HANDLING THE DIVORCE INVOLVING PARENT-CHILD INTERSTATE/INTERNATIONAL ISSUES

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0. INTRODUCTION

This paper focuses on the issues in the Texas courts and other courts where there is a divorce involving interstate and international matters, which affects the parent-child relationship. The primary areas discussed herein are the Hague Convention, the UCCJA and the PKPA.

0. PURPOSE AND SCOPE OF THE HAGUE CONVENTION

The Hague Convention was drafted to provide a remedy for international child abductions. Remedies under the Convention are not exclusive, but shall be in addition to remedies available under other laws or international agreements. 42 U.S.C. 11603(h).

The stated objectives of the Hague Convention are:

a. to secure the prompt return children wrongfully removed to or retained in any Contracting State; and

b. to insure the rights of custody and of access under the law of one Contracting State are effectively respected in other Contracting States.

ART. 1, HAGUE CONVENTION.

When enacting the enabling legislation for the Hague Convention as the "International Child Abduction Remedies Act," Congress made the following findings:

1. The international abduction or wrongful retention of children is harmful to their well-being.

2. Persons should not be permitted to obtain custody of children by virtue of their wrongful removal or retention.

3. International abductions and retention of children are increasing, and only concerted cooperation pursuant to an international agreement can effectively combat this problem.

4. The Convention on the Civil Aspects of International Child Abduction, done at The Hague October 25th, 1980 establishes legal rights and procedures for the prompt return of children who have been wrongfully removed or retained, as well as for securing the exercise of visitation rights. Children who are wrongfully removed or retained within the meaning of the Convention are to be promptly returned unless one of the narrow exceptions set forth in the Convention applies. The Convention provides a sound treaty frame work to help resolve the problem of international abduction and retention of children and will deter such wrongful removal and retention.

International Child Abduction Remedies Act, 102 Stat. 437 (1988)(codified at 42 U.S.C. 11601(2)(a) (1988)). Congress also declared:

> The Convention and the Act empower courts in the United States to determine **only**

> **rights under the Convention and not the merits of any underlying child custody claims.** (emphasis added)

42 U.S.C. 11601(B)(4).

The Hague Convention applies to abductions occurring only after the effective date of the treaty with an individual country. ART. 35, HAGUE CONVENTION. The United States became a party to the Hague Convention on July 1, 1988 and the following countries also have that effective date: Australia, Canada, France, Hungary, Luxembourg, Portugal, Spain, Switzerland, and the United Kingdom. Countries which have subsequently become a party to the Hague Convention are as follows: Austria (10/1/88); Norway (4/1/89); Sweden 6/1/89); Belize (9/1/89); Netherlands (9/1/90); Germany (12/1/90); Argentina (6/1/91); Denmark (7/1/91); New Zealand (10/1/91); Mexico (10/1/91); Ireland (10/1/91); Israel (12/1/91); Yugoslavia (12/1/91); and Ecuador (4/1/92).

0. JURISDICTION

A petition for the return of a child may be filed in either federal or state court as they have concurrent jurisdiction. 42 U.S.C. 11630(a). Deciding whether to file in federal or state court depends largely upon your state court judges. Federal court may be a better forum if you think that your state court judges may have difficulty in strictly applying the Convention. If, however, you have a child abuse claim, a specialized state family court may be preferred since they have heard child abuse allegations before and will not be as affected by the defense. In practice, most cases are being filed in state court.

0. MANDATORY RETURN OF CHILD

Generally, the return of a child pursuant to the Hague Convention is mandatory:

> Where a child has been wrongfully removed or retained in terms of Article 3, and at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, **the authority concerned shall order the return of the children forthwith.** (emphasis added)

ART. 12, HAGUE CONVENTION.

Under some circumstances discussed in another section of this paper, the court's return of the child is discretionary.

To invoke the mandatory provision, a party must show that the requesting country is the country of the child's habitual residence and a wrongful removal or retention occurred. The concept behind the Convention is to return the child to their country of habitual residence and allow a court in that country to decide any underlying custody claims. The court's return of the children to the country where they were abducted is in no way a comment on the merits of a custody proceeding. *ART. 19, HAGUE CONVENTION.*

a. Habitual Residence

The Hague Convention applies only if the child was a **habitual resident** of a Contracting State immediately before any breach of custody or access rights. ART. 4, HAGUE CONVENTION. The term "habitual

residence" is not defined anywhere in the Convention; however, it has been interpreted to mean something close to domicile. But, this is really more of a practical concept than a legal concept.

The facts and circumstances of each case should continue to be assessed without resort to presumptions or pre-suppositions and there must be a degree of settled purpose. That is not to say that the propositus intends to stay where he is indefinitely. Indeed his purpose while settled may be for a limited period. Education, business or profession, employment, health, family or merely love of the place spring to mind as common reasons for a choice of regular abode, and there may well be others. All that is necessary is that the purpose of living where one does has a sufficient degree of continuity to be properly described as settled. In re Bates (a minor), CA 122/89 (UK High Ct. of Justice, Family Div. 1989).

The concept of "habitual residence" refers to that place that is the focus of the child's life, where the child's day-to-day existence is centered. Dyer, Adair: "Remarks at Briefing at Hague Child Abduction Convention and Related Federal Legislation" on January 6-7, 1989 at the Department of State and ABA Headquarters, Washington, D.C.

Some Courts have found habitual residence to change quite easily:

> [G]iving the expression "habitually resident,"... its ordinary and natural meaning, such residence of a person in particular country... could be lost in a single day by that person leaving the country with a settled intention not to return, that the habitual residence of a child would be that of the parent in whose sole custody he was.... It may take time -- I do not say it does -- to establish habitual residence, but I cannot see that it takes any time to terminate it. James' intentions must, of course, be those of his mother since he is two and a half, there is no doubt at all in my mind that the mother ceased to be habitually resident in Western Australia from the moment she left Western Australia bound for England with the intent of remaining permanently in this country.

C. v. S., 3 W.C.R. 492 (U.K. 1990).

Another view is that habitual residence can be "altered" only by a change in geography and the passage of time. Friedrich v. Friedrich, 983 F.2d 1396 (6th Cir. 1993).

a. Wrongful Removal or Retention

The removal or retention of a child is to be considered wrongful where --

(a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone under the law of the State in which the child was habitually resident immediately before the removal or retention; and

(b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights in sub-paragraph (a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision,

or by reason of an agreement having legal effect of the law of that State.

ART. 3, HAGUE CONVENTION.

A "wrongful removal" generally occurs where one parent takes the child to another country with the intent not to return. A wrongful removal can occur before the entry of a custody decree. *42 U.S.C. 11603 (f)(2).*

A "wrongful retention" generally occurs when a parent will not allow children to return home after vacationing to another country. To be wrongful, the removal or retention must be contrary to a parent's rights:

For the purposes of this Convention --

(a) "rights of custody" shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;

(b) "rights of access" shall include the right to take a child for a limited period of time to a place other than the child's habitual residence. *ART. 4, HAGUE CONVENTION.*

These definitions are very broad; therefore, virtually any circumstance where the parent's access to a child is limited without a court order will be considered "wrongful."

For the retention or removal to be "wrongful" within the meaning of the Convention's Articles 3 and 5, one must ask two questions:

1. Was there a breach of "custody rights," which includes the right to determine the child's place of residence?

2. Were the custody rights actually exercised, jointly or alone, or would they have been exercised but for the removal or retention?

