

The UCCJEA: Where are we on the eve of the 5th anniversary?

By Amy Sara Cores, Esq.

Effective December 13, 2004 New Jersey repealed the Uniform Child Custody Jurisdiction Act (UCCJA) and replaced it with the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA or NJUCCJEA). As of March 15, 2008 the only states that have not adopted the UCCJEA are: Missouri, Massachusetts, New Hampshire, and Vermont. Puerto Rico has also not adopted the Act. There are 2008 introductions in Massachusetts, Missouri and New Hampshire.

Prior to the adoption of the UCCJEA, there was a direct conflict between the rules set forth in the UCCJA and the Parental Kidnapping Prevention Act (PKPA). The PKPA was enacted by Congress in 1981. Since the PKPA was a federal law, it pre-empted the UCCJA. However, many states continued to follow the jurisdictional principles as set forth in the UCCJA. The result was that multiple states were exercising jurisdiction needlessly and confusion abounded. In 1997, the Uniform Law Commissioners promulgated the UCCJEA. The UCCJEA accomplished two goals. It reconciles UCCJA principles with the PKPA and it adds interstate civil enforcement for child custody orders.¹

The UCCJEA adopts the 'home-state priority' rules set forth in the PKPA. Indeed a primary purpose of the UCCJEA was to clarify the concept of exclusive continuing jurisdiction to the original decree granting state. N.J.S.A. 2A:34-65 contains the relevant provisions for the initial child custody jurisdiction determination:

- (a) Except as otherwise provided in N.J.S.A. 2A:34-68, a court of this State has jurisdiction to make an initial child-custody determination only if:
 - (i) this State is the home State of the child on the date of the commencement of the proceeding, or was the home State of the child within six months before the commencement of the proceeding and the

- child is absent from this State but a parent or person acting as a parent continues to live in this State;
- (ii) a court of another State does not have jurisdiction under paragraph (1), or a court of the home State of the child has declined to exercise jurisdiction on the ground that this State is the more appropriate forum under N.J.S.A. 2A:34-71 or N.J.S.A. 2A:34-72, and:
 - (A) the child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this State other than mere physical presence; and
 - (B) substantial evidence is available in this State concerning the child's care, protection, training, and personal relationships;
 - (iii) all courts having jurisdiction under paragraph (1) or (2) have declined to exercise jurisdiction on the ground that a court of this State is the more appropriate forum to determine the custody of the child under N.J.S.A. 2A:34-71 or N.J.S.A. 2A:34-72; or
 - (iv) no state would have jurisdiction under paragraph (1), (2) or (3) of this subsection.
- (b) Subsection (a) is the exclusive jurisdictional basis for making a child-custody determination by a court of this State.
 - (c) Physical presence of, or personal jurisdiction over, a party or a child is neither necessary nor sufficient to make a child-custody determination.
 - (d) A court of this State may assume temporary emergency jurisdiction in accordance with N.J.S.A. 2A:34-68.

The earliest New Jersey decision that refers to the UCCJEA is the case of In the Matter of Ashley C. Meng, 376 N.J.Super. 641 (App.Div.2004). The case was decided approximately 3 months prior to the effective date of the UCCJEA. In dicta, the appellate panel noted that although the case was governed by the UCCJA, the result would not have been different under the UCCJEA. Then on November 30, 2004, the appellate division issued its decision in the case of Poluhovich v. Pellarano, 373

N.J. Super. 319 (App.Div.2004). Although decided under the UCCJA, the court noted that "New laws that radically change or clarify the old may be the basis of, and may provide some indication of, legislative intent of the applicable statute. Indeed, although a superseding statutory enactment is not yet effective, the legislative policy and intent of the new state may inform interpretation and application of the existing version of the statute." Id., at 354 [citations omitted].

