

Advanced Interstate Child Custody Issues

Equal Justice Wyoming

Webinar

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Legal issues in relocation

- Has a custody order been entered?
- Can client leave without violating the order?
- Effect of flight on potential immigration relief?
- Parental kidnapping or custodial interference law (criminal)?
 - Domestic violence exemption?
 - Domestic violence defense?
 - Child protection defense?
- Relocation law?
- Protection order law?
- Custody law?
- Confidentiality laws – including identity change – can client do it without publication and can the file be sealed?
- Likelihood that client would be brought back into litigation here?

Non-legal issues in relocation

- Is there a safety issue/is refuge state safer?
- Economic opportunities?
- Shelter?
- Police response?
- Childcare?
- Family support?
- Legal assistance?
- Would a protection order be effective?
- How do the two states handle interstate custody cases?
- How do the two states enforce protection order laws?

PART II

- Some concepts to keep in mind

Purpose of UCCJEA

- To avoid jurisdictional competition and conflict between courts of different states in child custody matters;
- Assure that litigation concerning custody takes place in state where child and her family have closest connection.
- See W.S. 20-5-309 Info to be submitted to Court

Types of Proceeding Applicable to UCCJEA

- "Child custody proceeding" = legal custody, physical custody or visitation of a child is an issue:
 - divorce
 - separation
 - neglect, abuse, dependency
 - guardianship
 - paternity
 - termination of parental rights or
 - protection from domestic violence in which the issue may appear.
- Wyo. Stat. 20-5-202(a)(iv)

Important Provisions of the UCCJEA

1. Jurisdictional Bases
 - Judicial Communication
 - Interstate Discovery
2. Temporary Emergency Jurisdiction
3. "Unclean Hands" Doctrine
4. Inconvenient Forum
5. Full Faith and Credit
6. Confidentiality
7. Interstate Enforcement Mechanisms

Advanced Issues:

- Should a dv victim seek a protection order before relocating?
- What is continuing exclusive jurisdiction?
- How about custody provisions within protection orders?
- What is a temporary absence?
- What about relocation laws?
- What emerging trends have we seen?
- What about military cases?

Relocation Scenario

Susan Webber has lived in Cheyenne with her husband, Jack, throughout their ten-year marriage. Susan and Jack have three children: Sarah, age 7, Martin, age 4, and Jeffrey, age 2.

Over the past ten years, Jack has abused Susan, often punching her, kicking her, keeping her up at night, and threatening to kill her if she ever sought help. Because Jack's brother is a police officer, and she had no friends in the area, Susan kept quiet. Recently, when Jack held a gun to her head in front of Sarah, Susan fled with the children to a shelter two hours away.

Relocation Scenario

Susan would like to return to Nebraska, where her mother and sister live. Jack has told her repeatedly that if she ever leaves him, she will never see the children again. Susan has no income and nowhere to go in Wyoming when her shelter stay is completed in two weeks. She has learned that she may be eligible for a protection order, but she does not know if she should get one.

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Should Susan get a protection order *before* leaving Wyoming?

What are the pros and cons of getting a protection order before leaving Wyoming?

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Benefits:

- If it is issued, this will document the violence, which could be helpful for jurisdictional and custody arguments in the future
- It may help protect Susan and would be enforceable nationally
- If Susan is awarded custody as part of the protection order, Jack would not be able to take the children away from Susan
- Susan may not be able to get a protection order from a court in another state later if that court does not have personal jurisdiction over Jack

Risks:

- -If the protection order is not issued, Jack will claim that he never abused Susan (in future legal proceedings)
- -If Jack is awarded some sort of regular visitation, Susan will have to comply which may make it impossible to leave the state
- -If a custody order is issued as part of the protection order, this may give Wyoming continuing, exclusive jurisdiction, forcing Susan to litigate further custody proceedings in Wyoming

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Risks (Continued)

- If a custody order is issued as part of the protection order, this may trigger the state's parental kidnapping or relocation laws if she leaves
- -If she seeks a protection order in Wyoming, it may make it more difficult to win an "inconvenient forum" argument later (if she asks Wyoming to transfer the long-term custody case to Nebraska)

