

Joint Editorial Board for Uniform Family Law
Commentary on UCCJEA Subject Matter Jurisdiction & Hague Abduction Convention
November 1, 2024

The Joint Editorial Board for Uniform Family Law (JEBUFL), which consists of members from the Uniform Law Commission, the American Bar Association Section of Family Law, the American Academy of Matrimonial Lawyers, and the Association of Family and Conciliation Courts, is responsible for monitoring all uniform and model acts that are related to family law. The JEBUFL periodically prepares memoranda on a uniform act in family law to assist in its uniform interpretation in the states. One widely enacted act is the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), which sets forth the exclusive basis for subject matter jurisdiction over child custody determinations in the United States.

Complex jurisdictional issues can arise with international families and their movement between the United States and other countries. One such complication involves the interaction between the UCCJEA and the 1980 Hague Convention on the Civil Aspects of International Child Abduction (Hague Abduction Convention), ratified by the United States in 1988. The Hague Abduction Convention is not a “custody jurisdiction” law. Instead, it may require return of a child who has been wrongfully removed from, or retained outside of, that child’s habitual residence. This would necessitate the physical movement of the child between countries where the child might be subject to different legal systems. As a result, courts and practitioners sometimes conflate the purpose of the Hague Abduction Convention (to return the child wrongfully removed or retained), with the jurisdiction of a court to adjudicate custody, either initially or as a modification. This memorandum addresses the interaction of child custody jurisdictional standards under the UCCJEA with the requirements of the Hague Abduction Convention to ensure an accurate understanding among families whose children are moving across international borders into or out of the United States. The UCCJEA is the sole basis for determining jurisdiction to hear a child custody determination in the U.S. states and territories that have enacted it.

I. *The Uniform Child Custody Jurisdiction and Enforcement Act*

The U.S. Supreme Court has excepted domestic-relations matters, including divorce, spousal support, and child custody, from the jurisdiction of the federal courts in the United States.¹ With the resolution of child custody disputes lying exclusively with U.S. states, the Uniform Law Commission has promoted uniformity among states in establishing jurisdictional rules for determinations of child custody and for recognition among the states of sister-state custody determinations. For a child custody determination (defined as a court judgment, decree, or order) to be entitled to recognition and enforcement in sister states, jurisdiction must also conform to the Parental Kidnapping Prevention Act of 1980 (PKPA), 28 U.S.C. §1738A. The PKPA sets out a jurisdictional overlay to be satisfied in order for the enforcement requirement to apply. In particular, the court making a child custody determination must have jurisdiction

¹ *Ankenbrandt v. Richards*, 504 U.S. 689, 693-705 (1992); *In re Burrus*, 136 U.S. 586, 593-94 (1890).

pursuant to the law of that state and one of several conditions must be met. One of those conditions, with narrow exceptions, is that the issuing state was the child’s “home state.”

In 1997, the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) was promulgated by the Uniform Law Commission. It replaced the Uniform Child Custody Jurisdiction Act (UCCJA), which all states had enacted by 1985. The UCCJEA ensures adherence to the jurisdictional bases in the PKPA. Today, forty-nine states, the District of Columbia, and the U.S. Virgin Islands have enacted the UCCJEA, with its jurisdictional requirements for establishing a child custody determination. The only remaining state – Massachusetts – retains the UCCJA, but because the PKPA is federal law, it effectively adheres to the same principles. The UCCJEA §§ 201 *et seq.* sets forth provisions to determine jurisdiction over a child custody matter.²

A. Child Custody Jurisdiction is Subject Matter Jurisdiction

Subject matter jurisdiction, including over a child custody dispute, either exists or does not at the time the petition is filed in a court. “The UCCJEA is the exclusive method of determining subject matter jurisdiction in custody cases.”³ Most courts have found that subject matter jurisdiction cannot be created by the consent, assent, or presence of the parties, nor by their waiver.⁴ Subject matter jurisdiction cannot be conferred by estoppel.⁵ If the court lacks subject matter jurisdiction to make an initial child custody determination or to modify an existing determination, the judgment must not be issued, and, if issued, must be vacated.⁶ A defect in subject matter jurisdiction can be raised at any time by any party or by the court.⁷ Therefore, it is well settled in case law throughout the United States that the jurisdiction to establish or modify a child custody determination either exists by statute, or does not. The parties cannot confer such jurisdiction through an agreement.