Thereafter, there have been few cases in New Jersey that address the various provisions of the UCCJEA and most are unpublished. *See generally*, C.K. & J.T. v. D.Y.F.S., 2005 WL 2447785 (Not Reported in A.2d) [holding that New Jersey lacked jurisdiction when another state had jurisdiction over the removal of a child by protective services]; Frizzie v. Frizzie, 2005 WL 2738776 (Not Reported in A.2d) [holding that Illinois was the home state of children who had been relocated there 5.5 months prior to the filing of a divorce action, since the significant contacts were in Illinois]; Jones v. Caporusso, 2006 WL 853214 (Not Reported in A.2d) [declining to relinquish jurisdiction where the children spent equal time between Pennsylvania and New Jersey, but where original custody order was filed in New Jersey]; Hatcher v. Hadiddou, 2008 WL 268806 (Not Reported A.2d) [holding that default judgment of divorce not seeking custody or parenting time did not preserve issues for later litigation; since the children had not resided in the state for a period of more than six months at the time of the later application for custody and parenting time, New Jersey lacked jurisdiction to make an initial child custody determination]; Hirschhorn v. Hait, 2008 WL 695892 (Not Reported in A.2d) [discussing the application of the statute to a dispute between the United States and Israel and holding that the children's home 'state' was Israel]

If a state takes jurisdiction over a child custody dispute, it retains jurisdiction so long as that state, by its own determination, maintains a significant connection with the disputants or until all disputants have moved away from that state.ⁱⁱ In contrast, the UCCJA allowed jurisdiction to shift if the initial ground for taking jurisdiction ceased to exist. In other words, under the UCCJA jurisdiction could be shifted to a different state every six months, if a parent continuously moved with a child. The UCCJEA prohibits such a result.

N.J.S.A. 2A:34-66 contains the relevant provisions for exclusive, continuing jurisdiction:

(a) Except as otherwise provided in N.J.S.A. 2A:34-68, a court of this State which has made a child-custody determination consistent with N.J.S.A. 2A:34-65 or N.J.S.A. 2A:34-67 has exclusive, continuing jurisdiction over the determination until:

(1) a court of this State determines that neither the child, nor the child and one parent, nor the child and a person acting as a parent have a significant connection with this State and that substantial evidence is no longer available in this State concerning the child's care, protection, training, and personal relationships; or

(2) 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.

(b) A court of this State which has made a child-custody determination and does not have exclusive, continuing jurisdiction under this section may modify that determination only if it has jurisdiction to make an initial determination under N.J.S.A. 2A:34-65.

Therefore, in order for New Jersey to exercise jurisdiction to modify a custody order, New Jersey would have to have jurisdiction to make an initial custody determination under N.J.S.A. 2A:34-65. Once a custody determination has been made, a court of another state does not have authority to modify the custody determination, unless the state with jurisdiction

determines that it does not have jurisdiction as noted above, or any state court determines that the child, parents, and any acting parents do not reside in the state that currently has jurisdiction.

Griffith v. Tressel, 394 N.J.Super. 128 (App.Div.2007), directly addressed the applicable standards to be applied under N.J.S.A. 2A:34-66(a)(1). The parties were divorced in New Jersey in 2001. The agreement provided that the parties would share joint legal custody and the mother would have primary physical custody and be permitted to move to Maryland with the parties' child. The court noted that "only a New Jersey court can determine that New Jersey has lost jurisdiction based on a lack of significant connection and substantial evidence." Id., at 141. The court further adopted a literal reading of N.J.S.A. 2A:34-66(a)(1) and held that "so long as there is either a "significant connection" or "substantial evidence," "exclusive, continuing jurisdiction" is retained." Id., at 145. The appellate court found that New Jersey retained a significant connection under the particular facts of the case.

However, the Griffith court further addressed the issue of inconvenient forum as set forth in N.J.S.A. 2A:34-71. Based on the facts in the case, the appellate court indicated that Maryland was in a better position to acquire and receive the relevant evidence. Griffith, at 150. In short, the appellate court determined that New Jersey was an inconvenient forum.