ABA JUVENILE AND FAMILY COURT JOURNAL, Spring 1997/Vol. 48, No. 2, "Jurisdiction in Child Custody and Abduction Cases: A Judge's Guide to the UCCJA, PKPA, and the Hague Child Abduction Convention," by Patricia M. Hoff, Esq., Adrienne E. Volenik, Esq., Linda K. Girdner, Ph.D. (hereinafter referred to as "JFCJ").

a. Procedure for Return

When a child has been wrongfully removed or retained within the meaning of the Hague Convention, the party whose rights have been breached should contact their country's Central Authority. In the United States, an applicant should contact:

U.S. Central Authority
Office of Citizen's Consular Services
Child Custody Division
Department of State
Room 4817
Washington, D.C. 20520
(202) 647-3666

The State Department will ask the applicant to provide information regarding the child, the suspected abductor, circumstances surrounding the abduction or retention and photos of the child as well as the abductor. The State Department will contact the Central Authority in the country where the child is believed to be located.

0. EXCEPTIONS TO MANDATORY RETURN - DISCRETIONARY POWER EXITS

Article 12 of the Hague Convention

states that "the authority concerned **shall** order the return of the child forthwith." Generally, the return of a child pursuant to the Hague Convention is mandatory; however, under certain circumstances the Court has some discretion in determining whether or not to return the child to the country of his or her habitual residence.

Even if one of the exceptions to a mandatory return of the child under the Convention is established, the judicial administrative authority **may** always order the return of the child:

> **The provisions of this Chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time.** (emphasis added).

ART. 18, HAGUE CONVENTION.

Regardless of the circumstances of your case, if you are representing a party trying to obtain the return of their child, this provision should always be cited as authority for the Court to order the child's return.

a. One Year Rule

The return of the child is mandatory under Article 12 only if less than one year has elapsed from the date of the wrongful removal or retention and the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is located. *ART. 12, HAGUE CONVENTION.*

a. Now Settled in its New Environment

If more than a year has passed, the Court **shall** also order the return of the child, unless it is demonstrated that the child is now settled in its new environment. In In re Marriage of Collopy, 90 Dr 1138, Division B (Colo. May 8, 1991), the Court refused to order the return of a twenty (20) month old child to England because the child had been in Colorado since she was two (2) months old. The Court found that the child had established significant ties to the community by virtue of having been there for that length of time despite no showing that the child was in pre-school or nursery school. Id.

a. Actual Exercise of Custody Rights

A judicial or administrative authority is bound to order the return of the child only if the applicant **actually exercised the custody rights** at the time of removal or retention, or had not consented or subsequently acquiesced in the removal or retention. (emphasis added) ART. 13(a), HAGUE CONVENTION.

a. "Grave Risk"

This is the big one, the exception that you are most likely to encounter. This provision is somewhat analogous to the "serious and immediate question" exception to an automatic return of the child pursuant to a writ of habeas corpus. The "grave risk" standard is, however, more stringent standard and requires a higher burden of proof.

The "grave risk" exception must be proven by **clear and convincing** evidence by the party asserting the defense. (emphasis added). 42 U.S.C. 11603. Even if the party proves "grave risk" by clear and convincing evidence, the return of the child is still in the court's discretion. *ART. 18, HAGUE*

CONVENTION.

The "grave risk" exception has been very narrowly construed:

> [I]t would seem necessary to underline the fact that the three types of exceptions to the rule concerning the return of the child must be applied only so far as they go and no further. This applies above all that they are to **be interpreted in a restricted fashion** if the Convention is not to become a dead letter. In fact, the Convention as a whole rests upon the unanimous rejection that this phenomenon of illegal child removals and upon the conviction that the best way to combat them at an international level is to refuse to grant them legal recognition. (emphasis added).

Section 34, Perez-Vera Report (explanatory report adopted by the Fourteenth Session).

The greatest risk associated with a "grave risk" allegation is that the hearing on the return of the child will turn into determination of custody. A court should determine only whether or not there has been a wrongful retention or removal, and whether grave risk exits, and then order the return of the child, with appropriate safeguards if necessary.

. RISK POSED BY THE COUNTRY

Courts have construed "grave risk" in different ways. The most narrow view is that "grave risk" refers to the risk posed by the **country** and not the parent. Gsponer v. Johnstone, 12 Fam. L.R. 744. This analysis of Article 13(b) begins by the recognition that the **Central Authority** filed the "application" for the return of the child and is therefore, "the applicant".

With few exceptions, no evidence will exist that suggests that a child will be in any danger if returned to the requesting **country**. A "grave risk" would be posed by the country if the requesting country were at war on its own soil and there was a likelihood that the child may be captured, injured or killed. Another example where "grave risk" might exist is where a nuclear disaster occurred in the country and the children would be exposed to large doses of radiation upon their return home.

. RISK POSED BY THE PARENT

Even when the Court finds that "grave risk" refers to the risk posed by the parent, the burden is very difficult to meet. "Grave risk" means that the risk must be more than an ordinary risk. In re A (A Minor), 1 Fam. L.R. 365. Article 13 was not intended as a vehicle to litigate the children's best interest. 51 Fed. Reg. 10,494, 10,510 (1986); In re Marriage of Collopy, 90 DR 1138, Division B (Colo. May 8, 1991). The risk to the child must be **grave, not merely serious**. Id. The "grave risk" standard clearly is a higher standard than "serious and immediate".

The imposition of such a high standard will implement the goal of litigating custody in the Courts of the child's habitual residence. In one case, the judge refused to hear any evidence despite Article 13(b) allegations:

> In this case, the Australian courts are the proper courts in which to investigate the allegations made by the father; if those allegations have substance I have no doubt that the Australian courts will deal with them appropriately....

> In my judgment there is a very heavy burden indeed upon a person alleging to have abducted a child in order to bring himself or herself within the provisions of Article 13, and the court should indulge every inference in favor of returning the child before it grants what is in effect an exemption from the purpose and urgency which is at the very heart of this Convention and the Action incorporating it.

Evans v. Evans, 1 Fam. L.R. 135 (1988).

Even courts which have heard evidence of grave risk are extremely reluctant to deny a petition for the return of a child. In one case, the Court stated that evidence that returning the child to a parent would expose the child to the serious drinking of the parent's father and that the wife is under the influences of a man who had been convicted several times, and was recently dismissed from his employment at a home for girls because of sexual misconduct was not enough to establish a "grave risk" exemption to the Convention - the proper assumption being that the Court of the habitual residence of the kids would take the steps necessary to protect them. *Decision of the Children's Judge at Hertogenbosch District Court, (Netherlands February 13, 1991)*.

If your client faces serious allegations such as sexual abuse, you should offer to the court that the child return to the country if his or her habitual residency in the company of the other parent so the parent seeking return of the child cannot pose a threat to the child. See Zimmermann v. Zimmermann, 91-14556-S (Tex. Dist. Ct. 1991); Kelly v. Williams, (Canada App. 1988).

a. Consent

If a party consented or subsequently acquiesced to the other parent's removal or retention of the child, then the Court is not bound to order the return of the child. *ART. 13(A), HAGUE CONVENTION.*

a. Age of the Child

. SIXTEEN YEARS

It is unclear whether a court could still exercise its discretion and order the return of a child pursuant to Article 18 under these circumstances. One may certainly argue that none of the provisions apply after age sixteen.

. AGE AND DEGREE OF MATURITY

Article 13(b) further provides:

> A judicial or administrative authority **may** also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity of which it is appropriate to take account of its views.

ART. 13(b), HAGUE CONVENTION.

State law may offer guidance as to what the appropriate age is to consider the child's views.