Practical Tips if Susan Seeks a Protection Order

- Indicate compliance with the UCCJEA, the jurisdictional basis under which the custody provision was ordered, and the court's telephone number
- Seek a protection order that does not include visitation for the perpetrator, when appropriate
- If visitation is ordered by the court, make sure the order specifies the visitation plan, a safe location for visitation exchange, a plan for emergencies, and a third-party through whom communication can occur

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Practical Tips if Susan Seeks a Protection Order (Cont)

- -If relocation is contemplated, request the court's permission to move (per state relocation law)
- -Understand the relationship between a custody provision within a protection order and a long-term custody order (per state case law)

How about custody provisions within protection orders?

Does a protection order with a custody provision confer exclusive continuing jurisdiction?

- For example, if Susan obtains a protection order granting her temporary custody in Wyoming before leaving, will a Nebraska court be able to modify the order?

Maybe!

It is unsettled whether issuance of a protection order gives a state continuing jurisdiction over a long-term custody case: it may vary depending on the jurisdictional base under which the protection order was issued.

Continuing Exclusive Jurisdiction

The issuance of a protection order may give a state continuing jurisdiction if the order was issued under the UCCJEA's initial or modification provisions, but not if it was issued under the UCCJEA's emergency jurisdiction provision.

To determine whether a protection order gives a state continuing jurisdiction, the court issuing the protection order would need to document the jurisdictional basis for ordering custody [or another court would need to reconstruct this later].

Continuing Exclusive Jurisdiction

- Protection orders often are the vehicle through which a state exercises emergency jurisdiction. *See, Commentary to Section 204, UCCJEA.*
- Emergency jurisdiction is a temporary exception to continuing jurisdiction. *See, e.g., Melgar v. Campos*, 215 Ariz. 605 (2007).
- A protection order that has expired does not confer continuing, exclusive jurisdiction. *See, e.g., Klein v. Kelly*, 142 Wn. App. 297 (2007).

What is a temporary absence?

Temporary Absence

- └ The UCCJEA's home state definition states that a period of temporary absence of the child, a parent of the child, or a person acting as a parent is part of the six-month period used to calculate home state status
- └ This means that an absence from the jurisdiction, if deemed to be "temporary," should be counted as part of the time during which the child lived in the state prior to commencement of the action

Example:

Mom, dad, and child live in California for two years; the whole family relocates to Wyoming while dad works a temporary job in the oil fields for 8 months; the family returns to California and within a month mom files for divorce and custody.

Does California have home state jurisdiction?

Yes, but only if the move to WY is deemed a temporary absence.

A number of courts across the country have decided temporary absence cases. The approaches differ.

Temporary Absence

- At least one court has taken what it calls an “objective” approach (Powell v. Stover, 165 S.W.3d 322 (Tex. 2005))
 - The court looks only at where the parties were physically present in the six months before commencement of the action
 - Arguably, this eliminates “temporary absence” from the definition of home state
 - Court states that instead inconvenient forum and unclean hands should be used if jurisdiction is inappropriate

Temporary Absence

- Several decisions assess the subjective intent of the parties (See In re Donboli, 2005 Wash. App. LEXIS 1705 (and cases cited therein))
 - Some decisions note that intent can change and may look at the parties' intent at a later time (Atkins v. Atkins, 59 P.3d 255 (Alaska 2002); In re Doolan, 2004 Iowa App. LEXIS 416)
 - By doing so, can prevent absent parent from changing his or her mind and making it difficult or impossible for the left-behind parent to file in the original state claiming home state jurisdiction

Example:

Father takes child from the home state of Wisconsin to Wyoming and the parents agree that the stay will be temporary. After 8 months, dad decides he intends to stay with the child in WY. To avoid punishing mom for the change in intent, the court would find that WI was the home state until the time when dad's intent changed; therefore, mom can still file for custody in WI under the **extended home state rule**

