

Interstate Custody Jurisdiction Continues to Reveal Tough Issues

By *David A. Blumberg*



Before 1970, American child custody law was a jurisdictional nightmare reminiscent of the Wild West. The U.S. Supreme Court had consistently held that the Constitution's Full Faith and Credit Clause did not apply to child custody orders.¹ No state court was required to recognize or to enforce child custody orders made in any other state, and parents throughout the country were taking full advantage of the situation. Every year, hundreds of thousands of children were being abducted to other states by their feuding parents.

The Uniform Child Custody Jurisdiction Act (UCCJA) was drafted in 1968 in an attempt to end that jurisdictional nightmare. It created uniform jurisdictional standards for custody orders and a means to compel recognition and enforcement of sister-state custody orders as a matter of *state* law, independent of the U.S. Constitution. All 50 states had adopted the UCCJA by 1981. Congress enacted the Parental Kidnaping Prevention Act in 1980 to fix two of the UCCJA's most problematic defects.² Still, when the Uniform Laws Commission proposed the Uniform Child Custody

Jurisdiction Enforcement Act (UCCJEA) in 1998 as the replacement for the UCCJA, it was clear that the UCCJA needed serious revision and that a uniform set of robust enforcement tools had to be part of that revision.

In 2006, Wisconsin became the 43rd state to replace the old UCCJA with UCCJEA.³

The UCCJEA has now been adopted by 49 states, the District of Columbia, the U.S. Virgin Islands and Guam. A bill proposing its adoption is presently pending in Massachusetts, which is the sole hold-out state. In Puerto Rico, which never even adopted the old UCCJA, a bill proposing the UCCJEA's adoption was introduced last year. That bill, however, died, and it has not been reintroduced this year.

Though only two published Wisconsin appellate cases have interpreted any part of the UCCJEA, more than a thousand appellate cases have been handed down in other states. Indeed, such appellate cases are now being decided nationwide at the rate of more than three per week. With so many decisions and at least seven ALR annotations, it would be foolhardy

1

Interstate Custody Jurisdiction
Continues to Reveal Tough Issues

7

Mandatory Fee Shifting Provisions
Under the UCCJEA

9

Practice Guidelines for Guardians
ad Litem in Family Court –
Updated

10

Guardian Ad Litem Guidelines

14

Ten Tips for Engaging People in
Conversation

16

Chair's Column: Changes are
Coming to WJFL

17

Editor's Column: Keeping the WJFL
Informative and Relevant

17

Upcoming State Bar of Wisconsin
PINNACLE Seminars Cover
Domestic Violence Issues, Same-
Sex Marriage Rights and Benefits

18

Understand the Interrelationship
of Immigration and Family Law at
June Annual Meeting & Conference

to attempt in the space of one article to present a coherent overview of how child custody jurisdiction has developed over the past decade. Instead, this article will attempt to identify a couple of the major issues and a surprising split of authority that have developed over the past several years.

Can A Child Custody Order Be Made Before a Child Is Born?

From the standpoint of religion, science or even law, the question of when life begins can be debated endlessly. It should not be surprising that appellate courts in 14 states have considered whether the UCCJEA permits courts to make orders concerning the custody of a child before that child has been born.⁴ Twelve of the 14 have held that custody jurisdiction cannot exist before a child has been born. The decisions in the two minority states⁵ are subject to criticism, in that they essentially assume that pre-birth jurisdiction must exist without squarely addressing that question.

The 2007 decision in *Hatch v. Hatch*⁶ brought Wisconsin within that 12-state majority. Its facts are typical of how these cases arise. Tanya and Michael were married in Idaho and lived there just seven months before they separated and Tanya moved to Wisconsin. Soon after Tanya's departure, Michael filed for divorce in Idaho. About four months after leaving Idaho, Tanya gave birth in Wisconsin, and 12 days later she filed suit here for custody of the child. On Michael's motion, the Idaho court granted him interim custody and ordered Tanya to return with the child. Michael then moved to dismiss Tanya's Wisconsin custody case and persuaded the trial court that the Idaho court had jurisdiction to decide the child's custody. Tanya appealed the resulting dismissal, and the Wisconsin Court of Appeals reversed, holding that Wisconsin had custody jurisdiction as the child's "home state," and that Idaho did not.