0. COURT PROCEEDINGS

The intent of the Hague Convention is to obtain a quick return to the country of the child's habitual residence, not to litigate custody. To effectuate this purpose, the Convention also provides for less stringent evidentiary rules. Not only does this speed up the process, but it is also a great help in presenting your case when all of the evidence

is located in another country.

a. Not a Custody Proceeding

First, and foremost, one must realize that a Hague Convention proceeding does not determine custody. The hearing should be limited to whether or not the child should be returned to his country of habitual residence. Any decision under the Convention shall not be taken to be a determination of the merits of any custody issue. *ART. 19, HAGUE CONVENTION*

Article 16 prohibits a custody determination until the Court finds that the child will not be returned:

> After receiving notice of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained **shall not decide on the merits of rights of custody** until it has been determined that the child is not to be returned under this Convention or unless an application under this Convention is not lodged within a reasonable time following receipt of the notice. (emphasis added)

ART. 16, HAGUE CONVENTION; see also 42 U.S.C. 11601(B)(4).

a. Expeditiously

Every effort should be made to have a hearing as soon as possible to effectuate the intent of the Convention. *ART. 2, HAGUE CONVENTION.* Art. 11 states:

> The judicial or administrative authorities of Contracting State **shall act expeditiously** in the proceeding for the returned children. If the judicial or administrative authority concern has not reached a decision within **six weeks** from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay. (emphasis added)

ART. 11, HAGUE CONVENTION

a. Evidentiary Rules

The provisions of the Hague Convention regarding evidence supersede the Texas Rules of Civil Evidence. Article 14 states:

> In ascertaining whether there has been a wrongful removal or retention within the meaning of Article 3, the judicial or administrative authorities of the requested State **may take notice directly** of the law of, and of judicial or administrative decisions, formally recognized or not in the State of habitual residence of the child, **without recourse to specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable**. (emphasis added)

ART. 14, HAGUE CONVENTION.

If the Article 13 exceptions are asserted:

> The judicial administrative authority shall take into account the

> **information relating to the social background of the child provided by the Central Authority or other competent authority** of the child's habitual residence. (emphasis added)

ART. 13, HAGUE CONVENTION. This section appears to require the court to consider any attachments that the Central Authority sends with its application as well as any other relevant documents, such as school records, health records, etc.

0. ATTORNEY'S FEES AND EXPENSES

a. Mandatory

In the United States, the court **must** award attorney's fees and expenses to a successful applicant:

> Any court ordering the return of a child pursuant to an action brought under Section 4 **shall** order the respondent to pay **necessary expenses** incurred by or on behalf of the petitioner **including court costs, legal fees**, foster home or other care in the course of the proceedings and the action, and transportation costs related to the return of the child, unless the respondent establishes that such order would be clearly inappropriate. (emphasis added)

42 U.S.C. 11607(b)(3)

The American Courts have been willing to award attorney's fees under this provision as indicated by the court's comments in Keane:

> I find the nature, extent and difficulty of the services rendered by Plaintiff's counsel to have been considerable. This was a case of first impression and this jurisdiction involved novel issues including the application of International, British and American Federal law in a South Carolina State Family Court setting which included defending the position that this Court should not determine the underlining merits of the custody dispute.
>
> I further find the time and labor devoted to the case by Plaintiff's counsel to have been appropriate given the fact that this case involved two separate hearings totaling more than four hours of in-court time, as well as pre-trial conferences with this Court with opposing counsel as well as with the American and British authorities, including Plaintiff's counsel in London and the United States Department of State. Also, it was necessary for them to prepare their case at long-distance, acquire affidavits to offer to the Court and prepare their client on short notice to testify ....

Keane v. Courtwight, 91-DR-40-0667 (April 16, 1991).

In a recent Dallas case, the Court granted judgment against the Respondent in the amount of **$19,716.16** for legal fees incurred in obtaining the return of his children to the United Kingdom. Zimmermann v. Zimmermann, 91-14556-S.

Despite the mandatory language, some

courts have not awarded attorney's fees on the basis of limited financial resources. So with limited financial resources, apparently finding it "clearly inappropriate." See David S. v. Zamira S., V 196959-60/90 (N.Y. Fam. Ct 1991).

a. Discretionary

The mandatory award of fees provision will not apply outside the United States. In other countries, one must rely upon the Convention itself to recover fees in another country:

> Upon ordering the return of a child or issuing an order concerning rights of access under this Convention, the judicial or administrative authorities **may**, where appropriate, direct the person who removed or retained the child, or who prevented the exercise or rights of access, to pay **necessary expenses** incurred by or on behalf of the applicant, **including travel expenses**, any costs incurred or payments made for locating the child, the **costs of legal representation** of the applicant, and those of returning the child.

ART. 26, HAGUE CONVENTION.

a. No Bond Required

An applicant seeking return of his children will not be required to post any type of bond:

> No security, bond or deposit, however described, shall be required to guarantee the payment of costs and expenses in the judicial or administrative proceedings falling within the scope of this Convention.

ART. 22, HAGUE CONVENTION.

D. Practice Tips

The *JFCJ* suggests the following as a guide to the practitioner:

> As good as the Hague Convention remedy id for recovering abducted children from foreign countries, it is no substitute for preventing abductions in the first place. When counsel demonstrates a likelihood of international child abduction, judges should include safeguards in the custody order.
>
> These include restrictions on leaving the U.S. without written consent of the other parent or court permission; restrictions on applying for or receiving original or duplicate passports for a child; mandatory surrender of all passports (U.S. and foreign) before visitation rights may be exercised; require of a bond to guarantee the child's return from abroad; securing a "mirror image" order from a court in the foreign national parent's country as a prerequisite to exercise custody or visitation rights. See Chapter 7 [of the JFCJ] for a discussion of risk factors for a child abduction and preventive measures that the court can incorporate into the custody order.
>
> Judicial safeguards are of added safeguards are of added importance when an abduction to a non-Hague country is foreseeable, particularly where it is shown that the custody law of the foreign country does not give both parents a fair hearing or consider

the child's best interests.

JFCJ at 10-10.

0. INTERSTATE JURISDICTION-OUTSIDE THE UCCJA.

Prior to the Uniform Child Custody Jurisdiction Act (the UCCJA), adopted by Texas in 1983, and recodified in 1995, the rules existed in each state which provided the minimum contacts necessary to establish jurisdiction in the courts of that state so that the parental rights of nonresidents could be ligated. In Texas there is a case law asserting the right of Texas courts to exercise "subject matter jurisdiction" to litigate parental rights, even without personal jurisdiction over nonresident parents.

a. Personal Jurisdiction.

Texas Family Code, §102.011 addresses acquiring jurisdiction over nonresidents in a suit affecting the parent-child relationship, be exercising status or subject matter jurisdiction over the suit pursuant to the UCCJA, §102.011(a) and, as an alternative, by exercising personal jurisdiction over a person on whom service of citation is required, although the person os not a resident or domiciliary of Texas, §102.011(b), as set forth below.

a. S.A.P.C.R.

Texas courts may exercise *in personam* jurisdiction over a non resident respondent or the nonresidents personal representative if (i) the person was personally served in this state, (Iii)the person submits to the jurisdiction of the state by consent, by entering a general appearance, or by filing responsive documents having the effect of waiving any consent to personal jurisdiction, (iii) the child resides in the state as a result of the acts or directives of the person, (iv) the person resides with the child in the state, (v) the person resided in this state and provided parental expenses or support of the child, (vi) the person engaged in sexual intercourse in this state and the child may have been conceived by the act of intercourse, or (vii) there is a basis consistent with the constitutions of Texas and the United States for the exercise of personal jurisdiction. TEX. FAM. CODE ANN. §102.011 (Vernon 1995). These prerequisites represent the Legislature's attempt to meet the "minimum contacts" requirement of due process of law.

