

“Temporary Absence”: A Continuing Obstacle to Clarity in Child Custody Jurisdiction

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Virginia adopted the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA)¹ in 2001. This statute was envisioned as correcting deficiencies in the prior Uniform Child Custody Jurisdiction Act. However, the meaning of the term “temporary absence” in the statute remains unclear.

Recently, we discovered the lack of clarity while representing a mother in a child custody case. The mother and father traveled with their minor child from Virginia to the Former Yugoslav Republic of Macedonia in December, 2006. The father works for a Virginia employer and was transferred to Macedonia. He had a contract which ensured his employment in Macedonia through July 31, 2007, and provided for the possibility of extending his employment there. Prior to the move, the parties sold their residence and vehicles. While in Macedonia, the father’s employment was extended, the couple had another child, and except for one visit to the United States for one week in 2008, the family lived continuously in Macedonia until the father moved to Virginia in May, 2009. The father initiated custody litigation in the Juvenile and Domestic Relations District Court in late April, 2009.

At first blush, this seemed a no brainer. The child had lived in Macedonia with her parents on a continuous basis since December, 2006. Virginia could have no jurisdiction because the home state was Macedonia, right? Not so fast. The father argued that because of the nature of his employment, the terms of his employment contract, the family ties to Virginia and the intent of the parties to return, the two-and-one-half years they spent in Macedonia was a period of temporary absence under the statute and that Virginia remained the home state, since they had resided here for more than six months before they temporarily moved to Macedonia.

Suddenly the lack of definition of the term “temporary absence” in the statute created an obstacle to the clarity that the UCCJEA was supposed to afford. In our case, the Juvenile and

Domestic Relations District Court Judge agreed with the father’s contention and found Virginia to be the “home state,” but that court *sua sponte* declined to exercise jurisdiction as an inconvenient forum.² On appeal, the circuit court judge held that Macedonia was the home state.³ So where is the clarity we were expecting in the UCCJEA?

A Little History

Virginia adopted the UCCJEA;⁴ after federal enactment of the Parental Kidnapping Prevention Act (PKPA). Both acts differ from the predecessor Uniform Child Custody Jurisdiction Act (UCCJA) in a preference for jurisdiction for custody determinations in the “home state” of the child.⁵ “Home state” is defined in both the UCCJEA and PKPA 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. In the case of a child less than six months of age, the term means the state in which the child lived from birth with any of the persons mentioned. A period of temporary absence of any of the mentioned persons is part of the period.”⁶

For a court to have jurisdiction to make an initial custody determination under the UCCJEA and the PKPA, the court must be in the home state of the child on the date of the commencement of the proceeding, or the court is in what was the home state of the child within six months before the commencement of the proceeding and the child is absent from the state but a parent or person acting as a parent continues to live in the state.⁷

Previously, under the UCCJA, courts were creative in utilizing the four jurisdictional provisions under the act as loopholes to exercise jurisdiction in cases where the court was not in the home state of the child.⁸ The UCCJEA and PKPA while intending to close the subjectivity of jurisdiction selection, left open the definition of what constitutes a “temporary absence” under the statutes.

Objective v. Subjective Test

Courts have varied in the interpretation of the “temporary absence” language. Some courts have chosen to apply an objective standard to the definition of a “temporary absence” while others have applied a subjective intent test given the particular circumstances of the individual case. It is in this disparity that the clarity envisioned in the UCCJEA disappears.

Courts applying the objective standard tend to focus on a bright line of where the child lived for the six months immediately preceding the filing of the suit.⁹ Those courts look to the unique word selection of the statutes; utilizing the word “lived” as opposed to well-defined legal principles such as residence or domicile. They also look to the express purposes of the PKPA and UCCJEA in prioritizing home state jurisdiction and note the introduction of uncertainty in what constitutes a temporary absence if it may be subjectively determined.¹⁰ Finally, objective standard courts fault the use of the intent of the parties as a basis for a determination of whether an absence was temporary because it necessitates a court to ignore one of the parent’s intent in favor of the other parent’s without any statutory authority.¹¹

Courts applying a subjective standard look to such factors as each parties’ intent, the length of absence, the purpose of the absence, and the child’s prior contact with the forum.¹² Courts applying the subjective test draw heavily on prior adjudication of what constituted a temporary absence made under the UCCJA given the fact that wording of the definition of home state was only slightly changed under the UCCJEA and the comments to the UCCJEA state that no substantive change was intended.¹³

Courts have already applied an objective standard to the second prong of the home state definition which permits a court to make an initial custody determination if it was “...the home state of the child within six months before the commencement of the proceeding...”¹⁴ As the Florida District Court of Appeal stated in *Sarpel v. Eflanli*:

[C]ases have concluded, however, that the inclusion of the words “immediately before the commencement of a child custody proceeding” in the definition of “home state” should not be read so as to essentially eliminate and render meaningless the provision allowing for the assertion of jurisdiction if the state qualified as the child’s home at any time within the six months preceding the filing of the custody proceeding. The courts reasoned that this result is supported not only by principles of statutory construction, which mitigate against interpreting a statute so as to render parts of the statute without meaning, but also by the policies underlying the adoption of the UCCJEA in lieu of its predecessor, i.e., prioritizing home state jurisdiction and minimizing competing assertions of jurisdiction.¹⁵

Uniformly, the addition of any subjective test to this portion of the jurisdiction determination is rejected as introducing unacceptable uncertainty to the later portion of the statute. This is even true in states which use a subjective test to determine a temporary absence.