The court reasoned that Wis. Stat. section 822.02(7) provides that the "home state" of a child under the age of six months is the state where she has "lived from birth," and that the child had lived only in Wisconsin from the date of her birth until the date on which Tanya filed her custody petition.

Thus, under Wis. Stat. section 822.21(1)(a) only Wisconsin could decide the child's custody. The court rejected Michael's argument that his Idaho case had jurisdictional priority under the "simultaneous proceedings" provisions of section 822.26. The court reasoned that Idaho had never been the child's home state even though Michael's case had been filed well before Tanya's Wisconsin action.⁷ In declining to characterize Tanya's move to Wisconsin as "unjustifiable conduct" under section 822.28, the court held that "crossing state lines while pregnant, without more, is not 'unjustifiable conduct'"

Nearly all the opinions in the majority states assume – just as did the court in *Hatch* – that a state can become a newborn child's "home state" almost as soon as the child is born and starts living in its mother's or father's home.⁸ How long after birth? In the New York case of *Sara Ashton McK. v. Sam Bode M.*⁹, the mother filed her custody petition when the child was just two days old, but that was long enough for the New York appellate court to conclude that New York was the child's home state under New York's parallel to section 822.02(7). After all, when the mother filed her case, New York was the only state in which the child had "lived from birth" with one of its parents. And, like the *Hatch* court, it strongly rejected the trial court's conclusion that the mother's last-minute departure from California in violation of no order somehow constituted the sort of "unjustifiable conduct" that would compel New York to decline jurisdiction. Rather,

it held, "... the mother's conduct at issue here amounts to nothing more than her decision to relocate to New York during her pregnancy. Further, we reject the Referee's apparent suggestion that, prior to her relocation, the mother needed to somehow arrange her relocation with the father with whom she had only a brief romantic relationship. Putative fathers have neither the right nor the ability to restrict a pregnant woman from her constitutionally-protected liberty."¹⁰

An unusual and fascinating variation on the no-jurisdiction-before-birth rule arose in the Texas case of *Berwick v. Wagner*¹¹. The story began when two fathers-to-be from Texas contracted with a surrogate to carry a donated egg fertilized by sperm from one of the men and to give birth to a child for them in California. Before the child was born, the couple sought and obtained a stipulated California judgment that provided, *inter alia*, that both same-sex partners would be the child's legal parents, that they would be listed as such on the child's California birth certificate, that both would be jointly awarded legal and physical custody of the child upon its birth, and that neither the surrogate nor her husband would be deemed the child's mother or father, nor would they have any parental rights.

Two months after the child was born in California, the Texas couple assumed custody and brought the child to Texas, where they all lived as one family for a few years. When the two "fathers" separated, the non-biological father ("NBF") sued in Texas for joint custody and placement. The biological father ("BF") counter-claimed for sole custody, asserting that NBF had no biological relation to the child. To bolster his claim, NBF separately registered the stipulated California parenting judgment under the Texas parallel to Wis. Stat. section 822.35.¹²

Despite BF's timely objection, the Texas trial court ruled that the California judgment qualified as a proper "child custody determination" under the UCCJEA and confirmed the registration. The biological father appealed from that confirmation, but the appellate court affirmed.

The court's lengthy and meticulous analysis essentially boils down to two holdings: First, it held that although the California judgment made no express custody orders as between the two partners, it still qualified as a "child custody determination" under the UCCJEA, because it effectively foreclosed the surrogate and her husband from asserting any parental rights. Thus, it was every bit as much a "custody determination" as any other order terminating parental rights.¹³ Second, the court rejected BF's argument that the judgment was jurisdictionally void by reason of its having been made before the child's birth, since the judgment's effect had been stayed under California law until the child was actually born in California. Had the child not been born in California, the stayed orders could not have taken effect, because jurisdiction would have been lacking. However, because the child was actually born in California and no other state could properly assert jurisdiction over the child's custody at that point, jurisdiction could and did attach, and the judgment became fully effective. Given that mature jurisdictional predicate, the court held the California judgment to be a valid and recognizable custody determination under the UCCJEA. As such, there was no impediment under the UCCJEA to its registration in Texas.

