FAM. CODE ANN. § 152.204(b).

If there has been a previous child custody determination entitled to be enforced, or a child custody determination has been commenced in a state having initial, continuing exclusive, or modification jurisdiction, any order issued by a Texas court under this section must specify in the order the period of time that the court considers adequate to allow the person seeking the emergency order to obtain an order from the state with the

requisite jurisdiction. The temporary emergency order remains in effect until an order is obtained from the other state or the period expires. TEX. FAM. CODE ANN. § 152.204(d).

Thus, the UCCJEA provides for temporary emergency jurisdiction that can develop into continuing jurisdiction only if no other state with grounds for continuing jurisdiction can be found or, if found, declines to take jurisdiction. The child's presents and its abandonment, mistreatment, or abuse still trigger the taking of emergency jurisdiction, but threats to siblings or a parent can also confer emergency jurisdiction.

VIII. Inconvenient Forum

Even if a Texas court has the requisite jurisdiction to make a child custody determination, it may decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances and that a court of another state is a more appropriate forum. In determining whether it is more appropriate for another state to exercise jurisdiction, the court shall consider the following factors:

- 1) whether or not there has been domestic violence;
- 2) how long the child has resided outside the state;
- 3) the distance between the states;
- 4) the relative financial circumstances of the parties;
- 5) any agreement of the parties regarding jurisdiction;
- 6) the nature and location of the evidence relative to the pending litigation;
- 7) the ability of the court to decide the matter expeditiously; and
- 8) the familiarity of the court of each state with the facts and issues of the pending litigation.

TEX. FAM CODE ANN. § 152.207.

Furthermore, even if a Texas court has the necessary jurisdiction to make a child custody determination, the court may decline to exercise it because a person seeking to invoke its jurisdiction has engaged in "unjustifiable conduct" unless:

- 1) the parents and all person acting as parents have acquiesced in the exercise of jurisdiction;
- 2) the Texas court with jurisdiction determines it is the more appropriate forum; or
- 3) no court of any other state would have jurisdiction under the UCCJEA.

TEX. FAM CODE ANN. § 152.208.

IX. Enforcement of Child Custody Determinations

With Texas’s adoption of the Uniform Child Custody Jurisdiction and Enforcement Act, litigants now have an additional means of enforcement of custody and possession orders. Although generally considered a means for enforcement of out-of-state custody orders, subchapter D of chapter 152 sets forth procedures for the issuance of a warrant to take possession of a child, and does not limit its application to interstate orders.

Under the UCCJEA, Texas courts shall recognize and enforce a child custody determination of a court of another state, if the issuing state exercised jurisdiction in substantial conformity with the Act. TEX. FAM. CODE ANN. § 152.303(a). This is in compliance with the provisions of the PKPA. Enforcement may be through a temporary visitation order, registration of the child custody determination (using procedures similar to those found in the Uniform Interstate Family Support Act), through an expedited enforcement proceeding, or through a warrant to take physical custody of a child.

The “Petitioner” is the party seeking to enforce an order for the return of a child either under the Hague Convention on the Civil Aspects of International Child Abduction (Hague) or enforcement of a “child custody determination.” TEX. FAM. CODE ANN. § 152.301(1).

The “Respondent” is the person against whom a proceeding has been commenced for enforcement of an order for the return of a child under The Hague or enforcement of a child custody determination. TEX. FAM. CODE ANN. § 152.301(2).

A. Temporary Visitation

A Texas court may issue a temporary order enforcing the visitation provisions of an out of state order, even if it does not have jurisdiction to modify a child custody determination. TEX. FAM. CODE ANN. § 152.304. It can even issue a temporary order enforcing the visitation provisions of an out of state order that does not provide for a specific visitation schedule, but must include a period in which the temporary order will be in effect, providing the Petitioner time to seek an order from the court having the appropriate jurisdiction.

B. Expedited Enforcement of Child Custody Determinations

A petition for expedited enforcement must be verified, and certified copies, or copies of certified copies, of all orders sought to be enforced, as well as any order confirming registration of the order, must be attached to the petition. TEX. FAM. CODE ANN. § 152.308(a). The petition must state:

- (a) whether the court that issued the determination identified the jurisdictional basis it relied upon in exercising jurisdiction and, if so, what the basis was;

- (b) whether the determination sought to be enforced has been vacated, stayed, or modified by a court whose decision must be enforced, and if so, the identity of that court, the case number, and the nature of the proceeding;
- (c) whether any other proceeding has been commenced that could affect the current proceeding, including any proceeding related to domestic violence, protective orders, termination, or adoption, and if such a proceeding has been commenced, the court, case number, and the nature of that proceeding;
- (d) the current physical address of the child and the Respondent, if known; and
- (e) whether any other relief in addition to the immediate physical custody of the child and attorney's fees is being requested and, if so, what is being requested, including any special request for assistance from a law enforcement agency.

