

Same-Sex Marriage in Wisconsin Post *Obergefell*: A Practical Guide

By Christopher S. Krimmer



The U.S. Supreme Court issued the single most important civil rights case in the history of the gay and lesbian civil rights movement this past term. In Obergefell v. Hodges,¹ the Court held that gay men and lesbians have the right to marry under the Due Process and Equal Protection Clauses of the U.S. Constitution. In other words, no state can deny this right to gay and lesbian couples by legislation, referendum, case law, or even a state constitutional amendment.

Marriage equality for same-sex couples is now legal in every state in the country. This article will discuss a brief history of same-sex marriage in Wisconsin, the *Obergefell* decision, and how that decision impacts family

violated the rights of gay men and lesbians under the U.S. Constitution.² Within hours of the decision being released, couples started to gather around local county clerk offices seeking marriage licenses. Many same-sex couples who waited years, if not decades, to legally marry in

Wisconsin, were married on a late Friday evening in June 2014.

Judge Crabb's declaratory order did not contain any injunctive relief, rendering unclear whether the state could issue marriage licenses to same-sex couples immediately or if issuance must wait until Judge Crabb ruled on a pending motion to stay her decision. On June 13, 2014, Judge Crabb clarified the confusion

37

Same-Sex Marriage in Wisconsin
Post *Obergefell*: A Practical Guide

45

Obergefell:

The Impact on Estate Planning

46

Twelve Tax Tips for the
Well-Prepared Divorce Attorney

50

Thank You, State Bar of Wisconsin
PINNACLE Authors

51

Recent Revisions to Maintenance
Statutes

52

Chair's Column:
Our Clients, Our Selves

53

Three Critical Steps to
Avoid Interstate Custody
Jurisdiction Problems

56

Three Critical Steps to Avoid Interstate Custody Jurisdiction Problems

By *David A. Blumberg*

When the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) was created,¹ its drafters tried to make its standards clearer, tighter and less likely to be inconsistently interpreted than its predecessor, the Uniform Child Custody Jurisdiction Act (UCCJA).²

Though unique facts will always challenge those goals, the UCCJEA has come far closer to achieving its creators' goals of clear standards and consistent interpretation than its predecessor ever managed. Most interstate jurisdictional problems can now be avoided, or at least minimized, with a little advance planning.

Ironically, one of the biggest remaining obstacles to the avoidance of interstate jurisdictional problems comes not from any ambiguity or opacity inherent in the UCCJEA itself, but rather from lawyers and litigants who just overlook its standards at critical stages of their cases – at the first intake interview, at the drafting of the initial pleadings, and when drafting the final judgment or order at the end of the case. This article attempts to describe the simple but crucial steps you can take in every case to steer clear of interstate jurisdictional obstacles.

Step One: Screen Every Case for UCCJEA Issues

When a potential divorce client lets on that he or she is new to Wisconsin, most family law attorneys start thinking about the six-month and 30-day jurisdictional hurdles of Wis. Stat. section 767.301.³ It is tempting to assume that section 767.301 is the only jurisdictional hurdle to clear in divorce cases, but it is only one of at least three for any case that involves children.



One of the most common mistakes family law practitioners make is not screening every case for potential UCCJEA problems. If either party lives outside of Wisconsin and the case will involve maintenance or child support, the Uniform Interstate Family Support Act (UIFSA) will govern jurisdiction for those issues.⁴ The UCCJEA governs jurisdiction to make all child custody and placement orders. The UCCJEA can be safely ignored only if every child in the case was born in Wisconsin and has lived only in Wisconsin since birth.

Fortunately, almost every jurisdictional obstacle under the UCCJEA can be screened out with just two questions. Those questions are:

1. Has any court, anywhere in the world, ever made a custody, placement or visitation order for any of the client's children?
2. Have any of the client's children lived outside of Wisconsin at any time in the past six months?

If the answer to both questions is "no," you can safely assume that

Wisconsin has custody jurisdiction and move on to other issues.

For all other cases, you'll have to assemble a complete jurisdictional history. If the answer to the first question was "yes," you'll need to identify when and where the very first custody order was made. From that starting point, you'll need to identify every single custody order made since then. In addition, the listing of each child's address will have to be expanded to include every address (or at least the state in which the child lived) all the way back to six months before filing date of the first custody case ever filed for that child. Only after those lists have been assembled will you be ready to competently screen for jurisdictional problems. If the only "yes" answer is to the second question, you'll need to assemble a separate list for each child, with every address the child has had over the past couple of years, together with the names of every adult the child has lived with at each of those addresses *and* the inclusive dates for each address.