Be cautious of *In re P.D.M.*,¹⁴ an unpublished but troubling 2001 case from Iowa. There, the father had filed a pre-birth paternity action in Wisconsin,¹⁵ and the Wisconsin court – assuming that the child would be born in Wisconsin – had

ordered that once the baby was born, it must not be removed from Wisconsin.¹⁶ Then, shortly before the child was born, the mother moved to Iowa and gave birth there. The child had lived only in Iowa when the mother sued in Iowa to terminate the father's parental rights. Though the Wisconsin order had not actually forbidden the mother from moving *before* giving birth, the Iowa appellate court implied that intent, found that Iowa had become the child's home state only because the mother unjustifiably violated that implied intent, held that the trial court's failure to dismiss the case in the face of that "unjustifiable conduct" was an abuse of discretion, and remitted to assess fees and costs.

To the extent that the decision uncritically conflates Wisconsin's jurisdiction to entertain pre-birth paternity actions with its jurisdiction to make custody determinations for unborn children, it is troubling. However, if we recall how the *Hatch* court declined to hold that "crossing state lines while pregnant, *without more*, is not 'unjustifiable conduct...'"¹⁷ under Wis. Stat. section 822.28, *In Re P.D.M.* might better be seen as an example of what sort of evidence might be sufficient to justify an "unjustifiable conduct" dismissal under section 822.28 when a pregnant mother has unexpectedly exercised her constitutional right to cross state lines just before giving birth.

Can A State Modify Its Initial Custody Orders If One Parent Moves Back After Both Had Moved Away?

As a quick review, we know that the UCCJEA sets up a two-track system for jurisdiction. The first track is for "initial jurisdiction" cases where no previous custody orders have been made in any state. Under Wis. Stat. section 822.21, which lays out the rules for initial jurisdiction cases, if the child has a "home state,"¹⁸ only that state has jurisdiction to make an initial custody order. If the child

has no home state, section 822.21 provides backup criteria to permit initial jurisdiction. The second track is for "modification jurisdiction," where an initial custody order already exists. Under sections 822.22 and .23, which control these second track cases, the child's home state is irrelevant.

Instead, the state that issued the initial custody order loses exclusive, continuing jurisdiction (ECJ) when the child and *both* parents have moved out of the state.¹⁹ Thus, so long as even one parent still remains in the initial order state, the state will retain its ECJ, and the fact that another state has become the child's home state will be irrelevant to the jurisdictional analysis.¹⁹

Once everybody leaves the initial order state, however, the jurisdictional picture changes. Thus, if Wisconsin properly issued an initial custody order, but the child and *both* parents have moved from Wisconsin before one of the parents files a motion to modify that initial custody order, Wisconsin's ECJ will have been lost, and jurisdiction to hear the motion will need to be determined according to the rules for initial jurisdiction cases under section 822.21.²¹ It is also clear that if a parent moves back to Wisconsin *after* that modification motion has been filed, Wisconsin's ECJ does not spring back into existence.

But what happens if a parent moves back to Wisconsin *before* a motion for modification is filed? The answer to that question will depend on which state is answering the question, because there is a split of authority for these cases. The controversy underlying that split centers on whether the court should strictly interpret the statute's actual words or whether it should rely on how the UCCJEA's drafters described their intention.

On the one hand We know what the drafters intended because the Uniform Laws Commission

promulgated the UCCJEA in 1998 with the drafting committee's official comments to each section of the act. Those comments essentially serve the same function as a legislative history. For the section that became Wisconsin's section 822.22, the comment makes it clear that the drafters intended that the initial decree state would lose its ECJ as soon as the child and both parents had left that state. The actual text of the comment is "... unless a modification proceeding has been commenced, when the child, the parents, and all persons acting as parents physically leave the State to live elsewhere, the exclusive, continuing jurisdiction ceases."²² The comment then states, "[e]xclusive, continuing jurisdiction is not re-established if, after the child, the parents, and all persons acting as parents leave the State, the non-custodial parent returns."²³

On the other hand The actual words of Wis. Stat. section 822.22(1)(b), however, state that the initial order state loses its ECJ when "a court of this State or a court of another State *determines* that the child, the child's parents, and any person acting as a parent do not presently reside in this State."²⁴ Read literally, those words suggest that ECJ is not lost automatically when the physical facts giving rise to its existence change. Rather, it suggests that the initial decree state only loses its ECJ when a court actually looks and "determines" that everybody has ceased to "presently reside" in the initial decree state. The implication from that literal reading would be that even after everybody has moved away, the initial decree state still keeps its ECJ until a court somewhere actually makes a finding that neither the child nor even one of the parents is "presently" – i.e., at the time that the determination is being made – residing in that state.

