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16 YEARS OF UCCJEA INTERSTATE CUSTODY JURISDICTION IN TEXAS

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The Uniform Child Custody Jurisdiction and Enforcement Act passed in Texas in 1999 is supposed to give certainty and uniformity to the state that would have jurisdiction over a child custody matter. This made a lot of sense because prior laws in different states sometimes made it possible to have conflicting child custody orders in several states. To date, all states have adopted some form of this Uniform Act, with the exception of Massachusetts.

The UCCJEA covers initial child custody jurisdiction and modification jurisdiction, among other things. According to an article in CNN

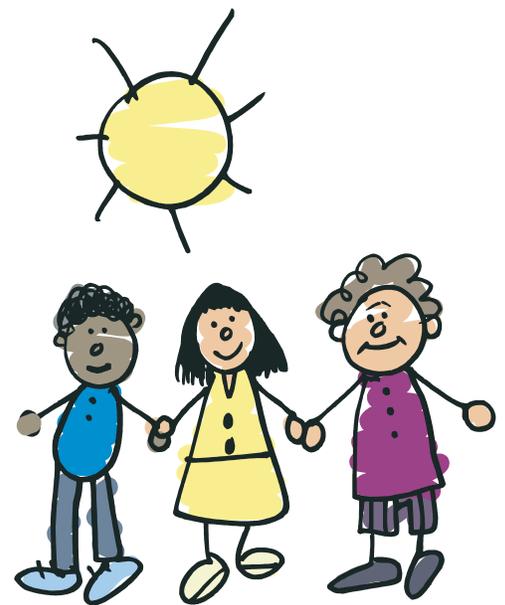


Money, more Americans moved to Texas in recent years than any other state, with the state experiencing a net gain of more than 387,000 residents in the 2013 census. Five Texas cities—Austin, Houston, San Antonio, Dallas and Fort Worth—were among the top 20 fastest-growing large metro areas, with Austin earning the title of the fastest growing major city. Given all of that migration into Texas, this act has been and will continue to be the subject of litigation

for Texans and would-be Texans.

The act itself establishes initial child custody jurisdiction in a state that is the home state of the child when suit is filed, or if other connections are met if there is no home state. A child's home state is generally where the child lived for six months or longer. The act also establishes modification jurisdiction for a prior custody order, and sets out when a state may lose or decline jurisdiction over a custody order, and send the litigation to another state. In most cases, modification jurisdiction will stay in the state that initially litigated a custody order, unless all parties have moved out of the state, or if other conditions are met.

Since its enactment, the courts of appeal in Texas have handled dozens of cases involving the UCCJEA, including several opinions from the Texas Supreme Court. The volume of cases in varied jurisdictions demonstrates what most



family lawyers already know: interstate child custody fights are here to stay.

The first major theme arising out of many cases is the identity of the child's home state in an initial child custody proceeding. The Texas Supreme Court tackled that issue in 2005 in *Powell v. Stover*, in a fight for jurisdiction between Texas and Tennessee.

In *Powell*, the Texas Supreme Court rejected a parent's subjective intent, and determined that the child's actual physical presence in a state for six months would be "the central factor" to be considered when determining the child's home state where custody would be litigated. The court stated, "The UCCJEA was thus intended to give prominence to objective factors.

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Most of the jurisdiction disputes on appeal have involved the fact issue of the child’s physical residence (especially when parents are living in different states but sharing the child), and the due process requirements of the hearing necessary to establish or reject a custody case based on jurisdiction.

We believe the UCCJEA should be construed in such a way as to strengthen rather than undermine certainty that prioritizing home-state jurisdiction was intended to promote, and thus decline to apply a test to determine where a child ‘lived’ based on the parties’ subjective intent.” So, for purposes of an initial child custody suit, the courts have looked to the child’s actual physical presence in a state.

Several Texas cases address the interesting question of jurisdiction of an infant that has not reached six months of age, and what happens when a suit is filed before the child is born. The UCCJEA states that the home state is where the child was born and resided for less than six months if the child is less than six months old. But what happens when suit is filed in State A before the child is born, but the child is born in State B? The Texas Supreme Court examined this question in 2012 in *In re Dean*. The court found that a child’s home state was New Mexico because the mother moved there from Texas, where the child was conceived. This theme was also addressed by the Fort Worth Court of Appeals in 2011 in *Arnold v. Price*. The question was which state had jurisdiction when a child was unborn at the time of the filing of the custody suit but was born in another state.

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The UCCJEA also addresses the modification jurisdiction of an initial custody order. As a general rule, Texas retains jurisdiction to modify its initial custody order, so long as a parent or the child remains behind in Texas. Texas would retain exclusive jurisdiction over that case unless neither the child, nor the child and one parent, nor the child and a person acting as parent, have a significant connection with Texas and substantial evidence is no longer available in Texas. In 2004, in *In re Forlenza*, the Texas Supreme Court examined when a court could lose modification jurisdiction if a parent remained behind in Texas but the children moved out of state with another parent.

The UCCJEA has proven to be fertile ground for litigation. Overall, the model act has created more certainty and communication between states fighting over either initial or modification of child custody jurisdiction. But given the

mobile nature of modern society—and the importance of child custody to parents—jurisdiction fights under the UCCJEA should continue to be a hot source for litigation in Texas.

Brad LaMorgese is a partner in the Dallas family law firm Orsinger Nelson Downing & Anderson. Board Certified in Family Law by the Texas Board of Legal Specialization, his practice includes numerous appeals in Texas appeals courts, the Texas Supreme Court and the U.S. Court of Appeals for the Fifth Circuit. 



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