B. The UCCJEA Sets Forth Principles for Jurisdiction to Establish Initial Child Custody Determinations

UCCJEA § 201 sets forth the prioritized jurisdictional bases for an initial determination of child custody determination. Those bases are as follows.

² See generally LINDA ELROD, CHILD-CUSTODY PRACTICE AND PROCEDURE, SEC. 3:7 (THOMSON REUTERS 2024).

³ *Schneer v. Llauro*, 195 Cal. Rptr. 3d 858 (Ct. App. 2015).

⁴ *A.M.H. v. D.E.H.*, 376 So.3d 536, 541 (Ala. Civ. App. 2022); *Officer v. Blankenship*, 555 S.W.3d 449 (Ky. Ct. App. 2018); *Kubal v. Anderson*, 8 N.W.3d 811 (N.D. 2024); *In re Jones*, 430 P.3d 544, 551 (Okla. Civ. App. 2018); *Starr v. Statler-Houchin*, 2024 WL 4264240 (Ohio Ct. App. 2024); *Schwartz & Battini*, 410 P.3d 319, 323 (Or. Ct. App. 2017); *Alfonso v. Skadden*, 251 S.W.3d 52 (Tex. 2008).

⁵ *Wahlke v. Pierce*, 392 S.W.3d 426, n4 (Ky. Ct. App. 2013).

⁶ *Meador v. Lu*, 2024 WL 3690730 (Iowa Ct. App. 2024) (unpublished).

⁷ *Parisi v. Niblett*, 238 A.3d 740 (Conn. Ct. App. 2020); *In the Interest of A.J.T.*, 654 S.W.3d 312, 317 (Tex. 2022).

1. “Home state” is the prioritized jurisdictional basis for establishing an initial child custody determination. A “home state” is defined in § 102(7) as the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding. The state with subject matter jurisdiction to establish an initial child custody determination (judgment, decree, or court order) is the child’s “home state” 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 but a parent or person acting as a parent continues to live in the state. The “home state” for an infant is the child’s place of birth. The UCCJEA does not confer jurisdiction over an unborn child. A period of temporary absences is part of the period of time to establish “home state.” A “home state” remains for six months after a child leaves the State.⁸

2. A state court in the United States may assume jurisdiction if no state has “home state” jurisdiction or if the “home state” declines jurisdiction on the basis of an inconvenient forum, 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 the state other than mere physical presence; and

(B) substantial evidence is available in the state concerning the child's care, protection, training, and personal relationships. This section is often used when no action has been filed, all parties have left what would have been the “home state,” and the child has lived with one or both of the parties in a new state for less than six months.

The other bases are that: (3) all courts having jurisdiction under the “home state” basis or the “significant connection” basis have declined to exercise jurisdiction on the ground that a court of the petitioned state is the more appropriate forum; and (4) no court of any other state would have jurisdiction (often referred to as “vacuum” jurisdiction).

Section 105 of the UCCJEA addresses the impact of another country’s assumption of jurisdiction over a child custody dispute. If a state in the United States applying the UCCJEA concludes that another country has assumed jurisdiction over a child custody matter and is exercising that jurisdiction under factual circumstances in substantial conformity with the UCCJEA’s jurisdictional bases, then the state in the United States must recognize that other country’s jurisdiction and must defer to the court seized with child custody jurisdiction, even though it is another country.

Example: Parents and Child reside in Country A (not in the United States). Parent 1 wrongfully removes the Child from Country A and relocates the Child to State B in the United States that has enacted the UCCJEA. Parent 2, still residing in Country A, promptly (within six months of Parent 1 taking the child) commences a child custody proceeding in Country A, and immediately commences a Hague Abduction Convention return proceeding in State B where the Child is located. The court in the United States declines to return the Child to Country A under the Hague Abduction Convention. Thereafter, Parent 1 commences a child custody proceeding in

⁸ UCCJEA §201; *see also* Kevin P. v. Ieisha T., 215 N.Y.S.3d 488 (App. Div. 2024).