However, if the respondent on a SAPCR is a Texas resident, a custodial non resident can submit to the jurisdiction of a Texas court to litigate child support issues without running afoul of due process considerations and without complying with the UCCJA subject matter requirements. See *Creavin v. Moloney*. 773 S.W. 2d 698 (Texas. App.--Corpus Christi 1989, writ denied), discussed more fully below. Texas does not require that a court make a custody determination prior to the entry of a child support order (which requires a jurisdiction over the payor); each may be done separately. There is no requirement that the party comply with UCCJA to bring suit for support. Although it is desirable to have the physical presence to the child in Texas for jurisdictional purposes, it is not essential. Jurisdiction should not be refused if there is no more appropriate forum in the world.

Also, it appears that a Texas court can acquire personal jurisdiction over a non-resident respondent who is served while physically present in Texas regardless of the

character of the respondent's contacts with Texas. In *Burnham v. Superior Court of Ca.* , 58 U.S.L.W. 4629 (U.S. May 29, 1990), the Supreme Court upheld the *in personam* jurisdiction of a California divorce court over a nonresident who was personally served while in California to visit his children. Mr. and Mrs. Burnham, residents of New Jersey, agreed that they would separate and that Mrs. Burnham would move to California with the couple's children. Seven months later, while in California to visit the children, Mr. Burnham was personally served with Mrs. Burnham's divorce petition. Mr. Burnham's subsequent special appearance motion was denied and he appealed, arguing that California lacked personal jurisdiction over him because the litigation did not arise out of his activities in the state. The Supreme Court held that a state's assertion of personal jurisdiction over an absent respondent must satisfy due process requirements, but that no such "minimum contacts" were required when the respondent was physically present in the state when served with process.

a. Divorce.

The Texas Family Code also permits the exercise of personal jurisdiction over a nonresident in a suit affecting the parent-child relationship connected with a divorce whenever personal jurisdiction exists to litigate the divorce. Specifically, in Texas courts may exercise personal jurisdiction over a nonresident respondent of (i) Texas is the last marital residence of the petitioner and the respondent and the suit is commenced within two years after the date on which marital residence ended or (Iii)if there is any basis consistent with the constitutions of Texas and the United States for the exercise of the personal jurisdiction.

A court acquiring jurisdiction for a divorce pursuant to the provisions of the Texas Family Code also acquires personal jurisdiction over the respondent in a suit affecting the parent-child relationship.

a. Long Arm Jurisdiction .

The Texas long arm statute, as set forth above, should be utilized with caution, being mindful of due process attacks which may arise. Certain federal cases have recognized due process shortcomings in long arm statutes.

For example, in *Kulko v. Superior Court of CA.,* 438 U.S. 908 (1978) it was held that mere consent (as alluded to in TEX FAM. CODE ANN. § 11.051(2) (Vernon 1993) of the non-custodial parent to change in the child's residence does not in and of itself confer jurisdiction without derivation of some benefit from that move or minimum contacts within the new state.

Likewise, the over broad grant of jurisdiction under the Texas Family Code may be subject to attack for lack of specificity. In this, as in other areas of practice, the exercise of personal jurisdiction consistent with the Texas and U.S. Constitutions can only be interpreted by way of case law. The careful practitioner would be wise to look beyond family law cases to ascertain just what establishes "*in personam"* jurisdiction.

. Child Custody Cases.

Prior to the adoption of § 102.011, Texas courts held that jurisdiction to determine custody existed if Texas was the child's domicile or if the child was physically present in Texas. *Ex Parte Birmingham,* 244 S.W. 2.d. 977 (Tex. 1951). This *in rem* basis for jurisdiction, i.e., the child, as "the thing",

being in Texas overruled in 1979 and currently exists in §152.003 (a)(2)(A), which provides that physical presence in Texas of the child and one of the contestants is not alone sufficient to confer jurisdiction on a Texas court to make a child custody determination.

At the same time, a strict personal jurisdiction approach was set forth in *May v. Anderson,* 345 U.S. 528 (1953). The United States Supreme Court in a 4-1-2-1 decision held that an Ohio court was not compelled to accord full faith and credit to a Wisconsin decree rendered without personal jurisdiction over the parent resisting enforcement.

Justice Frankfurter's concurring opinion suggested that although *May v. Anderson* did not mandate Ohio's acceptance of the Wisconsin decree under full faith and credit, the Ohio court has clearly not prohibited from such. This view was accepted in the Texas case of *Perry v. Ponder,* 604 S.W. 2d 306 (Tex Civ. App.-Dallas 1980, no writ). Specifically, the Dallas Court held:

[T]he trial court should have not sustained the father's special appearance and dismissed the suit for lack of contacts by him with the state of Texas, *but should have inquired into the circumstances of the parties and the child for the purpose of determining whether the child and the mother have been in Texas long enough to give this state a sovereigns's interest in and responsibility for the child's welfare and to provide access to sufficient evidence to make an informed decision concerning the child's best interests.*

Id. at 318 (emphasis added).

The court further stated that:

[T]he standard of "traditional notions of fairness and substantial justice" laid down in *International Shoe* and elaborated in *Shaffer* as the ultimate test of due process may be met in a child custody case by delivery of personal notice outside the state without any requirement of "minimum contacts" on the part of the absent parent.

Id. at 316.

The strictly personal jurisdiction requirement has been rejected in the UCCJA as well as the Parental Kidnaping Prevention Act (the PKPA). Specifically, the Texas Supreme Court has held under *In re S.A.V. and K.E.V.,* 837 S.W. 2d 80, 84. (Tex. 1992) that: "...[d]ue process permits adjudication of the custody and visitation of a child without showing of 'minium contacts' on the part of the nonresident." Nonetheless, in some states the requirement of personal jurisdiction has been reiterated. *See Pasqualone v. Pasqualone,* 406 N.E. 2d 1121, 1127 (1980), *Ex Parte Dean,* 447 So. 2d 733 (Ala. 1984).

. Child Support Cases.

In *Perry v. Ponder,* 604 S.W. 2d 306, the court distinguished the jurisdictional requisites for custody from those more stringent jurisdictional requisites of a personal judgment for support. Due process requires that a court have personal jurisdiction over an obligor before it can order payment of personal obligations such as child support. *See also Hemingway v. Robertson,* 778 S. W. 2d 199 (Tex. App-Houston [1st Dist.] 1989, no writ).

The principle that minimum contacts are required to impose a support order was upheld in *Cunninhgam v. Cunningham,* 719

S.W. 2d 224 (Tex. App.-Dallas 1986, no writ). The court's analysis in *Cunningham* focuses upon the following facts: 1) father had established new domicile outside of Texas; 2) severed his ties with Texas; 3) owned no property in Texas; 4) did not conduct business in Texas; and 5) only entered Texas to visit his child. The court held that there were no minimum contacts.

The minimum contacts necessary for a support order must exceed mere acquiescence to the child's presence in Texas. *Ford v. Durham,* 624 S.W. 2d 737, 738-740 (Tex.App.-Fort Worth 1981, writ dism'd) (*citing Kulko).*

Minimum contacts can be satisfied if the action sued for "arises out of" the defendant's contacts with the state. *Southern Clay Products, Inc. v. Guardian Royal Exch. Assurance, Ltd.,* 762 S.W. 2d 927 (Tex. App.-Corpus Christi 1988, no writ). Maintenance of the family relationship has been held to be sufficient minimum contacts by the Supreme Court under *In re S.A.V.,*837 S.W. at 84, which the Supreme Court distinguished from both *Cunningham and Ford.* The Court clearly set forth the two requirements which must be met before a court can impose a child support or other monetary obligation on a nonresident party: 1) a statue that authorizes exercise of jurisdiction, and 2) the exercise of the jurisdiction must be consistent with the notions of fair play and substantial justice. The Court notes that § 11.051(4) of the Texas Family Code allows "any basis" consistent with justice to serve as a basis to assert jurisdiction in child support matters. In *S.A.V.,* the Court found that the father's visits to see his children in Texas and his continuing job search in Texas constituted a deliberate establishment of minimum contacts with Texas sufficient to assert personal jurisdiction for child support.