So far, appellate courts in at least nine states have considered the

question. Three of those courts rely on the drafters' comments and hold that the initial decree state's ECJ ends as soon as everybody moves from the state.²⁵ The courts hold that ECJ is not re-established when a parent later returns to the state, even if that return is before the filing of a motion to modify. Four of those courts strictly interpret what they read as the unambiguous statutory language.²⁶ Those four hold that ECJ is not lost until some court actually "determines" that nobody is "currently residing" in the initial decree state. The two other states – Alabama and Florida – appear to side with the strict constructionists, but their decisions are equivocal enough to make their holdings uncertain. In Wisconsin and the roughly 40 other states that have not ruled on the issue, the decision could go either way. That uncertainty, however, can be seen in a hopeful light. Because UCCJEA cases are so heavily fact-driven, good lawyering can still help determine how Wisconsin's courts will ultimately decide this issue.

Modifications in Split-Custody Cases After Everyone Leaves Initial Decree State

Split custody occurs when siblings are separated, so that one (or one set) lives mainly with one parent and the other(s) live mainly with the other parent. So long as at least one parent stays in the state that issued the initial order, split custody arrangements present no special jurisdictional issues. If, however, both parents move away from the initial decree state, all bets are off. Jurisdictionally, the split custody arrangement complicates everything.

The main reason that the case becomes a jurisdictional nightmare is that jurisdiction under the UCCJEA is determined on a child-by-child basis – not on a whole-family basis. The Kentucky case of *Ellis v. Ellis*²⁷ provides a real-world example of just how complicated the jurisdictional issues can get in what might seem a

perfectly straight-forward case.

The Setup. Mom and dad were divorced in Indiana. By agreement, their divorce judgment gave dad primary physical custody of their son, and mom received primary custody of their daughter. Within weeks of the final judgment, dad and the son moved to Kentucky, while mom and the daughter moved to Arizona. About 10 months later, dad registered the Indiana decree in Kentucky and petitioned to modify its custody orders for both children. Less than two months later, mom registered the Indiana decree in Arizona and sought modification for both children in the Arizona courts. As everybody had left Indiana, it was undisputed that Indiana's court did not have ECJ. Indeed, the Indiana court formally disclaimed any jurisdiction, even though there was no need for it to do so.

By the time dad filed his petition for modification, Kentucky had become the boy's home state, and Arizona had become the girl's home state. In the words of the appellate court, "either state would have jurisdiction over one child, but not over both."²⁸ To accentuate the jurisdictional complications, mom and dad stipulated that the boy had never lived in Arizona and that the girl had never lived in Kentucky. Thus, all the relevant evidence concerning the boy was located in Kentucky, while all the evidence concerning the girl was in Arizona.

Trial Court Tries To Avoid The Mess. Reasoning that splitting jurisdiction between two states should generally be avoided as inconsistent with the purposes of the UCCJEA, the trial court resorted to the UCCJEA's inconvenient forum section, which in Kentucky is virtually identical to Wis. Stat. section 822.27. The court examined that section's eight statutory factors and then declined custody jurisdiction over the boy in favor of Arizona, which it held to be "a more

appropriate forum.” Dad appealed.

Appellate Court Says, “Wrong!”

Though the appellate court sympathized with the trial court’s concern that custody decisions for one family’s two children ought not be split between two courts, it held that the trial court abused its discretion by finding that Arizona would be “a more appropriate forum.” It held that the home state requirements of its parallel to section 822.21(1) and the eight factors of section 822.27, trumped the general policy against splitting custody decisions between two courts. It reasoned that forcing dad to litigate custody of the son in Arizona – a state with no connection to the son and no relevant evidence about that child – would put him at a significant disadvantage. Not only would dad have to travel to Arizona and import all the relevant evidence and witnesses from Kentucky, the court held that not even one of the inconvenient forum section’s eight statutory factors favored Arizona’s exercise of jurisdiction over Kentucky’s. It reversed and told the trial court, in essence, to grit its teeth and try the son’s case on the merits.²⁹

Is There Any Better Solution?