Temporary Absence

- └ Finally, other decisions look at the **totality of the circumstances**
- └ Factors include the parties' intent and the duration of the absence
- (Hammond v. Hammond, 708 S.E.2d 74 (N.C. Ct. App. 2011); In re S.M., 938 S.W.2d 910 (Mo. Ct. App. 1997)(UCCJA decision; temporary absence language identical)

Temporary Absence

Strategies for attorneys:

- You may need to develop evidence regarding the parties' intent and whether it changed over time
 - Such things as getting a driver's license, signing a lease, enrolling children in school, etc. will be relevant
 - Testimony by the parties regarding their subjective intent, as evidenced in part by their conversations during the relevant time period, also may be desired by the court
- See HARIGNORDOQUY v. BARLOW 313 P.3d 1265 (WYO) and 989 P.2d 109

What about relocation laws?

Relocation laws

What do they do?

- Their purpose is to set forth standards that must be met prior to relocating with children
- Some relocation laws apply only to relocation out of state, while others also cover relocation within the same state

Relocation: *Arnott v. Arnott*, 293 P.3d 440

- A relocation by a primary physical custodian, as well as factors that are derivative of the relocation, may constitute a material change in circumstances sufficient to warrant consideration of the best interests., overruling *Watt v. Watt*, 971 P.2d 608.

Relocation laws

Where are they found?

They vary by state.

- They may be codified by statute, either within a custody law, or as a separate relocation law
- The standards for relocation may be set forth in case law
- In a few states, there may not be any relocation laws

Relocation laws

Do they require the existence of a custody order?

They vary by state.

- Most relocation laws set forth standards that must be met before a custodial parent moves out of state with the children
- Some relocation laws also apply if a parent leaves the state with children even if there is no existing custody order

Relocation laws

What do they require?

They vary by state.

- Many require notification of the other parent prior to a move out of state
- Some require the parent who wishes to relocate to contact the court and request permission to move
- Some require the relocating parent to demonstrate that the move is in the child's best interest or to demonstrate exceptional circumstances
- Some require the non-custodial parent to show why the move is not in the child's best interest

Relocation laws

What is the impact for survivors of domestic violence?

It varies by state.

- Most require the relocating parent to take certain steps PRIOR to moving out of state, which could endanger a survivor if taking such steps alerts a perpetrator to an impending separation
- Many require disclosure of the new address to the other parent, which could endanger a survivor
- Some penalize parents who do not comply with the relocation law (including by changing custody of the children), which could jeopardize children in domestic violence cases

Wyo Confidentiality Law and Notice of Relocation

- ┆ W.S. 14-3-441
- ┆ W.S. 35-21-112
- ┆ W.S. 1-25-101
- ┆ Notice of relocation law in Wyoming:
- ┆ See **W.S. 20-2-202(a)**

What are some current emerging
trends?

Emerging Trends

- Courts are beginning to communicate with each other more frequently across state lines
- Some courts permit survivors to participate by telephone in custody cases when they have relocated for their safety
- Courts in refuge states may be willing to exercise emergency jurisdiction when there is a history of domestic violence
- Courts in home states may be willing to decline jurisdiction based on inconvenient forum when domestic violence is an issue and the survivor is in a refuge state willing to assume jurisdiction

What about military cases?

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The UCCJEA and Military Families

Some questions that arise:

- What is the **home state**, especially where the service member and his or her children live overseas during deployment/assignment?
- Are deployments/assignments considered "**temporary absences**" under the statute?
- How does **continuing, exclusive jurisdiction** work when the service member is the only one left in the issuing state and he or she has been deployed/assigned elsewhere?

The UCCJEA and Military Families

What is the **home state**, especially where the service member and his or her children live overseas during deployment?

The UCCJEA and Military Families

- The UCCJEA generally treats a foreign country as if it were a state of the United States, including in the home state analysis
- As a result, an overseas deployment/assignment can result in the foreign country becoming the “home state” of the child
- See *Carter v. Carter*, 758 N.W.2d 1 (Neb. 2008)

The UCCJEA and Military Families

Are deployments considered
“temporary absences”
under the statute?