Likewise, in *Phillips v. Phillips,* 826 S.W. 2d 746 (Tex. App.-Houston [14th Dist.] 1992, no writ), the Court held that the nonresident's complaint of no personal jurisdiction necessary to order him to pay child support, alimony, or attorney's fees failed in the face of the facts. In that case, the parties married in Virginia and moved shortly thereafter to a series of foreign locations as a result of the husband's employment with the U.S. State Department. When the parties separated, the wife returned to her family's home in Houston and filed for divorce. The appellate court found that the husband's eight trips to Houston, all in "furtherance of the family or marital relationship: constituted sufficient basis for the exercise of personal jurisdiction over him.

Minimum contacts have been found where children have been conceived in Texas, born in Texas, resided with the respondent in Texas, or some combination thereof. *Butler v. Butler,* 577 S.W. 2d 501 (Tex. Civ. App.-Texarkana, 1978, writ dism'd)' *Crockett v. Crockett,* 589 S.W. 2d 759 (Tex. Civ. App-Dallas 1979, no writ).

0. UNIFORM CHILD CUSTODY JURISDICTION ACT .

The Uniform Child Custody Jurisdiction Act (the UCCJA) was approved by the American Bar Association in 1968, after having been promulgated by the National Conference of commissioners on Uniform State Laws. Texas adopted a somewhat modified version of the model act which went into effect September 1, 1983 and was recodified in 1995.

The UCCJA is an effort by all states and jurisdictions of the United States to establish state guideline for exercising jurisdiction over original custody determinations and modification actions involving custody. The UCCJA also has international application [Koester v. Montgomery, 886 S.W. 2d 432 (Tex. App.-Houston [1st Dist] 1994, no writ)]and is applicable to neglect an dependency suits, including suits for termination of a parental rights involving a Mexican national and his daughters, one of whom was a Mexican national. [*Arteaga v. Texas Department of Protective and Regulatory Services,* 924 S.W. 2d. 756 (Tex. App.-Austin 1996, writ denied) and in *re Stephanie M.,* 867 P.2d 706 (Cal. 1994)}.

The UCCJA of each state should inform its practitioners, as well as those of other states, as to the requirements necessary to be met before such state can exercise jurisdiction over litigation involving the custody of children. It is the basic framework each state has developed to determine whether or not it may adjudicate custody actions. Each state has its own UCCJA which may, or may not, differ from the model act. The Texas version of the UCCJA is found in TEX. FAM. CODE ANN. §152.001, et seq. (Vernon 1995).

For an excellent discussion of case law from other jurisdictions *see* George, Jurisdiction in Suits Affecting the Parent Child Relationship, STATE BAR OF TEXAS, 15TH ANNUAL ADVANCED FAMILY LAW COURSE (1989).

a. Purposes.

THE UCCJA is a multi-purpose act. The purposes, similar to those established in the PKPA, as set forth in §152.001, are to:

1. avoid jurisdictional competition and conflict with the courts of other states in matters of child custody that have in the past resulted in the shifting of children from state to state with harmful effects on their well-being;

2. promote cooperation with the courts of other states to the end that a custody decree is rendered in the state that can best decide the case in the interest of the child;

3. assure that litigation concerning the custody of a child takes place ordinarily in the state where the child and his family have the closest connection and where significant evidence concerning his care, protection, training, and personal relationships is most readily available, and that courts of this state decline the exercise of jurisdiction when the child and his family have a closer connection with another state;

4. discourage continuing controversies over child custody in the interest of greater stability of home environment and of secure family relationships for the child;

5. deter abductions and other unilateral removals of children undertaken to obtain custody awards;

6. avoid relitigation of custody decisions of other states;

7. promote and expand the exchange of information and other forms of mutual

assistance between the courts of this state and those of other states concerned with the same child; and

8. make uniform the law of those states that enact it.

The purposes clause should not be ignored as many case throughout the country have relied upon it to justify an opinion, especially when jurisdiction may properly fall in either two states.

a. Key Definitions.

It is important to be acquainted with the definitions of terms used in the UCCJA and their meanings, which are specifically set out in § 152.002. This section gives specific meaning to "custody determination as being a court decision, order, and instructions providing for the custody of the child; and "home state" as the state in which the subject child lived immediately preceding the suit.

a. Jurisdiction- Generally.

The grounds for jurisdiction established by the UCCJA comprise the heart of the act. However, it must be reiterated that a custody determination by a Texas Court need not be based upon personal jurisdiction. The ruling in *May v. Anderson,* 345 U.S. 528 (1952) has been specifically rejected by the UCCJA.

The case of *Perry v. Ponder,* 604 S.W. 2d 306, although a pre-UCCJA, pre-PKPA case, is instructive in this area. *Perry v. Ponder* establishes a test which closely follows the reasoning and dictates of both UCCJA and the PKPA when attempting to determine if Texas courts should decide a custody issue. Specifically, the court sets forth the proper analysis as follows:

> [T]he trial court should not have sustained the father's special appearance and dismissed the suit for lack of contacts by him with the State of Texas, but should have inquired into the circumstances of the parties and the child for the purpose of determining whether the child and the mother have been in Texas long enough to give this state a sovereign's interest in and responsibility for the child's welfare and to provide access to sufficient evidence to make an informed decision concerning the child's best interest.

Id. at 318.

It is not necessary for a Texas court to exercise the UCCJA status jurisdiction if the court as personal jurisdiction over the parties. In *Creavin v. Moloney,* 773 S.W. 2d 698 (Tex. App.-Corpus Christi 1989, writ denied) the parties were citizens of Ireland, were married in Ireland, and their child was born in Ireland. The family moved to Pennsylvania and lived there together until the mother and child moved back to Ireland. The father then obtained a divorce in Pennsylvania , but the divorce decree did not mention the child. The father later moved to Texas and applied for U.S. citizenship, The mother, long distance from Ireland, filed an original SAPCR seeking child support, a "confirmation" of herself as managing conservator, and attorney fees. Since no proof of Pennsylvania law was offered, the court of appeals presumes that it was the same as Texas law. The appellate court held that since the mother, the nonresident party, had submitted to the court's personal jurisdiction, there was no need or requirement for the court to exercise status jurisdiction under the UCCJA. The Corpus Christi court held that:

> The underlying motive behind the

> usage of status or subject matter jurisdiction is to acquire jurisdiction over an unwilling party who, on account of his lack of minimum contacts with the forum state, would not otherwise be properly before the court. The traditional notions of fairness, substantial justice and due process are not at issue when the nonresident makes herself amenable to the jurisdiction of the court.

Id. at 704.

a. Jurisdictional Requisites-Specifically.

The UCCJA jurisdictional provisions are set forth in § 11.53. They consist of a hierarchy of grounds for a Texas court to assume jurisdiction of a custody determination proceeding.

. Home State.