In dicta, the court noted that the New Jersey and Maryland family part judges should have conferred during the course of the parties' post-judgment litigation. Indeed, the panel noted that there had been several missed opportunities for the judges to do so. The court noted that the failure of the judges to consult, created confusion and speculation with regard to the interpretation of the Maryland court rulings.

In the recent case of Hinton-Lynch v. Horton, 2008 WL 4298819 (Not Reported in A.2d), the Appellate Division found that New Jersey did not have jurisdiction to modify a custody determination made by a Georgia court in March 2002. The mother had obtained an order in Georgia in 2002, granting her custody of the parties' daughter, providing for supervised visitation to the father, and establishing support, among other things. The order was later registered in New Jersey for enforcement, after the mother moved to New Jersey in May 2002. In 2004, the parties availed themselves of the court on several occasions seeking modification of the visitation provisions, and ultimately the father filed a motion to change custody. In the interim, the mother had moved to Maryland. The trial court transferred custody to the father, after the mother failed to appear at the hearing. In vacating the custody order, the appellate division stated, "Nothing contained in the record on appeal reveals to us that Georgia ever relinquished its exclusive, continuing jurisdiction over that order prior to the custody order now under review." (Slip Decision, p. 3)

Likewise, in K.E.P. v. M.P., 2008 WL 2511794 (Not Reported in A.2d), the appellate division reversed a trial court's determination to relinquish jurisdiction to New York, where the trial court failed to address all of the factors under the inconvenient forum provisions of the NJUCCJEA. In K.E.P., the trial court had originally assumed jurisdiction under the UCCJA and entered the initial child custody determination in November 2005, after a trial. In May 2007, the father sought enforcement and the trial court *sua sponte* dismissed the motion and cross-motion. In reversing, the appellate panel admonished the trial court for failing to address all eight factors set forth in N.J.S.A. 2A:34-71(b)(1)-(8) and relying solely on the fact that the child had then been residing in New York for more than 5

years. See also, Fields v. Richards, 2006 WL 1313051 (Not Reported in A.2d) [holding that New Jersey retained continuing exclusive jurisdiction over child custody determination made pursuant to a Temporary Restraining Order]

In Greely v. Greely, 194 N.J. 168, 171 (2008), the Court held that "a motion to dismiss a child custody matter on inconvenient forum grounds may be made by any party, by the court on its own motion, or by another state's court." The parties resided in New Jersey at the time that a complaint for divorce was filed in 2006. After nearly a year of litigation, the wife relocated to Nebraska with the parties children, filed a 'unilateral stipulation of dismissal,' and a subsequent complaint for divorce in Nebraska, seeking the same relief she had previously sought in New Jersey. The Appellate Division granted leave to appeal after the trial court vacated the stipulation of dismissal. The Appellate Division held, "New Jersey has no further interest in this litigation since both parties have moved out of State, the children now reside in Nebraska and neither party owns property in this State." Id., at 174. The Supreme Court affirmed the trial court's rejection of the plaintiff's application to dismiss the matter on the grounds of *forum non conveniens*, but for a different reason. In being presented with the unique circumstance that the party who originally filed in New Jersey, who then elected to move to another state, now sought to dismiss her original complaint, the Supreme Court noted that to permit such a result, "could open the door to crass forum shopping." Id., at 177. However, the Court further noted that the UCCJEA provides that any party or the court on its own motion can raise the issue for inconvenient forum.

The UCCJEA also makes provisions for a state to assume emergency jurisdiction. A state that otherwise would not have

jurisdiction may enter a temporary emergency order if the child is in danger and needs immediate protection. After the issuance of an emergency order, the state court must determine if there is an existing custody order from another state in effect. If so, the emergency order must allow a reasonable time for the parties to return to the state having continuing exclusive jurisdiction and address the pending issues.

For example, assume an initial child custody determination is made in Pennsylvania and the custodial parent moves to New Jersey. DYFS intervenes and removes the children from the physical custody of the custodial parent and places the children with the other parent who had remained in Pennsylvania. Any further custody proceedings would occur in Pennsylvania, rather than New Jersey. In short, the emergency provisions of the statute allow the courts to intervene in a crisis, but then require further proceedings to return to the state having exclusive, continuing jurisdiction.