Technically, the Kentucky appellate court made the right decision. On the facts, neither Arizona nor Kentucky could be seen as an appropriate forum for deciding the custody of either non-resident child. In theory, the family’s former home of Indiana *might* have been a more appropriate forum for deciding both children’s custody, but it is safe to say that nobody would accept that solution – not even the Indiana court. Simply ignoring the jurisdictional problem and allowing one court to decide the case for both children would result in an order that would be void as to the non-resident child and subject forever to collateral attack.

Sadly, there may be no good

solutions for this sort of case. The UCCJEA has tools that might make the two-court solution a little “less bad,” but those tools are far from easy or well developed. The tools, which are found in Wis. Stat. sections 822.11 and .12, relate to cooperation between courts in the production and exchange of evidence, depositions, and live testimony.

If both courts had the technical resources and a mutual willingness to sail in uncharted waters, both courts could try to conduct a simultaneous, joint trial. With a two-way video to link the two courtrooms, each judge could see and hear the evidence, testimony and argument in both courtrooms at the same time. Without compromising their individual responsibility to decide the case for their resident child, the judges could confer with each other to make sure that their separate decisions would not inadvertently prove unworkable for the family as a whole.

Pie in the sky? Probably. However, as our society becomes ever more mobile, family lawyers and judges will have to figure out some practical way to resolve the logistical problems inherent in these cases, especially if their attempts at avoidance are batted aside by supervising courts like they were in the *Ellis* case.

Though this article has described just a few of the tougher issues that have been addressed on appeals involving the UCCJEA over the past 15 years, it has hopefully provided a taste of how this law can be intriguing and fact-dependent. Although the UCCJEA was designed to clarify rules and to make their application more predictable and consistent throughout the country, unique facts will always challenge those goals. Finally, don’t be shy to look to other jurisdictions for guidance, since many issues may have been decided on language

precisely the same as the Wisconsin’s version of the UCCJEA.

NOTE: A second article, to be published in a later issue of the WJFL, will offer some practical advice about how to approach any interstate custody case that may arise in the day-to-day practice of family law.

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Endnotes

- 1 See e.g., *May v. Anderson*, 345 U.S. 528 (1953), and *Ford v. Ford*, 371 U.S. 187 (1962). These and other U.S. Supreme Court cases held both that (1) where a state court lacks personal jurisdiction over a non-resident parent, other states were not required to accord full faith and credit to the resulting custody order, and that, even if the court had personal jurisdiction over both parents; and (2) since custody orders are never truly “final” – they are always subject to modification by the court that rendered them, in light of changed circumstances – they were neither res judicata nor entitled to full faith and credit in other states if “changed circumstances” required a different arrangement to protect the child’s health, safety or welfare. Moreover, it is absolutely clear that those cases are still good law today.
- 2 The Parental Kidnaping Prevention Act of 1980 (28 U.S.C. 1738A) made two changes. First, it restructured the UCCJA’s list of grounds for initial child custody jurisdiction into a hierarchy, with “home state” trumping all other grounds. Second, it established the principle that once an initial custody order was properly made, the state issuing that order would retain exclusive, continuing jurisdiction to modify that order until courts of that state lost jurisdiction under the law of that state.
- 3 The UCCJEA, codified as Wis. Stats. Ch. 822, became effective on March 25, 2006.
- 4 The 12 majority states include Alabama, Arizona, Arkansas, Connecticut, Colorado, Florida Texas, New York, Ohio, Oklahoma, Washington (case reported but non-published) and Wisconsin. The Arizona and Colorado cases were decided under the UCCJA, but the relevant language of that old act was transplanted into the UCCJEA without material change, so those older cases should still be good law.
- 5 The two minority states are Indiana and Kentucky.