TEX. FAM. CODE ANN. § 152.308(b). Unless a warrant for the immediate return of the child is also issued, the petition, along with an order to appear, must be served by any means authorized by Texas law on the Respondent and on any other person who has physical custody of the child. TEX. FAM. CODE ANN. § 152.309.

C. Order To Appear

On the filing of the petition, the court shall issue an order directing the Respondent to appear in court, in person, either with or without the child, at a hearing. The court may also enter any other orders necessary to ensure the safety of the parties and the child. TEX. FAM. CODE ANN. § 152.308(c).

The hearing must be held on the next judicial day after service unless that date is impossible, in which case the court shall hold the hearing on the first judicial day possible. The court can only extend the hearing date upon the request of the Petitioner. TEX. FAM. CODE ANN. § 152.308(c).

The Order To Appear should state the time and place of the hearing and include a warning to Respondent that at the hearing, the court will award Petitioner the immediate physical custody of the child and order Respondent to pay any fees, costs, and expenses incurred by the Petitioner. Such relief will be granted unless the Respondent appears as ordered and establishes that:

- (a) the child custody determination has not been registered and confirmed as required by section 152.305 and the issuing court did not have jurisdiction under the UCCJEA;
- (b) the child custody determination has not been registered and confirmed under section 152.305 and has been vacated, stayed, or modified by a court with UCCJEA jurisdiction;
- (c) the child custody determination has not been registered and confirmed and the Respondent, although entitled, was not afforded proper notice of the proceeding that issued the order sought to be enforced; or
- (d) the child custody determination was registered and confirmed but has since been vacated, stayed, or modified by the court with UCCJEA jurisdiction.

TEX. FAM. CODE ANN. § 152.308(d). Thus, the scope of the inquiry for the enforcing court is quite limited. Unlike the habeas corpus proceedings, the voluntarily relinquishment of actual care, custody, and control of the child for a period of time is not a defense to enforcement of a child custody determination under the UCCJEA. The defenses to enforcement under the UCCJEA are limited to jurisdictional and due process arguments against the order sought to be enforced. The court is not allowed to look into any other defenses. If there are allegations that the child will be endangered by the enforcement of a custody or visitation order, the court may be able to assume emergency jurisdiction as outlined above, but that jurisdiction will be limited—allowing the court to issue a temporary order and directing the parties to proceed in either the court that is exercising continuing jurisdiction over the custody proceeding or that would have jurisdiction to modify the custody determination.

D. Warrant To Take Physical Custody

The petition for physical custody under this section may also on verified pleading, include an application for the issuance of a warrant to take physical custody of the child. TEX. FAM. CODE ANN. § 152.311(a). If the court, after hearing the testimony of the Petitioner or another witness, finds that the child is immediately likely to suffer serious physical harm or to be removed from the State, it may issue a warrant to take physical custody of the child.

In the event such a warrant is issued, the hearing on the underlying petition must be held the next judicial day following execution of the writ unless that day is impossible, in which case the hearing must be held on the first judicial day possible. The application for the warrant must include the same statements required to be contained in the petition. TEX. FAM. CODE ANN. § 152.308(b).

The warrant to take physical custody of the child must recite all of the facts on which the conclusion of imminent serious physical harm or removal from the jurisdiction is based. It should direct the appropriate law enforcement officers to take physical custody of the child immediately and make orders for the placement of the child pending final relief. TEX. FAM. CODE ANN. § 152.311(c). Placement with the Petitioner or any other appropriate placement authorized by law may be ordered.

The Respondent must be served with the petition, the warrant, and order immediately after the child is taken into custody. TEX. FAM. CODE ANN. § 152.311(d).

X. Conclusion

While it is impossible to do more than highlight some of the provisions of the UCCJEA in such a short article, it is the hope of the Uniform Law Commissioners that it will provide much better relief for parents and children who suffer from interstate child custody disputes. It is the hope of the Commission, that like the UCCJA, it will soon be adopted by all 50 states.