In D.Y.F.S. v. E.E. & B.D. & J.E., 2006 WL 2730316 (Not Reported in A.2d), the parties resided in North Carolina with their two children as a family until May 4, 2004. The mother then left for her parent's residence in New Jersey. The father filed for divorce in North Carolina. The New Jersey courts became involved after an allegation by the mother that the father had physically and sexually abused the parties' daughter. The trial court determined that North Carolina had jurisdiction over all issues bearing on the children's best interests and dismissed the complaint in New Jersey. The appellate division affirmed.

In D.Y.F.S. v. D.D., 2006 WL 1932703 (Not Reported in A.2d), the parties were divorced in Minnesota. The children subsequently moved to New Jersey with their mother. During a counseling session, one of the children disclosed an allegation

of sexual abuse that had occurred 4 years earlier. On appeal the defendant-father contended that New Jersey did not have the authority to modify parenting time under UCCJEA, ie., it lacked subject matter jurisdiction. The Appellate Division agreed finding that in order to modify a custody determination of another state that the provisions of the UCCJEA must be adhered to, "and there was no emergency situation sufficient to allow forum court to exercise temporary emergency jurisdiction to protect children." (Slip Decision at page 4) After the matter was remanded, the Minnesota court relinquished jurisdiction over the custody and parenting time issues, finding that it was an inconvenient forum. *D.Y.F.S. v. DD*, 2008 WL 150053 (Not Reported in A.2d), Slip Decision page 1.

The subsequent decision clarified the meaning and implication of a finding that New Jersey lacked emergency jurisdiction under the UCCJEA. In agreeing with the defendant's contention that the original ruling of the trial court in New Jersey had been vacated by the prior appellate decision, the panel stated, "We did not mean to imply that we were leaving intact some vestige of those orders concerning [the children], in the hypothetical event that the courts of Minnesota thereafter yielded jurisdiction to our state." *D.Y.F.S. v. D.D.*, 2008, Slip Decision page 2. In short, the harsh reality of this legally sound decision was that a new fact finding hearing was required in an abuse and neglect case because the court lacked jurisdiction in the first instance. After more than four years of litigation in two states at the trial and appellate levels, the matter was to essentially start anew.

However, if there is no existing child custody order, the state assuming emergency jurisdiction will continue to exercise jurisdiction until a court in a state having "home state" jurisdiction makes a determination. If no determination is made

in the "home state" and the emergency court's state becomes the child's home state, then the emergency order will become the initial and final custody determination.

Although the UCCJEA provides for continuity in jurisdiction in custody matters, the law in New Jersey is just emerging. Unfortunately, there is still confusion when a child resides in more than one state after the issuance of the initial custody determination. Moreover, our courts will continue to struggle with jurisdictional questions until all of the states have adopted the uniform law. As a court of equity, the family part judges of this state should continue to decide each case based on the unique facts and circumstances presented within the construct of the statutory provisions. It is also essential that we serve the families to whom this law applies, by not causing them to engage in costly litigation relating to jurisdiction without even addressing the best interests of the children. It is in this manner only that we can fulfill the intent of the law.

Amy Sara Cores, Esq. is a partner in the law firm of Hoffman, Schreiber & Cores, P.A., in Red Bank, New Jersey. Ms. Cores is Certified by the Supreme Court of New Jersey as a Matrimonial Law Attorney. Her practice is limited to family law, including international family law and appeals. Ms. Cores is an editor of the New Jersey Lawyer Magazine and an Associate Managing Editor of the New Jersey Family Lawyer.

ⁱ http://www.nccusl.org/nccusl/uniformact_summaries/uniformacts-s-uccjaea.asp

ⁱⁱ http://www.nccusl.org/nccusl/uniformact_summaries/uniformacts-s-uccjaea.asp