The UCCJEA and Military Families

- Courts vary in their approach to this question
- A military deployment/assignment is not necessarily considered to be a temporary absence from the original state; courts use a case-by-case analysis:
 - *Carter v. Carter*, 758 N.W.2d 1 (Neb. 2008): permanent military assignment not a temporary absence
 - *In re Holder*, 2002 Cal. App. Unpub. LEXIS 2898: 9-month military assignment found to be a temporary absence; strong dissent disagreed
 - *Lemley v. Miller*, 932 S.W.2d 284 (Tex. Civ. App. 1996): 11-month military assignment found to be a temporary absence

The UCCJEA and Military Families

How does continuing, exclusive jurisdiction work when the service member is the only one left in the issuing state and he or she has been deployed/assigned elsewhere?

The UCCJEA and Military Families

- Scenario: Mom, military dad, and child all lived in Wyoming. Mom and dad divorced, mom got primary physical custody of child. Mother and child move to Florida, with permission of the court. Father subsequently is assigned to a military installation in Georgia; he is abusive during custody exchanges and mother seeks to modify the order in Florida. Does Wyoming retain continuing, exclusive jurisdiction if dad still has a residence in Wyoming while on military assignment to GA?

The UCCJEA and Military Families

Does the issuing state have continuing, exclusive jurisdiction?

- As we discussed, the UCCJEA would allow FL to modify the order if a FL court finds that "the child, the child's parents, and any person acting as a parent do not presently reside in" the issuing state of WY.
- So the question is: does the father "presently reside" in WY when he has been living in GA but still has ties to WY, including a residence, driver's license, etc.

The UCCJEA and Military Families

Does the issuing state have continuing, exclusive jurisdiction?

- The case law is split:
 - Some courts determine "presently reside" based solely upon where the person is physically living, despite the fact that the person has a house, driver's license, and voting registration in another state and pays taxes there.
 - See *Staats v. McKinnon*, 206 S.W.3d 532 (Tenn. Ct. App. 2006) ;
 - Wagner v. Wagner*, 887 A.2d 282, 287 (Pa. Super. Ct. 2005)
 - In our scenario, WY would have lost continuing, exclusive jurisdiction under this analysis

The UCCJEA and Military Families

Other courts use a "**totality of the circumstances**" test that considers several factors, including:

- | the length and reasons for the parent's absence from the issuing state;
- | their intent in departing from the state and returning to it; reserve and active military assignments;
- | where they maintain a home, car, driver's license, job, professional licensure, and voting registration;
- | where they pay state taxes; and
- | the issuing state's determination of residency based on the facts and the issuing state's law

See *Brandt v. Brandt*, 2012 Colo. LEXIS 70 (Jan. 23, 2012) (and cases cited therein)

The UCCJEA and Military Families

Does the issuing state have continuing, exclusive jurisdiction?

- | Note that these issues arise in non-military cases too and may be part of the continuing jurisdiction analysis whenever there is a dispute about whether the left-behind parent "presently resides" in the issuing state.

The Uniform Deployed Parents Custody and Visitation Act (UDPCVA)

- ▮ **CO:** deployment does not change the residence of the deploying parent for purposes of the UCCJEA.
- ▮ **ID Introduced (similar to Wyo):** Bill would grant the court authority to enter an order or decree temporarily modifying the existing order of a servicemember under the Servicemembers Civil Relief Act, upon notification of deployment.

Wyo. Stat. 20-2-205.

Temporary military duty; modification of orders; visitation assignment; electronic evidence.

▮ Service member's ability to exercise custody or visitation responsibilities

“Any order establishing the terms of custody or visitation in place at the time the service member receives the temporary duty, deployment or mobilization orders may only be temporarily modified so as to provide for the child's best interests”

National Organizations

- ▮ Legal Resource Center on Violence Against Women
(301) 270-1550, lrc@lrcvaw.org, www.lrcvaw.org
- ▮ National Center on Protection Orders and Full Faith and Credit
(800) 903-0111, ext. 2
- ▮ National Clearinghouse for the Defense of Battered Women
(800) 903-0111, ext. 3

Thank You!

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