A Texas court that is competent to decide child custody matters has jurisdiction to make a child custody determination by initial decree or modification decree or order if Texas (i) is the home state of the child on the date of commencement of the proceeding; or (Iii) 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 Texas because of the acts of a person claiming his custody or for other reasons, and a parent or person acting as parent continues to live in Texas. TEX FAM. CODE ANN. § 152.003 (a)(1)(A)(Vernon 1995) see also *Graves v. Graves,* 916 S.W. 2d 65 (Tex.App.-Houston [1st Dist.] 1996, n.w.h.)].

In this regard, the Texas UCCJA conforms with the PKPA in that it has set "home state" as the number one priority for determining whether or not Texas can exercise jurisdiction. See *Lemley v. Miller,* 932 S.W. 2d 284 (Tex. App.-Austin 1996, n.w.h.) which held that "The home state provision, section 152.003 (a)(1), is the preferred method of establishing jurisdiction in a custody determination." The model UCCJA puts home state and "significant connections" on an equal footing, but such equality was specifically rejected in the Texas UCCJA.

The problem is that many states, in placing "home state" and "significant connections" on par with one another, as in the model UCCJA, have created a conflict because two states could exercise jurisdiction under equally authoritative grounds. However, if Texas has exercised jurisdiction based on home state jurisdiction, then it will be allowed full faith and credit, and will dominate the decree of any other state which may have exercised jurisdiction under the significant connections provision. *See Harkness v. Harkness,* 709 S.W. 2d 376 (Tex. App.-Beaumont 1986, no writ) and *Ex Parte McDonald* ,737 S.W. 2d 102 (Tex. App.-Corpus Christi 1987, no writ).

In the case of *Wilber v. Buelow,* 523 N.Y.S. 2d 249 (N.Y.A.D. 3 Dept., 1988) 136 A.D. 2d 786, a New York court held that a Texas divorce decree need not be recognized in New York because the decree was entered by a court which did not have jurisdiction to determine child custody. The Texas court was without jurisdiction because the oldest child had been absent from Texas for 11 months and the youngest child had never resided in Texas. Furthermore, both children lived in New York with their mother at the time the

decree was entered. Thus, Texas did no have jurisdiction under the UCCJA and New York would not recognize the decree.

"Home state" controls over the "first to file". In the case of *Bolger v. Bolger,* 678 S.W. 2d.194 (Tex. App.-Corpus Christi 1984, writ ref'd n.r.e.), a New York court found that the "home state" of the children was New York under the PKPA. Therefore, Texas could not acquire jurisdiction over the children. The parties had been separated and the children lived with her in New York. While the father has the children for Easter holidays in Texas, he filed for divorce and obtained a temporary retraining order. The father was named temporary managing conservator. A month later mother filed for divorce in New York and obtained a final judgment granting her custody of children in New York, which she attempted to enforce by writ of habeas corpus. After the motion was denied, the mother filed a motion to dismiss, which she was granted. On appeal the court found that New York was the children's "home state" under the PKPA. Applying paragraph (g) [exercise of jurisdiction when another state has proceedings to determine custody], Texas never had jurisdiction over the children. Therefore, paragraph (g) does not apply. In other words , if you don't have proper "home state" jurisdiction, it does not matter if you file first for divorce. *See also Swink v. Swink,* 745 S.W. 2d 464(Tex. App.-Tyler 1988, no writ).

. Significant Connections and Substantial Evidence.

In order to exercise jurisdiction under the significant connection/substantial evidence ground, there must be more than "mere physical presence". The significant connections can be those of a parent, both parents, the child, and/or a "contestant." TEX FAM. CODE ANN. § 152.003(a)(2) (Vernon 1995).

Like the PKPA, the Texas UCCJA further adds that in addition to significant connections there need also be "substantial evidence" as to the child's present or future care, protection, training and personal relationships.

A Texas court has jurisdiction to make a child custody determination by initial decree or modification decree or order if it appears that no other state is the child's home state and it is in the best interest of the child that a Texas court assume jurisdiction because (i) the child and his parents, or the child and at least one contestant, have a significant connection with Texas other than mere physical presence; and (Iii) there is available in Texas substantial evidence concerning the child's present or future care, protection, training, and personal relationships.

. Abandonment/Emergency.

Assuming that Texas is not the "home state" and does not have significant connections/substantial evidence, the next alternative available in order to exercise jurisdiction is if the child is found abandoned in Texas or of an emergency exists. TEX. FAM. CODE ANN. § 11.53 (a)(3) (Vernon 1993).

In defining emergency the Texas UCCJA borrows language from the Family Code in requiring that there be a serious and immediate questions concerning the welfare of the child. There is abundance of case law interpreting the term serious and immediate question as that term has been part of the Family Code for years.

In *Mason v. Barton,* the S.W.2d 284 (Tex. App.-San Antonio 1986, no writ) the court was confronted with a child physically present in Texas, in an emergency situation. The mother and father of the child were divorced in Oregon and the father was named custodial parent. The mother moved to Texas and had lived there for several years when the child ran away from his father in Oregon to his mother in Texas. Within one month after receiving the child the mother filed a motion to modify custody alleging an emergency. The father filed a habeas corpus proceeding and plea in abatement to the modification action. Interestingly, the father stipulated that there was a serious immediate questions concerning the child. The trial court granted the father's writ of habeas corpus but named the mother temporary managing conservator for a period of a few months or until she sought or obtained relief in Oregon, whichever occurred first. The mother appealed, contending the Texas court should have taken jurisdiction over the modification. The Court of Appeals said it was under these circumstances; however, Oregon was obviously the home state so Texas should decline jurisdiction.

Texas is now limited both by case law [*Aberholden v. Morizot,* 856 S.W. 2d 829 (Tex.App.-Austin 1993, no writ)] and statue [TEX. FAM. CODE ANN. § 152.003(d) (Vernon 1995) from assuming jurisdiction even in emergency for more than the entry of temporary orders necessary to protect the child until the court with proper jurisdiction assumes that jurisdiction. Any emergency temporary orders entered by a Texas Court are dismissed by operation of law on the 91st day after filing regardless of whether or not another court has asserted jurisdiction during that time period.

In *Lundell v. Clawson,* 697 S.W. 2d 836(Tex. App.-Austin 1985, no writ) it was held that "the word emergency would appear to imply an unexpected crisis demanding immediate action by the court to protect the child from physical or emotional harm, irrespective of other considerations which must be suspended until the emergency abates." Id. At 840. *See Soto-Ruphuy v. Yates,* 687 S.W. 2d 19 (Tex. App.-San Antonio 1984, no writ) for further discussion of what does not constitute an emergency.

Mere presence of the child in the state and a **claim** of an emergency is insufficient under *In re Carpenter,* 835 S.W. 2d 760 (Tex. App.-Amarillo 1992, no writ) for Texas to assert jurisdiction. In *Carpenter,* the father had abducted the child from the state of Pennsylvania in violation of that state's order and had secreted himself and the child in the state of Texas. Despite the father's clever and all encompassing arguments, the Court that held that "Ronald should not be allowed to use his deliberate secretion of himself and Jimmy as a claim of right...To do so would make a mockery of the purposes of the UCCJA." *See also Huffstutlar v. Koons,* 789 S.W. 2d 707 (Tex.App-Dallas 1990, no writ) and *Ex parte McDonald,*737 S.W. 2d 102 (Tex. App.-Corpus Christi 1987, no writ).