To help you navigate through the UCCJEA's requirements, there are practice aids that make it fairly simple to screen any custody case for jurisdictional issues. The first and easiest of these navigational aids is the set of UCCJEA flowcharts published in the State Bar of Wisconsin PINNACLE *Wisconsin Judicial Benchbook: Volume III – Family*, at the back of Section 16.⁵ With the child's residential history and the list of all prior custody orders in hand, the flowcharts will quickly and safely guide you through all but the truly rare and tough jurisdictional problem areas. For cases with no prior orders, one trip through the flowcharts will be all

you need to know if Wisconsin has jurisdiction to handle your client's custody and placement issues. For cases that do have prior custody orders, you'll need to examine each step in the chain of orders to be sure that the court(s) making those orders actually had jurisdiction under the UCCJEA's rules. For most cases, no jurisdictional problems will pop up, and it will be clear either that Wisconsin's courts can or cannot entertain the client's request to modify the most recent custody order. If, however, even one of the orders was made without proper jurisdiction, that jurisdictional flaw has the potential to invalidate every subsequent step in the chain.⁶ If your new client doesn't like the current order, the news of such a jurisdictional problem may come as an unexpected gift. But whether the news be boon or bane, you'll be alerted to a potential problem that cannot be ignored.

Step Two: File a UCCJEA Affidavit in Every Case

Once you have done the screening for potential UCCJEA issues, preparing the affidavit required by Wis. Stat. section 822.29 should be simple and painless.⁷ Though Wisconsin's official Form GF-150 was designed to satisfy the requirements of section 822.29, it achieves that objective in only the simplest of cases. For cases involving any interstate moves or any out-of-state custody orders, careful practitioners will be well-advised either to craft affidavits on their own or to use a more complete model. An example of just such a form was created by this article's author and is freely available for use on his website.⁸ The good news is that once you have the factual information from your screening in hand, preparing the affidavit itself involves nothing more than transferring that information into the appropriate blank spaces of the form. Once filed, the court will have all the factual information it needs to know if it has or does not

have jurisdiction under the UCCJEA.

Just one further note should be made on this pointer. The UCCJEA Affidavit should not only accompany the first "pleading" in a divorce case. It should also be prepared and filed with every new motion seeking to modify those initial custody and placement orders, if only to assure the court that it still has jurisdiction to hear the motion and to make those modification orders.

Step Three: Include Custody Jurisdiction Findings in Every Judgment and Order

This pointer is a logical outgrowth of your having done the initial jurisdictional screening described in Step One, and your having prepared the properly detailed UCCJEA affidavit described in Step Two. In fact, you should be able to create the judgment's UCCJEA findings as soon as the UCCJEA Affidavit is finished.

Adding custody jurisdiction findings to every divorce judgment and every modification order serves two important purposes. First, it helps everyone in the case understand exactly why Wisconsin's courts have jurisdiction to make the custody and placement orders contained in the judgment or order. Second, and even more important, the findings will document each order's jurisdictional underpinning for any sister-state's court that may, much later, be called on to enforce those orders. The existence of such findings should effectively preclude nearly every reasonably foreseeable collateral challenge to those enforcement efforts.

Though creating such findings should not be difficult, here are three sample findings for the three most typical cases.⁹

1. For Divorce Judgments:

Finding: Other than this action, no custody proceeding concerning the minor child[ren] has ever been commenced in

this or any other state, and the child[ren] had lived in Wisconsin with [the mother] [the father] [both parties] for at least six consecutive months immediately before [date], when this action for divorce was commenced.¹⁰

Conclusion: This court has jurisdiction, pursuant to Wis. Stat. section 822.21(1)(a), to make the custody determinations set forth hereafter for the minor child[ren].

2. For Modification Orders When Wisconsin Retains Continuing Jurisdiction:

This Court has exclusive, continuing jurisdiction under Wis. Stats. section 822.22 to determine this proceeding, by reason of the [child[ren]'s] [father's] [mother's] [parties'] continuing residence in Wisconsin since [the commencement of the action for divorce on [date]] [the first filing in this action on [date]], at which time Wisconsin was the child[ren]'s home state.

3. For Modification Orders After Original State Loses Continuing Jurisdiction:

Although the most recent custody determination concerning the minor child[ren] was made in the State of , this Wisconsin Court has jurisdiction to modify that determination under Wis. Stat. section 822.23(2), because (1) neither parent, nor the child[ren], nor any person acting as a parent, within the meaning of Wis. Stat. section 822.02(13) presently resides in that state, and (2) the child[ren] had lived in Wisconsin with [the mother] [the father] [both parties] for at least six consecutive months immediately before [date], when the [mother's] [father's] instant motion for modification was filed.

Naturally, if the facts of your case are not typical, you will need to

reject those three models and create findings from the facts you have laid out in your initial UCCJEA Affidavit.