- 6 *Hatch v. Hatch*, 302 Wis. 2d 215, 733 N.W.2d 648 (App., 2007).
- 7 Under Wis. Stat. section 822.26, a court of this state may not assume jurisdiction over a custody proceeding if, at the time this state's case was filed, a custody proceeding was already pending in another state, but only if that other state's court has jurisdiction "substantially in conformity with [the UCCJEA]..." In rejecting Michael's challenge under section 822.26, the court had to decide whether the court in Michael's Idaho action had child custody jurisdiction "substantially in conformity with [the UCCJEA]." Because it had concluded that custody jurisdiction cannot exist under the UCCJEA before a child is born, and Michael's Idaho action was filed before the child's birth, it only followed that the Idaho court never had jurisdiction in substantial conformity with the UCCJEA. Thus, section 822.26 did not require a dismissal of Tanya's Wisconsin case.
- 8 There are a few appellate cases in which the child was taken directly from the hospital to a home or a placement in another state. Those cases essentially exclude the newborn's brief stay in the hospital's maternity ward from the calculation of where the child has "lived from birth" with one of its parents. See e.g., *In re D.S.*, 840 N.E.2d 1216 (Ill., 2005).
- 9 *Sara Ashton McK. v. Sam Bode M.*, 974 N.Y.S.2d 434, 111 A.D.3d 474 (N.Y. App., 2013).
- 10 *Id.*, at 435-36 (citations omitted).
- 11 336 S.W.3d 805 (Tex. App., 2011).
- 12 Section 822.35 spells out the procedure for registering another state's child custody determination.
- 13 Under Wis. Stat. sections 822.02(3) and (4), and their Texas parallels, a "child custody determination" includes any judgment for custody, and a "child custody proceeding," is any action – including one for "termination of parental rights" – in which a child's custody is an issue.
- 14 *In re P.D.M.*, 2001 WL 1503276 (Iowa App., 2001).
- 15 Under Wis. Stat. section 767.80(3), which was at that time codified as section 767.45(3).
- 16 That *ne exeat* order may well have exceeded the court's legitimate authority, since section 767.80(3), requires that all proceedings (except service of process, filing of pleadings, the first appearance, and the taking of depositions to preserve testimony) must be stayed until after the child has been born.
- 17 *Hatch, supra*, at 225.
- 18 "Home State" is defined by Wis. Stat. section 822.02(7), as the state in which the child has lived with at least one parent (or a person acting as a parent) for at least the six consecutive months immediately before the custody proceeding was commenced. For a child under 6 months of age, the home state is where the child has lived from birth with at least one parent.
- 19 Wis. Stat. sections 822.22(1)(a) and 822.23(1) spell out a second basis on which the initial state's exclusive, continuing jurisdiction can be lost even though one parent still lives in the original state. That basis will exist only if the relationship between the still-resident parent and the out-of-state child becomes so attenuated that the child's connection with the original state is no longer "significant" and substantial evidence about the child's visits is no longer available in that state. Courts have generally held that this second basis for losing ECJ is unavailable if the child has returned to the initial decree state for as little as a week or two per year.
- 20 This does not mean that a child's long-time residence in another state might not be relevant in a different context. For example, the length of a child's absence from the state that has ECJ to decide custody is one of the eight factors the court must consider for an inconvenient forum motion under section 822.27. It is also important to note that a state's loss of its ECJ does not necessarily mean that it will be precluded from exercising jurisdiction to modify its own initial orders. The true import of losing ECJ is actually more analogous to hitting a legal "reset" button, after which jurisdiction has to be determined anew under the "initial jurisdiction" standards of section 822.21(1). If the child already has a new home state when the redetermination is made, the original state will no longer have a viable basis to assert jurisdiction over the child's custody. But if, for example, a modification motion were filed just a few months after the entire family had left the original state and before the child's new state could qualify as a "home state," the old, original state might well still qualify to assert jurisdiction under the "significant connection" standard of section 822.21(1)(b).
- 21 See also Wis. Stat. § 822.22(2).
- 22 See the Official Act and Comments to section 202, which can be found [here](#).
- 23 *Id.*
- 24 Emphasis added.
- 25 These three intent followers are Washington, North Carolina, and Tennessee.
- 26 These four strict constructionists are California, New Mexico, Oklahoma and Texas.
- 27 *Ellis v. Ellis*, 420 S.W.3d 528 (Ky. App., 2014).
- 28 *Id.* at 529.
- 29 *Id.* at 531.