In the event that jurisdiction is improperly laid in the trial court, the appropriate remedy at that level is a motion to dismiss for want of jurisdiction. In the event it is a matter which can be corrected, the dismissal must be without prejudice. *Attorney Gen. Of Tex. V. Sailor,* 871 S.W. 2d 257 (Tex. App.-Houston [14th Dist.] 1994, no writ). If a

motion to dismiss for a want of jurisdiction is unsuccessful, two different remedies are available depending on the status of the procedure. In *Little v. Daggert,* 858 S.W. 2s 368 (Tex. 193) a mother had filed a paternity action in Texas which was later dismissed for want of prosecution. The mother and child had moved in the interim to Tennessee. After the mother and child had been in another state for more than six months, the father filed a paternity suit in Texas an sought temporary order which were granted, The mother appealed the temporary orders by way of mandamus because temporary orders are not appealable. In this case of first impression, the Supreme Court found that prior proceedings had not conferred continuing jurisdiction on Texas because there had been no final order entered. The court granted the mandamus because of the lack of other remedy at that stage of the proceedings. By contrast, the court in *Hughes v. Black,* 863 S.W. 2d 559 (Tex. App.-Waco 1993, no writ) did not grant a mandamus because the mother did not seek relief from the temporary orders, to which she had agreed. The Waco court held that mandamus was not appropriate because the appellant had relief available through a direct appeal.

. Other State Declines Jurisdiction.

The last alternative for the exercise of jurisdiction is that it would be in the best interest of the child for Texas to exercise jurisdiction and it appears that no other qualifies, or that another state has declined jurisdiction. TEX. FAM. CODE ANN.§ 11.53 (a)(4)(Vernon 1993).

When another state declines jurisdiction over some issues (i.e., visitation, and child support) it may be required to assert jurisdiction over an issue of custody if the children have been gone from the state of Texas for more than 6 months at the time of the filing of the action. In *Henry v. Rivera,* 783 S.W. 2d 766 (Tex. App.-San Antonio 1990, no writ) the parties were divorced in Texas. Thereafter the mother and the children moved to Utah. The court of appeals found that Utah had properly declined jurisdiction on the issues of child support and visitation. It also found that, because there was no **written** agreement to the contrary, Texas was required to defer jurisdiction on the custody matter to the state of Utah as the new home state of the children.

a. Continuing Jurisdiction

The model UCCJA includes as provision which awards continuing jurisdiction to the original state "for as long as one contestant continues to reside in the original state." This provision allows a possibility that the possessory conservator will request ongoing custody litigation to be conducted in the original state despite the fact that the managing conservator and child have long since left. Such ongoing litigation in the original state would create a great expense to the managing conservator and inconvenience with all substantial connections and significant evidence in another state.

The drafters of the Texas UCCJA included a "self purging statue" to deal with the continuing jurisdiction sections in the model UCCJA. Section 152.003(d) provides that, except on written agreement on all the parties, a court may not exercise its continuing jurisdiction to modify custody if the child and the party with custody have established another home state, unless the action to modify was filed before the new home state was acquired.

This loss of jurisdiction provision applies only to a "custody determination" (i.e., modification of managing conservatorship) and does not apply to modification of visitation and child support, or to the issue of attorney's fees. *Hemingway v. Robertson* 778 S.W. 2d 199 (Tex. App.-Houston [14th Dist.] 1989, no writ), *Henry v. Rivera,* 783 S.W. 2d 766 (Tex. App.-San Antonio 1990, no writ).

a. Modification.

In order for a Texas Court to modify a custody determination of another state, it must first be determined that the court that rendered the decree does not have jurisdiction prerequisites substantially in accordance with the UCCJA, or has declined to assume jurisdiction to modify the decree; and that Texas qualifies for jurisdiction under one of the four provisions for *the Interest of Wilson,* 709 S.W. 2d 773 (Tex. App.-Tyler 1990, no writ) wherein the Texas judge consulted with the Oklahoma judge who dictated an order or the phone declining jurisdiction so that Texas might proceed. However the order was unsigned and uncertified and, therefore, held by the court of appeals to be void.

a. Recognition of Out of State Custody Decrees.

Section 153.013 mandates recognition and enforcement of out of state custody decrees, be they initial or modification decrees, when the foreign court had assumed jurisdiction under statutory provisions substantially in accordance with the Texas UCCJA.

In the case of *Hanson v. Leckey,* 754 S.W. 2d 292 (Tex. Civ. App.-Tyler 1988, writ denied) a Kansas order of modification was in issue. It was recognized that the Texas UCCJA departs from the uniform act as well as Kansas version by not establishing home state and significant connections on an equal level. The court held:

[A Texas court is only permitted] to rely upon the significant connection ground if no other state has jurisdiction via the home state ground. Although Colorado was the home state of the child at the time of the commencement of the Kansas modification action, Texas law still requires recognition of the Kansas court's modification order [based upon significant connection].

Id. at 295.

The drafters of the uniform act obviously included the modifier "substantially", to ensure that the states that did not adopt the act in toto would recognize each other's decrees
irrespective of individual amendments to the uniform act. We find that the Kansas act is "substantially in accordance" with the Texas version. Therefore, under TEX. FAM.CODE ANN. § 11.63 we must recognize and enforce the Kansas modification order if the facts support the finding of jurisdiction under the significant connection/substantial evidence ground of the Kansas physical custody of the child or any parent whose rights have not been determined must be given notice pursuant to §§ 152.004 and 152.005. This would include notice to any non-parental custodians.

Id. at 296.

a. Notice.

The UCCJA notice requirement is simply that any person having physical

custody of the child or any parent whose rights have not been terminated must be given notice pursuant to § 11.54. This would include notice to any non-parental custodians.

In the case of *Wright v. Wentzel,* 749 S.W. 2d 228 (Tex. App.-Houston [1st Dist.] 1988, no writ) the former wife was given notice and an opportunity to be heard on husband's motion to modify conservatorship when she was served with process by personal delivery out-of-state. The letter of notice of hearing, however, was returned as "refused". The court held that unclaimed notice of a proceeding would be sufficient to comply with notice requirements if it is apparent that the address was valid and could be located by the postal office.

a. Res Judicata

If a party has been afforded notice pursuant to the UCCJA, the decision of the court is binding on that person regardless of whether or not the court has personal jurisdiction over the contestant. TEX. FAM. CODE ANN. § 152.012 (Vernon 1995.)

a. Sworn Statement.

A sworn statement is required in each party's first pleading or in an affidavit attached thereto when custody is in issue and at least one contestant lives out-of state. The statement must include information as to the child's present address, the places where the child has lived within the last five years, and the names and present addresses of the persons with whom the child has lived during that period. Additionally, the statement must state whether the affiant has participated in other litigation concerning the custody of the same child in Texas or any other state, has information of any proceeding concerning the child pending in a Texas court or any other state, and whether he knows of any person not a party to the proceedings who has physical custody of the child or claims to have custody or visitation rights with respect to the child. TEX. FAM. CODE ANN. § 11.59 (Vernon 1993).

The case of *Wright v. Wentzel,* 749 S.W. 2d 228, also addresses the mandatory nature of the § 11.59 affidavit. Because the husband in *Wright v. Wentzel* did not know that his wife resided outside the state when he filed his motion and because his wife resided in Texas at all times prior to the motion, the court found that the husband sufficiently alleged jurisdiction in his pleadings by asserting that the court had "continuing jurisdiction" of the suit.

a. Simultaneous Proceedings.

Section 152.006 provides that when a custody action is filed under the UCCJA, the court must determine, based on the §152.009 affidavit and other means available , that no other custody action is pending in a court of another state which exercises jurisdiction substantially in accordance with Texas' UCCJA. It directs the court to investigate using the child custody register established under §§ 152.015, 152.016 and 152.017.