State B. If Country A is the “home state” of the Child when Parent 2 commences the child custody proceeding there, then State B cannot accept jurisdiction of the child custody proceeding, unless the court in Country A declines jurisdiction over the child custody proceeding. Under the UCCJEA, if Country A is the Child’s “home state” at the time Parent 2 commences the custody proceeding, it is filed under factual circumstances in substantial conformity with the jurisdictional bases in the UCCJEA. The decision to not return the Child to Country A under the Hague Abduction Convention does not impact the underlying child custody jurisdiction analysis.

C. The UCCJEA Sets Forth Principles for Exclusive Continuing Jurisdiction of Child Custody Determinations

The UCCJEA also includes provisions that judges must use to determine jurisdiction to modify an existing child custody determination. Section 202 of the UCCJEA states that if a court has made a child custody determination consistent with the jurisdictional predicates in the UCCJEA, that State shall retain exclusive, continuing jurisdiction over the determination until certain preconditions take place. Clearly, if the parents and child are still in the state in the United States that heard the original action, that court retains jurisdiction to hear any modification requests. If a court properly assumed jurisdiction in the first instance, that court retains exclusive, continuing jurisdiction under the PKPA, 28 U.S.C.A. §1738A(d) to the exclusion of courts of other states if one contestant remains in the state and there is a basis for jurisdiction under the state's law.⁹

Section 203 provides prohibitions on a state that has enacted the UCCJEA in modifying another State’s child custody determination without certain findings. These findings are: (1) that a court of the requested state determines that neither the child, the child’s parents, or any person acting as a parent have a significant connection with that state, and substantial evidence concerning the child’s care, protection and training is no longer available; or (2) a court determines that the child and all contesting parties have left the jurisdiction.

The party petitioning a new state in the United States to assume jurisdiction to modify a child custody determination bears the burden of proving not only that the new state would have jurisdiction to enter an initial child custody order, but also that the issuing state has lost or declined to exercise jurisdiction as well.¹⁰

The concept of exclusive, continuing jurisdiction may conflict with the jurisdictional rules in another country. In other words, under the UCCJEA in certain circumstances a state in the United States may retain jurisdiction to modify its child custody determination, but a court in another country will also have jurisdiction to modify the order issued by the state in the United States.

⁹ *In re Marriage of Kent*, 247 Cal. Rptr. 3d 466 (Ct. App. 2019); *Swanson v. Perez-Swanson*, 259 A.3d 39 (Conn. Ct. App. 2021).

¹⁰ UCCJEA §§ 202 – 203; *see also* *Brandt v. Brandt*, 268 P.3d 406 (Colo. 2012).

Example: Parents and Child reside in State B in the United States that has enacted the UCCJEA. State B has “home state” jurisdiction pursuant to the UCCJEA and the court issues an initial child custody determination. The court order permits Parent 1 and Child to relocate to Country A. Parent 2 continues to reside in State B. The UCCJEA provides that the state that issued the initial child custody determination would retain exclusive, continuing jurisdiction to modify its order, unless and until the preconditions in the UCCJEA are met (for example all parties have left the state, the state has lost jurisdiction under its law, the state decides it is an inconvenient forum). Even though State B retains jurisdiction pursuant to the UCCJEA to modify its child custody determination, Country A may have internal law that permits it to modify State B’s initial child custody determination. This could lead to multiple, conflicting child custody orders. If Country A assumed jurisdiction to modify State B’s initial child custody determination in a manner that is not under factual circumstances that are in substantial conformity with the UCCJEA’s jurisdictional predicate of exclusive, continuing jurisdiction, State B is unlikely to recognize or enforce Country A’s modified child custody determination.