The Virginia Court of Appeals recently provided some guidance, by lending credence to the objective test, in *Prizzia v. Prizzia*.¹⁶ In *Prizzia*, the wife/mother alleged, after a two-and-a-half year period of the child living in Virginia and then returning to the child’s birth country, that the time in Virginia was a period of temporary

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absence from Hungary and sought to have Hungary established as the home state of the child. The wife/mother testified at trial that the parties always intended to return to Hungary. The court found the argument without merit stating in a footnote,

Even if the trial court believed wife’s testimony that the parties intended to return to Hungary after a two-year period in Virginia, the fact remains that the parties purchased a

home and actually *lived* in Virginia for over two-and-a-half years. The UCCJEA defines “home state” as “the state in which a child *lived*.” Code § 20-146.1. The intent to live somewhere else in the future does not negate the fact that the parties here *lived* with the child in Virginia long enough to make Virginia the child’s home state under the UCCJEA. See *Powell v. Stover*, 165 S.W.3d 322, 326, 328 (Tex. 2005) (declining “to apply a test to determine where a child ‘lived’ based on the parties’ subjective intent,” and instead holding “that in determining where a child lived for purposes of establishing home-state jurisdiction, the trial court must consider the child’s physical presence in a state”). The parties’ voluntary two-and-a-half-year residence in Virginia is simply not a “temporary absence” within the meaning contemplated by Code § 20-146.1.¹⁷

The court’s opinion in *Prizzia* is consistent with the court’s prior interpretation of “lived” as it appears in the UCCJEA¹⁸ regarding the determination of whether a court has exclusive continuing jurisdiction in a child custody case. In the unreported case of *Key v. Key*, the court of appeals stated in footnote 3 “[i]t appears that a majority of state courts considering where a parent or child ‘lives’ under the former UCCJA have concluded, as did the Georgia Court of Appeals in [*Brenner v. Cavin*, 295 S.E.2d 135, 137 (Ga., 1982)] that physical presence is controlling.”¹⁹

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Conclusion

Until there is a uniform approach among the states, which may require an amendment of the statutes, a lack of clarity will continue. Without deciding which approach is the law in Virginia, the circuit court judge hearing my case analyzed the approaches in light of the facts of the case as follows:

I have given consideration to the evidence of their subjective intent but believe that an objective analysis should be given prominence. The temporary absence concept arises in the UCCJEA definition of home state. The temporary absence provision is to be applied in determining if the child lived for a six month period immediately before commencement of the child custody proceeding. The period of “temporary absence” is “part of the period.” The “period” is the six month period. If the focus is only on six months in deciding whether the state is a home state, the “temporary absence” would have to be less than six months. In other words, by definition any temporary absences during the six month period are not excluded. Here the father suggests a temporary absence can be 30 months. He conceded at the hearing that at some point, a court would have to conclude it is no longer temporary. Even if I do not adopt such a bright line test, i.e., one that uses the six month period used for home state analysis as a test for a temporary absence versus a permanent move, this is not a temporary absence. Under the totality of the circumstances of this case I do not believe that this absence is the sort of temporary absence envisioned of the UCCJEA. The child and her family had the closest connection with Macedonia. Significant evidence was readily available there. This concept is critical in making proper custody decisions. It should not be subordinated to the subjective intent of a parent to return to another jurisdiction.

If a purpose of the UCCJEA is to afford clarity in the determination of initial child custody jurisdiction, then the disparate results in the interpretation of “temporary absence” by various courts do a disservice to that goal. And while the term “temporary absence” continues to elude express definition, parties will continue to attempt to exploit the lack of clarity for their own purposes with the real possibility of results contrary to the intent of the law and the best interests of the children.

Endnotes:

- 1 VA. CODE § 20-146.1 to § 20-146.38.
- 2 *In re Juvenile Appeal*, Docket No. CJ10-35, Loudoun County Circuit Court (July 26, 2011).
- 3 *Id.*

- 4 The general purposes of the UCCJEA are set forth in Code of Virginia, § 20-146.38, as amended, and include in part:
1. Avoid jurisdictional competition and conflict with 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 that state that can best decide the case in the interest of the child;
 3. Ensure that litigation concerning the custody of a child take place ordinarily in the state with which 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.
- 5 Stoner, Kelly Gaines, “The Uniform Child Custody Jurisdiction & Enforcement Act (UCCJEA) — A Metamorphosis of the Uniform Child Custody Jurisdiction Act (UCCJA),” *North Dakota Law Review*, Vol. 75, pg. 303-305.
- 6 Code of Virginia, §20-146.1, as amended.
- 7 Code of Virginia, §20-146.12(A)(1), as amended.
- 8 Stoner, *supra* note 1 at 305.
- 9 *Powell v. Stover*, 165 S.W.3d 322, 325 (Texas, 2005).
- 10 *Id.*, at 326.
- 11 *Id.*, at 325-6.
- 12 *See e.g., Hammond v. Hammond*, 708 S.E.2d 74 (N.C., 2011).
- 13 *Id.*, at footnote 6.
- 14 § 20-146.12(A)(1), *supra*.
- 15 65 So.3d 1080 (FL 2011).
- 16 58 Va. App. 137, 707 S.E.2d 461 (2011).
- 17 *Id.*, 58 Va. App. at 149 n.6, 707 S.E.2d at 467 n.6.
- 18 Code of Virginia, § 20-146.13, as amended, in part states that Court “has exclusive, continuing jurisdiction as long as the child, the child’s parents, or any person acting as a parent continue to *live* in this Commonwealth.” (*emphasis added*).
- 19 *Key v. Key*, Record No. 1079-04-1 (Va. App., December 14, 2004).