A Texas court may not exercise its jurisdiction under the UCCJA, if at any time of filing the petition, a custody proceeding concerning the child was pending in a court of another state exercising jurisdiction substantially in conformity with the Texas ,UCCJA, unless the proceeding is stayed by the court of other state because its state is a more appropriate forum. *See Porter v. Johnson,* 712 S.W. 2d 598 (Tex. Civ. App,-Corpus Christi 1986, no writ).

a. Bad Actors/Reprehensible Conduct.

Section 152.008 provides a basis to decline jurisdiction by reason of wrongful conduct of the petitioner, such as improperly removing the child from the physical custody of the person entitled to custody, improperly retaining the child after a visit or other temporary relinquishment of physical custody, or violating any other provision of a custody decree of another state. The court can charge the bad actor in such a case with necessary travel and other expenses, including attorney's fees, incurred by other parties or their witnesses. *See Carpenter and Huffstatler,* both discussed above.

a. Inconvenient Forum.

Texas courts have the right to decline jurisdiction if the court finds, on its own motion or the motion of a litigant or guardian ad litem, that Texas is not the most convenient forum for determining custody. TEX. FAM. CODE. ANN. § 11.57 (Vernon 1993). Subsection (c) sets forth the circumstances which the court may consider in making the determination.

An example in which Texas, may and probably should, decline jurisdiction, is the family that has lived in another state for many years and had just recently (6 months ago) moved to Texas. Texas would qualify as the home state, however, under factual circumstances the court could decline or defer jurisdiction.

In *Haley v. Haley,* 713 S.W. 2d 801 (Tex. App.-Houston [1st Dist.] 1986, no writ) the court declined jurisdiction when divorce was filed by husband in Texas four months after the mother left Texas with the children and moved to Alaska. The mother was from Alaska, the children's grandparents were in Alaska and the children were born in Alaska. The court held that Alaska was in a better position to determine custody, despite the fact that Texas had been the marital domicile.

In *Creavin v. Moloney,* 773 S.W. 2d 698 (Tex. App.-Corpus Christi 1989, writ denied) the father was a resident of Texas while the mother and child were citizens and residents of Ireland. The appellate court cautioned that in determining whether or not to decline jurisdiction, the court's inquiry should center on the best interest of the child.

Specifically, although the court may decline to exercise its jurisdiction should it find that it is an inconvenient forum, it should not refuse to exercise jurisdiction if there is no more appropriate forum in the world. This fact should weigh heavily in the court's decision whether to entertain the suit because TEX. FAM. CODE ANN. § 11.57 (Vernon 1986) only permits the declination of jurisdiction where a trial court "finds that it is an inconvenient forum to make a custody determination...*and that a court of another state is a more appropriate forum".*

ID. at 704.05. (emphasis added).

a. Maintaining and Obtaining Records.

Section 152.016 provides for the filing, acquisition, and preservation of court documents, such as pleadings, orders, and decrees, any record that has been made of its hearings, social studies, and other pertinent documents until the child reaches the 18 years of age or in accordance with Texas law, for use in another state.

a. International Application.

Section 152.023 states that the UCCJA shall "extend to the international area." It specifically provides that the general policies of the UCCJA extends the recognition and enforcement given by Texas courts to custody decrees of other states to custody decrees and decrees rendered by similar legal institutions of other nations if reasonable notice and opportunity to be heard were given to all affected persons. See *Koester v. Montgomery* discussed hereinabove.

See Garza v. Harney, 726 S.W. 2d 198 (Tex. App.-Amarillo 1987, no writ) in which the act was applied to a Mexico decree with regard to child removed to Texas.

0. PARENTAL KIDNAPING PREVENTION ACT.

a. An Overview.

Despite the fact that the UCCJA was supposed to have established the consistency necessary to determine jurisdiction for custody proceedings, in 1980 Congress found it necessary to establish the PKPA (Parental Kidnaping Prevention Act, 28 U.S.C.S. § 1738A (1989) to further restrict jurisdictional disputes and forum shopping. The PKPA provides for (1) full faith and credit to be given to orders between sister states, (2) availability of criminal action and extradition for the kidnaping parent, and (3) use of the Parent Locator Service to locate the kidnaping parent and child. The application of the PKPA in Texas adds an additional burden on a litigant in modification actions. Before Texas can assert jurisdiction for such an action, it must determine whether it has proper jurisdiction according to the PKPA **and** whether the sister state no longer has jurisdiction or has declined jurisdiction.

a. Does PKPA Create a Federal Cause of Action?

Under most areas of the law, residence of the litigants in two different states make the federal forum available to the litigants. Not so in the area of custody. In the late 1800's the federal court made their dislike of domestic issues clear by creating the "domestic relations exception" to federal jurisdiction.

There was a glimmer of hope in the case of *Heartfield v. Heartfield ,* 749 F. 2d 1138 (5th Cir. 1985) involving visitation and child support. However, that brief glimmer was extinguished in *Thompson v. Thompson,* 484 U.S. 174, 108 S. Ct. 513, 98 L.Ed. 2d 512 (1988) holding that there is no federal cause of action arising out of the PKPA.

a. How Does PKPA Differ from UCCJA?

Because of the intricate inter-twining of the UCCJA and the PKPA, it becomes difficult to ferret out cases resting solely on the PKPA. The greatest differences lie in the 1) availability of "substantial contacts" to establish jurisdiction, 2) the requirement that the sister state either no longer have or decline jurisdiction, and 3) criminal sanctions available for the bad acting parent.

Aside from the cases already discussed previously in this paper, the following are cases resting primarily on the PKPA for their outcomes. In *Rush v. Stansbury,* 668 S.W. 2d 690 (Tex. 1984), the Texas Supreme Court afforded full faith and credit to a Tennessee order and conditionally created a writ of mandamus in the event the Texas order, entered without jurisdiction under the PKPA, was not voided.

Geary v. Geary, 878 S.W. 2d 602 (Tex. 1994) is a mandamus proceeding involving an order entered in Texas without regard to the home state of the children, which was Minnesota.

In *McGee v. McGee,* 651 S.W. 2d 891 (Tex. App-El Paso 1983, no writ), the trial court viewed both the PKPA and the UCCJA to determine whether there was jurisdiction over the children. Despite the fact that there was no jurisdiction over the father, there was jurisdiction over the children both pursuant to state and federal standards.

Although the majority in *Perez v. Williamson,* 726 S.W. 2d 634 (Tex. App.-Houston [14th Dist.] 1987, no writ) dismissed the underlying cause of action on a standing ground, concurring opinion encouraged dismissal on a jurisdictional ground. Specifically, the Justice Sears urged:

The trial court erred in refusing or failing to recognize the Mississippi decree. There was no showing that the Mississippi court lacked jurisdiction over the parties or the minor child. Therefore, pursuant to § 11.63 of the Family Code, the Texas Court was required to recognize the Mississippi decree. TEX. FAM. CODE ANN. § 11.63 (Vernon 1986). Further, when a court of another state has made a custody decree, a court of this state may not even modify the decree unless there is a showing that the foreign court failed to meet jurisdictional prerequisites or has declined to assume jurisdiction to modify the decree. TEX. FAM. CODE ANN. § 11.64 (Vernon 1986).

0. CONCLUSION

On the International front, the Hague Convention is an effective means of combating international child abductions. During the few years that the treaty has been in effect, numerous children have been returned to the country of their habitual residence.

Within the United States, it appears that over the years the federal law and the court opinions have shaped our state law jurisdiction. Where children are concerned, the courts seem to bend the rules, in order to achieve the "right result."

Although the application of these laws are difficult, there is enough discretion and flexibility within these areas to allow courts to do the right thing.

For information about The Hague Convention cases worldwide, check William Hilton at http://www.hiltonhouse.com.