II. The Hague Abduction Convention

The United States ratified the Hague Abduction Convention in 1988 and implemented it with the International Child Abduction Remedies Act (ICARA), now at 22 U.S.C. §§ 9001 *et seq.* The two objects of the Hague Abduction Convention, as identified in its Article 1, are: (1) to secure the prompt return of children under the age of sixteen who have been wrongfully removed to or retained in any Contracting State, and (2) to ensure that rights of custody and access are effectively respected in other Contracting States (countries). The goal is to restore the status quo before the wrongful removal or retention and deter parental kidnapping and forum shopping. The Hague Abduction Convention does not, however, determine where a parent may seek to establish (or modify) a child custody determination. It does not provide a jurisdictional basis for a court in a Contracting State to accept or decline jurisdiction over a child’s custody.

“Home state” under the UCCJEA is not the same concept as “habitual residence” used in the Hague Abduction Convention (and other conventions negotiated at the Hague Conference on Private International Law). The United States Supreme Court has found that “habitual residence” is determined by a totality-of-the-circumstances analysis. See *Monasky v. Taglieri*, 140 S. Ct. 719 (2020). In many cases, the child’s “home state” and “habitual residence” may be one and the same, but that is not always going to be the case. Moreover, foreign countries do not have the UCCJEA and do not look to a child’s “home state.” The child’s “habitual residence” may not be the same as the child’s “home state,” which incorporates a more objective six-month rule. The child’s “habitual residence” also may not be the state which has exclusive, continuing jurisdiction to modify an existing custody order.

The Hague Abduction Convention does not address four distinct legal issues that are important to these internationally mobile families:

1. It does not determine who is entitled to seek custody of a child.
2. It does not establish where a child custody determination is to be made (*i.e.*, jurisdiction).

3. It does not provide rules for resolving competing claims for jurisdiction in international custody disputes.
4. It does not contain procedures for obtaining recognition and enforcement of foreign judgments or orders governing child custody.

In light of these principles, a child may be wrongfully removed from his or her “habitual residence” and then be returned under the Hague Abduction Convention to a country that may not have jurisdiction under the standards that are substantially similar to the UCCJEA to make a custody order. See Robert J. Spector, *International Abduction of Children: Why the UCCJEA is Usually a Better Remedy than the Abduction Convention*, 49(3) FAMILY LAW QUARTERLY 386 (Fall 2015). Likewise, if a court denies a parent’s request to return their child under the Hague Abduction Convention, the country where the child is sitting after the abduction may not have jurisdiction to make a custody order. In review, the Hague Abduction Convention’s provisional remedy of returning a child after an abduction requires a distinct legal analysis from determining which court in which country has jurisdiction to make a child custody determination. The analysis as to which country has jurisdiction to issue a child custody determination is an independent analysis under each country’s internal jurisdictional law. This law in the United States is the UCCJEA for each state and territory that has enacted it.¹¹

Because subject matter jurisdiction over a child’s custody cannot be conferred by agreement of the parties to the litigation or waived by their behavior, parents must still meet the prioritized legal bases in the UCCJEA to ensure jurisdiction to establish initial child custody jurisdiction or to modify an existing child custody determination.

Example: Parents and Child reside in Country A (not the United States). Parent 1 wrongfully removes the Child from Country A to State B in the United States that has enacted the UCCJEA. Within a month of the Child’s removal, Parent 2, still residing in Country A, files a request in the court of State B where the Child is located to return the Child to Country A under the Hague Abduction Convention. No custody lawsuit has been filed in any jurisdiction. The Parents reach an agreement to permit the Child to continue residing in State B and to dismiss the Hague Abduction Convention claim. They wish to have their agreement incorporated in a court judgment, i.e., an initial child custody determination. In determining to which court the Parents submit their agreement for incorporation into a judgment, the Parents must make an independent analysis of whether the court has jurisdiction. If they intend to submit their agreement to the court in State B, they must meet the requirements in State B’s enactment of the UCCJEA. The Parents cannot confer jurisdiction on the court of State B by agreement.

¹¹ For Massachusetts, it is the UCCJA, with the filter of the PKPA.