Final Thoughts

Just as any able family law practitioner must be sensitive to typical bankruptcy and tax issues, sensitivity to basic issues of custody jurisdiction is not just for specialists. Though we may need to call on an expert to help with complex jurisdictional problems, all family lawyers can learn to spot the basic jurisdictional issues. Clients may not appreciate the time required to ascertain and document the details of jurisdiction, but that should not dissuade us from providing them with good service and able lawyering. Doing your due diligence on jurisdiction and then documenting the facts on which the court's exercise of custody jurisdiction is based will not just facilitate any later efforts to enforce the custody orders you help your client obtain. They will also improve the likelihood of success for those enforcement efforts.

Skipping a jurisdictional screening will not always – or even often – result in void or unenforceable custody orders. However, the risk of winding up with a void order increases significantly when the screening is not performed. What our clients will surely not appreciate is to discover, long after investing their time and money into obtaining what they thought were valid and enforceable custody orders, that those orders were void for lack of jurisdiction. The chance of such unpleasant discoveries and future heartache can be all but eliminated if we just make sure, during every

initial interview, to gather the factual data necessary to screen for custody jurisdiction and then to file a complete and accurate UCCJEA Affidavit from which the court can verify its own jurisdiction. Even better insurance would be to include that same information in our divorce decrees and post-judgment orders by way of specific findings that explain the basis on which the court was authorized to exercise custody jurisdiction under the UCCJEA. Our insurance carriers will certainly appreciate our extra attention to these details. Do we really owe our clients anything less?

David A. Blumberg practices in Glendale and limits his practice to family law, and more specifically to UCCJEA representation. He maintains a website on UCCJEA issues, which has a wealth of information.

Endnotes

- ¹ The UCCJEA, codified as Wis. Stats. Ch. 822, became effective on March 25, 2006. The act has now been adopted by the District of Columbia, U.S. Virgin Islands, Guam and every state except Massachusetts.
- ² See, generally, Prefatory Notes to the [Uniform Child Custody Jurisdiction and Enforcement Act](#) (1997), as promulgated by the National Conference of Commissioners on Uniform State Laws in 1997 and approved by the American Bar Association on Feb. 4, 1998.
- ³ Under Wis. Stat. section 767.301, if at least one of the parties has not lived in Wisconsin for six months and in the county where the case is filed for 30 days before the action is filed, jurisdiction to entertain a divorce action is lacking.
- ⁴ UIFSA is found at Wis. Stats. Ch. 769. That act's basic grounds for jurisdiction over a party who does not reside in Wisconsin can be found at Wis. Stat. section 769.201. If a prior child support order was made in another state, and both parents have left that state, jurisdiction to modify those orders is usually governed by section 769.611 or, if both parents now live in Wisconsin, section 769.613.

⁵ Those UCCJEA flowcharts were created by this article's author. For those who don't have ready access to the [family court Judicial Benchbook](#), the very same flowcharts can be found at the top of the "UCCJEA Resources" page of the [author's website](#).

⁶ Although a lack of personal jurisdiction to make support or maintenance orders can be cured by stipulation, waiver or even estoppel, child custody jurisdiction is a form of subject matter jurisdiction. The lack of subject matter jurisdiction cannot be cured by waiver, estoppel, agreement or stipulation, and it can be raised at any time. See, e.g., *Rosen v. Celebreeze*, 883 N.E.2d 420 (Ohio, 2008); *Matter of K.U.-S.G.*, 702 S.E.2d 103 (N.C.App., 2010); *In re Jabeim B.*, 87 Cal.Rptr.3d 504 (Cal.App., 2008), *Ruff v. Knickerbocker*, 275 P.3d 1175 (Wash.App., 2012). If a court that lacks custody jurisdiction makes a custody order, that order will be both void and incapable of ever being recognized or enforced in any other state. In other words, that order will be subject to direct or collateral attack until the end of time.

⁷ Under Wis. Stat. section 822.29, each party's initial filing must include – either as a separate affidavit or as part of the initial pleading itself – sworn information listing every place the child has lived for the past five years and the names (and present addresses of) every person the child has lived with during that time, plus information about other custody-related orders and cases in any court in any state.

⁸ The alternate form is immodestly called [DAB-150](#) and is available on the [UCCJEA Resources](#) page of the author's website.

⁹ Other model recitals and findings, for stipulations and other situations, can be found at the [UCCJEA Resources](#) page of the author's website.

¹⁰ If a child was under six months old when the case was first filed, the second clause of the finding will need to read "... and the child had lived in Wisconsin with [the mother] [the father] [both parties] from birth until [date], when this action for divorce was commenced." Also, if any child was temporarily absent from Wisconsin during the six-months immediately before the case was filed, the findings should be specific about the nature and duration of such absence(s) and reveal enough to justify a conclusion that the absences were "temporary" within the meaning of Wis. Stat. section 822.02(7).